

ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 86/2

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A copy of the Brief filed in the Supreme Court of the United States on behalf of American Booksellers Association and others, regarding the Ferber case has been sent to your committee together with a copy of the statement made by the Association of American Publishers on December 8, 1982, to Senator Specter's committee. We would call particular attention to the last paragraph of page 4 and to page 5 regarding the book Show Me, and reference to a forthcoming book by G.P. Putnam's Sons. The entire statement should be helpful to the legislature in its deliberations.

We wholeheartedly endorse your goal of attempting to protect children from sexual exploitation, but ask that legislation properly accomodate First Amendment principles and protection.

If we can supply any additional information or be of assistance in any way please contact us.

Sincerely



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STATEMENT OF
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.
CONCERNING PROPOSED AMENDMENTS TO THE
PROTECTION OF CHILDREN AGAINST SEXUAL
EXPLOITATION ACT OF 1977

To the Subcommittee on Juvenile Justice
Senate Judiciary Committee
December 8, 1982

The Association of American Publishers, Inc.

("AAP"), the major trade association of book publishers in the United States, submits this statement for inclusion in the record of this Subcommittee's hearings on proposals to amend the Protection of Children Against Sexual Exploitation Act of 1977 ("Act"). The impact of those proposals -- S.2856 and S.2788 -- upon book publishers is specifically addressed in the comments below.

AAP's more than 300 members represent a substantial segment of the book publishing community and are responsible for the publication of numerous prominent works concerning health, sexuality, psychology, child rearing and human development. It is AAP's belief that the book publishing industry must -- and does -- play a vital role in the production, dissemination and preservation of ideas and knowledge. AAP and

its members are committed to the belief that the free exchange of ideas through publishing is the greatest service the publishing industry can render society, and further that the public's access to such ideas in book form should not be restricted.

Towards these goals, AAP and its members have diligently followed legal developments regarding publishing generally and judicial and legislative events which may implicate First Amendment rights in particular. The efforts of Congress and state legislatures to protect children from sexual abuse by outlawing child pornography have been viewed by AAP with both interest and concern. AAP's members of course deplore the exploitation of children to support a "kiddie porn" industry and fully support legislative efforts to curb such abuses. At the same time, they are deeply troubled by statutory provisions which, in an effort to control child pornography, threaten to sweep within their grasp a variety of serious works deserving of wide availability and unrestricted dissemination.

This concern over the potential overbreadth of child pornography statutes led AAP to closely monitor the enactment of, and the subsequent litigation concerning, New York's child pornography statute. As this Subcommittee is aware, it was a prosecution under one section of that statute that was reviewed by the Supreme Court in New York v. Ferber.

AAP participated as an amicus curiae in the Ferber litigation, urging both the Supreme Court and the New York Court of Appeals constitutionally to limit the legislative arsenal against child pornography to the prosecution of (1) persons who employ minors in the creation of kiddie porn, and (2) persons who publish or otherwise disseminate depictions of sexually explicit conduct by minors, provided the works containing such depictions are shown to be legally obscene. It was, and remains, the book publishing community's concern that more wide-ranging efforts to control child pornography -- through penalties upon the dissemination of non-obscene works containing portrayals of adolescent sexual behavior -- would eviscerate the significant societal benefits to be derived from the availability of a variety of materials concerning human sexuality and adolescent sexual development without significantly enhancing the enforcement effort against truly hard core pornography. We note that Congress, in enacting the present child pornography legislation, apparently agreed with this sentiment. As the Senate Committee on the Judiciary noted in 1977, "virtually all of the materials that are normally considered child pornography are obscene under the current standards . . . In comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential."

AAP is of course aware that the Supreme Court in Ferber upheld the constitutionality of New York's statutory scheme prohibiting the dissemination of materials depicting specified sexual conduct by a minor even where the materials are not legally obscene. In reaching its result, the Court determined not to interfere unduly with legislative judgments as to how best to proscribe the production of hard-core child pornography and thereby avoid the perceived detrimental impact upon children used as subjects of such pornographic materials. As we discuss below, the Court's opinions in Ferber did recognize the potential that a statutory scheme seeking to achieve such a result could improperly impinge upon the dissemination of materials of a non-pornographic nature which have serious literary, artistic, scientific or educational value. In responding to the Ferber decision with any new legislative initiatives, Congress must, we submit, not merely address the problem of child abuse arising out of pornographic depictions, but also must make provision for the unfettered dissemination of non-pornographic, socially-useful materials which may involve depictions of minors engaged in otherwise forbidden sexual conduct.

AAP's concern over the potential impact of amended federal child pornography legislation on the creation and distribution of important and responsible works is far from hypothetical. At least two works of which AAP is aware

illustrate the problem. The first is a book entitled Show Me!, published in translation by the distinguished St. Martin's Press in 1975. Show Me!, authored by a Swiss child psychologist, was designed as a tool for parents to use in discussing sex with their children. This it attempts to do through explicit and realistic photographs and text. The book, while highly controversial, has been praised by educators and others as a valuable resource tool and has been purchased and read by tens of thousands of families wishing to approach the subject of sexuality in an open, frank and uninhibited manner.

The second book, to be published by G. P. Putnam's Sons in the coming months, similarly deals with a mother's efforts to educate her daughter about female sexuality, and comprises both photographs and text.

Works such as the foregoing may be controversial, but they are neither pornographic nor exploitive. That one may agree or disagree with the ideas in, or manner of communication adopted by, such works is not the point; history teaches us that it is perilous to predict which ideas will one day achieve wide acceptance. Unless we are prepared to adopt the authoritarian view that controversial teaching tools such as Show Me! have no place in our society, provision must be made in the federal legislative scheme for such works to exist and be freely available.

If Congress is to consider, in light of the Ferber decision, eliminating the requirement from § 2252 of the Act that prohibited works must be "obscene" -- a key feature both in S.2788 and S.285 -- at a minimum, provision must be made to exempt from the statute's coverage depictions of sexual conduct engaged in by minors that are contained in works that have serious literary, artistic, scientific or educational value. This approach finds support in the Ferber decision itself.

Each of the four opinions in Ferber recognized that the statute at issue in that case invited unconstitutional applications because, broadly applied, it covers depictions which do not threaten the harms sought to be prevented. Justices Brennan and Marshall expressly stated that application of such statutes "to depictions of children that in themselves do have serious literary, artistic, scientific or medical value, would violate the First Amendment." They further opined that in the case of such depictions, the argument of harm to the child resulting from the creation of a "permanent record" of his participation "lacks much of its force." Similarly, Justice Stevens recognized that "a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films [proscribed by the statute]

and, when viewed as a whole in a proper setting, be entitled to constitutional protection."

Further support for appropriately limited statutory language is found in the opinion of the New York Court of Appeals issued on remand of the Ferber case from the Supreme Court. In a concurring opinion joined by Judge Fuchsberg, Judge Meyer stated that he would, "as a matter of state constitutional law, recognize an affirmative defense for literary, scientific, educational, governmental or other similar justification." He further stated that in his view, "without such a defense, the chilling effect. . . upon serious depictions which do not actually threaten the harms addressed by that statute will cause greater harm to this state's interest in free expression than is constitutionally permissible."

Additional precedent for legislation containing similar saving language may be found in several state statutes, some of which were enacted in specific response to the Ferber decision. While some of these provisions are, in AAP's judgment, constitutionally deficient, they nonetheless reflect commendable attempts by various states to ameliorate the problem addressed herein.

For example, a bill was recently passed in Alabama to strengthen that state's child pornography law "by making certain changes permitted by a recent United States Supreme

Court decision." The statute prohibits knowing dissemination or possession with intent to disseminate "obscene matter" containing a visual reproduction of a person under the age of 17 engaged in various enumerated acts. The statute defines "obscene" as follows:

(a) When used to describe any matter that contains a visual reproduction of breast nudity, such term means matter that

1. Applying contemporary local community standards, on the whole, appeals to the prurient interest; and
2. Is patently offensive; and
3. On the whole, lacks serious literary, artistic, political or scientific value.

(b) When used to describe matter that contains a visual reproduction of an act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct, such term means matter containing such a visual reproduction which reproduction itself lacks serious

literary, artistic, political or
scientific value.

Similar, although more narrow, exceptions may be found in
statutes in other states.¹

AAP urges this Subcommittee, in its consideration
of possible amendments to the present law, not merely to
strike the obscenity requirement from § 2252, without more.
For if publishers are to be deprived of the protection
afforded by the present obscenity requirement -- which change
in law we do not concede to be either appropriate or
necessary -- a meaningful substitute that will preserve the
opportunity to disseminate serious works otherwise falling
within the statute's prohibitions must be devised. S.2856
makes a commendable effort to address the problem, in

1. Pennsylvania and South Dakota have statutes which except
from their reach "materials involving only nudity, if such
materials are made for and have a serious literary, artistic,
educational or scientific value." South Dakota Statutes §
22-22-25; Pennsylvania C.S.A. § 6312(e). Likewise, the anti-
child abuse law in Michigan contains, in its definition of
"erotic nudity," a requirement that the nudity be displayed
"in a manner which lacks primary literary, artistic, educa-
tional, political or scientific value and which the average
person applying contemporary community standards would find
appeals to prurient interests." Michigan C.L.A., § 750.145c
(1)(d). Still another state, Massachusetts, allows an affir-
mative defense in any prosecution under its child pornography
law "that such dissemination of any visual material that con-
tains a representation or reproduction of any posture or ex-
hibition in a state of nudity was produced, processed, pub-
lished, printed or manufactured for a bona fide scientific or
medical purpose, or for an educational or cultural purpose
for a bona fide school, museum or library. . . ." Mass. Gen.
Laws, Ch. 272 § 29B.

providing that exhibition of the genitals or pubic area of a minor falls outside of the statute if such exhibition has literary, artistic, scientific or educational value. But we submit that that language is inadequate.

For one thing, a showing of literary, artistic, scientific or educational value should protect depictions of "sexually explicit conduct" without regard to whether they involve merely nudity (as S.2856 contemplates) or some other conduct. From AAP's perspective, if depictions of nudity may be said to be justifiable and deserving of protection in certain instances, then it is difficult to condemn depictions of other types of sexual behavior that may equally be a part of legitimate educational or other desirable works. The book Show Me!, for example, contains several photographs which arguably depict not merely nudity but sexual exploration in the form of masturbation. Is it logical to conclude that the social value of Show Me! -- indeed, its very ability to be marketed -- should turn on precisely the form of sexual conduct depicted? We think not.

We further find inadequate the apparent intention, in S.2856, to apply the test of literary, artistic, scientific or educational value to individual depictions themselves, as apart from the works as a whole. We are frankly at a loss to understand how one would meaningfully determine whether a particular depiction of nudity, or other sexual conduct, standing alone, and outside of the context of the work of

which it is a part, has educational, scientific or other value such that it would fall outside of the reach of the statute. In a book with scores of pictures and accompanying text, such as Show Me!, is the intention to view each photograph for its own intrinsic worth? AAP submits that the provision as drafted is both vague and lacking in meaningful protection for serious works containing non-pornographic depictions. We recommend instead a test that would focus upon whether the work in which the depictions appear, taken as a whole, has serious literary, artistic, scientific or educational value.

We finally find problems with the scienter test in § 2252(a)(1) and (2), on the assumption that the term "obscene" were stricken from the present language of (a)(1) and (a)(2). The present scienter requirement is meaningful in requiring the knowing transport, shipment, or receipt of any obscene visual or print medium, as defined. In the absence of the term obscene, all that would be required would be the knowing transport, shipment, or receipt of any visual or print medium -- a meaningless scienter standard. We believe the statute, if amended to delete the obscenity requirement, should make clear that it is the transport, shipment, or receipt of materials with knowledge that such materials contain depictions prohibited under the statute that constitutes illegal activity.

Were the Subcommittee to adopt the foregoing suggestions, § 2252(a) might be amended to read as follows:

(a) Any person who -

(1) transports or ships in interstate or foreign commerce, or mails any visual or print medium, with knowledge that -

(A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; and

(C) such visual or print medium, taken as a whole, lacks literary, artistic, scientific or educational value; or

(2) receives any visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, with knowledge that -

(A) the producing of such visual or print medium involves the use

of a minor engaging in sexually explicit conduct; and

(B) such visual or print medium depicts such conduct; and

(C) such visual or print medium, taken as a whole, lacks literary, artistic, scientific or educational value;

shall be punished as provided in subsection (b) of this section.

