

University of Michigan Journal of Law Reform

Volume 12

1979

Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation

T. Christopher Donnelly
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Juvenile Law Commons](#), [Law and Society Commons](#), and the [Legislation Commons](#)

Recommended Citation

T. C. Donnelly, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J. L. REFORM 295 (1979).

Available at: <https://repository.law.umich.edu/mjlr/vol12/iss2/5>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjlr.repository@umich.edu.

PROTECTION OF CHILDREN FROM USE IN PORNOGRAPHY: TOWARD CONSTITUTIONAL AND ENFORCEABLE LEGISLATION

Within the past two years there has been a growing awareness of the shocking use and display of young children in pornographic materials.¹ While nearly every person in this country is, in a general sense, outraged by this abuse of children, the legislative answers to the problem have caused considerable debate. Indeed, serious constitutional issues are raised in attempting to end the abuse of children, while protecting the freedom of speech guaranteed by the first amendment.² Yet, due to the outrageous nature of some child pornography,³ the constitutional issues are often ignored.⁴ It is, however, in precisely these areas of strong emotions that constitutional freedoms must be carefully considered.

This article will begin with an overview of the child pornography problem, then move to a more detailed discussion of the harms wrought upon children and society by the production and distribution of such material. A discussion of prior law will follow, detailing the need for legislation aimed specifically at the child pornography industry. The majority of the article will undertake a critical examination of existing child pornography legislation. The various elements of the offenses will be discussed and recommendations will be made to assure the effectiveness and constitutionality of child pornography statutes. In addition, provisions designed to facilitate easier enforcement of the statutes will be considered. Provisions seeking to protect and rehabilitate the victimized child will also be considered. Finally, recommendations made through-

¹ See "60 Minutes," C.B.S. telecast, May 15, 1977, vol. IX, no. 33: "Kiddie Porn" [hereinafter cited as "Kiddie Porn"], reprinted in *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.* 123 (1977) [hereinafter cited as *Senate Juvenile Delinquency Hearings*]; *Child Pornography: Outrage Starts to Stir Some Action*, U.S. NEWS & WORLD REPORT, June 13, 1977, at 66; *Child's Garden of Perversity*, TIME, April 4, 1977, at 55; J. Densen-Gerber, *What Pornographers Are Doing to Children: A Shocking Report*, REDBOOK, August 1977, at 30; Moseley, *Investigation of Child Pornography*, Chicago Tribune (four part series of articles), May 15, 1977, at 1, col. 1, May 16, 1977, at 1, col. 1, May 17, 1977, at 1, col. 1, reprinted in *Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess.* 428-42 (1977) [hereinafter cited as *House Crime Hearings*].

² For a discussion of first amendment problems, see notes 76-147 and accompanying text *infra*.

³ "Child pornography" can be defined, in a broad sense, as any print or visual material that depicts a child engaged in explicit sexual conduct. However, for purposes of legislation, "child pornography" must be more carefully defined. Indeed, arriving at precise meanings of "visual material," "child," and "explicit sexual conduct" are the major problems faced by legislators. These various elements of the definition will be discussed in detail. See notes 76-170 and accompanying text *infra*.

⁴ This is particularly true in the popular literature. See, e.g., "Kiddie Porn," *supra* note 1; Moseley, *supra* note 1, reprinted in *House Crime Hearings*, *supra* note 1, at 428-42.

out this analysis will be summarized for the benefit of legislators and others seeking to improve the effectiveness of child pornography laws.

I. NATURE AND SCOPE OF THE PROBLEM

Although the use of children in pornography has become widely publicized only in the past several years, the phenomenon is not of recent origin.⁵ It is equally clear, however, that the demand for child pornography has increased substantially in the past several years.⁶ Today over 260 magazines are available in the United States which depict children engaged in sexually explicit conduct.⁷ In addition, hundreds of short films ("loops") involving children are produced and sold each year.⁸ Other available forms of child pornography include still photographs, playing cards,⁹ and video cassettes.¹⁰

These materials depict children, as young as three years old,¹¹ engaged in all types of sexual activity, including intercourse, fellatio, cunnilingus, masturbation, rape, incest, sexual sadomasochism, and lewd poses. The children are depicted with other children and adults of both sexes.¹²

⁵ *Senate Juvenile Delinquency Hearings*, *supra* note 1, at 13 (testimony of Ronald Kelly, Sergeant, Chicago Police Department).

⁶ The burgeoning of child pornography is thought to be the latest (perhaps final) step in the pornography industry. As one writer put it:

Porn is an industry, a service industry you might call it, and, like any other industry, it has to constantly create a demand for new products, or else the market becomes stagnant. And, the fact is, until kiddie porn came along, the porn business was in trouble. Everything had been tried. People were bored So the great search commenced [Finally] the industry found The Answer, "the last frontier," as one "straight" porn producer puts it, the ultimate turn-on: kids.

Anson, *The Last Porno Show*, *NEW TIMES*, June 24, 1977, reprinted in *Senate Juvenile Delinquency Hearings*, *supra* note 1, at 150-51.

⁷ R. LLOYD, *FOR MONEY OR LOVE: BOY PROSTITUTION IN AMERICA* 226 (1976).

⁸ A loop is a 10 to 12 minute film, retailing for \$25 to \$50. *Senate Juvenile Delinquency Hearings*, *supra* note 1, at 24 (testimony of Guy Strait, convicted child molester). Examples of the subject matter of such films include one film depicting an alleged father engaged in urallia with his four year old daughter and another film depicting children violently deflowered on their communion day. *House Crime Hearings*, *supra* note 1, at 41 (statement of Judianne Densen-Gerber, President, Odyssey Institute).

⁹ *House Crime Hearings*, *supra* note 1, at 41 (statement regarding playing cards which picture naked, spread-eagled children).

¹⁰ S. REP. NO. 438, 95th Cong., 1st Sess. 6 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 40, 43.

¹¹ For example, the magazine entitled "Moppets" features photographs of girls aged 3 to 12. *House Crime Hearings*, *supra* note 1, at 41.

¹² See generally Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 810-20 (1978); *Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Education and Labor Comm.*, 95th Cong., 1st Sess. 64 (1977) [hereinafter cited as *House Select Education Hearings*], *House Crime Hearings*, *supra* note 1, at 41; *Senate Juvenile Delin-*

Since the production of pornographic material is clandestine, it is extremely difficult to accurately estimate the number of children involved in the production of child pornography. Estimates range from 30,000 children directly involved in child pornography,¹³ to nearly one million if all forms of sexual and commercial exploitation of children are considered.¹⁴

Although it is difficult to generalize about the type of children involved in the industry, the majority of the victims are thought to be runaways or from broken homes.¹⁵ Many of the victims, especially the runaways, are lonely and without money, often with nothing to sell except their bodies.¹⁶ Frequently the producer serves as a parent model for the child, sometimes gaining the child's trust before engaging in sexual exploitation.¹⁷ Other children view posing for pictures and the closely related prostitution activities¹⁸ as an easy way to make money.¹⁹

The production of child pornography is a nationwide phenomenon with the major production centers in the large urban areas.²⁰

quency Hearings, supra note 1, at 67. Obscenity laws are aimed at the harm to society from exposure to sexually explicit material. On the other hand, child pornography regulations should seek to protect the child actors from abuse. For further discussion, see notes 30-37 and accompanying text *infra*.

¹³ *Wondering If Children Are Necessary*, TIME, March 5, 1979, at 42.

¹⁴ *House Crime Hearings, supra* note 1, at 45 (testimony of Judianne Densen-Gerber, President, Odyssey Institute).

¹⁵ For a good description of the sexually exploited child, see Comment, *supra* note 12, at 817-20.

¹⁶ "[T]he young victims we are concerned with are usually runaways, reasonably 'street-wise,' emotionally troubled children who trade themselves for money or for what they interpret as affection." *House Crime Hearings, supra* note 1, at 57 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit).

¹⁷ Although of questionable credibility, Mr. Guy Strait, a convicted child molester and child pornography producer, testified that all his victims volunteered to be photographed. *House Crime Hearings, supra* note 1, at 64; *Senate Juvenile Delinquency Hearings, supra* note 1, at 28. The emotional connection between the child victim and the adult producer is evidenced in part by the difficulty of getting the victim to testify against the abuser. *Id.* at 16 (testimony of Sergeant Ronald Kelly, Chicago Police Department). See also *House Crime Hearings, supra* note 1, at 64 (testimony of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit).

¹⁸ There is a connection between child pornography and child prostitution. For example, one producer ran a home for wayward boys where he encouraged young boys to engage in orgies that he filmed with a hidden camera. He then sold the films to "sponsors" of the home and also arranged for some of the sponsors to come out to the farm to have sex with the boys. S. REP. NO. 438, 95th Cong., 1st Sess. 7 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 32, 37.

¹⁹ For an excellent first hand account of this phenomenon, see the testimony of Marty, a 17 year old prostitute and child pornography actor. *Senate Juvenile Delinquency Hearings, supra* note 1, at 18-22. For an outrageous account of the work of an 8 year old hustler, see *House Crime Hearings, supra* note 1, at 61.

These children who are consenting partners in the sexual activity "may appear to be 'hustlers,' but they are in fact children and victims in the truest sense of the word." *Id.* at 57 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit).

²⁰ Los Angeles, New York, and Chicago are reported to be the largest production centers. S. REP. NO. 438, 95th Cong., 1st Sess. 6 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 40, 43.

Since production requires nothing more than a hotel room, movie camera, and one or more child actors, however, producers have been discovered throughout the United States.²¹

The child pornography business can best be understood as a two-tiered industry composed of producers and distributors. The producer group is most directly engaged in the use of children for commercial purposes. This group includes those persons who coerce or entice children into appearing in the visual material. These same persons are generally those who photograph the children.²² In some cases, however, individuals may only be involved in obtaining the children for the use of those who engage in and record the events of sexual behavior.²³ In the most extreme cases, children are coerced into posing by their own parents.²⁴

The distributor group includes sellers of films, magazines, books, and other materials, as well as operators of bookstores and theaters that exhibit these films and pictures. Although this group is not directly engaged in the abuse of children,²⁵ it provides the producer group with incentives for the continued production of child pornography.²⁶ Large profit margins, coupled with the enormous demand for material, create a tremendous economic incentive to produce and distribute child pornography.²⁷

²¹ For example, producers have been found in such unlikely places as Port Huron, Michigan and Winchester, Tennessee. *Id.*

²² *House Crime Hearings*, *supra* note 1, at 112 (testimony of Michael Sneed, Chicago Tribune). Contrary to popular belief, these abusers are not all "dirty old men." Rather, they are often "wealthy, mobile, educated, sometimes very important members of a community." These people often infiltrate organizations and groups which deal with children. *House Crime Hearings*, *supra* note 1, at 93 (testimony of Robert F. Leonard, National Association of District Attorneys). Suggestions have been made to improve the employment screening process of those who work for these groups. *Id.* at 93-95. Such proposals are beyond the scope of this article.

²³ Investigations have uncovered nationwide schemes for the dissemination of information regarding children available for the purposes of sexual exploitation. One publication, *The Broad Street Journal*, is in essence an ad listing agency for pedophiles. In 1972, a pamphlet was published, entitled "Where the Young Ones Are," which listed 378 places in 59 cities of 34 states where "the young can be found." *House Crime Hearings*, *supra* note 1, at 58, 62.

²⁴ "There are several documented cases where prostitutes sold their own children for sexual purposes." S. REP. NO. 438, 95th Cong., 1st Sess. 8 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 40, 46.

²⁵ Arguably, the distributors of child pornography aid and abet the producer's child abuse. This argument will be fully developed below. See notes 141-43 and accompanying text *infra*.

In some instances, the same person produces and sells the material. For purposes of the preceding analysis, the producer and distributor groups will be considered separately.

²⁶ One producer-distributor estimated he made \$5-7 million in his own operation, before he was convicted of child molestation. *House Crime Hearings*, *supra* note 1, at 117. Magazines that retail for \$7.50 to \$12.50 per copy can be produced for 35 to 50 cents. *Id.* at 59. A 200-foot film that retails for \$100 can be produced for \$21 per copy. S. REP. NO. 438, 95th Cong., 1st Sess. 6 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 40, 44. See also *Senate Juvenile Delinquency Hearings*, *supra* note 1, at 39 (two hundred foot film retails for \$75-\$200 depending on the "action"; twelve photos retail for \$10).

²⁷ Because of the large amount of money involved, many suspect that organized crime is, or will become, heavily involved in the child pornography industry. The extent of organized crime's involvement in the child pornography industry is unknown. There are some reports

In first considering the child pornography problem, the natural tendency is to concentrate on the traditional hard core smut producers. It is important to note, however, that the display of children involved in certain explicit sexual activities is not limited to material most people would consider pornography.²⁸ Therefore, since the prohibition on the use of children in visual material is premised on the prevention of harm to the child, a complete discussion cannot exclude consideration of non-obscene material. The regulation of child pornography is better thought of as addressing a child abuse problem rather than an obscenity problem.

II. HARM TO CHILDREN AND SOCIETY

While there is a general sense of outrage regarding the use of children in pornography, to develop effective solutions to the problem, it is necessary to reduce this general outrage to concrete harms. Only then can an intelligent decision be reached as to what conduct should be regulated or prohibited.

A. Harm in Production of Material

Perhaps the greatest harms are the emotional and psychological damage to the child who is forced to engage in various sexual acts at a young age. As a result of such early sexual encounters, it is often difficult for a child to develop healthy affectionate relationships in the future.²⁹ Evidence shows that sexually abused children tend to have sexual dysfunctions later in life, including promiscuity and frigidity.³⁰ Furthermore, children who have been sexually abused tend to become sexual abusers as adults.³¹ Hence, the

that, to the extent that such rumors are true, the syndicate is primarily tied to the distribution end of the industry. See generally *House Crime Hearings*, supra note 1, at 47, 70, 96, 111, 308.

²⁸ Some of this material is certainly not legally obscene. For example, the popular movie *The Exorcist* depicts a child simulating masturbation with a crucifix. Although some viewers may have found that particular scene offensive, *The Exorcist* was clearly not a product of the pornography industry. See notes 105-106 and accompanying text *infra*.

²⁹ S. REP. NO. 438, 95th Cong., 1st Sess. 9 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 40, 46. Evidence suggests that many of these children will become deeply involved in drugs, prostitution, and other criminal activity in their adult lives. *House Crime Hearings*, supra note 1, at 57 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit). See *Panel Workshop: Violence, Crime Sexual Abuse and Addiction*, 5 CONTEMP. DRUG PROB. 385 (1976).

³⁰ *House Crime Hearings*, supra note 1, at 73 (testimony of Rep. Dale E. Kildee).

³¹ J. Densen-Gerber, S. Hutchinson, & R. Levine, *Incest and Drug-Related Child Abuse—Systematic Neglect by the Medical and Legal Professions*, 6 CONTEMP. DRUG PROB. 135, 137 (1977). See also *House Crime Hearings*, supra note 1, at 57 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit); S. REP. NO. 438, 95th Cong., 1st Sess. 9 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 40, 46.

psychological and emotional harm often extends throughout the life of the child.³² It must be recognized, however, that the magnitude of the emotional harm varies with the age of the child and the frequency and severity of the sexual abuse.³³

Although most of the child victims of pornography production are only affected emotionally, physical harm can also result. There is substantial evidence that production of child pornography and the sexual molestation of children are closely related.³⁴ Most of this harm results from sexual molestation from adults, whether it is recorded on film or not.³⁵ Even if the child is photographed alone or with other children in simulated acts, the producers of the visual material often engage in sexual activity with the child before and after photographing.³⁶ Thus, the absence of adults in the visual material does not mean that the child has not been sexually assaulted by an adult.

B. Harm From Produced Material

Although the connection between obscene material in general and sex crimes has been hotly debated,³⁷ child pornography ap-

³² S. REP. NO. 438, 95th Cong., 1st Sess. 9 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 40, 46.

³³ The interrelationship between age and nature of sexual abuse has been explained by one psychiatrist as follows:

“[I]f a child gets through the first six years of psycho-sexual development in a healthy state, then a single seduction or molestation, whether heterosexual or homosexual in nature, will not alter his sexual role. However, a child with a flimsy sexual identification at age seven or eight may suffer permanent development damage and a reversal of his heterosexual identification by an environmental trauma of contact with a pedophilic of either sex. The doctor concluded that such encounters are more likely to tip the balance for a seven or eight year-old than for a fifteen year-old who may have more fully acted out or solidified his sexuality.”

