

the moral rights provision of the Berne Convention.¹²²

¹²² Recent adoption of legislation incorporating some of the copyright standards of the International Convention for the Protection of Literary and Artistic Works, (better known as the Berne Convention) may force Congress to consider how expanding artists' proprietary interests in their works affects the public interest in the dissemination of ideas embodied in the art. Although the Berne Convention recognizes moral rights of authors, it remains to be seen to what extent, if any, the United States will recognize these rights in its efforts to provide copyright protection consistent with that provided under the Berne Convention. The Convention itself provides some exceptions to protection of authors' moral rights for the public interest. See Phillips, *The Berne Convention and the Public Interest*, 11 COLUM. J. L. & ARTS. 165-67 (1986). It is not clear, however, whether these exceptions are coextensive with the first amendment rights guaranteed under the United States Constitution. The Preliminary Report of the Ad Hoc Working Group on United States Adherence to the Berne Convention expresses the opinion that "there are substantial grounds for concluding that the totality of U.S. law provides protection for the rights of paternity and integrity sufficient to comply with [Article] 6bis [of the Berne Convention which recognizes these moral rights], as it is applied by various Berne countries." Preliminary Report of the Ad Hoc Working Group on United States Adherence to the Berne Convention, Ch. 6, quoted in Geller, *Comments on Possible U.S. Compliance with Article 6 Bis of the Berne Convention*, 10 COLUM. J.L. & ARTS 513, 665 (1986).

THE CHILD PORN MYTH

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I. INTRODUCTION: WHAT IS THE MYTH?

Child pornography came to be perceived as a serious and pervasive problem in American society during the mid-1970s, shortly after items of child pornography appeared on the shelves of adult bookstores in New York, Los Angeles, Chicago, Minneapolis, and other major cities. Almost immediately, self-appointed moral crusaders and some feminists began storming the country to decry the shameful exploitation of children by child pornographers and adults who engage or desire to engage in sexual activity with children. Articles and editorials appeared in nearly every newspaper in the United States calling for a stop to child pornography. Within a year or two, in the face of mounting public pressure, distributors and retailers of adult pornography had removed child pornography from their stocks and shelves. The federal government and state legislatures responded by enacting legislation proscribing the production and sale of child pornography and by funding law enforcement efforts to combat it. By the time the first federal child pornography law took effect in February, 1978, the production and commercial distribution of child pornography in the United States had been virtually eliminated.

Despite this, the child pornography issue continued to be exploited nationwide by law enforcement officials, moral crusaders, politicians, and the media. What may have begun as a legitimate concern for the well-being of children quickly turned into a "moral panic" which swept the nation.¹ Currently, child pornography slide shows and "teach-ins" continue to be given by law enforcement personnel, religious groups, Women Against Pornography,² and other groups professing the danger that child pornography poses to children and society. Thousands of news

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¹ Cf. Eliasoph, *Drive-In Morality, Child Abuse, and the Media*, 90 SOCIALIST REV. 7, 29 (1986) [hereinafter Eliasoph]. The term "moral panic" refers to the situation "in which a minor social problem expresses and preempts a deeper related one." *Id.* at 29.

² This feminist organization, claiming 10,000 members, was founded in 1979 by author Susan Brownmiller and Dorchon Leidholdt. It seeks to change public opinion

articles, exposes, editorials, books, and television programs still proliferate at an astonishing rate, warning parents and children about kidnappings or sexual advances from strangers, neighbors, and, occasionally, relatives.³

School programs aimed at teaching children about "good" touch and "bad" touch have been developed and implemented.⁴ Professionals and volunteers who work with children, particularly teachers of young children, day care workers, Big Brothers, and scout leaders, are literally terrified of touching or being alone with a child, lest they be accused of abuse. Widespread fear about sexual abuse has led frantic parents, social workers, and others who work with children to look to sexual abuse as the cause of any difficulties which a child might have in growing up — e.g., poor grades, shyness or inability to relate to peers, or fear of adult men.⁵ Moreover, childhood expressions of sexuality—masturbation and sex play—have been stigmatized and treated as possible precursors to adult pedophilia or evidence of past or ongoing sexual abuse.⁶ Some researchers have even defined childhood sex play as a new form of sexual abuse.⁷

At the same time, laws have been passed requiring psychiatrists, psychologists, psychotherapists, and other professionals to report any suspicion of sexual activity.⁸ Such mandatory reporting is likely to deter individuals from seeking counseling. Compliance with mandatory reporting laws thus "creates problems

about pornography so that Americans no longer view it as socially acceptable or sexually liberating. See *ENCYCLOPEDIA OF ASSOCIATIONS* 1410 (K. Gruber 21st ed. 1987).

³ See, e.g., Andrews, *Are We Raising A Terrified Generation?* *PARENTS*, Dec. 1986, at 138.

⁴ Bowen, *Facing Up to Sex Abuse. Prevention Programs Proliferate in Classrooms Across the U.S.*, *TIME*, Nov. 12, 1984, at 91-92.

⁵ S. O'BRIEN, *CHILD PORNOGRAPHY*, 103-05, (1983); see also Schultz, *Victims, HELPING THE SEXUALLY OPPRESSED* 118-19 (H. GOCHROS, ed. 1986).

⁶ Author John Crewdson sternly warned his readers: "When abuser and victim are both very young, the beginnings of a lifelong compulsion to have sex with children may be easily passed off as 'playing doctor'. In somewhat older children, what may be the emergence of a grown-up pedophile is likely to be dismissed as preadolescent sex play." J. Crewdson, *BY SILENCE BETRAYED* 207 (1988).

⁷ "For a long time," reported one recent article, "most people wrote it off as just 'playing doctor.' Now authorities know better. Children as young as 4 and 5 are sexually abusing other children." The article reports the findings of Toni Cavanagh Johnson, a researcher associated with a California child abuse treatment center, in a recent study of forty-seven boys and thirteen girls, ages four to thirteen. According to the study, the mean age of boy sex abusers was eight-and-one-half and the mean age of girl sex abusers was six-and-one-half. Johnson also noted that girls are more prone to the use of force than are boys. Curtin, *Child Abusers May Be Children*, *St. Petersburg Times*, Oct. 16, 1988, at 1, col. 4. See also Johnson, *Child Perpetrators — Children Who Molest Other Children: Preliminary Findings*, 12 *CHILD ABUSE & NEGLECT* 219-29 (1988).

⁸ See, e.g., *DEL. CODE ANN.* tit. 16, § 908 (1983); *MINN. STAT. ANN.* §§ 556-626(8) (West 1983); *W. VA. CODE* § 49-60-7 (1980). See also *id.* at 1118-19 and nn.27-33; *Federal Child Abuse Prevention and Treatment Act of 1974*, 42 *U.S.C.* §§ 5101-07 (1983).

and encroaches on important interests of the offender, including breach of confidentiality, violation of privilege, and potential invasion of privacy."⁹ Moreover, enforcing such laws may have the contrary result of placing the child at greater risk.¹⁰

In this climate of acute social paranoia and suspicion, claims of child sexual abuse have reached epidemic proportions.¹¹ Many innocent individuals—parents and non-parents, teachers and day-care workers—have been falsely accused of crimes involving children. Such alleged crimes include sex rings with dozens of children, animal sacrifices, satanic rituals, gang rapes, child pornography, child prostitution, and child murder.¹² Many of the accused are convicted on little or no evidence.¹³ Many are acquitted, but are left bankrupt by the costs of defending the charges against them.¹⁴ Often they are unable to find jobs and are left socially and emotionally ruined.¹⁵

Paradoxically, according to American Enterprise Institute director Douglas Besharov, up to sixty-five percent of all child abuse reports in the United States today may be unfounded.¹⁶ Critics of Besharov point out that "unfounded" does not necessarily mean that the incident did not occur. Rather, social services organizations merely failed to find sufficient evidence to warrant further action. But even so, a great many child abuse accusations may be groundless, some even malicious.¹⁷ Given

⁹ See *infra*, Coleman, note 10, at 1115.

¹⁰ *Id.* Coleman, *Creating Therapist-Incest Offender Exception to Mandatory Child Abuse Reporting Statutes — When Psychiatrist Knows Best*, 54 *U. CINN. L. REV.* 1113 (1986). See also Scott, *Why Clergy Shouldn't Tell*, *MINISTRY* 18, 28 (Jan. 1989). See also Money & Weinrich, *Juvenile, Pedophile, Heterophile: Hermeneutics of Science, Medicine and Law in Two Outcome Studies*, 2 *MED. & LAW* 39, 52-53 (1983).

¹¹ See *supra* notes 1-7 and accompanying text.

¹² See, e.g., Lamar, *Disturbing End of a Nightmare: The Scott County Sex-Abuse Cases Draw to a Confusing Close*, *TIME*, Feb. 25, 1985, at 22; see also *Hollywood Tapes and Testimony: A Chilling Sexual-Abuse Case Takes a Strange Turn*, *TIME*, Dec. 15, 1986, at 64; Moss, *Are the Children Lying?*, *A.B.A. J.*, May 1, 1987, at 59-62.

¹³ See generally *infra* notes 193-244 and accompanying text.

¹⁴ See *infra* note 15.

¹⁵ S. EBERLE, *THE POLITICS OF CHILD ABUSE*, 17-91 (1986) [hereinafter EBERLE]. The Virginia McMartin case is an example of the high cost of litigating with respect to financial, physical and emotional drain upon defendants. *\$3 Million Bail Set in Child Sex Case*, *N.Y. Times*, Dec. 18, 1987, at 24, col. 3; *Preschool Founder Is Warned in Abuse Trial*, *N.Y. Times*, Sept. 13, 1987, at 48, col. 1. See also, R. UNDERWAGER & H. WAKEFIELD, *ACCUSATIONS OF CHILD SEXUAL ABUSE* (1988).

¹⁶ Besharov, *Unfounded Allegations — A New Child Abuse Problem*, 83 *THE PUB. INTEREST* 18, 23 (1986).

¹⁷ See, e.g., Gordon, *False Allegations of Abuse in Child Custody Disputes*, 2 *MINN. FAM. L.J.* 1, 4 (1985); Schultz, *One Hundred Cases of Erroneously Charged Child Sexual Abuse: A Survey and Recommendations*, (presented at the 2d Annual Conference of the Victims of Child Abuse Laws (VOCAL), available from the author, Professor of Social Work, School of Social Work, West Virginia University, Morgantown, West Virginia); Coleman, *False Allegations of Child Sexual Abuse: Have the Experts Been Caught With Their Pants*

the fact that social service agencies generally work under great pressure and suffer a high turnover rate and constant shortage of properly trained personnel, errors in judgment are inevitable.¹⁸ Moreover, some individuals have been falsely convicted for a variety of crimes, as certain physical contacts may be misconstrued and stories may be fabricated by children during interviews and cross-examinations.¹⁹ Due to the intense feelings provoked by allegations of sexual abuse, as well as by the general disinformation disseminated about sexual abuse, truth and fiction have to some extent become indistinguishable.²⁰

A. Law Enforcement Activities Motivated by the Myth

The activities of law enforcement agencies have also grown exponentially in this area. United States Customs, the United States Postal Inspection Service, the Federal Bureau of Investigations ("FBI"), and state and local law enforcement and social service agencies have established special units and inter-agency task forces to combat child pornography and pedophilia. Dozens of undercover schemes aimed at enticing individuals into trading, selling, purchasing, or receiving child pornography through the mail have been implemented and several hundred individuals have been arrested. Some parents have been arrested and harassed by law enforcement authorities for taking innocent pictures of their children.²¹ Nudists and professional photographers who photograph children are particularly fearful of arrest. As a result, the number of depictions of nude children in the

Down? FORUM, Jan.-Feb. 1986, at 12-21; D. Schuman, False Accusations of Physical and Sexual Abuse, (paper presented at the Annual Conference of the American Academy of Psychiatry and the Law, Nassau, Bahamas, Oct. 26, 1984, available from the author, Director of Psychiatry, Norfolk County Probate and Family Court, Dedham, MA 02026); Dullea, *When mothers lie about child abuse*, San Francisco Chron., Feb. 4, 1987, at 20.

¹⁸ See Nathan, *The Making of a Modern Witch Trial*, Village Voice, Sept. 29, 1987, at 19; see also D. HECHLER, *THE BATTLE & THE BACKLASH* 135 (1987).

¹⁹ See, e.g., C. Herbert, *The Use of Anatomically Detailed Dolls in an Investigative Interview: A Preliminary Study of 'Non-Abused' Children*, (presentation funded by the British Columbia Ministry of Labor, Women's Programs, and the Chris Spencer Foundation, available from the authors, Department of Family Practice, University of British Columbia, 5804 Fairview Avenue, Vancouver, B.C., Canada V6T 1W5). The authors noted that "all of the children [in this sample] exhibited some behaviors that have been considered by some clinicians as evidence of sexual abuse," and that "it was often difficult to sort out fact from fantasy as children often added realistic detail to fantasized events. See also R. Underwager, *Behavior of Abused and Non-abused Children in Interviews With Anatomically-Correct Dolls*, (unpublished paper available from Institute for Psychological Therapies, 2344 Nicollet Ave. S., Suite 117, Minneapolis, Minn. 55404-3371); Nathan, *supra*, note 18; Lees-Haley, *Innocent Lies, Tragic Consequences: the Manipulation of Child Testimony*, 10 TRIAL DIPLOMACY J. 23, 23-26 (Fall 1987).

²⁰ See, e.g., Charlier & Downing, *Facts, fantasies caught in tangled web*, The Commercial Appeal, Jan. 1988, § A, at 1-2; *Justice Abused: A 1980s Witch-Hunt*, *id.* at 1-6.

²¹ See, e.g., *infra* notes 212-16 and accompanying text.

pages of art photography books and in American nudist publications has declined significantly since the mid-seventies. Sex education books depicting children have also been withdrawn from the market or censored.

B. Motivation for Adult—Child Sexual Contacts

In spite of, or perhaps because of, the hysteria over child pornography, the solution to the problem of sexual abuse of children continues to elude American society. One clue to solving that problem lies in understanding the motivations of adults who engage in sexual acts with children. Adults engage in such behavior for a wide variety of reasons, the most important of which are sexual desire (whether fixed or transitory) and power. A number of sex researchers have found that sexual desire toward minors is quite common among "normal" heterosexual adult men and women.²²

Specifically, one study of penile volume changes ("PVC") in both normal heterosexual and pedophilic men revealed that "[w]ith males who have no deviant object preferences, clearly positive sexual reactions occur [even] to 6- to 8-year-old female children."²³ While this finding "does not imply that every adult male is equally erotically sensitive to little girls . . . the number of . . . [normal (i.e. non-deviant) men who are so sensitive] must be substantial."²⁴ Some researchers believe that sexual desire for adolescents is so common that it should be considered normative among heterosexuals, despite its legal definition as "deviant."²⁵

²² Misconceptions and mistaken assumptions about childhood sexuality and adult-child sexual contacts abound not only in the popular press, but in the clinical literature as well. A number of researchers, however, have attempted to correct the paucity of accurate information. See, e.g., Kilpatrick, *Childhood Sexual Experiences: Problems and Issues in Studying Long-Range Effects*, 23 J. SEX RES. 173 (1987); Kilpatrick, *Some Correlates of Women's Childhood Sexual Experiences: A Retrospective Study*, 22 J. SEX RES. 221 (1986); Bauermann, *Sexualität, Gewalt und Psychische Folgen*, BUNDESKRIMINALAMT 523, (English summary, 1982); Nelson, *Incest: Self-report Findings From a Nonclinical Sample*, 22 J. SEX. RES. 4 (1986); L. CONSTANTINE & F. MARTINSON, *CHILDREN & SEX — NEW FINDINGS, NEW PERSPECTIVES* (1981); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives*, 52:3 CHILD WELFARE 147 (1973).

²³ Freund, *The Female Child as a Surrogate Object*, 2 ARCHIVES OF SEXUAL BEHAV. 119-30 (1972) [hereinafter Freund I]; see also Freund, *Erotic Preference in Pedophilia*, 5 BEHAV. RES. THERAPY 339 (1967).

²⁴ Freund I, *supra* note 23, at 131-32.

²⁵ See, e.g., Righton, *The Adult*, reprinted in PERSPECTIVES ON PEDOPHILIA 24 (B. Taylor ed. 1981).

I am taking it for granted that feelings of sexual attraction in adults towards at least some young people from about fifteen upwards are so common as to be virtually universal, and that similar feelings for boys and girls in the years immediately following puberty are experienced by rather more adults than most of them are prepared to acknowledge. These feelings, (while they can be intense), are occasional and transitory for the most part: the point is that

An examination of cross-cultural as well as ethological data suggests that male sexual attraction towards adolescent females is universal.²⁶

No studies comparable to the PVC studies with men have been conducted with women. Many women, however, also experience such desires. Anecdotal accounts of adolescent and pre-adolescent boys "initiated" sexually by older women can be found in the clinical literature as well as the popular press.²⁷ Dr. Alayne Yates has documented adult female sexual desires for their own young children; reports by many women of experiencing orgasm during breast-feeding further suggest that adult women having sexual feelings for children may not be uncommon.²⁸

Research on incest suggests that incestuous sexual desires are generally transitory or situational in nature, rather than a function of sexual orientation or preference. One study found that only four percent of a sample of 147 fathers who were incestuously involved with their children admitted a sexual preference for children.²⁹ Another study revealed that men incarcerated for incest offenses experienced penile reactions similar to those of community volunteers when shown pictures of females. Other researchers found little evidence of pedophilia in a mixed group of heterosexual men incarcerated for incest offenses.³⁰ Feminists have analyzed a substantial number of incest cases as the expression of domination and power, rather than of sexual attraction,

they occur at all. For to acknowledge this is to remind ourselves that the distinction between people with a relatively exclusive sexual preference for children, (whether or not they are 'active') and the rest of humanity is one of degree, not of kind.

Id. at 25.

²⁶ For example, in most societies, the average age for marriage of females is between the ages of twelve and fifteen, while the average age for males is between nineteen and twenty-one. S. FRAYSER, *VARIETIES OF SEXUAL EXPERIENCE: AN ANTHROPOLOGICAL PERSPECTIVE ON HUMAN SEXUALITY* 251 (1985).

²⁷ See, e.g., *Child sex abuse by women said underestimated*, *The Morning Call*, Nov. 12, 1988, at A30; *Woman Is Accused of Molesting Her Son*, *St. Petersburg Times*, Feb. 21, 1988, at 3; Morris, *Teacher Admits Sex With Student*, *The Chronicle*, Apr. 17, 1983, at 1.

²⁸ A. YATES, *SEX WITHOUT SHAME — ENCOURAGING THE CHILD'S HEALTHY SEXUAL DEVELOPMENT* (1982). Masters & Johnson reported that "[n]ot only did [nursing mothers] report sexual stimulation (frequently to plateau tension levels and, on three occasions, to orgasm) induced by suckling their infants, but as a group they also described interest in as rapid return as possible to active coition with their husbands. There was a heavy overlay of guilt expressed by six of the 24 women who admittedly were stimulated sexually by the suckling process." W. MASTERS & V. JOHNSON, *HUMAN SEXUAL RESPONSE* 162 (1966).

²⁹ P. GEBHARD, *SEX OFFENDERS — AN ANALYSIS OF TYPES* 665-66, 681 (1965).

³⁰ *EROTIC PREFERENCE, GENDER IDENTITY, AND AGGRESSION IN MEN: NEW RESEARCH STUDIES* 162 (R. Langevin ed. 1985). Incestuous child molesters have more appropriate sexual age preferences than those who are nonincestuous. Quinsey, Chaplin, & Carrigan, *Sexual Preferences Among Incestuous and Nonincestuous Child Molesters*, 10 *BEHAV. THERAPY* 562 (1979).

i.e. pedophilia.³¹

Power relations also appear to contribute to instances of day-care abuse. Despite substantial play in the press characterizing day-care centers as hunting grounds for adults who are sexually attracted to children, research indicates that these individuals are generally interested sexually and emotionally in children between the ages of six and fourteen.³² Children in day-care, on the other hand, are typically aged one- to five- years-old. FBI Agent Kenneth Lanning agrees that most day-care center cases do not involve pedophilia.

What you are dealing with is individuals who have emotional, psychological problems, hostilities, angers, pent up emotions, and they are simply taking them out on available targets, available vulnerable targets, who in this case are children. But the individual who is working at, this time, ABC nursery school, today, molesting children . . . could be . . . working at the XYZ nursing home and be doing the same thing to 85-year-old senile people laying [sic] in bed.³³

Since most sexual contacts between adults and children are the result of proximity, opportunity, and convenience (mostly for the adult), the scope of the problem of child sexual exploitation cannot be attributed to those few individuals who prefer children as subjects of fantasy or as actual sexual partners. Child sexual abuse is symptomatic of deeper problems in American society, where girls are socialized as untouchable sex objects and boys are encouraged to measure their self-esteem and express their power in sexual terms; where children are kept in positions of subservience to adult wishes and needs, and are treated as convenient outlets for adult aggression; where children are denied age-appropriate, sex-positive sex education; and where children, regardless of age or development, are treated as second-class citizens.³⁴ Unfortunately, those who exploit the hysteria over child pornography unwittingly or pur-

³¹ L. GILBERT & P. WEBSTER, *BOUND BY LOVE — THE SWEET TRAP OF DAUGHTERHOOD* 82-105 (1982); Gordon, *Incest and Resistance: Patterns of Father-Daughter Incest, 1880-1930*, 33 *SOC. PROBS.* 253 (1986).