We thank the Subcommittee for its consideration of AAP's views on this important legislative subject

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THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner

—against—

PAUL IRA FERBER,

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CIVIL LIBERTIES UNION and ST. MARTIN'S PRESS,
INCORPORATED AS AMICI CURIAE

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TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
The <i>Amici</i>	2
Interest of <i>Amici</i>	4
The Statute	5
The Misconceptions Urged by Petitioner and Its Supporting <i>Amici</i>	7
Potential Consequences Beyond the Scope of This Case	8
ALLEGMENT—	
The Statute Violates the First Amendment to the United States Constitution	10
A. Section 206.15 Does Not Fall Within Any of the Established Exceptions to the First Amendment	12
B. The Statute's Restriction on Speech Is Not Content Neutral; Nor Is It the Least Restrictive Alternative Available to Promote the State's Purpose	16
C. New York's Interest in Protecting the Welfare of Children Living Within the State Does Not Justify the Denial of First Amendment Rights	19
D. The Amended Statute, purporting to Provide an Exemption for Medical Speech of Educational Material, Falls Outside the Boundaries of a Content-neutral	21

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ORIGINAL.

	PAGE
E. By Allowing the Moral Values of Some to Dictate What May Be Read by All, the Statute Impermissibly Infringes Upon the Rights of Parents and Teachers to Educate Children About Sex With the Aid of Materials Designed to Deal With the Subject in a Frank and Non-Obscene Manner	24
F. The Statute Cannot Be Saved by Analogies to So-Called "Trafficking" and "Contraband" Laws Which Require the Existence of an Underlying Crime, and That the Speaker Be Directly Involved in That Criminal Activity	28
CONCLUSION	32
APPENDIX—	
Relevant Statutory Provisions	1a

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Abrams v. United States</i> , 250 U.S. 616 (1919)	10n
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	14, 15
<i>Butler v. Michigan</i> , 352 U.S. 380 (1957)	7
<i>Carey v. Population Services International</i> , 431 U.S. 678 (1977)	15
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	14
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	10, 13, 14, 15, 18, 24, 27
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	20, 21
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	20
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	22n, 23
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	17n
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975).....	18, 22n
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968)	27, 27n
<i>Gooding v. Wilson</i> , 405 U.S. 518 (1972)	23
<i>Hess v. Indiana</i> , 414 U.S. 105 (1973)	14, 15
<i>Kaplan v. California</i> , 413 U.S. 115 (1973)	12
<i>Kelly v. Illinois Bell Telephone Co.</i> , 210 F.Supp. 456 (N.D. Ill. 1962), <i>aff'd</i> , 325 F.2d 148 (7th Cir. 1963) ...	31
<i>Miller v. California</i> , 413 U.S. 15 (1974)	6, 12, 17
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415 (1963)	23, 24
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	24, 25
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	14

	PAGE
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<i>Paris Adult Theatre I v. Slaton</i> , 413 U.S. 49 (1973)	11, 12
<i>People v. Ferber</i> , 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 638 (1981)	13, 18, 29
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	18, 24, 27n
<i>Roth v. United States</i> , 354 U.S. 476 (1957)	12
<i>St. Martins Press, Inc. v. Carey</i> , 440 F.Supp. 1196 (S.D.N.Y. 1977) <i>rev'd on other grounds</i> , 605 F.2d 41 (2nd Cir. 1979)	4, 11n, 29n
<i>Schad v. Borough of Mount Ephraim</i> , — U.S. —, 101 S.Ct. 2176 (1981)	18, 19
<i>Smith v. Daily Mail Publishing Co.</i> , 443 U.S. 97 (1979)	20, 20n, 21
<i>State v. Shingaki</i> , Hawaii Cir. Ct., 1st Cir., Cr. No. 54385, Apr. 27, 1981	11n
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	10n, 22
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969)	18
<i>U.S. v. Alpirn</i> , 307 F.Supp. 452 (S.D.N.Y. 1969)	31
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	16, 17, 18
<i>Young v. American Mini Theatres, Inc.</i> , 427 U.S. 50 (1976)	18
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	PAGE
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New York Penal Law §§263.00, 263.05, 263.10 and 263.15	<i>passim</i>
New York Penal Law §260.10	9n, 11n
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Tex. Penal Code Ann., Tit. A, §43.25(e)	5n
Universal Military Training and Service Act, 150 U.S.C. App. §462(b)(3)	16
Wis. Stat. Ann. §940.203(4)	5n
18 U.S.C. §1054	28
18 U.S.C. §1952	28
18 U.S.C. §2511(1)(e)	29
29 U.S.C. §212(a)	29, 30
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	PAGE
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No. 81-55

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INCORPORATED AS *AMICI CURIAE***

The American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, Freedom to Read Foundation, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., American Civil Liberties Union, The Association of American University Presses, Inc., New York Civil Liberties Union, and St. Martin's Press, Incorporated, (collectively referred to as "*Amici*") submit this brief *amici curiae* in support of respondent Paul Ira Ferber, pursuant to Rule 36.2 of the Rules of

this Court, urging affirmance of the decision below.¹ This joint brief is submitted upon the written consents of both petitioner and respondent.²

The Amici

American Booksellers Association, Inc. ("ABA") is a trade association composed of booksellers located throughout the United States. The Association has approximately 5,200 members consisting of private bookstores, university bookstores, and chain bookstores.

The Association of American Publishers, Inc. ("AAP") is the major national association for publishers of general and educational books in the United States. Its more than 300 members include large commercial book publishers and small or non-profit publishers, university presses and scholarly associations.

Council for Periodical Distributors Associations ("CPDA") is a national trade association for over 500 independent local wholesale distributors of magazines, comic books, paperback books, and newspapers.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

¹The opinion of the New York Court of Appeals is reported at 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 638 (1981).

²The written consents of petitioner and respondent to the filing of this brief are submitted herewith.

International Periodical Distributors Association, Inc. ("IPDA") is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

National Association of College Stores, Inc. ("NACS") is a trade association composed of 2500 college and university bookstores located throughout the United States.

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of over 200,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its sixty-one year existence the ACLU has particularly been concerned with protecting the First Amendment guarantees of freedom of speech and press.

The Association of American University Presses, Inc. ("AAUP") is an educational not-for-profit association serving university presses. Its 78 members include the presses of virtually all of the most distinguished American universities, as well as several Canadian and international scholarly publishers.

The New York Civil Liberties Union ("NYCLU") is a not-for-profit corporation organized under the laws of New York State for the purpose of defending and promoting individual rights and liberties. It is the New York State branch of the American Civil Liberties Union and has over 20,000 members throughout the State. Freedom of speech and of the press have been principal concerns of the NYCLU since its inception.

St. Martin's Press; Incorporated, a member of the AAP, is a New York City publishing house. It is a subsidiary of Macmillan Publishers Limited, the 130 year old British

publisher. One of the many books it has published is *Show Me!*, a non-obscene, photographic sex education book containing explicit, sex-oriented photographs and designed primarily for use by parents in educating their children about some of the emotional and physical aspects of sex.

Interest of Amici

As representatives of writers, publishers and sellers of non-obscene books and periodicals distributed throughout the United States, as well as members of the public at large who purchase, borrow and read such materials, and the librarians who serve them, *Amici* have a vital interest in assuring that the freedoms guaranteed by the First Amendment to the United States Constitution are neither narrowed nor abridged. In the context of this case, *Amici* AAP, AAUP, ABA, CPDA, IPDA and NACS also seek to protect the rights of their members, many of whom could arguably be subjected to criminal liability pursuant to the statute under attack should the Court of Appeals decision be reversed. *Amicus* St. Martin's Press, Incorporated, is the publisher of a book, *Show Me!*, which could arguably subject it to criminal liability. Indeed, if the decision of the Court of Appeals is reversed, St. Martin's Press would again fear prosecution for the distribution and sale of *Show Me!* even though it has been found not to be obscene by three courts in three different states. See *St. Martin's Press, Inc. v. Carey*, 440 F. Supp. 1196, 1 01-1202 (S.D. N.Y. 1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979).³

³ While librarians, with whom *amicus* Freedom to Read Foundation is closely associated, are granted an affirmative defense against prosecution under Section 263.20(2) of the New York statute, a number of other state statutes covering mere dissemination of non-obscene matter, cited in Petitioner's brief (page 13, n.4), do not

(Footnote continued on next page)

This case represents an effort by a state to carve out a novel, broad and unprecedented exception to the First Amendment. The question presented here is whether, in the interest of protecting youngsters from being exploited "as subjects in sexual performances", New York can proscribe the dissemination of a broad range of non-obscene, constitutionally protected materials.

The Statute

While the Court has often been confronted with attempts by state and local governments to impinge upon First Amendment freedoms, it has never, except in the most extraordinary circumstances, upheld a statute that makes it a crime to disseminate First Amendment protected materials based solely on the nature of their content. By enacting Section 263.15 (set forth in the Appendix) (the "Statute"), the State of New York has—purely and simply—attempted to engraft into First Amendment doctrine an unprecedented and wholly unjustified exception to well-recognized classes of protected speech. The State has conceded this, boldly asserting that, ". . . regardless of whether materials which are devoted to depicting the sexual abuse of children fit into any previously recognized category of unprotected speech, prohibiting dissemination of those materials does not violate the First Amendment if the 'compelling state interest-less restrictive alternative' standard is satisfied" (Brief for Petitioner, p. 16) (emphasis supplied).⁴ The Court should reject the State's well-intentioned, but constitutionally-misguided, effort to undo

provide such an exemption and would therefore appear to criminalize the normal professional activities of librarians. *See, e.g.*, Ariz. Rev. Stat. Ann. §13-3553; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§11-9-1.1; Tex. Penal Code Ann., Tit. 9, §43.25(e); Wis. Stat. Ann. §940.203(4).

⁴*See* discussion *infra* at Point B concerning the State's flawed "compelling state interest-less restrictive alternative" argument.

the unbroken line of precedent granting full constitutional protection to the speech here at issue—non-obscene depictions of naked children or of adolescent sexual behavior.

For the laudable purpose of protecting children from sexual exploitation, New York has not only made it illegal in §263.05 to use a child in a sexual performance⁵ and in §263.10 to “manufacture, sell, disseminate or display” obscene materials which depict sexual conduct by youngsters under the age of 16,⁶ but also, by its enactment of the Statute, has criminalized the dissemination, sale or display of constitutionally protected non-obscene materials which portray juveniles in sexually related roles.⁷ While the proscriptions as they pertain to obscene works do not raise constitutional problems (*see Miller v. California*, 413 U.S. 15 (1974)), the prohibitions in the Statute banning the dissemination of First Amendment protected materials cannot be supported by any decision of the Court.

Under the Statute, it is a crime to participate in the public dissemination of any material which contains any depiction of actual or simulated sexual conduct by a child or “lewdly” exhibits the child’s genitals.⁸ No countervailing consideration is permitted for the artistic, literary, political or scientific merit of the work in which the photograph or other visual representation appears. According to the New York legislature, the dissemination of any material containing a depiction, actual or simulated, of juvenile sexual conduct is per se injurious to the well-being of the child, regardless of the context in which that con-

⁵ New York Penal Law, §263.05 (McKinney).

⁶ New York Penal Law, §263.10 (McKinney).

⁷ New York Penal Law, §263.15 (McKinney).

⁸ New York Penal Law, §263.00 (McKinney).

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The Misconception and Its Support

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duct is portrayed. Thus, adults in New York are deprived of their right to view or obtain, and publishers and booksellers are deprived of their right to disseminate, a broad variety of constitutionally protected materials.⁹ Cf. *Butler v. Michigan*, 352 U.S. 380 (1957).

The Misconceptions Urged by Petitioner and Its Supporting Amici

Despite the broad claims of petitioner and its supporting *Amici* ("Petitioner's *Amici*") in briefs filed here in opposition to the Court of Appeals decision, the Statute is not a "child pornography" law. The task of proscribing child pornography is amply taken care of by other sections of the New York Penal Law, specifically §263.05 controlling the creation of such materials and §263.10 prohibiting the dissemination of related obscene works. To the contrary, the Statute reaches beyond the unprotected obscene materials prohibited by §263.10. It permits law enforcement officials to enter legitimate bookstores and libraries in order to seek out non-obscene works which arguably fall within the Statute's broad proscriptions of content.