Id. at 76 (statement of Robert F. Leonard, National Association of District Attorneys).

³⁴ See *House Crime Hearings*, *supra* note 1, at 58-59 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit).

³⁵ Children are most often physically harmed when forced to engage in sadomasochistic abuse. In the most extreme case, the child victim is murdered in the course of the sexual abuse. For specific details, see Anson, *The Last Porno Show*, NEW TIMES, June 24, 1977, reprinted in *Senate Juvenile Delinquency Hearings*, *supra* note 1, at 154. In addition, a more subtle form of physical harm has also been reported. “The prepubescent child having intercourse does not have a vaginal pH which protects against infection. Work in Australia by Dr. Malcom Doppleson, a gynecologist and Odyssey Board Member, has shown that children who have prepubescent intercourse have the highest incidence of cervical carcinoma of all women at early ages in their twenties and thirties.” *House Crime Hearings*, *supra* note 1, at 44 (testimony of Judianne Densen-Gerber, President, Odyssey Institute).

³⁶ *House Crime Hearings*, *supra* note 1, at 59 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit); *id.* at 114 (testimony of Michael Sneed, Chicago Tribune) (describing an actual case in which pornographic materials were used in molesting a five year-old girl).

³⁷ See REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970); HILL-LINK MINORITY REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) [hereinafter cited HILL-LINK]; REPORT OF CHARLES H. KEATING, JR., COMMISSION ON OBSCENITY AND PORNOGRAPHY (1970) [hereinafter cited as KEATING]. See also note 41 *infra*.

pears to play a special role in the sexual molestation of children.³⁸ Pornography, particularly photos of children engaged in sexually explicit conduct, is frequently used to sexually stimulate both the molester and the child, as well as to overcome inhibitions a child may have regarding the acts that he or she is expected to commit.³⁹

In addition to the direct connection between child pornography and child molestation, the presence of child pornography may be harmful to society in a general sense.⁴⁰ Although studies have not been undertaken regarding the effect on society of pornographic material depicting children, arguments have been advanced that such material will lead to a further decay in family values and fundamental moral principles.⁴¹

In addition to this possible societal harm, publication of the visual material arguably imposes a harm on the child victim analogous to the emotional harm redressed in the invasion of privacy tort.⁴² Public exposure of the child's body and sexual activity may cause emotional damage beyond that incurred in the actual photographing of the child. The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.⁴³

In summary, the harms of child pornography are arguably found in the production and distribution of the material. The harm to the child in the production of such material is virtually undisputed. While the harm to society inherent exposure to such material is open to some question, publication of the visual material arguably furthers the psychological harm suffered by the child.

³⁸ Recent investigations by the Sexually Exploited Child Unit in Los Angeles showed that in the more than 50 cases of child molestation investigated in an eight month period, pornography was involved in every case. *House Crime Hearings*, *supra* note 1, at 58 (statement of Lloyd H. Martin, Los Angeles Police Department, Sexually Exploited Child Unit).

³⁹ *Id.* at 112 (testimony of Michael Sneed, Chicago Tribune) ("In interviews with young boys who have [been picked up by chickenhawks] they say that 9 times out of 10, pictures are actually taken of them. Pornographic films are shown to them. It is a way of getting them around to it."); *id.* at 307 (statement of Robert G. Gemignani, First Assistant State's Attorney, Rockford, Ill.).

⁴⁰ Such an argument was advanced by Dr. Judiane Densen-Gerber. *Id.* at 41.

⁴¹ Many commentators have made this argument in regard to standard obscene material. See, e.g., Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 394-95 (1963); HILL-LINK, *supra* note 37; KEATING, *supra* note 37. However, it is generally accepted that the adverse effects of obscene materials in general have never been conclusively proved or disproved. Nevertheless, the questionable nature of the harm resulting from exposure to obscene materials does not preclude the State from legislating in these areas. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-64 (1973). This article does not undertake an analysis of whether the state should regulate sexually explicit materials as a general matter.

⁴² See note 123 and accompanying text *infra*.

⁴³ Telephone interview with Dr. Ann Thompson, M.D., consulting child psychiatrist to the University of Michigan Interdisciplinary Project on Child Abuse and Neglect, April 16, 1979.

III. INADEQUACY OF PRIOR LEGISLATION

Given the identifiable harms stemming from the widespread use of children in visual materials, legislation is needed to prevent the use of children in pornography. To understand what legislation is required to prevent these harms, it is necessary to first consider the extent to which existing legislation covers this area.

All states have sex offense statutes which prohibit various sexual acts, including rape, incest, and indecent or immoral conduct with minors.⁴⁴ These laws appear to reach the producers of child pornography. These laws, however, would be applicable only in cases where the adult actually sexually molested the child, and not where the child was forced to pose alone or with other children.⁴⁵ In addition, evidence of molestation is often difficult to obtain.⁴⁶

Child abuse laws also appear to reach the producers of child pornography. Application of these laws, which make criminal⁴⁷ the physical abuse of children, to the child pornography problem is limited, however, in several respects. First, many of the laws only impose liability on parents and guardians.⁴⁸ Second, some of the laws have relatively weak penalty provisions.⁴⁹ Third, many of the laws only outlaw physical abuse.⁵⁰ Many of the victims of child pornog-

⁴⁴ See, e.g., N.Y. PENAL LAW §§ 130.00-.70 (McKinney 1975 & Supp. 1978) (rape, sodomy, and sexual abuse); N.Y. PENAL LAW § 255.25 (McKinney 1975) (incest).

⁴⁵ The sex offenses only prohibit actual sexual contact by an adult with a child. Thus, children posing with other children or nudity is not proscribed by these statutes.

⁴⁶ These evidentiary problems arise in two respects. First, there is a problem of witness competency in cases where the victim is too young. Second, even if the witness is legally competent, he or she is often too frightened or confused to properly testify. *House Crime Hearings, supra* note 1, at 306 (statement of Robert G. Gemignani, First Assistant State's Attorney, Rockford, Ill.); *id.* at 198 (testimony of Rep. Barbara A. Mikulski).

⁴⁷ The criminal statutes outlawing child abuse and neglect are only one class of laws which deal with the child abuse problem. One commentator has identified three other groups of child abuse legislation. These include "juvenile or family court acts that permit such courts to assume protective custody or supervision over 'neglected' children . . . ; legislation that establishes protective services for abused and neglected children as part of a comprehensive program of public child welfare services; [and] reporting statutes that encourage or mandate the reporting of actual or suspected abuse or neglect for the child's protection and the family's treatment." Katz, Ambrosino, McGarth, & Sawitsky, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 FAM. L.Q. 151, 154 (1977). These three categories deal exclusively with abuse by parents and guardians. On the other hand, some of the criminal statutes impose liability on all abusers. See, e.g., CAL. PENAL CODE § 273d (West 1970 & Supp. 1978) (" . . . any person who wilfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is guilty of a felony. . . .").

⁴⁸ See, e.g., N. Y. FAM. CT. ACT § 1012(e) (McKinney Supp. 1978), which defines "abused child" as "a child less than eighteen years of age whose parent or other person legally responsible for his care [abuses such child]."

⁴⁹ In those states that impose criminal liability on abusing adults, the crime is generally a misdemeanor. Generally, the penalty for a misdemeanor is a relatively small fine and a prison term of less than one year. For a more detailed analysis see Katz, Howe, & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 75-362. The penalties under the child pornography laws are substantially longer. See notes 221-27 and accompanying text *infra*.

⁵⁰ For a review of the various definitions of "neglect and abuse" of a child, see Katz, Howe, & McGarth, *supra* note 49, at 75-362.

raphy production are harmed psychologically, rather than physically.

Laws which outlaw acts contributing to the delinquency of a minor may also be applied to those engaged in abusive activity during the production process.⁵¹ Like the child abuse statutes, these laws have weak penalty provisions.⁵²

The existing obscenity laws prohibit the dissemination and the production of any material found to be legally obscene. If most child pornography is obscene under existing standards,⁵³ there is arguably no need for further legislation.⁵⁴ Application of the present obscenity laws would effectively proscribe the use of children in legally obscene materials. These laws, however, would provide no relief for those children who are similarly photographed and sexually abused, but whose pictures appear in nonobscene works.⁵⁵ This shortcoming is further compounded by the difficulty of prosecution under the current obscenity laws,⁵⁶ and the low priority status of obscenity prosecutions in general.⁵⁷ Relying on the current obscenity laws to prevent the sexual abuse of children in visual material would rest on a determination of "obscenity," without regard to the concomitant harm to the child. While such a determination might be relevant when applied to distributors, where strong freedom of speech interests are involved,⁵⁸ it does not apply to the producer's direct abuse of the child where no countervailing constitutional issues must be considered.

In summary, although several categories of existing laws are readily applicable to certain producer and distributor activities as-

⁵¹ See, e.g., N. Y. PENAL LAW §§ 260.10-.20 (McKinney 1975) (endangering the welfare of a child and unlawfully dealing with a child).

⁵² The penalty for contributing to a minor's delinquency is generally a misdemeanor. See, e.g., N. Y. PENAL LAW § 260.20 (McKinney 1975) (class B misdemeanor).

⁵³ See, e.g., United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974); United States v. Various Articles of Obscene Merchandise, Schedule 1724, 460 F. Supp. 826 (S.D.N.Y. 1978); United States v. Brown, 328 F. Supp. 196 (E.D. Va. 1971) (all supporting convictions under regular obscenity laws for materials depicting children).

⁵⁴ See *House Crime Hearings*, *supra* note 1, at 245-49 (testimony of Larry E. Parrish, former Assistant United States Attorney, Memphis, Tenn.).

⁵⁵ It makes no sense to deny protection to a child who is sexually abused for the purposes of making visual material, simply because the finished product is nonobscene. Simply stated, there is no connection between the legal status of the material and the harm to the child. See notes 76-161 and accompanying text *infra*.

⁵⁶ For an excellent statement of the difficulties of prosecution under the obscenity laws, from the point of view of a former Assistant United States Attorney, see *House Crime Hearings*, *supra* note 1, at 241-53.

⁵⁷ *Id.* at 48 (testimony of Judianne Densen-Gerber, President, Odyssey Institute); *id.* at 98 (testimony of Robert Leonard, President-Elect, National Association of District Attorneys). A related problem is the difficulty in getting tough sentences from judges who are philosophically opposed to the obscenity laws. For example, after pleading guilty to obscenity felonies involving children, one man was given 27 consecutive weekends in jail instead of the possible 7 year sentence. *Id.* at 48.

⁵⁸ See notes 101-34 and accompanying text *infra*.

sociated with child pornography, these laws are limited in effect because of proof problems, their failure to reach all abusive acts, and their weak sanctions. Consequently, further legislation is needed to comprehensively combat the problems inherent in child pornography.⁵⁹

IV. LEGISLATIVE APPROACHES

The recent publicity surrounding child pornography has prompted legislation designed to combat the problem. As of this writing, thirty-nine states have passed laws aimed at the child pornography problem, thirty-four states having enacted legislation in 1977 or 1978.⁶⁰ In addition, a recently enacted federal law became effective in February, 1978.⁶¹

Due to the identity of substantive issues, the federal and state laws will be considered together. The federal law only regulates interstate aspects of the child pornography problem.⁶² It is important

⁵⁹ In addition to filling the gaps, new legislation may also create an impetus for stronger enforcement of existing law, especially if the existing law is recodified in the pornography context.

⁶⁰ As of April 20, 1979, 34 states have passed statutes specifically designed to deal with the child pornography problem. ALA. CODE tit. 13, §§ 7-230 to 238 (Supp. 1978); ALASKA STAT. § 11.41.455 (Supp. 1978)(effective January 1, 1980); ARIZ. REV. STAT. ANN. §§ 13-3508, -3551 to 3555 (West Pamph. Supp. 1978); CAL. LAB. CODE §§ 1309.5-6 (West Supp. 1979); CAL. PENAL CODE §§ 311.2(b), .4 (West Supp. 1979); CONN. GEN. STAT. ANN. §§ 53a-196a to 196b (West Supp. 1979); DEL. CODE ANN. tit. 11, §§ 1103, 1108-1110 (Supp. 1978); FLA. STAT. ANN. § 847.014 (Harrison Supp. 1978); GA. CODE ANN. § 54-309.1(b) (Harrison Supp. 1978); HAW. REV. STAT. §§ 707-750 to 751 (Supp. 1978); ILL. ANN. STAT. ch. 38, § 11-20 a (Smith-Hurd Pamph. Supp. 1978); IND. CODE §§ 35-30-10.1-1 to -4, -42-4-4 (Burns Supp. 1978); Act of June 5, 1978, Sen. File 2205, 1978 Iowa Legis. Serv. 224 (to be codified as IOWA CODE §§ 728-728.1); KAN. STAT. ANN. § 21-3516 (Supp. 1978); KY. REV. STAT. §§ 531.300-.370 (Supp. 1978); LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978); ME. REV. STAT. ANN. tit. 17, §§ 2921-2923, tit. 30, § 508 (West Supp. 1978); MD. ANN. CODE art. 27, § 419A (Supp. 1978); MASS. ANN. LAWS. ch. 272, §§ 29A, 30D, 31 (Michie/Law. Co-op Supp. 1978); MICH. COMP. LAWS ANN. § 750.145c (Supp. 1978), and Act of June 14, 1978, Pub. Act No. 228, 1978 Mich. Legis. Serv. 701 (West)(to be codified as MICH. COMP. LAWS §§ 409.114a, .122); MINN. STAT. ANN. § 617.246 (West Supp. 1978); MO. ANN. STAT. § 568.060 (Vernon Pamph. Supp. 1979); NEB. REV. STAT. §§ 28-1463 to 1464 (Supp. 1978); N.H. REV. STAT. ANN. §§ 169:32, 650:1-:2 (Supp. 1977); N.J. STAT. ANN. §§ 2A:142:A-1 to 5 (West Supp. 1978); N.M. STAT. ANN. § 30-6-1 (Supp. 1978); N.Y. PENAL LAW §§ 263.00-.25 (McKinney Supp. 1978); OHIO REV. CODE ANN. §§ 2907.32.1, 2919.22 (Page Supp. 1979); OKLA. STAT. ANN. tit. 21, §§ 1021.1-3 (West Supp. 1978); 18 PA. CONS. STAT. ANN. § 6312 (Purdon Supp. 1978); R.I. GEN. LAWS §§ 11-9-1 to 1.1 (Supp. 1978); S.D. COMPILED LAWS ANN. §§ 22-22-22 to -25 (Supp. 1978); TENN. CODE ANN. §§ 39-1019, 50-707(t) (Supp. 1978); TEX. PENAL CODE ANN. tit. 9, §§ 43.23, .25 (Vernon 1974 & Supp. 1978); WIS. STAT. ANN. § 940.203 (West Supp. 1979). In addition, five states have criminal statutes that prohibit employment of a child in connection with a violation of the state obscenity laws. N.C. GEN. STAT. § 14-190.6 (Supp. 1977); N.D. CENT. CODE § 12.1-27.1-03 (1976)(applies only to live performances); S.C. CODE § 16-15-180 (1976); VA. CODE § 18.2-379 (1975); W. VA. CODE § 61-8A-6 (1977).

⁶¹ Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C.A. §§ 2251-2253, 2423 (West Supp. 1978).

⁶² For a preliminary discussion of the interstate commerce issue, which is not discussed in this article, see *House Select Education Hearings*, *supra* note 12, at 296-98.

for state lawmakers to recognize that the federal law does not preempt state legislation. Rather, the legislative history indicates the federal law was enacted as part of a coordinated state and federal approach to the child pornography problem.⁶³ Thus, federal legislation cannot adequately regulate child pornography absent supplementary legislation at the state level.

A. General Approach of the Laws

In varying combinations, these new laws impose criminal liability on all the participants in the child pornography industry. The federal law and thirty-nine state laws impose criminal liability on the producer of the visual material depicting children in sexually explicit conduct.⁶⁴ The federal law and twenty-nine states make criminal the coercing or enticing of a child to be photographed in child pornography.⁶⁵ In addition, the federal law and eleven states

⁶³ H.R. REP. NO. 696, 95th Cong., 1st Sess. 9 (1977) ("We perceived a need to not supplant or discourage state and local response to those practices, but to respond in the areas where the states turned to the federal government for assistance."); S. REP. NO. 438, 95th Cong., 1st Sess. 10 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 40, 48. ("What is needed is a coordinated effort by Federal, state and local law enforcement officials aimed at eradicating this form of child abuse.").

⁶⁴ 18 U.S.C.A. § 2251(a) (Supp. 1978); ALA. CODE tit. 13, § 7-237 (Supp. 1978); ALASKA STAT. § 11.41.455 (Supp. 1978) (effective January 1, 1980); ARIZ. REV. STAT. ANN. §§ 13-3508, -3552 (West Pamph. Supp. 1978); CAL. PENAL CODE § 311.4 (West Supp. 1979); CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1979); DEL. CODE ANN. tit. 11, § 1108 (Supp. 1978); FLA. STAT. ANN. § 847.014(2)(a) (Harrison Supp. 1978); GA. CODE ANN. § 54-309.1(b) (Harrison Supp. 1978); HAW. REV. STAT. § 707-750 (Supp. 1978); ILL. ANN. STAT. ch. 38, § 11-20a(b)(2) (Smith-Hurd Pamph. Supp. 1978); IND. CODE §§ 35-30-10.1-3, -42-4-4 (Supp. 1978); Act of June 5, 1978, Sen. File 2205, § 1, 1978 Iowa Legis. Serv. 224 (to be codified as IOWA CODE § 728); KAN. STAT. ANN. § 21-3516 (Supp. 1978); KY. REV. STAT. § 531.310 (Supp. 1978); LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2922 (West Supp. 1978); MD. ANN. CODE art. 27, § 419A (Supp. 1978); MASS. ANN. LAWS ch. 272, § 29A (Michie/Law. Co-op Supp. 1978); MICH. COMP. LAWS ANN. § 750.145c(2) (Supp. 1978), and Act of June 14, 1978, Pub. Act No. 228, § 1, 1978 Mich. Legis. Serv. 701 (West) (to be codified as MICH. COMP. LAWS §§ 409.114a, .122); MINN. STAT. ANN. § 617.246 (West Supp. 1978); MO. ANN. STAT. § 568.060 (Vernon Pamph. Supp. 1979); NEB. REV. STAT. § 28-1463(1) (Supp. 1978); N.H. REV. STAT. ANN. § 650:2 (Supp. 1977); N.J. STAT. ANN. § 2A:142:A-3 (West Supp. 1978); N.M. STAT. ANN. § 30-6-1 (Supp. 1978); N.Y. PENAL LAW §§ 263.05-.15 (McKinney Supp. 1978); N.C. GEN. STAT. § 14-190.6 (Supp. 1977); N.D. CENT. CODE § 12.1-27.1-03 (1976) (applies only to live performances); OHIO REV. CODE ANN. § 2907.32.1 (Page Supp. 1979); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1978); 18 PA. CONS. STAT. ANN. § 6312(b) (Purdon Supp. 1978); R.I. GEN. LAWS § 11-9-1(b) (Supp. 1979); S.C. CODE § 16-15-180 (1976); S.D. COMPILED LAWS ANN. § 22-22-23 (Supp. 1978); TENN. CODE ANN. § 39-1019, 50-707(t) (Supp. 1978); TEX. PENAL CODE ANN. tit. 9, § 43.23 (Vernon 1974); VA. CODE § 18.2-379 (1975); W. VA. CODE § 61-8A-6 (1977); WIS. STAT. ANN. § 940.203 (West Supp. 1979).

⁶⁵ The coercer category includes those persons who cause, coerce, entice, induce, or permit a child to appear in child pornography. 18 U.S.C.A. § 2251(a) (West Supp. 1978); Alaska Stat. § 11.41.455 (Supp. 1978) (effective January 1, 1980); ARIZ. REV. STAT. ANN. § 13-3552 (West Pamph. Supp. 1978); CAL. PENAL CODE § 311.4 (West Supp. 1979); CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1979); FLA. STAT. ANN. § 847.014(2)(a) (Harrison Supp. 1978); ILL. ANN. STAT. ch. 38, § 11-20a(b)(3) (Smith-Hurd Pamph. Supp. 1978); Act of June 5, 1978, Sen. File 2205, § 1, 1978 Iowa Legis. Serv. 224 (to be codified as IOWA CODE § 728); KAN. STAT. ANN. § 21-3516 (Supp. 1978); KY. REV. STAT.

have specific provisions making it a crime for a parent or legal guardian to permit his child to engage in the production of child pornography.⁶⁶ Finally, the federal law and twenty-seven states impose criminal liability on the distributors and sellers of child pornography.⁶⁷

In terms of comprehensiveness of coverage, only the federal law and nine states have provisions that expressly impose criminal liability on all four classes of actors: producers, coercers, parents or guardians, and distributors.⁶⁸ However, eleven other states reach the four groups by imposing criminal liability on producers, distributors, and coercers, which includes parents.⁶⁹

B. Elements of the Offense

Typically, the statutes prohibit the production of, the distribu-

§ 531.310 (Supp. 1978); LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2922 (West Supp. 1978); MD. ANN. CODE art. 27, § 419A (Supp. 1978); MICH. COMP. LAWS ANN. § 750.145c(2) (Supp. 1978); MINN. STAT. ANN. § 617.246 (West Supp. 1978); MO. ANN. STAT. § 568.060 (Vernon Pamph. Supp. 1979); N.H. REV. STAT. ANN. § 169:32 (Supp. 1977); N.J. STAT. ANN. § 2A:142:A-2 (West Supp. 1978); N.M. STAT. ANN. § 30-6-1 (Supp. 1978); N.Y. PENAL LAW § 263.05 (McKinney Supp. 1978); N.C. GEN. STAT. § 14-190.6 (Supp. 1977); N.D. CENT. CODE § 12.1-27.1-03 (1976) (applies only to live performances); OHIO REV. CODE ANN. § 2919.22(B)(4) (Page Supp. 1979); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1978); 18 PA. CONS. STAT. ANN. § 6312(b) (Purdon Supp. 1978); R.I. GEN. LAWS § 11-9-1(b) (Supp. 1979); S.D. COMPILED LAWS ANN. § 22-22-23 (Supp. 1978); TENN. CODE ANN. § 39-1019 (Supp. 1978); VA. CODE § 18.2-379 (1975); WIS. STAT. ANN. § 940.203 (West Supp. 1979).

⁶⁶ 18 U.S.C.A. § 2251(b) (West Supp. 1978); ALA. CODE tit. 13, § 7-236 (Supp. 1978); CAL. PENAL CODE § 311.4 (West Supp. 1979); CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1979); ILL. ANN. STAT. ch. 38, § 11-20a(b)(3) (Smith-Hurd Pamph. Supp. 1978); KAN. STAT. ANN. § 21-3516 (Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2922 (West Supp. 1978); N.H. REV. STAT. ANN. § 169:32 (Supp. 1977); N.J. STAT. ANN. § 2A:142:A-2 (West Supp. 1978); N.Y. PENAL LAW § 263.05 (McKinney Supp. 1978); OKLA. STAT. ANN. tit. 21, § 1021.3 (West Supp. 1978); WIS. STAT. ANN. § 940.203(3) (West Supp. 1979).

⁶⁷ 18 U.S.C.A. § 2252 (West Supp. 1978); ALA. CODE tit. 13, §§ 7-231 to 235 (Supp. 1978); ARIZ. REV. STAT. ANN. §§ 13-3508, -3553 (West Pamph. Supp. 1978); CAL. LAB. CODE §§ 1309.5-.6 (West Supp. 1979); CAL. PENAL CODE §§ 311.2(b), .4 (West Supp. 1979); CONN. GEN. STAT. ANN. § 53a-196b (West Supp. 1979); DEL. CODE ANN. tit. 11, § 1109 (Supp. 1978); FLA. STAT. ANN. § 847.014(2)(b) (Harrison Supp. 1978); HAW. REV. STAT. § 707-751 (Supp. 1978); ILL. ANN. STAT. ch. 38, § 11-20a(b)(1) (Smith-Hurd Pamph. Supp. 1978); IND. CODE §§ 35-30-10.1-2 to 3 (Supp. 1978); KY. REV. STAT. §§ 531.340-.350 (Supp. 1978); LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2923 (West Supp. 1978); MASS. ANN. LAWS § 29A (Michie/Law. Co-op Supp. 1978); MICH. COMP. LAWS ANN. § 750.145c(3) (Supp. 1978); MINN. STAT. ANN. § 617.246 (West Supp. 1978); NEB. REV. STAT. § 28-1463(2) (Supp. 1978); N.H. REV. STAT. ANN. § 650:2 (Supp. 1977); N.J. STAT. ANN. § 2A:142:A-4 (West Supp. 1978); N.Y. PENAL LAW §§ 263.10-.15 (McKinney Supp. 1978); OHIO REV. CODE ANN. § 2907.32.1 (Page Supp. 1979); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1978); 18 PA. CONS. STAT. ANN. § 6312(c) (Purdon Supp. 1978); R.I. GEN. LAWS § 11-9-1.1 (Supp. 1979); S.D. COMPILED LAWS ANN. § 22-22-24 (Supp. 1978); TENN. CODE ANN. § 39-1019 (Supp. 1978); TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon Supp. 1978); WIS. STAT. ANN. § 940.203(4) (West Supp. 1979).

⁶⁸ These states are California, Connecticut, Illinois, Maine, New Hampshire, New Jersey, New York, Oklahoma, and Wisconsin. For specific statutory citations, see notes 64-67 *supra*.

⁶⁹ These states are Arizona, Florida, Kentucky, Louisiana, Michigan, Minnesota, Ohio,

tion of, the coercing of a child to appear in, and the granting of parental consent to a child to appear in:

- (1) any print or visual material⁷⁰
- (2) that depicts a child⁷¹
- (3) engaged in certain sexual conduct.⁷²

With regard to the first element, about half of the laws require that the visual material be legally obscene as a prerequisite for imposing

Pennsylvania, Rhode Island, South Dakota, and Tennessee. For specific statutory citations, see notes 64, 65, and 67 *supra*.

⁷⁰ Print or visual material generally includes books, magazines, prints, negatives, slides, motion pictures, or videotapes.

In Connecticut, Illinois, and Massachusetts, undeveloped materials are included. In *United States v. Levine*, 546 F.2d 658 (5th Cir. 1977), statutory prohibitions against interstate shipment of obscene materials were held to apply to unprocessed materials. Therefore, inclusion of undeveloped materials appears to be appropriate.

In addition, 20 states include live performances in this list. These states are Alaska, California, Connecticut, Florida, Hawaii, Indiana, Kentucky, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. For specific statutory citations, see note 60 *supra*.

On the federal level, a prohibition of live performances depicting children engaged in sexual conduct was contained in the Senate version of the bill. The provision was omitted by the Conference Committee. H.R. CONF. REP. NO. 811, 95th Cong., 1st Sess. 5 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 69, 70.

⁷¹ Sixteen states define a child as a person under 18 years old. ARIZ. REV. STAT. ANN. §§ 1-215, 13-3508, -3551 to 3555 (West Supp. 1978); DEL. CODE ANN. tit. 11, § 1103 (Supp. 1978); FLA. STAT. ANN. § 847.014(1)(a) (Harrison Supp. 1978); GA. CODE ANN. §§ 54-309.1, 74-104 (Harrison 1973 & Supp. 1978); IOWA CODE ANN. § 728.1 (West Supp. 1978); MASS. ANN. LAWS ch. 272, § 29A (Michie/Law. Co-op Supp. 1978); MICH. COMP. LAWS ANN. § 750.145c (Supp. 1978) (under 18 unless emancipated); MINN. STAT. ANN. § 617.246 (West Supp. 1978); N.H. REV. STAT. ANN. § 650:1 (Supp. 1977); N.D. CENT. CODE § 14-10-01 (Supp. 1977); OHIO REV. CODE ANN. § 2919.22(B)(4) (Page Supp. 1979); R.I. GEN. LAWS § 11-9-1 to 1.1 (Supp. 1979); TENN. CODE ANN. §§ 39-1019, 50-707(t) (Supp. 1978); VA. CODE §§ 1-13.42, 18.2-379 (1975); W. VA. CODE § 61-8A-6 (1977); WIS. STAT. ANN. § 940.203(6) (West Supp. 1979). Four states define a child as under 17 years old. ALA. CODE tit. 13, §§ 7-231 to 238 (Supp. 1978); LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978); MO. ANN. STAT. § 568.060 (Vernon Pamph. Supp. 1979); TEX. PENAL CODE ANN. tit. 9, §§ 43.23, .25 (Vernon 1974 & Supp. 1978). The federal law and 16 states define a child as under 16. 18 U.S.C.A. § 2253 (West Supp. 1978); ALASKA STAT. § 11.41.455 (Supp. 1978) (effective January 1, 1980); CAL. LAB. CODE § 1309.5 (West Supp. 1979) and CAL. PENAL CODE § 311.4 (West Supp. 1979); CONN. GEN. STAT. ANN. § 53a-193 (West Supp. 1979); HAW. REV. STAT. § 707-750 to 751 (Supp. 1978); KAN. STAT. ANN. § 21-3516 (Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2921 (West Supp. 1978); MD. ANN. CODE art. 27, § 419A (Supp. 1978); N.J. STAT. ANN. § 2A:142:A-1 (West Supp. 1978); N.M. STAT. ANN. § 30-6-1 (Supp. 1978); N.Y. Penal Law § 263.00 (McKinney Supp. 1978); N.C. GEN. STAT. § 14-190.6 (Supp. 1977); OKLA. STAT. ANN. tit. 21, §§ 1021.2 to .3 (West Supp. 1978); 18 PA. CONS. STAT. ANN. § 6312 (Purdon Supp. 1978); S.C. CODE § 16-15-180 (1976); S.D. COMPILED LAWS ANN. §§ 22-22-23 to 24 (Supp. 1978). In addition, two states define a child as a person who is under 16 or appears as a prepubescent. ILL. ANN. STAT. ch. 38, § 11-20a (Smith-Hurd Pamph. Supp. 1978); NEB. REV. STAT. § 28-1463 (Supp. 1978). Similarly, one state defines a child as one who is or appears to be under 16. IND. CODE §§ 35-30-10.1-2 to 3 (Supp. 1978). Another state provides for two age classifications (16 and 18) and varies the punishment according to the age of the victim. KY. REV. STAT. §§ 531.300-.370 (Supp. 1978).