³² See, e.g., Bernard, *An Enquiry Among a Group of Pedophiles*, 11 *J. SEX RES.* 242 (1975); G. WILSON & D. COX, *THE CHILD-LOVERS — A STUDY OF PAEDOPHILES IN SOCIETY* 18 (1983); Mohr, *Age Structures in Pedophilia*, reprinted in *ADULT SEXUAL INTEREST IN CHILDREN* 45 (M. Cook & K. Howells, eds. 1981).

³³ *Transcript of Proceedings*, U.S. Department of Justice, the Attorney General's Commission on Pornography, Public Hearing, Miami, Fla. (Nov. 20-22, 1985), at 228 [hereinafter *Meese Commission*].

³⁴ See, e.g., Calderone, *Above and Beyond Politics: The Sexual Socialization of Children*, at 131, 137; Millet, *Beyond Politics? Children and Sexuality*, reprinted in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 221-24 (C. Vance ed. 1984); Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 *ARIZ. ST. L.J.* 865.

posefully divert public attention away from these underlying societal ills.

II. CHILD PORNOGRAPHY AND THE LAW

The Protection of Children Against Sexual Exploitation Act of 1977 proscribed the sale and commercial exchange of child pornography.³⁵ Child pornography was defined under the Act as any obscene³⁶ visual depiction of a person under the age of sixteen showing that person either engaged in any sexual activity, in a state of sexual arousal, or posed in such a way that the genitals or anal area were lewdly exhibited. A simple nude photograph of a minor was not, under the 1977 Act, considered child pornography.³⁷ In essence, the 1977 law made it a federal crime, punishable by up to ten years imprisonment and a \$10,000 fine for a first offense, to produce or distribute obscene depictions of children for commercial consideration, if such production or distribution involved the use of the mails or had some other connection with interstate commerce sufficient to invoke federal law.

In 1984, in the wake of the Supreme Court decision in *New York v. Ferber*,³⁸ Congress amended the child pornography law by removing the requirements that the depictions be obscene or that they be commercially exchanged or intended for commercial usage. Congress also extended the scope of the law by broadening the prohibited conduct to include depictions of "children" between the ages of sixteen and eighteen and by making it a crime to receive or import child pornography. Additionally, the 1984 amendments raised the maximum fine for a first offense to \$100,000 and added a provision providing for the forfeiture of certain personal belongings — for example, automobiles, cameras, videotape players, and even houses — alleged to have been used in connection with the crime.³⁹

³⁵ Protection of Children Against Child Exploitation Act of 1977, 18 U.S.C. §§ 2251-55 (1978) (original version at ch. 110, § 2251, 92 Stat. 7 (1978); Senate Judiciary Comm., Protection of Children Against Sexual Exploitation Act of 1977, S. Rep. No. 438, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 40, 40 (1978).

³⁶ See *infra* note 43 and accompanying text.

³⁷ See *supra* note 35. By implication, nude photographs of minors are not to be considered child pornography.

³⁸ 458 U.S. 747 (1982).

³⁹ The United States Department of Justice has taken the position that federal law authorizes the forfeiture of property which has been used in the commission of an offense under the federal child pornography laws, even though the owner of the property is not the person charged. Section 2254 (A)(2) allows the United States to forfeit "[a]ny property, real or personal, tangible or intangible, which was used or intended to be

The 1984 amendments incorporated into the Child Protection Act of 1984⁴⁰ took effect on May 21, 1984. In 1986, it became illegal to publish or cause the publication of any advertisement offering to sell or requesting to purchase child pornography, with the same attendant penalties for violators.⁴¹

Since, under current federal law, a depiction of a minor need not be found obscene to be proscribed, child pornography constitutes a *per se* category of unprotected speech. Once an item is found to fit the description of child pornography, it is illegal to print, publish, exchange, trade, sell, reproduce, receive, or otherwise transfer possession of it. Such activities are illegal even if, taken as a whole, the item would not be obscene under the controlling test promulgated by the Supreme Court in *Miller v. California*.⁴² That case held that a work is not obscene if it possesses "serious literary, artistic, political, or scientific value," if it depicts explicit sexual conduct unoffensively, and if it does not primarily appeal to a "prurient interest" in sexuality.⁴³

State child pornography laws vary widely from state to state, but they generally encompass a broader range of materials than does the federal law. The laws of certain states, such as Ohio, Massachusetts, Kansas and Indiana, proscribe the depiction of nudity of minors *per se*: their definitions include any depiction of the buttocks and developed or undeveloped female breasts, as well as of the genitals.⁴⁴ The Massachusetts law, which provides

used," to commit or promote criminal sexual exploitation of children, but not "to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 18 U.S.C. § 2254 (A)(3) (1982 & Supp. V 1987). Thus, where the Federal government brought forfeiture proceedings against a house and property owned by a woman whose son and daughter-in-law had allegedly created child pornography and had sex with children in that house, the property is subject to forfeiture unless the woman can "demonstrate that she did not know what was taking place there." Horgan, *Son Stands Accused Mother Stands To Lose Her Home*, The Hartford Courant, June 5, 1988, at A2. See also, *Guilty Until Proven Innocent*, The Hartford Courant, June 13, 1988, at B6.

⁴⁰ 18 U.S.C. §§ 2251-55 (1984).

⁴¹ 132 CONG. REC. H8590-92(daily ed. Sept. 29, 1986) (statement of Rep. Hughes); *The Child Sexual Abuse and Pornography Act of 1986* (codified as amended, at 18 U.S.C. §§ 2251-55 (1986)).

⁴² 413 U.S. 15 (1973).

⁴³ *Id.* at 24.

⁴⁴ OHIO REV. CODE ANN. § 2907.323 (Anderson 1987 & Supp. 1988). ILLEGAL USE OF MINOR IN NUDITY-ORIENTED MATERIAL OR PERFORMANCE

(A) No person shall do any of the following:

(1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce, or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply: (a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psy-

an exception only for bona fide scientific and educational institutions,⁴⁵ was overturned by the Supreme Judicial Court of Massachusetts and arguments were heard in January, 1989, by the United States Supreme Court.⁴⁶ At least eleven states criminalize lascivious or erotic depictions of minor female breasts.⁴⁷

chologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used;

(2) Consent to the photographing of his minor child or ward, or photograph his minor child or ward, in a state of nudity or consent to the use of his minor child or ward in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought, or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought, or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

Id. See also, MASS. GEN. LAWS ANN. ch. 272, §§ 29A-31 (West 1984); KAN. STAT. ANN. § 21-3516 (1984 & Supp. 1987); IND. CODE ANN. § 35-49-1-9 (Burns 1985 & Supp. 1988). These laws may or may not include certain exceptions. See, e.g., OHIO REV. CODE ANN., § 2907.323 (ANDERSON 1987 & SUPP. 1988), MASS. GEN. LAW.

⁴⁵ Massachusetts provides a defense "for a bona fide scientific or medical purpose, or for an educational or cultural purpose for a bona fide school, museum, or library. *Id.* at § 29A.

⁴⁶ See *Commonwealth v. Oakes*, 401 Mass. 602 (1988), 518 N.E.2d 836, cert. granted, Massachusetts v. Oakes, 108 S. Ct. 1984 (1988). (reviewing a Massachusetts case which found a Massachusetts statute unconstitutionally overbroad by making it a crime to knowingly permit a child under the age of eighteen "to pose or be exhibited in a state of nudity . . . for purposes of visual representation or reproduction in any book, . . . photograph, or picture."); Brief Amicus Curiae of The Law & Humanities Institute, authored by Edward De Grazia, Counsel of Record, and Lawrence A. Stanley, Of Counsel (oral argument heard Jan. 17, 1989); MASS. GEN. LAWS ANN. (West 1984) ch. 272, §§ 29A & 29B.

⁴⁷ These state statutes include: IDAHO CODE § 1507 (1), (2)(d) (1989); IOWA CODE ANN. §§ 728.1(g), 728.12 (West 1979 & Supp. 1988); KAN. STAT. ANN. § 21-3516 (2)(D) (1988); KY. REV. STAT. ANN. § 531.300 (4)(D) (Michie/Bobbs-Merrill 1985 & Supp. 1988); MICH. COMP. LAWS § 750.145 (1968 & Supp. 1988); MISS. CODE ANN. § 97-29-103 (1972 & Supp. 1988); N.H. REV. STAT. ANN. § 650:1 (VI) (1955 & Supp. 1988); OHIO REV. CODE ANN. § 2907.01 (Anderson 1953 & Supp. 1988); 18 PA. CONS. STAT.

Other states look beyond the actual contents of the depiction in question and examine intent in determining whether an item constitutes child pornography. Michigan and Idaho, for instance, prohibit "erotic nudity," while other states, such as California and Washington, prohibit nude depictions created, sold, exchanged, or received "for the purpose of sexual stimulation of the viewer."⁴⁸ Another section of California law prohibits nude depictions "intended to appeal to the prurient interests of any persons."⁴⁹ Similar provisions have been enacted in Missouri,⁵⁰ Iowa,⁵¹ and Utah.⁵²

Legal proscriptions regarding the age of a "child" may also differ from state to state. Although most states set the legal age for nude sexually suggestive depictions at eighteen, a few states, such as New York, Montana, and Vermont still follow the 1978 federal law and set the upper age limit of child pornography at sixteen.⁵³ Similarly, Indiana's proscription on nudity applies only to "a person under sixteen (16) years of age."⁵⁴ Most states criminalize possession of child pornography, but only if the prohibited items are possessed for a commercial purpose.⁵⁵ However, at least fourteen states—Alabama, Arizona, Colorado, Florida, Illinois, Minnesota, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania, Texas, Utah and Washington—have outlawed mere possession of what they define as child pornography.⁵⁶ Finally, some states not only proscribe child pornography in the

ANN. § 5903(E)(2) (Purdon 1972 & Supp. 1988); S.D. CODIFIED LAWS ANN. § 22-24-27(a) (1988); UTAH CODE ANN. § 76-10-1201(1)(b) (1978 & Supp. 1988).

⁴⁸ MICH. COMP. LAWS § 750.145c(d) (1986); IDAHO CODE 18-1506, 18-1507 (1987 & Supp. 1988); CAL. PENAL CODE § 311.3(b)(5), § 311.4(d) (West 1988); WASH. REV. CODE ANN. § 9.68A.011 (West 1988).

⁴⁹ CAL. PENAL CODE § 311.3(a)(5) (West 1988). Under California law, even where a photograph cannot be found to constitute child pornography, the adult may still be prosecuted under the child protection laws. In January, 1983, a Riverside, California schoolteacher was convicted for child molestation after he asked several boys to pose for photographs without their shirts. Deputy District Attorney David Gunn said that although the defendant did not approach the boys sexually or fondle them, because he admitted to being sexually attracted to boys, by "asking them to pose shirtless, he violated the misdemeanor molestation law. . . ." *Shirtless Photos Lead to Misdemeanor Molestation Conviction*, Press-Enterprise, Riverside, CA, Feb. 17, 1983.

⁵⁰ MO. ANN. STAT. § 568.060(1)(b)(1) (Vernon 1979 & Supp.) (for the purpose of sexual stimulation or gratification of any individual who may view such depiction).

⁵¹ IOWA CODE ANN. §§ 728.1-728.12 (West 1979 & Supp. 1988) (arousing or satisfying the sexual desires of a person who may view a depiction of a nude child).

⁵² UTAH CODE ANN. §§ 76-5A-2(5), 76-5A-3(1) (Supp. 1988) (for the purpose of sexual arousal of any person).

⁵³ See, e.g., N.Y. PENAL LAW § 263.15 (McKinney 1980); MONT. CODE ANN., § 45-5-625(c)(3) (1987).

⁵⁴ IND. CODE ANN. § 35-49-1-9 (Burns 1985).

⁵⁵ CAL. PENAL CODE § 311.2(a)-(d) (West 1988 & Supp. 1989).

⁵⁶ Cohen, *A Fresh Assault on an Ugly Crime*, NEWSWEEK, Mar. 14, 1988, at 64-65.

form of photographs, films, and videotapes, but also include drawings, paintings, statutes, written descriptions, and other media.⁵⁷

Under federal law, all materials depicting minors under the age of eighteen engaged in prohibited conduct are considered child pornography, regardless of where the depictions are created or produced, and regardless of whether the depicted activity is legal in the country or state in which it is created or produced.⁵⁸ Thus, an individual who receives, sells, or trades a Dutch magazine depicting a sixteen- or seventeen-year-old girl, which is legal in Holland, or a Danish magazine depicting a fifteen- or sixteen-year-old boy, which is legal in Denmark, may be prosecuted for receiving, selling, or trading child pornography in

⁵⁷ See, e.g., CAL. PENAL CODE § 311(3)(b) (West 1988) which defines "matter" to include "any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials." *Id.* VA. CODE ANN. § 18.2-374.1 (1988) defines "sexually explicit visual material" as "picture, photograph, drawing, sculpture, motion picture film or similar visual representation . . . or a book, magazine or pamphlet which contains [same]." *Id.*

⁵⁸ See 18 U.S.C. § 2252(a) (1982 & Supp. V 1987).

- (a) Any person who—
 - (1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if—
 - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
 - (B) such visual depiction is of such conduct; or
 - (2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
 - (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
 - (B) such visual depiction is of such conduct; shall be [fined or imprisoned] as provided in subsection (b) of this section.
- Id.* 18 U.S.C. 2256 (Supp. V 1987) provides the relevant definitions for the chapter. For the purposes of this chapter, the term —
 - (1) "minor" means any person under the age of eighteen years;
 - (2) "sexually explicit conduct" means actual or simulated —
 - (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) bestiality;
 - (C) masturbation;
 - (D) sadistic or masochistic abuse (for the purpose of sexual stimulation); or
 - (E) lascivious exhibition of the genitals or public area of any person;
 - (3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;
 - (4) "organization" means a person other than an individual; and
 - (5) "visual depiction" includes undeveloped film and videotape.

Id.

the United States.⁵⁹

Although Congress purportedly raised the age of majority from sixteen to eighteen in order to protect fourteen- and fifteen-year-olds, prosecutions for pornography depicting older teenagers are no less vigorous than those for pornography depicting young children.⁶⁰

A. Child Pornography as a Commercial Enterprise

Most of the child pornography which appeared commercially in the United States and Europe in the late 1960s and early to mid-1970s was not created primarily in the United States. This is supported by the fact that photographs contained in those materials were photographed in Europe, Asia, and North Africa. Many more photographs depicted erotic nudity rather than sexual activity, and somewhere between ten to twenty percent of the photographs in child pornography magazines were pirated from nudist magazines, depicting children at nudist camps engaged in innocent play.⁶¹

⁵⁹ Lounsberry, *Priest Given Probation; Got Child-Porn Journal*, Philadelphia Inquirer, Nov. 14, 1986, at 10B, col. 1. The Catholic priest was convicted of receiving a magazine, entitled *Joyboy 33*, published in Denmark, featuring teenage boys. See also *infra* note 99.

⁶⁰ Mark M. Richard, Deputy Assistant Attorney General, told Congress that "[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." H.R. REP. NO. 536, 98th Cong., 2d Sess. 14, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 505, 505. The government has proceeded to prosecute as child pornography depictions of sixteen to eighteen-year olds. See, e.g., *United States v. United States Dist. Court for Central Dist. of Cal.*, 858 F.2d 534 (9th Cir. 1988), *vacating and remanding*, *United States v. Kantor*, 667 F. Supp. 1421 (C.D. Cal. 1987) (issuing a writ of mandamus ordering the District Court to issue a jury instruction including a defense of mistake as to age of a minor involved in child pornography prosecution); *United States v. Sherin*, No. 86-1480 (S.D.N.Y., Jan. 28, 1987) (WESTLAW) (involved the distribution and sale of gay magazines featuring adolescent and adult males). See also *Video Owners Indicted on Porno*, Youngstown Vindicator, Apr. 30, 1987 (male and female owner and two female employees of a Batavia, Ohio video store indicted on twenty-nine counts of selling videotapes starring Traci Lords).

An interesting anomaly is created by including depictions of minors up to the age of eighteen in the definition of child pornography. In a great many jurisdictions, teenagers have the full legal right to consent to sexual intercourse, but they may not legally consent to being photographed in a lascivious pose.

⁶¹ See *supra* notes 35-60. Only magazines containing depictions of children who are apparently or actually under the age of sixteen were included in this count. Newly-titled American reprints of foreign-produced magazines were not counted in the total, since the materials contained in such reprints were identical to those in the foreign original. This information is based upon preliminary findings of a content analysis in progress for the Institute for the Advanced Study of Human Sexuality under the direction of the author [hereinafter *Content Analysis, Preliminary Findings*]. When completed, the study will have analyzed the contents of (1) approximately 265 magazines depicting primarily minor females (with some minor males included) and approximately 275 magazines depicting minor males which contain at least one depiction of a minor engaged in sexual activity, not including lewd or lascivious exhibition of the genitals; and (2) approximately 450 magazines depicting minor males and approximately 75 magazines depicting

A number of experts who have observed the child pornography industry from its beginnings to its alleged demise generally agree that the number of minors depicted in commercial child pornography magazines and films did not exceed between 5,000 to 7,000 worldwide.⁶² Most children appeared in only one photograph or in a few photographs, while a relatively small number were featured in dozens of photographs. The children who were depicted in commercial child pornography were not generally runaways, and only rarely were they prostitutes or drug addicts.⁶³ They were also not the victims of kidnapping. Nearly all were from middle-class homes and well-acquainted with the adult or adults for or with whom they posed.⁶⁴

The children depicted in commercial child pornography were generally between the ages of seven and fourteen, though the appearance of younger children has occasionally been noted. Instances of infants being molested and photographed simultaneously are extremely rare.⁶⁵ Other claims—child auctions in

minor females which contain at least one depiction of a minor engaged in lewd or lascivious "exhibition of the genitals." For the purposes of determining inclusion in the content analysis, the terms "lewd exhibition of the genitals" or "lascivious exhibition of the genitals" were defined objectively — i.e., according to the content of the photograph rather than by the intent of the photographer, magazine manufacturer, or viewer. Thus, for minor females, "lewd" or "lascivious" referred to depictions in which the female's legs were spread in such a way as to reveal the clitoris or vaginal opening or where her buttocks were spread or where the photograph was focused primarily upon the vulva. For minor males, "lewd" or "lascivious" referred to depictions in which the male's penis was erect or his buttocks spread or which focused primarily on the penis. Only magazines containing at least one depiction of a pubescent or pre-pubescent minor were included. Magazines which included only depictions of post-pubescent (mid- to older teenaged) minors or adults were not included.

⁶² *Id.*

⁶³ Those who work with runaways are well aware of this fact. Lois Lee, Executive Director of Children of the Night, an organization which offers refuge and counseling to runaways in Los Angeles, stated that she is "sure there are some [juveniles involved in pornography], but not many" (cited in Rojas, "Porn Industry Sees Report's Impact In Small Towns," United Press International, (1986)(assessing impact of Meese Commission Report)); see also, *West 57th: Child Pornography — Mail Order Crime*, (CBS Television broadcast, Oct. 8, 1988) [hereinafter *West 57th*] (Postal Inspector Dan Mahalco states that children depicted in pornography are "kids from down the street. They're not your missing children, they're not your runaways. . .").

⁶⁴ *Content Analysis, Preliminary Findings*, *supra* note 61. See, also *West 57th*, *supra* note 63, at 1-2; Linedecker, *CHILDREN IN CHAINS* 32 (1981) [hereinafter Linedecker].

⁶⁵ See, e.g., Gentile, *Tells of Babies in Porn*, N.Y. Daily News, July 28, 1982, at 2, col. 1. See also Hamill, *Child Abuse: the Worst Perversion*, N.Y. Newsday, Apr. 24, 1987, at 6, (claiming that "[k]ids as young as 9 months . . . are being pimped off and gang raped."). In reality, it is rare in commercial child pornography for very young children to be portrayed at all, let alone engaged in any sexual activity with an adult. No instances of babies being molested in commercial child pornography could be confirmed by this author. The frequently cited *Baby Sex* did not feature children at all, but an achondroplastic dwarf in his mid-thirties. Interview with Clifford Schëiner, M.D., Brooklyn, New York (Mar. 12, 1987).

Amsterdam,⁶⁶ toll-free numbers and mail-order houses for ordering child prostitutes,⁶⁷ child "snuff" films,⁶⁸ satanic molestation rituals in which animals are dismembered,⁶⁹ "chains of [American] brothels and bordellos . . . where children are kept . . . under lock and key,"⁷⁰ and motorcycle gang rapes⁷¹ —are touted by anti-pornography activists, law enforcement officers, prosecutors, politicians, and others without presenting persuasive evidence of such occurrences.⁷² No children appearing in child pornography magazines or films have ever been known or even suspected to have been victims of murder.⁷³

Commercial child pornography magazines and films were produced during the late 1960s and throughout the 1970s in Denmark and Holland, and a number of magazines and films were also produced in Sweden and West Germany.⁷⁴ Relatively few child pornography magazines were actually printed in the United States.⁷⁵ Child pornography magazines were usually digest-size, black-and-white or color magazines produced by reputable firms, as well as by fly-by-night operations.⁷⁶ Generally consisting of somewhere between twenty-four and sixty-four pages, these magazines published original photographs, antique photographs, and photographs taken from other magazines, together with drawings, fictional, and non-fictional written materials. Since few producers of pornography would ever have an opportunity to avail themselves of the copyright protection laws, pirating between magazines was the norm.⁷⁷

The approximate total number of commercial child pornography magazines produced in the United States and Europe from the late 1960s onward consist of: less than 550 magazines depict-

⁶⁶ *Child Pornography and Pedophilia: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs*, 98th Cong., 2d Sess., pt. 1, at 23-24 (1984) (testimony of Prof. Kenneth J. Hermann, Dept. of Social Work, SUNY College of Brockport) [hereinafter *Child Pornography and Pedophilia*].