As the U.S. Senate Judiciary Committee noted in considering a proposed federal child pornography bill that prohibited the dissemination of both obscene and non-obscene depictions of sexual conduct by children:

⁹ *E.g.* serious compilations of artistic photographs, such as Sullivan, *Nude Photographs, 1850-1980* (1980), pp. 47, 78, 125 and 134; Ruby, *The Human Figure: A Photographic Reference for Artists* (1974), pp. 309-317; Mason, *The Family of Children* (1977), pp. 84-85; Mark, *Prostitutes of Bombay* (1981); Hamilton, *Sisters* (1973); and the works cited in footnotes 22 and 27, *infra*. The overbreadth is compounded by the fact that the Statute defines "sexual conduct" to include "lewd exhibition of genitals" (New York Penal Law, §263.00-3). "Lewd" has not been defined by the legislature and can readily be interpreted to encompass a wide variety of genital exhibition.

"The Committee also believes that the enactment of such a provision would be unnecessary. It was the opinion of the experts who testified before the Committee that virtually all of the materials that are normally considered child pornography are obscene under the current standards. Thus, they can be prohibited under the existing federal obscenity statutes. Indeed as was noted earlier, federal authorities have already begun an extensive crackdown on child pornography." S. Rep. No. 95-438, 95th Cong., 2d Sess. 13, [1978] U.S. Code Cong. & Ad. News at 50.

Consequently, regardless of the nature of the motion pictures involved in this particular case (which, from their descriptions in the brief might well have been found obscene by a jury), it would be improper to view this appeal as one involving merely the adult entertainment districts of New York's larger cities where "child pornography" may be peddled, an activity that will continue to be prohibited by §263.10 even if the Statute is not resurrected. The focus, rather, should be on the overbroad impact of such statutes on legitimate publishers, booksellers, medical schools, and libraries, many of which stock, purchase and disseminate materials of serious artistic, literary, political or scientific merit that appear to fall within the ambit of the Statute. These works are not only fully entitled to First Amendment protection, but could not, by the remotest stretch of the imagination, be said to constitute "child pornography".

Potential Consequences Beyond the Scope of This Case

A reversal of the Court of Appeals decision will signal to the states that the Court sanctions direct invasions of First Amendment protections whenever a state can articulate

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a reasonable sounding basis for doing so. Other new laws attempting to regulate a wide variety of speech are certain to follow, leading ultimately to a limiting redefinition of the scope of free expression through countless appeals to the Court. This burdensome process can easily be avoided. New York's interest in the well-being of its children is adequately protected by §263.05 prohibiting use of children in the creation of sexually related works and §263.10 which bans all child pornography.¹⁰ An affirmation of the Court of Appeals decision holding the Statute unconstitutional will signal to the states that they may properly ban both the production and sale of child pornography, as well as sexual use and abuse of children, without regard to First Amendment considerations, but that they may not criminalize the dissemination of legitimate non-obscene works.

¹⁰ See also New York Penal Law, §260.7 (McKinney) (child abuse as a crime) and New York Soc. Serv. Law, Art. 6, Tit. 7 (care and protection of children, including abused children; see §371-4-b).

A R G U M E N T

The Statute Violates the First Amendment to the United States Constitution.

The First Amendment, as interpreted by this Court, is intended to foster a wide open exchange of ideas and expression, free from state interference.

"It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).¹¹

Amici of course recognize that certain sexually explicit speech, if found obscene, is not protected First Amendment

¹¹ Justice Holmes likened First Amendment protections to a free market for ideas, only allowing individual choice to determine what information is communicated.

"[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

In accord, *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("The safeguarding of these rights to speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to a free government.")

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expression. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). New York State, however, does not attempt to justify the Statute's proscriptions based upon an obscenity standard. Its justification, rather, is that in order to protect minors from commercial sexual exploitation, the dissemination of *all* materials containing certain sexually related depictions of children, even those with serious merit, must be banned.¹² Such a drastic measure is unprecedented, finds no support in the previous decisions of the Court, and goes much further than is required to alleviate the perceived harm. Accordingly the Statute, by imposing such overbroad restrictions, should be held unconstitutional as an infringement of First Amendment rights.¹³

¹² As stated by the New York State legislature upon passage of New York Penal Law, §263.00 *et seq.*:

"The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.

"The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act." Legislative Findings and Declaration, New York Penal Law, §263.00 (McKinney).

¹³ In fact, the only decisions known to *Amici* construing the constitutionality of statutes such as the one in issue in this case have found them unconstitutional. *St. Martin's Press v. Carey*, 410 F. Supp. 1196 (S.D.N.Y. 1977) *rev'd on other grounds* 605 F.2d 41 (2d Cir. 1979); *State v. Shingaki*, Hawaii Cir. Ct., 1st Cir., Cr. No. 54385, Apr. 27, 1981. *See also*, Pope, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L. Forum 711, 743-44 ("New York's rejection of the obscenity doctrine [§263.15] appears patently unconstitutional.")

A. Section 263.15 Does Not Fall Within Any of the Established Exceptions to the First Amendment

In *Roth v. United States*, 354 U.S. 476 (1957), the Court noted the obvious: “. . . sex and obscenity are not synonymous” (at 487). For this reason, the Court recognized,

“It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.” *Id.* at 488.

The principle enunciated in *Roth*—that treatment of the subject of sex will be accorded constitutional protection unless the material in issue is found to be legally obscene—remains bedrock constitutional doctrine. Thus, in *Miller v. California*, *supra*, 413 U.S. at 29, the Court unequivocally announced: “[T]oday . . . a majority of this Court has agreed on concrete guidelines to isolate ‘hard core’ pornography from expression protected by the First Amendment.” *Accora: Paris Adult Theatre I v. Slaton*, *supra*, 413 U.S. at 69 (“We have directed our holdings, not at thought or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights”); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (pictures, films, printed words “have First Amendment protection until they collide with the long-settled position of this court that obscenity is not protected by the Constitution”).

It is precisely because non-obscene sexual expression “taken as a whole” contains “serious literary, artistic, political or scientific value,” *Miller v. California*, *supra*, 413 U.S. at 24, that such expression is entitled to First Amendment protection “regardless of whether the government or a

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majority of the people approve of the ideas these works represent." *Id.* See also *Cohen v. California, supra*, 403 U.S. at 24-25 (unpleasant or offensive consequences of free expression constitute the "necessary side effects" of achieving "the broader enduring values" promoted by such expression).

In light of the foregoing, the New York Court of Appeals was entirely correct in finding overbroad the State's total prohibition of the dissemination of "non-obscene sexual performance involving children," 52 N.Y.2d at 678, and in recognizing that, "no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail protected modes of expression." 52 N.Y.2d at 679. This does not mean that a state may not curtail the use of children in the creation of child pornography. It is constitutionally free to do so, as New York has, by punishing those who employ or induce children to engage in proscribed forms of sexual conduct. To the extent a state wishes to curtail the publication or dissemination of materials depicting adolescent sexual activity by those having no relationship to the actual child abuse, it may also constitutionally do so, but only as § 263.10 provides, by punishing those who publish or disseminate legally obscene materials depicting such conduct.

Notwithstanding that the speech sought to be curbed by the Statute is non-obscene and hence entitled to constitutional protection, New York urges rejection of such "overly simplistic First Amendment analysis" (Brief for Petitioner, p. 7) in favor of the crafting of a massive constitutional loophole. This loophole, however, would enable the government to prohibit otherwise protected expression whenever it arguably promotes illegal activity. Thus, the State as-

serts, without benefit of any supporting authority: "Section 263.15 . . . is premised on the sound idea that the state can properly forbid distribution of materials produced in a certain manner if the state has properly prohibited that manner of production." Brief for Petitioner, p. 10. It is the State's contention that the ban on dissemination of non-obscene protected expression is constitutional solely because it furthers the State's interest in protecting children from child abuse. *Id.*

Amici have been unable to find a principled basis on which to justify the State's position; in fact, there is none. In considering the State's position, the Court must of course be guided by the recognition that exceptions to classes of speech entitled to First Amendment protection are few, "well-defined and narrowly limited." *Cohen v. California*, *supra*, 403 U.S. at 19-20; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). *See also Hess v. Indiana*, 414 U.S. 105 (1973). The expression proscribed by the Statute fails to fall within the obscenity exception. Neither does that speech fall within any of the other established exceptions, *e.g.*, fighting words (*Chaplinsky v. New Hampshire*, *supra*), defamation (*see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), or incitement to imminent lawless activity (*see Brandenburg v. Ohio*, 395 U.S. 444 (1969)). The State is thus asking the Court to adopt an entirely new exception to the First Amendment, unsupported by precedent. To accede to this request would require the Court to exclude from First Amendment protection all speech that has a tendency to make illegal activity more likely, since that is the only connection alleged by the State between the speech to be suppressed and a legitimate state purpose. Such an expansive new exception, however, is both unwise and unwarranted.

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The required nexus between the speech sought to be censored and the illegal conduct said to be provoked thereby has previously been addressed by the Court. In *Brandenburg v. Ohio*, *supra*, 395 U.S. at 447 and *Hess v. Indiana*, *supra*, 414 U.S. at 108, the Court delineated the limited situations in which speech may be suppressed on the basis that it is likely to cause illegal conduct taking the form of street violence. According to the Court in *Brandenburg*,

“the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, *supra*, 395 U.S. at 447, quoted in *Hess v. Indiana*, *supra*, 415 U.S. at 108.

There is simply no compelling reason to dilute the *Brandenburg* test to accommodate the Statute. *Cf. Carey v. Population Services International*, 431 U.S. 678, 701 (1977). As discussed above, the cost of such a contraction of First Amendment rights is substantial. As the Court stated in *Cohen v. California*, *supra*, 403 U.S. at 24, “most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions.” Surely, in an area of First Amendment doctrine as well-explored as the issue of the illegal conduct “caused” by speech, the fact that the Statute fails the established test as completely as it does demonstrates clearly its unconstitutionality.

B. *The Statute's Restriction on Speech Is Not Content Neutral; Nor Is It the Least Restrictive Alternative Available to Promote the State's Purpose*

The Statute, imposing restrictions on the content of First Amendment protected speech, is unconstitutional, especially since there are less restrictive alternatives available. Although the State relies heavily upon this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968),¹⁴ to support the Statute, such reliance is misplaced.

O'Brien involved the prosecution of a demonstrator for burning his draft card in public to protest against the Vietnam War. He was tried under the 1965 Amendment to §12(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. §462(b)(3)), which makes it a crime "knowingly" to destroy or mutilate a selective service registration certificate. *O'Brien* argued that the statute violated the First Amendment by effectively denying to him his right to express disapproval of the war by the act of burning his card.

Finding the statute constitutional, the Court set out the test to be applied when a law regulating conduct is challenged as violative of the First Amendment:

"[A] governmental regulation is justified . . . [1] if it furthers an important or substantial government interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377.

Here the Statute regulates the conduct of *Amici* and others similarly situated by proscribing the dissemination

¹⁴ See Brief for Petitioner, p. 11.

of certain constitutionally protected works. Assuming, arguendo, that such a prohibition is rationally related to the furtherance of a legitimate concern of the State of New York (at least to the extent that the minors protected are residents of the State of New York) and thus complies with the first of the criteria,¹⁵ it nonetheless fails to meet the other two.

The harm allegedly protected against is not, as required by the second part of *O'Brien*, unrelated to the suppression of First Amendment rights.¹⁶ The Statute is directed only at materials which portray certain juvenile sexual activities. Consequently, it is the harm perceived to be caused by the message itself which has led to criminalization of the works covered by the Statute.

In similar contexts, the Court has not sanctioned indiscriminate direct invasions of First Amendment freedoms. When students were suspended from school for wearing armbands in protest of the Vietnam War, their suspensions were overturned. The Court's decision emphasized that the suspensions were invalid because they were made pursuant to a regulation which banned only the specific form of expression chosen by the students.

