Child Pornography, the First Amendment, and the Media: The Constitutionality of Super-Obscenity Laws

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By JAMES W. MOORE*

I
Introduction

The Supreme Court will soon address the constitutionality of New York's child pornography law.1 The issue is significant. If the law is upheld, the Court may create a new exception to the First Amendment's guarantee of free expression. If it is invalidated, as many as twenty-eight state legislatures2 may face the task of redrafting similar statutes.

The child pornography issue is relatively new; in 1977, Time magazine observed:

Child porn is hardly new, but according to police in Los Angeles, New York and Chicago, sales began to surge a year ago and are still climbing. Years ago much child pornography was fake—young looking women dressed as Lolitas. Now the use of real children is startlingly common. Cook County State's Attorney Bernard Carey says porno pictures of children as young as five or six are now generally available in Chicago.3

Child pornography had suddenly become too widespread, too intrusive and too realistic to be tolerated. Real children were being sexually exploited for profit. They were often remarkably young and often, it seemed, they were American children.4

* Member, Third Year Class.
1. N.Y. PENAL LAw § 263.15 (McKinney, 1980).
2. See note 15 and accompanying text, infra.
4. "[B]ased upon my personal experience in law enforcement, I believe the only type of material that I had ever seen in the past always seemed to be . . . of foreign origin, but in the last 18 months I was talking about there is a proliferation of what appears to be a more domestic type of material." Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 53 (1977) (statement of Mr. Bernard Carey).
As a social problem, child pornography appears to have first arisen in the mid-1970's. The journalist Robin Lloyd discovered it in 1976 while doing research for a book on child prostitution. A professor teaching a class on child abuse in Illinois was shocked when students began bringing examples of child pornography to class. The Illinois legislature uncovered the problem while redrafting its obscenity law, a discovery which prompted the Chicago Tribune to make its own investigation. In May, 1977, the Tribune published a series of exhaustive and sensational articles, describing the problem as it existed in Chicago, Los Angeles and New Orleans. In the same month, an equally sensational report was televised on CBS's "60 Minutes" show.

The new child pornography was graphic and perverse. It shocked reporters, and it shocked their readers; it was not difficult to conclude that the children depicted had suffered from the experience. In January, 1977, Dr. Judianne Densen-Gerber, a child psychologist specializing in drug problems, launched a crusade for new and stringent legislation.

Congress and almost all of the states have now enacted child pornography statutes. All of these statutes forbid the production of any visual media depicting specified sexual conduct by children. The federal Protection of Children Against Sexual

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7. Id. at 109 (statement of Michael Sneed, George Bliss, and Ray Moseley, reporters, Chicago Tribune).
12. See notes 13 and 15 and accompanying text, infra.
Exploitation Act of 1977\textsuperscript{13} prohibits the sale, distribution and display only of media that are obscene.\textsuperscript{14} State legislatures have not always been so circumspect. Forty-seven states have adopted child pornography statutes. Of these, all but Missouri's restrict promotion as well as production of visual media. Twenty-eight of these state laws do not include an obscenity standard.\textsuperscript{15} One such statute, New York Penal Law


\textsuperscript{14} 18 U.S.C.A. § 2251(a) (1976) provides:
Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

\textsuperscript{15} U.S.C.A. § 2252, which applies to transportation, distribution and sale, does include an obscenity standard. 18 U.S.C. 2252(2) reads:
‘[S]exually explicit conduct’ means actual or simulated—(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, (B) bestiality; (C) masturbation; (D) sado-masochistic abuse (for the purpose of sexual stimulation); or (E) lewd exhibition of the genitals or pubic area of any person.

section 263.15,\textsuperscript{16} has been declared unconstitutional by the New York Court of Appeals; the United States Supreme Court has granted certiorari.\textsuperscript{17} This note considers the background, history, and possible fate of this New York statute.

New York's experience is interesting in part because it illustrates a possible conflict between the new child pornography legislation and what may be called the "legitimate media."\textsuperscript{18} Child pornography legislation affects not only producers of actual pornography, but also established publishing houses and film companies that operate openly and have an interest in using child actors, or at least in the continued display of pictures and films made in the past with the use of child actors. Reputable photographers have made serious, artistic nude photographs including children.\textsuperscript{19} Sex education material may be more helpful to children if it depicts child actors.\textsuperscript{20}

Sexuality exists in minors as well as in adults. Sociologists believe that most Americans discover sex during adolescence and that for this reason adolescence is a particularly difficult and important period in life.\textsuperscript{21} It is arguable that this experience is significant enough to be an appropriate theme for media depiction, and that the media have shown a capacity to treat this theme in a non-abusive, responsible, and even thought-provoking way.\textsuperscript{22} The legitimate media have used juvenile actors to depict simulated sexual activity, and some serious filmmakers see child pornography legislation as a threat to their artistic freedom.\textsuperscript{23}

Legitimate depiction of sexual themes has been protected by

\textsuperscript{16.} (McKinney 1980).
\textsuperscript{17.} People v. Ferber, 52 N.Y.2d 674 (unpublished case, hereinafter cited from slip opinion), cert. granted, — U.S. — (Nov. 16, 1981).
\textsuperscript{18.} See text accompanying notes 91-108 and 118-127, infra.
\textsuperscript{20.} See text accompanying notes 92-93, infra.
\textsuperscript{21.} See, e.g., C. CHILMAN, ADOLESCENT SEXUALITY IN A CHANGING AMERICA (1978); A. HASS, TEENAGE SEXUALITY: A SURVEY OF TEENAGE SEXUAL BEHAVIOR (1979); R. SORENSON, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA (1973).
\textsuperscript{22.} See films cited in note 23, infra.
\textsuperscript{23.} The actor Richard Dreyfuss considered the problem a serious one:
Well, one of the things that came [sic] to mind is that, really, in terms of let's say the films that I personally have done, "American Graffiti" could fall under
the obscenity standard in *Miller v. California*, which requires that a work be considered as a whole and protects material that is not patently offensive, does not appeal to a prurient interest, or has serious literary, artistic, scientific or political value. But even under *Miller*, legitimate media are inhibited in ways that pornographers are not. Legitimate media must maintain an image of respectability and have relatively high expenses in proportion to profit; they can ill afford to litigate obscenity cases.