⁶⁷ LINEDecker, *supra* note 64, at 32.

⁶⁸ *Id.* at 186.

⁶⁹ J. CREWDSON, *BY SILENCE BETRAYED* 138 (1988); Eberle, *supra* note 15, at 36.

⁷⁰ *Child Victims of Exploitation: Hearing Before the Select Comm. on Children, Youth, and Families*, 99th Cong., 1st Sess. 28 (1985).

⁷¹ Linedecker, *supra* note 67, at 31.

⁷² See, PAIDIK, Book Review, J. PEDOPHILIA (Autumn 1988) (reviewing J. Crewdson, *BY SILENCE BETRAYED* (1988) and D. Hechler, *THE BATTLE & THE BACKLASH* (1987)).

⁷³ In contrast, "[t]alk in the media is scarce . . . about the one million children who are abused or seriously neglected by their parents each year, or the estimated five who are killed each day at their own parent's hands." Eliasoph, *supra* note 1, at 8 (citing Report of the National Center for Child Abuse and Neglect, Aug. 1979).

⁷⁴ See *supra* note 61 and accompanying text.

⁷⁵ See *supra* note 61.

⁷⁶ See *supra* note 61.

⁷⁷ See *supra* note 61.

ing children engaged in sexual activity with other children or adults (with slightly more magazines depicting boys than girls); 460 magazines depicting boys in naturist or erotic nude settings, including at least one photograph which would qualify as "lascivious exhibition of the genitals"; and less than 100 magazines depicting girls in naturist and erotic nude settings, including at least one photograph which would qualify as "lascivious exhibition of the genitals."⁷⁸ Some magazines which have been publicized in the United States press as child pornography actually contained no sexual activity or "lascivious exhibition of the genitals."⁷⁹

Production of child pornography magazines was always sporadic,⁸⁰ largely due to the facts that the market for child pornography was relatively insignificant from a commercial point of view, and that the production of all obscene materials, involving adults or children, was, and continues to be, illegal in the United States and in most European countries. Accordingly, the supply of child pornography photographs and films, including the home-made variety, was extremely limited. Several magazines made continuous appeals to their readers to contribute materials; the repetition of photographs from magazine to magazine also indicates that child pornography was a scarce item everywhere.⁸¹ Often, monthly magazines produced only a few issues over the period of several years. They were then replaced by other magazines, which reprinted many of the same photographs.⁸²

Child pornography never amounted to a lucrative business

⁷⁸ *Content Analysis Preliminary Findings*, *supra* note 61. Compared with the number of adult magazines, films, and videos, the total production of child pornography from inception to demise is miniscule. In the United States, in 1985 alone, over 1,700 adult-sex videotapes were released. U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 1390 (1986) (hereinafter MEESE COMMISSION REPORT). Over 2,000 adult magazine titles were on display in only sixteen adult bookstores visited by members of the Meese Commission. MEESE COMMISSION REPORT, *supra*, at 1406.

⁷⁹ "Moppets," for example, was one of the better-known titles which actually did not qualify as "child-pornography," despite testimony before Congress. *Contra Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 47, 50 (1977) (colloquy between Rep. Kildee and Lloyd Martin of the Los Angeles Police Dept., Sexually Exploited Child Unit) [hereinafter *Sexual Exploitation of Children, Hearings*] with *Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary*, 95th Cong., 1st Sess. 67 (1977) (testimony of Prof. Frank Osanka) and MEESE COMMISSION REPORT, *supra* note 78, at 1364 (describing the magazine as presenting "child pornography"). See also *supra* note 70. See *infra* note 86 for further discussion of Lloyd Martin.

⁸⁰ See *infra* notes 82-84 and accompanying text.

⁸¹ See *supra* note 61.

⁸² See *supra* note 61.

in the United States or elsewhere. Child pornography was cheaply produced for a very limited market, selling an average of 5,000 to 10,000 copies per issue worldwide. There is no commercial production of magazines or videotapes depicting child pornography in the United States or in Europe today.⁸³ It does continue to be created much as it had been prior to 1970: it is made by a few individuals, on an amateur basis, in small quantities (most often, just a handful of pictures), primarily for the purpose of private viewing. Occasionally, such pictures are traded or given to others,⁸⁴ but then only to close friends or acquaintances.

III. THE EXPLOSION OF THE MYTH INTO PUBLIC HYSTERIA

The hysteria over child pornography developed after a few well-publicized raids in 1975 and in 1977 upon several distributors and adult booksellers who handled child pornography magazines and films.⁸⁵ The raids were followed by a media blitz by self-appointed experts, such as Sergeant Lloyd Martin of the Los Angeles Police Department ("LAPD")⁸⁶ and Judianne Densen-Gerber, the founder of the multi-national drug rehabilitation

⁸³ What little commercial pornography was produced in the United States ceased by the time the Child Protection Act came into effect in 1978. Commercial child pornography ceased in Denmark by 1980, when Danish Child Pornography laws were passed. In Holland, with the exception of approximately five issues of one 24-page publication featuring young boys and several issues of one magazine featuring young girls, the last child pornography magazines were produced in or around 1982. *David* produced its last issue in the Spring of 1987, and *Lolita* produced its last issue in early 1984. The latter was confirmed by San Bernardino police agent R. P. "Toby" Tyler before the MEESE COMMISSION, *supra* note 33, at 163. As in the United States, videotapes and photographs depicting boys and girls have been produced in Europe in recent years, but not for commercial distribution. *Id.* at 152-63.

⁸⁴ The contention that they are freely traded "like baseball cards" has no basis in fact. See generally O'Brien, *supra* note 5. In fact, among adults who have a sexual interest in children, home-made production occurs infrequently, so that most individuals would have nothing to trade, even if the opportunity for trade presented itself. Compare, e.g., H.R. Res. 41, 80th Leg., Gen. Sess., 1977 Ill. Laws, reprinted in ILLINOIS LEGISLATIVE INVESTIGATING COMM., REPORT TO THE GEN. ASSEMBLY OF 1977, at viii (1980) [hereinafter ILIC Report] (where ILIC noted the "paucity even of homemade child pornography"). See also Senate Comm. on Governmental Affairs, Permanent Subcommittee on Investigations, Child Pornography, S. Rep. 537, 99th Cong., 2d Sess. (1986).

⁸⁵ BURGESS, CHILD PORNOGRAPHY AND SEX RINGS, 8 (1984).

⁸⁶ Martin resigned from the LAPD in 1982. Police officials believed Martin "was a classic example of a police officer who crossed the line between dedication and obsession." Love, *Officer Finds Fame, Misfortune*, L.A. Times, Apr. 28, 1982, at 8. Martin was criticized by fellow police officers and public officials for failing to back up his claims with verifiable figures, for acting in an overzealous manner, and for harassing members of the gay community without cause. One officer stated that Martin "was not above overstating the problem . . . to gain support for his cause and fame for himself." *Id.* See also Mitzel, *LA Vice Cop Lloyd Martin Moved to Administrative Job*, Gay Community News, Mar. 27, 1982; Love, *Child Sex Unit Chief Reassigned*, L.A. Times, Mar. 12, 1982, § II, at 1; Mendenhall, *'Child Sex' Cop Transferred: L.A. Ends Martin's Crusade*, Bay Area Reporter, Mar. 18, 1982.

organization, Odyssey House. Martin testified in Congress that child pornography was "worse than a homicide."⁸⁷ Barbara Pruitt, an investigator for the LAPD, claimed that "[t]he children who die, they are the lucky ones."⁸⁸ Densen-Gerber mailed child pornography to members of Congress and toured the country with stories of forced prostitution, drug addiction, kidnapping, and murder.⁸⁹

Densen-Gerber made many unsubstantiated claims, including one in 1979 that "[b]y recent count" there were 264 child pornography magazines being produced monthly and sold in adult bookstores across the country.⁹⁰ Additionally, Densen-Gerber and others stated that as many as 1.2 million children were the victims of child pornography and child prostitution.⁹¹

Densen-Gerber's figure of 1.2 million — later repeated in the sensational television expose on child pornography, *The Silent Shame*, aired in August, 1984 — was an extrapolation from a claim contained in a book written by Robin Lloyd.⁹² In that book, Lloyd stated that there were 300,000 male prostitutes under the age of eighteen nationwide.⁹³ That figure was repeated by Lloyd Martin and other law enforcement officials in Congressional hearings and in the press.⁹⁴ From this figure of 300,000, Densen-Gerber surmised that there must be at least as many female prostitutes under the age of eighteen. She then doubled the overall figure, assuming that the problem had been grossly underestimated.⁹⁵

The Illinois Legislative Investigating Commission ("ILIC"), appointed by the Illinois House of Representatives in March, 1977, to investigate the domestic child pornography industry na-

⁸⁷ *Sexual Exploitation of Children, Hearings, supra* note 79, at 46 (statement of Lloyd Martin).

⁸⁸ *Id.* at 56 (statement of Barbara Pruitt).

⁸⁹ LINEDECKER, *supra* note 64, at 21.

⁹⁰ Densen-Gerber, *Sexual and Commercial Exploitation of Children: Legislative Responses and Treatment Challenges*, 3 CHILD ABUSE AND NEGLECT 61 (1979) [hereinafter Densen-Gerber].

⁹¹ *Id.* at 62.

⁹² R. LLOYD, FOR MONEY OR LOVE: BOY PROSTITUTION IN AMERICA, 226 (1976).

⁹³ *Id.* at 226.

⁹⁴ ILIC Report, *supra* note 84, at 8.

⁹⁵ "No one has counted the number of girls involved in sex-for-sale, but most authorities agree that there are probably as many girls involved as boys. In other words, there are more than one-half million children in the United States who are actively engaged in prostitution. Some experts estimate the number of children involved is easily twice that number — 1.2 million, and this includes only children under the age of sixteen. The number nearly doubles again if sixteen and seventeen year olds are added." Densen-Gerber, *supra* note 90, at 62. Densen-Gerber cites Robin Lloyd as her source for these speculations, but Lloyd never speculated on the number of minor female prostitutes.

tionwide, but especially in Illinois (thought to be a major production center for child pornography), made findings which indicated that earlier statistics were unsubstantiated.⁹⁶ The ILIC conducted an intensive three-year investigation: it gathered information about child pornography; interviewed convicted child molesters, pimps, and pornographers; set up its own sting operations and undercover investigations; and exchanged information with the FBI, the LAPD, the United States Postal Service, and United States Customs. Ultimately, the Commission found that the extent to which minors were involved in pornography and prostitution was grossly exaggerated. In fact, the ILIC reported to the Legislature that:

there is no evidence to substantiate the claim that 300,000 or more children ever have been involved in these exploitative activities; that very few parents ever have offered their children to pornographers as models . . . that there never was a nationwide movement of children for sexual purposes; and finally that organized crime is not involved in child prostitution and never was.⁹⁷

With regard to Lloyd Martin's figures, the ILIC noted that the number

was an estimate derived partially from Robin Lloyd. . . . Martin admitted that he had no firm statistics upon which to base his estimate and that, further, such statistics simply do not exist, particularly on a nationwide basis.

Our investigator then spoke with Robin Lloyd. . . . [He] stated that he had "thrown out" a figure of 30,000 as an estimate to see how law enforcement officials would react. . . . Though Lloyd's book contains numerous factual references, he appends neither footnotes nor bibliography; thus, it is impossible to check the veracity of anything he says.⁹⁸

The claims of Martin and Densen-Gerber were further exaggerated in news reports and on the editorial pages of the country's major newspapers, as well as in Congressional and State hearings.⁹⁹

⁹⁶ ILIC Report, *supra* note 84, at vii.

⁹⁷ *Id.*

⁹⁸ *Id.* at 8-9.

⁹⁹ For newspaper articles, see, e.g., *Child Porn*, South Bend Tribune, May 28, 1977, reprinted in *Sexual Exploitation of Children: Hearings, supra* note 79; *60 Minutes: Kiddie Porn* (CBS news program broadcast, May 15, 1977); *Child Pornography: "Sickness for Sale."* "It's Easy to Buy Child Pornography," "Father, Teacher: Tangled Life of Child Pornographer," "Chicago Is Center of National Child Porno Ring," "Hunt 6 Men, 20 Boys in Crackdown," "'Chicken' Makes \$500 A Week, But At 17 He's Getting Too Old," "Police Spend Long Nights Watching Parade Pass By," "How Ruses Lure Victims To Child Pornographers," "His Only Regret: I Got Caught," "Police Seize 2 in Sex Film

Both Martin's and Densen-Gerber's crusading ended in 1982,¹⁰⁰ but others swiftly replaced them.¹⁰¹

Ever since the late seventies, public officials, among others, have claimed that the creation, production, and distribution of child pornography is an enormous industry, generating untold profits, exploiting a large number of children under the age of eighteen, and

Ring Exploiting 14-Year-Old Boys," and " 'Adult' Book Stores Hit in U.S. Child-Porn Raids," a series of articles from the *Chicago Tribune*, reprinted in *Protection of Children Against Sexual Exploitation: Hearings on S. 1585 and S. 1011, Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary, 95th Cong., 1st Sess.*, at 121-50 [hereinafter *Protecting Children Against Sexual Exploitation, Hearings*]; Anson, *The Last Porno Show*, N.Y. Times, June 24, 1977, reprinted in *id.* at 150-58.

For hearings on related issues, see e.g., *The Select Committee on Child Pornography: Its Related Causes and Control*, Texas House of Representatives, 66th Sess., Oct. 19, 1978; *Sexual Exploitation of Children: Hearings on H.R. 3913 and H.R. 4571 Before the Subcomm. on Select Education of the Comm. on Education and Labor, 95th Cong., 1st Sess.*, (1977); *Child Pornography, Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary, 97th Cong., 2d Sess.*, (1982); *Child Pornography and Pedophilia: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, 98th Cong., 2d Sess.*, (1984); *Child Pornography and Pedophilia: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, 99th Cong., 1st Sess.* (1985); *The Use of Computers to Transmit Material Inciting Crime: Hearings on S. 1305 Before the Subcomm. on Security and Terrorism of the Comm. on the Judiciary, 99th Cong., 1st Sess.* (1985); *Computer Pornograph [sic] and Child Exploitation Prevention Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary, 99th Cong., 1st Sess.* (1985); *Child Victims of Exploitation: Hearings Before the Select Committee on Children, Youth, and Families, 99th Cong., 1st Sess.* (1985); *PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, CHILD PORNOGRAPHY AND PEDOPHILIA*, S. Rep. No. 537, 99th Cong., 2d Sess. (1986) [hereinafter *CHILD PORNOGRAPHY AND PEDOPHILIA*].

¹⁰⁰ New York State Attorney General Robert Abrams accused Densen-Gerber in January, 1982 of misappropriating public monies for her own personal use. The money had been targeted for Odyssey House. Other charges of professional misconduct have been leveled at Densen-Gerber, including "that she forced an inmate to kneel and wash her feet; that she forced a black man to sit in a chair while white women spat on him; and that once when an inmate died at Odyssey House, she ordered other inmates to dance around the deceased while singing 'Jingle Bells.'" Mitzel, *Financial Scandal Hits Anti-Kid Porn Crusader*, Gay Community News, Jan. 23, 1982. According to journalist Lucy Komisar, a federal team analyzed Odyssey's Midtown Adolescent Resource Center (MARC), and cited Densen-Gerber's program for its "punitive and coercive orientation" and "misuse" of children. Komisar, *The Mysterious Mistress of Odyssey House*, NEW YORK, Nov. 19, 1976, at 46. Also according to Komisar, "[a] member of [New York] city's police runaway unit said he stopped taking young prostitutes to Odyssey. 'I'm afraid I would have only negative things to say,' . . . said Detective Warren McGinniss of the [New York City Police] Youth Aid Division. 'Every kid we put in there walked right back out.'" Densen-Gerber also employed humiliation as a treatment tactic. "Residents who committed infractions were forced to wear costumes with paper ears and tails. ['If you act like a jackass, you might as well look like a jackass,'] they were told." *Id.* at 47.

¹⁰¹ One of these individuals was Kee MacFarlane, a social worker associated with Children's Institute International in California. Although she presented no evidence to support her theories, MacFarlane told members of Congress in 1984:

I believe that we're dealing with an organized operation of child predators designed to prevent detection. . . . The preschool, in such a case, serves as a ruse for a larger, unthinkable network of crimes against children. If such an operation involves child pornography or the selling of children, as is frequently alleged, it may have greater financial, legal, and community resources at its disposal than those attempting to expose it.

J. CREWDSON, BY SILENCE BETRAYED 139-40 (1988).

involving a vast underground network of "pedophiles." The Ladies' Home Journal, one of the most popular magazines in America, reported that child pornography generates between 500 million dollars and one billion dollars annually, exploiting several million children.¹⁰² The Albany Times Union reported that child pornography is a "\$46 billion national industry — a loose network involving 2.4 million youngsters, according to federal statistics."¹⁰³ As recently as 1988, Senator Dennis De Concini, in commenting upon the proposed Child Protection and Obscenity Enforcement Act of 1988, told Congress that "[c]hild pornography has become a highly organized multimillion-dollar industry. . . ."¹⁰⁴ Despite these sensational claims, no such statistics exist on a federal level or anywhere else. United States law enforcement in the field knew or should have known since the late 1970s that there was never such a large industry devoted to child pornography, and that any industry that did exist had virtually disappeared by 1978.

According to the ILIC Report,¹⁰⁵ the heyday of child pornography in the United States was 1976-78. The ILIC Report notes that prior to the effective date of the first federal child pornography law, public pressure and legal proceedings had already forced underground what little commercial production and distribution still existed. It found that after the effective date of the Act, child pornography had completely disappeared from the commercial chain of distribution in the United States, and that there was little evidence of its continued existence underground.¹⁰⁶

Information provided to the ILIC by the FBI was consistent with this conclusion. On April 14, 1980, the FBI concluded a sting operation in which child pornography was actively solicited by investigators nationwide, and in which simultaneous raids were staged upon sixty warehouses where pornography was being stored pending distribution. "In [the FBI's two and one half years of searching for child pornography] on a commercial level, none was discovered. Furthermore, none of the 60 raids resulted in any seizures of child pornography, even though the raids were comprehensive and nationwide."¹⁰⁷

While child pornography still appeared to be available during

¹⁰² Rooney, *Innocence for Sale: A Special Report on Child Pornography*, LADIES' HOME J., Apr., 1983, at 79, 128-30.

¹⁰³ Kermani, 'Kid Porn': A Billion-Dollar Scandal, Albany Times Union, Apr. 25, 1982.

¹⁰⁴ 134 CONG. REC. S645-46 (daily ed. Feb. 4, 1988) (statement of Sen. De Concini), reprinted in Stanley, *The Child-Pornography Myth*, PLAYBOY, Sept. 1984, at 41.

¹⁰⁵ ILIC Report, *supra* note 84.

¹⁰⁶ *Id.* at vii-viii, 6-64.

¹⁰⁷ *Id.* at 30.

the late seventies and the early eighties by mail order through various sexually-oriented tabloids distributed in small numbers across the United States, the ILIC found that the overall scope of the industry was unimpressive. The ILIC concluded that:

Pornography and other sex-related "industries" continue to be enormous operations in this country. However, neither child pornography nor child prostitution has ever represented a significant portion of the industry. Individuals may have made significant amounts of money from their own small child pornography operations . . . but these have not been organized activities. They should not be construed to be significant elements of the very real sex industry that exists in this country.¹⁰⁸

Chief Postal Inspector Charles Clausen confirmed the ILIC's findings, at least with regard to mail-order activity, four years later, in testimony before Congress on the Child Protection Act of 1984. According to Clausen,

[w]hile the production and/or distribution of child pornography is potentially lucrative, we have not found it to be highly profitable when conducted through the mails. Although we have investigated several commercial operations, they were relatively minor in scope compared to operations dealing in adult material and did not enjoy the financial success often achieved in the adult pornography business. Most often, our investigations have resulted in the identification of collectors, some of whom sell their material while others do not.¹⁰⁹

Despite the assessments contained in the ILIC Report and the candid statements of other law enforcement officials, reports of a massive underground industry and a nationwide network of child molesters purchasing and exchanging child pornography and children persisted. In the early 1980s, as the hysteria over child pornography merged with the "missing children" scare, public hysteria reached new heights.¹¹⁰ Child pornography and the activities of "pedophiles" were claimed to be directly responsible for the disappearance of hundreds of thousands, if not millions of children per year, despite the fact that, according to the FBI, in 1985 there were

¹⁰⁸ *Id.* at 30. See also note 80 and accompanying text.

¹⁰⁹ H.R. Rep. No. 536, 98th Cong., 2d Sess. 492, 507 (1984).

¹¹⁰ For accounts of the "missing children" scare which explain it as a fraud, see the series in the Denver Post by Diana Griego and Louis Kilzer, *The Truth About Missing Kids*, Denver Post, May 12, 1985, at 1, col. 1; Ostrow, *Media Helped Publicize Inflated Data*, Denver Post, May 13, 1985, at 10A, cols. 3-7; see also, Schneider, *Lost Innocents. The Myth of Missing Children*, HARPER'S, Feb. 1987, at 47-53.

sixty-seven cases of children abducted by strangers.¹¹¹ The ILIC report noted that "the opinions of [the] 'experts' often were printed without corroboration, thus influencing the spread of stories and quotations that had little basis in fact;" this statement is still true today.¹¹²

A. *The Exaggerated Publicity of the Myth*

Reports of a large child pornography export business in Holland and Scandinavia also have little basis in fact. Shortly after NBC aired *The Silent Shame*, a television special which alleged extensive child pornography export activities in Denmark, Danish officials conducted a thorough investigation. Berl Kutchinsky, Professor of Criminology at the University of Copenhagen, and Denmark's foremost expert on pornography, reported in 1985 that:

allegations of a large export of child pornography from Denmark to the United States caused great alarm in Denmark. . . . When the two NBC reporters came back to Denmark to give evidence about their under-cover sessions with Danish porn dealers, they also handed over specimens of what they claimed to be Danish produced child pornography. Examinations of these specimens as well as the stocks of the alleged porno exporters showed, however, that no children were involved. Although some of the material may have been considered "child pornography" according to American laws (the federal age limit appears to be eighteen years), not one single magazine or film contained pictures which qualified as child pornography according to the Danish law.¹¹³

Kutchinsky also noted that none of the addresses supplied by American law enforcement personnel to Danish investigators belonged to businesses engaged in child pornography.