¹⁵ *Amici* do not deny that §263.05, barring the actual "use" of children, furthers the legitimate and important state interest in protecting children from sexual child abuse. The relation, however, between the dissemination offenses and the desire to prevent child abuse is, of course, far more tenuous. Section 263.10, dealing with "obscene" matter, is presumptively constitutional under *Miller v. California*, *supra*, whether or not it otherwise furthers the State's interest in child protection. The Statute, on the other hand, is far removed both from the actual criminal abuse and from the dissemination of materials without constitutional protection. Therefore, in *Amici's* view, it raises far more difficult questions, even under the first branch of the *O'Brien* test. In this respect the burden is on the State. *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

¹⁶ See, for example, note 12, *supra*, wherein the State interest, as expressed by the New York legislature, is set forth.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

In another case, when a protestor was convicted of disturbing the peace merely for wearing a jacket containing a disquieting epithet directed toward the military draft, the Court once again found that the state action was unconstitutional. California, by its prosecution of the protestor, unconstitutionally intended to shield the public from the form of the communication chosen. *Cohen v. California*, *supra*.

Only where the regulation of conduct is "content neutral" (see *United States v. O'Brien*, *supra* and *Prince v. Massachusetts*, 321 U.S. 158 (1944)¹⁷) or where the restriction on expression is "minimal" (*Young v. American Mini Theatres Inc.*, 427 U.S. 50 (1976); *Schad v. Borough of Mount Ephraim*, — U.S. —, 101 S.Ct. 2176 (1981)) has the Court tolerated the concomitant abridgement of First Amendment protections.

The Statute is not "content neutral". It is aimed only at certain sexually related speech and ignores other communications or expressions which may similarly cause injury to young juveniles. See *People v. Ferber*, 52 N.Y.2d at 680-81. By singling out only works depicting certain conduct, the Statute is patently unconstitutional. Cf. *Tinker*, *supra*, 393 U.S. at 510-11; and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975). Nor is the restriction minimal; it is, in fact, absolute.

Even if the Court were to find the Statute "content neutral," it still must fall under the third criterion of

¹⁷ See also, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496-1502 (1975).

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O'Brien in that it restricts First Amendment freedoms to a greater extent than is necessary.

As evidenced by the legislative policy statement issued upon passage of the Statute,¹⁸ New York is primarily concerned with eliminating the sexual exploitation of persons under age 16. This result is still achieved if the Statute is declared unconstitutional in that separate provisions in the New York Penal Law already proscribe the creation as well as dissemination of child pornography.¹⁹ Section 263.05 makes the use of children in the creation of child pornography illegal while §263.10 bans its dissemination. These are sufficient to not only effectuate the state policy of protecting youths from sexual exploitation, but, as a less restrictive alternative, also avoid any infringement of First Amendment freedoms by not also criminalizing non-obscene works. See *Schad v. Borough of Mount Ephraim*, *supra*, 101 S. Ct. at 2183.

C. New York's Interest in Protecting the Welfare of Children Living Within the State Does Not Justify the Denial of First Amendment Rights

Petitioner claims that New York's interest in the protection of its children is sufficiently compelling so that constitutional rights to publish, distribute and sell certain non-obscene materials can be restricted. The State urges that it is "physically, psychologically and emotionally harmful" for a child to be depicted engaging in various categories of sexually related conduct in any work, regardless of its legitimate value.²⁰

¹⁸ See note 12, *supra*.

¹⁹ New York Penal Law §§263.05 and 263.10 (McKinney).
See also the statutes regulating child abuse cited in fn. 10, *supra*.

²⁰ See Brief for Petitioner, pp. 14-15.

This very argument, that a state's interest in protecting the reputation and emotional well-being of its youths outweighs First Amendment freedoms, has previously been made to, and rejected by, the Court. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), a newspaper printed the name of a juvenile offender in violation of a West Virginia law which prohibited such a publication absent the prior written approval of the Juvenile Court. The State urged that the law was a constitutional attempt to protect the welfare of West Virginia youths who become enmeshed in the criminal process at a young age.²¹ Chief Justice Burger, writing for seven of the eight justices who heard the case, rejected the argument that such an interest could outweigh First Amendment rights.

"... [T]he reasoning of Davis [*v. Alaska*, 415 U.S. 308 (1974)] that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.

"The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents." *Id.*, at 104.

Similarly, in *Cor Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court denied enforcement of a Georgia statute which, in effect, deprived the media of its right to publish or broadcast the name of a rape victim in order to protect her family's right of privacy.

²¹ The state interest is described in the Court's opinion as follows: "The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further anti-social conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense." *Smith v. Daily Mail Publishing Co.*, *supra*, 443 U.S. at 104.

Here, like *Smith* and *Cor.*, the enunciated state interest cannot prevail over the First Amendment rights of *Amici* and others to disseminate legitimate works which contain non-obscene depictions of juvenile sexual conduct.

D. *The Amended Statute, by Failing to Provide an Exemption for Medical, Scientific or Educational Material, Is Overly Broad and Unconstitutional*

An absolute prohibition of the dissemination of all works which depict children engaged in certain categories of sexually related conduct, regardless of obscenity, clearly regulates protected speech. The State so concedes in its brief. (Brief for Petitioner, p. 26.) If the Statute is upheld, *Amici's* publisher, distributor, and bookseller members will be denied their right to disseminate a wide range of medical, scientific and educational works which, as an essential part of their content, contain sexually related pictures of naked youths.²²

This Court has repeatedly stressed that laws are overbroad and unconstitutional when they restrict First Amendment freedoms in the process of regulating unprotected expression.

"A . . . threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils

²² See, e.g., Falkner, *Human Development* (1966), pp. 184-221 (This text is geared toward educating physicians, scientists and students studying anatomy, genetics, biochemistry, physiology, psychology and behavioral science and in furtherance thereof, contains explicit photographs of minors displaying various genital deformities); Waldo, *Textbook of Pediatrics* (1979), pp. 1567-1570, 1623-1630 (Basic pediatric text dealing with diagnosis and treatment); Rudolph, *Pediatrics* (16th Ed. 1977), pp. 1328, 1608, 1678, 1713-14, 2015 (Pediatrician's desk book for diagnosis and treatment); Forfar and Ariiel, *Textbook of Pediatrics* (1973), pp. 1052-55, 1115 (Pediatrician's desk book for diagnosis and treatment); and Lightwood, Brimblecombe and Bartrop, *Paterson's Sick Children* (9th Ed. 1971), pp. 203, 206, 208 (Text dealing with diagnosis of children's diseases).

within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. State of Alabama*, 310 U.S. 88, 97-98 (1940).²³

Furthermore, the Court is not constrained by the facts of this case in determining the constitutionality of the Statute.²⁴ When a law is attacked on overbreadth grounds, the Court must look beyond the record to other unrelated potentially improper applications of the regulation at issue:

"[T]he instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner

²³ See also *Erznoznik v. City of Jacksonville*, *supra*, 422 U.S. at 216 ("This Court has long recognized that a demonstrably overbroad statute or ordinance may deter the legitimate exercise of First Amendment rights."); and *Dombrowski v. Pfister*, 360 U.S. 479, 486 (1965).

²⁴ While it is true that Ferber was convicted under the Statute and acquitted under §263.10, it is likely that the jury's unwillingness to impose a double penalty, and not the nature of the seized films' contents, was the reason for such action. Due to their similar wording, a defendant cannot be convicted under §263.10 without also being found guilty under the Statute because all "obscene" sexual performances violate both provisions. Had only §263.10 been on the books, it is likely that Ferber would have been convicted under that statute. (See Brief of Amici Keating and Citizens for Decency Through Law, pp. 30-31) Consequently, the nature of the films which formed the basis for Ferber's conviction should not be regarded as illustrative of the kinds of works proscribed by the Statute.

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has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963)

As noted, the State readily admits that protected expression is proscribed by the Statute, but proposes that such overbreadth be ignored here and dealt with on a case-by-case basis in later criminal prosecutions.²⁵ The Court has previously considered and emphatically rejected similar proposals.

"When the statutes also have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett v. Bullitt*, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions . . . ?' *N.A.A.C.P. v. Button*, 371 U.S. 415, 433." *Dombrowski v. Pfister*, supra, 380 U.S. at 486.

Cf. Gooding v. Wilson, 405 U.S. 518, 520-21 (1972).

²⁵ See Brief for Petitioner, p. 26:

"To take an instance cited by the court below (App. A. at 5a) in the unlikely event that a person would ever be prosecuted for showing 'a filmed report of New Guinea fertility rites,' that person could interpose a defense based on the unconstitutionality of the statute as applied. Given the legitimate breadth of the statute, these limited situations can be dealt with on a case by case basis, without resort to the drastic remedy of declaring the statute unconstitutional on its face."

These are not hypothetical concerns. *Amici's* members, publishers and distributors of legitimate materials, face the real threat of criminal prosecution pursuant to the Statute's overbroad prohibitions. Apart from actual prosecution, the "chilling effect" of such an overbroad statute is equally real. The New York legislature's failure to include an exemption for medical, scientific and educational works, as well as the coexistence of §§263.10 and 263.15, is conclusive of its intent to regulate, by the Statute, both protected and unprotected expression. In light of this obvious overbroad legislative intent, recognized by the Court of Appeals below, the Statute cannot be construed narrowly. *Cf. Prince v. Massachusetts, supra*, 321 U.S. at 163. The Court should, therefore, find the Statute unconstitutional on its face and permanently enjoin the State from its enforcement.

E. By Allowing the Moral Values of Some to Dictate What May Be Read by All, the Statute Impermissibly Infringes Upon the Rights of Parents and Teachers to Educate Children About Sex With the Aid of Materials Designed to Deal With the Subject in a Frank and Non-Obscene Manner

Among our most sacred freedoms are those protected by the First Amendment to the United States Constitution. *N.A.A.C.P. v. Button, supra*. They ensure that no person or group will ever be able to set out the subjects about which we can read, think or teach. *Cf. Cohen v. California, supra*. The State and Petitioner's *Amici*, however, seek to impose their view of morality upon the State of New York by banning the protected works covered by the Statute. The Court in *Near v. Minnesota*, 283 U.S. 697 (1931) rejected a similar attempt to restrict the scope of First Amendment freedoms:

"If the town paper for n habitants n its circulati is no limit t violent reac nization of this consid with the in tional prote words." *Id.*

A focal point *Amici* is the em of young juven nography". In t non-obscene w misleading. "T tious writing children are tific, literary by definitly "child por

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“If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited.’ The danger of violent reactions becomes greater with effective organization of defiant groups resisting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the Constitutional protection would be reduced to a mere form of words.” *Id.* at 722.

A focal point of the briefs of Petitioner and Petitioner’s *Amici* is the emphasis placed upon calling all photographs of young juveniles engaged in certain conduct “child pornography”. In the context of the Statute, which proscribes non-obscene works, use of such a term is erroneous and misleading. “Pornography” is defined as “obscene or licentious writing, painting, or the like”.²⁶ Where, however, children are depicted in materials which *have* serious scientific, literary, political or artistic merit, those works are not, by definition, obscene. They should not be categorized as “child pornography.”

Within this group of materials, the dissemination of which is criminalized by the Statute, are pictorial texts intended to aid parents and teachers in educating children about anatomy, sex and sexual relationships.²⁷ The authors

²⁶ *Webster’s New International Dictionary* (2d Ed. 1957), Unabridged, p. 1922; See also, Black, *Black’s Law Dictionary*, 5th Ed., West Publ. Co., 1979, p. 1075.

²⁷ See, Waxman, *Growing Up Feeling Good; A Child’s Introduction to Sexuality* (1979) (Touches human sexuality to children by discussing love, love making and genital development. Using pictures to supplement the written material); Waxman, *What is a Girl? What is a Boy?* (1976) (Very basic pictorial essay)
(Footnote continued on next page)

of these works uniformly believe that there is a psychological benefit to being exposed to such materials at a young age. It is thought that by seeing pictorial presentations of sex in an open and unembarrassed manner, youths will not need to learn about relationships, birth control and pregnancy on street corners, and, further, can more easily develop into mature, aware adults.

The *President's Commission on Obscenity & Pornography* ("President's Commission") came to a similar conclusion in its 1970 report where it stated:

"Biological studies indicate that boys and girls enter pubescence earlier than formerly was the case, and, as a result, are aware of their sexual feelings earlier. It is highly desirable at this stage in their development that they receive straightforward information from their parents, from the school, and from qualified community agencies. . . .

