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THE CHILD PROTECTION ACT: A BLANKET PROHIBITION SMOTHERING CONSTITUTIONALLY PROTECTED EXPRESSION

"Those Young Girls," an erotic film featuring Traci Lords, is the origin of *United States v. Kantor.*[1] In "Those Young Girls," Lords was required to engage in sexually explicit conduct for the purpose of filming.[2] Two years after the film's release, it was discovered that Lords was merely sixteen years old at the time of filming.[3] Because of Lords' age, Ronald Rene Kantor and Rupert Sebastian MacNee, the producers, were indicted[4] under 18 U.S.C. section 2251 *et seq.* (the "Child Protection Act").[5] The Child Protection Act makes it unlawful to employ persons under the age of eighteen to engage in sexually explicit conduct, actual or simulated, for the purpose of filming or photography.[6]

Defendants Kantor and MacNee moved to dismiss the indictment, claiming section 2251(a), as applied, violated both the First and Fifth

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1. United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987).
2. *Id.* at 1422.
3. *Id.* at 1423.
4. *Id.* at 1422.
5. Section 2251 was the critical portion of the Child Protection Act discussed in *Kantor.* At the time of the indictment, the statute provided in pertinent part:

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mail, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed. . . .
>
> (c) Any individual who violates this section shall be fined no more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years, more than 15 years, or both. . . .

Section 2255(1) provided that "minor" means any person under the age of eighteen years. 18 U.S.C. § 2251 (1982); *Kantor,* 677 F. Supp. at 1422 n.1. Additionally, § 2255(2) provided:

> (2) "sexually explicit conduct" means actual or simulated—
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (B) bestiality;
> (C) masturbation;
> (D) sadistic or masochistic; abuse; or
> (E) lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. § 2255(2) (1982); *Kantor,* 677 F. Supp. at 1422 n.1.

6. 18 U.S.C. §§ 2251-2256 (1988).

Amendments of the United States Constitution.[7] Specifically, the defendants alleged that the statute was overbroad under the first amendment overbreadth doctrine.[8] Additionally, Kantor and MacNee contended that section 2251(a) was unconstitutional under the fifth amendment unless it required the government to prove the defendants' actual knowledge that Lords was under eighteen.[9] In the alternative, the defendants contended that even if such proof was not constitutionally required, they must be permitted to show that they acted on the basis of a reasonable, good faith mistake of fact concerning Lords' age.[10]

The government proceeded to prosecute the action claiming that Ms. Lords was sixteen at the time of filming, that the defendants were her employers and that they knew the film would be transported in interstate commerce.[11] The government alleged that proof of scienter was not an issue under section 2251(a), thus, the defendants' knowledge of Lords' actual age was not contended. In fact, the government filed a motion *in limine* to prevent the defendants from introducing any evidence as to the state of their knowledge or belief concerning Lords' age.[12] The court concluded that both the defendants' motion to dismiss and the government's motion *in limine* must be denied.[13]

I. SUMMARY OF THE *KANTOR* COURT'S REASONING

United States v. Kantor, a case of first impression in the Ninth Circuit,[14] tests the constitutionality of the Child Protection Act.[15] The defendants, Kantor and MacNee, argued that under both the first and fifth amendments the government was required to prove that the producers knew Lords' actual age.[16] The court disagreed, concluding that the government would be required only to prove that Kantor and MacNee knew

7. *Kantor*, 677 F. Supp. at 1423.

8. A court uses the overbreadth doctrine when a statute or other governmental restriction, directed at speech which in itself is not protected by the first amendment, is sufficiently broad so as also to prohibit speech which is protected under the first amendment. Such restrictions may be perfectly constitutional, but nevertheless "overbroad," or invalid "on its face," for the reason that their reach also extends to protected speech. In this situation, the person charged with violation of the restriction has standing to assert the invalidity of the restriction notwithstanding the fact that his speech is not in itself constitutionally protected. M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4-147 (1984).

9. *Kantor*, 677 F. Supp. at 1423.

10. *Id.*

11. *Id.* at 1422.

12. *Id.* at 1423.

13. *Id.*

14. *Kantor*, 677 F. Supp. at 1422.

15. *See supra* note 5.

16. *Kantor*, 677 F. Supp. at 1423.

that the "nature and character" of the materials produced were sexually explicit.[17] Once the government proves Kantor and MacNee knew the nature and content of "Those Young Girls" (child pornography), then almost by definition the defendants must know the film depicts minors. Therefore, the defendants would possess the guilty knowledge required for conviction.

Next, the defendants argued that their reasonable mistake of fact as to Lords' age was an affirmative defense.[18] Although conceding that section 2251(a) does not make reasonable mistake of age an affirmative defense, the defendants contended that the statute must be construed as implicitly providing for such a defense.[19] The court agreed with the defendants stating that, on remand, the defendants must be given the opportunity to prove the reasonableness of their mistake.[20]

In support of its conclusion, the court noted that strict liability for criminal offenses is justified only in three circumstances: "(1) where the legislature grants the privilege to engage in the activity; (2) where the deterrent effect of a severe penalty is necessary to prevent harm to the public interest; and (3) where basic notions of fairness are not upset by criminal conviction."[21]

The court found the first condition was not applicable. The right to produce pornographic materials with adult performers is not granted by Congress; instead it is a freedom of expression protected by the Constitution.[22] Additionally, the court held that the remaining two justifications for strict liability were also inapplicable. The court reasoned that a defense of reasonable mistake of fact would not undermine the deterrent value of a severe penalty; rather, it would encourage individuals to make a careful investigation of age before engaging in sexual filming.[23] Finally, the court held that notions of fairness demand that a person who will be imprisoned for a long term based upon a factual error must be afforded the defense of a good faith reasonable mistake of fact.[24] Because section 2251 regulates pornography to prevent the employment of underaged performers, performers knowing they will be denied employment have every incentive to falsify their age. Therefore, the court held that an employer should not face a long jail term, due to deliberate deception and

17. *Id.* at 1429.
18. *Id.* at 1423.
19. *Id.*
20. *Kantor*, 677 F. Supp. at 1435.
21. *Id.* at 1433.
22. U.S. CONST. AMEND. I.
23. *Kantor*, 677 F. Supp. at 1434.
24. *Id.* at 1435.

trickery on behalf of a performer, without the opportunity to prove honest mistake of fact.[25]

Accordingly, the court ruled that the defendants would be allowed to present evidence to prove a reasonable mistake of fact as an affirmative defense.[26] Therefore, the court denied the government's motion to exclude evidence regarding Kantor and MacNee's knowledge concerning Lords' actual age.[27]

In addition to the opportunity to prove their reasonable mistake of fact, Kantor and MacNee argued that section 2251(a) violated the first amendment by virtue of its overbreadth.[28] The court, therefore, addressed the question of whether the Child Protection Act, under the first amendment overbreadth doctrine,[29] had a chilling effect on constitutionally protected expression. In particular, the court focused on the statute's proscription of "simulated" sexual conduct as applied to sixteen and seventeen-year-olds.[30]

The court concluded that the definition of "sexually explicit conduct" under section 2251(a) was not suitably limited "in that the potential encroachment upon the first amendment is not properly directed to the legitimate objectives of protection of children from the abuses of child pornography."[31] Section 2251 *et seq.* infringes upon the first amendment rights of all those involved in artistic expression, not merely teenage actors; thus, its encroachment upon the first amendment is not properly directed towards the goal of protecting children. Nevertheless, based on the collective view of the Supreme Court in *New York v. Ferber*,[32] the court "reluctantly" determined that section 2251(a) could not be struck down facially, at least until challenged by a party affected by the statute's alleged overbreadth.[33]

A. *Fifth Amendment Issues*

The indictment posed two questions under the fifth amendment: (1) whether Congress can criminalize the employment of an underaged

25. *Id.*
26. *Id.*
27. *Id.*
28. *Kantor,* 677 F. Supp. at 1423.
29. *See supra* note 8.
30. *Kantor,* 677 F. Supp. at 1429.
31. *Id.* at 1432.
32. New York v. Ferber, 458 U.S. 747 (1982).
33. *Kantor,* 677 F. Supp. at 1432. "Those Young Girls" falls directly within the category of speech covered by the Child Protection Act, thus Kantor and MacNee are not presently affected by the statute's alleged overbreadth.

performer for filming without requiring proof of the defendant's knowledge of the performer's actual age; and (2) if Congress can criminalize this conduct, whether it can prescribe so severe a penalty for violation as that under section 2251(a).[34] Analyzing section 2251(a) solely by reference to the fifth amendment, the court answered these questions in the affirmative[35] and dismissed the defendants' fifth amendment claims.

Recognizing that the activity being regulated in *Kantor* is child pornography, not the employment of children, the court applied the Supreme Court's decision in *New York v. Ferber*.[36] The Supreme Court in *Ferber* established that Congress has the authority to regulate child pornography for the protection of children.[37] The *Kantor* court found, when regulating child pornography, Congress leaves the responsibility of conforming one's conduct within the scope of the law upon those who participate in such activities.[38] In such situations it is irrelevant whether the defendants knew or should have known they were violating the law by employing an underaged performer such as Lords.[39] Therefore, Congress has the authority to implement section 2251(a) and define the defendants' conduct as criminal.[40]

With respect to the second question regarding the severity of the penalty, the *Kantor* court acknowledged that "due process dictates that not too severe a penalty be attached to crimes which do not require an element of criminal intent."[41] However, these due process concerns must be balanced against other societal interests.[42] Relying on congressional findings that indicate the harm to children which flows from engaging in sexually explicit conduct for the purpose of filming is severe, the Supreme Court has found the interest in protecting children is compelling.[43] Because Congress looked at the harm to the minor as the basis for establishing the section 2251 penalty, rather than to the subjective culpa-

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34. *Id.* at 1426. Section 2251(c) provided:

> Any individual who violates this section shall be fined no more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years, more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

18 U.S.C. § 2251(c) (1982).

35. *Id.* at 1426-28.

36. 458 U.S. 747 (1982).

37. *Kantor*, 677 F. Supp. at 1426.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1427.

42. *Kantor*, 677 F. Supp. at 1427.

43. *Ferber*, 458 U.S. at 756-57.

bility of the employer, the *Kantor* court concluded that Congress did not exceed its power by attaching a severe penalty to section 2251 *et seq.*[44]

B. First Amendment Issues

Filmmaking is a form of protected expression under the first amendment.[45] Because of the importance of the free speech guarantee, Congress cannot prohibit altogether the filming of sexually explicit conduct. When Congress does regulate in this area, its legislative power must be so exercised as not to unduly infringe upon this protected freedom. Section 2251(a), however, is potentially so broad that it has a chilling effect on constitutionally protected speech. The statute proscribes materials traditionally entitled to constitutional protection from governmental interference such as art work, plays and films where a child portrays a simulated sexual act in a nonobscene manner. Additionally, medical and educational materials depicting adolescents in the proscribed manner are prohibited by the statute.

The critical portion of the Child Protection Act analyzed in *Kantor* is section 2251(a). In general, section 2251(a) makes it unlawful to employ persons under the age of eighteen to engage in "sexually explicit conduct" for the purpose of filming or photography where "sexually explicit conduct" is defined as actual or simulated sexual intercourse.[46] The statute provides in pertinent part:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.[47]

The statutory definition of "sexually explicit conduct" is not suitably limited and described.[48] Additionally, the societal interest which justifies restricting first amendment rights in protecting individuals between the ages of sixteen and eighteen is strained.[49] Consequently, the expan-

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44. *Kantor,* 677 F. Supp. at 1428.
45. *Id.*
46. 18 U.S.C. § 2256(2) (1988).
47. 18 U.S.C. § 2251(a) (1988).
48. *Kantor,* 677 F. Supp. at 1432.
49. *Id.* at 1429.

sive scope of the Child Protection Act infringes upon the fundamental liberties guaranteed by the first amendment.

II. CASE AND LEGISLATIVE BACKGROUND

A. *The Landmark Case of New York v. Ferber*

The overbreadth issues in *Kantor* arose out of the Supreme Court's decision in *Ferber.* Paul Ferber, the proprietor of a New York bookstore specializing in sexually oriented products, was indicted for selling sexually explicit films in violation of New York's child pornography laws.[50] The New York statute in *Ferber* was similar to section 2251(a) of the Child Protection Act in two ways. First, the New York statute did not require proof of obscenity if the materials depicted children engaged in sexual conduct.[51] Second, it defined sexually explicit conduct as "actual or simulated sexual intercourse."[52] A "child" for purposes of the New York statute is "a child less than sixteen years of age."[53]