One alleged world center of child pornography production and export was immediately raided by the Danish police. It turned out to be the home address of a brochure advertising Danish holiday facilities. According to the criminal police the brochure merely showed naturists, adults and children, in

¹¹¹ See Eliasoph, *supra* note 1. "Patricia Lee Kirby, a special agent in the FBI's Behavioral Science Unit, told a Delaware Task Force that only 50 to 60 of the more than one million children missing each year are victims of abduction by strangers. 'We are figuring that 99% are runaways or throwaways or parental abductions, she said.'" New York Native, Aug. 26-Sept. 1, 1985, at 12.

¹¹² ILIC Report, *supra* note 84, at 14.

¹¹³ Kutchinsky, *Pornography and Its Effects in Denmark and the United States. A Rejoinder and Beyond*, 8 COMP. SOCIAL RES. 301, 308-9 (1985).

their natural surroundings; moreover, the brochure had been authorized by the U.S. Department of Commerce for distribution in the United States. A list of names and addresses of firms presented at a hearing as being exporters of child pornography to the United States have been examined by *Politiken* (17 January, 1985). According to this leading Danish newspaper, the list contained addresses of firms which have not existed since the 1970s. Apparently the names and addresses came from brochures and other material intercepted by the US postal service authorities prior to 1980.¹¹⁴

Nor is there any evidence today of large scale child pornography production and export in Holland, where child pornography sales have been actively prohibited since April, 1984. The leading case developed by Dutch authorities is the prosecution of American photographer Donald Mader and Intermale, the largest gay bookstore in Europe.¹¹⁵ Mader's nude portraits of teenage and pre-teen boys in natural and studio settings were seized last year off the walls of the small gallery operated by Intermale. All but two of the photographs would not have violated United States federal law, but Mader, as a foreigner, and Intermale, as a gay business, may have been considered convenient targets.¹¹⁶

The Mader case has generated extensive controversy in Holland, and a number of leading Dutch magazines — including the magazine of the Dutch probation officer's union — have published some of the allegedly pornographic photographs alongside supportive editorials.¹¹⁷ Because Dutch law has not yet arrived at a clear

¹¹⁴ *Id.* at 309 (emphasis added). Mader v. Openbaar Ministerie, Hoge Raad No. 2370. [Information (Danish daily newspaper) Dec. 1, 1984.]

¹¹⁵ According to Mader's attorney, the Dutch authorities were under considerable pressure from American law enforcement officials. Interview with Willem van Bennekom, attorney for Donald Mader, Amsterdam, The Netherlands (Nov. 29, 1988); see also American secret agent active against child pornography in Amsterdam, *Trouw*, May 15, 1987, at 1. The Dutch police and Minister of Justice Korthals Altes have denied any American involvement or American pressure in the child pornography issue. According to a United States Senate report, however, not only have European police dealing in child pornography cases been invited to receive training in the United States Customs office in Bonn, West Germany, but Bonn "already has provided an undercover officer to assist the Amsterdam City Police in its investigations." Child Pornography and Pedophilia, *supra* note 99, at 34.

¹¹⁶ Interviews with Donald Mader and van Bennekom (Nov. 29, 1988); see also Stanley, *Dutch Raid Bookshop*, *Gay Community News*, May 24-31, 1987, at 1, 12.

¹¹⁷ Essmeijer, *In pedofiele verhouding is seks bijzaak*, *Vrij Spraak* (Magazine of the Dutch Probation Officer's Union, which reproduced one of Mader's offending photographs), Issue 6, Sept. 1988, at 3-5 (Amsterdam); see also Sanders, *In Nederland: De Zedenpolitie in Actie. Kan een stilleven van een sexy gedrapeerde asperge als pornografie betiteld worden? De foto's van Don Mader geconfisqueerd*, *Haagse Post*, May 23, 1987, at 7-10; *Hier en Daar: Een bui (column)/ Blote Kinderen mogen wel, niet misschien*, *De Tijd*, July 1, 1988, at 6 (Amsterdam); in van Duin, *Gerespecteerde Pedofil weegt zijn eigen straatje*, *Het Parool*, Nov. 6, 1987, at 1, 20; Oskamp, *Ook links niet altijd tegen betutteling*, 67 *SEKSTANT*, 3-4 (Oct. 1987) (interview with

definition of child pornography, Mader's fate remains uncertain. Recently, in pre-trial proceedings, a Dutch appeals court found that most of the pictures did not constitute child pornography, but that a few of them could properly be deemed child pornography if they were intended to arouse sexual desire.¹¹⁸ The decision is on interlocutory appeal to the Hoge Raad, Holland's highest court, located in the Hague.¹¹⁹ As for the present availability of child pornography in Holland, according to United States Customs Agent John Forbes, it was "virtually impossible" to find as of August, 1986.¹²⁰

Federal indictment and conviction statistics illustrate that child pornographic activity in the United States has been minimal. Between February 6, 1978 and May 21, 1984, the respective effective dates of the Child Protection Act of 1977 and the Sexual Exploitation Act of 1984, only sixty-nine defendants were convicted under all the federal statutes covering the creation, importation, mailing, production, receipt, and exchange of child pornography.¹²¹ Many of those sixty-nine convicted were guilty only of buying one or two child pornography magazines or films from Europe for personal viewing; others were convicted for selling pre-existing, commercially available materials to Postal Inspectors and other undercover law enforcement personnel or informants.¹²²

Most convictions for producing child pornography between 1978 and 1984 involved only a handful of photographs. From a survey of the reported cases and hundreds of news articles and wire service reports concerning child pornography, apparently the biggest case involved the home-made production of approximately ten short films intended for commercial sale.¹²³ Only the case of Catherine Stubblefield Wilson and her colleague, Richard Trolio, actually involved significant distribution of child pornography.¹²⁴

Hein Roethof, Senior Member of the Tweede Kammer (the Dutch House, of Representatives).

¹¹⁸ See Mader, Hoge Raad No. 2370.

¹¹⁹ Interview with Willem van Bennekom (Nov. 29, 1988).

¹²⁰ Thornton, *Customs Service Leads War On Child Pornography*, *Washington Post*, Aug. 9, 1986.

¹²¹ *Child Pornography and Pedophilia*, *supra* note 99, at 5-6.

¹²² See, e.g., *United States v. Thoma*, 726 F.2d 1191 (7th Cir. 1984); *United States v. Gantzer*, 633 F. Supp. 174 (W.D.N.Y. 1986), *aff'd*, 810 F.2d 349 (2d Cir. 1987); *United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States v. Hale*, 784 F.2d 1465 (9th Cir. 1986); *United States v. Hurt*, 795 F.2d 765 (9th Cir. 1986).

¹²³ See 6 *Charged in City Smut Case*, *Baltimore Sun*, May 5, 1978, at 1, 6, col. 1; 3 *sentenced for making child porn*, *Baltimore Sun*, Nov. 2, 1978; *Pa. Man Charged as Part of Pornography Ring*, *Washington Post*, May 6, 1978; *Child-Porn Activities Net Stiff Terms for 3 Men*, *Baltimore Evening Sun*, Nov. 2, 1978; *Pornographer Freed to Take Up Life in Guatemala*, *Washington Post*, Mar. 22, 1982.

¹²⁴ See Meese Commission, *supra* note 33, at 234-45 (statement of Postal Inspector Kenneth Elssesser).

B. *Perpetuation of the Myth: Law Enforcement Involvement*

According to officials of the Southern California Child Exploitation Task Force, as well as the LAPD, one of the most knowledgeable police units in the country in dealing with child pornography, Catherine Stubblefield Wilson was responsible for the distribution of eighty percent of all commercial child pornography in the United States from the late 1970s until her arrest on California state charges on May 6, 1982.¹²⁵ Kenneth Elsesser, a Postal Inspector instrumental in Wilson's arrest, said: "[d]istribution, be it commercial or non-commercial, of child pornography on the scale of Catherine Wilson will never again be seen in this country."¹²⁶

Various police agencies had suspected Wilson of selling child pornography since the mid-seventies, but in 1976, when she was arrested on obscenity charges, police raided her home and found only adult pornography.¹²⁷ The FBI and LAPD nevertheless continued their investigation of her business. In late 1981, law enforcement personnel on Wilson's mailing list received advertisements for pornography depicting bestiality. Police officers ordered, and received, an 8-mm film depicting sexual conduct between an adult woman and a dog. Based on that test purchase, which led to the identification of Richard Trolie as Wilson's distributor, and upon law enforcement officers' suspicions that Wilson might be selling child pornography, Trolie was arrested.¹²⁸

Upon his arrest, Trolie agreed to cooperate with the police in their efforts to arrest Wilson. While law enforcement officers had failed to purchase child pornography from Wilson or Trolie, they did obtain, through electronic surveillance, evidence suggesting that Wilson and Trolie were selling child pornography films.¹²⁹

Wilson's mode of operation was relatively simple. She placed advertisements in adult-oriented newspapers and magazines for pornography with a contact address in Denmark. All orders and correspondence were sent back to Wilson, and the

¹²⁵ *Woman Charged in Child Pornography Operation*, N.Y. Times, Aug. 22, 1982, at 28. Wilson was charged with fifteen counts in a federal indictment in December, 1982. See also Press, *The Mother of Kiddie Porn?*, NEWSWEEK, Jan. 23, 1984.

¹²⁶ Meese Commission, *supra* note 33, at 148 (statement of Postal Inspector Kenneth Elsesser).

¹²⁷ See *supra* notes 108-16 and accompanying text.

¹²⁸ Meese Commission, *supra* note 33, at 145.

¹²⁹ Meese Commission, *supra* note 33, at 136-48. The evidence consisted of wiretaped conversations between Trolie and Wilson in which they discussed the distribution and sale of child pornography.

money was funneled through bank accounts in Switzerland and the Grand Cayman Islands. Wilson and Trolie mailed their orders from post offices throughout California and the South.¹³⁰

Prosecutors and law enforcement officers involved in the case alleged at the time of her arrest that Wilson was netting half a million dollars a year selling child pornography to 30,000 customers.¹³¹ Her Swiss bank account records, however, did not support this allegation. In the eleven-year period between December, 1973 and December, 1983, \$556,182 had passed through her five accounts.¹³² Furthermore, the mailing list seized from Wilson contained the names of only several thousand past, present, and potential customers from around the world, some undisclosed number of which may have purchased child pornography from her.¹³³

If, as law enforcement officials claim, Wilson's activities constituted eighty percent of all child pornography activity, then that industry generated well under a million dollars in the United States during that ten-year period. The *Wilson* case also demonstrates that only several thousand individuals nationwide were involved in this industry — and as consumers, not producers. Most importantly, since the arrest of Wilson and Trolie in 1982, the sale and distribution of child pornography has been significantly reduced.

Federal indictment and conviction statistics since May 21, 1984 similarly indicate that the claims of a growing child pornography industry or underground exaggerate the real situation. Since the 1984 amendments to the 1977 Act became effective, approximately 600 defendants nationwide have been indicted; most of these indictments resulted in plea-bargained, probationary sentences.¹³⁴ This increase is not necessarily the result of better law enforcement or of an increase in child pornography crimes, but may actually be the consequence of solicitation and sale of child pornography by the United States government. The annual increase in child pornography indictments¹³⁵ may in fact

¹³⁰ *Id.*

¹³¹ See *supra* note 125.

¹³² Meese Commission, *supra* note 33, at 147 (statement of Postal Inspector Kenneth Elsesser).

¹³³ Elsesser testified that "5000 mailing labels used by Wilson" were seized, as well as a "customer list including the names of all individuals that had previously purchased child pornography." *Id.* at 146.

¹³⁴ Interview with Kevin Meath, U.S. Department of Justice, Task Force on Pornography (May 1988); for earlier figures, see *Child Pornography and Pedophilia*, *supra* note 99, at 5-6.

¹³⁵ There were sixty-one indictments in fiscal year 1984, 126 in fiscal year 1985, 147

be specifically attributable to the mass marketing of child pornography by the United States Customs and the United States Postal Inspection Service.¹³⁶

On the state level, there has been a marked increase in prosecutions for possession of child pornography, as well as for the creation of photographs depicting nudity of minors.¹³⁷ At least dozens of parents have been arrested after innocently photographing their children naked and then attempting to have those pictures developed at local film processing stores.¹³⁸

Despite the low number of convictions for offenses involving child pornography, United States law enforcement officers, Customs agents, and Postal Inspectors have been increasingly active in their attempts to ferret out child pornography and those who purchase it. These officials' methods include creating phony businesses, newsletters, and personae in order to encourage the purchase, sale, and exchange of child pornography. Sting operations are aimed at individuals who receive pornography from

in fiscal year 1986, and 244 in fiscal year 1987. The period following May 21, 1984 also saw a small increase in prosecutions for receipt of magazines from Europe, and for the creation, distribution, or receipt of child pornography depicting post-pubertal teenagers between the ages of sixteen and eighteen. There were also a handful of prosecutions for non-commercial exchange of child pornography. See, e.g., *United States v. Johnson*, 855 F.2d 299 (6th Cir. 1988); *United States v. Marchant*, 803 F.2d 174 (5th Cir. 1986); *United States v. Miller*, 776 F.2d 978 (11th Cir. 1985); *United States v. Kleiner*, 663 F. Supp. 43 (S.D. Fla. 1987); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987); *United States v. Cocco*, 604 F. Supp. 1060 (M.D. Pa. 1985); *Indictment, United States v. Perlmutter*, Crim. No. 87-00161 (E.D. Pa. 1987).

¹³⁶ There were a total of 255 indictments through February 27, 1986, seventy-two of which occurred between February 6, 1978 and May 21, 1984. See MEESE COMMISSION REPORT, *supra* note 78, at 416, 606 n.432. This statistic varies slightly from those in the Senate Report, *supra* at note 107. It was during fiscal year 1987 that the government concluded its largest sting operations — Operation Borderline and Project Looking-Glass, which resulted in approximately 225 to 230 indictments. Most of those occurred in 1987. Numerous other sting operations resulted in substantial numbers of indictments, among them F & H Associates (North and South Carolina), International Enterprises, S.A. (part of U.S. Customs' "Operation Cameo" in the South), Euro-Arts International (conducted by U.S. Postal Inspector Paul Hartman), and Samoan Adventures.

¹³⁷ See, e.g., *Commonwealth of Massachusetts v. Oakes*, 518 N.E.2d 836 (1988); *Ohio v. Robinson*, Case Nos. 85 CA 47, 85 CA 48 (Ohio Ct. App. May 1, 1986) (WESTLAW OH-CS), *rev'd and remanded*, 28 Ohio St. 3d 65, 502 N.E.2d 634 (S.Ct. Ohio 1986); *People v. Lerch*, 134 Ill. App. 3d 643, 89 Ill. Dec. 510, 480 N.E.2d 1253 (1985), *appeal denied*, 108 Ill.2d 580, 483 N.E. 2d 888 (1985); *Missouri v. Helgoth*, 691 S.W.2d 281 (Mo. 1985) (*en banc*); *Ohio v. Meadows*, *rev'd*, 28 Ohio St. 3d 43, 503 N.E.2d 697 (S.Ct. Ohio 1986), *cert. denied*, 480 U.S. 936 (1987);

¹³⁸ For an example of the kind of hysteria which innocently-taken pictures of one's children can generate, see Price, *Nudist Disarms 'Investigation' of Child's Photos with Honesty*, THE AMERICAN SUNBATHING ASSOCIATION BULLETIN, July, 1986, at 12; Kaltenhauser, *Indecent Exposures?*, City Paper, Nov. 11, 1988, at 19-20, 60; Journey, *Mother Charged With Possession of Porn*, St. Petersburg Times, Jan. 4, 1988; Hess, *Snapshots, Art, or Porn?*, Village Voice, Oct. 25, 1988, at 31-32; Jenkins, Jr., "Explicit" Photos of Children Land Virginia Mother in Court, Washington Post, July 19, 1988.

abroad, gay men, swingers, suspected "pedophiles", nudists, and any others assumed to be consumers or home producers of child pornography.

Organizations devised and operated by postal inspectors and other undercover officers — with names like "Candy's Love Club," "Ohio Valley Action League," "Research Facts," "Midlands Data Research," "Project Sea Hawk," "Heartland Institute for a New Tomorrow," and "Freedom's Choice" — initiate correspondence with individuals by claiming to support first amendment rights "to read whatever we please," to promote "sexual freedom," and to encourage contact with those with "similar interests."¹³⁹ These organizations usually send questionnaires to suspects under the pretense of doing media or other research. The questionnaires are crudely designed to document the correspondent's early sexual experiences, his opinions about childhood sexuality, or his sexual preferences.¹⁴⁰ These provide personal information often used in targeting individuals for further investigation, in securing search warrants, and in obtaining convictions.

Sometimes these organizations initiate a relationship between "pen-pals." These pen-pals are actually undercover officers posing in such roles as divorcees with young children, adults sexually attracted to children, or children themselves (with "authentic" child-like handwriting); the officers then attempt to induce suspects to send pornography through the mails.¹⁴¹ In some instances, undercover officers engage in extensive writing campaigns, sending their targets sexually explicit letters, offers for photography sessions, child pornography, and even liaisons with fictional children.¹⁴²

Some government agencies concoct newsletters, such as the now-defunct "Crusaders for Sexual Freedom" ("CSF"), operated

¹³⁹ See e.g., Affidavit for Search Warrant, *United States v. 1747 Bayou Drive* (W.D. La. 1988); Memo of Mar. 17, 1986 from Postmaster to Postal Inspector Calvin Comfort, and accompanying fabricated erotic letters sent to J.P. McGlynn (available in author's files) [hereinafter Postmaster Memo]. Ohio Valley Action League and Research Facts were operated by U.S. Postal Inspector Paul Hartman. CLC and Project SeaHawk are operated by U.S. Postal Inspector Robert Northrup. Heartland Institute for a New Tomorrow and Midlands Data Research are the creation of Postal Inspector Calvin Comfort.

¹⁴⁰ See Affidavit for Search Warrant, *supra* note 139.

¹⁴¹ See, e.g., *War on Child Pornography: Postal Agents' Sting Tactics Lead to Indictments*, Rocky Mountain News, June 21, 1987, at 28.

¹⁴² See, e.g., Postmaster Memo, *supra* note 139. See also letters from U.S. Postal Inspector Calvin Comfort to Russell Zangger, dated July 9 and 21, 1986, respectively (exhibits 17 and 21 in *United States v. Zangger*, Case No. CR 86-04017, (N.D. Iowa)), *reprinted in part in Your Postal Dollars At Work, Part One: The Tootsie Sting*, PLAYBOY, Feb. 1989, at 46-47.

by Chicago Postal Inspector John Ruberti; "Computer Link Co-op," believed to be operated by Postal Inspector Robert Northrop; "It's a Small World, the Newsletter of the American Hedonist Society," operated by Postal Inspector Calvin Comfort; "Loveland, The Newsletter for Lovers," "New Age: The Truth Through Education", "Ponce de Leon, S.A." and its "Fountain of Youth Inner Circle Club;" "The Little Light;" and the "American Sensuality Society."¹⁴³ These publications contain news, editorials, fictional accounts of sexual experiences, fantasies, and advertisements for other sting operations.

One issue of "Ponce de Leon, S.A.," published by the United States Customs Service, contained an editorial supporting pedophilia, entitled "Pedophilia: What are the Facts?"; a work of fiction entitled, "My Favorite Fantasy," about a sexual encounter between a thirty-two-year-old man and a thirteen-year-old girl; phony advertisements from "families" and "pornographers"; and even a few photographic reproductions of boys and girls playing and posing nude.¹⁴⁴ "New Age" showed a full-page computer-generated photographic depiction of a pre-teen girl on its back cover.¹⁴⁵ The visual depictions contained in these newsletters appear to be within the bounds of federal law, but may violate the laws of a number of states.

Government newsletters also encourage suspects to place advertisements soliciting or offering to sell or buy child pornography. All advertisements other than the targeted suspect's are placed by police officers, so any attempt by the suspect to exchange, sell, or buy child pornography results in arrest.¹⁴⁶ These government-created publications are the only publications in the United States today which solicit, advertise, sell, or offer to purchase or exchange child pornography. Government agents also operate "confidential" film laboratories which claim to provide confidential developing services. Examples of these labora-

¹⁴³ The addresses for these publications are: Crusaders for Sexual Freedom, P.O. Box 3050, Glen Ellyn, IL 60137; Computer Link Co-op, P.O. Box 2912, Norfolk, VA 23501; It's A Small World, The Newsletter of the American Hedonist Society, P.O. Box 2098, Madison, WI 53701; Loveland, The Newsletter for Lovers, P.O. Box 999, Loveland, CO 80539; The Little Light: Bulletin of the Southwest Association for Family and Youth, 212 Pat Booker Rd., Universal City, TX 78148; New Age, The Truth Through Education, 115 N. Main, Suite 138, Broken Arrow, OK 74012; Ponce de Leon, S.A. and the Inner Circle Fountain of Youth Club, Box 915, Avenida Obregon 4800, Nogales, Sonora, Mexico.