• • •

"A study by Offer (1969) defines the levels of sexual development that young people in high school and college experience, and suggests that as interest in the opposite sex begins to crystallize, attitudes are more important initially than overt sexual behavior. These developing attitudes must be based on accurate and complete information regarding sexuality if subsequent behavior is to be responsible and mature.

of anatomy geared toward children. Designed to teach the differences between males and females.); Goldstein, Haeberle and McBride, *The Sex Book, A Modern Pictorial Encyclopedia* (1971) (Pictorial encyclopedia of anatomy and sexuality with accompanying text.); McBride and Fleischhauer-Hardt, *Show Me!* (1975) (A picture book of anatomy and sexual relationships for parents and children.); and Nass, Libby & Fisher, *Sexual Choices* (1981) (Text book for college classes studying human sexuality which includes photographs of naked children as an aid to understanding the textual material).

"Sex education fully developed education to the whole country require adequate the community its trained parents Books E

Included in such persons under these books can find ment from child all Americans in honest rendition the best way to would be contrary those parents who such materials t York, 390 U.S. deny parents th v. California, are offended by "simply by a

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"Sex education, then, must be expanded and more fully developed as an integral element of general health education to insure its adequacy to meet the needs of the whole community. *Both parents and young people require adequate sources of reliable information, and the community should provide these sources through its trained personnel and institutions.*" Report, Bantam Books Edition, pp. 312-13. (emphasis added)

Included in such works, of necessity, are depictions of persons under the age of 16 so that the youngsters reading these books can fully understand their own sexual development from childhood to puberty through adulthood. While all Americans may not agree that non-obscene pictorially honest renditions of anatomy and sexual relationships are the best way to educate children about human sexuality, it would be contrary to our Constitutional freedoms to deny those parents who choose to have their children taught with such materials their right to do so. *See Ginsberg v. New York*, 390 U.S. 629 (1968).²⁵ The statute, however, would deny parents this choice. As stated by the Court in *Cohen v. California*, *supra*, 403 U.S. at 21, those individuals who are offended by such texts can avoid exposure to them "simply by averting their eyes."

By permitting books to be banned in the manner contemplated by the Statute, the Court would be impliedly saying to children that sex is a subject which can be dis-

²⁵ In *Ginsberg*, the Court stated:

"First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, *supra* at 166." *Id.* at 639.

ussed openly only in back alleys and on street corners. It is this attitude that the President's Commission concluded must be eliminated if our society is to ever outgrow its preoccupation with pornography:

"Sex education, *straightforward and adequate begun in the home*, continued in school, and supplemented by community agencies such as religious, medical and other service institutions, can reduce interest in pornography as a source of information and can assist in developing a healthy attitude toward sexuality." Report, p. 312. (emphasis added)

The Court must not allow the moral values of some to be thrust upon all. Individual choice is the cornerstone of a free society. The Statute, as a proscriptive law aimed at eliminating only certain forms of protected speech, should be held unconstitutional as denying New Yorkers of their right to free expression.

F. The Statute Cannot Be Saved by Analogies to So-Called "Trafficking" and "Contraband" Laws Which Require the Existence of an Underlying Crime and That the Speaker Be Directly Involved in That Criminal Activity

Amicus curiae Covenant House, in its brief (pp. 19-22), attempts to support the constitutionality of the Statute by analogy to the so-called "trafficking" and "contraband" laws, i.e., federal criminal statutes which ban certain transmissions and communications involving, or made with the knowledge of, various underlying crimes. The "trafficking" statutes referred to by Covenant House relate to the transmission of wagering information (18 U.S.C. §1054) and the promotion of racketeering activities (18 U.S.C. §1952); the contraband statutes referred to prohibit the disclosure of information obtained through illegal wiretapping (18 U.S.C.

§2511(1)(e)) and oppressive child labor laws, however reasons.

First, the Statute below, bars the pictures taken in the country where *v. Ferber*, 52 House support graphs may have violated any law crime, as is the "band" statutes

In addition, the Statute can be seen as a law for disseminating words reasonably believed to be true or outside the scope of the crime.

Petitioner's argument is no different from the products market

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§2511(1)(c)) and the sale of products manufactured with oppressive child labor (29 U.S.C. §212(a)).²⁹ These analogies, however, fall wide of the mark for two important reasons

First, the Statute, as recognized by the Court of Appeals below, bars the dissemination of works even if they contain pictures taken outside New York "in another State or country where such conduct may not be prohibited." *People v. Ferber*, 52 N.Y.2d at 680.³⁰ Petitioner and Covenant House support this interpretation.³¹ Thus, since the photographs may have been taken where their production did not violate any law, there is not necessarily an underlying crime, as is required in all the "trafficking" and "contraband" statutes cited by Covenant House.

In addition, due to its multi-jurisdictional application, the Statute can subject a seller to criminal liability for disseminating works which contain photographs that he reasonably believes were legally taken outside New York State or outside the country since knowledge is not an element of the crime.

Petitioner and Covenant House also assert that the Statute is no different in principle than the prohibition of the products manufactured with child labor in violation of 29

²⁹ Petitioner also makes a similar argument concerning the child labor laws at pages 17-18 of its brief.

³⁰ In *St. Martin's Press, Inc. v. Cory*, 605 F.2d 41, 44 (2d Cir. 1979) the majority opinion suggested that the New York courts would interpret the Statute not to include films or photographs produced outside the United States. This interpretation, however, was squarely rejected by the New York Court of Appeals in the decision below. In fact, at the trial of this case, the Respondent himself attempted to prove that the films in question were taken and produced in Europe, but his offer of proof was disallowed as irrelevant.

³¹ See, Brief for Petitioner, pp. 29-32; and Brief of Covenant House, pp. 23-25.

U.S.C. §212. The child labor laws, however, unlike the Statute, clearly do not infringe upon protected speech. *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Litigation*, 12 Mich. L.J. Reform 295, 316 n.127 (1979). It is one thing to say that children cannot be hired to produce a newspaper. It is quite another thing to argue that it cannot be sold because it contains photographs of child labor.

This distinction was recognized by the Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) where it stated:

"The broadside assertion that petitioners 'could not be covered by the [Fair Labor Standards] Act,' for the reason that 'application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment,' is without merit. If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce. *The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.*" 327 U.S. at 192-193 (citations omitted; emphasis added)³²

Second, the federal laws cited by petitioner and Covenant House banning certain communications require not only the

³² The Court added in a footnote to the above statement in *Oklahoma Press Publishing Co.*, that "[n]o question is presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform." 327 U.S. at 193 n.8.

existence of an unassertion of Communicating be in underlying crime. seller to liability. do with the origin nothing about it.

For this reason information rega sheets" are prose §1084(b); *U.S. v. Kelly v. Illinois E. Ill. 1962*), *aff'd*, 3: been held that i "speaker" not it would be in viol *Illinois Bell Tele*

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existence of an underlying crime, but also, contrary to the assertion of Covenant House,³³ the person doing the communicating be involved with, or have knowledge of, the underlying crime. The Statute, to the contrary, subjects a seller to liability even though he may have had nothing to do with the original production of the picture and knows nothing about it.

For this reason, neither newspapers which merely convey information regarding illegal activities nor gambling "tip sheets" are proscribed by either §1084 or §1952. 18 U.S.C. §1084(b); *U.S. v. Alpirn*, 307 F.Supp. 452 (S.D.N.Y. 1969); *Kelly v. Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). Indeed, it has been held that if statutes such as these did apply to a "speaker" not involved with the underlying crime, they would be in violation of the First Amendment. *Kelly v. Illinois Bell Telephone Co.*, *supra* at 465.

In contrast, the Statute does not require any involvement by the disseminator in the actual photographing of a child or any knowledge by him that the photograph was taken in violation of law. The dissemination of a work can be in violation of the Statute even though its production was not in violation of §263.05, and, indeed, even if such production was not a crime of any kind.

It is apparent, therefore, that the analogies drawn by Petitioner and Covenant House to interstate communications and distribution proscriptions where they relate to criminal activities are without merit.

³³ See Brief of Covenant House, p. 20.

CONCLUSION

For the reasons set forth above, the Statute is unconstitutional, and therefore the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Civil Liberties Union, The Asso-
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Of Counsel

APPENDIX

APPENDIX

Relevant Statutory Provisions

§263.00 *Definitions*

As used in this article the following definitions shall apply:

1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and

Appendix

which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 Use of a child in a sexual performance

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 Promoting an obscene sexual performance by a child

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

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

§263.15 Promoting a sexual performance by a child

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof,

Appendix

he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

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



Official Business

Alaska State Legislature

Pouch V
State Capitol
Juneau, Alaska 99811

PUBLIC HEARING ANNOUNCEMENT***TELECONFERENCE***

THE SENATE HEALTH, EDUCATION AND SOCIAL SERVICES
COMMITTEE WILL BE CONDUCTING A TELECONFERENCE ON

CSSSHB 270 - An Act relating to child pornography.

This bill would make the inducement of a child under 18 to engage in sexual acts for the purposes of producing films or written material a class B felony. The bill also covers a parent or legal guardian permitting a child to engage in these activities, and the distribution of child pornography.

the teleconference will be held at 3:00 P.M. (PST) on WEDNESDAY, MAY 11, 1983 at Legislative Information Offices in Anchorage, Fairbanks, Mat-Su, Ketchikan and Kenai. Any other sites interested may participate.

Committee members are: Joe Josephson, D-Anchorage, Chair; Vic Fischer, D-Anchorage, Vice chair; Paul Fischer, R-Kenai; Rick Halford, R-Chigiak; and Pappy Moss, D-Delta Junction.

FOR MORE INFORMATION, call Nancy Deitrick - 465-4907.

SECTION 1 (a) A PERSON COMMITS THE CRIME OF UNLAWFUL EXPLOITATION OF A MINOR IF THAT PERSON KNOWINGLY INDUCES OR PAYS A CHILD UNDER 18 TO ENGAGE IN ACTUAL OR SIMULATED SEXUAL ACTS LISTED, WITH THE INTENT OF PRODUCING PHOTOGRAPHS, FILM OR PRINTED MATERIAL.

(b) A PARENT OR LEGAL GUARDIAN COMMITS THE CRIME OF UNLAWFUL EXPLOITATION OF A MINOR IF THE PERSON PERMITS A CHILD UNDER 18 TO ENGAGE IN THE CONDUCT LISTED IN (a) FOR THE PURPOSE OF PRODUCING FILMS, PHOTOGRAPHS OR PRINTED MATERIAL.

(c) UNLAWFUL EXPLOITATION OF A MINOR IS A CLASS B FELONY.

SECTION 2 A PERSON COMMITS THE CRIME OF DISTRIBUTION OF CHILD PORNOGRAPHY IF THAT PERSON BRINGS OR CAUSES TO BE BROUGHT INTO THE STATE FOR SALE OR DISTRIBUTION, OR POSSESSES, PREPARES, PUBLISHES OR PRINTS WITH THE INTENT TO DISTRIBUTE, SELL, OR EXHIBIT MATTER THAT DEPICTS CONDUCT DESCRIBED IN SECTION 1 (a), KNOWING THAT THE CHILD IS UNDER 18.

(b) THIS SECTION DOES NOT APPLY TO A MOTION PICTURE OPERATOR OR PROJECTIONIST EMPLOYED BY THE THEATER UNLESS THAT PERSON

(1) HAS A FINANCIAL INTEREST IN THE PLACE OF EMPLOYMENT.

(2) CAUSED THE PERFORMANCE OR PICTURE TO BE SHOWN WITHOUT THE AUTHORIZATION OF THE OWNER OR MANAGER.

(c) DISTRIBUTION OF CHILD PORNOGRAPHY IS A CLASS C FELONY.

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HEADING HOUSE HEALTH, EDUCATION & SOCIAL SERVICES
STANDING COMMITTEE

April 5, 1983
1:07 p.m.

Members Present: Rep. Tischer, Co-Chair
Rep. Fritz, Co-Chair
Rep. M.W. Miller, Vice-Chair
Rep. Davis
Rep. Goll
Members Absent: Rep. Cato
Rep. Koponen

CALENDAR SSHB 88: "An Act making a special appropriation to the Department of Health & Social Services for the acquisition and improvement of the Buchner building in Whittier as a correction facility; and providing for an effective date."
SSHB 270: "An Act relating to child pornography."