Legitimate media are particularly vulnerable to uncertainty. Unlike most pornographers, these media distribute to a national market, but they may be prosecuted in almost any jurisdiction under an unpredictable, local “community standard.” The enactment of state child pornography laws, many of which recognize no constitutional standard, magnifies this uncertainty. Because they are open to scrutiny, legitimate media have little choice but to comply with the federal act of 1977. Whether compliance will save them from legal difficulty is another question. State child pornography laws are usually more restrictive than the federal statute and are frequently vague

[a child pornography statute without an obscenity standard] more, even [sic] specifically, than “Inserts.” . . .

If there are existing laws, such as contributing to the delinquency of a minor . . . that could deal with these problems in any way, then they should be more vigorously enforced. But when you have a bill that deals with the punishment of those people who are involved in the interstate selling and receiving end, then those people . . . actors, airplane pilots, studio chiefs, directors of other kinds of films could be nailed or at least pressured into not creating their work . . . .

Not only is “The Exorcist” or “Lolita” or whatever an example of a film that might be harmed, so is “American Graffiti,” so is “Taxi Driver,” so is “Loose Change” by Francois Truffaut . . . .


25. There is evidence that for these reasons, obscenity law under _Miller_ has been more effective in chilling the efforts of nationally distributed film companies than in deterring pornographers. _See_ material cited in _Community Standards, Class Actions, and Obscenity under Miller v. California_, 88 HARV. L. REV. 1838, 1860-61 n.94 (1975).

26. Since the abolition of the “national standard” in _Miller v. California_, 413 U.S. at 30-31, juries have enjoyed a very broad discretion in deciding obscenity cases, _see_ Jenkins v. Georgia, 418 U.S. 153 (1974); _Note, supra_ note 25, at 1839-46. Critics have complained that the “community standard,” coupled with opportunities for prosecutorial forum shopping under federal postal laws, tends to make the standards of the most conservative jurisdiction into a de facto national standard. _See id._ at 1858-60; _Note, Federal Obscenity Prosecutions: Dirty Dealing With the First Amendment?_ 18 SANTA CLARA L. REV. 720, 736-756.
and mutually inconsistent.\textsuperscript{27} Prosecution under one of these statutes could be disastrous for the media; child pornography statutes carry exceedingly heavy penalties.\textsuperscript{28} Nationally distributed media thus face a frighteningly unpredictable array of dangerous local traps. Statutes like New York Penal Law section 263.15 threaten more than an abstract conception of First Amendment freedom; they endanger a concrete and legitimate media interest.

II

Background of the New York Statute: The State's Interest and the Problem of Constitutionality

A. Defining the State's Interest

If the \textit{Miller} standard cannot be maintained without causing children to suffer, then most would probably agree that the state's interest in protecting children ought to prevail. The question is to what extent these interests are incompatible, a

\textsuperscript{27} Massachusetts prohibits dissemination of "visual material that contains a reproduction of any posture or exhibition in a state of nudity or any act that depicts, describes, or represents sexual conduct participated or engaged in by a child under eighteen years of age." (\textit{Mass. Gen. Laws Ann.} ch. 272, § 29A (West Supp. 1981)). Louisiana prohibits "the sale, distribution, or possession with intent to sell or distribute, any photographs, films, videotapes, or other reproductions of any act of sexual conduct or the obscene, lewd, or lascivious exhibition of the genitals or pubic area involving a child under the age of seventeen." The Louisiana statute annexes a penalty of from two to ten years imprisonment, "without benefit of parole, probation, or suspension of sentence." (\textit{La. Rev. Stat. Ann.} § 14.81.1 (West Supp. 1981)). Neither statute includes a definition of "sexual conduct," a concept which might be extended to include kissing or even flirtation—if the prosecutor disapproves of a film. This is not an exhaustive list of problematic statutes. Sixteen of these are reviewed in Note, \textit{Child Pornography Legislation}, 17 J. Fam. L. 505, 520-31 (1978-79). The author concludes: "Few generalizations can be stated about these statutes. As a rule, they are broader than the federal legislation. They tend to focus on depictions of certain acts rather than view the works as a whole. . . . However, no two statutes on child pornography are identical . . . ." \textit{Id.} at 531.

\textsuperscript{28} Penalties vary widely, but are generally severe by the standards of the jurisdiction. California makes the crime of using a child in a sexual performance punishable by three, four, or five years imprisonment; the offense is deemed to be as serious as assault with a deadly weapon on a peace officer. \textit{See Cal. Penal Code} §§ 311.4, 245 (West, 1982). By national standards, the California law is mild. More typical is the federal statute, which annexes a penalty of not more than ten years imprisonment, both for the production and for the distribution of child pornography. (18 U.S.C. §§ 2251(c), 2252(b) (1976)). In Delaware, repeat offenders face a mandatory sentence of life imprisonment. (\textit{Del. Code Ann.} tit. 11, § 1110 (1979)).
question that was raised repeatedly in congressional hearings held pursuant to enactment of the federal act of 1977.

Congress assumed that production of explicit sexual media depicting children is child abuse in itself and is not protected by the First Amendment. Producers must necessarily induce children to engage in sex, a practice which was in many cases already illegal.\(^29\) Although they were unable to cite supporting case law, expert witnesses agreed that courts would probably uphold a statute banning production of such media under a “sexually explicit conduct” standard—regardless of whether the material produced was obscene.\(^30\) But these witnesses also believed that the sale, distribution, and display of sexually explicit media constitute speech and are probably protected by the First Amendment unless the media are obscene.\(^31\) Debate centered around the question, whether there existed a state interest strong enough to justify prohibition of what had been considered constitutionally protected speech.

Congressmen who favored strong sanctions against the sale, distribution, and display of sexually explicit media did not usually say that these media should be suppressed because they were obscene. More often, they argued that these sanctions are necessary to prevent direct abuse of children in pornography.\(^32\) They observed that child pornography is lucrative and that profit is an incentive to child abuse. Producers of child pornography work clandestinely and are hard to catch; it is simpler to cut off their market by penalizing distribution.\(^33\)

But Congress also heard, and probably considered, testimony suggesting that the state had a substantial interest in suppressing obscenity.\(^34\) Representative Dornan (R-Calif.) ar-

\(^{29}\) See, e.g., \textit{Cal. Penal Code} §§ 272 (contributing to the delinquency of a minor), 288 (exciting lust of child under age of fourteen (West, 1981)).

\(^{30}\) \textit{See Senate Hearings, supra} note 9, at 83-84 (statement of Peter Flaherty, Deputy Atty. Gen.); \textit{id.} at 92 (statement of Paul Bender, professor of law); \textit{Hearings, House Ed. & Labor Comm., supra} note 10, at 314 (statement of John Keeney, Deputy Asst. Atty General).

\(^{31}\) \textit{See id.} at 299-301 (statement of John Keeney); \textit{Senate Hearings, supra} note 9, at 91 (statement of Peter Flaherty); \textit{id.} at 104-06 (statement of Paul Bender).

\(^{32}\) Sen. Roth, Rep. Kildee, and Rep. Murphy, all authored bills which included strong penalties for promotion of sexually explicit material including children, and all argued that this was their primary purpose. \textit{See 123 Cong. Rec. 33,050 (1977)} (remarks of Sen. Roth); \textit{Hearings, House Ed. & Labor Comm., supra} note 10, at 2 (statement of Rep. Kildee); \textit{id.} at 329-30 (statement of Rep. Murphy). \textit{See also id.} at 76 (statement of Joe Freitas); \textit{id.} at 118-19 (statement of Robin Lloyd).

\(^{33}\) See material cited in note 32, \textit{supra}.

\(^{34}\) See notes 35-41, \textit{infra}.
gued that child pornography was only an aggravated form of obscenity, an inevitable consequence of sexual permissiveness and resultant moral decay. It could be eliminated, he said, only by a vigorous campaign against all obscenity. Dornan was seconded by the Mayor of New York—then engaged in “cleaning up” midtown Manhattan—and by the then present—then acting—Chief of the Los Angeles Police Department.

Possibly more persuasive was testimony by members of the Los Angeles Police Department that most apprehended pedophiles—child molesters or “chicken hawks”—had child pornography in their possession and that this material was used to seduce children.

Dr. Densen-Gerber testified that child pornography is particularly dangerous because it “encourages, rationalizes and justifies sexual activity with children.” She said that it had caused the rate of incest to rise and that it promoted the “disintegration of family values.” Although she presented no evidence to support her more sweeping assertions, it does seem probable that graphic and widely available child pornography might make sex with children seem acceptable.

The state has a constitutionally recognized interest in “stemming the tide of commercialized obscenity,” both to preserve the “quality of life” and because “there is at least an arguable correlation between obscenity and crime.” The correlation of child pornography to crime is more obvious than that of conventional pornography; while much obscene material depicts activities that are in themselves entirely innocent, child pornography depicts—and may encourage—criminal misconduct. The state’s interest in suppressing child pornography as obscenity might arguably be as great as its interest in protecting children from direct abuse in pornography, which, testimony indicates, makes up only a small part of a nationwide pattern.

36. See id. at 257, 260 (statement of Abraham Beame).
38. See id. at 36, 38 (statement of Barbara Pruitt, L.A.P.D.); id. at 40 (statement of Lloyd Martin, L.A.P.D.).
39. See id. at 39, 44.
40. Id. at 264.
41. Hearings, House Judiciary Comm., supra note 6, at 43.
43. See Hearings, House Ed. & Labor Comm., supra note 10, at 41 (statement of Lloyd Martin, L.A.P.D.); id. at 80 (statement of Robert Leonard, Prosecuting Att’y, Flint, Mi.); id. at 95 (statement of Joe Freitas, Dist. Att’y of San Francisco); id. at 109.
CHILD PORNOGRAPHY

of sexual child abuse.

However, few members of Congress stressed the state's interest in suppressing obscenity. Representative Murphy (R-Penn.), sponsor of the first federal child pornography bill, said with some vehemence that his bill had nothing whatever to do with obscenity. Murphy did not mean to disparage the state's interest in suppressing obscenity; he meant that he was dissatisfied with past enforcement of obscenity laws and did not wish to be restricted by the Miller standard. The primary theoretical objection to an obscenity standard was that "[t]he focus of the bill is on the sexual and emotional abuse of the child per se rather than on whether such an abuse [sic] might be obscene." The greatest practical objection was that the Miller standard made it too difficult for prosecutors to convict.

However, prosecutors themselves did not raise this objection. Several prosecutors testified that child pornography was, or would be, so shocking to juries as to make conviction simple, even under the Miller standard. Two prosecutors went so far to object that legislation which omitted an obscenity standard would be subject to constitutional challenge on appeal and embroil them in unwanted litigation.

Two congressional committees found that, as a practical matter, media depicting sexual abuse of children were almost always obscene. The House Committee on the Judiciary emphasized that the issue of obscenity is decided by juries.


44. See Hearings, House Ed. & Labor Comm., supra note 10, at 327.
45. See id.
46. Id.; see also 123 Cong. Rec. 33,050 (1977) (remarks of Sen. Roth).
48. See Hearings, House Ed. & Labor Comm., supra note 10, at 325 (statement of John Keeney, Deputy Asst. Att'y Gen.); id. at 358 (statement of C. Niel Benson, Chief Postal Inspector); id. at 421 (statement of G.R. Dickerson, Acting Commissioner of Customs); Hearings, House Judiciary Comm., supra note 6, at 260 (statement of Larry Parrish, former U.S. Att'y); id. at 280 (statement of Richard Wier, Att'y Gen. of Delaware).
50. See notes 55 and 58 and accompanying text, infra.
Apparently the Committee believed that juries would not acquit people who profit from the abuse of children. This conclusion seems reasonable. The Miller system gives juries exceedingly wide discretion in deciding what is obscene. One experienced prosecutor has blamed the difficulty of getting obscenity convictions on a growing jury tolerance for pornography. But this difficulty seems unlikely to arise in child pornography prosecutions; even if it is true that Americans do not mind pornography, it is not often said that they like child abusers. It has been argued that juries are likely to understand the need to protect children too well and that juries in child pornography cases may become so emotional as to reach verdicts unfair to the media—even under existing obscenity standards.

The Senate Committee on the Judiciary had heard testimony that although some non-obscene films, such as “The Exorcist,” did include brief scenes depicting simulated sexual activity by minors, the filming of these scenes probably did not constitute child abuse serious enough to be of legislative concern. The

We have viewed much of this material, and there seems little doubt that they would be found obscene under existing federal and state obscenity laws. The Supreme Court ruling in Miller v. California, supra, considerably relaxed the requirements for proving obscenity by—

a. Declaring that the standard of obscenity should be a local, and not a national one. (Subsequent decisions by the Court suggest that the effect of this change is that if a jury finds that material is obscene, then a “local standards” has been established.

b. [Abolishing the requirement that obscene material be utterly without redeeming social importance].

52. Cf. Hearings, House Judiciary Comm., supra note 6, at 221 (statement of Rep. Conyers, Chairman, Subcomm. on Crime), Rep. Conyers stated that, “The Subcommittee staff has received hundreds of letters from the public expressing disgust at the revelations . . . . Surely, in this country, a survey of the “community standard” for freedom of expression would not allow for child pornography.”

53. See note 26, supra.


55. Cf. H. Kalven & H. Zeisel, The American Jury 273-75 (1966). The authors compare the rate of jury conviction for indecent exposure in cases involving minors and in those involving adult victims, concluding that juries normally regard the offense as “de minimis”—except when children are involved.


57. Senate Hearings, supra note 9, at 108. Professor Bender testified:

“The Exorcist” is not obscene and therefore if you are worried about whatever the child did in “The Exorcist,” then you could not reach that through prohibiting “The Exorcist.” I’m not sure you should be worried about a child acting in a film that is protected by the first amendment under present
Committee did not fully adopt this standpoint, but observed that in any event, "all of the bills considered by the Committee would ban the use of children in the actual production of such scenes in the future," and concluded that "virtually all of the materials that are normally considered child pornography are obscene under the current standards."

It thus appears that child pornography legislation protects two interests, both derivative from the state's underlying interest in protecting children. It protects children directly from physical abuse in pornography and indirectly by suppressing obscene material that might encourage further abuse or might be used to seduce children. There are cogent reasons to believe that both these interests can be adequately protected under existing obscenity standards.

B. The Constitutional Issue

Before enacting the federal act of 1977, Congress considered several theories under which the Act might have been held constitutional, if it had not included an obscenity standard. It seems unnecessary here to analyze all these theories in depth. Some of them have already been adequately criticized. Moreover, the outcome of the child pornography issue does not necessarily depend on the merit of one or another theoretical construct. Courts have wide latitude to uphold a statute, even in the First Amendment area, if they regard the interest underlying the statute as sufficiently compelling. However, some of obscenity standards. It is hard for me to conceive of a child acting in a film like "The Exorcist" as being child abuse of the sort that I think you are mostly worried about. After all, that takes place in a more or less open situation with a well-established business. There are parents or guardians around who are looking after their child's best interest. This is not some child that they are abusing in the ordinary sense of that word. It's a child that they are using as an actor. Although the child may be doing things that you or I would not want our children to do, I do not think there is a major social problem when you are dealing with material protected by the first amendment. I think the major social problem here is children being abused in ways that show up in material that is not protected by the first amendment under present constitutional doctrine.

59. Id. at 13.
60. See Note, supra note 56, at 741-44 nn.151-57.
61. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 622 (1973). The Supreme Court held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615. Although "substantial overbreadth" is not a precise concept, see J. NOWACK, R. ROTUNDA & J. YOUNG, HAND-
these theories have wider implications which are worth mentioning because of their potential to cause mischief if the theories are adopted.

John Keeney, a lawyer testifying for the Department of Justice, suggested that legislation that did not include an obscenity standard might be justified by the Supreme Court's holding in *United States v. O'Brien*, which reads in part:

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

But it is unclear in what way *O'Brien* can be said to justify statutes like New York Penal Law section 263.15. It appears doubtful that a statute whose direct effect is to prohibit what has been regarded as protected speech can be said to further a "governmental interest unrelated to the suppression of free expression" within the meaning of *O'Brien*. In *O'Brien*, the Court held that the burning of a draft card is not constitutionally protected as "symbolic speech." The government forbade the destruction of draft cards to preserve the selective service system; this interest was held to be unrelated to the

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BOOK ON CONSTITUTIONAL LAW 725 (1978), the case seems to stand for the principle that the Supreme Court is reluctant to strike down statutes for overbreadth. See id. One author has described a test like that in *Broadrick* as a balancing test and suggests that it could be used to uphold a statute such as N.Y. PENAL LAW § 263.15, see Note, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Micr. J.L REF. 295, 314, 317-18, 317 n.133 (1979). One lower court has in fact used *Broadrick* in this way, see text accompanying notes 112-13, infra.

64. Id. at 377.
65. See id. at 385; the Court distinguishes two earlier cases, saying:
In these cases, the purpose of the legislation was irrelevant, because the inevitable effect . . . [of the statutes struck down in those cases] abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive."
The display of visual media would seem to be inevitably expressive.
66. *See id.* at 376. The Court said:
*O'Brien* first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this defi-
suppression of free expression\textsuperscript{67} and "sufficiently important" to "justify incidental limitations on First Amendment freedoms."\textsuperscript{68} Statutes like New York Penal Law section 263.15 do not incidentally limit expression; they suppress it directly. The display of films and other visual media is not "symbolic speech"; it does not combine "'speech' and 'nonspeech' elements" "in the same course of conduct."\textsuperscript{69} The display of films has been held to be speech \textit{per se},\textsuperscript{70} a holding which should probably not be disturbed without careful consideration of its wider First Amendment implications.

A second theory would make the dealer in child pornography an accessory after the fact to child abuse.\textsuperscript{71} This theory also has questionable implications. Child pornography statutes that govern speech prohibit the display of visual media depicting specific types of conduct, regardless of when, or in what jurisdiction, the media were produced. Statutes like New York Penal Law section 263.15, which do not include an obscenity standard, seem especially likely to sweep into their ambit media depicting conduct that was quite lawful at the time and place of production.\textsuperscript{72} A court depending on this theory might thus find itself in the anomalous position of trying a defendant as an accessory to a non-existent crime.

A third theory was advanced by Senator Helms (R-N.C.) on the Senate floor\textsuperscript{73} and is incorporated in the preface of Colorado's child pornography statute.\textsuperscript{74} Under this theory, distribution of media depicting a minor engaged in sexually explicit activity can be made a crime because it is an invasion of the minor's privacy, an invasion to which the minor is by definition incapable of consent. It is an offense in itself, independent of any abuse which may have occurred in producing the media.

\begin{itemize}
\item \textsuperscript{67} See id. at 378-82.
\item \textsuperscript{68} Id. at 376.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Kingsley Pictures Corp. v. Regents, 380 U.S. 684 (1959).
\item \textsuperscript{72} See text accompanying note 108-115, infra.
\item \textsuperscript{73} 123 CONG. REC. 53,056 (1977).
\item \textsuperscript{74} COLO. REV. STAT. § 18-6-403 (Supp. 1981).
\end{itemize}
Ostensibly, Helms’s proposal is based on a recognized category of unprotected speech and would thus seem to escape constitutional objections that might be raised against the other two. However, there is some novelty in the idea that the state has a direct interest in preventing the invasion of privacy. Traditionally, invasion of privacy has been thought to be a tort doctrine. The press may find it alarming to see a precedent established that would make invasion of privacy a crime.

The theories described above are problematic. At best, they rest on awkward legal fictions; at worst, they imply a curtailment of First Amendment freedoms going beyond the area of child pornography itself. These theories share the failing that they rest solely on the state’s interest in protecting its own children. This interest would not seem to justify the suppression of media produced in another nation or culture where the activities depicted are not illegal. If, as is suggested above, child pornography legislation also protects an interest in suppressing obscenity, then this rationale seems inadequate because it does not justify suppressing obscene material produced abroad. But if child pornography legislation reaches non-obscene media produced abroad, or before the legislation was enacted, then it overreaches its purpose, for the state has no apparent interest in protecting children beyond the scope of its police power. New York’s experience suggests that this logical difficulty may create practical and constitutional problems.

III

Genesis of New York’s Child Pornography Law

The crusade against child pornography had its base in New York, and New York was among the first states to adopt a child pornography statute. In February, 1977, Assemblyman Howard Lasher and State Senator Ralph Marino introduced in the New York legislature a bill making it a felony to use a child in any sexual performance, or to promote use of a child in such a performance. “Promotion” was defined to include distribu-

75. See text accompanying notes 35-43, supra.
76. See text accompanying notes 108-21, infra.
tion, sale, or display. The bill did not include an obscenity standard. In May, the bill passed the State Assembly; it had meanwhile been altered, Lasher told a *New York Times* reporter, to satisfy the criticisms of civil rights advocates.  

Both the content and the rhetoric of the bill had been significantly changed. One section of the original bill had defined "promoting a sexual performance by a child" as a felony. As enacted, the amended bill includes two sections governing promotion. Section 263.15 prohibits "promoting a sexual performance by a child," and section 263.10 prohibits "promoting an obscene sexual performance by a child." Aside from the word "obscene," the two sections are identical. Both offenses are defined as "class D" felonies.

The rhetoric of the Lasher-Marino bill had also been

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79. *Id.* § 263.00(4). The language is identical to that of the statute as enacted, see note 81, infra.


81. The text is essentially identical with that of the statute as enacted, which reads in relevant part:

§ 263.00 Definitions
As used in this article the following definitions shall apply:
1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.
2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene. . . .
3. "Sexual Conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. . . .
5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. . . .

§ 263.10 Promoting an obscene sexual performance by a child
A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§ 263.15 Promoting a sexual performance by a child
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Promoting a sexual performance by a child is a class D felony.

(McKinney 1980). A class D felony carries a maximum penalty of imprisonment not to exceed seven years, and a minimum term of one year or less. Criminal possession of stolen property in the first degree is a class D felony. *See* N.Y. *Penal Law* §§ 70.00, 165.50 (McKinney 1980).
changed. The original draft had included a "Legislative Declaration," reciting the state's interest in protecting children and the need to prevent their abuse through commercial exploitation. The revised bill included an additional paragraph, which reads, as enacted:

The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges those involved law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act.

These changes are informative. The legislature, in drafting section 263.15 without an obscenity standard, may only have intended to make it easier for prosecutors to get convictions and not specifically to suppress protected speech. However, the legislature must have been aware that section 263.15 was constitutionally doubtful, and that it would affect protected speech. Section 263.10 was apparently meant to be a "fallback" provision in case section 263.15 was declared unconstitutional.

The "Legislative Declaration" is unusual; New York statutes are not normally accompanied by declarations. Since the declaration purports to state findings of the legislature, and since it is addressed to enforcement officers, it seems reasonable to infer that it was written to clarify the legislature's intent and serve as a guide to enforcement. Apparently the legislature intended not only to protect children from abuse in pornography, but also to protect "the fabric of our society" against "movies, magazines and photographs."

Movies, magazines and photographs are forms of expression, and protecting the fabric of our society against these

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82. S. 2743-A, supra note 78. Identical language was enacted in N.Y. Penal Law, ch. 910 § 1 (McKinney 1980).
84. See Memorandum from the N.Y.C.L.U. to New York Senate Codes Committee (undated), reprinted in Joint Appendix, St. Martin's Press, Inc. v. Carey, 605 F.2d 41 (2d Cir. 1979).
CHILD PORNOGRAPHY

media has been held to be the function of an obscenity statute. To paraphrase Circuit Judge Timbers, the legislature seems to have regarded the suppression of sexually explicit speech as an important function of section 263.15. The statute may fairly be called a “super-obscenity law,” for it is directed against speech, it carries an enhanced penalty, and it denies defendants the protection of the Miller standard.

The New York Times applauded the purpose of the bill but complained that,

[I]ts overly broad language would tend to discourage the publication and distribution of reputable works. . . .

For example, a well-known sex education book, “Show Me,” contains photographs of a little girl and a little boy exploring each others’ bodies, and so might fall under the new ban even though it has been found free of obscenity in several court tests.

SHOW ME! did seem a likely victim under section 263.15. Its publisher, St. Martin’s Press, was respectable. Its author was a Swiss psychoanalyst specializing in child-rearing. It purported to be educational, it was designed to help parents teach children about sex. But the book did contain some very explicit sexual material, including pictures of children masturbating. It was controversial. It had in fact withstood several

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88. See St. Martin’s Press, Inc. v. Carey, 605 F.2d 41, 48 (2d Cir. 1979) (Timbers, J., dissenting):

In view of the double-barrelled attack by this statute on both the production and promotion of “this filth,” I do not share my colleagues’ confidence that the New York courts would decline to apply New York law to this case because the production took place abroad before the statute was enacted. . . . [I]t was not merely direct harm to the depicted children which was the concern of Article 263. An equally important goal appears to have been the elimination of the derivative harm to society at large.

89. Normally, one who: “1. Promotes, or possesses with intent to promote, any obscene material; or 2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity,” is guilty, in New York, only of a misdemeanor. Only wholesaler promoters of obscenity are guilty of a felony, see N.Y. PENAL LAW §§ 235.05, 235.06 (McKinney 1980).
92. St. Martin’s Press, Inc. was a subsidiary of Macmillan Publishers, Ltd., and a publisher of textbooks, reference works such as WHO’S WHO, and general scholarly and trade books. SHOW ME! had been its only sexually explicit publication. See affidavit of Thomas J. McCormack [President of St. Martin’s Press, Inc.], Joint Appendix 24a-25a, St. Martin’s Press, Inc. v. Carey, 605 F.2d 41 (2d Cir. 1979).
93. Id. at 24a-27a.
obscenity actions. The crusader Judianne Densen-Gerber had made the book a special target of her campaign, saying that it taught bad morals and contributed to the breakdown of the family. According to the New York Times, Assemblyman Lasher's counsel had specifically named SHOW ME! "as in apparent violation of the [new child pornography] law."

Despite this opposition, the bill quickly passed the State Senate and became law on August 11, 1977.

IV
Case Law Under the New York Statute

Without waiting for the new law to take effect, St. Martin's Press stopped distribution of SHOW ME! and prepared to challenge section 263.15 in federal court. It had become impractical to continue selling SHOW ME!. The statute carried a maximum penalty of seven years imprisonment, and St. Martin's was unwilling to expose its employees to such a risk. Nor would booksellers agree to continue selling the book. St. Martin's anticipated a very large loss in revenue.

Pursuant to 42 U.S.C. § 1983, the firm filed an action in the District Court for the Southern District of New York, naming the Governor and several district attorneys as defendants. St. Martin's asked for a preliminary injunction, which would protect the firm from prosecution until the constitutionality of section 263.15 could be decided in a full trial.

In granting the injunction, Judge Ward found that section 263.15 clearly applied to SHOW ME! and that St. Martin's

95. See Hearings, House Ed. & Labor Comm., supra note 10, at 266.
98. See affidavit, supra note 92, at 32a.
99. See id. at 30a-31a, 34a-35a.
100. 42 U.S.C. § 1983 (1976) provides a federal right of action to plaintiffs deprived of their constitutional rights under color of state law.
102. 440 F. Supp. at 1199. Named defendants are Governor Carey and the District Attorney of New York County. Parallel actions by booksellers against the District Attorneys of Westchester and Suffolk Counties were consolidated for trial.
103. Id. at 1198.
104. Id. at 1201.
Press faced a real danger of irreparable harm. The court observed that although the defendants had not threatened to prosecute the firm, they had also repeatedly declined, at oral argument, to say that they would not prosecute. In view of the climate of opinion and the controversial nature of the book, the court concluded that prosecution was likely, that the plaintiffs had little choice but to cease distribution and that they faced a real threat to their livelihood.

The defendants had argued that state courts should be given an opportunity to clarify the statute—to give it a constitutionally acceptable construction. Judge Ward held that the statute was clear and that “when the meaning and applicability of the statute is clear it is not necessary to give the state courts the first chance to declare their state statutes unconstitutional.” As applied to SHOW ME!, Judge Ward held that the statute was constitutionally doubtful:

The argument most persuasive to the Court at this time is that the statute as applied to SHOW ME! denies substantive due process in making criminal the dissemination of photographs of children taken outside the United States some years before the effective date of the statute. Where a statute affects such fundamental rights as are at stake in this case, it “must be narrowly drawn to express only the legitimate state interests at stake” . . . and to foster them by the least drastic means possible . . . . While New York’s interest in protecting children is both legitimate and important, the question remains whether it has pursued rational and least drastic means for effectuating that interest.

Having appealed the decision in St. Martin’s Press, Inc. v. Carey, the District Attorney of New York County began prosecutions under the new law. Paul Ira Ferber, a New York bookseller, was charged with violation of sections 263.10 and 263.15. Ferber filed a motion to dismiss in a state trial court, claiming inter alia that section 263.15 was unconstitutional.

The court swiftly disposed of this claim. Citing Broaderick v. Oklahoma, it held that the statute was not “substantially
overbroad".112

This poses the not unusual dilemma of balancing the right of freedom of expression against the right of the Legislature to protect children against sexual exploitation. . . .

On balance, the protection of children must prevail. . . . If it were important for literary or artistic value, a juvenile over 16 who perhaps looked younger could be utilized. . . . Where alternative means to safeguard expression are reasonably available, courts should not declare statutes unconstitutional which may inhibit such expression but which have independent and overriding justification.113

The defendants in *St. Martin’s Press, Inc. v. Carey* had insisted that section 263.15 must first be interpreted by a state court.114 A state court had now spoken, and that court held that the statute did and should apply to non-obscene material.

The court did not refer to a specific state interest in protecting New York children, or even American children. The course of Ferber’s trial suggests that Judge Ward had been correct in believing that section 263.15 was meant to reach material “regardless of where they were photographed, the nationality of the children, or whether the content of the book is in fact child pornography.”115 Ferber’s attorney offered evidence purporting to prove that the films in question were made in Europe. The court ruled that the evidence was irrelevant.116 In an ordinary obscenity trial, this ruling would have been unremarkable. But *People v. Ferber* was not an ordinary obscenity trial; it was also a trial under section 263.15, which included no obscenity standard. Ostensibly such statutes are meant to protect children from direct abuse in pornography.117 Since New York had no greater apparent interest in protecting European children depicted in the *Ferber* films than in protecting those depicted in *SHOW ME!*, it would seem that the court interpreted section 263.15 as being directed against expression. It is difficult to see what defense would have been available to St. Martin’s Press, had its case been tried in a New York court.

112. 96 Misc. 2d at 677, 409 N.Y.S.2d at 637. On “substantial overbreadth,” see note 61, supra.
113. 96 Misc. 2d at 676-77, 409 N.Y.S.2d at 637.
114. See text accompanying note 107, supra.
117. See text accompanying notes 32 and 46 and 62-76, supra.
In January, 1979, the Court of Appeals for the Second Circuit overturned the injunction in *St. Martin's Press*, on the ground that the action involved no "case or controversy." The court suggested that the plaintiffs' fears were exaggerated and that the plaintiffs may have been motivated by a desire for publicity. It held that the lower court had erred in finding that section 263.15 applied to *SHOW ME!*

The photograph of a young man masturbating, which appellants contend brings them within the reach of the statute, was taken in Germany before 1973, and section 263.15 was not enacted until 1977. We cannot believe that the New York courts would construe section 263.15 to apply to children throughout the world, regardless of the moral and legal standards of the country in which they live, and would disregard the fact that the photograph in question was taken years prior to the enactment of the statute and the photograph's "promotion." We fail to see how the New York legislature in 1977 could have had any legitimate concern with the welfare of German children in the years before 1973, and we believe the New York courts would hold that the legislature had none.

The case thus ended inconclusively. The plaintiffs' appeal for a rehearing was denied, but *St. Martin's* had gained the breathing space it needed. By this time *SHOW ME!* had lost its vogue, and its publisher had no incentive to pursue the case further.

The case decided nothing, but it does have illustrative value. It illustrates the confusion inherent in treating a statute as if it were intended solely to prevent physical abuse of children, when both the statute's language and its application indicate that it is directed against expression. The case also illustrates the severe problems that super-obscenity statutes may cause for legitimate publishers and filmmakers. Assuming the federal Court of Appeals was correct, and that New York courts would not have applied section 263.15 to *SHOW ME!*, it is hard to see how the issue could have come to trial in a New York court.

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119. *Id.* at 45.
120. *Id.* at 45 n.3.
121. *Id.* at 44.
123. See notes 82-88 and accompanying text, *supra*.
124. See notes 116-117 and accompanying text, *supra*.
125. See text accompanying note 121, *supra*. 
York court. St. Martin's Press would have been hard put to find employees willing to distribute the book, or legitimate booksellers willing to sell it, considering the severe sanctions the law imposed. Censorship bears more heavily on legitimate expression than on pornography, and if only for this reason it seems desirable that censorship laws should be narrowly drawn.