¹⁴⁴ Ponce de Leon, S.A., 3rd Edition, March, 1987. The depictions in Ponce de Leon and its Inner Circle Fountain of Youth Club were nudist depictions taken from a nudity-oriented Marquis publication, entitled 6 to 16.

¹⁴⁵ New Age, Vol. VI, Spring 1986.

¹⁴⁶ See *United States v. Thoma*, 726 F.2d 1191, 1194 (7th Cir. 1984).

tories include Logan Photo Reproduction Service and Fig Leaf Labs in Philadelphia, Pennsylvania; Oak Leaf Custom Lab in Oak Island, Minnesota; and Tender Foto in Whittier, California. Solicitations for such companies appear in government sting newsletters or are sent to suspects targeted for investigation.

Such activities have resulted in relatively few arrests. By far the most successful tools in obtaining child pornography indictments and inflating child pornography statistics have been the government sting operations, in which the government aggressively markets and sells child pornography. The Postal Inspection Service and Customs have solicited thousands of individuals and have sold child pornography videotapes, magazines, and photo sets to hundreds of individuals.¹⁴⁷

During 1987, two operations alone — Operation Borderline, a United States Customs sting operation run by Customs agent Jack O'Malley in Chicago under the names "L. Gagnon" and "Produit Outaouais," with a mailing address of Hull, Quebec; and Project Looking-Glass, run by the United States Postal Service under the name of the Far Eastern Trading Company, with a Virgin Islands mailing address — resulted in approximately 225 indictments.¹⁴⁸ Four individuals who were targets of the sting — Thomas Cleasby, Robert Brase, Dale Riva, and Gary Benson Hester — committed suicide.¹⁴⁹

C. Suspect "Target Lists"

Over the past several years, various law enforcement officials

¹⁴⁷ The government utilizes false identifications, soliciting under names like Paradise Entertainment (using a Makawao, Hawaii mailing address); Samoan Adventures (American Samoa); F & H Associates (Columbia, South Carolina); International Enterprises, S.A. (Mexico City); Euro-Arts International (Virgin Islands); Lone Star Traders (San Antonio, Texas); Down Under Publications (Sydney, Australia); and J & S Distributors (Bangkok, Thailand and Albuquerque, New Mexico). Copies of all solicitation letters are available in author's files. Total sting indictments are not always available, but the F & H Associates sting resulted in twenty-one indictments in the Carolinas. Wright, *Porn Indictments Name 2*, The Charlotte Observer, Oct. 8, 1987.

¹⁴⁸ Interview with Kevin Meath, U.S. Department of Justice, Pornography Task Force, (May, 1988). According to Postal Inspector Posey, approximately 139 people were charged under Project Looking-Glass. Telephone interview with Postal Inspector Posey, (Oct. 21, 1988). According to an unidentified official at United States Customs Public Affairs Office, eighty-five people were indicted, although there were still some arrests or indictments to come. Telephone interview (Oct. 26, 1988).

¹⁴⁹ Cleasby left a suicide note saying he had been "cursed with a demon for a sexual preference." *A Fresh Assault on an Ugly Crime*, NEWSWEEK, Mar. 14, 1988, at 64-65; *Lawyer Found Dead in Home*, Eau Claire Leader Telegram, June 26, 1987. Brase committed suicide the day before his arraignment; Hester also shot himself just prior to his arraignment; and Riva committed suicide a few hours before his indictment was publicly announced. *Porn Defendant Is Found Dead*, Omaha World-Herald, Nov. 3, 1987; *2 Porn Suspects Die in Cars, Guns at Side*, Cleveland Plain Dealer, Sept. 17, 1987; *Child Porno Sting Figure Found Dead*, The Vindicator, Sept. 16, 1987 (Youngstown, OH).

have insisted that individuals targeted for child pornography investigations and solicitations are carefully screened and chosen. For example, Chief Postal Inspector Charles Clausen recently wrote *Playboy* magazine that his Project Looking-Glass was aimed only at those individuals "who knowingly purchase and receive child pornography through the mail."¹⁵⁰ The subjects of the investigation, Clausen further claimed, "were individuals who had demonstrated on at least two previous occasions an interest in child pornography."¹⁵¹ Jack O'Malley, Customs Special Agent in Chicago, and the Southern California Child Exploitation Task Force have made similar claims.¹⁵² While certainly many of the individuals who fall prey to government solicitations have demonstrated an interest in child pornography, the government targeting encompasses a very broad spectrum.¹⁵³

Individuals who are deemed by postal and customs officials to be potential targets for child pornography solicitations come from a variety of sources, such as "target lists." These are compiled by United States Customs, and are comprised of names of individuals who have been the intended recipients of foreign-produced pornography seized by United States Customs.¹⁵⁴ According to Customs officials, by early 1984, Customs had entered into their computer banks the names of 6,000 suspects from mail seized in New York and Chicago alone.¹⁵⁵

Suspects whose names are gathered from pornography seizures were not generally the intended recipients of child pornography. Customs seizes pornography of every type, including works dealing with bestiality, sadomasochism, and homosexuality; however, the majority of pornography seized by Customs is primarily of the adult heterosexual variety.¹⁵⁶ Child pornogra-

¹⁵⁰ Letter from Clausen to G. Barry Golson, an editor at *PLAYBOY* (Oct. 6, 1988), reprinted in *PLAYBOY*, Feb. 1989, at 45-46.

¹⁵¹ *Id.*

¹⁵² See letter from Southern California Child Exploitation Task Force to *PLAYBOY*, reprinted in *PLAYBOY*, Jan. 1989, at 60-61.

¹⁵³ See *Commissioners' Round Table: Pornography*, 20 *CUSTOMS TODAY* 15, 35 (1985) [hereinafter *Commissioners' Round Table*] (Customs agents discuss the criteria for targeting). An examination of numerous search warrant affidavits, however, has shown a much more arbitrary method, for example, by labeling seized adult pornography as "child" pornography.

¹⁵⁴ Medis, *Customs Compiles Porno Mail Lists*, *USA Today*, Apr. 13, 1984, at 20. According to James Burke, a United States Customs special agent, Customs, together with postal inspectors, the FBI, and local police, will compile a list of names of people involved in pornography seizures on computer, so that the records will be readily accessible to investigators. *Commissioners' Round Table*, *supra* note 153, at 15.

¹⁵⁵ Medis, *supra* note 154.

¹⁵⁶ Gleaned from an inspection of seizure lists by the author of all seizures of sexually-oriented materials during the period May 1, 1985 to May 1, 1986, filed in United States District Court, Eastern District of New York, where civil forfeiture actions are filed for

phy comprises a small fraction of the sexually-explicit materials which have been seized by Customs over the past ten years.¹⁵⁷ Thus, intended recipients of foreign pornography depicting only adults end up as targets for government sting operations which sell and solicit child pornography. Intended recipients of magazines bearing titles like "Sweet Little 16" and "Teenage Schoolgirls," which depict only adults but suggest younger models, are at especially high risk.

Despite the fact that these magazines are legally sold throughout Europe, the United States government uses them in targeting suspects, and their seizure may be offered as evidence of predisposition towards ordering actual child pornography from the government. In one case, government agents insisted that the defendant was predisposed towards ordering child pornography on the basis of their seizure of four magazines, entitled *Joyboy 30*, *Superboy 31*, *Kuddles Freunde*, and *Film Video Index*.¹⁵⁸ These magazines, several of which contained depictions of teenaged young men and one of which contained depictions of adults, were produced legally in Denmark and were not considered to be child pornography there. Despite the defendant's protestations as to the hearsay character of the government's information, government agents were at no point required to produce the magazines and prove their illegality. According to a pediatrician consulted in the case, the individuals depicted in one of the magazines were most likely over the age of sixteen, the legal minimum age under federal law at the time they were seized by Customs.¹⁵⁹

Other important sources of suspects are address books and mailing lists of individuals or firms suspected of or charged with selling, purchasing, trading, wanting to buy or trade child pornography, or for engaging in sexual activity with a minor. The

materials entering the United States at Kennedy Airport. Out of hundreds of magazines seized, one photo set and eleven magazines were positively identified as containing nude depictions of minor males. Five magazines were positively identified as containing nude depictions of minor females. An additional seven magazines were suspected of containing nude depictions of minor females, but positive determinations could not be made due to failure to designate full titles and/or issue numbers on the seizure lists. According to United States Customs Acting Chief Counsel, Michael T. Schmitz, New York seizures represent "the bulk of what comes in by mail." *Commissioners' Round Table*, *supra* note 153, at 9.

¹⁵⁷ *Id.* According to the ILIC Report, child pornography seizures were relatively low even when it was legally produced and sold in Holland. See ILIC Report, *supra* note 84, at 27.

¹⁵⁸ *United States v. Maday*, Cr. 88-35E (W.D.N.Y. 1988).

¹⁵⁹ Letter from Stephen Commins, M.D. to Mark J. Mahoney, attorney for Maday, (Oct. 4, 1988), in evidence in *United States v. Maday*, Cr. 88-35E (W.D.N.Y. 1988) (copy in author's files).

mere appearance of an individual's name on a mailing list is sufficient for targeting; no tie to illegal activity is necessary. The prospective customer lists seized from Catherine Wilson — including one seized in 1976 when she was, by the government's own admission, selling almost exclusively heterosexual adult pornography, and one seized at the time of her arrest in 1982 — have been used to target suspects in several sting operations, including Operation Borderline.¹⁶⁰ The prospective customer or mailing list of Michael Nemuras, who sold two issues of a non-pornographic magazine depicting clothed and unclothed minor girls, has been used to target potential buyers of child pornography.¹⁶¹ Other mailing lists include that of Melton Midge, who sold erotic, non-pornographic publications produced in Japan which featured underaged females;¹⁶² Glendon Todd, who sold Tarzan-style bathing suits through nudist publications;¹⁶³ Dean Ryder, who sold adult films, as well as a few nudity-oriented, non-pornographic videotapes depicting teenage and pre-teen girls¹⁶⁴; Donald Sherin and Male Views, which sold gay pornography, including magazines alleged to depict minor males;¹⁶⁵ and Joseph Surin who, in doing business as Alpine Distributors, sold adult films, including one film alleged to have contained depictions of a teenaged minor masturbating.¹⁶⁶

The prospective customer list of Award Films, which sold legitimate films with gay themes or whose subjects were children, was also used, after that list was seized without a valid warrant by Detective William Dworin of the LAPD in May, 1985. Award sold films about growing up, coming-of-age, or being gay. Neither Award nor its principals were ever suspected of, indicted for, or charged with selling child pornography.¹⁶⁷

¹⁶⁰ Affidavit in Support of a Search Warrant, *United States v. Krause*, Case No. 87 M 492, (D. Or., June 9, 1987).

¹⁶¹ *United States v. Mrva*, See Cr. 87-619 (E.D.N.Y.) (mailing list of Michael Nemuras).

¹⁶² See *infra* note 167, 217-26 *United States v. Emerick*, (mailing lists of Melton Midge and Award Films).

¹⁶³ Letter from Glendon Todd to Ron Hall, attorney for the American Civil Liberties Union (Apr. 9, 1986) (documenting his legal problems).

¹⁶⁴ *United States v. Bevacqua*, Crim. No. 87-00191, U.S. District Court, Middle District of Pennsylvania, Affidavit in Support of A Search Warrant (mailing list of Dean Ryder).

¹⁶⁵ *United States v. Sherin* (S.D.N.Y.) Memorandum opinion and order, 86 Cr. 480 (MJL) Jan. 20, 1987.

¹⁶⁶ See *infra* notes 200-09 and accompanying text. See also *United States v. Dempsey*, No. CR 88-158, (D.S.C. 1988); *United States v. Porter*, Criminal No. 88-80554, (E.D. Mich. 1989) (1989 WL 32097) (mailing list of Joseph Surin).

¹⁶⁷ In May, 1985, Detective William Dworin of the LAPD, together with other law enforcement personnel, seized copies of the mailing list of Award Films, a film distribution company which distributes critically-acclaimed domestic and foreign films, such as "Fanny and Alexander" (Bergman), "Small Change" (Truffaut), "Suddenly Last Sum-

Names for target lists have also been obtained through advertisements placed by government agents in nudist, swinger, gay, and other sexually-oriented or nudity-oriented magazines and on computer bulletin boards; and by monitoring foreign correspondence from distributors of non-fiction and fiction works regarding gay youth, children, or pedophilia, and foreign shipments of nudist or other nudity-oriented, non-pornographic, publications depicting children.¹⁶⁸ Finally, persons previously arrested for pornography or on charges of child molestation are added to the target lists and solicited in government sting operations. The lists of names compiled by the government are circulated among law enforcement agencies throughout the United States, including the regional child pornography task forces in major metropolitan areas.¹⁶⁹

The target lists comprise only a small amount of the information collected regarding potential consumers of child pornography. Law enforcement officials run background checks and often engage in extensive undercover work to determine an individual's sexual proclivities, using criteria such as whether the individual lives near a playground or school, works with children, takes photographs, or has a computer. Trash covers (where a suspect's trash is secretly inspected by undercover officers in search of incriminating evidence), visual surveillance, and wiretapping are also employed to collect information.¹⁷⁰ This extensive and very expensive law enforcement activity generates the impression of a large, thriving child pornography underground. Police activities are even cited as "proof" that such a large underground actually exists.¹⁷¹

mer" (Mankiewicz), "Lianna" (Sayles) and "Taxi Zum Klo" (Riploh). Award did not distribute any type of pornography, but the officers executing the search warrant remarked that some individuals whom they had arrested for receiving child pornography owned films distributed by Award. This, they concluded, was reason enough for the seizure. The Award mailing list was distributed to law enforcement agencies throughout the United States. See Affidavit of Paul Hartman, *United States v. Emerick*, No. CR86-190A, at 4 (N.D. Ohio 1986), at 4; interview with David Brown, Esq., Brown, Weston & Sarno (Mar. 30, 1987); Award Films advertising brochures, *The Insider*, Vol. 1, Nos. 1-3; Vol. 2, No. 1.

¹⁶⁸ In *United States v. Metzger*, Crim. No. 88-50081-C1 (W.D. La. 1987), defendant answered an advertisement placed by government agents in the *Texas Area Swinger* (Houston, TX) in May, 1987, which read: "Wanted: other sincere, liberal couples, families, and singles who believe in family rights, love children, and support freedom of thought and expression for young and old alike, to join association of like-minded people. Newsletter, no membership first year. Write for membership application." See *id.*, Application and Affidavit in Support of Search Warrant.

¹⁶⁹ The Southern California Child Exploitation Task Force and the Illinois Child Exploitation Task Force were among the first task forces to deal with child exploitation.

¹⁷⁰ See, e.g., *United States v. Thoma*, 726 F.2d 1191, 1194 (7th Cir. 1984).

¹⁷¹ In testimony before Congress, Toby Tyler, a child pornography expert from the

Today, a person seeking that underground is likely to find only a vast network of postal inspectors and police agents. There are no sexually-oriented publications, above-ground or underground, published in the United States today which contain advertisements offering to sell, exchange, or purchase child pornography; there are no toll-free numbers to order child prostitutes; and there are no large networks of individuals, other than public authorities, exchanging child pornography.¹⁷² The small number of networks exchanging children uncovered by law enforcement officials over the past ten years usually concern teenagers looking to escape abusive homes, poor economic and living conditions, and lack of affection; the "networks" are usually no more than a few individuals who are acquainted with one another.¹⁷³ There is currently only one active "pedophile" organization, the North American Man-Boy Love Association, ("NAMBLA"), which operates wholly within the law as a lobbying and support organization. Investigations between 1982 and 1986 by the Postal Inspection Service in New York and the United States Permanent Subcommittee on Investigations failed to uncover any evidence of involvement in illegal activities on the part of NAMBLA.¹⁷⁴

San Bernardino County, California Sheriff's Office, cited various solicitations for child erotica placed in the now-defunct publication, *Wonderland*. At least one of those advertisements was the creation of postal inspector John Ruberti. Another advertisement is believed to have been placed by LAPD Agent William Dworin. See Stone & Tyler, *Child Pornography: Perpetuating the Sexual Victimization of Children, Child Pornography and Pedophilia*, Nov. 29-30, 1984, at 99. Several advertisements in *Wonderland* appeared to offer to purchase or trade child pornography, but most of the advertisements which offered to sell material offered only non-pornographic nude depictions of minors. At least one book advertised in *Wonderland*, entitled *NYPHE*, contained depictions of minor females engaged in "lascivious exhibition of the genitals." See *Wonderland*, Issues 4, 13; interview with David Techter, publisher of *Wonderland* (Apr. 1986). According to Techter, those advertisements he knew or had reason to believe were placed by undercover police officers were placed on page 9 of the last several issues of *Wonderland*. A total of thirteen issues of *Wonderland* were produced until Techter's arrest in May, 1986 on Illinois state charges of possession of child pornography. One year later, Techter was released when the lower court judge dismissed the case. See *People v. Techter*, No. 86-CR-7857 (Code Cty. Cir Ct. Crim. Div. 1986). In the spring of 1987, undercover police officers began publishing *Wonderland* again, using Techter's mailing list as an investigative tool.

¹⁷² See *supra* note 61 and accompanying text.

¹⁷³ This is not to excuse or justify real exploitation where it exists, but merely to challenge "white slavery" myths. See, e.g., J. MITZEL, *THE BOSTON SEX SCANDAL* (1980).

¹⁷⁴ *Child Pornography and Pedophilia*, *supra* note 99, at 19-21. See also, *A Witchhunt Foiled: The FBI vs. NAMBLA* at 86-91 (1985) (available from North American Man-Boy Love Association, Box 174 Midtown Station, New York, N.Y. 10018). The latter report on NAMBLA contains excerpts from a United States Postal Service report, obtained through a Freedom of Information Act request, which found that the organization was involved in no illegal activities and ordered agents to cease further investigation.

D. Consumers of Child Pornography

When government agents target individuals as potential consumers of child pornography, they assume "that the world is divided clearly between criminal and noncriminal citizens. It is assumed that presenting a temptation will not endanger the uprightness of the latter, while the former will commit the offense if given any opportunity to do so."¹⁷⁵

Government officials have offered two basic theories to justify the undercover sale of child pornography. First, as a preventive measure, because apprehending potential purchasers will diminish the market for child pornography. Second, as a proactive measure, because those likely to purchase child pornography are also likely to engage in sexual activity with children.¹⁷⁶ In reality, the government sale of child pornography may actually stimulate whatever market there may be for child pornography. According to the multitude of press reports of child abuse, it certainly fails to prevent the sexual exploitation of children.

Potential purchasers of child pornography are a diverse group. Since child pornography includes depictions of any minor under the age of eighteen, the desire to view certain child pornography should actually be considered normative. For example, dozens of movies and magazines produced between 1984 and 1986 depicting Traci Lords, a highly popular adult film star who was under the age of eighteen, technically constitute child pornography. Various film producers, video store owners, and private collectors have been prosecuted for dealing in child pornography featuring Ms. Lords because she was legally a minor. The agent and producers of her film, "Those Young Girls," were indicted after it was learned that Lords was underage at the time the film was made.¹⁷⁷ That film was not her first appearance as an adult film star; Lords had previously appeared in other films, as well as in the centerfold of *Penthouse Magazine*. Lords never complained to anyone about her work in the adult film industry, for which she was handsomely paid. In fact, the defendants have proffered the defense that she had purposely lied about her age to obtain the work in the first place.¹⁷⁸

¹⁷⁵ Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQUENCY 165, 172 (1982) [hereinafter MARX].

¹⁷⁶ See, e.g., letter from Southern California Child Exploitation Task Force to *Playboy* magazine at 60-61 (regarding author's Sept. 1988 article, *The Child Pornography Myth*) reprinted in *Playboy*, Jan. 1989; letter from Charles R. Clausen, Chief Postal Inspector at 45-46 (responding to same article), reprinted in *Playboy*, Feb., 1989.

¹⁷⁷ *United States v. Kantor*, 858 F.2d 534 (9th Cir. 1988).

¹⁷⁸ *Id.* at 540. The Ninth Circuit held that the defendants could proffer a "mistake of

Since Ms. Lords' appearance was so deceptively mature, her young age cannot imply that consumers of her films demonstrated any deviation from cultural or social norms. Consumers of real child pornography may also fail to demonstrate any deviation from societal norms.

Given these variables, virtually anyone who purchases sexually-oriented material may be a potential purchaser of child pornography, whether out of sexual interest in sexually mature or immature males or females, out of mere curiosity, or out of a nostalgic longing to relive early fantasies or activities.¹⁷⁹ In light of the fact that the only crime committed by the majority of the defendants indicted and convicted pursuant to government child pornography sales operations was the purchase of a single magazine or videotape sold by the government, government child pornography solicitations amount to random "integrity testing."¹⁸⁰ Moreover, if the child pornography industry is, as federal law enforcement officials have been insisting since at least 1984, an underground network of individuals exchanging homemade pictures, videotapes, and films, the government solicitation and sale of pre-existing commercial child pornography is unlikely to have any effect whatsoever on that alleged clandestine network. In fact, by selling child pornography, the government itself is stimulating a market for child pornography and providing an opportunity for purchase which would otherwise not exist. "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."¹⁸¹

Government sales operations also fail as a proactive measure to protect children. Even where an individual does order child pornography specifically based upon an alleged or admitted sexual attraction to children, that individual may not necessarily engage in sexual activity with children or be more likely to do so than those who do not purchase child pornography from the government. Studies of men incarcerated for sex crimes against chil-

age" defense even though it is not specified as a defense under the statute. The prosecution argued that the statute imposed strict liability.