WITNESS REGISTER

WITNESS:
Roger Endell
Director
Division of Corrections
Department of Health & Social Services
Juneau, Alaska 99811
465-3376
Position Statement: Testified against SSHB 88.

WITNESS:
Rep. Ward
State Capitol Building
Pouch V
Juneau, Alaska 99811
465-4939
Position Statement: Supported SSHB 88; proposed a bottom-fishing industry in Whittier.

WITNESS:
Rep. Liska
State Capitol Building
Pouch V
Juneau, Alaska 99811
465-3732
Position Statement: Urged passage of SSHB 270; proposed 2 amendments.

WITNESS:
Gayle Horvatski
Criminal Division
Department of Law
Pouch KC
Juneau, Alaska 99811
465-3428
Position Statement: Stated the department's support for SSHB 270 and opposition to raising the age limit; recommended 3 amendments.

WITNESS:
Michael Gay
State Capitol Building

Position Statement: Read a memorandum in favor of raising the age limit, for the record.

PREVIOUS ACTION

SSHB 88: 1/20/83 - First Reading.
Committee referrals - HESS, Finance and Rules Committees.
See HESS minutes of March 29, 1983.

SSHB 270: 3/25/83 - First Reading.
Committee referrals - HESS, Finance and Rules Committees.
No previous action in HESS.

ACTION NARRATIVE

TAPE#25
Recording
Number 0001

Co-Chair Tischer called the meeting to order at 1:07 p.m. Representatives Davis, M.W. Miller and Fritz were present. Representative Goll arrived shortly thereafter. Co-Chair Tischer announced the committee calendar and the intent of the Chair to move both bills.

Number 0030

Co-Chair Tischer invited Rep. Bettisworth, sponsor of SSHB 88, to testify. Rep. Bettisworth deferred to the next witness. Roger Endell, Director of the Division of Corrections, presented a brief history and description of the Buchner Building. Mr. Endell asserted that the building would not be appropriate as a correction facility because of 2 main factors, those being cost and inaccessibility. In addition, Mr. Endell cited the opposition of citizens in Whittier and the difficulties involved in converting an existing building into a corrections facility.

Number 0053

Number 0120

Mr. Endell stated his opposition to the development of any prison in Alaska with a population over 400 people because of the dangers and managerial problems involved. In response to questions from Rep. Miller regarding other possible prison sites, Mr. Endell described Wildwood, Chineak, and Goose Bay facilities.

Number 0133

Number 0171

Mr. Endell stated that 200 to 300 prisoners need housing now and stressed the importance of getting the sites on line quickly.

Number 0200

Discussion about the fiscal note for HB 88 which reflects the need for 7 million dollars to purchase the Buchner Building and 62 million dollars to convert it into correctional space.

Number 0258

Rep. Fritz clarified Mr. Endell's concerns as: the immediate prison overcrowding crisis and the knowledge that renovating the Buchner building will take a long time, and his preference to go with the Wildwood site because it would take the least amount of time and money to renovate. Mr. Endell agreed to Rep. Fritz's analysis.

Number 0270

Rep. Tischer agreed that Wildwood would meet the immediate need, but questioned what would follow to accommodate future prisoners. Mr. Endell cited a 3.6 million dollar request to build a new maximum security facility.

Number 0290

Rep. Tischer argued against approaching the prison population problem in a patchwork method. Mr. Endell outlined his plan to acquire Wildwood

Goose Bay Site, and then build a maximum security facility. Mr. Endell stressed the dangers and disadvantages of large, fortress type prisons, and cited examples such as Alcatraz.

Number 0341

Rep. Tischer asked how prison industries worked into Mr. Endell's plan. He responded that he had instructed the prison industry commission to start planning for industries at those sites.

Number 0372

In response to Rep. Goll's request for clarification of reasons for opposition to the Buchner building, Mr. Endell pointed out the size and location of the building. According to Mr. Endell's estimates, the proposed prison would probably triple the population of Whittier and require approximately 400 staff members.

Number 0420

Mr. Endell repeated his opposition to converting a regular building into a correction facility, as well as housing over 400 people together.

Number 0472

Rep. Davis inquired about the support services necessary for prisoners. Mr. Endell cited fire and life safety devices, trooper and emergency services, power and water supplies, medical and dental care, provisions for counseling and visitation, access to family members, education and other programming, all of which are lacking in Whittier.

Number 0527

Rep. Tischer argued that there are remote sites throughout Alaska which seem to be able to recruit people to work there. In addition, she stated that the size of the Buchner building does not mandate housing over 400 prisoners there.

Number 0550

Mr. Endell stated that most of the people Rep. Tischer referred to in rural Alaska are there on their own accord; said problems occur in remote sites when people are put there against their own will.

Number 0573

Rep. Goll asked if prisoners currently housed out of state who might return to Alaska under the Cleary Decision would fill the Wildwood facility. Mr. Endell explained it would cost 45 million dollars to house 300 prisoners at Wildwood, 200 Alaskan criminals are currently housed out of state, and one-third of them do not want to return to the state, so the facility would not be filled by returning prisoners.

Number 0586

Rep. Ward testified in support of SSHB 88 and argued that the Director of Corrections should be stationed at the major correction facility in Anchorage not in Juneau. Rep. Ward testified against warehousing prisoners and said the resolution to prison problems is prisoner rehabilitation through work programs. Rep. Ward said that working on the Wildwood site would not benefit prisoners because the work would not carry over into the real world.

Number 0687

Rep. Ward proposed a bottom-fishing prison industry based at Whittier which would cost 12 million dollars and could feed all of the prisoners in the U.S.A.

Number 0707

Rep. Ward argued that the piecemeal approach to solving problems in corrections would lead to warehousing prisoners and thus promote crime. Rep. Ward also described the prison industry

with putting all long term prisoners in Alaska in one big facility.

Number 0750 Discussion of the bottom fishing industry in Prince William Sound.

Number 0805 Rep. Fritz moved to pass SSHB 88 out of committee. Rep. Davis objected. The motion passed with two members signing "do pass" and three members having "no recommendation".

~~Number 0815~~ Co-Chair Tischer called the sponsor of HB 270 to the witness stand.

Number 0826 Rep. Liska, District 15, pointed out the lack of any statutes covering the sale, distribution and issues of parental consent with regards to child pornography. Rep. Liska said HB 270 is long overdue and necessary in order to incarcerate offenders and dissuade potential offenders.

Number 0870 ~~Rep. Liska recommended changing the age limit on Page 1, Lines 1, 19 and 26 from 16 to 18, but~~ said he could also propose the amendment on the House floor.

Number 0891 Rep. Liska also recommended inserting "actual or simulated" on Page 1, Line 6 after the word "following".

Number 0913 Rep. Goll stated his support of the bill and opposition to changing the sale of child pornography to a Class B felony; argued that judges will not implement HB 270 if the sentences are set too high.

Number 0974 ~~Gayle Horetski, Criminal Division - Department of Law, said the Department supports HB 270 in general, but opposes raising the age limit to 18.~~

Number 1018 Discussion regarding the age of majority under law and conditions for emancipation.

Number 1043 Rep. Tischer spoke in favor of raising the age to 18 from a parental perspective.

Number 1053 Ms. Horetski suggested the following 3 amendments:

- (1) insertion of "actual or simulated" on Page 1, Line 6 after "following".
- (2) deletion of "sends or causes to be sent for" on Page 2, Line 7.
- (3) deletion of "a minor or a person who reasonably appears to a minor" on Page 2, Lines 12-13 and insertion of "child under 16 (18)" (18 if the committee decides to raise the age limit).

Number 1139 Rep. Miller moved the amendments suggested by Ms. Horetski with the addition of an amendment to raise the age limit from 16 to 18.

Number 1147 Discussion regarding raising the age to 18.

Number 1195 Gayle Horetski said raising the age to 18 would make it slightly more difficult to prove the age of a child on sight but would not have drastic consequences.

Number 1234 Michael Gay, Aide to Rep. Liska, read a memorandum from Police Chief Porter (Anchorage) in support of changing the age limit in SSHB 270 to 18.

Number 1257 Co-Chair Tischer called for a vote on the amendments. The motion to amend SSHB 270 passed with 4 members signing a "do pass" and one signed no recommendation.

Number 1264 Rep. Goll expressed his objections to voting on the four amendments as a group instead of individually.

Substitute for HB 270 out of committee with individual recommendations. There being no objection, the motion passed.
The meeting adjourned at 2:58 p.m.

Number 1271

END OF DOCUMENT

SEARCH - QUERY

00002 CHILD AND PORNOGRAPHY AND HOUSE AND HESS

sness0429831 DOCUMENT= 2 OF 3

COMM = SNESS
DATE = 042983
TIME = 1500
YEAR = 83

DOC ID sness0429831500

HEADING SENATE HEALTH, EDUCATION & SOCIAL SERVICES
STANDING COMMITTEE

April 29, 1983
300 p.m.

Members Present: Senator Joe Josephson, Chair
Senator Pappy Moss
Senator Vic Fischer
Senator Rick Halford (late)
Senator Paul Fischer (late)
CALENDAR HB 39 Amended Title: An Act relating to services for pregnant women; and providing for an effective date.
HB 270 Amended Title: An Act relating to child pornography.
SB 78 Amended Title: An Act making the public employment relations act applicable to employees of school districts; and providing for an effective date.

WITNESS REGISTER

WITNESS:
Representative Mike Miller of Juneau
Alaska House of Representatives
Pouch V, Juneau, AK 99811
465-4841
Position Statement: Testifies in support of HB 39.
WITNESS:
Jon Paden
Address and phone not provided
Position Statement: Testifies in support of HB 39 and encourages its passage.
WITNESS:
Representative Jerry Martin
Alaska House of Representatives
Pouch V, Juneau, AK 99811
465-3783
Position Statement: Supports HB 39.
WITNESS:
Thomas Robertson, Assistant Attorney General
Department of Law
Pouch K, Juneau, AK 99811
465-3503
Position Statement: Reviews the legal problems.
WITNESS:
Betty Lauritzen
Pregnancy Aid
3704 Amalga St., Juneau, AK
789-3715
Position Statement: Testifies in support of HB 39.
WITNESS:

Department of Health and Social Services

Address and phone not provided

Position Statement: Highlights the reasons the division supports HB 39.

WITNESS:

Rocky Plotnick-Weller

Address and phone not provided

Position Statement: Testifies in support of HB 39 and health education.

WITNESS:

Mike Gay

Representative Liska's office

Pouch V, Juneau, AK 99811

465-3732

Position Statement: Testifies in support of HB 270.

WITNESS:

Jim Lear

Legislative Affairs, Legal Services

Pouch Y, Juneau, AK 99811

Position Statement: States that HB 270 is patterned after suggested state legislation.

WITNESS:

Guy Stringham, Director

Labor Relations

Department of Administration

Pouch C, Juneau, AK 99811

465-4403

Position Statement: Testifies on Sb 78.

WITNESS:

Bob Manners

NEA-Alaska

147 S. Franklin

586-3090

Position Statement: Supports the NEA's position on Sb 78.

PREVIOUS ACTION

Hb 39

Please refer to House HESS Committee minutes prior to 03/16/83. Please refer to Senate Finance Committee minutes prior to 03/23/83. There is no previous action to report in the senate HESS Committee.

Hb 270

Please refer to House HESS Committee minutes dated prior to 04/06/83. Please refer to House Judiciary Committee minutes dated prior to 04/07/83. Please refer to House Finance Committee minutes dated prior to 04/13/83. There is no previous action to report in the Senate HESS Committee.

Sb 78

Please refer to Senate HESS Committee minutes dated 02/21/83, 03/07/83, and 04/27/83.

ACTION NARRATIVE

TAPE# 1 for 04/29/83, SIDE 1

Recording

Number 000

The 04/29/83 meeting of the Senate HESS Committee was called to order at 3:00 by Chair Josephson with member senators Moss and Vic Fischer present. Senators Halford and Paul Fischer were late.

Number 004

HB 39 is brought before the committee.

Number 022

Chair Josephson explains that they will take no action on this bill at this meeting, but he is taking testimony from witnesses.

Number 030

Representative Mike Miller of Juneau is the sponsor. He explains that the bill is an alternative to abortion. It is in no way compulsory; it is a choice.

Number 094 offering other medical services to women above the poverty level. Representative Mike Miller (Juneau) states that the solution is to remove the words "and medical services" in line 21 and write "other than medical services." Birthing centers and midwife services would also be deleted.

Number 154 Chair Josephson asks a question of Representative Mike Miller (Juneau).

Number 172 Chair Josephson states that the fiscal note underwent some revision.

Number 174 Representative Mike Miller (Juneau) explained that it was reduced 1.79 mm.

Number 193 Chair Josephson asks about contracts with the Booth Home.

Number 195 Representative Mike Miller (Juneau) explains that the Booth Home is very interested in this. Without the money they have had to turn away hundreds of women.

Number 204 Senator Moss: Do midwives have to be licensed.

Number 210 Representative Mike Miller (Juneau) states that he doesn't know, but that concern would not be addressed in this bill.

Number 238 Chair Josephson asks whether other states have something similar.

Number 239 Representative Mike Miller (Juneau): Yes. This bill cries out to be on the books. It is a sad situation when women are forced to choose abortion because of their economic situation. Jon Paden testifies in support of HB 39 and encourages its passage.

Number 250 Chair Josephson thanks Mr. Paden.

Number 287 Representative Terry Martin supports HB 39's unanimous passage.

Number 293 Chair Josephson asks whether the money is in the budget and does not get a definitive answer.

Number 302 Thomas Robertson, Assistant Attorney General from the Department of Law, reviews the legal problems. 1. The effective date can cause problems. 2. There are some problems with the eligibility criteria. 3. There are some problems with the language. 4. There are some problems with the medical services.

Number 308 Senator Moss questions the meaning of resident. Mr. Robertson discusses the meaning of resident. He continues with potential legal problems.

Number 360 Mr. Robertson cautions parity on both sides.

Number 375 Betty Lauritzen representing Pregnancy Aid, testifies in support of HB 39.

Number 413 John Pugh of the Department of Health and Social Services, highlights the reasons the division supports HB 39. Many low income persons, especially adolescents in rural areas, have problems getting pre-natal care. It is important for the state to give support.

Number 530 Mr. Pugh requests a third party payer clause in the bill. He would like Legal to address the specific authority for the department.

Number 559 Senator Moss likes the bill but has a problem with the residency requirements.

Number 615 Senator Harford enters the meeting.

Number 621 Rocky Plochnick-Weller testifies in support of HB 39 and health education.

Number 635 Chair Josephson thanks the witnesses and closes the matter due to time.

Number 649

Number 665

Number 032

HB 270 is brought before the committee. Chair Josephson explains that they will not act on this bill today but will hear witnesses.

Number 091

Mike Gay from Representative Liska's offices explains that there are many newspaper articles on child pornography, but there are no laws on the books covering this issue.

Number 112

Jim Lear from Legal Services states that HB 270 is patterned after suggested state legislation.

Number 125

Chair Josephson closes the matter due to time constraints. SB 78 is brought before the committee.

Number 147

Chair Josephson: We would like to understand the differences so the committee can make policy changes.

Number 158

Guy Stringham, Director of Labor Relations for the Department of Administration, testifies.

Number 159

Chair Josephson: Please address what Governor Sheffield wants.

Number 167

Mr. Stringham discusses sectional analysis.

Number 209

Senator Paul Fischer enters the meeting.

Chair Josephson feels that the critical question is whether the school board may select finalizing options during the cooling off period.

Number 210

Mr. Stringham discusses the Governor's position that after a 10 day cooling off period the school board can look at all options. There is no advantage in anything but a full strike for the board.

Number 245

Chair Josephson discusses unlimited strike.

Number 248

Mr. Stringham feels the board might want it but doubts it.

Number 287

Chair Josephson feels that the conduct of the union might be different if it knew what the ground rules were when the dispute arose as to the success of the mediation effort.

Number 295

Mr. Stringham discusses third party arbitration and "last best offer."

Number 344

Chair Josephson asks the definition of mediated arbitration.

Number 345

Mr. Stringham explains that a mediator comes into the picture and works out things separately with two groups. These are the final unresolved issues.

Number 447

Senator Paul Fischer questions final arbitration, package by package.

Number 464

Mr. Stringham explains that Iowa has a four step program which is a good one to follow.

Number 486

Chair Josephson feels there are still many differences between the NEA's proposed bill and the Governor's proposed bill.

Number 498

Bob Manners, representing NEA-Alaska, supports the NEA's position on SB 78.

Number 536

Chair Josephson questions the sectional analysis material just handed out. He suggests that an opportunity be given to study the analysis and adjourns the meeting.

END OF DOCUMENT

SEARCH - QUERY

00002 CHILD AND PORNOGRAPHY AND HOUSE AND HESS

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3 OF

3

DATE = 051183
TIME = 1505
YEAR = 83

DOC ID shess0511831505

HEADING SENATE HEALTH, EDUCATION & SOCIAL SERVICES
STANDING COMMITTEE
Teleconference
May 11, 1983
3:05 p.m.

Members Present: Senator Joe Josephson, Chair
Senator Paul Fischer
Senator Rick Halford
Senator Pappy Moss
Senator Vic Fischer (late)

CALENDAR Hb 270 Amended Title: An Act relating to child
pornography.
SB 74 Amended Title: An Act relating to sexual abuse
of a minor.

WITNESS REGISTER

WITNESS:
Linda Edgeworth, Professional Assistant
Representative Liska's office
Pouch V, Juneau, AK 99811
465-3732
Position Statement: Explained the major concern of Hb 270.

WITNESS:
Ketchikan LID witnesses
Names and addresses not provided
Position Statement: Testified in favor of HB 270.

WITNESS:
Sitka LID witnesses
Names and addresses not provided
Position Statement: Testified in favor of HB 270.

WITNESS:
Stephanie Ellis
Juneau, AK
Address and phone not provided
Position Statement: Supports HB 270.

WITNESS:
Sharon Brown
Juneau, AK
Address and phone not provided
Position Statement: Supports HB 270.

WITNESS:
Matsu LID witnesses
Names and addresses not provided
Position Statement: Have questions regarding porn magazines.

WITNESS:
Susan Winchell
Juneau, AK
Address and phone not provided
Position Statement: Supports HB 270.

WITNESS:
Gayle Horetski, Assistant Attorney General
Department of Law, Legal Services
Pouch XC, Juneau, AK 99811
465-3460
Position Statement: Testified on Hb 270 and SB 74.

WITNESS:
Nancy Groszek, Professional Assistant
Senator Vic Fischer's office
Pouch V, Juneau, AK 99811
465-4954
Position Statement: Testified on SB 74.

PREVIOUS ACTION

from 04/06/83, House Judiciary of 04/07/83 and House Finance on 04/11/83 and 04/15/83. Please refer to Senate HESS committee minutes dated 04/29/83.

Please refer to Senate HESS committee minutes 02/25/83 and 05/04/83.

Sb 74

ACTION NARRATIVE

TAPE# 1 from 05/11/83, SIDE 1

Recording

Number 000

The 05/11/83 teleconference meeting of the Senate HESS committee was called to order by Chair Joe Josephson with all member Senators present (Senator Vic Fischer arrived late). Chair Josephson opens the meeting. The first bill before the committee is HB 270. Josephson reads a legal opinion from James H. Lear, Legal Services, Legislative Affairs Agency dated 05/11/83.

Number 079

Linda Edgeworth, Professional Assistant for Representative Liska explained that the bill's major concern is protection of children. Book Cache "questionable" book can be tested in court. The bill should not be reduced in form as they wouldn't want to weaken the bill.

Number 122

Teleconference witnesses from Ketchikan LIO testified in favor of the bill.

Number 164

Teleconference witnesses from the Sitka LIO testified in favor of the bill.

Number 244

Senator Moss questions the motion picture operator/projectionist's role and responsibility.

Number 256

Chair Josephson discusses the owner-operator matinees and their stock options, financial interest, etc. (Section 2).

Number 284

Senator Halford says that applies only to people/actors under age 18 and discusses the distinction.

Number 319

Stephanie Ellis, Juneau, supports the bill and thinks it ought to be passed. It is adequate as it is.

Number 320

Sharon Brown, Juneau, feels encouraged by the bill and supports it. She is the mother of 7.

Number 356

Chair Josephson asks the opinion of Ms. Brown regarding a child having access to the materials mentioned in the bill where children are depicted in sexual acts. Is it more impacting than if the child sees the same thing where adults are involved?

Number 370

Ms. Brown answers yes and cites an example of her son coming across material and having a battle of concentration. Children are greatly influenced by their peers.

Number 397

Senator Halford questions section 2 and agrees with what Ms. Brown has to say regarding character models.

Number 431

Linda Edgeworth states that much material comes from other states (Section 2).

Number 455

~~Joyce Holbrook, Assistant Attorney General from the Department of Law, states the bill is based on the fact that there are 2 versions on age: 18 and 16. The House bill says age 18; the Senate bill age 16.~~

Number 500

Senator Vic Fischer arrives.

Number 557

Senator Halford discusses inconsistency of "knowing" and "aware of fact."

Number 596 Senator Josephson says that Senator Halford and he have a disagreement on exploitation and purience.

Number 616 Ms. Horetski discusses the soft core meaning.

Number 625 Teleconference participants from the Matsu LIO have questions regarding porn magazines and their availability to youth.

Number 648 Chair Josephson: This bill doesn't deal with magazines or access there of.

Number 657 Susan Winchell of Juneau supports the bill as written.

Number 665 Senator Halford moves to pass the bill out of committee.

Number 666 Senator Moss objects.

Number 671 Senator Halford reminds Senator Moss that it goes to the Judiciary Committee for further consideration.

Number 676 Senator Vic Fischer is in agreement with Senator Moss. He would like to go over it some more.

Number 677 Chair Josephson says the matter will come back at Monday's meeting. The meeting was recessed. It reconvened at 3:40 without teleconference participation.

Number 000 BEGIN SIDE 2, TAPE 1

Number 002 Chair Josephson brings SB 74 before the committee. He invites Gayle Horetski, Assistant Attorney General, to testify.

Number 005 Ms. Horetski discusses handed out matrix. The only reduction is on page 2, line 7, a change from class A felony to unclassified felony.

Number 082 Senator Vic Fischer goes along with the House version; he is bothered by the reduction and the use of the male pronoun. He discusses Section 3 and marital rape. He moves to pass the Fischer amendment out of committee. He explains that 16 states now have marital rape exemptions.

Number 180 Senator Halford objects to the motion and discusses the affirmative defense section.

Number 228 Chair Josephson discusses the end result of a false conviction.

Number 256 Senator Vic Fischer discusses legal recourse versus no recourse under existing law regarding rape without pain.

Number 258 Ms. Horetski discusses marital defense and the code definition of physical pain.

Number 289 Senator Vic Fischer wants to pursue the matter further with the Anchorage defense attorney. He said that "this is working in other states and we need to open our eyes to the reality."

Number 309 Senator Halford agrees.

Number 320 Senator Vic Fischer suggests pulling other states' language to help finalize the bill.

Number 312 Chair Josephson asks Ms. Horetski if a spouse twists a wife's arm and has penetration, would he be prosecuted for rape or assault?

Number 312 Ms. Horetski explained that she would look at the case as sexual assault.

Number 342 Senator Vic Fischer asks Ms. Horetski for statistics on marital rape.

Number 346 Ms. Horetski: The information is not readily available.

Number 360 Senator Moss: Does this bill correct existing problems?

Number 362 Gayle Horetski: Yes, the bill is badly needed.

Number 368 Chair Josephson refers to California figures.

spouses only to have other agendas transpire.
He sees this as a problem.
Number 384 Senator Halford questions the definition of
co-habitation and when it ceases.
Number 420 Chair Josephson discusses affirmative defense
legalities and the credibility issue.
Number 447 Senator Halford questions Ms. Horetski on the
definition of "legally married."
Number 448 Ms. Horetski discusses valid/invalid marriages.
Number 470 Senator Paul Fischer discusses the 3rd and 4th
degrees and thinks they should be shifted over
to unclassified.
Number 474 Ms. Horetski doesn't agree and thinks they
should stay classified "A."
Number 475 Chair Josephson discusses incest by a first time
offender and legal retribution. He asks whether
we have information on how many of these people
could be helped and rehabilitated.
Number 502 Gayle Horetski: None of that is settled.
Number 504 Chair Josephson: What are we trying to say here?
How do we prosecute and save families and some
time?
Number 519 Gayle Horetski: That is hard to answer; she
agrees.
Number 549 Senator Vic Fischer discusses a person 18 years
or older who has sexual penetration with a son
or daughter under 18. What would the penalty be
if it was other than a son or daughter?
Number 577 Ms. Horetski discusses the ages of actor.
Number 602 Senator Vic Fischer selects to deal with the
marital rape provision.
Number 616 Chair Josephson adjourns the meeting at 4:25
p.m.

R0601 * END OF DOCUMENTS IN LIST - ENTER RETURN OR ANOTHER COMMAND.

MEMORANDUM

March 17, 1983

SUBJECT: Child pornography
(HB 270)

TO: Representative John Liska

FROM: James H. Lear
Legislative Counsel

In response to your request, I drafted HB 270 relating to child pornography. Monday afternoon, Mike Gay requested that I redo the bill to define the word "obscene". He indicated that it would have to be done by 9:00 yesterday morning. With just a short amount of time to fulfill this request, I inserted sec. 2 that would add a new paragraph to AS 11.41.470 (definitions) that would define "obscene" to mean

". . . conduct that, taken as a whole and applying to contemporary community standards,

- (A) appeals to the prurient interest in sex;
- (B) is patently offensive; and
- (C) lacks serious literary, artistic, political, or scientific value."

This definition sets out the standard established by the United States Supreme Court in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973).

You should be advised that the standard set forth in Miller for determining obscenity may be relaxed by the states in prohibiting child pornography. Unfortunately, I was not aware of the July, 1982, case of New York v. Ferber, ___ U.S. ___, 73 L.Ed.2d 1113, 102 S.Ct. 3348, in which the United States Supreme Court drew the distinction between child pornography and other forms of obscenity.

I will outline the critical points made in New York v. Ferber, supra, and summarize your alternatives with HB 270.

March 17, 1983

At issue in New York v. Ferber is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

The decision highlights the fact that the federal government and 47 states have sought to combat the problem of child pornography with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene (i.e., that apply the Miller standard). Thirty-five states and the United States Congress have also passed legislation prohibiting the distribution of such materials. Twenty states prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.

The heart of the New York v. Ferber case is a pronouncement by the United States Supreme Court that it is permissible for a state to penalize the production of child pornography and the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.

Here is how the Court arrived at that decision. The Court stated the issue as follows:

To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the first amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?

The Supreme Court indicated that this case constitutes its first examination of a statute directed at and limited to depictions of sexual activity involving children. The Court then began with the question of whether a state has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children. The Court reviewed the position taken in Miller, supra, that the

. . . states have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant

March 17, 1983

danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.

Miller v. California, 413 U.S., at 19.

The Miller standard, like its predecessors, was an accommodation between the states' interests in protecting the "sensibilities of unwilling recipients" from exposure to pornographic material and the dangers of censorship inherent in unabashedly content based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, the Court was persuaded that the states are entitled to greater leeway in the regulation of pornographic depictions of children.

(1) It is evident beyond the need for elaboration that a state's interest in "safeguarding the physical and psychological well-being of a minor" is compelling.

(2) The distribution of photographs of and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.

(3) The advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation.

(4) The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceeding modest, if not deminimus.

(5) Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with the Court's earlier decisions.

The Court reiterated that the test for child pornography is separate from the obscenity standard enunciated in Miller, but may be compared to it for purposes of clarity. The Miller formulation is adjusted in the following respects:

(1) A trier of fact need not find that the material appeals to the prurient interest of the average person;

March 17, 1983

(2) It is not required that sexual conduct portrayed be done so in a patently offensive manner; and

(3) The material at issue need not be considered as a whole.

The Court did indicate, however, that there are limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combatted requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

The Supreme Court proceeded to analyze the New York statute observing that the forbidden acts to be depicted are listed 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 Court gave special emphasis to the fact that the term "lewd exhibition of the genitals" is not unknown to the Court in this area and, indeed, was given in Miller as an example of a permissible regulation.

The Supreme Court made it perfectly clear that a state is not barred by the First Amendment from prohibiting the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene.

The Court further clarified its position with regard to child pornography by dismissing the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific or educational value or material which does not threaten the harm sought to be combatted by the state. The Court held this to be the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. The Court seriously doubted that those arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

March 17, 1983

The Supreme Court refused to 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 exhibitions of the genitals". Whatever overbreadth might exist should be cured through case by case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Now, how does this decision effect HB 270?

It means that HB 270 could be amended to delete the definition of "obscene" set out in sec. 2 of the bill, since it is permissible for the state to enforce AS 11.41.455 and AS 11.61.125 without a court finding that a depicted touching or exhibition is obscene. I would suggest, however, inserting the word "visually" before the word "depicts" on page 1, line 13, and on page 2, line 18; and changing the word "obscene" to "lewd" on page 1, lines 18, 20, and 24.

The suggested changes to HB 270 would give the state much greater latitude in enforcing the child pornography laws and still be within the constitutional guidelines set forth by the United States Supreme Court.

JHL:ljb
10/012

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

May 11, 1983

SUBJECT: Child pornography
(HB 270 and SB 221)

TO: Representative John J. Liska

FROM: James H. Lear
Legislative Counsel *JHL*

You have requested our office to respond to the legal issues raised by The Book Cache in a letter to the House Judiciary Committee regarding HB 270 and SB 221 and application of the United States Supreme Court ruling in New York v. Ferber, U.S. ____, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982). As a matter of law, both HB 270 and SB 221 fit squarely within the scope of the constitutional guidelines set forth in Ferber, contrary to the inferences raised in the letter.

The letter to the Committee quotes the Association of American Publishers as stating, in reference to legislation like that in HB 270 and SB 221, that "The Court's opinions in Ferber did recognize the potential that a statutory scheme seeking to achieve such a result could improperly impinge upon the dissemination of materials of a non-pornographic nature which have serious literary, artistic, scientific or educational value. In responding to the Ferber decision with any new legislative initiatives you must . . . make provision for the unfettered dissemination of non-pornographic, socially-useful materials which may involve depictions of minors engaged in otherwise forbidden sexual conduct." (emphasis supplied)

Contrary to the above inferences, the Supreme Court did not state in its majority opinion in Ferber that the New York statute in question improperly impinged upon, nor do HB 270 and SB 221 improperly impinge upon, the dissemination of materials of a non-pornographic nature which have serious literary, artistic, scientific or educational value. It is

true that the New York statute does, and that HB 270 and SB 221 would, impinge upon such dissemination, but the Supreme Court clearly declared in Ferber that this is "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." The Supreme Court applied Broadrick v. Oklahoma, 413 U.S. 601, holding that whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which the statute's sanctions, assertedly, may be applied. Therefore, the Alaska State Legislature is not, as a matter of law, required to "... make provision for the unfettered dissemination of non-pornographic, socially-useful materials which may involve depictions of minors engaged in otherwise forbidden sexual conduct" as the letter suggests.

The letter contains a recommendation that the legislature amend the child pornography legislation to provide exceptions or affirmative defenses for "legitimate works" and makes reference to five states that have done so. To place this information in perspective, the Ferber decision indicates that forty-seven states have statutes specifically directed at the production of child pornography, at least half of which do not require that the materials produced be legally obscene. Thirty-five states have also passed legislation prohibiting the distribution of such materials, twenty of which do not require that the material be legally obscene. The five states referenced in the letter represent a relatively small percentage of states that have child pornography statutes. The Supreme Court made it perfectly clear that a state is not barred by the First Amendment from prohibiting the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene.

The Court further clarified its position with regard to child pornography by dismissing the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific or educational value or material which does not threaten the harm sought to be combatted by the state. The Supreme Court forcefully expressed that the states are entitled to greater leeway in the regulation of pornographic depictions of children for the following reasons:

- (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to the

physiological, emotional, and mental health of the child, easily passes muster under the First Amendment;

(2) the standard of Miller v. California, 413 U.S. 15, for determining what is legally obscene is not a satisfactory solution to the child pornography problem;

(3) the advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation;

(4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not de minimis; and

(5) recognizing and classifying child pornography as a category of material outside the First Amendment's protection is not incompatible with this Court's decisions dealing with what speech is unprotected. When a definable class of material, such as that covered by the New York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as outside the First Amendment's protection.

Throughout its ruling in Ferber the Supreme Court emphasized that the states have uniformly indicated the paramount government objective of preventing sexual exploitation of children as subjects in sexual performances, since the care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The Court underscored the long-term physiological, emotional, and mental repercussions on a child as a result of having a permanent record made of the child's participation in the production of sexually explicit materials, indicating that distribution of those materials may haunt the child for life.

The Court considered it "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As the trial court in this case observed, if it were

Representative John J. Liska
Page 4
May 11, 1983

necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children."

In summary, HB 270 and SB 221 do not need to be amended to comply with the pronouncements by the Supreme Court in Ferber. Additionally, the suggestion that the proposed legislation has to be modified to provide exceptions or affirmative defenses for material which, when taken as a whole, possesses serious literary, scientific, social, artistic or educational value, is a policy consideration that the legislature is at liberty to accept or reject without worrying whether the legislation would be declared invalid.

JHL:ljb
19/021

Offered: 4/6/83
Referred: Judiciary

Original sponsors: Liska, Adams,
Bussell, et al

1 IN THE HOUSE BY THE HEALTH, EDUCATION AND
2 CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 270 (HESS) SOCIAL SERVICES COMMITTEE
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 THIRTEENTH LEGISLATURE - FIRST SESSION
5 A BILL

6 For an Act entitled: "An Act relating to child pornography."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 * Section 1. AS 11.41.455 is repealed and reenacted to read:

9 Sec. 11.41.455. UNLAWFUL EXPLOITATION OF A MINOR. (a) A person
10 commits the crime of unlawful exploitation of a minor if, in this
11 state and with the intent of producing a live performance, film,
12 photograph, negative, slide, book, newspaper, or magazine that vis-
13 ually depicts the conduct listed below, the person knowingly induces
14 or employs a child under 18 years of age to engage in, or photographs,
15 films, or televises a child under 18 years of age engaged in the
16 following actual or simulated conduct:

- 17 (1) sexual penetration;
18 (2) the lewd touching of another person's genitals, anus,
19 or female breast;
20 (3) the lewd touching by another person of the child's
21 genitals, anus, or female breast;
22 (4) masturbation;
23 (5) bestiality; or
24 (6) the lewd exhibition of the child's genitals.

25 (b) A parent, legal guardian, or person having custody or con-
26 trol of a child under 18 years of age commits the crime of unlawful
27 exploitation of a minor if, in this state, the person permits the
28 child to engage in conduct described in (a) of this section knowing
29 that the conduct is intended to be used in producing a live

1 performance, film, photograph, negative, slide, book, newspaper, or
2 magazine that visually depicts such conduct.

3 (c) Unlawful exploitation of a minor is a class B felony.

4 * Sec. 2. AS 11.61 is amended by adding a new section to read:

5 Sec. 11.61.125. DISTRIBUTION OF CHILD PORNOGRAPHY. (a) A
6 person commits the crime of distribution of child pornography if the
7 person brings or causes to be brought into this state for sale or
8 distribution, or in this state possesses, prepares, publishes, or
9 prints with intent to distribute, sell, or exhibit to others for
10 commercial consideration, any matter which visually depicts conduct
11 described under AS 11.41.455(a), knowing that the production of the
12 matter involves the use of a child under 18 years of age engaged in
13 such conduct.

14 (b) This section does not apply to acts that are an integral
15 part of the exhibition or performance of a motion picture when the
16 acts are done within the scope of employment by a motion picture
17 operator or projectionist employed by the owner or manager of a thea-
18 ter or other place for the showing of motion pictures, unless the
19 motion picture operator or projectionist

20 (1) has a financial interest in the theater or place in
21 which employed; or

22 (2) caused the performance or motion picture to be per-
23 formed or exhibited without the consent of the manager or owner of the
24 theater or other place of showing.

25 (c) Distribution of child pornography is a class C felony.