⁷² Although the prohibited conduct varies from state to state, it generally includes the following: sexual intercourse (genital-genital, oral-genital, anal-genital, oral-anal), bestiality, masturbation, sexual sadomasochism, lewd exhibition of the genitals or pubic area, excretory functions performed in a lewd manner, and, in a few jurisdictions, nudity. For a detailed discussion of proscribed conduct, see notes 160-70 and accompanying text *infra*.

criminal liability on the producer and distributor.⁷³ A minority of states impose this requirement in regulating parents and coercers.⁷⁴ In addition, several states require the material be produced or distributed for commercial gain in order to impose liability.⁷⁵ Finally, as in all criminal statutes, the knowledge of the defendant is an implicit element of the offense. The following subsections

⁷³ Of the 39 state laws that regulate producers, 18 require the material to be obscene. ALA. CODE tit. 13, § 7-237 (Supp. 1978); ARIZ. REV. STAT. ANN. §§ 13-3508, -3552 (West Pamph. Supp. 1978) (§ 13-3508 requires the material be obscene; § 13-3552 has no such requirement); CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1979); ILL. ANN. STAT. ch. 38, § 11-20a(b)(2) (Smith-Hurd Pamph. Supp. 1978); IND. CODE §§ 35-30-10.1-3, -42-4-4 (Supp. 1978) (§ 35-30-10.1-3 requires the material be obscene; § 35-42-4-4 has no such requirement); MD. ANN. CODE art. 27, § 419A (Supp. 1978); MINN. STAT. ANN. § 617.246 (West Supp. 1978); NEB. REV. STAT. ANN. § 28-1463(1) (Supp. 1978); N.H. REV. STAT. ANN. § 650:2 (Supp. 1977); N.Y. PENAL LAW §§ 263.05-.15 (McKinney Supp. 1978) (§ 263.10 requires the material be obscene; §§ 263.05, .15 have no such requirement); N.C. GEN. STAT. § 14-190.6 (Supp. 1977); N.D. CENT. CODE § 12.1-27.1-03 (1976) (applies only to live performances); OHIO REV. CODE ANN. § 2907.32.1 (Page Supp. 1979); S.C. CODE § 16-15-180 (1976); TENN. CODE ANN. §§ 39-1019, 50-707(t) (Supp. 1978); TEX. PENAL CODE ANN. tit. 9, § 43.23 (Vernon 1974); VA. CODE § 18.2-379 (1975); W. VA. CODE § 61-8A-6 (1977). Of the 27 states that regulate distributors, 13 require the material to be obscene. ALA. CODE tit. 13, §§ 7-231 to 235 (Supp. 1978); ARIZ. REV. STAT. ANN. §§ 13-3508, -3553 (West Pamph. Supp. 1978) (§ 13-3508 requires the material be obscene; § 13-3553 has no such requirement); CONN. GEN. STAT. ANN. § 53a-196b (West Supp. 1979); FLA. STAT. ANN. § 847.014(2)(b) (Harrison Supp. 1978); ILL. ANN. STAT. ch. 38, § 11-20a(b)(1) (Smith-Hurd Pamph. Supp. 1978); IND. CODE §§ 35-30-10.1-2 to 3 (Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2923 (West Supp. 1978); MINN. STAT. ANN. § 617.246 (West Supp. 1978); NEB. REV. STAT. § 28-1463(2) (Supp. 1978); N.H. REV. STAT. ANN. § 650:2 (Supp. 1977); N.Y. PENAL LAW §§ 263.10-.15 (McKinney Supp. 1978) (§ 263.10 requires the material be obscene; § 263.15 has no such requirement); OHIO REV. CODE ANN. § 2907.32.1 (Page Supp. 1979); TENN. CODE ANN. § 39-1019 (Supp. 1978). On the federal level the material need not be obscene with respect to producers, but with respect to distributors, the material must be obscene. 18 U.S.C.A. §§ 2251-2253 (West Supp. 1978).

Among those states that have obscenity requirements, the statutory definition of obscene varies. Most use "obscene" as construed in *Miller v. California*, 413 U.S. 15 (1973). See note 105 and accompanying text *infra*. Others use a "harmful to minors" definition similar to the standard approved in *Ginsberg v. New York*, 390 U.S. 629 (1968), discussed in note 107 and accompanying text *infra*. See, e.g., FLA. STAT. ANN. § 847.014 (Harrison Supp. 1978). Other states provide an affirmative defense, allowing the defendant to escape liability if the material has a bona fide scientific, educational, or governmental justification. See, e.g., TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon Supp. 1978).

⁷⁴ Of the 29 states that regulate coercers, 10 require the material be obscene. CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1979); ILL. ANN. STAT. ch. 38, § 11-20a(b)(3) (Smith-Hurd Pamph. Supp. 1978); MD. ANN. CODE art. 27, § 419A (Supp. 1978); MINN. STAT. ANN. § 617.246 (West Supp. 1978); N.H. REV. STAT. ANN. § 169:32 (Supp. 1977); N.C. GEN. STAT. § 14-190.6 (Supp. 1977); N.D. CENT. CODE § 12.1-27.1-03 (1976) (applies only to live performances); OHIO REV. CODE ANN. § 2919.22(B)(4) (Page Supp. 1979); TENN. CODE ANN. § 39-1019 (Supp. 1978); VA. CODE § 18.2-379 (1975). Of the 11 states that regulate parents and guardians, four require the material be obscene. ALA. CODE tit. 13, § 7-236 (Supp. 1978); CONN. GEN. STAT. ANN. § 53a-196a (West Supp. 1979); ILL. ANN. STAT. ch. 38, § 11-20a(b)(3) (Smith-Hurd Pamph. Supp. 1978); N.H. REV. STAT. ANN. § 169:32. Under the federal law, the material need not be obscene with respect to parents or coercers. 18 U.S.C.A. §§ 2251-2253 (West Supp. 1978).

⁷⁵ 18 U.S.C.A. §§ 2251-2253 (West Supp. 1978) ("for pecuniary profit"); ALASKA STAT. § 11.41.455 (Supp. 1978) (effective January 1, 1980); CAL. PENAL CODE §§ 311.2(b), .4 (West Supp. 1979); KAN. STAT. ANN. § 21-3516 (Supp. 1978); ME. REV. STAT. ANN. tit. 17, § 2922 (West Supp. 1978); MICH. COMP. LAWS ANN. § 750.145c (Supp. 1978); OHIO REV. CODE ANN. § 2907.32.1 (Page Supp. 1979); TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon Supp. 1978).

undertake a detailed analysis of each of these elements, including a discussion of the major constitutional issues associated with each.

1. *Visual Material: The Necessity of an Obscenity Requirement*—Because child pornography production and distribution involves visual material, legislation regulating such material must be considered with due regard for first amendment freedoms. The weight to be accorded the first amendment interest is best considered with respect to the four classes of actors involved in the child pornography problem.

a. *Producers*—It is well established that the state has an interest in protecting its children from various harms.⁷⁶ In *Prince v. Massachusetts*,⁷⁷ which upheld the constitutionality of a state law prohibiting street preaching by a minor, the United States Supreme Court recognized the right of the state to intervene in the family relationship where necessary for the child's welfare.⁷⁸ Similarly, child labor laws⁷⁹ and other legislation protecting children⁸⁰ have consistently been found constitutional.⁸¹

The purpose of the child pornography laws is to control the abuse of children.⁸² Specifically, they were enacted to protect the child from the harms inherent in the production of such material.⁸³ It is reasonable to conclude that statutes phrased in terms of proscribing the production of material involving the use of children engaged in sexually explicit conduct are aimed at the harm to the child. Consequently, regulation of the producer's activities seems to be a reasonable exercise of a state's police power to protect its children.

It is argued, however, that the producer's conduct also involves an element of speech because the product of his activity is visual material.⁸⁴ Yet, the Supreme Court has recognized that not all activities that incidentally involve speech have a protected speech

⁷⁶ See *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁷⁷ 321 U.S. 158 (1944).

⁷⁸ *Id.* at 166-67.

⁷⁹ See Fair Labor Standards Act, 29 U.S.C. § 212 (1976), and the various state child labor laws. For a recent analysis of the state child labor laws, see Note, *Child Labor Laws—Time to Grow Up*, 59 MINN. L. REV. 575 (1975).

⁸⁰ See, e.g., Child Protection and Toy Safety Act, 15 U.S.C.A. §§ 1261-1275 (West Cum. Supp. 1979); Child Nutrition Act, 42 U.S.C.A. §§ 1771-1788 (West Cum. Supp. 1979); Child Abuse Prevention and Treatment Act, 42 U.S.C.A. §§ 5101-5106 (West Cum. Supp. 1979).

⁸¹ See, e.g., *Terry Dairy Co. v. Nalley*, 146 Ark. 448, 225 S.W. 887 (1920); *In re Spencer*, 149 Cal. 396, 86 P. 896 (1906); *Lenahan v. Pittson Coal Min. Co.*, 218 Pa. 311, 67 A. 642 (1907) (all upholding child labor laws).

⁸² See S. REP. NO. 438, 95th Cong., 1st Sess. 15 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 40, 53 ("... the Committee intends to fill the existing gap in Federal law by declaring that the use of children in the production of such materials is a form of child abuse."); H.R. REP. NO. 696, 95th Cong., 1st Sess. 11 (1977).

⁸³ See notes 29-36 and accompanying text *supra*.

⁸⁴ See note 103 and accompanying text *infra*.

element.⁸⁵ Indeed, if the concept of speech is extended absolutely almost any activity can be thought to contain some type of speech element.⁸⁶ Even if it is conceded that the conduct of the producer contains some element of speech, the state is arguably still justified in prohibiting the use of children in the production of this material. Under the "balancing of interests" test,⁸⁷ the state's interest in protecting children arguably outweighs any free speech right of the producer because of the nature of the harms suffered by the children.⁸⁸ Therefore, it would appear that the conduct of the producers may be prohibited, without regard to the legal status of the visual material.⁸⁹

In regulating the producer's activity, the legislatures have consistently made the judgment that the state's interest in protecting its children outweighs any first amendment right the producer might have in producing material depicting children engaged in certain sexual conduct. This legislative judgment appears constitu-

⁸⁵ *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

⁸⁶ Arguably, every action taken has a "communicative element." However, one must draw the line somewhere. See generally Henkin, *The Supreme Court, 1967 Term - Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968).

⁸⁷ See *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring). Basically, the balancing approach weighs the state's interest in regulating the activity against the free speech interest of the actor.

⁸⁸ The balancing approach is relied on below in determining whether an obscenity requirement is a prerequisite to the imposition of liability on distributors. The analysis concludes that, in light of the strong state interest in protecting the children, the distributor's activity (containing a stronger free speech interest than the producer's activity) may be regulated without an obscenity requirement. See notes 101-134 and accompanying text *infra*. That analysis is equally pertinent to the necessity of an obscenity requirement in the production process.

Under an alternative test, the "clear and present danger" test, the same conclusion is reached. In *Schenck v. United States*, 249 U.S. 47, 52 (1919), the Supreme Court held that speech may be regulated when there is a clear and present danger connected with the exercise of that speech. The use of children in the production of materials depicting explicit sexual activity presents a distinct clear and present danger: physical, emotional, and psychological harm to the child. Thus, under this test, an obscenity requirement on producers does not appear to be necessary. For the purposes of this analysis, the clear and present danger test is not relied upon, because it is no longer universally accepted in American jurisprudence. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Mr. Justice Black and Mr. Justice Douglas, both concurring, abandoned the clear and present danger test); Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); Strong, *Fifty Years of "Clear and Present Danger": From Schneck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.

⁸⁹ It is important to note that this analysis assumes that all of the proscribed sexual conduct results in harm to the child. In order to find a clear and present danger or a strong interest in protecting children, the state must show the child is being harmed by the activity. This implicit assumption highlights the importance of carefully defining prohibited sexual conduct. See notes 160-170 and accompanying text *infra*. At this point, the reader should recognize that the standard to be applied in reviewing prohibited sexual conduct is lower with respect to producers than distributors. As long as minors are involved and there is no strong speech interest affected, the state need only justify its regulation by showing a rational relationship between the prohibition and the prevention of harm to the child.

tional, provided the prohibited sexual conduct is defined to only include activities that harm the child. Thus, legislation regulating producers need not require the ultimate product be obscene, and those imposing this requirement are unnecessarily strict, provided prohibited conduct covers only harmful activities.⁹⁰

b. Coercers—Persons who obtain children for purposes of appearing in sexually explicit conduct play an essential role in the child pornography industry. These coercers are directly involved in promoting the child abuse inherent in the production process. Therefore, for the same reasons enunciated with respect to the producer,⁹¹ the state may prohibit coercive conduct.⁹²

Unlike the producer, the coercer has no argument that the activity involves an element of speech.⁹³ Regulation of the coercer is simply a proscription of a certain type of conduct by a state as an exercise of the police powers. Therefore, since there is no countervailing first amendment interest, to regulate coercers it is unnecessary to provide in a statute that the ultimate product be legally obscene.⁹⁴

c. Parents and Guardians—Parents and guardians who allow their children to engage in the proscribed activities are a subset of the coercer group. Consequently, the substantive issues are identical, with one exception: regulation of the parent-child relationship raises issues relating to the family and the role of the government in the familial relationship.

The Supreme Court has recognized as fundamental the rights to marital privacy and to raising a family.⁹⁵ In *Prince v. Mas-*

⁹⁰ For a list of these states, see note 73 *supra*. It should be noted that none of the statutes regulating producers have been challenged in court. However, as discussed below, these laws must be amended to narrow the definition of sexually explicit conduct if they are to pass constitutional muster. See notes 160-170 and accompanying text *infra*.

In response to claims that a movie depicting a child engaged in prohibited conduct (regardless of the social value of the film) could no longer be legally produced in jurisdictions with child pornography laws that do not contain an obscenity requirement, the use of actors that appear to be young has been suggested as an alternative. Adult players appearing to be young could be utilized to film any scenes involving prohibited conduct, just as stunt men are used to film dangerous scenes in regular movies.

⁹¹ See notes 76-90 and accompanying text *supra*.

⁹² An analogy can be drawn to laws prohibiting prostitution. For example, inducing a child to travel interstate to engage in prostitution is criminal under federal law. 18 U.S.C. § 2423 (1976).

⁹³ While the producer group is directly engaged in making visual material, coercers are one step removed from the production of the visual material.

⁹⁴ For a list of states that unnecessarily require the material be obscene with respect to liability of coercers, see note 74 *supra*. Note that the removal of the obscenity requirement is dependent on a stricter definition of explicit sexual conduct. See notes 160-170 and accompanying text *infra*.

⁹⁵ See *Griswold v. Connecticut*, 381 U.S. 479 (1965). Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

sachusetts,⁹⁶ however, the Court, after acknowledging the conflict between the state's interests in protecting the health, welfare, and morals of its children and the "sacred private interests" associated with the parental claim, held that under its *parens patriae* authority, the state had a duty to limit parental control by requiring school attendance, regulating child labor, and otherwise protecting children against the evils of employment.⁹⁷ In addition, courts have unanimously upheld statutes which make abandonment or nonsupport of one's children a criminal offense.⁹⁸ Finally, courts have routinely held child abuse laws to be within a state's power although they intrude on the familial relationship.⁹⁹ Thus, it is clear that the state, through its criminal laws, may legitimately intrude in the familial relationship when the protection of the child is involved.

Since there is essentially no difference between state regulation of coercers and parents in this context, it is unnecessary for statutes to impose an obscenity requirement as a prerequisite to criminal liability of parents.¹⁰⁰

d. Distributors—The regulation of distributors of child pornography raises more difficult constitutional questions than the regulation of the producers, coercers, and parents. The activities of the distributor are one step removed from the direct abuse of children present in the production process. Moreover, the distribution of visual material has traditionally been afforded a high degree of protection under the first amendment.¹⁰¹ At issue is the extent to which the state may regulate the distribution and sale of material depicting children engaged in sexually explicit conduct.

i. Free Speech Protections and the Balancing Approach—The Supreme Court has consistently adhered to the proposition that freedom of speech and expression is the foundation of a free society.¹⁰² The Court has in general afforded visual material the same

⁹⁶ 321 U.S. 158 (1944).

⁹⁷ *Id.* at 166. See also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁹⁸ See, e.g., *In re Mitchell*, 19 Cal. App. 567, 126 P. 856 (1912); *People v. Bos*, 162 Ill. App. 454 (1911); *Ex parte Strong*, 95 Tex. Crim. Rep. 250, 252 S.W. 767 (1923).

⁹⁹ See, e.g., *In re Van Vlack*, 81 Cal. App. 2d 838, 185 P.2d 346 (1947); *In re Edwards*, 70 Misc. 2d 858, 335 N.Y.S. 2d 575 (1972); *In re Fred S.*, 66 Misc. 2d 683, 322 N.Y.S. 2d 170 (1971); *In re J.Z.*, 190 N.W.2d 27 (N.D. 1971) (sexual abuse). The child pornography statutes which regulate certain parental conduct are merely a specific form of child abuse legislation.

¹⁰⁰ For a list of states that unnecessarily require the material be obscene with respect to liability of parents, see note 74 *supra*.

¹⁰¹ See notes 102-17 and accompanying text *infra*.

¹⁰² "[T]he guarantee of freedom of speech and press . . . is a social necessity required for the 'maintenance of our political system and an open society.'" *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 149 (1967) (citations omitted). See also *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); A. MEIKELJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). The relationship between free speech and a free society is not of recent vintage. See *Emperor Domitian, Apothegem* (C.A.D. 90) ("In libera civitate opertet etiam linguas esse

first amendment protection as speech.¹⁰³ The Court has consistently held, however, that the state may constitutionally regulate the distribution of obscene materials.¹⁰⁴

The current test for judging whether a work is obscene was articulated by the Supreme Court in *Miller v. California*.¹⁰⁵ The Court ruled that a work is obscene if: (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁰⁶ In *Ginsberg v. New York*,¹⁰⁷ the Court specifically recognized a state's power to prohibit the dissemination of sexually explicit material which is not obscene by adult standards.¹⁰⁸ The state may make the distribution of such materials to minors a criminal offense.¹⁰⁹

The obscenity laws are premised on the prevention of harm to society resulting from adult exposure to these materials.¹¹⁰ Although the extent of this harm is an unsettled issue,¹¹¹ the Su-

liberas"—In a free state there must be free speech), *quoted in* THE HOME BOOK OF PROVERBS, MAXIMS AND FAMILIAR PHRASES 2191 (1948).

¹⁰³ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952). *See also* *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Kingsley Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684 (1959).

¹⁰⁴ This proposition was first recognized in *Roth v. United States*, 354 U.S. 476 (1957).

¹⁰⁵ 413 U.S. 15 (1973).

¹⁰⁶ *Id.* at 24.

¹⁰⁷ 390 U.S. 629 (1968).

¹⁰⁸ The "harmful to minors" test upheld in *Ginsberg* examines (a) whether the material appeals to the prurient interest of the average minor, (b) whether the material is patently offensive to the prevailing standard in the adult community as a whole with respect to what is suitable for minors, and (c) whether the material lacks serious literary, artistic, political, or scientific value for minors. This broader definition of obscenity was approved, based on the state's interest in protecting its children. *Id.* at 632-33.

¹⁰⁹ *See generally* Israel & Burns, *Juvenile Obscenity Statutes: A Proposal and Analysis*, 9 U. MICH. J.L. REF. 413 (1976).

¹¹⁰ In W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS* 988-89 (4th ed. 1975), the authors suggest the following objectives of the obscenity laws:

- (1) To prevent the stimulation of behavior that is illegal or inconsistent with existing moral standards.
- (2) To prevent a change in the accepted moral laws and standards of the community through gradual eroding away of community support for such standards.
- (3) To maintain the moral tone of the community against the "sin of obscenity" which is assumed to "corrupt morals and character" by stimulating immoral thoughts and desires, independent of whether it stimulates immoral behavior.
- (4) To prevent the arousal of feelings of disgust and revulsion by affronting individuals with shockingly offensive events or materials.
- (5) To prevent the commercialized stimulation of psycho-sexual tensions.
- (6) To protect children from the adverse effects mentioned above, often thought to be more harmful to children because of their intellectual and emotional immaturity.

¹¹¹ *See* notes 37 and 41 *supra*.

preme Court has cited the decay of the quality of life and the threat of related sex crimes as justification for the obscenity laws.¹¹² To the extent that the child pornography statutes are based on these same objectives—prevention of harm resulting from viewing such material—it would appear that prohibiting distribution must be limited to legally obscene materials.

As has been previously emphasized, however, the primary purpose of child pornography statutes is to prevent child abuse.¹¹³ The *Miller* standard recognizes the protection of society from the harm of viewing sexually oriented materials as the only interest competing with the fundamental freedom of speech interest. When an additional competing interest is added to the balance, namely the state's interest in protecting its children from sexually oriented visual materials, the Supreme Court has been willing to extend the area of nonprotected speech.¹¹⁴ Therefore, the determination of regulation of free speech ultimately becomes a balancing test between free speech interests and other state interests.¹¹⁵ The test must be applied in light of the great respect accorded to free speech and the precise nature of the state's interest in protecting its children. To assure that speech interests are adequately protected, the Court has developed two standards which must be considered in determining the constitutionality of child pornography statutes. First, legislation with a constitutional purpose can, through too

¹¹² *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 57-61 (1973). See also *Roth v. United States*, 354 U.S. 476, 485 (1957) (state may act to protect "the social interest in order and morality").

¹¹³ See note 82 and accompanying text *supra*.

¹¹⁴ See *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹¹⁵ See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Colten v. Kentucky*, 407 U.S. 104 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *Contra United States v. Robel*, 389 U.S. 258, 268 n.20 (1967).

As an alternative, other commentators have relied on the so-called *O'Brien* test, in analyzing the constitutionality of child pornography statutes. See *Commet*, *supra* note 12, at 830; *House Crime Hearings*, *supra*, note 1, at 137 (testimony of John Keeney, Criminal Division, Department of Justice). In fact, the preamble to the Kentucky law contains a summary of the *O'Brien* test as authority for its law which does not include an obscenity requirement. Act of March 30, 1978, ch. 219, 1978 Ky. Rev. Stat. & Rules Serv. 659 (statute codified, except for preamble, in KY. REV. STAT. §§ 529.030, 531.300-370). This test was developed from *United States v. O'Brien*, 391 U.S. 367 (1968), in which a criminal statute prohibiting the destruction of a draft card was held constitutional. The Supreme Court ruled that when "speech" and "non-speech" elements are combined in the same course of conduct, government regulation is sufficiently justified (1) if it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest unrelated to the suppression of free expression, and (3) if the incidental restriction on alleged first amendment rights is no greater than is essential to the furtherance of that interest. *Id.* at 377. The *O'Brien* test turns on a distinction between "speech" and "conduct." Several commentators have questioned the validity of such a distinction. See *Henkin, The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968); *Nimmer, The Meaning of Symbolic Speech under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973). The balancing of interests approach is a more appropriate scheme of analysis than the *O'Brien* test.

broad a sweep, become unconstitutional in its overbreadth.¹¹⁶ Second, the Court in considering conflicts between state regulatory powers and first amendment rights has suggested that if an alternative means of regulation exists, which does not infringe on individual rights, the state must adopt the least restrictive alternative.¹¹⁷

ii. State's Interest—The state's right to protect its children from the harms inherent in the production of child pornography is undisputed.¹¹⁸ Nonetheless a distributor is not directly engaged in physical abuse of children.¹¹⁹ Arguably, however, the distributor aids and abets the producer's abuse of children by serving as the vital link in the industry between the market and the production process. The economic incentives to produce are provided by the distributor's activities. Without these economic incentives, production of child pornography and the connected child abuse would be severely curtailed. Proponents of the legislation aimed at distributors argue that sanctions directed toward the economic center of the industry, rather than the production center, are the only effective means of ending the use of children for these purposes.¹²⁰ From a prosecutorial viewpoint, the passage of criminal laws aimed at producers without similar regulation of distributors will arguably shift the production process further underground.¹²¹ Prosecution will become even more difficult. Since locating the material is easier than locating and proving the use of the production facilities, successful prosecution of the distributors is more likely than prosecution of producers.¹²² Additionally, because of the economics of the pornography industry, prosecution of the distributors would be much more effective in eliminating the abuse of children.

The state has a further interest in protecting the child from the psychological harm incurred in knowing the material has been pub-

¹¹⁶ "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (citing *Zwickler v. Koota*, 389 U.S. 241, 249-50 (1967)). See also *Gooding v. Wilson*, 405 U.S. 518 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Annot., 45 L. Ed. 2d 725 (Supreme Court's views as to overbreadth of legislation in connection with first amendment rights).

¹¹⁷ *United States v. Robel*, 389 U.S. 258, 268 (1967). See also *Martin v. City of Struthers*, 319 U.S. 141, 148-49 (1943).

¹¹⁸ See notes 76-81 and accompanying text *supra*.

¹¹⁹ The publication and distribution of child pornography may, however, cause psychological harm to the child victim. See note 43 and accompanying text *supra*.

¹²⁰ See, e.g., *House Crime Hearings*, *supra* note 1, at 167 (statement of Rep. John W. Murphy) ("Production will stop if there is no market for results, or the penalties for transporting and marketing make it impossible to do business economically or profitably").

¹²¹ *Id.* at 125 (testimony of Heather G. Florence, American Civil Liberties Union).

¹²² *Id.* at 34 (testimony of Charles Rembar, pornography defense attorney).

licly circulated.¹²³ In addition to the state's interest in protecting its children, the statutes aimed at the distributors also regulate the alleged harm to society.¹²⁴

iii. Striking the Balance Between the First Amendment and the State's Interests—The constitutionality of legislation must be considered initially in light of the principle requiring legislation to minimize first amendment intrusions by employing the least restrictive regulatory scheme.¹²⁵ The goal of preventing child abuse, while minimally affecting distributor's rights, can arguably be most directly accomplished through the specific regulation of producers. Under this standard, pornography statutes aimed at producers and coercers, and statutes outlawing sexual molestation and sexual abuse of children, would be constitutionally permissible. The activities of distributors would not be regulated beyond the requirement that the material they sell be nonobscene, which may cover some, but not necessarily all the material showing children in sexually explicit activities. Acceptance of this approach is premised on the belief that regulation of production is sufficient to prevent the child abuse inherent in the production of such material.

A strong argument has been made, however, that mere regulation of the producers and coercers would not effectively deter the child abuse.¹²⁶ Without legislation aimed at the economic center of the industry, other legislation will be ineffective. This argument has prevailed in the federal child labor laws which prohibit not only the use of children in the manufacturing process, but also the shipment in interstate commerce of goods manufactured by children.¹²⁷ The proposition that regulation of the distributors is the only way to effectively prevent the sexual abuse of children inherent in child pornography requires an examination of the extent to which the distributor's activity may be constitutionally regulated.

In considering the conflicting interests, the weight of the first

¹²³ In civil cases, such a harm has been held to be recompensable on an invasion of privacy theory. These cases are based on a theory recognizing the harm emanating from public disclosure of private facts. See W. PROSSER, *LAW OF TORTS* 809-12 (4th ed. 1971). See also *Myers v. U.S. Camera Publishing Corp.*, 167 N.Y.S.2d 771 (1957). Every child has the right to be free from public exposure of his body and sexual activities. In his dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), Mr. Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men."

While damages have been allowed under an invasion of privacy theory of public disclosure of private facts, no criminal statute has ever been founded on such a theory. The state's interest in this instance is better characterized as protection of the child from emotional and psychological harm, rather than protection of the child's privacy interest.

¹²⁴ See notes 40-41 and accompanying text *supra*.

¹²⁵ See note 117 *supra*.

¹²⁶ See notes 120-22 and accompanying text *supra*.

¹²⁷ 29 U.S.C. § 212 (1976). Of course, in the case of child labor, the fundamental first amendment interests are not involved.

amendment interest is essentially fixed,¹²⁸ but the harm suffered by the child arguably varies according to the age of the child and the nature of the sexual conduct in which he or she is engaged. Conduct which unquestionably causes severe harm to the victim would include any type of sexual sadomasochistic abuse involving a young child. Conduct resulting in relatively little harm is the depiction of an older child's genitals. With acts such as masturbation, the severity of harm would arguably depend upon the age of the child.

The current laws regulating child pornography do not recognize a sliding scale of harms and classify all the acts with a child of any age as prohibited.¹²⁹ Because of this single broad class of harms, encompassing all types of sexual acts and children of all ages, these laws, when applied to distributors, could be attacked as overbroad, since in some instances they may impose liability when no harm has resulted to the child.¹³⁰ While the lines drawn by the statutes regarding prohibited activities and age of the victim are arbitrary,¹³¹ if prohibited sexual conduct is narrowly defined and age limitations are reasonable, the sweep of the statute will most often only include conduct that is harmful to children.¹³² The Supreme Court has recognized that "incidental" overbreadth is permissible, even when first amendment freedoms are at stake.¹³³ Therefore, so long as proscribed sexual conduct is narrowly defined, the balance between the state's interest in protecting its children and distributors' and viewers' free speech interests tips toward allowing regulation. Under this analysis, a statute imposing liability on dis-

¹²⁸ Even though the child pornography statutes purport to regulate the abuse of children, the effect of the regulation is to deny the distributors an opportunity to sell and show the material and to deny the audience an opportunity to view the material.

¹²⁹ See note 72 *supra*, and notes 160-70 and accompanying text *infra*.

¹³⁰ For example, some seventeen year-olds will not suffer physical or psychological harm in having their genitals photographed or in having such photographs widely circulated.

¹³¹ The lines are arbitrary in the sense that the harm to the victim is not assured in each case. The lines are also arbitrary in their failure to distinguish between severe harms and slight harms. Presumably, this failure to distinguish merely reflects the legislative judgment that the lesser harms are sufficient to impose liability on the distributors.

¹³² The few instances in which the statutes may be too broad would probably be those cases where an older child is engaged in prohibited behavior (*e.g.*, sexual intercourse) without physical or psychological harm to him. This incidental overbreadth arises out of the objective lines drawn by the statute in defining maturity and explicit sexual conduct. Such incidental overbreadth may be analogous to the statutes that prohibit dissemination of certain sexually explicit materials to minors. See *Ginsberg v. New York*, 390 U.S. 629 (1968). Under those statutes, some children, although younger than the age of majority, may be mature enough to view the prohibited material. Nonetheless, the state is justified in imposing criminal sanctions on those persons who disseminate certain explicit material to such a child. See *Israel & Burns, supra* note 109.

¹³³ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("To put the matter another way, 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.").

tributors of visual material depicting children in sexual activity, regardless of whether the material is legally obscene, is constitutional, so long as "sexual activity" is properly defined. The definitions of sexual activity in the current statutes are, however, too broad to withstand constitutional challenge.¹³⁴

e. Review of Present Case Law—The first statute to be challenged was the Texas statute making it a felony for a person to commercially possess, exhibit, distribute, or sell "any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct."¹³⁵ In *Graham v. Hill*,¹³⁶ an action for declaratory relief brought by the owner and manager of a movie theater and bookstore, a federal district court held the statute unconstitutionally overbroad.¹³⁷ The court found that the statute could not be justified as a measure to protect the welfare of children, because the statute prohibited some conduct that was not harmful to the child actors, resulting in an infringement of the distributor's first amendment rights.¹³⁸ The court noted, however, that if the statute were limited to prohibiting activities that were actually harmful to children, the law would be constitutional.¹³⁹

The New York statute is the other statute that has been challenged in court. In *People v. Ferber*,¹⁴⁰ the defendant, a distributor, moved to dismiss an indictment under the New York statute on constitutional grounds. The court ruled that the New York statute,¹⁴¹ aimed at both producers and distributors, was constitutional. The statute makes it a felony for a person to produce, direct, or promote¹⁴² any¹⁴³ performance¹⁴⁴ which includes sexual conduct by a child less than sixteen years of age. The court in addressing the overbreadth challenge recognized the legislative intent to

¹³⁴ See notes 160-70 and accompanying text *infra*.

¹³⁵ TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon Supp. 1978).

¹³⁶ 444 F. Supp. 584 (W. D. Tex. 1978), *appeal docketed*, No. 78-1622 (5th Cir. April 4, 1978).

¹³⁷ *Id.* at 592.

¹³⁸ *Id.* at 592-93.

¹³⁹ "If the statute were limited to prohibiting the depiction of minors actually engaging in sexual conduct, or even if the statute merely prohibited the observance of actual sexual conduct by minors, the Court would likely have no hesitation in declaring its constitutionality." *Id.* at 592. The court suggests that an obscenity requirement may be necessary to assure the constitutionality of the statute, but then implies that the statute would be constitutional if it was limited to prohibiting sexual exploitation of children. *Id.* at 592-93.

¹⁴⁰ 96 Misc. 2d 669, 409 N.Y.S.2d 632 (1978).

¹⁴¹ N. Y. PENAL CODE §§ 263.10-.15 (McKinney Supp. 1978).

¹⁴² "'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." *Id.* § 263.00(5).

¹⁴³ Under *id.* § 263.15, the performance does not have to be obscene, while under *id.* § 263.10, a narrower statute, the performance must be obscene.

¹⁴⁴ "'Performance' means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience." *Id.* § 263.00(4).

prohibit sexual conduct by a child, even if the performance is within a constitutionally protected context.¹⁴⁵ In balancing between "the right of freedom of expression" and "the right of the Legislature to protect children against sexual exploitation"¹⁴⁶ the court held the balance to be in favor of the protection of children.¹⁴⁷

Given the paucity of decisions, it is impossible to discern a trend in the case law. Both the New York and Texas cases can be read, however, as upholding a state's power to protect children against actual harms by regulating the distribution of child pornography without an obscenity requirement. The best decisions will be rendered when the harms to the child victim and the various interests of the state and the defendants are recognized and fully articulated. Only then can a just balance be struck between the state's police power and the first amendment interests protected by the Constitution.

2. *Age of the Victim*—The age of minority in the child pornography statutes varies from sixteen to eighteen years.¹⁴⁸ Although the line drawn between childhood and adulthood is arbitrary, the practical impossibility of making a subjective inquiry into the maturity of each individual child victim makes use of a flat age limit reasonable. Flat age limits have been upheld in various con-

¹⁴⁵ *People v. Ferber*, 409 N.Y.S.2d at 637.

¹⁴⁶ *Id.*

¹⁴⁷ The court, in discussing both the state's interests and free speech interests, noted that reasonable alternatives are open to the producers of such material, such as using a child older than 16 years who appears younger. The court also suggests that certain acts could be legally simulated within the bounds of the New York statute. *Id.* The New York law defines "simulated" as the explicit depiction of any sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breast, genitals or buttocks. N.Y. PENAL LAW § 263.00(6) (McKinney Supp. 1978).

The New York statute had been previously challenged by the publisher of *Show Me!*, a controversial sex education book depicting children engaged in explicit sexual conduct. The publishers and distributors of this book have sought declaratory and injunctive relief. Although the declaratory issue has not been decided, a federal district court granted a preliminary injunction against New York state officials, enjoining application of the statute pending resolution of the declaratory issue. *St. Martin's Press, Inc. v. Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977). On appeal, the Second Circuit reversed, holding that the case did not involve a case or controversy justifying federal court intervention. *St. Martin's Press, Inc. v. Carey*, Nos. 77-7603, 77-7623, 78-7027, slip op. (2d Cir. Jan. 10, 1979). Although the opinion focused primarily on the procedural issue, the court found that the book would not be covered by the statute because the photographs were taken in 1973, four years prior to passage of the statute, outside the United States. *Id.* at 5356. Implying that the statute is aimed at preventing harm to children, the court said: "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 . . ." *Id.* at 5356. In a strong dissenting opinion, Judge Timbers disagreed with the majority on this point, maintaining the statute clearly covered *Show Me!* *Id.* at 5361. Beyond this simple recognition of the statutory purpose to protect children, the case did not speak to the overbreadth issue.

¹⁴⁸ See note 71 *supra*.

texts, including drinking age,¹⁴⁹ curfew statutes,¹⁵⁰ and operation of motor vehicles.¹⁵¹ Where the age limits vary with the different statutes, the oldest age used is eighteen. Within the context of protecting a child from sexual abuse, drawing the line at eighteen years old does not appear to be beyond legislative reason. Therefore, child pornography statutes should be held constitutional in this regard.

The only statutes that are questionable are those that define a child as a person who is under sixteen or appears as a prepubescent,¹⁵² and the one that defines a child as one who is or appears to be under sixteen.¹⁵³ These statutes could be applied to consenting adults who appear to be young. Since child pornography statutes are premised on protecting children from actual harm, these definitions extend the state police power too far. The state has no legitimate interest in prohibiting adults from posing for sexually explicit materials, unless that material is obscene.¹⁵⁴ Therefore, these definitions are unconstitutionally broad.

To establish the liability of the defendant, the state must prove that a minor was actually depicted in the material. In practice, this could prove to be a major hurdle for prosecutors. It is often impossible to find these children for the purposes of testifying in court.¹⁵⁵ To circumvent this problem, several states provide that expert medical testimony, which is based upon the child's physical appearance through inspection of the visual material, is admissible, and possibly conclusive evidence of the child's age.¹⁵⁶

In a variety of contexts courts have held that the outward physical appearance of an alleged minor may be considered in judging his or her age.¹⁵⁷ This judgment, however, has always been made

¹⁴⁹ *Houser v. State*, 85 Wash. 2d 803, 540 P.2d 412 (1975).

¹⁵⁰ See *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975). See also Note, *Juvenile Curfew Statutes and the Constitution*, 76 MICH. L. REV. 109 (1977); 54 TEX. L. REV. 812 (1976).

¹⁵¹ *State ex rel. Oleson v. Graunke*, 119 Neb. 440, 229 N.W. 329 (1930); *Plunkett v. Heath*, 1 N.Y.S. 2d 778 (1938); *Berberian v. Petit*, 374 A.2d 791 (R.I. 1977).

¹⁵² ILL. ANN. STAT. ch. 38 § 11-20a(a)(1)(A) (Smith-Hurd Pamph. Supp. 1978); NEB. REV. STAT. §§ 28-1463 to 1464 (Supp. 1978).

¹⁵³ IND. CODE §§ 35-30-10.1-2 to 3 (Supp. 1978).

¹⁵⁴ See text accompanying notes 105-06 *supra*.

¹⁵⁵ *House Crime Hearings*, *supra* note 1, at 64-65 (testimony of L. Martin, Los Angeles Police Department).

¹⁵⁶ ALA. CODE. tit. 13, § 7-233(b)(Supp. 1978) (jury may make judgment regarding age without expert testimony); MASS. ANN. LAWS ch. 272, § 29A (Michie/Law. Co-op Supp. 1978); MICH. COMP. LAWS § 750.145c (Supp. 1978); N.Y. PENAL LAW § 263.25 (McKinney Supp. 1978) (jury may make judgment regarding age without expert testimony); 18 PA. CONS. STAT. ANN. § 6312(d) (Purdon Supp. 1978) (expert testimony "sufficient" to establish age). See also N.J. STAT. ANN. § 2A:142:A-5 (West Supp. 1978) (person appearing in photograph or film as under 16 rebuttably presumed to be under the age of 16).

¹⁵⁷ See *Lew Git Cheung v. Nagle*, 36 F.2d 452 (9th Cir. 1929) (age of a Chinese applicant for citizenship); *Manship v. People*, 99 Colo. 1, 58 P.2d 1215 (1936) (age of statutory rape victim); *People v. Kaminsky*, 208 N.Y. 389, 102 N.E. 515 (1913) (age of juvenile offender).

by viewing the victim when physically present in the courtroom.¹⁵⁸ In those cases, such evidence has been found admissible, but rarely conclusive.¹⁵⁹ Under the provisions considered here, the victim would be present only on film. Age judgments should, therefore, be made only by an expert well versed in the deceptive nature of photographs and the various problems of judging age from appearances. The appropriate weight to be given the evidence will necessarily have to be determined by the trial judge. But such evidence should only be used as conclusive proof of minority in cases where the child is clearly under the statutory age of minority.

3. *Proscribed Sexual Conduct*—A precise definition of prohibited sexual conduct is crucial if statutes which do not have an obscenity requirement are to withstand constitutional attacks.¹⁶⁰ To prevent unconstitutional overbreadth, the prohibited sexual conduct must be confined to those activities that cause harm to the child actor. Harm can be in the form of physical, psychological, and emotional hardship to the child. The child may also be harmed by viewing explicit sexual conduct.¹⁶¹

Less clear is the harm associated with the conditions surrounding production.¹⁶² Although there may be a close connection between molestation and production in *some* cases, the state, in enacting child pornography legislation, cannot assume the child is harmed away from the camera. Therefore, the statutes should not be premised on the harm resulting to the child through molestation away from the camera. Rather, the statutes should be concerned with the harm resulting to the child through engaging in sexual conduct with other children and adults. Prosecution of off camera sexual molestation of children by adults can be reached under existing sex crime laws.

Unquestionably, the child is psychologically and emotionally harmed when forced to engage in any type of sexual intercourse,¹⁶³

See generally 2J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 222 (3d ed. 1940).

¹⁵⁸ *See* *Slaughter v. District of Columbia*, 134 A.2d 338 (D.C. 1957); *Cunningham v. United States*, 86 A.2d 918 (D.C. 1952); *State v. Fries*, 246 Wis. 521, 17 N.W.2d 578 (1945). *But see* *People v. Grizzle*, 381 Ill. 278, 44 N.E.2d 917 (1942).

¹⁵⁹ *See* cases cited in note 158 *supra*.

¹⁶⁰ *See* notes 76-90 and 101-34 and accompanying text *supra*.

¹⁶¹ The state has a legitimate interest in protecting children from viewing certain sexual conduct depicted in visual material. *Ginsberg v. New York*, 390 U.S. 629 (1968). This interest would extend to a prohibition against children viewing *live* sexual conduct as well.

¹⁶² *See* notes 29-36 and accompanying text *supra*. As noted earlier, the sex crime statutes are particularly inadequate due to their failure to cover forced sexual conduct between children. *See* note 45 and accompanying text *supra*.

¹⁶³ Sexual intercourse should be defined in the statute to include genital-genital, oral-genital, anal-genital, and oral-anal intercourse.

bestiality, or sadomasochism.¹⁶⁴ Further, the child may incur physical harm by engaging in any of these activities. The same emotional and psychological harm is incurred when the child simulates these acts.¹⁶⁵ Thus, the state seems justified in enumerating actual or simulated sexual intercourse, bestiality, and sadomasochistic abuse as prohibited sexual conduct.

The difficult definitional problems arise in the context of masturbation, and another person's fondling of and exhibition of the child's genitalia. For purposes of this analysis, all of these activities can be thought of as exhibition of the child's genitalia.¹⁶⁶ There may be situations where such activity will harm the child psychologically, particularly where the child is young and participating in hard core films. However, exhibition of the genitals may not be considered harmful in many other types of films or photographs.¹⁶⁷ A broad prohibition against exhibition of the genitals could cover situations in which the child is not harmed in production or by the knowledge that his picture is widely distributed. The harmful situations are arguably those in which the context of the nudity would tend to debase the child's view of his body or sexuality. In other situations, the child is not harmed, and thus, does not need the protection of the statute.¹⁶⁸

The problem is establishing the line between harmful exhibition of the genitals and non-harmful exhibition. Since much of the harm is psychological, prohibited exhibition of the genitals could be defined as exhibition of the genitals that, according to accepted psychiatric evidence, tends to harm the child psychologically or emotionally. For the purposes of this definition, an expert witness could be free to consider the age of the child and the context in

¹⁶⁴ Sadomasochism is variously defined by the statutes. Some states require the activity to be sexually related. *E.g.*, 18 U.S.C.A. § 2253(2)(D) (West Supp. 1978). This appears to be an unnecessary requirement. If the child is being harmed through the sadomasochistic abuse, the sexual gratification of the abuser should be irrelevant. Further, definitions should not restrict the activity by requiring bizarre costumes or other sexual trappings. *See, e.g.*, N.Y. PENAL LAW § 235.20(5) (McKinney 1967). "Sadism" and "masochism" should be accorded their common dictionary meaning in interpreting the statutes.

¹⁶⁵ "Simulates" should be simply defined as the depiction of conduct which creates the appearance of such conduct. In instances of simulation, the child still suffers the same psychological and emotional harm as if he or she was actually engaged in the act.

¹⁶⁶ Another person fondling the genitalia of a child may be distinguishable on the grounds that the child's body space is physically invaded. However, the major harm resulting from the activity appears to be similar to that of masturbation and exhibition of the genitals: psychological and emotional injury. Thus, all three will be considered together.

¹⁶⁷ For example, a depiction of a young naked boy in a context such as a diaper advertisement would not be harmful to the child.

¹⁶⁸ Although the child may not be physically, emotionally, or psychologically harmed, the child still retains the right to be free from commercial exploitation. Many states have special provisions in their child labor laws affording protection to children who appear in a film or theatrical performance. *See, e.g.*, ILL. ANN. STAT. ch. 48, § 31.8 (Smith-Hurd 1969); N.Y. EDUC. LAW § 3229 (McKinney Supp. 1978).

which the child's genitals are depicted. This definition would place a burden on prosecutors to present expert testimony regarding the harm to the child, but only in cases where the child was merely depicted with exposed genitalia. In all other instances the prohibited conduct would be explicitly defined and the state would not have the burden of presenting affirmative evidence that the child was harmed. As a practical matter, the burden placed on prosecutors will probably be slight, since most prosecutions are likely to be against producers and distributors of material that depicts a child engaged in actual or simulated sexual intercourse, bestiality, or sadomasochistic abuse.¹⁶⁹

In summary, "sexually explicit conduct," for purposes of the statute, should be defined as (1) actual or simulated sexual intercourse (genital-genital, oral-genital, anal-genital, oral-anal), (2) actual or simulated bestiality, (3) actual or simulated sadomasochistic abuse, and (4) exhibition of the child's genitals that, according to accepted psychiatric evidence, tends to harm the child psychologically or emotionally. The psychological expert witness is free to consider the age of the child and the context in which the child's genitals are depicted. Since each category of prohibited activity defines activities which will impose harm on a child, the child pornography statutes which do not have an obscenity requirement can withstand constitutional attack.¹⁷⁰

4. *Commercial Requirement*—Seven of the state laws and the federal law require that the production be for pecuniary profit or commercial exploitation.¹⁷¹ While the state legislatures may include this requirement, presumably to protect an area of privacy, this requirement appears to be constitutionally unnecessary. The state police power to protect its children extends beyond commercial activity.¹⁷² Producers of child pornography are arguably engaged in culpable child abuse regardless of their motive. The commercial exploitation requirement in state statutes appears to be an unnecessary impediment to meeting the objective of preventing this form of child abuse. To come within the commerce clause however the federal law must contain the commercial requirement.¹⁷³

¹⁶⁹ Although most of this conduct would be considered obscene under existing obscenity statutes, under the child pornography laws, the state would be saved the substantial burden of proving the material was legally obscene. See notes 53-58 and accompanying text *supra*.

¹⁷⁰ See notes 90 & 134 and accompanying text *supra*.

¹⁷¹ See note 75 *supra*.

¹⁷² *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

¹⁷³ In recent years, federal regulation of criminal activities based on the commerce clause has become more widespread. See *Perez v. United States*, 402 U.S. 146 (1971); Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271 (1973); Note, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 U. ILL. L.F. 805.

5. *Mental Element*—Many of the state child pornography laws contain broad provisions which require that to incur criminal liability a defendant must knowingly undertake the proscribed activity.¹⁷⁴ Two key factors in a knowledge requirement—the context of the material and the age of the child—will be examined.¹⁷⁵

a. *Content*—i. *Producer*—For producers, specific knowledge of the content is not necessary. Since producers are directly involved in the abusive acts, knowledge of the nature of the material is inherent in the process production. The state need only prove that the defendant actually produced the material.¹⁷⁶

ii. *Distributors*—The Supreme Court on several occasions has addressed the constitutional question of the extent to which the distributor must have knowledge of the content of the material sold or exhibited before criminal liability is imposed.

In *Smith v. California*,¹⁷⁷ the Supreme Court struck down as a violation of the first amendment a Los Angeles obscenity ordinance that imposed strict criminal responsibility without requiring “any element of scienter” for possession of obscene material in a place where books were sold. The Court recognized that mens rea is the rule, rather than the exception, to the principles of Anglo-American jurisprudence,¹⁷⁸ but noted further that strict liability crimes are appropriate in some cases.¹⁷⁹ The Court ruled, however, that elimination of scienter in such a case would work a substantial restriction on the freedom of speech and press.

However, in *Hamling v. United States*,¹⁸⁰ the Court ruled that under the federal statute prohibiting the distribution of obscene material, it is unnecessary to prove the defendant knew the materials were legally obscene. It is sufficient to satisfy the constitutional requirement of scienter “that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials.”¹⁸¹

The scienter requirement on distributors can be extended to in-

¹⁷⁴ Some statutes expressly define the knowledge requirement. See, e.g., ALA. CODE tit. 13, § 7-230(4) (Supp. 1978); FLA. STAT. ANN. § 847.014(1)(g) (Harrison Supp. 1978). Other states simply express the knowledge requirement in broad terms. See, e.g., N.J. STAT. ANN. § 2A:142:A-4 (West Supp. 1978) (“knowingly”); N.Y. PENAL LAW §§ 263.10-.15 (McKinney Supp. 1978) (“knowing the character and content thereof”).

¹⁷⁵ Under the federal law, the knowledge requirement also arises with respect to knowledge of the interstate transportation of the visual material. 18 U.S.C.A. §§ 2251-2252 (West Supp. 1978). Federal jurisdiction rests on this interstate transportation requirement. The requisite knowledge of this interstate effect is an issue beyond the scope of this article.

¹⁷⁶ See generally W. LAFAYE & A. SCOTT, CRIMINAL LAW, 191-204 (1972).