¹⁷⁹ The choice of sexually arousing material is idiosyncratic . . . Each individual is forming a unique set of experiences and associated mental images or fantasies [in childhood] that may be retained as sexually stimulating material for future use during adult sexual behavior. Child pornography may be used to represent or enhance these early images. . . . [Thus], [i]t is possible that most use of child pornography is not associated with a psychological disorder.

Cepeda, *Raison d'Etre for Child Pornography*, 19 MED. ASPECTS HUM. SEXUALITY 16, 85 (1985).

¹⁸⁰ See MARX, *supra* note 175.

¹⁸¹ *Sherman v. United States*, 356 U.S. 369, 385 (1957) (Frankfurter, J. concurring).

dren reveal that the prisoners had little exposure to pornography. Ron Langevin¹⁸² notes that the rate of association between consumption of pornography of any type including child pornography and the commission of sex offenses is quite low:

I have just recently tabulated the frequency of pornography use among sex offenders seen in our clinic. . . . [W]e did so a few years ago and decided to abandon the question because of the low incidence of such behavior, i.e. it seemed unimportant. In light of the current popular debate on the role of pornography in sexual offenses we started to collect the data again. The results are essentially the same. If sex offenders are exposed to any pornography, it is generally of the Playboy or Penthouse variety and their sexual interest is not sustained by such materials. I do not believe that there is any "predisposition" to possess pornography that is related to a predisposition to commit crimes [against children]. The link between pornography and sexual crimes has consistently been statistically non-significant. In summary, it seems that men who commit sexual offenses against children do not accumulate child pornography although some individuals might. To predict a predisposition to pedophilia or to the commission of child abuse based on the possession of pornography would be a futile effort.¹⁸³

Where an individual has admitted a sexual attraction to children or has been convicted previously for sexual contact with children or for child pornography, government solicitation raises important ethical issues. Undercover law enforcement officials have preyed on the "weakened capacity" of these individuals "to distinguish [between] right and wrong," the need for psychological support and validation, as well as the need for sexual fulfillment.¹⁸⁴ In *United States v. Edmundson*, the defendant, an individual who had served three years in prison on charges of fondling two of his nieces, aged five and seven, was under psychiatric care when he was solicited by the government to purchase child pornography. The defendant, who admitted his attraction to children, was struggling to change his sexual orientation.¹⁸⁵ His arrest for receipt caused severe psychological setbacks. For an individual who has never broken the law, undercover agents may unwittingly push the suspect

¹⁸² Senior Research Psychologist and Associate Professor of Psychiatry at the Clarke Institute, University of Toronto. Langevin is one of the foremost experts on sexual offenses, particularly pedophilia and incest. He has been conducting research on sex offenders for nearly twenty years.

¹⁸³ Personal correspondence with the author (Dec. 4, 1987).

¹⁸⁴ See MARX, *supra* note 175, at 170.

¹⁸⁵ Interview with Randy T. Edmundson (Jan. 12, 1989).

over the edge, rather than offering him the help he needs. For example, in *United States v. Esch*,¹⁸⁶ one of the defendants created the child pornography for which he was convicted only after an undercover agent persuaded him to purchase a camera.¹⁸⁷ Such police work acts to destabilize individuals, causing further psychological difficulties, social alienation, financial ruin, and even suicide.¹⁸⁸

IV. EFFECTS OF THE MYTH

Government sale of child pornography may not alter the small amount of non-commercial exchange of child pornography which does exist or prevent individuals from engaging in sexual activity with children. However, government sales operations do artificially inflate statistics which reflect child pornography offenses, and give the appearance of a widespread social problem. The intense focus upon the few horror stories where children have actually been harmed "do not merely attract attention; they also shape the [public] perception of the problem."¹⁸⁹ Unfortunately, the public is misled into thinking that the "atrocities [are] in some sense representative" of the whole picture.¹⁹⁰

Inflated statistics and sensationalism have a specific purpose: first, they give the appearance that the government is doing something about a serious social problem — the physical, emotional, and sexual abuse of children; second, they focus public attention away from that real abuse.

For the stated purpose of protecting children, millions of taxpayer dollars are spent to investigate and prosecute would-be consumers of child pornography, many of whom do not pose any immediate danger to children. According to the Justice Department's own public testimony, only a handful of the over 225 individuals indicted pursuant to Operations Borderline and Looking Glass were involved in any other indictable offenses involving children.¹⁹¹ Reports by some researchers indicate that as many

¹⁸⁶ 832 F.2d 531 (10th Cir. 1987).

¹⁸⁷ *Id.* at 538-39.

¹⁸⁸ *Id.*

¹⁸⁹ Best, *Rhetoric in Claims-Making: Constructing the Missing Children Problem*, 34 Soc. Prob. 101, 106 (1987).

¹⁹⁰ *Esch*, 832 F.2d at 114.

¹⁹¹ According to the Justice Department, 35 of those indicted as the result of Operations Borderline and Looking-Glass "admitted to or evidence was found of sexual molestation of children." *U.S. Indicts 100 in Sting to Send a Message on Child Pornography*, *The Star-Ledger*, Sept. 15, 1987 (Newark, N.J.). A review of over one hundred newspaper articles from 21 states, national press and wire service reports, numerous case files, and conversations with numerous defense attorneys, failed to yield more than a handful of cases of actual evidence of abuse uncovered in sting operations. Prosecutorial posturing of this type is common in this particular area of law enforcement. For example, in one

as fifty percent of all females are molested by fathers, uncles, brothers, stepfathers, babysitters, and strangers before they reach the age of eighteen¹⁹²; in light of those statistics, a random targeting of the American population might yield a higher incidence of illegal activity involving minors than did the government's highly organized targeting system. Considering the very real incidence of physical, sexual, and emotional abuse of children, government investigations of child pornography represent a serious misuse of public monies and resources.

A. "Victims" of the War Against Child Pornography

The following ten cases are representative of child pornography arrests since May, 1984:

(1) In May, 1985, Professor Al Katz of the State University of New York at Buffalo Law School was arrested for mailing a single photograph, not taken by him, of a young girl lewdly exposing her genitals. Katz had unwittingly mailed the photograph to a Postal Inspector nearby in attempting to mail the child pornography underground.¹⁹³ The investigation of Katz was lengthy. Katz received numerous solicitations and questionnaires from undercover officers. In addition, a surveillance team was assigned to follow and observe Katz' comings and goings. After one and one-half years of investigation, Katz was charged with "promoting a sexual performance of a child" under New York State law on the basis of the single photograph.¹⁹⁴

Katz' long-standing interest in erotica and pornography led

case in Atlanta from a 1986 sting operation, the evidence of child molestation uncovered consisted of "seven 'graphic' drawings of minors engaged in sex." *3 Metro Atlanta Men Among 175 Indicted in Child-Porn Sting*, *The Atlanta Constitution*, Sept. 15, 1987, at 2, col. 1. No abused minors were found because none existed. Interview with C. Everett Boutwell, Esq., attorney for Harold Brookshire, Laurel, Miss. (Aug. 19, 1988).

¹⁹² D. FINKELHOR, *A SOURCEBOOK ON CHILD SEXUAL ABUSE* 20-21 (1986).

¹⁹³ Letter from Mark J. Mahoney, Esq., Diebold, Birmingham, Gorman, Brown & Cook, P.C., to Richard J. Arcara, Erie County District Attorney (Apr. 14, 1986) (recommending that charges against the defendant be dropped); Plea Agreement, New York v. Katz, No. 85-0421-001 (Erie County Nov. 26, 1986); Correspondence from Al Katz, (July 29, 1986).

¹⁹⁴ Sentencing Statement and Recommendations on Behalf of the People, People v. Katz, No. 85-0421-001 (Erie County Jan. 6, 1987). Katz was a prominent and outspoken member of the bar in Buffalo and particularly at the law school at University of California, Berkeley, where, in 1966 and 1967, he received his J.D. and LL.M. In 1969, Katz wrote articles on Henry Miller's *Tropic of Cancer* and on the landmark Supreme Court decision *Stanley v. Georgia* for the Yale Law Review and the Supreme Court Review. That year he also wrote several book reviews for the Stanford Law Review and the California Law Review. In addition, Katz was an avid photographer. His adult nudes have been exhibited in galleries in Buffalo and elsewhere. Letter from Mark Mahoney, Esq., Diebold, Birmingham, Gorman, Brown & Cook, P.C. to Richard J. Arcara, *supra* note 193.

him to his ill-fated attempt to investigate the child pornography underground, particularly among families that might be involved in such activities. What Katz found were "phonies, people who pretended to be involved in a network but were not, and of course cops, people who were (like me) pretending to be something they weren't." Katz observed that family involvement in child pornography activities was a rare phenomenon.¹⁹⁵

Neither the Erie County District Attorney's Office nor the judge in the case were sympathetic to Katz' contention that he was conducting research. Moreover, there were rumors in the community that certain Buffalo officials were "gunning" for Katz.¹⁹⁶ Unable to endure an expensive trial, Katz entered into a plea bargain in which the child pornography count against him was dropped. Katz was convicted of one count of "obscenity in the third degree," a misdemeanor, and was sentenced to thirty days in prison.¹⁹⁷

(2) In January, 1986, a mid-Western couple was arrested for creating and possessing "nudity-oriented material," a form of child pornography under applicable state law,¹⁹⁸ after the husband sent a roll of film to a local film processor. The film contained photographs of the couple's daughter and two nieces sunbathing in the family's backyard and running around the house nude. The couple had similar photographs and videotapes in their possession. They were not consumers of any form of pornography, adult or child. The family had always treated nudity as natural, not as a subject of shame.

When the couple was arrested, their daughter was taken into custody by state child protection workers. She was placed in a foster home for nearly seven months, and she was allowed to see her parents only on an approved visitation schedule with the supervision of a social worker. She was severely frightened and dis-

¹⁹⁵ Katz, *A Short History of My Interest in Erotic Art, Porn, Kiddie Porn, and the Flannel Underground*, at 11 (unpublished manuscript in author's file). Katz's case is comparable to that of Patrick I. LaFollette, who was acquitted on facts almost identical to those in Katz' case. LaFollette was independently researching and investigating the sexual behavior of pedophiles. He impersonated a pedophile to discover information, and he inadvertently traded child pornography with an undercover agent. He was subsequently arrested. The court held that his "unorthodox" but scholarly approach was protected by state law. Steward, *Man Cleared of Child Exploitation Count: Judge Says Law Protects Sex Researcher's 'Unorthodox' Approach*, L.A. Times, Mar. 2, 1985, at 29; *Researcher Cleared in Child Pornography Case*, L.A. Daily J., Mar. 5, 1985.

¹⁹⁶ Correspondence from Prof. Vern Bullough, State University College at Buffalo, to Al Katz (July 16, 1988); Interview with Mark Mahoney, Esq. (July 31, 1986).

¹⁹⁷ Interview with Mark Mahoney, Esq., Jan. 6, 1987; *UB Prof Pleads Guilty to Obscenity Charge*, Buffalo News, Nov. 27, 1986; *UB Law Professor Gets A Stay of Jail Sentence*, Buffalo News, Jan. 23, 1987.

¹⁹⁸ OHIO REV. CODE ANN. § 2919.32(a)(2)-(3) (Anderson 1986).

turbed by her treatment at the hands of the state. The couple is still awaiting trial; though the child has long been returned to their full custody and is now over the age of eighteen.¹⁹⁹

(3) Alan Porter was solicited by Produit Outaouis, operated by Customs, to purchase child pornography after his name was found on the mailing list of Alpine Distributors, operated by Joseph Surin in Chicago. Surin's prospective customer list came into the possession of law enforcement officials after Surin himself fell victim to a government sting operation and purchased child pornography. In the Application and Affidavit in Support of a Search Warrant, and throughout the case, law enforcement officials and the federal prosecutor repeatedly referred to Alpine and Surin as "known child pornography distributors." However, the story of Alpine Distribution was told only in a special hearing, after the jury had found Porter guilty for the "knowing" receipt of child pornography.²⁰⁰

Alpine was a small mail-order business, earning under \$9,000 in the year prior to Surin's arrest, which sold homemade adult materials purchased by Surin. Surin built his prospective customer list from advertising in video magazines.²⁰¹ The advertisements which Surin ran were innocuous: Homemade Amateur Videos. Beautiful women, solo, and couples. \$2.00 for list. Alpine Distributors, P.O. Box 402, Oak Lawn, IL 60453.²⁰² No indication was given, nor was it ever established, that Surin sold child pornography.²⁰³ According to both government agents and Surin's attorney, Surin sold approximately one dozen films depicting adults engaged in sexual activity. He also allegedly offered one videotape, containing two unrelated sequences, depicting minors. The first sequence showed two girls, approximately twelve or thirteen years old, "modeling" in bathing suits. The second segment, entitled "Teacher's Pet," depicted a female masturbating.²⁰⁴ Whether the female was under the age of eighteen is a matter of dispute. According to the pediatrician con-

¹⁹⁹ State v. Robinson, No. 85 CA 47, 85 CA 48, (Ct. App. Ohio May 1, 1986) (WESTLAW S134, OH-CS); telephone interview with Catherine Barber, Esq., Carretta, Cartwright & Barber Co., L.P.A., attorney for defendants (May 18, 1988).

²⁰⁰ Report of Postal Inspector John Ruberti, Oaklawn, Illinois, Case No. 352-85-59945-PM(1) (Aug. 14, 1985) (alleged pornography violations by Joseph A. Surin, Jr.). Interview with Adam Bourgeois, attorney for Surin (Dec. 8, 1988); United States v. Surin, CR 88-810 (D. Ill. 1988).

²⁰¹ Interviews with Adam Bourgeois and Bernard Farber, Esqs. (Dec. 8, 1988).

²⁰² *Id.*

²⁰³ *Video Magazine*, Feb. 1985, at 165.

²⁰⁴ United States v. Porter, Crim. No. 88-80554, (E.D. Mich. 1988). Record, Special Hearing, Dec. 14-16, 1988 [hereinafter Special Hearing].

sulted by the government in the Surin case, the individual depicted could have been anywhere between fifteen and twenty-two years of age. Based on her behavior, however, the pediatrician stated his belief that she was probably under the age of eighteen.²⁰⁵ According to Wayne Dierlam, the custodian of records for Customs who testified in the *Porter* case, the individual depicted was interviewed by Customs officials and, although she testified that she had made such films in the past, she could not remember whether or not she was under eighteen at the time this particular film was made.²⁰⁶ Moreover, after the film was shown in the *Porter* courtroom during a special hearing, Lawrence Zatcoff, Presiding Judge, admitted that he could not tell whether the individual depicted was under age.²⁰⁷ Finally, Surin's source for "Teacher's Pet," a private retailer of adult films in California, had indicated in his solicitations that the individuals depicted in that film were over the age of eighteen.²⁰⁸

The government never introduced any evidence that Porter had ever done business with Surin or Alpine. Nor were any other facts introduced by the prosecution that would suggest that Porter had any predisposition toward acquiring child pornography.²⁰⁹ Porter was a name on a mailing list and nothing more.

The solicitation which the government, posing as "Produit Outaouis," sent to Porter was very ambiguous. Rather than specify the precise ages of the models allegedly depicted in the materials offered, the government brochure merely stated that the material contained depictions of "boys and girls in sex action". As Porter's attorney pointed out to the judge and the jury, such ambiguity is typical of the "come-on" advertisements used in the adult pornography business.²¹⁰ Unfortunately for Porter, the tactic did not prove successful, as it did in the Herbolt case.²¹¹

The lack of a factual basis on which to prosecute Porter did not deter the prosecuting attorney from referring to Porter's

²⁰⁵ *Id.*

²⁰⁶ *Id.* A letter stating the opinion of the pediatrician was entered into the record.

²⁰⁷ *Id.* (testimony of Wayne Dierlam).

²⁰⁸ *Id.*

²⁰⁹ *Porter*, Record at Trial, November 21, 22, 1988.

²¹⁰ *Porter*, Record at Trial, Nov. 21, 22, 1988; Special Hearing, testimony of Lawrence A. Stanley, Esq., Dec. 15, 1988. The titles offered by Produit — "Nymph Lover," "Lolita," and others, are not dissimilar to hundreds of films and magazines featuring adults only. A few examples of these films and magazines listed in MEESE COMMISSION REPORT, *supra* note 78, at 1538, 1543, 1546, 1591, & 1612, are: (films) Little Girl, Girls of the Street, Little School Girl, Lolita Rape, Young & Innocent, Young Girls Do; (magazines) Tender Young Tits, Tender Twat, Teen Playmates, Teacher's Pet, Virgin Love, Virgin Pussy, Young Girls, Young Love, and Young Tight & Ready.

²¹¹ See *infra* notes 234-36 and accompanying text.

connections with "a known child pornography distributor." Nor did it deter him from suggesting that Porter must have hidden incriminating evidence out of the reach of government agents. In the final moments of his summation to the jury, the prosecutor pointed at Porter and shouted "[t]his man wants to rape your teenage daughter."²¹²

(4) William Lerch and his wife were indicted in 1985 and charged with "photographing their six-year-old child in the nude with her pubic area exposed," and with "knowingly permitting their child to be so exposed."²¹³ The girl was playing with her mother on the living room floor before a bath, turning somersaults and running around, and the father photographed them, as he had many times before. These photographs were discovered by the authorities after William Lerch took them to the local drug store for processing.

Shortly after Christmas Day, 1985, when Lerch went back to the drugstore to pick up his pictures, he was arrested. His wife, unaware that there was any problem, was arrested at gunpoint by more than half a dozen police officers on the street in front of her house.²¹⁴ The six-year-old was picked up at her day care center by child protection workers who told the staff that the girl was a victim of child pornography and possibly had been sexually abused by her parents.²¹⁵

At 3 o'clock that morning, the 6-year-old [was] placed by the Illinois Department of Children and Family Services in a foster home. For five days, the child refused to eat. She just cried. At last, her parents convinced the judge to release their daughter to her grandparents, where she stayed six weeks before coming home.²¹⁶

William Lerch was given a one year suspended sentence for creating child pornography.²¹⁷

(5) Between September, 1985 and April, 1986, Tim Emerick, an individual from a mid-western American city, received several solicitations from two scam operations created by Cleveland Postal Inspector Paul Hartman: (1) "Research Facts," which claimed it was in the business of conducting consumer surveys; and (2) the "Ohio

²¹² *Porter*, Summation of U.S. Attorney DeLonas, Record at Trial, Dec. 22, 1988.

²¹³ Appellant's Brief at 1, *People v. Lerch*, No. 83-1827 (Ill. App. Ct. 1985), Stipulation of Facts, R. 46. See also, *People v. Lerch*, 483 N.E.2d 888 (S. Ct. Ill. 1985).

²¹⁴ Hentoff, *This Is Child Porn?*, Washington Post, Aug. 2, 1984.

²¹⁵ *Id.*

²¹⁶ Interview with Harvey Grossman, American Civil Liberties Union, attorney for William Lerch on appeal.

²¹⁷ *People v. Lerch*, 483 N.E.2d 888 (Sup. Ct. Ill. 1985).

Valley Action League," which purported to be "an organization founded to protect and promote sexual freedom and freedom of choice." Hartman claimed that Emerick became a target for investigation because his name was found on the "correspondent's lists" of one individual and one company suspected of selling child pornography. The individual was never convicted and it was not known why he had Emerick's name. Those "correspondents' lists" belonged to Award Films and Melton Midge.²¹⁸

Emerick ignored the enticing letters and surveys requesting various items of information, such as his sexual interests and what kind of pornography he might purchase. In April, 1986, Hartman sent Emerick another letter, this time from an organization calling itself "Euro-Arts International," with a mailing address in Fredericksted, Virgin Islands. Euro-Arts, also created by Hartman, had as its sole purpose the sale and distribution of child pornography. An order form for child pornography, with descriptions of the videotapes being offered by Hartman, was sent to Emerick, who promptly ordered one videotape at a cost of \$50. Purportedly, it depicted two boys, ages eleven and fourteen, engaged in masturbation and oral sex. Emerick sent his order and payment to Euro-Arts in the Virgin Islands. The United States Postal Service then forwarded it to Hartman in Cleveland, who filled Emerick's order by making a copy of the ordered videotape.

When Emerick received the videotape in the mail on June 17, 1986, he was arrested and his house was searched.²¹⁹ Police officers seized two video players, a Polaroid camera, an 8mm movie camera, some non-pornographic videotapes, and six adult magazines depicting nude women.²²⁰ No child pornography was found, and Emerick never saw the ordered videotape. Emerick was convicted on charges of importing and receiving child pornography, and he was given a lengthy probationary sentence.²²¹ The defense of entrapment was not available to Emerick, since he could not prove that the government actively coerced or tricked him into purchasing the child pornography. Hartman has boasted that he has arrested and convicted over two dozen would-be consumers through Euro-Arts and other

²¹⁸ Correspondence from R. Van Camp, Director of the Ohio Valley Action League, to T. Emerick, Exhibit 6, Motion to suppress, *United States v. Emerick*, No. 86-190A (N.D. Ohio 1986).

²¹⁹ *Id.* at 5-6.

²²⁰ Motion to Suppress, Attachment A: Inventory of Seized Items, *United States v. Emerick*, No. 86-190A (N.D. Ohio, Sept. 26, 1986).

²²¹ Others have not been so lucky. Sentences in cases of this type have ranged from a few years probation to ten years of imprisonment, depending upon the sentencing judge.

schemes selling and exchanging child pornography.²²²

(6) Danny Lee Stokes, a twenty-three year-old construction worker from the South fell victim to a scheme similar to the one in Emerick's case run by the United States Customs Service out of Mexico City. Law enforcement officials claimed that Stokes may have purchased "pornography and/or child pornography" prior to autumn, 1984, but never clearly indicated why they suspected Stokes of illegal activity.