The statute's constitutionality was thus left for state courts to decide. Ferber's conviction was affirmed without opinion by the Appellate Division, then reversed by the state's highest tribunal, the New York Court of Appeals.

The Court of Appeals observed that, if possible, doubtful statutes should be construed to avoid constitutional infirmity. But here such a limiting construction would be meaningless, because promotion of an obscene sexual performance by a child was already prohibited by New York Penal Law section 263.10. Section 263.15 could therefore have no independent purpose other than that of prohibiting what has traditionally been protected speech.

As for the contention that section 263.15 was meant to protect children and not to censor, the court said that where free expression is at issue First Amendment standards apply, however benign the intent of the legislature may be. It is true that First Amendment standards are not absolute; the state's interest in protecting its children may sometimes transcend First Amendment concerns. But the court had reservations:

126. Presumably, the court did not mean to suggest that the plaintiffs should have sued in a New York forum for declaratory or injunctive relief, which could only have duplicated the preliminary injunction that the court dissolved and which would have been open to objections similar to those the court raised.

127. Cf. Ex parte Young, 209 U.S. 123, 145-46 (1908); in accepting jurisdiction to strike down a confiscatory state law governing railroad tariffs, the Supreme Court observed:

Disobedience to the passenger rate act renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years . . . The company, in order to test the validity of these acts, must find some agent or employé to disobey them at the risk stated. . . . The officers and employés could not be expected to disobey . . . at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company.


130. Id. at 3 (slip op.).

131. Id. at 4 (slip op.).
The statute at issue in this case would go further, if as the District Attorney urges it is designed to protect children employed in the making of plays, films and books. With respect to recorded performances or photographs the statute draws no distinction between those made in this state and those made elsewhere. Anyone who promotes such materials would be subject to prosecution even though the act recorded may have occurred in another state or country where such conduct may not be prohibited. It applies equally to a live performance of a Broadway play and a filmed report of New Guinea fertility rites. Indeed in this case defendant's conviction did not rest on any contention that the film was made in this state. To the extent the statute would purport to regulate the sexual performances of children throughout the world there is some question as to whether that goal, however commendable, necessarily comes within the police powers of the State of New York.\(^3\)

The court thus seems to suggest that section 263.15 may be unconstitutional, either because it reaches protected expression, or because it goes beyond the state's police power. But the court's actual holding is based on narrower grounds. "Assuming, without deciding," that the state "may prohibit the . . . promotion of . . . visual materials, whenever the making of the film necessarily involved a violation of some other law designed to protect the performers, at least youthful performers, from a danger to their health and well-being," the court held section 263.15 to be "strikingly underinclusive." The statute addresses only sexually oriented material, and does not prohibit the knowing sale or promotion of any film, or other item, in which a child has performed a dangerous stunt or where production required a child to engage in any of the numerous activities which the Legislature in the exercise of its police power has determined is [sic] dangerous to the health or well-being of child employees or employees generally. . . . In short, the statute discriminates against films and other visual portrayals of non-obscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for this type of portrayal, the statute cannot be sustained (Erznoznik v. City of Jacksonville, supra at 215).\(^4\)

132. Id. at 4-5 (slip op.).
133. Id. at 5 (slip op.).
134. Id. at 4-5 (slip op.) (citation omitted).
V

Conclusion

The narrow holding in *Ferber* is not entirely persuasive. It rests heavily on the assertion that the "statute discriminates . . . solely on the basis of . . . content," an assertion the dissent forcefully called into question. It seems doubtful that section 263.15 is "underinclusive" within the meaning of *Erznoznik v. City of Jacksonville.* But it is clear from the body of the decision that the real issue in *Ferber* is not one of underinclusiveness. Clearly the court believed that First Amendment values outweighed any good that section 263.15 might accomplish. Apparently the court thought it wise to decide the case on narrower grounds.

It has repeatedly been urged that the state's interest in child pornography legislation is solely that of protecting children from direct abuse in pornography. The most striking lesson of New York's experience is that this is a bad fiction. Child pornography legislation is also directed against obscenity, has been used against obscenity, and should be used against obscenity; this is an important part of its function.

The real question is whether an obscenity standard would unduly burden prosecutors in child pornography cases. On the basis of exhaustive testimony, two congressional committees concluded that it would not unduly burden prosecutors; that juries would not tolerate films or pictures depicting child abuse, and that in practice almost all child pornography is

135. *Id.* at 5, 9 (slip op.) (dissent). The dissent argued that teenage sexuality could be discussed—or presumably, depicted—without using juvenile actors.

136. *442 U.S. 205* (1975). *Erznoznik* is readily distinguishable. In *Erznoznik,* the Supreme Court overturned an ordinance making it a public nuisance for a drive-in theater to show films depicting nudity, if the screen was visible from a street or other public area. It was argued inter alia that such a display might create a traffic hazard. The Court held that the ordinance was "strikingly underinclusive" because any spectacular film might have a similar effect, *id.* at 214-15. The issue of traffic safety was raised only in oral argument and was easily disposed of. The Court saw "no justification . . . for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic." *Id.* at 214-15. Child pornography legislation protects a more important state interest. Child pornography is notoriously a social-problem in need of a remedy; the question is only how drastic the remedy must be. It has not been maintained that the depiction of children engaged in a "dangerous stunt" constitutes a serious problem, and it would be surprising if the legislature had mentioned it in the statute.

137. See notes 86-88 and accompanying text, *supra.*

138. See notes 115-117 and accompanying text, *supra.*

139. See text accompanying notes 38-43, *supra.*
obscene.\textsuperscript{140}

Super-obscenity laws are mischievous, and they rest on questionable assumptions. Super-obscenity laws are not needed. They should be declared unconstitutional.

\textsuperscript{140} See notes 50-59 and accompanying text, \textit{supra}. 