Ferber, like Kantor and MacNee, challenged the constitutionality of the New York statute under the first amendment "overbreadth doctrine."[54] Ferber argued that the statute was "unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State."[55]

Applying the New York statute, the equivalent of the Child Protection Act, a jury acquitted Ferber of the obscenity charges, but found him guilty of both counts of promoting a sexual performance by a child.[56] The conviction was affirmed without opinion by the Appellate Division of the New York State Supreme Court.[57] The New York Court of Appeals reversed, holding that the New York Act violated the first amendment.[58] The New York Court of Appeals held that without the inclusion of the obscenity standard, the statute would "prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment."[59] In reach-

50. *Ferber,* 458 U.S. at 751-52.
51. N.Y. PENAL LAW § 263.00 (MCKINNEY 1980).
52. N.Y. PENAL LAW § 263.00(3) (MCKINNEY 1980).
53. N.Y. PENAL LAW § 263.05 (MCKINNEY 1980).
54. *Ferber,* 458 U.S. at 766.
55. *Id.*
56. *Id.* at 752.
57. *Id.*
58. *Id.*
59. People v. Ferber, 52 N.Y.2d 674, 678, 422 N.E.2d 523, 525 (1981), *rev'd* 458 U.S. 747 (1982).

ing this conclusion, the court referred to plays and films which would be prohibited by the statute if a child portrayed a defined sexual act, real or simulated, in a nonobscene manner.[60] Furthermore, the court noted that the law would "prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts."[61]

The United States Supreme Court granted the state's petition for certiorari.[62] The issue was whether, to prevent the abuse of children, the New York State Legislature could, consistent with the first amendment, prohibit the dissemination of materials depicting children engaged in sexual conduct, regardless of whether such materials were obscene.[63] The Court answered this question affirmatively, holding that the New York statute did not violate the first amendment.[64] In upholding the statute,[65] the Court created a new class of unprotected speech and recognized for the first time that there is a difference between child pornography and adult pornography. In his opinion for the five member majority, Justice White stated five reasons to justify why the states should have greater leeway in the regulation of child pornography.[66]

Applying the first amendment overbreadth doctrine,[67] the Supreme

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60. *Id.*

61. *Id.*

62. *Ferber,* 458 U.S. at 753.

63. *Id.*

64. *Id.* at 773-74.

65. N.Y. PENAL LAW § 263.15 (McKinney 1980): "A person is guilty of promoting a sexual performance by a child when knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."

66. First, Justice White asserted that the state's interest in protecting the physical and emotional welfare of children is compelling. *Ferber,* 458 U.S. at 756-57. Second, the majority found the Miller v. California, 413 U.S. 15 (1973), guideline for determining what is legally obscene an unsatisfactory solution to the child pornography problem. *Ferber,* 458 U.S. at 761. A sexually explicit depiction of a child need not be patently offensive or appeal to the prurient interest, as required in adult pornography, in order to have required the sexual exploitation of a child for its production. *Id.* Third, the majority recognized that advertising and selling of child pornography provide an economic motive and are thus an integral part of the production of new child pornography, an illegal activity in all fifty states. *Id.* Fourth, the Court stated that the social value of allowing children to engage in sexual conduct for purposes of filming is "exceedingly modest, if not *de minimis.*" *Id.* at 762. Finally, Justice White explained that it is acceptable to classify speech on the basis of its content when the "evil to be restricted so overwhelmingly outweighs the expressive interests." *Id.* at 763-64. The Court concluded that when the societal interest in the welfare of children is balanced against the first amendment interests of child pornography "the balance of competing interests is clearly struck and it is permissible to consider these materials as without the protection of the First Amendment." *Id.* at 764.

67. Initially the Court discussed the issue of standing. The Court stated that "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others

Court held that the New York statute was not constitutionally invalid because it was not substantially overbroad.[68] Writing for the majority, Justice White explained this conclusion as the case of a state statute, directed at the hard core of child pornography, "whose legitimate reach dwarfs its arguably impermissible applications."[69] This meant that although some protected expression would fall prey to the statute, the Court felt it would not amount to more than a tiny fraction and whatever overbreadth may exist would be cured by a case-by-case analysis of the fact situation.[70]

The *Ferber* Court's explanation is a mere rationalization used to justify its inadequate decision. The Court failed to explain or provide a standard indicating how much overbreadth must be apparent before the overbreadth doctrine will be applied.[71] Rather, the Court decided the permissible scope of a statute's potential overbreadth would be left to a case-by-case analysis.[72] The Court acknowledged instances of overbreadth flowing from the New York statute yet they concluded that the statute was not overbroad.[73] The Court appears to be sensitive to the issue of child pornography, however, such biases have colored its decision and limited its application to the specific facts in *Ferber.*

The "scope and ramifications of the *Ferber* Court's rejection of the defendant's overbreadth argument are very much at issue" in *Kantor.*[74] Congress was prompted to amend the Child Protection Act in response to *Ferber* and the concern for child protection.[75] Such changes, however, have a potential chilling effect on films and other forms of expression far beyond the encroachment considered in *Ferber.*

B. *The Child Protection Act of 1984*

In 1978, Congress passed the Protection of Children Against Sexual

in situations not before the Court." *Id.* at 767. An exception to this principle is recognized as the first amendment overbreadth doctrine, which developed due to the Court's concern that people who wish to engage in legally protected expression may refrain from doing so rather than risk prosecution. *Id.* at 768. Furthermore, the Court stated that the seriousness of striking down a statute on its face requires that the overbreadth involved must be substantial before a facial invalidation may occur. *Id.* at 769.

68. *Ferber,* 458 U.S. at 773.
69. *Id.*
70. *Id.* at 774.
71. *Kantor,* 677 F. Supp. at 1425.
72. *Ferber,* 458 U.S. at 774.
73. *Id.* at 773.
74. *Kantor,* 677 F. Supp. at 1424.
75. *See infra* note 78.

Abuse Act,[76] which was designed to protect children from sexual abuse. This statute made it unlawful to knowingly sell or distribute for commercial purposes magazines, films or any other material containing pictures of children engaged in obscene sexual conduct.[77] The 1978 Act, however, was ineffective and failed to provide adequate protection for children.[78] The ineffectiveness was attributed to the statutory requirements that the materials must be both obscene and distributed for commercial purposes.

In an attempt to resolve these weaknesses, Congress enacted the Child Protection Act of 1984.[79] This Act dramatically enlarged the Protection of Children Against Sexual Exploitation Act of 1978 in an attempt to facilitate the prosecution and enforcement of child pornography laws.

Most significantly, Congress deleted the obscenity requirement extending prosecution to nonobscene sexually explicit materials. Congress felt that eliminating the obscenity element would streamline prosecution and expedite trial preparation and the trial itself.[80]

Additionally, Congress amended the definition of "minor" under the Act by raising the age of majority from sixteen to eighteen years of age. Although the child protection law upheld in *Ferber* applied only to children sixteen and under, the legislators felt that protecting sixteen and seventeen-year-olds would be constitutional as well.[81]

III. ANALYSIS

In the wake of *Ferber* and congressional amendments to the Child Protection Act, the first amendment analysis in *Kantor* focused on the following questions: (1) Whether the societal interest in protecting children, the justification for restricting rights otherwise secured by the first amendment, extends to individuals between the ages of sixteen and eighteen; (2) whether the definition of "sexually explicit conduct" is suitably limited and described; and (3) whether section 2251(a) should be struck

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76. 18 U.S.C. §§ 2251-2253 (Supp. II 1978).

77. *Id.*

78. H.R. REP. NO. 536, 98TH CONG., 2D SESS. 1 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 492, 500. A Deputy Assistant Attorney General of the Criminal Division testified, at the House Subcommittee on Crime hearings in 1982, that no individual had been convicted for producing child pornography under the 1978 Act since its enactment and only 23 people were convicted for selling child pornography. *Id.*

79. 18 U.S.C. §§ 2251-2256 (1988) (signed into law on May 21, 1984 by President Reagan).

80. *See supra* note 78, at 502.

81. *See supra* note 78, at 505.

down under the overbreadth doctrine in order to avoid its chilling effect on constitutionally protected speech.[82]

A. *Protection of Sixteen and Seventeen-Year-Olds*

The increase in the specified age in the Child Protection Act, from sixteen to eighteen, jeopardizes the Act's constitutionality under the first amendment overbreadth doctrine. Section 2251(a) is a blanket prohibition with no exceptions. The Child Protection Act is capable of application in such a manner as to prohibit or punish protected speech. Under absolutely no circumstances may seventeen-year-old actors volunteer to perform nonobscene simulated sexual conduct for motion pictures or theatrical productions nor may their parents consent to such performances.[83] The Act's statutory language of "simulated sexual conduct," as applied to sixteen and seventeen-year-olds, must be questioned because the mandatory *compelling* state interest which justifies abridging free speech is lacking.

The societal interest in protecting sixteen and seventeen-year-old "children" from simulating nonobscene sexual conduct is strained.[84] As the age in the Act is progressively increased "there comes a point at which the prohibition against employing underage performers becomes a transparent means for prohibiting the performance itself. . . . That point is reached when the affected performers are sufficiently 'adult' so as to be no longer the legitimate subjects of protection of 'children.' "[85] The *Kantor* court concluded that, because Congress cannot prohibit the filming of all sexually explicit conduct under the first amendment, *Ferber* stands for the proposition that Congress can "prohibit the use only of those who truly are children in such performances."[86] Society's concern for protecting sixteen and seventeen-year-olds as "children" is tenuous. At age eighteen such individuals are regarded as "adults" in circumstances such as voting rights and mandatory draft registration requirements.[87] Furthermore, as children reach this age the physical acts to be performed on film become more natural to the performers. Therefore, Congress may not be protecting young adults from engaging in physical acts with which they would otherwise have no experience.[88]

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82. *Kantor*, 677 F. Supp. at 1428.
83. *Id.* at 1430.
84. *Id.* at 1429.
85. *Id.*
86. *Id.*
87. *Kantor*, 677 F. Supp. at 1430 n.43.
88. *Id.*

Legislative history reveals and confirms that the requisite compelling state interest is lacking. Congress was not motivated by a concern for people between the ages of sixteen and eighteen when it amended the statutory age. Rather, Congress wanted to facilitate the prosecution of cases involving thirteen and fourteen-year-olds. Mark Richard, a Deputy Assistant Attorney General, stated: "[i]f the law were amended to protect minors under the age of 18, rather than 16, it would be easier to prosecute cases in which 14 or 15-year olds have been sexually exploited, but regarding whom actual proof of age is not available."[89] Congress hoped to aid prosecutors in identifying the age of those depicted since some thirteen and fourteen-year-olds might pass for sixteen, but they would seldom pass for eighteen. This rationale and justification of protecting children does not support abridging first amendment rights under these circumstances. Congress must use less restrictive alternatives to facilitate the prosecution process.

The *Ferber* majority concluded, consistent with the first amendment, that the New York statute could prohibit the dissemination of non-obscene sexually explicit materials because the specified statutory age was merely sixteen. This conclusion, however, cannot be reached under the Child Protection Act. The Act was never meant to protect sixteen and seventeen-year-olds. Furthermore, the societal interest in protecting children, articulated in *Ferber,* does not justify restricting such an individual's first amendment rights. It is inappropriate for Congress to limit constitutionally protected behavior in an attempt to facilitate the prosecution of cases involving children less than sixteen years old.

B. The Suitability of the Definition of "Sexually Explicit Conduct"

The definition of "sexually explicit conduct," as defined in the Child Protection Act, is practically identical to the definition of "sexual conduct" in the New York statute discussed in *Ferber.* The change in the specified age from sixteen to eighteen, however, necessitates a more careful examination of the suitability of such definition.

1. Sexual Intercourse

The Child Protection Act, like the statute upheld in *Ferber,* defines sexually explicit conduct as "actual or simulated sexual intercourse."[90] Unlike the New York statute, section 2256(2) uses the word "including" followed by a list of four specific sexual contacts. Specifically, the four

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89. *See supra* note 78, at 505.
90. 18 U.S.C. § 2256(2) (1988).

sexual contacts listed are: genital-genital, oral-genital, anal-genital and oral-anal.[91] Congress' use of the word "including" expanded the definition of sexual intercourse: "Conventional principles of construction suggest that, from the use of the term 'including,' it may be presumed that there are other acts which also fall within the definition."[92]

Congress' open-ended definition of sexually explicit conduct is overinclusive. In fact, it is possible that Congress did not intend to limit the definition to the four acts specifically listed.[93] However, Congress' failure to establish a limit on the potential overbroad reach of the statute results in its infringement upon speech protected by the first amendment. A case-by-case evaluation of various sexual contacts depicted on film to determine whether they are within the meaning of the statute would not be an inviting prospect for judges and juries.[94] The term "including" should be deleted from section 2255(2) to quash this overinclusiveness. Furthermore, if the specified age in the Child Protection Act had been left at sixteen, like the New York statute in *Ferber*, then most likely "potential problems with the definition of 'sexual intercourse' in Section 2251(a) would be 'suitably limited,' and any potential overbreadth" could be analyzed later when raised by the facts of a specific case.[95]

2. Simulated Sexual Intercourse

The Child Protection Act forbids nonpornographic depictions of sixteen and seventeen-year-olds *simulating* sexual conduct. Unlike the potential overbreadth discussed in *Ferber*, the possible number of instances of sixteen and seventeen-year-olds simulating sexual conduct for nonpornographic films is not a tiny fraction.[96]

Kantor recognized that with respect to children fifteen or younger, there is little reason to portray them on film doing acts resembling sexual intercourse other than to produce pornographic materials.[97] Therefore, the court felt, with respect to fifteen-year-olds, there was "little reason to focus on the fact that 'sexually explicit conduct' is defined so to include both actual and simulated conduct."[98] However, the same cannot be said when the statute is applied to sixteen and seventeen-year-olds:

Major motion pictures intended for mass distribution may call

91. *Id.*
92. *Kantor*, 677 F. Supp. at 1430.
93. *Id.*
94. *Id.*
95. *Id.* at 1431.
96. *Id.*
97. *Kantor*, 677 F. Supp. at 1431.
98. *Id.*

> for the simulation of sexual intercourse, by characters portraying older teenagers, in roles which are otherwise not generally considered pornographic. When young people have reached an age where some forms of sexual intimacy can no longer be considered unnatural as experienced in their private lives, it becomes increasingly likely that some form of visual depiction, short of pornography, of these forms of intimacy will become part of serious artistic works.[99]

The *Ferber* decision permits the government to suppress speech for purposes unrelated to any societal harm caused by the expression itself.[100] The congressional objective of the Child Protection Act was to protect children from sexual abuse, however, the inclusion of simulated conduct goes far beyond this objective. To achieve a simulation of sexual intercourse, young actors can perform entirely innocuous physical acts which may create a lascivious visual effect.[101] The Child Protection Act's blanket prohibition, which dictates that no one under eighteen be allowed to perform the most innocuous physical acts in simulation, goes well beyond Congress' legitimate interest of child protection.[102]

The undifferentiated inclusion of simulated sexual conduct in the definition of "sexually explicit conduct" renders the Child Protection Act substantially overbroad when applied to sixteen and seventeen-year-olds. The Act abridges young actors' first amendment communicative processes by forbidding their participation in nonpornographic roles which require the simulation of sexual intercourse.

C. *The Chilling Effect of the Child Protection Act on Constitutionally Protected Expression*

The *Ferber* Court failed to provide meaningful guidance for the application of the overbreadth doctrine to specific facts. The majority failed to articulate how much overbreadth would be tolerated in the potential reach of a statute before such statute would unconstitutionally chill the exercise of legitimate first amendment rights.[103] The Supreme Court opinion in *Ferber,* composed of the collective views of the Justices, made clear "only that a majority of the members of the Court were able to reconcile other differences in principle on the basis of a shared view

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99. *Id.*
100. Comment, *Child Pornography: Ban The Speech And Spare The Child? New York v. Ferber,* 32 DE PAUL L. REV. 685, 705 (1983).
101. *Kantor,* 677 F. Supp. at 1431.
102. *Id.*
103. *Id.* at 1425.

that the overbreadth of the New York statute was *de minimis*."[104]

The Child Protection Act's potential chilling effect on films and other forms of protected expression is unacceptable. *Kantor* concluded that the amount of tolerable overbreadth "depends on how clearly the permitted encroachment is necessary for the legitimate protection of children, and on how narrowly any overbreadth encroaches on expressions deemed to have marginal first amendment value."[105] In effect, the *Kantor* court provides a two-part analysis: first, whether it is truly necessary to abridge free expression in order to protect children and, second, if it is necessary to abridge such expression, then to what extent does such overbreadth abridge protected expression. Applying this standard to the facts in *Kantor*, the court recognized that the artistic expression in the film "Those Young Girls" is the most marginal type of expression protected by the first amendment.[106] However, many other forms of expression depicting older teenagers simulating nonobscene sexual conduct warrant first amendment protection and are forbidden by section 2251(a). The statute reaches a substantial number of impermissible applications. For example, such depictions as photographs incorporated in pediatric medicine texts, sculptures such as Donatello's David and films like "Fast Times At Ridgemont High," "The Blue Lagoon" and "The Exorcist" may be prohibited by the Child Protection Act.[107] With sufficient evidence regarding the age of the children involved and whether such depictions satisfy the definition of section 2251 *et seq.* producers of such materials may be subject to prosecution. This is unlikely since prosecutorial distaste for these types of educational, medical and artistic portrayals is not as strong as the distaste for films like "Those Young Girls." Nevertheless, the very existence of the Act has a chilling effect on constitutionally protected expression. Those who present books, plays and films portraying teenagers cannot be singled out for punish-

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104. *Id.* at 1424. Justice O'Connor's concurrence stated that the New York statute might be overbroad because it "bans depictions that do not actually threaten the harms identified by the Court." New York v. Ferber, 458 U.S. 747, 775 (1982). Justice O'Connor mentioned clinical pictures of adolescent sexuality reproduced in medical textbooks as well as *National Geographic's* pictures of children engaged in rites approved by their cultures as examples of depictions regulated by the statute which may not "trigger the compelling interests identified by the Court." *Id.* Justice O'Connor, however, brushed these examples aside and refused to apply the overbreadth doctrine on the basis that this potential overbreadth was not sufficiently substantial. Justice Brennan, joined by Justice Marshall, also declined to apply the overbreadth doctrine on the basis that such overbreadth was *de minimis. Id.* at 776. Justice Stevens avoided the overbreadth analysis, postponing it until actually confronted with a case that presents facts where application of the statute is overbroad. *Id.* at 780.

105. *Kantor,* 677 F. Supp. at 1431.

106. *Id.*

107. United States v. Reedy, 632 F. Supp. 1415, 1421 n.15 (W.D. Okl. 1986).

ment simply because they address teenage sex in a realistic and nonobscene manner.[108]

In addition to prohibiting the production of such materials, section 2251(a) interferes with the right of young performers to compete for roles in nonpornographic works simply because a single scene may fit one of the statutory definitions.[109] It is precisely this sort of deterrence of protected expression that the first amendment guards against.

The Child Protection Act does not merely have a marginal affect on freedom of speech. The Act abridges the constitutional rights of all those involved in artistic expression such as producers, writers and young performers. Additionally, audiences' first amendment interests are infringed. Thus, a substantial sector of the film and theater industry is affected by the Child Protection Act and such effect should not be considered *de minimis:* "[t]he overbreadth of Section 2251 is not limited simply to situations which are rare and insignificant."[110]

IV. CONCLUSION

The court in *Kantor* concluded that the definition of "sexually explicit conduct" in section 2251(a) of the Child Protection Act is not suitably limited and described because the "potential encroachment upon the first amendment is not properly directed to the legitimate objectives of protection of children from the abuses of child pornography."[111] Furthermore, the court said it would easily conclude that, given such unsuitability and the chilling effect on protected expression, the potential overbreadth of section 2251(a) is substantial and should be struck down facially:[112] "Congress should be sent back to the task of designing a statute, the reach of which is more clearly limited to the protection of children."[113]

However, the *Kantor* court concluded section 2251(a) could "not be struck down facially, at least until such time as a case is presented in which the alleged overbreadth of the statute is urged by someone affected by it."[114] This conclusion was colored by the fact that the overbreadth issue was presented to the court in the defendants' motion to dismiss, rather than during a trial on the merits, and in the context of "Those

108. People v. Ferber, 52 N.Y.2d 674, 679, 422 N.E.2d 523, 526 (1981), *rev'd* 458 U.S. 747 (1982).

109. *Kantor,* 677 F. Supp. at 1432.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Kantor,* 677 F. Supp. at 1432.

Young Girls," a film which clearly falls within the category of speech covered by the Child Protection Act.

Although the court in *Kantor* postponed such a decision until it actually arises, the constitutionality of the Child Protection Act, particularly section 2251(a), will be challenged and eventually struck down under the first amendment overbreadth doctrine. *Kantor* is a preview illustrating how courts will react when confronted with the overbreadth issue of the Child Protection Act.

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