In June, 1986, using a scam operation calling itself "International Enterprises, S.A." and purporting to be a distributor of "hard-to-find" pornography, United States Customs sent Stokes two solicitations. The first was a letter of introduction and a questionnaire asking Stokes to indicate his preference for various types of pornography. The second was an order form for child pornography magazines. Stokes ordered one magazine at twenty-five dollars and sent his order to Mexico City. United States Customs packaged the designated magazine and delivered it to his post office box. When Stokes picked up the magazine, he was placed under surveillance.²²³ Once he entered his home with the package, he was arrested.

Police officers seized a large quantity of materials from Stokes' home, including hundreds of magazines such as *Time* and *Newsweek*, a few nudist magazines, a dozen adult pornography magazines, his wedding photo album, three cameras, a video recorder, fourteen videotapes (three of which were adult erotic videos and the remainder of which were Hollywood movies), three registered guns, and his pick-up truck.²²⁴ No child pornography was found, although Customs declared at the time of Stokes' arrest that thousands of magazines and videotapes were seized.²²⁵ Stokes was eventually sentenced to five years probation, ordered to pay a \$9,000 fine, and required to forfeit all of the items seized by the police. In addition, he was ordered to undergo psychiatric treatment on a weekly basis until such time as his psychiatrist saw fit.²²⁶ The Customs operation, "Operation Cameo," which led to Stokes' arrest and conviction, as well as to the arrests and convictions of as many as ten other individuals, was hailed by Customs at the time as "the largest single anti-pornography operation in Customs Service history."²²⁷

²²² Griffith, *Hunting Child-Porn Traffickers*, *Cleveland Plain Dealer*, July 22, 1985, at D6, col. 1.

²²³ Affidavit of Evans, *United States v. Stokes*, *infra* note 225.

²²⁴ Fed. Search Warrant #85-0050C, *United States v. Stokes* No. 86-00146-AH (S.D. Ala. 1987). Interview with Danny Lee Stokes.

²²⁵ Werneth, *Child Porn Sting Nets 6 Suspects in 5 States*, *Press Reg. Rep.*, Nov. 18, 1986.

²²⁶ Plea Agreement, *United States v. Stokes*, No. 86-00146-AH (S.D. Ala. 1987).

²²⁷ *Six Arrested in Kiddie Porn Sting*, *UPI Wire Service*, Nov. 18, 1986. Officials informed

(7) James Smith, a Honolulu businessman, befriended three girls, ages thirteen and fourteen, who lived in his neighborhood. After several months of being acquainted with the girls, the defendant asked them to model lingerie, while he photographed them. The photographs were not intended for commercial distribution. The girls were photographed mostly in lingerie, although a few of the photographs showed them nude. The nudes were found not to constitute child pornography. In three of the photographs, however, the girls were shown posing with a milk tail, which the prosecution called a "whip-like device."²²⁸ One of the three pictures showed two of the girls laughing while one pretended to "whip" the other.²²⁹ Smith was sentenced to five years in federal prison for creating child pornography depicting "sadistic and masochistic abuse" of children on the basis of that photograph.²³⁰ The testimony of the girls in court clearly showed that no such abuse had taken place, and that Smith had never even propositioned them, let alone touched them, during the course of their acquaintance.²³¹

(8) Leland Stevenson, a businessman from Arizona, regularly vacationed in Sri Lanka, where he engaged in sex with a number of teenagers and young adults. There was no evidence that he ever engaged in such activity in the United States. In the fall of 1985, Stevenson returned from Sri Lanka to his home in Nevada with thirty rolls of 8mm film in his possession. The film, made for his personal consumption, showed the teenagers and Stevenson engaged in sexual activity. Stevenson drove to California with the film and deposited it with Yale Laboratories, a film processing outfit in Los Angeles. Only a few hours after Stevenson picked up his film from the laboratory, he was arrested.²³²

At trial, Stevenson argued, as did James Smith, that federal law did not include the interstate shipment of undeveloped film depicting minors engaged in sexually explicit conduct. The court disagreed, and sentenced Stevenson to five years imprisonment.²³³

the press that they expected six more arrests as well. According to Robert Grimes, then regional Customs commissioner in New Orleans, 500 individuals had been solicited by the government in this one year operation involving Customs "and 30 other federal state and local law enforcement agencies" in five states. *Federal Sting Nets 6 Arrests in 4 States on Child Porn Charges*, Clarion Ledger, Nov. 19, 1986, at 1, col. 3, (Jackson, MS).

²²⁸ Brief for Appellees at 7, *United States v. Smith*, 795 F.2d 841 (9th Cir. 1986).

²²⁹ Interview with H. Dean Steward, Ass. Federal Public Defender, Honolulu, HI, attorney for defendant James Smith (Mar. 24, 1987).

²³⁰ *Smith*, 795 F.2d at 845.

²³¹ Memminger, *3 Teen Girls Tell of Nude Poses for 'Lonely Bachelor'*, Honolulu Star-Bulletin, June 26, 1985, at A9; interview with H. Dean Steward (Mar. 24, 1987); letter from H. Dean Steward to Lawrence Stanley (Oct. 21, 1986).

²³² Brief for Appellant at 5, *United States v. Stevenson*, 795 F.2d 841 (9th Cir. 1986).

²³³ *Id.* at 7.

Stevenson's appeal was consolidated with that of James Smith, who also had argued that undeveloped film did not constitute "visual depictions." Both convictions were affirmed, but to ensure that this defense would never be used successfully, Congress, at the request of the Justice Department, amended the federal child pornography law in 1986 to include unprocessed film within the definition of "visual depiction."²³⁴

(9) Seventy-one-year-old Vincent S. Herbert from Carthage, Ohio was solicited in early 1987 by the United States Customs Service as part of Operation Borderline. Herbert, an avid collector of adult pornography, received a two-page brochure from Customs, printed in English and French, advertising a variety of pornographic material "with boys and girls in sex-action." Although the titles of the photo sets were identical to the titles of child pornography magazines produced during the 1970s, no ages were specified in the Customs brochure. Herbert had come across similar advertisements over the years, all for "fantasy" type of material depicting adult women posed as "cheerleaders" or "schoolgirls."²³⁵

A few months after Herbert placed his order for seven sets of photographs (for a total of \$105), his package was delivered by law enforcement agents posing as deliverymen. Herbert was charged with "knowing receipt" of child pornography.²³⁶

Allen Brown, Herbert's criminal attorney, introduced into evidence the advertisements collected by Herbert over the years. By comparing Customs' child pornography brochure with some adult pornography advertisements in Herbert's collection, Brown argued to the jury that one could easily understand how the defendant might believe that the Customs brochure advertised adult pornography. With the additional assistance of a nun who served as a character witness, and in light of the fact that Customs had manufactured Herbert's "photo sets" only after he placed his order, Herbert was acquitted.²³⁷

(10) On June 13, 1986, professional photographer William Kelly was arrested after sending a roll of film to Colorfax laboratory in Silver Spring, Maryland, which, unbeknownst to Kelly, contained

²³⁴ Testimony of Stephen D. Bishop, Manager, Fraud & Prohibited Mailings Branch, before the House Judiciary Subcommittee on Crime (Aug. 14, 1986); CHILD SEXUAL ABUSE & PORNOGRAPHY ACT OF 1986, H.R. REP. NO. 99-910, 99th CONG., 2d Sess., reprinted in U.S. CODE CONG. & ADMIN. NEWS 5952 (clarification of meaning of "Visual Depiction"); *Smith*, 795 F.2d at 846-47.

²³⁵ Interview with Allen Brown, attorney for defendant Vincent S. Herbert (May 10, 1988). There was no record in this case, as it resulted in Herbert's acquittal.

²³⁶ Kaufman, *Entrapment Defense Used in Kid Porn Case*, Cincinnati Enquirer, Dec. 1, 1987, at C2, col. 1.

²³⁷ Interview with Allen Brown, *supra* note 234.

depictions of his children, ages ten and twelve, in pornographic poses. Kelly spent seven days in jail before the court set his bond at \$20,000.²³⁸ The photographs, one showing his twelve-year-old son with an erection and three others showing his ten-year-old daughter in lascivious poses, were taken by his children in Florida where they lived with their mother. The children had photographed each other in pornographic poses previously: the three photographs of the daughter were actually composites of photographs previously taken by the children. Neither parent was aware of their activities. During Kelly's last visit, his son gave him the roll and asked him to get it developed.²³⁹

The case against Kelly collapsed quickly, but not before considerable damage had been done to Kelly's reputation and to the peace of mind of his children and wife.

Prior to the trial, Fairfax police investigator William H. Whilden repeatedly grilled Kelly's children, insinuating that Kelly had taken photographs of them or molested them. Each time, the children denied that anything had happened and insisted they had taken the pictures themselves. Finally, after considerable pressure, the children briefly changed their story, but the prosecution still had no hard evidence of any wrongdoing by Kelly. On the way to the preliminary hearing, Kelly was informed that all charges against him had been dropped.²⁴⁰

Kelly's outrage at the treatment he and his children received led him to bring a \$5 million suit for damages against Whilden and the Fairfax County Police Department for coercing his children into making false testimony, malicious prosecution, and malicious imprisonment.²⁴¹

During the three-day federal trial, Kelly's daughter testified that, from the outset, she told Whilden that her father had not photographed her or indecently touched her. "Then Whilden said if you don't tell the truth, you'll go to juvenile jail . . . so I told him yes. . . . I thought if he heard what he wanted to hear everything would be all right," she testified.²⁴² Both daughter and son testified that they took the photographs, not their father. Kelly was awarded \$5,000 in punitive damages (the money Kelly had to pay his attor-

²³⁸ Jordan, *Father Accused of Abuse Wins \$55,000 in Suit Against Fairfax Police*, Washington Post, Aug. 27, 1987, at C3; Finucane, *Man Wins Sex-Charge Suit: Jury Says Detective Violated Rights, Awards \$55,000*, Journal Newspapers, Aug. 27, 1987, at A1, col. 1.

²³⁹ Interview with William J. Kelly, Jr. (May 17, 1988).

²⁴⁰ Washington Post, Aug. 27, 1987, at C3, col. 1; Journal Newspapers, *supra* note 237.

²⁴¹ *Id.*

²⁴² Jordan, *Father Accused*, Washington Post, Aug. 27, 1987, at C3, col. 4.

ney in the state court proceedings) and \$50,000 in compensatory damages by the jury.²⁴³ The state appealed and the verdict was overturned by the trial judge on a technicality. Unable to pay attorneys' fees and transcript costs for an appeal, Kelly abandoned his case. The experience, he says, left him seriously questioning the American justice system. "My children, too," he said in a telephone interview from his home in Fairfax, "no longer have a great respect for 'law and order.'" ²⁴⁴

V. CHILD PORNOGRAPHY & CENSORSHIP

The paucity of data supporting claims that child pornography exists as a serious problem in the United States today raises the question as to why so much attention is focused upon, and why so many resources are devoted to, child pornography investigations and propaganda. Significant coverage is given to the cause of protecting children, and explanations are proffered which denigrate opponents of any repressive measures against child pornography. Yet for all the activity by American law enforcement agencies, few children are protected from the real physical and sexual abuse and neglect to which they are subjected daily.

Since the child pornography law came into effect in 1978, child pornography has been treated as an expanding category of constitutionally unprotected speech. Not only has the age of majority increased for child pornography participants, but the problems which befall obscenity prosecutions²⁴⁵ are exacerbated by conflicting definitions of what constitutes child pornography. These problems are exemplified in *United States v. Dost*²⁴⁶ and *United States v. Wiegand*.²⁴⁷

In *Dost*, the defendants were found guilty in a bench trial of taking a series of photographs of a sixteen-and-one-half-year-old girl engaged in lascivious poses and one photograph of a ten-year-old girl engaged in a lascivious pose. The photographs of the sixteen-and-one-half-year-old in *Dost* were clearly lascivious under federal law. "In most of the pictures, her legs are open and her arms are raised behind her head. In the majority of the pictures, her pubic area is in the foreground so as to be the promi-

²⁴³ *Id.*

²⁴⁴ Telephone interview with William J. Kelly (May 17, 1988).

²⁴⁵ See *supra* notes 191-239 and accompanying text.

²⁴⁶ 636 F. Supp. 828 (S.D. Cal. 1986).

²⁴⁷ 812 F.2d 1239, 1244 (9th Cir. 1987).

nent focal point of the photograph."²⁴⁸ The photograph of the ten-year-old, however, posed problems for the court.

That photograph, taken on Black's Beach, a nudist beach near San Diego, depicted a pre-pubescent girl who had just had her body painted and who was posing for her picture in the presence of her brother and mother. According to Thomas F. Homann, the attorney who represented Dost's co-defendant, Edwin Weigand, the photograph was a full body shot, taken from about ten feet away, and showed the girl sitting next to her brother, looking toward him. Also according to Homann, the girl was sitting on her feet and leaning back. If there was anything unnatural in the girl's pose, it was due to the fact that she was showing off a body-painting, not exhibiting her genitals. It would have been physically difficult, Homann noted, for the girl to sit with her knees together. The *Dost* court even stated that there was nothing particularly sexual about the ten-year-old's demeanor. "The grandmother of this child, looking at the photograph, might think it was a cute picture," Homann said in an interview. "A postal inspector, however, would see 'child pornography.'"²⁴⁹

Despite the harmlessness of the photograph, and probably heavily influenced by testimony from undercover agents that one or both of the defendants were "pedophiles," the court found the defendants guilty of creating child pornography.

Among the relevant factors considered by the *Dost* court in finding that the photograph of the ten-year-old was child pornography were:

- 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;
- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

²⁴⁸ *Dost*, 636 F. Supp. at 833. The *Dost* decision misreported the age of the older girl as fourteen. The Stipulation of Facts in the case, however, sets her birthdate at December 26, 1967, and the date of the photography session on June 16, 1984.

²⁴⁹ Interview with Thomas Homann, attorney for Weigand on appeal (Oct. 24, 1988).

....
... Of course, a visual depiction need not involve all of these factors to be a "lascivious exhibition of the genitals or pubic area." The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.²⁵⁰

In applying these criteria, the court theorized that a ten-year-old could not, by definition, appear sexually coy. Despite the graphic evidence provided by the child pornography magazines at which the federal child pornography laws were purportedly aimed, the court found that "[s]exual coyness is an expression outside the young child's range of experience."²⁵¹ The court also theorized that the pose of the ten-year-old girl was not ordinary for her age: "The average 10-year-old sitting on the beach, especially when unclothed, does not sit with her legs positioned in such a manner. This unusual pose is one that an ordinary child would not normally assume but for adult coaching (as was the case here)."²⁵² No evidence, however, was introduced in the record suggesting that the ten-year-old was in fact coached to sit in a manner so as to reveal her genitals. Neither was evidence introduced showing that a nudist child would not, without adult coercion, sit on a beach in such a manner. It is this author's contention that there is no reason to believe that a child should have developed the same sense of modesty which the district court judge and prosecutor assumed was natural.²⁵³

*Wiegand*²⁵⁴ carried the *Dost* ruling even further down the slippery slope:

In the context of the statute applied to the conduct of children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles. . . . The picture of a child "engaged in sexually explicit conduct" within the meaning of 18 U.S.C. §§ 2251 and 2252 as defined by § 2255(2)(E) is a picture of a child's sex organs displayed lasciviously — that is, so presented by the photographer as to arouse or satisfy the sexual cravings of a

²⁵⁰ *Id.* at 832.

²⁵¹ *Id.* at 833.

²⁵² *Id.*

²⁵³ For several years, *Naturists* in Oshkosh, Wisconsin publicized its activities with a flyer showing two little girls, from behind, sitting on a beautiful beach with their legs spread wide apart to the oncoming tide. The flyer quipped: "Should They Grow Up Like This. . . ?" Brochure in author's files.

²⁵⁴ 812 F.2d 1239 (9th Cir. 1987).

voyeur.²⁵⁵

The rationale behind *Dost* and *Wiegand* — that “Congress’ intent, as evidenced by the change [from ‘lewd’ to ‘lascivious’]. . . , was to broaden the scope of the existing ‘kiddie porn’ laws,”²⁵⁶ — presents a clear departure from the legislative history of the federal child pornography laws, as well as from the Supreme Court’s decision in *New York v. Ferber*.²⁵⁷

In *Ferber*, a Manhattan jury found the defendant in violation of a New York criminal statute which prohibited the sale of films containing non-obscene depictions of children engaged in sexually explicit conduct (in this case, depictions of prepubescent boys engaged in masturbation).²⁵⁸ The New York Court of Appeals overturned the defendant’s conviction on the basis that the state had the power only to regulate obscene depictions of children.²⁵⁹ In a narrowly worded decision, the Supreme Court upheld the New York statute proscribing non-obscene depictions of children, and reinstated *Ferber*’s conviction.²⁶⁰

The essential question entertained by the Supreme Court in *Ferber* was whether an outright ban on non-obscene depictions of children engaged in sexually explicit conduct ran afoul of the first amendment by being vague or overly broad. In reaching its determination that the New York statute was not constitutionally deficient, the Supreme Court found that the risk of adverse effects upon child participants in child pornography was sufficiently serious to justify a broad ban on such materials, despite any redeeming social or other value. But the Court technically limited its holding to the specifics of the New York statute:

The forbidden acts to be depicted are listed [in the New York statute] with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” The term “lewd exhibition of the genitals” is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation. . . .

²⁵⁵ *Id.* at 1244.

²⁵⁶ *Dost*, 636 F. Supp. at 831.

²⁵⁷ 458 U.S. 746 (1981).

²⁵⁸ The jury found these films were not obscene under another provision of New York law. See *People v. Ferber*, 52 N.Y.2d 674, 439 N.Y.S.2d 863 (1981).

²⁵⁹ *Id.*

²⁶⁰ *Ferber*, 458 U.S. 746 (1981).

. . . How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the New York statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute’s reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on “lewd exhibition[s] of the genitals.” Under these circumstances, [the statute] is “not substantially overbroad. . . .”²⁶¹

Following *Ferber*, Congress amended federal law by proscribing lascivious, rather than lewd exhibitions of the genitals or pubic area; it intended to insure that courts and juries would not mistakenly apply the *Miller* test to depictions of minors. It did not intend to broaden the scope of the federal law beyond the limits established by *Ferber*. As one senator told Congress: “[since] lewd has in the past been equated with ‘obscene,’ this change [from lewd to lascivious] is . . . intended to make it clear that an exhibition of a child’s genitals does not have to meet the obscenity standard to be unlawful.”²⁶² Thus, the courts in both *Dost* and *Wiegand* have undertaken precisely the “expansive construction” against which Justice White warned in *Ferber*.

In so reinterpreting the federal law, the Ninth Circuit accomplished what Congress had avoided in passing the original federal child pornography law in 1977. The original legislative proposal contained a proscription on nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction. This provision was abandoned after the Justice Department advised Congress that it found this provision “troublesome . . . [because] it would be difficult to determine by what standard the sexual stimulation or gratification could be assessed.” The Justice Department specifically recommended the term “‘lewd exhibition of the genitals’ . . . a phrase used by the Chief Justice [Warren E. Burger] in *Miller v. California* . . . to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes.”²⁶³ This latter suggestion was adopted in the final bill.

²⁶¹ *Id.* at 765 (emphasis added).

²⁶² Testimony of Arlen Specter, 130 Cong. Rec., S. 3511 (daily ed., Mar. 30, 1984).

²⁶³ “Prohibiting the Sexual Exploitation of Children,” H.R. Rep. No. 95-696, 95th Cong., 1st Session., Oct. 12, 1977, at 21; Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the Committee of the Judiciary, May 23, 25, June

The holdings of *Dost* and *Wiegand* are similar to many state laws in that they proscribe "erotic nudity" or nudity *per se*; they provide a basis for censoring any photograph in which a minor's genitals (or a minor female's breasts) are visible. They lose sight of the fact that some nudity is constitutionally protected.²⁶⁴

Many of the politicians, law enforcement officials, and anti-pornography groups who have myths about child pornography found the 1986 Attorney General's Commission on Pornography, appointed by Edwin Meese, to be receptive to their long-term goals: the eventual suppression, through active prosecution or intimidation, of sexually-oriented materials and of viewpoints about sexuality or the family which deviate from their narrow view of the societal norm.

Testifying before the Meese Commission, FBI agent Kenneth Lanning stated that adult erotica — even erotica as generally accepted as *Playboy* or *The Joy of Sex* — also poses a danger to children because of its potential to lower a child's inhibitions to engage in sexual activity.²⁶⁵ Lanning has identified as "child erotica" non-fiction books, articles, and research studies by psychiatrists and other professionals which suggest that children have sexual feelings and needs, or which discuss pedophilia in less than condemnatory terms.²⁶⁶ In his handbook developed for the National Center for Missing and Exploited Children, Lanning advises:

Books on human sexuality, sex education, and sex manuals are also used to lower inhibitions. Children accept what they see in books, and many pedophiles have used sex education books to prove to children that such sexual behavior is acceptable. Adult pornography is also used, particularly with adolescent boy victims, to arouse them to lower inhibitions.²⁶⁷

A number of professionals have felt the stigma of the misrepresentation of their works as somehow supporting or encouraging child molestation or pedophilia. Statements such as Lanning's, echoed in professional journals by those researchers and ideologues

10, Sept. 20, 1977, at 137 (statement of John C. Keeney), Deputy Assistant Attorney General, Criminal Division, Department of Justice.

²⁶⁴ *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), *rev'g*, 249 F.2d 114 (D.C. Cir. 1957), *aff'g* 128 F. Supp. 564 (D.D.C. 1958), *on remand*, 184 F. Supp. 767 (D.D.C. 1960).