¹⁷⁷ 361 U.S. 147 (1959).

¹⁷⁸ *Id.* at 150.

¹⁷⁹ *Id.*

¹⁸⁰ 418 U.S. 87 (1974).

¹⁸¹ *Id.* at 123.

clude situations in which the defendant had reason to know the character and content of the material. In *Ginsberg v. New York*,¹⁸² a case reviewing a conviction under the New York statute prohibiting distribution of obscene materials to minors, the Supreme Court approved a scienter requirement which allowed convictions when the defendant knew or had reason to know "the character and content of any material . . . which is reasonably susceptible of examination by the defendant."¹⁸³ In *Hamling*, the Court cited with approval this portion of *Ginsberg* upholding the objective scienter requirement.¹⁸⁴

With respect to the child pornography statutes, *Hamling* and *Ginsberg* require that the distributor know or have reason to know the character and content of the material which is reasonably susceptible of examination. In order to assure this effect, the statutes should include a definition of "knowingly" expressly incorporating such an interpretation.¹⁸⁵ The act of distributing or intent to distribute child pornography must also be established to impose criminal liability.

Several states provide that possession of a certain number of copies of the same article shall be prima facie evidence of intent to disseminate.¹⁸⁶ As a general principle, the "possession of instruments, tools, or other means of doing the act is admissible as a significant circumstance; the possession signifies a probable design to

¹⁸² 390 U.S. 629 (1968).

¹⁸³ *Id.* at 643. The old New York provision, N.Y. PENAL LAW OF 1909 § 484-h(1)(g), reprinted in N.Y. PENAL LAW app., at 387 (McKinney 1967), read as follows:

"Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and
- (ii) [provision dealing with the age of the child].

¹⁸⁴ *Hamling v. United States*, 418 U.S. at 123.

¹⁸⁵ For an example of such a provision, see ALA. CODE § 13-7-230(4)(Supp. 1978):

"Knowingly" means a person knowingly disseminates or publicly displays obscene matter when the person knows the nature of the matter. A person knows the nature of the matter when either of the following circumstances exist:

- a. The person is aware of the character and content of the matter, or
- b. The person recklessly disregards circumstances suggesting the character and content of the matter.

The Florida law provides that a person in possession of the child pornographic goods, after service of summons and complaints, is chargeable with knowledge of the content or character thereof. FLA. STAT. ANN. § 847.014(3)(e) (Harrison Supp. 1978). Under *Hamling* and basic notions of fairness, a defendant should not be charged with the requisite knowledge at the time of the alleged violation simply because he is served with a summons and complaint.

¹⁸⁶ ALA. CODE § 13-7-232 (Supp. 1978) (6 copies); DEL. CODE ANN. tit. 11, § 1109(3) (Supp. 1978) (one movie); ILL. ANN. STAT. ch. 38, § 11-20a(d) (Smith-Hurd Pamph. Supp. 1978) (4 copies); KY. REV. STAT. § 531.340 (Supp. 1978) (one copy); LA. REV. STAT. ANN. § 14:81.1(B) (West Supp. 1978) (3 copies); ME. REV. STAT. ANN. tit. 17, § 2923(2) (West Supp. 1978) (10 copies).

use."¹⁸⁷ This principle has been applied in a variety of contexts including burglary, arson, selling liquor illegally, forgery, counterfeiting, and murder by the use of knife, gun, or poison.¹⁸⁸ The common thread in all these cases is the relevancy of the conduct to the intent to commit the crime.¹⁸⁹ In the child pornography context, possession of several copies of the same work seems closely related to an intent to disseminate. Normally a person would not keep extra copies of a pornographic work unless he intended to sell copies. The precise number of copies necessary to make this link is not fixed, but can be left to the discretion of the legislature.¹⁹⁰ This type of provision will be most effective in those states which make criminal the possession of prohibited material with intent to disseminate.¹⁹¹ Such a provision may also be helpful in proving an attempt to commit the substantive offense.

iii. Coercer and Parents—Based on the underlying policy objectives of the child pornography laws, coercers should be held to an objective standard of knowledge of the content, while parents are more appropriately held to a subjective standard. The objective standard is appropriately applied to coercers in light of the commercial nature of the coercer's activity. A person hired to obtain children for purposes of posing and acting is entrusted with the responsibility of informing parents of the purposes for which their child is to be used. In essence, an objective scienter requirement imposes a duty on the person seeking children for films or photographs to make reasonable inquiry into the nature of the visual material. The imposition of this duty seems reasonable in light of the position of trust held by the coercer.

The subjective standard appears more appropriate for parents. Imposition of an objective standard would place liability on parents who were unable to meet such a standard due to lack of mental capacity or other circumstances. While such a parent might be subject to sanctions or treatment under child neglect laws,¹⁹² the law should not impose a harsh criminal sanction on those who fail to make a reasonable investigation of the activities in which their children are engaged. Holding parents to a subjective standard ap-

¹⁸⁷ 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 238 (3d ed. 1940) (italics deleted). This only applies to prove design or plan to commit a crime and should be distinguished from possession as evidence of having committed the crime.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* "Any attempt to reconcile all these rulings is hopeless. . . . The question is always one of experience and common sense in each case." *Id.*

¹⁹⁰ Under the statutes of six states that have such a provision, the number of copies ranges from one to ten. See note 186 *supra*.

¹⁹¹ See, e.g., KY. REV. STAT. § 531.340 (Supp. 1978).

¹⁹² See Katz, Howe, & McGrath, *supra* note 49.

propriately limits the state's intrusion into the family relationship.

b. Age of the Child—Seven states explicitly provide that the defendant must have knowledge of the child's minority,¹⁹³ while several other states allow lack of knowledge to be pleaded as an affirmative defense.¹⁹⁴ The issue is whether knowledge of the child's age is a necessary element of the offense.

In *United States v. Hamilton*,¹⁹⁵ the Court of Appeals for the Third Circuit held that the government need not prove that a defendant knew a girl was under eighteen years of age in order to sustain a conviction under the Mann Act. The court found that knowledge of the victim's age was not an element of the offense.¹⁹⁶ Similarly, knowledge of the abused child's age should not be considered an element of the child pornography offense and, hence, unnecessary to be proved by the prosecution. Provisions that allow the defendant to assert an affirmative defense based on a reasonable bona fide attempt to ascertain the age of the child should be permitted.¹⁹⁸ Since the harm to the child can be quite severe, the standard of this bona fide attempt should be high, which will assure more effective laws.¹⁹⁹

C. Enforcement Provisions

To be more effective, the child pornography statutes should include provisions to ease enforcement of the laws. Several provisions included in current child pornography laws will be analyzed

¹⁹³ CAL. PENAL CODE §§ 311.2(b)-4 (West Supp. 1979) and CAL. LAB. CODE § 1309.5 (West Supp. 1979) ME. REV. STAT. ANN. tit. 17, § 2923(1)(A) (West Supp. 1978); MICH. COMP. LAWS § 750.145c (Supp. 1978); R.I. GEN. LAWS § 11-9-1.1 (Supp. 1978); S.C. CODE § 16-15-180 (1976); TENN. CODE ANN. § 39-1019(a)(2) (Supp. 1978) (actual or constructive knowledge); W. VA. CODE § 61-8A-6 (1977).

¹⁹⁴ See, e.g., ARIZ. REV. STAT. §§ 13-3501, 13-3508 (1978) (defendant is relieved of liability if he makes a reasonable bona fide attempt to ascertain the age of the minor); N.Y. PENAL LAW § 263.20 (McKinney Supp. 1978) (defendant's good faith belief that actor was older than 16 may be pleaded as an affirmative defense). But see LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978) (lack of knowledge of the juvenile's age shall not be a defense).

¹⁹⁵ 456 F.2d 171 (3d Cir.), cert. denied, 406 U.S. 947 (1972).

¹⁹⁶ *Id.* at 173. Cf. *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941) (dictum); *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940) (dictum) (both recognizing the rule that defendant's knowledge of the age of the woman is not essential element of the crime of statutory rape).

¹⁹⁷ The legislative history of the federal law also reflects this interpretation. See H.R. CONF. REP. NO. 811, 95th Cong., 2d Sess. 5 (1977), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 61 ("The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child"). See also H.R. REP. NO. 696, 95th Cong., 1st Sess. 12 (1977).

¹⁹⁸ See ARIZ. REV. STAT. §§ 13-3501, -3508 (West Pamph. Supp. 1978).

¹⁹⁹ Therefore, this author would reject the New York defense which allows the defendant to escape liability if he had a good faith belief that the actor was not under sixteen. N.Y. PENAL LAW § 263.20 (McKinney Supp. 1978). "Good faith" does not necessarily require the defendant to make an affirmative effort to check the age of the actor.

in terms of their constitutionality and effectiveness in easing enforcement.

1. Record Keeping Provision—One of the major difficulties faced by law enforcement officials is the near impossibility of discovering the key producers and large volume distributors of child pornography. In response to this problem, the California statute requires that both the wholesale distributors and retailers of child pornography maintain records of the names and addresses of persons from whom such material is obtained.²⁰⁰ Records are confidential, except for use by law enforcement officials, and failure to keep these records is a misdemeanor.²⁰¹

There is evidence that this record keeping requirement is an effective deterrent to distribution of child pornography.²⁰² Its effectiveness seems to stem from the fear of the potentiality of law enforcement officials inspecting the records or visiting the premises of distributors.²⁰³ There is some indication that, regardless of whether the records are kept, the provision has decreased the amount of dissemination of child pornography in California.²⁰⁴

This requirement raises a question whether the state can compel all retailers and distributors to maintain these records. This requirement arguably compels self-incriminating testimony in viola-

²⁰⁰ CAL. LAB. CODE § 1309.5(a)-(b) (West Supp. 1979).

²⁰¹ *Id.* § 1309.5(c).

²⁰² National Decency Reporter, July-August, 1978, at 4, col. 1 (published by Citizens for Decency Through Law, Inc., Cleveland, Ohio) (statement of State Sen. Newton Russell, co-author of the California law).

²⁰³ "Pornography purveyors do not want to distribute any type of material which gives law enforcement [officials] the right to inspect their records or visit their premises." *Id.*

This fear raises a fourth amendment issue regarding reasonable search and seizure. Generally, in order to inspect business records or premises, a warrant must be obtained upon a showing of probable cause. However, warrantless searches and inspections have been upheld by the Supreme Court in a few circumstances. In upholding a warrantless inspection of dealers in firearms under the Gun Control Act of 1968, 18 U.S.C. §§ 921-928 (1976), the Court in *United States v. Biswell*, 406 U.S. 311 (1972), ruled that warrantless searches, carefully limited in time, place, and scope, were constitutional when a history of pervasive government regulation of the industry existed and the targeted business had accepted a license in the regulated business. A subsequent Second Circuit Court of Appeals decision upheld the warrantless examination of the required records of a pharmacist under a statute interpreted to be "limited to the business records . . . that are properly subject to intensive regulation in the public interest." *United States ex rel. Terraciano v. Montanye*, 493 F.2d 682, 685 (2d Cir.), *cert. denied*, 419 U.S. 875 (1974). The statutorily required child pornography records can be distinguished from both *Biswell* and *Terraciano* on the grounds that pornography distributors are not licensed by the state. While they are aware of the moderately regulated nature of their business, the pornography dealers have not "consented" to the warrantless search to the same extent as the licensed pharmacists or firearms dealers. Accordingly, it would appear that a warrantless search under the California statute, even if limited to the required records, would be unconstitutional under the Fourth Amendment. Of course, California law enforcement officials remain free to obtain a warrant or subpoena through the regular judicial process.

²⁰⁴ According to one of its co-authors, the California law, bolstered by this provision, has resulted in the destruction of carloads of child pornography in the Los Angeles area. National Decency Reporter, *supra* note 202, at 4, col. 1.

tion of the fifth amendment. In *Shapiro v. United States*,²⁰⁵ the Supreme Court established the required records exception in upholding regulations promulgated pursuant to the wartime Emergency Price Control Act of 1942, which required that anyone subject to the Act keep detailed business records for examination by the Office of Price Administration.²⁰⁶

Although a variety of rationales have been suggested for the required records exception to the privilege against self-incrimination, the doctrine is best recognized "as a limitation on the privilege based upon the public need for information in limited circumstances to make effective public regulation of certain activities."²⁰⁷ Therefore, the question becomes a balancing of the public need for the information against the strong policy in favor of maintaining the privilege against self-incrimination. Commentators have suggested that several factors be considered in making this determination,²⁰⁸ including (1) the burden placed on the party by the requirements, (2) the importance of the regulation to be effected, and (3) the availability of other means of effectuating the regulation. In evaluating the California provision on the basis of these factors, arguably it does not burden the distributors and retailers since gathering of such information would not require ex-

²⁰⁵ 335 U.S. 1 (1948).

²⁰⁶ In deciding a trilogy of cases in 1968, the Supreme Court explained the limits of the required records rule as follows:

First, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents.

Grosso v. United States, 390 U.S. 62, 67-68 (1968).

²⁰⁷ MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 142, at 303 (2d ed. 1972).

²⁰⁸ These factors include:

- (a) a consideration of the importance of effective regulation of the underlying activity;
- (b) the availability of methods other than compulsory self-incrimination as a means of making this regulation effective;
- (c) the burden placed on the party by the requirement, as, for example, whether he is required to perform extensive activities to collect the information that he would not otherwise perform, or whether the requirement is simply that he grants access to information that he would otherwise keep for his own use;
- (d) the extent to which the records are simply a convenient method of collecting essentially public information . . . as opposed to requiring that the individual record and submit to public authorities information of a personal nature that would not otherwise be disclosed;
- (e) the extent to which the information revealed would be of value to the government for purposes other than the criminal prosecution of the individual to reveal it; and
- (f) the existence and effectiveness of any limitations upon access of prosecuting agencies to the information.

traordinary activity by either group. Indeed, these records are of the kind normally kept by businesspeople. Secondly, the regulation to be effected—the prohibition against producing or selling child pornography as a means of protecting the welfare of children—is of very high priority. The third factor, the availability of methods other than compulsory self-incrimination as a means of making this regulation effective, raises a more difficult problem. Arguably, laws aimed directly at retailers and distributors are sufficient within themselves to prohibit child pornography. In addition, the law is aimed at only those who sell or distribute child pornography, activities deemed illegal under the statute. In *Haynes, v. United States*,²⁰⁹ the Court held that a defendant could properly assert the privilege against self-incrimination under the National Firearms Act²¹⁰ which only required registration of certain classes of firearms, such as sawed-off shotguns, machine guns, and silencers. The Court found that the “required records” doctrine was inapplicable, because the registration requirements were directed at a highly selective group presumed to be involved in criminal activities, were concerned with an area permeated with criminal statutes (rather than an essentially noncriminal and regulatory area of inquiry), and no records or other documents were involved which had “public aspects.”²¹¹ In light of *Haynes*, which exempts persons from keeping records which are inherently incriminating, the California provision which singles out distributors of child pornography appears to be unconstitutional.²¹²

To circumvent the constitutionality problem while achieving one of the chief goals of record-keeping—facilitating widespread prosecution through better information—the statute could grant limited immunity to parties maintaining the records. This provision would preclude the prosecution from using the information contained in the records against the party who kept them, but would allow the prosecutor to use such information in initiating and prosecuting cases against other distributors and retailers.²¹³ Such a provision would avoid possible self-incrimination problems, yet provide law enforcement officials with substantial information from which to

²⁰⁹ 390 U.S. 85 (1968).

²¹⁰ 26 U.S.C. §§ 5801-5862 (1976).

²¹¹ In *United States v. Freed*, 401 U.S. 601 (1971), an amended version of the National Firearms Act was upheld. Under this version, all possessors of firearms rather than those often engaged in unlawful activities were required to comply.

²¹² This same conclusion was reached by another commentator. Note, *Free Speech and Self-Incrimination: The Constitutionality of California's New Child Pornography Laws*, 10 PAC. L.J. 119, 136-37 (1979).

²¹³ Such a provision might read: “Any person who maintains records in accordance with this provision shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions.”

locate participants in the child pornography distribution network.²¹⁴

2. *Sanctions*—Enforceability of the child pornography laws depends, to some degree, on the sanctions provided for violations. These are not limited to penal sanctions, but include injunctive relief and seizure of the visual material.

a. *Injunctive Procedures*—Two state statutes contain procedures to enjoin a violation or threatened violation of the law.²¹⁵ These provisions allow the sale of a work depicting children engaged in sexual conduct to be enjoined before the defendant is found guilty. This provision raises a question as to the extent to which visual material, a form of speech, may be regulated prior to adjudication of its illegality. In *Freedman v. Maryland*,²¹⁶ the United States Supreme Court enumerated the procedural safeguards necessary for a constitutional scheme of licensing. The Court held that the censor must bear the burden of proving that the material is unprotected expression, any restraint prior to judicial review must be brief, and a final judicial determination must be prompt.²¹⁷ Under the child pornography laws, courts would be bound to apply these same standards.²¹⁸

b. *Seizure of Material*—Two states provide that each photograph, film, videotape, or other reproduction of any child pornographic material shall be contraband and shall be seized and disposed of in accordance with the law.²¹⁹ Accepting the view that the only effective way to end child pornography is to stop the distribution of the material, seizure of the material will prove effective in deterring distribution of such material. Under the obscenity laws, however, the material may only be seized following a judicial determination of obscenity.²²⁰ Therefore, under the child pornography laws, the materials may only be seized following conviction

²¹⁴ A similar grant of immunity is contained in many state child abuse reporting statutes. See, e.g., MICH. COMP. LAWS ANN. § 722.625 (Supp. 1978). In order for a state to qualify for assistance under the federal Child Abuse Prevention and Treatment Act, it must have in effect a child abuse and neglect law which includes provisions for immunity for persons reporting instances of child abuse and neglect from prosecution under any state law. 42 U.S.C.A. § 5103(b)(2)(A) (West 1977).

²¹⁵ FLA. STAT. ANN. § 847.014(3) (Harrison Supp. 1978); MASS. ANN. LAWS ch. 272, § 30D (Michie/Law. Co-op Supp. 1978).

²¹⁶ 380 U.S. 51 (1965).

²¹⁷ *Id.* at 58-59.

²¹⁸ The Massachusetts statute provides that procedures for issuance of an injunction against dissemination of child pornography shall be the same as those applicable under its obscenity law. MASS. ANN. LAWS ch. 72, § 30D (Michie/Law. Co-op Supp. 1978).

²¹⁹ ALA. CODE tit. 13, § 7-238 (Supp. 1978); LA. REV. STAT. ANN. § 14:81.1 (West Supp. 1978).

²²⁰ *Heller v. New York*, 413 U.S. 483 (1973). Materials seized by customs officials must be submitted within 14 days to a United States District Court for determination of whether they should be forfeited and destroyed as obscene. *House Crime Hearings*, *supra* note 1, at 211 (statement of G.R. Dickerson, Acting Commissioner, U.S. Customs Service).

of the distributor.

c. Penalties—In the vast majority of states, violation of the child pornography laws is a felony.²²¹ In general, the length of the sentence and amount of fine vary widely from jurisdiction to jurisdiction. In the twenty-seven states that impose liability on both distributors and producers,²²² twelve states impose equivalent penalties on sellers and producers,²²³ while fourteen states impose a greater penalty on producers than distributors,²²⁴ and one state imposes a greater penalty on distributors.²²⁵ Several of the states have provisions for repeat offenders and others provide mandatory sentences.

As a general proposition, sentences should be long enough to create a deterrent effect, while not discouraging convictions with sentences that are perceived to be too harsh. In some states, lengthy mandatory sentences are imposed that will likely result in a reluctance to convict.²²⁶ In other states, some of the possible sentences are so harsh that if imposed they arguably constitute cruel and unusual punishment.²²⁷ Penalties imposed on producers should be harsher than those imposed on coercers, parents, or distributors. While the latter three classes of defendants are unquestionably involved in activity that results in harm to children, the

²²¹ For the purposes of this analysis, a felony has been arbitrarily defined as a crime with a sentence of one year or longer.

²²² For the purposes of these statistics, the producer group includes producers, coercers, and parents.

²²³ These states are Arizona, Indiana, Louisiana, Massachusetts, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, Tennessee, and Wisconsin. For statutory citations see note 60 *supra*. The federal statute also provides for an equivalent penalty on both producers and distributors. 18 U.S.C.A., §§ 2251-2252 (West Supp. 1978).

²²⁴ These states are Alabama, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Kentucky, Maine, Michigan, Minnesota, New York, Pennsylvania, and South Dakota. For statutory citations see note 60 *supra*.

²²⁵ TEX. PENAL CODE ANN. tit. 9, §§ 43.23-.25 (Vernon Supp. 1978).

²²⁶ See, e.g., ME. REV. STAT. ANN. tit. 17, § 2922 (West Supp. 1978) (mandatory five year sentence for producers; mandatory ten year sentence for second offense).

²²⁷ See, e.g. DEL. CODE ANN. tit. 11, §§ 1108-1110 (Supp. 1978) (for producer, first offense is punishable by 3 to 30 years and second offense rates life imprisonment). Where the duration of a sentence imposed on one convicted of a crime is so disproportionate to the offense committed as to shock the conscience and offend fundamental notions of human dignity, the punishment is prohibited by constitutional provisions proscribing cruel and unusual punishment. *Weems v. United States*, 217 U.S. 349 (1910). For cases that have applied this principle in the context of sex offenses against a child, see *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1973) (aggravated penalty of one year to life for second offense of indecent exposure violated prohibition against cruel and unusual punishment); *In re Wells*, 46 Cal. App.3d 592, 121 Cal. Rptr. 23 (1975) (penalty for annoying or molesting children under 18 years of age, a life-maximum sentence for one previously convicted of committing lewd and lascivious acts on a child under 14 years of age, is invalid); *Banks v. State*, 342 So.2d 469 (Fla. 1976) (a mandatory penalty of 25 years imprisonment without possibility of parole for conviction of a sexual battery upon a child of less than age eleven is not a cruel or unusual punishment and the imposition of a life sentence with 25 years to be served without possibility of parole upon a defendant convicted of a sexual battery upon an eight year old boy was valid).

producer is directly involved in child abuse, activity warranting a more severe penalty.

D. Protection of the Victimized Child

Most of the state statutes ignore the problems of the victimized child, concentrating solely on imposing liability on the primary actors in the industry. However, one state has an express provision whereby an official may take temporary custody of the child victim.²²⁸ In at least one state private reports of child abuse and the official investigative report, including reported violations of the child pornography law, *must* be sent to the prosecuting attorney of the county in which the child lives.²²⁹ Creative provisions such as these are essential to an effective child pornography regulatory strategy.²³⁰

The current child pornography statutes fail to provide for rehabilitation of the child. Given the serious emotional, psychological, and physical harm suffered by the victims of child pornography, legislatures should consider incorporating treatment for these victims into present child abuse rehabilitation programs. On the federal level, funds are available for rehabilitative purposes under the Child Abuse Prevention and Treatment Act.²³¹

V. SUMMARY OF RECOMMENDATIONS

Throughout the preceding analysis, this article has raised several issues and made legislative recommendations. In drafting an effective child pornography statute, two key factors, the comprehensiveness of coverage and the obscenity requirement, are of paramount importance.

An effective child pornography statute must impose liability on all the actors in the industry. As was previously discussed, regula-

²²⁸ 1977 Conn. Pub. Act No. 577, § 3, *reprinted in* CONN. GEN. STAT. ANN. app., at 170 (West Unclassified Acts Pamph. Supp. 1978).

²²⁹ Act of June 20, 1978, Pub. Act No. 252, 1978 Mich. Legis. Serv. 759 (West) (to be codified as MICH. COMP. LAWS §§ 722.622, .623, .628, .633).

²³⁰ The Maine statute contains a declaration of legislative policy recognizing that publicity may often be harmful to the victims. District attorneys, their assistants and employees and other law enforcement officials are to refrain from any unnecessary pretrial public disclosure of information that may identify a minor victim of an offense under the child pornography laws, sex offenses, or incest laws. *Minors—Sexual Exploitation*, ch. 628, 1978 Me. Legis. Serv. 154 (West) (to be codified as ME. REV. STAT. tit. 30, § 508). *But see* Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); *State ex rel. Daily Mail Pub. Co. v. Smith*, 248 S.E. 2d 269 (W. Va.), *cert granted*, 99 S.Ct 448 (1978) (statute unconstitutional to the extent that it made it a criminal offense for a newspaper to publish the name of the child in any proceeding under child welfare statutes without prior approval of the trial court). *Cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

²³¹ 42 U.S.C. §§ 5101-5106 (Supp. V. 1975).

tion of the distributor may be as important, if not more important, than regulation of the producer of the material.²³² In addition, liability should be imposed on coercers and parents. A producer may be defined as any person who employs or uses a child to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any material depicting such conduct.²³³ A coercer may be defined as any person who persuades, induces, entices, or coerces any child to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any material depicting such conduct.²³⁴ The parent/guardian class should include any parent, legal guardian, or person having custody or control of a child who knowingly permits such child to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any material depicting such conduct.²³⁵ A distributor may be defined as any person who knowingly sells, delivers, exhibits or otherwise makes available, or offers or agrees to sell, deliver, exhibit, or otherwise makes available material depicting a child engaged in sexually explicit conduct, or buys, procures, or possesses such material with intent to disseminate it.²³⁶

The other major recommendation for drafting effective legislation is to eliminate any requirement that the visual material be legally obscene. An obscenity requirement poses a large barrier to enforcement of child pornography laws. Proving the obscenity of visual material is a costly procedure for prosecutors.²³⁷ Further, the harm to the child actor is not necessarily connected to the legal status of the material.²³⁸ This article has argued that failure to provide an obscenity requirement does not violate the first amendment, provided that explicit sexual conduct is defined to only include conduct certain to harm the child victim.²³⁹ It must be noted, however, that present laws, which use broad definitions of sexually explicit conduct, may be constitutionally overbroad.²⁴⁰ These laws must be amended to include only sexual conduct that harms the child.²⁴¹ Although the difficult question whether an obscenity requirement is a necessary prerequisite to

²³² See notes 120-22 & 127 and accompanying text *supra*.

²³³ This definition is similar to the one contained in the federal statute, 18 U.S.C.A. § 2251(a) (West Supp. 1978).

²³⁴ See 18 U.S.C.A. § 2251(a) (West Supp. 1978).

²³⁵ See 18 U.S.C.A. § 2251(b) (West Supp. 1978).

²³⁶ This definition is similar to the one contained in the Illinois statute, ILL. ANN. STAT. ch. 38. § 11-20a(b) (Smith-Hurd Pamph. Supp. 1978).

²³⁷ See notes 56-57 and accompanying text *supra*.

²³⁸ See note 55 and accompanying text *supra*.

²³⁹ See notes 76-134 and accompanying text *supra*.

²⁴⁰ See notes 128-34 and accompanying text *supra*.

²⁴¹ See notes 160-70 and accompanying text *supra*.

distributor liability has not been decided by a higher court, this article has argued that such a requirement is unnecessary.²⁴²

In addition to these two major recommendations, several other provisions are suggested, many of which are contained in some existing statutes. The definition of visual material should include undeveloped or unprocessed materials.²⁴³ Additionally, live performances depicting a child engaged in explicit sexual conduct should be covered in the law.²⁴⁴ Such provisions are constitutional and would significantly expand the scope of the law.

To minimize the prosecutorial problem of proving that the actor was a minor, statutes should include a provision allowing the admissibility of expert testimony regarding the age of the child.²⁴⁵ Since the primary statutory purpose is to prevent harm to the child actors, and not the viewers, the jury should not be allowed to make a judgment regarding the age of the child based solely on the visual material. Only testimony of an expert, familiar with the various problems of judging age based on photographic appearances, should be admissible on this point.²⁴⁶ An effective constitutional child pornography statute need not require the material be produced or distributed for commercial purposes.²⁴⁷

Any knowledge requirement should distinguish between knowledge of content of the materials and knowledge of the child actor's age. Parents should be held to a subjective standard of knowledge of the general character of the material, while the distributor and coercer should be held to an objective standard.²⁴⁸ On the other hand, knowledge of the age of the child should not be an element of the offense.²⁴⁹ The statute, however, should provide for an affirmative defense which allows the defendant to escape liability upon making a reasonable bona fide attempt to ascertain the age of the actor.²⁵⁰ In light of the harms being protected against, the standard by which the bona fide attempt is judged should be high, so defendants may only escape liability in cases where they had been clearly misled by the child actor.²⁵¹

The record-keeping provision of the California statute²⁵² may be effective in reaching the economic center of the industry — the dis-

²⁴² See notes 101-34 and accompanying text *supra*.

²⁴³ For citations to examples of such a provision, see note 70 *supra*.

²⁴⁴ *Id.*

²⁴⁵ For citations to examples of such a provision, see note 156 *supra*.

²⁴⁶ See text accompanying note 159 *supra*.

²⁴⁷ See notes 171-73 and accompanying text *supra*.

²⁴⁸ See notes 177-92 and accompanying text *supra*.

²⁴⁹ See notes 193-97 and accompanying text *supra*.

²⁵⁰ See note 198 and accompanying text *supra*.

²⁵¹ See note 199 *supra*.

²⁵² CAL. LAB. CODE § 1309.5 (West Supp. 1979).

tribution network.²⁵³ To avoid fifth amendment violations, the state should require wholesalers and retailers to maintain records of the names and addresses of persons from whom such material is obtained, but preclude prosecutors from using such information against the party who kept them.²⁵⁴ Under this proposal, law enforcement officials could get access to information crucial to destruction of the child pornography distribution network.

Procedures for enjoining distribution and seizing illegal visual material should be provided for in the statutes.²⁵⁵ Such provisions will prevent further distribution of child pornography. Constitutionally mandated procedural safeguards, however, must be adhered to in utilizing these provisions.²⁵⁶

Penalties should be harsh enough to create a deterrent effect, while not discouraging convictions with sentences that are too severe.²⁵⁷ While the precise lengths of sentences and fines are best left to the discretion of the legislature, this article recommends that the penalties imposed on producers be harsher than those imposed on coercers, parents, or distributors.

Finally, the statute should contain provisions to protect and treat the victimized child. This can be best achieved through coordinated efforts of state child abuse authorities and prosecutors of child pornography laws. The child may gain access to state child abuse treatment programs if the prosecutor is required to transmit the names of the child pornography victims to the child abuse authorities. Likewise, a tighter system of enforcement may be achieved if the child abuse authorities are required to report suspected violations of the child pornography law to local prosecutors.²⁵⁸ Rather than create a separate agency to deal with treatment of the victimized child, treatment should fall under the auspices of the established state child abuse agency.

VI. CONCLUSION

The production and distribution of visual material depicting children engaged in sexual conduct is best viewed as a particular type of child abuse. Because of the harm to the child and the limited coverage of existing laws, new statutes were necessary to deal with the problem. To date, the legislative approaches to the child por-

²⁵³ See notes 202-04 and accompanying text *supra*.

²⁵⁴ See notes 213-14 and accompanying text *supra*.

²⁵⁵ For citations to such provisions, see notes 215 and 219 *supra*.

²⁵⁶ See note 216-18 and 220 and accompanying text *supra*.

²⁵⁷ See notes 221-27 and accompanying text *supra*.

²⁵⁸ See, e.g., Act of June 20, 1978, Pub. Act. No. 252, 1978 Mich. Legis. Serv. 759 (West) (to be codified as MICH. COMP. LAWS §§ 722.622, .623, .628, .633).

nography problem have varied greatly. The key issue presented by these statutes, whether the material must be obscene in regulating distributors, has only been dealt with by a few courts. The ultimate effectiveness of the child pornography statutes will depend on the determination of the balance that must be drawn between the state's interest in protecting its children and first amendment freedoms. In addition to imposing criminal liability on all actors in the industry—producers, coercers, parents and distributors—the effectiveness of the laws can be further enhanced through a reporting requirement on distributors, reasonable penalties, and certain evidentiary provisions. Moreover, the victim of the child pornography industry—the child—can be afforded better protection and necessary treatment by coordination of child abuse reporting statutes and child pornography statutes.

Given more effective legislation, the burden rests on law enforcement officials to aggressively enforce the statutes. Only then will the outrageous abuse of children inherent in the production of this material begin to be curbed.

— *T. Christopher Donnelly*