²⁶⁵ THE MEESE COMMISSION, *supra* note 33, at 234-45 (testimony of Kenneth Lanning, Supervisory Special Agent, FBI). See also LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW ENFORCEMENT OFFICERS INVESTIGATING CASES OF CHILD SEXUAL EXPLOITATION 21 (1987) (warning against the use of *Playboy* magazine by adult men to seduce teenaged males) [hereinafter CHILD MOLESTERS].

²⁶⁶ THE MEESE COMMISSION, *supra* note 33, at 234-45 (testimony of Kenneth Lanning).

²⁶⁷ CHILD MOLESTERS *supra* note 65, at 21.

who share Lanning's perspective, have affected research funding, academic appointments, and publication of articles.²⁶⁸

Dr. Lore E. Stone, another expert called by the Meese Commission, testified about the use by some individuals of non-fiction best-sellers, such as Nancy Friday's *My Secret Garden* and *Forbidden Flowers*, to seduce children:

While in sex therapy many of my clients use books such as by Nancy Friday, which describe male and female scenarios and they act them out as a variety of sexual experiences if anyone was inclined to have a sexual interest in minors or adolescents, a good possibility exists that they would use these books in the same manner to get new ideas of what to do.²⁶⁹

Others testified before the Commission about the damage children suffer from purposeful or inadvertent exposure to pornography via telephone, computer, VCR, or at convenience stores.²⁷⁰ The Meese Commission itself recommended that depictions of eighteen- to twenty-one-year olds engaged in sexual activity be included in the definition of child pornography, since "adolescents are notoriously poor in making sexual choices well into their late teens and twenties."²⁷¹ Apparently, the Commission's aim was to convince the American public that children could only be protected by the wholesale suppression of sexually-oriented materials.

As the A.C.L.U. concluded in its summary and critique of the Meese Commission's Final Report:

Rather than clarifying the issues for Americans, this body has largely polluted the debate over sexually explicit materials and censorship. First, it attempts to breathe new life into the

²⁶⁸ De Mott, *The Pro-Incest Lobby*, PSYCHOLOGY TODAY, Mar. 1980, at 11-15; Letters, *Incestuous Argument*, PSYCHOLOGY TODAY, June 1980; Bowen, *Attacking the Last Taboo: Researchers are Lobbying Against the Ban on Incest*, TIME, Apr. 14, 1980; Letters, TIME, May 5, 1980; *Cradle-to-Grave Intimacy: Some Researchers Openly Argue That 'Anything Goes' for Children*, TIME, Sept. 7, 1981; Letters, *Sex in the Playpen*, TIME, Sept. 28, 1981; Mrazek, *Science, Politics, and Ethics: Issues in the Study of the Sexual Use of Children*, 30 CONTEMPORARY PSYCHOLOGY 37-38 (1985); RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 389 (1986); RUSSELL, RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 22-25, 248 (1984); HERMAN, FATHER-DAUGHTER INCEST 22-29 (1981); cf. Okami, *Child Sexual Abuse: A Critical Evaluation of New Perspectives*, presented at the Society for the Scientific Study of Sex, Nov. 13, 1988, San Francisco, CA. These writers have misrepresented viewpoints differing from their own, by attempting to portray their critics as condoning child sexual abuse.

²⁶⁹ THE MEESE COMMISSION, *supra* note 33 at 27 (testimony of Lore E. Stone). Stone is Director of California Counseling Services, Los Angeles, CA.

²⁷⁰ See, generally, *Polluting the Censorship Debate: A Summary and Critique of the Final Report of the Attorney General's Commission on Pornography*, American Civil Liberties Union Public Policy Report, Washington, D.C., July 1986 ("ACLU Report"); NOBILE & NADLER, UNITED STATES OF AMERICA VS. SEX (1986).

²⁷¹ THE MEESE COMMISSION REPORT, *supra* note 78, at 625, 523-25, 618-23.

archaic construct of "obscenity" law by applauding the most dangerous reasoning of all to suppress speech — that it generates "bad attitudes," in this case offensive ones about the status of women and the nature of women's sexuality. Although the Commission's conclusions about the message of much pornography is accurate, when our nation abandons the view that offensive imagery and ideas are not best handled with alternative, affirmative, "corrective" speech and turns instead to governmental censorship or moral mob rule, we are all the losers.

Second, it tries to extrapolate from a few modest social science experiments a theory of causation of sexual violence from certain kinds of pornography. This does a disservice to the integrity of the limited scientific data available. Moreover, the gaps in science were filled in by a legion of the Commissioners' own preconceptions and intuitions, bolstered by some gestalt derived from the voices of alleged "victims" and the images in a dozen slide-shows.

Something must be said of these "victims." Many were courageous and articulate, but with the exception of a few who were literally coerced into appearing in pornography, most of these individuals were women so mired in abusive relationships steeped in pathology, substance abuse, and family crisis that any central contribution ascribed to pornography for their problems seemed more likely a tangential afterthought.

Individuals, mainly women, can indeed be hurt by the abusive production or use of pornography. Tragically, the Commissioner's final recommendations endorse virtually nothing which could make a real difference to the genuine victims of a still sexist culture. Where is the emphasis (or in most cases, even the mention) of strengthening sexual harassment laws against pornography's presence in the workplace; removing spousal immunity in sexual assault cases; providing meaningful law enforcement assistance to models abused in the production of sexual material? Where is the affirmation of the 1970 Commission's embrace of a serious sex education effort to empower the young to have a chance to develop a healthy and balanced view of sexuality in our culture?

Instead of these efforts, this Commission's Report launches a national crusade against dirty pictures, as if they had some mystical power to lead men to violence, obliterate the values taught by other institutions in our culture, and, as well, preserve a dying patriarchy. The evidence is largely absent that pornography can do any of these things. Nevertheless, the crusade includes a panorama of unconstitutional proposals which strike not only the first amendment directly,

but intrude upon civil liberties values like due process, privacy, and choice.²⁷²

While most of the legal changes recommended by the Meese Commission have not been effectuated, the hysteria generated by pro-censorship groups has resulted in an all-out attack on adult pornography, as well as upon the depiction of non-exploitive child nudity. Since 1982, realistic sex education books which show children's bodies, such as *Show Me!* and *The Sex Atlas*, have been withdrawn from distribution.²⁷³ David Hamilton's widely popular books, such as *Dreams of a Young Girl*, *David Hamilton's Private Collection*, and *A Summer in Saint Tropez*, have been labeled child erotica by some law enforcement officials, and are no longer generally available in bookstores as they had been during the late seventies and early eighties.²⁷⁴ Under mounting social stigmatization and real legal pressure, photographic depictions of nude children have begun steadily to disappear from legitimate photography books and magazines. Those few nudist publications which are still published in the United States generally eschew full frontal nudes of children. Artists who still photograph children in the nude run the very real risk of arrest.²⁷⁵

Depending on the jurisdiction, legitimate art, films, photographs, and sex education books containing photographs of nude minors may be banned because the poses or settings may be erotic, appeal to the sexual interest of some person, or merely because they depict minors nude, regardless of whether they harm or even threaten to harm the minor so depicted. Even "bear rug" photographs of infants by their parents are subject to close scrutiny and, in some cases, prosecution. Conversely, Europe does not encourage this extensive censorship. There, *Show Me!* has been updated to include information about AIDS, other sex education

²⁷² ACLU Report, *supra* note 271, at 2-4.

²⁷³ *Show Me!*, by Swiss child psychologist Helga Fleischhauer-Hardt and photographer Will McBride, was first issued in Europe in 1974 by a Lutheran Church-sponsored children's publishing company. St. Martin's Press, which published the book in the United States, successfully defended the book against obscenity charges in Massachusetts, New Hampshire, and Oklahoma, spending more than \$100,000 in legal fees. Following *Ferber*, however, the book was withdrawn from distribution. McDowell, *Picture Book on Sex is Withdrawn*, N.Y. Times, Sept. 19, 1982; Hampson, *Publisher Halts Children-Sex Book*, East Bay Today, Sept. 20, 1982, at A4.

²⁷⁴ THE MEESE COMMISSION, *supra* note 33, at 242, 245 (testimony of Kenneth Lanning).

²⁷⁵ See *supra* note 108; see also Donahue Transcript #110888, with William Kelly, Alice and Bill Sims, et al., 1988, Multimedia Entertainment, Inc., Syndication Services, P.O. Box 2111, Cincinnati, OH 45201; interview with William and Alice Sims, August, 1988; State v. Sims, File No. 2154, Affidavit of Lawrence E. Agne, Investigator, in Support of Search Warrant, Alexandria Circuit Court, Commonwealth of Virginia.

books showing real children are readily available, and nudist magazines and other books depicting nude children are freely sold.

This author claims that United States officials have developed an inescapable logic which makes it nearly impossible for artists to defend themselves. This circular rationale may be seen clearly in statements by law enforcement officials: in a recent incident involving artist Alice Sims, arrested (but, as of this writing, not charged) on the suspicion of photographing her infant daughter and a friend in sexually explicit poses, United States Postal Inspector Robert Northrup, the chief investigator in the case, told Mrs. Sims that "art is anything you can get away with. . . . This is all filth."²⁷⁶

This author claims that the child porn myth has been exploited to suppress adult sexually-oriented materials, as evidenced by the language of the Child Protection and Obscenity Enforcement Act of 1988. The 1988 Act, which met with astonishingly little resistance in Congress, purports to amend the existing child pornography laws as well as the obscenity and RICO statutes.²⁷⁷ One of the most troublesome provisions of the 1988 Act is its "Record keeping requirements."²⁷⁸ Section 2257 requires that anyone who produces, duplicates, reproduces, or reissues any material (i.e., magazine, film, video, photograph or other visual media) which contains depictions of "actual sexual activity"²⁷⁹ must (a) ascertain the name(s), including stage names, maiden names, and assumed names, date of birth, and other identifying information yet to be specified in regulations of each person who appears in such material;²⁸⁰ (b) keep records

²⁷⁶ Hess, *supra* note 138, at 32.

²⁷⁷ Title VIII — Child Pornography and Obscenity, Sections 8001-4, 8011, 9021-8029, cited as the "Child Protection and Obscenity Enforcement Act of 1988."

²⁷⁸ Subtitle A — Child Pornography, § 2257: Record keeping requirements

²⁷⁹ (a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which — (1) contains one or more visual depictions made after February 6, 1978 of actual sexually explicit conduct; and (2) is produced in whole or in part with materials which have been shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce; shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

Id.

²⁸⁰ (b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct — (1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations; (2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage or professional name; and (3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

containing such information on the business premises or such other place as may be specified by the Attorney General;²⁸¹ and (c) affix to every copy of such material a statement describing where the records are located, including the name, title, and business address of the individual employed by such organization responsible for maintaining said records.²⁸² It should be pointed out that these provisions do not apply to depictions of minors, since to produce such materials is a violation of federal law.²⁸³ "Legitimate" works of art which contain depictions of "actual sexual activity" are also subject to the 1988 Act.²⁸⁴

Pursuant to § 2257, a business which fails to maintain identify-

Id. at § 2257(b).

²⁸¹ (c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

Id. at § 2257(c).

²⁸² (d)(3) In a prosecution of any person to whom subsection (a) applies for an offense in violation of subsection 2251(a) of this title which has as an element the production of a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct and in which that element is sought to be established by showing that a performer within the meaning of this section is a minor — (A) proof that the person failed to comply with the provisions of subsection (a) or (b) of this section concerning the creation and maintenance of records, or a regulation issued pursuant thereto, shall raise a rebuttable presumption that such performer was a minor; and (B) proof that the person failed to comply with the provisions of subsection (e) of this section concerning the statement required by that subsection shall raise the rebuttable presumption that every performer in the matter was a minor;

Id. at § 2257(d)(3).

²⁸³ (e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located. (2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section. (3) In any prosecution of a person for an offense in violation of section 2252 of this title which has as an element the transporting, mailing, or distribution of a visual depiction involving the use of a minor engaging in sexually explicit conduct, and in which that element is sought to be established by a showing that a performer within the meaning of this section is a minor, proof that the matter in which the visual depiction is contained did not contain the statement required by this section shall raise a rebuttable presumption that such performer was a minor.

Id. at § 2257(e).

²⁸⁴ (g) As used in this section — (1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in subparagraphs (A) through (E) of paragraph (2) of section 2256 of this title; (3) the term "produces" means to produce, manufacture, or publish and includes the duplication, reproduction, or reissuing of any material.

Id. at § 2257, (g).

ing records or neglects to affix information specifying where such records are kept may be prosecuted under the federal child pornography laws. In any such prosecution, the principals of the business must overcome the legal presumption embodied in the statute that all the performers in the visual depiction are under the age of eighteen.²⁸⁵ An individual who receives, sells, trades, purchases, or transfers possession of material which fails to contain a statement specifying where identifying records are kept may also be prosecuted under the federal child pornography laws. As with a business, an individual must overcome a legal presumption that the performers are under the age of eighteen.²⁸⁶ The record keeping requirements and legal presumptions apply retroactively to February 6, 1978, the effective date of the 1977 Act, even though from 1978 until May 21, 1984, the legal minimum age for participation in sexually-oriented materials was sixteen.²⁸⁷

When it takes effect, the record keeping requirements may prove excessively burdensome to producers of films, magazines, and videotapes which contain sexual activity. Moreover, the 1988 Act will have enormous economic repercussions for producers and distributors of magazines, films, and videotapes produced prior to 1989, or containing material produced prior to 1989, due to the enormous risk of prosecution which the lack of required record keeping poses. The 1988 Act will also chill the importation of a wide range of materials by magazine and book distributors, since foreign producers and distributors cannot be expected to comply with the United States laws. Those who produce, sell, transport, or distribute materials containing depictions of "actual sexual conduct" will have great difficulty in defending themselves against child pornography charges if the record-keeping requirements are not carefully followed. Short of testimony from actual performers (which in the case of distributors and booksellers is extremely unlikely), little evidence could overcome a legal presumption that the performer is a minor. Testimony from a pediatrician, for example, may be easily impeached on cross-examination, since physical development is not fixed according to age and differs from one individual to another. The presumption contained in the 1988 Act may even negate, to some extent, the scienter element in § 2252 — that the depictions be "knowingly" shipped, transported, sold, or received.²⁸⁸ Nevertheless, if the film, videotape, or magazine con-

²⁸⁵ *Id.* at § 2257(d)(3)(A), (B).

²⁸⁶ *Id.* at § 2257(e)(3).

²⁸⁷ *Id.* at § 2257(a).

²⁸⁸ It is not clear from the statute whether the presumption imposed would require

tained in its title such words as "young," "girl," "boy," "Lolita," "teenage," or any variation thereof, the scienter element would likely be satisfied.²⁸⁹

VI. CONCLUSION

The Protection of Children from Sexual Exploitation Act of 1977 quickly halted what little exploitation of children there was in the United States through the creation, production, and sale of child pornography. What remains is essentially propaganda about child pornography — i.e., misinformation, deception, and intentional distortion of fact. Unfortunately, it is the "very ubiquity of this propaganda which serves to conceal its pervasiveness and its danger as an obstacle to clear thinking and the preservation of democratic freedoms."²⁹⁰

There is no question but that the propaganda concerning child pornography has been and continues to be used by law enforcement officials and politicians, religious leaders, and the media to create confusion, feelings of powerlessness, and fear among the populace. This manipulation makes curtailment of first amendment freedoms and expansion of police powers easier. The moral panic over child pornography can then be viewed as is part of a larger trend in American society toward greater government and police intrusion into private lives. As Professor Gary T. Marx has observed, prior to the seventies,

[f]ake documents, lies, subterfuge, infiltration, secret and intrusive surveillance, and the creation of apparent reality [were] not generally associated with United States [internal] law enforcement. However, we may be taking small but steady steps toward the paranoia and suspicion that characterize many totalitarian countries.²⁹¹

Combined with the ever-present threat of prosecution for even the most innocent of activities, the paranoia and suspicion resulting from the child pornography myth has had an incalculable chilling effect upon a wide range of expressive conduct, particularly upon artistic and photographic expressive conduct.

that the seller or shipper knew that the material contained a depiction of a minor or whether it would require that he or she merely knew that the material contained no statements as to the location of identifying records.

²⁸⁹ See *Porter*, *supra* note 204. The prosecution in *Porter* successfully argued that the titles advertised by *Produit* suggested younger models and therefore constituted evidence of the defendant's intent to purchase "child pornography."

²⁹⁰ Stout, *Propaganda and Postmodernism*, 3 PROPAGANDA REVIEW 1 (1988).

²⁹¹ Marx, *supra* note 175, at 192.

Like the missing children campaign, the moral panic over child pornography has fed upon misinformation and fear. It has spearheaded a dangerous campaign aimed at expanding the scope of the child pornography laws, fixing the blame for actual child abuse on adult pornography and sex education materials, intruding upon the rights of the accused, and limiting discourse and scientific inquiry regarding childhood sexuality. It has provided justification for law enforcement officials to facilitate the commission of criminal acts which otherwise would not have occurred, and to break the law with impunity in order to enforce the law.

The child pornography myth has also proved financially, professionally, and politically profitable for those who have exploited it. Child pornography sting operations and other investigations give the appearance that public authorities and law enforcement officials are doing something about child abuse. These activities win appropriations, gain headlines, and justify promotions. Politicians have used the myth to divert attention from their own failure to confront the pressing issues which face American society, not the least of which is the lack of adequate nutrition, housing, and education for American children.

For the media, the child pornography issue has translated directly into the sale of newspapers, magazines, radio and television programs. This kind of reporting perpetuates the myth and sustains the public interest in and demand for more such stories.

In the final analysis, the child pornography myth will have achieved a significant loss of freedom while failing to solve the very real problems of child abuse and exploitation. The child pornography myth must be exploded before we can begin a reasoned analysis and propose meaningful solutions to these problems.

IMPOSING THE UNDERWRITERS' DUTY OF CARE ON ART AUCTIONEERS

I. INTRODUCTION

Few cases deal with art auctions and auctioneers.¹ Those that are litigated invariably concern questions of authenticity² or title,³ issues which are typically raised as defenses when the auctioneer sues the buyer to collect the purchase price of goods bought at an auction.⁴ In *Cristallina S.A. v. Christie, Manson & Woods*⁵ ("Christie's"), the seller sued the auctioneer and sought to hold him responsible for the failed auction.

Christie's involved a seller who consigned eight Impressionist paintings for sale to Christie's, the internationally known auction house. The subsequent auction was a failure. The sellers sued Christie's and their auctioneer,⁶ contending that: (1) the failed

¹ See generally 2 J. MERRYMAN & E. ELSEY, LAW, ETHICS AND THE VISUAL ARTS 505-24 (2d ed. 1987) [hereinafter MERRYMAN & ELSEY]. See also Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501 (1988) [hereinafter Gerstenblith].

Although few cases reach trial, the general level of litigation against art merchants has increased in direct proportion to the high stakes currently involved in the art business. See Burnham, *As The Stakes in The Art World Rise, So Do Laws and Lawsuits* N.Y. Times, Feb. 15, 1987, § 2 (Arts & Leisure) at 9, col. 2.

² See *Weisz v. Parke-Bernet Galleries, Inc.*, 67 Misc. 2d 1077, 325 N.Y.S.2d 576 (Sup. Ct. 1971), *rev'd*, 77 Misc. 2d 80, 351 N.Y.S.2d 911 (1974) (action by buyers regarding an express warranty as to the authenticity of two paintings); see also *Hahn v. Duveen*, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929) (suit against art expert for negligent appraisal).

³ *Abrams v. Sotheby Parke-Bernet, Inc.*, No. 42255-84 (Sup. Ct., N.Y. County, Aug. 24, 1984) (action by New York State Attorney General to enjoin sale of ancient Hebrew manuscripts as consignor's title to goods was in doubt). For an interesting commentary on the above case see Comment, *Why is This Sale Different From all Other Sales?* *Abrams v. Sotheby-Parke-Bernet, Inc.*, 4 CARDOZO ARTS & ENT. L.J. 139 (1985). See also *Levy Bros. & Adler, Rochester, Inc. v. Karp*, 124 Misc. 901, 209 N.Y.S. 720 (Sup. Ct. 1924).

⁴ See generally *Thompson v. Kelley*, 101 Mass. 291, 3 Am. Rep. 353 (1869). *French v. Sotheby & Co.*, 470 P.2d 318 (Okla. 1970). In both cases the courts held that the passing of title was not material to a suit instituted by the auctioneer for the purchase price; once the hammer falls at auction the bidder is liable for the contract price. However, in *Romani v. Harris*, 255 Md. 389, 258 A.2d 187 (1969), a successful bidder was excused based on a defense that the painting she had purchased was not by the alleged artist.

Parke-Bernet Galleries, Inc. v. Franklyn, 31 A.D.2d 276, 297 N.Y.S.2d 151 (1969), *rev'd on other grounds*, 26 N.Y.2d 13, 256 N.E.2d 506, 26 N.Y.S.2d 337 (1970), is another example of an auctioneer suing to collect the purchase price for a sale. The buyer in this case raised the defense of lack of personal jurisdiction—having conducted his bidding over the phone—which was dismissed.

⁵ 117 A.D.2d 284, 502 N.Y.S.2d 165 (1st Dep't 1986).

⁶ The fact that the consignor sued the auctioneer was of itself quite unusual. See *Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), *aff'd*, 53 N.Y.2d 696, 421 N.E.2d 500, 439 N.Y.S.2d 105 (1981) (owner of painting sues to recover work sold without his consent); *Art Education Press, Inc. v. Smith*, 252 A.D. 316, 299 N.Y.S. 170 (1937) (auctioneer sued by consignor for the proceeds of an auction sale). See generally Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO.