

*Free Expression and a Satisfied Society: What Child Pornography Laws Really Protect*

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ABSTRACT

Motion pictures portray childhood sexuality by pushing the elusive and controversial line between free expression and exploitation. While child pornography laws protect real children as subjects in overtly sexually exploitative motion pictures (kiddy porn), in practice, due to issues of interpretation, application, and accessibility, free expression in mainstream motion pictures is supported more fully than child protection. Recent Supreme Court and Circuit Court decisions allow the motion picture industry to more freely portray childhood sexuality without fear of expression becoming illegal. Thus, as our social history illustrates, the societal awareness of the bodies of children is all the more satisfied. Legally, through what it consumes and where it places its implicit and explicit interests, society supports the sexualization of children. Concomitantly, filmmakers respond with motion pictures that feed society's desires and push, if not exceed, the bounds of legitimate free expression. The perverse and unintended consequence is that crimes against children continue because child protection efforts forever languish in this history.

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“No subject is as publicly dangerous...as the subject of the child’s body.”<sup>2</sup>

### ***I. Introduction***

Most people do not discuss childhood sexuality or, its problematic extreme, child pornography.<sup>3</sup> The subjects are taboo. So, too, are censorship discussions that encompass child pornography and free expression. Andrew Vachss, an attorney who represents children, believes that “when it comes to child pornography, any discussion of censorship is a sham, typical of the sleight of hand used by organized pedophiles as part of their ongoing attempt to raise their sexual predation to the level of civil rights.”<sup>4</sup> Vachss’ comment too quickly dismisses discussions of censorship and child pornography by comparing those involved in the dialogue to pedophiles, thus shaming them into silence. Censorship discussions are essential because issues of childhood sexuality, child pornography, and the concomitant free expression reach each of us nearly every day—in the media,<sup>5</sup> on television,<sup>6</sup> at bookstores,<sup>7</sup> and certainly in motion pictures.

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<sup>2</sup> Anne Higonnet, *Pictures of Innocence: The History and Crisis of Ideal Childhood* 133 (Thames and Hudson, 1998).

<sup>3</sup> “Child” and “childhood” are used synonymously throughout this paper and pertain to any person “under eighteen years of age.” 18 USC §2256 (2003). The use of “sexuality” in conjunction with “child” or “childhood” is to me an adult construct imputed to the child, rather than a normative understanding of a child attribute. Additionally, my focus in this essay is primarily on the *adolescent* child—the period of time after development of secondary sex characteristics but prior to legal emancipation, generally when a child turns eighteen.

<sup>4</sup> Andrew Vachss, *Age of Innocence*, *Guardian*, Apr. 17, 1994, at 14.

<sup>5</sup> Consider the recent Mark Foley scandal involving Congressional pages, the history of priest pedophilia, or images in clothing catalogues and numerous advertisements.

<sup>6</sup> Consider episodes of *The Simpsons* and *South Park*, et alia. See also Kaiser Family Foundation, “Sex on TV 2005: A Kaiser Family Foundation Report” (Nov. 9, 2005) (on file with author) (biennial report of all sexual content, including content involving children, in television

Motion pictures present childhood sexuality in ways both subtle and striking, and, yes, at times, even explicit. Early in the movie, *Babel* (2006), a young teen masturbates on a hillside. Then, in other scenes, a teenage schoolgirl reveals her pubic area to schoolboys (and moviegoers) and later, completely naked, attempts to force herself on a man. The ten-year-old protagonist in *Birth* (2004), insisting he is a widow's reincarnated husband, appears nude, and joins her in the bathtub. *Ken Park* (2002), by controversial director, Larry Clark, portrays the lives of four high school students in scene after scene of intercourse, masturbation, fellatio, and sadomasochism. The Italian movie, *Malèna* (2000) shows its 14-year-old protagonist masturbating and having explicit sexual relations in a brothel. These movies represent only several of a vast number of motion pictures that render not only child sexuality, but illustrate an elusive and controversial line between free expression and exploitation.<sup>8</sup>

In order to bring clarity to such elusiveness, this article addresses two questions simultaneously: first, where exactly *is* the boundary between free expression and exploitation in child sexuality portrayed in motion pictures; and, second, with regard to motion pictures, what are U.S. child pornography laws really protecting?

My contention is that while child pornography laws protect real children as subjects in overtly sexually exploitative motion pictures (“kiddy porn”), in practice, due to issues of interpretation, application, and accessibility, free expression in mainstream motion pictures is supported more fully than child protection. Moreover, in the wake of the Supreme Court programming during the 2004-2005 season), *available at*, <http://www.kff.org/entmedia/7398.cfm> (last visited Nov. 24, 2006).

<sup>7</sup> Photography and literature books by the famous and not so famous—Wilhelm von Gloeden, Edward Weston, Sally Mann; novels by Edmond White, Judy Bloom, Dennis Cooper, et alia

<sup>8</sup> Among the many movies discussed in this paper, at this point, also consider *L.I.E.* (2001), *Wassup Rockers* (2005), *The King* (2005), *12 and Holding* (2005), et alia.

decision in *Ashcroft v. Free Speech Coalition*<sup>9</sup>—which limited the breadth of child pornography laws—as well as decisions regarding “naturist” images,<sup>10</sup> the motion picture industry ostensibly may more freely portray childhood sexuality without fear of expression becoming illegal. Finally, prosecutorial enforcement difficulties decrease the application of child pornography laws, and implicitly support more expansive free expression. Thus, as I explain, the societal awareness of the bodies of children is all the more satisfied.

## ***II. Childhood Sexuality in Motion Pictures Prior to New York v. Ferber***

Children and exploitation were not always connected when sex or sexuality was present, particularly on the European continent. The ancient Greeks of Plato’s era, for example, ritually initiated young boys into adulthood through sexual relations with an adult male.<sup>11</sup> In ancient Rome and during the Middle Ages, girls married and were sexually active between the ages of twelve and fourteen with males in their early twenties.<sup>12</sup> For centuries, people viewed images of children—primarily the bodies of boys in paintings and sculpture—that exuded sexuality.<sup>13</sup>

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<sup>9</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>10</sup> *See U.S. v. Moore*, 215 F.3d 681 (7<sup>th</sup> Cir. 2000). *See also U.S. v. Various Articles of Merchandise, Schedule No. 287*, 230 F.3d 649, 651 (3<sup>rd</sup> Cir. 2000).

<sup>11</sup> James Davidson, *Dover, Foucault, and Greek Homosexuality: Penetration and the Truth of Sex* in *Studies in Ancient Greek and Roman Society* 90 (Robin Osborn ed., Cambridge University Press, 2004).

<sup>12</sup> *See Nancy F. Cott, Public Vows: A History of Marriage and the Nation* (Harvard University Press, 2002).

<sup>13</sup> *See Germaine Greer, The Beautiful Boy 7-11* (Rizzoli, 2003). Moreover, not only were the painted subjects children, but also the models. *Massachusetts v. Oakes*, 491 U.S. 576, 593 (1989) (Brennan, J., dissenting) noted that “[m]any of the world’s great artists—Degas, Renoir,

Prior to the nineteenth century, boys were more likely than any other human figure in works of art to be completely naked.<sup>14</sup> After the nineteenth century, the bodies of girls became the focus of society's gaze.<sup>15</sup> During the late nineteenth and early twentieth centuries, European and U.S. photographers Julia Margaret Cameron, Wilhelm von Gloeden, Edward Weston, and Dorothea Lange each captured subtle and not so subtle images of children's unclad bodies.<sup>16</sup> Such history reveals past epochs when the sexuality of children appeared appreciated and celebrated, maybe even worshipped, by society. Yet analyzed through the lens of current suspicion, this history is awash in pederasty, exploitation, and pornographic images.

Arguably the first images of nude children in motion pictures emerged in *Boys Diving, Honolulu* (1902).<sup>17</sup> The 27-second silent film documents young boys jumping from a dock into the water, some boys wear swimming trunks, others not.<sup>18</sup> One naked boy standing on the dock looks directly at the camera, and in a moment of clear self-apprehension, covers himself with his hands. While this film caused no apparent concern in the viewing public, within several years Donatello, to name but a few—have worked from models under 18 years of age, and many acclaimed photographs and films have included nude or partially clad minors.”

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<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 59.

<sup>16</sup> See, for example, Cameron's *Venus Chiding Cupid and Removing His Wings* (no date), von Gloeden's *Three Boys on a Bench* (1895), Weston's *Neil* (1925), and Lange's *Torso, San Francisco* (1925). Additionally, throughout this article I reference photography. The medium and its history in many ways mirror the imagery of children in motion pictures, and each confronts nearly identical censorship issues. Moreover, photographic images have generated most of the litigation that may affect what motion picture filmmakers produce.

<sup>17</sup> *Boys Diving, Honolulu* (American Mutoscope & Biograph Co., April 10, 1902), available at, The Open Video Project, <http://memory.loc.gov/mbrs/awal/1228.mpg> (last viewed Nov. 24, 2006).

<sup>18</sup> Most early films were documentaries of ordinary life.

people began advocating censorship of motion picture content. These early advocates believed motion pictures would have a “persuasive, narcotic influence over its huge, loyal audience...[and provide] a safe place to express themselves physically and emotionally with laughter, tears, or sexual longings.”<sup>19</sup> Even the Supreme Court in 1915 proffered that “a prurient interest may be excited and appealed to” by watching motion pictures.<sup>20</sup> Motion pictures, the Court reasoned, were “capable of evil, having the power for it, the greater because of the attractiveness and manner of exhibition.”<sup>21</sup> And, still, in the midst of all this concern, unclad children regularly crossed the silver screen.<sup>22</sup>

Early motion picture censorship began roughly in 1909 with the National Board of Censorship, which in 1915 morphed into the National Board of Review (NBR). These organizations were self-governing and promoted self-censorship, rather than codified, legally enforceable censorship, although some preferred the latter.<sup>23</sup> Member filmmakers agreed to submit motion pictures to the NBR and follow the organizations recommended cuts. While NBR review was not required—as independent filmmakers did not have to submit—a film bearing the organization’s seal of approval led to increased theater screenings. Thus, filmmakers and

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<sup>19</sup> Jon Lewis, *Hollywood v. Hardcore: How the Struggle Over Censorship Created the Modern Film Industry* 88 (New York University Press, 2000) (uncorrected proof).

<sup>20</sup> *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230, 242 (1915).

<sup>21</sup> *Id.* at 244.

<sup>22</sup> Examples include: *Tarzan of the Apes* (1918) (rear nudity of boy Tarzan, two other African boys with rear nudity); *The Lion’s Den* (1919) (brief child nudity); *High Society* (1924) (full frontal nudity of boy); *Peter Pan* (1924) (rear nudity of boy).

<sup>23</sup> Lewis at 88. Jewish filmmakers supported the federal judiciary controlling censorship, while Christian filmmakers supported self-censorship as opposed to government control.

distributors had an economic incentive to obtain the seal.<sup>24</sup> Contemporary motion picture censorship and distribution in many ways mirrors this process, although the grip of organizations like the NBR—today’s Motion Picture Association of America (MPAA)—is weakened due to wide access of uncut, director’s cut, unrated, and foreign films.

Several Hollywood scandals in the early 1920s exacerbated concern over the need for censoring motion pictures, which led to the establishment in 1922 of a film review board called the Motion Picture Producers and Distributors of America (MPPDA), which became the current MPAA in the 1940s.<sup>25</sup> MPPDA’s first president, William Hays, created “The Don’ts and Be Carefuls” (1927) that listed activities member filmmakers could not include in their motion pictures.<sup>26</sup> The list memorialized the first clear content guidelines regarding children. Motion pictures unequivocally could not contain images of “children’s sex organs,” nor “any licentious or suggestive nudity—in fact or silhouette,” and no “inference of sex perversion.”<sup>27</sup> The list also warned about “the deliberate seduction of girls” or exhibiting “apparent cruelty to children...”<sup>28</sup> Yet, even with such clarity about what not to exhibit, filmmakers avoided self-censorship and found ways to get around censoring, among other things, childhood nudity.<sup>29</sup>

In 1934, the MPPDA further codified its censorship guidelines into the more restrictive Production Code (PC)—also known as the Hays Code.<sup>30</sup> The PC required member filmmakers of the MPPDA to submit their motion pictures for approval. Child censorship recommendations

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<sup>24</sup> *Id.* at 6.

<sup>25</sup> *See id.* at 92-97.

<sup>26</sup> *See id.* at 301-302.

<sup>27</sup> *Id.* at 301.

<sup>28</sup> *Id.* at 302.

<sup>29</sup> For example, *The Crowd* (1928); *Tabu* (1931); *Blond Venus* (1932).

<sup>30</sup> Named for William Hays, MPPDA’s president, who promulgated the guidelines.

under the PC changed little, becoming only somewhat more pointed, as “children’s sex organs are never to be exposed.”<sup>31</sup> Virtually every Hollywood filmmaker complied with the PC—fearing more the idea of state controlled censorship—and did so until the 1960s.<sup>32</sup> And, although rare, child nudity continued to appear in motion pictures, simply because the images were not considered censorable.<sup>33</sup> Sex organs were not pictured.<sup>34</sup> The nakedness was not licentious, nor suggestive, and did not “stir the sex impulses”<sup>35</sup>; most images were associated with bathing scenes or innocent childhood activities, like skinny-dipping.<sup>36</sup> Moreover, filmmakers never contemplated whether or not the images of children appealed to a viewer’s sexual longings, as a

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<sup>31</sup> *Id.* at 302.

<sup>32</sup> During this time period there was a thriving underground pornography market, which government was trying to control through anti-obscenity laws. Namely, through analysis of materials using the test developed in *U.S. v. One Book Called “Ulysses”*, 5 F.Supp. 182 (S.D.N.Y 1933), *aff’d*, 72 F.2d 705 (2d Cir. 1934). The test analyzed whether the author of the suspect material had “pornographic intent.” If no pornographic intent was found, then the court looked at whether the effect of the material as a whole on the average reader or viewer would “stir the sex impulses or to lead to sexually impure or lustful thoughts.” Filmmakers were not interested in government censoring the content of their materials. Therefore, during this period, U.S. motion pictures, while at times racy, were far from pornographic.

<sup>33</sup> See *Anthony Adverse* (1936); *Big Fella* (1937); *Tom Brown’s School Days* (1940); *A Child Went Forth* (1941); *Lord of the Flies* (1963).

<sup>34</sup> A number of foreign films during this period show full frontal nudity.

<sup>35</sup> *One Book Called “Ulysses,”* 5 F.Supp. at 182.

<sup>36</sup> For example, *Child Bride* (1938) (girl nude, skinny-dipping).

“child’s body was supposed to be naturally innocent of adult sexuality...”<sup>37</sup> Yet, in the wake of the 1957 Supreme Court decision *Roth v. U.S.*, Hollywood thinking would begin to shift.<sup>38</sup>

The Court in *Roth* wrestled with obscenity to determine if it was a category of expression that fell within the protection of the First Amendment—freedom of speech and of the press.

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people....

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to prevailing climate of opinion—have full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important social importance.*<sup>39</sup>

The Court determined obscene materials did encroach on areas of social importance, and thus were not protected and could be regulated by states. Equally as important, the Court defined obscenity as appealing to the “prurient interest—*i.e.* material having a tendency to excite lustful thoughts; having no serious literary, artistic, political, or social value; and offensive to the average person under contemporary community standards.”<sup>40</sup> Now, filmmakers had to contend with whether or not images depicting childhood sexuality—even the most innocent depictions, like *Boys Diving, Honolulu*—might appeal to prurient interests. Yet, contemporary communities would not find such displays prurient. People still unknowingly appreciated the subtle displays

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<sup>37</sup> Higonnet, 8.

<sup>38</sup> *Roth v. U.S.*, 354 U.S. 476 (1957) upheld the conviction of well-known pornographer, Samuel Roth, who was convicted of mailing obscene material. Some judges associated with this case believed “obscenity dissemination, a ridiculously vague crime, punishes people for selling books or pictures that may only ‘evoke thoughts’ and nothing more,” and, therefore, advocated that laws should be developed to allow people like Roth to sell his product. *See* Lewis at 238.

<sup>39</sup> *Roth*, 354 U.S. at 484, followed by a sentence from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). Emphasis added.

<sup>40</sup> *Roth*, at 487.

of childhood sexuality since a shadow over such appreciation had not yet been cast. Additionally, since nearly all motion pictures contained at least some literary or artistic value, the few images innocently revealing a child's unclad body surely were not obscene.

By the mid 1960s, however, thoughts on censorship—and what held literary and artistic value—underwent great change. Enormous social upheaval marked the whole period: sexual revolution, the Vietnam War, civil rights, women's liberation, *et alia*. On the one hand, courts continued what began in *Roth* by further questioning obscenity, pornography, and state controlled censorship.<sup>41</sup> Courts balanced obscenity with freedom of sexual expression. Feminist groups fostered an awareness of sexual assault, including assault on children. On the other hand, filmmakers mimicked the sexual revolution by desiring freedom from the sexual restraints of the Production Code, and worked hard to reach its limits. Finding the PC archaic, the MPAA abolished it in 1967, and in its place, the following year instituted a new voluntary ratings system. A board of parents who comprised the Classification and Ratings Administration

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<sup>41</sup> See, among others, *Grove Press v. Gerstein*, 378 U.S. 577 (1964) (reversing judgment that Henry Miller's book, *Tropic of Cancer*, was obscene); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (reversing the conviction of one who exhibited an obscene motion picture); *A Book Named "Joyn Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966) (affirming the book is not obscene); *Mishkin v. N.Y.*, 383 U.S. 502 (1966) (affirming material as obscene); *Ginsberg v. New York*, 390 U.S. 629 (1968) (affirming that proscriptions for distribution or exhibition to children of materials that would not be obscene for adults is permissible); *Stanley v. Georgia*, 394 U.S. 557 (1969) (affirming the *Roth* test as the standard governing obscenity); *U.S. v. Reidel*, 402 U.S. 351 (1971) (affirming constitutional a federal prohibition of dissemination of obscene materials through the mail); *Grove Press v. Maryland State Board of Censors*, 401 U.S. 480 (1971) (affirming obscene the motion picture "I Am Curious (Yellow)"); *Paris Adult Theater I v. Slaton*, 408 U.S. 921 (1972) (holding that, as established in *Roth*, obscene material is not protected by the First Amendment even if access is limited to consenting adults).

(CARA) determined the rating of a motion picture. Distributors and theater operators enforced the four-category system: G, M, R, and X.<sup>42</sup> Under this new rating system, filmmakers in big cities like Los Angeles, New York, and San Francisco moved x-rated motion pictures out of adult bookstores and male only stag parties into mainstream theaters.<sup>43</sup> Moreover, during this time, both filmmakers and publishers marketed increasingly questionable images of children. Warner Brothers, for example, released *The Exorcist*, which contained suggestive sexual scenes of twelve-year-old Regan, one scene of her with a crucifix and another of her pushing her mother's face between her legs. Film distributor and publisher, Grove Press, a harbinger of anti-censorship, published Larry Clark's, *Tulsa*, which pictured a 1969 photograph of three teenagers.<sup>44</sup> The focus of critic's interest was not on the nude girl shooting methamphetamine,

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<sup>42</sup> G: General Audiences, including children; M: Mature Audiences; R: Restricted, children under 16 not admitted without a parent or guardian; X: no one under 16 admitted. After morphing several times from this initial rating group, the current group is: G: General Audiences; PG: Parental Guidance Suggested, Some Material May Not Be Suitable for Children; PG13: Parents Strongly Cautioned, some material may be inappropriate for children under 13; R: Restricted, Under 17 Requires Accompanying Parent or Adult Guardian; NC-17: No One 17 and Under Admitted. See [http://www.mpaa.org/FilmRat\\_Ratings.asp](http://www.mpaa.org/FilmRat_Ratings.asp) (discussing the rating system) (last viewed Oct. 25, 2006). Regarding the X rating specifically: while X was an MPAA rating that the rating board issued to films not suitable for minors, X also was non-trademarked. Thus, anyone could apply X to their film if they knew the content was not suitable for minors, and, indeed, pornographers applied X to their films. Eventually, pornographers added Xs to the X rating—XX and XXX—to give the impression the film was more graphic. Thereafter, X became synonymous with pornography. In 1990, the MPAA dropped the non-trademarked X for the trademarked NC-17, which could be applied to motion pictures only by the MPAA.

<sup>43</sup> For example, *Pornography in Denmark* (1970); *Sex USA* (1970); *The History of the Blue Movie* (1970); *Behind the Green Door* (1972); *Deep Throat* (1973).

<sup>44</sup> Larry Clark, *Tulsa* (Grove Press, 1971).

or the nude boy holding her tourniquet, or even on the slightly averted face of the other fourteen- or fifteen year-old boy or on his elongated torso, rather, focus was on this boy's erection.<sup>45</sup> Surely, this history must have informed the Justices when they decided the 1973 landmark obscenity case, *Miller v. California*.<sup>46</sup>

The Supreme Court in *Miller* reworked the test for obscenity to specifically target hardcore pornography. The Court determined obscenity was material that “taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political or scientific value.”<sup>47</sup> Each of the criteria would be evaluated from the perspective of the “average person, applying community standards.”<sup>48</sup> Thus, places like Los Angeles and New York could have liberal standards, while small towns in the south and Midwest could have extremely conservative standards. Because of this variability, legal scholars found the test “unworkable”<sup>49</sup> and “spongy,” one that “leave[s] much to the vagaries of juries asked to evaluate

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<sup>45</sup> Later, Clark would publish, *The Perfect Childhood* (Scalo, 1995), which would be banned in the United States for twenty pages of black and white photography of a prostitute performing fellatio on a 16-year-old.

<sup>46</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>47</sup> *Id.* at 24.

<sup>48</sup> *Id.*

<sup>49</sup> Clay Calvert & Robert Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flint's Attorney*, 19 *Cardozo Arts & Entertainment L.J.* 313, 323 (2001). See also Clay Calvert & Robert Richards, *Nadine Strossen and Freedom of Expression: A Dialogue with the A.C.L.U.'s Top Card-Carrying Member*, 13 *George Mason U. Civ. Rts. L.J.* 185, 219 (2003) (stating that the Miller Test is “ambiguous, open-ended, and subject to interpretation”).

expert testimony on literary merit, offensiveness, and other unmeasurables.”<sup>50</sup> By developing this somewhat problematic test, the Court hoped to balance freedom of sexual expression with obscenity regulation. Additionally, the Court wanted law that protected the moral character of the citizens of a community and prevented illegal conduct that might result from exposure to obscene materials. Unfortunately, the Court gave little thought to the harm inflicted upon the actors, including children, who produced materials a jury may or may not find obscene.

*Miller* is but one thread of history within a rich web of law making, motion picture production, social upheaval, and children in images. What makes distinct the entire era up to and including *Miller* is the focus on censorship of *images* of children, rather than protection of the actual children who become the image. Laws protecting children, as victims in the creation of potentially obscene material, would not start to develop for several more years.

### ***III. Explicit Child Pornography Law***

Prior to 1977 no federal statute prohibited the use of children in the production of sexually explicit materials.<sup>51</sup> Realizing a substantial amount of pornographic materials “used and exploited [children] for pornographic purposes”<sup>52</sup> and was “very harmful to... children,” Congress passed the Protection of Children Against Sexual Exploitation Act in May of 1977.<sup>53</sup> The Act made it unlawful to use children engaged in “sexually explicit conduct for the purpose

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<sup>50</sup> Richard A. Posner, *Law and Literature: A Misunderstood Relation* 329 (Harvard University Press, 1988).

<sup>51</sup> See S. Rep. 95-438 at 1. Act became law under P.L. 95-225 (1978) (codified as amended at 18 U.S.C. §§2251-2252, 2256 (1994 & Supp. IV 1998)).

<sup>52</sup> *Id.* at 41.

<sup>53</sup> *Id.* at 43.

of producing any visual or print medium...”<sup>54</sup> The only flaw in the act was that *Miller* constrained “sexually explicit conduct” to hard-core pornography; unless a jury determined the “sexually explicit conduct” was obscene under *Miller*, the conduct would fall within First Amendment protection. Regardless of this constraint, the act represented the first federal move toward protecting children from exploitation. The second move would remove the constraint altogether.

Manhattan adult bookstore owner, Paul Ferber, sold two motion pictures that depicted boys under eighteen masturbating. Under a New York law that prohibited any non-obscene child pornography, Ferber was convicted. The law prohibited the use of children in “sexual performance,” meaning “any play, motion picture, photograph or dance” that includes “sexual conduct.”<sup>55</sup> The meaning of “sexual conduct” included “intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.”<sup>56</sup> The New York Court of Appeals (that state’s highest court) reversed, holding the law unconstitutional because its reach extended to material protected under *Miller’s* test for obscenity.<sup>57</sup> New York appealed to the U.S. Supreme Court.

The majority in *New York v. Ferber* upheld New York’s child pornography law prohibiting the “lewd exhibition of the genitals” of the two minors, thus reversing the New York Court of Appeals.<sup>58</sup> Yet, even with focus on the genitals, child “nudity, without more is

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<sup>54</sup> P.L. 95-225 (1978)(18 U.S.C. §2251(a)).

<sup>55</sup> *New York v. Ferber*, 458 U.S. 747, 751 (1982) (quoting N.Y. Penal Law §263.00(1)).

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 751-752.

<sup>58</sup> *Id.* at 747.

protected expression.”<sup>59</sup> The nudity fell outside of constitutional protection because of the act of masturbating.

Emphasizing the reasonableness of the N.Y. Court of Appeal’s holding, the majority continued by recognizing that serious harm was inflicted on children in making such material, that the value of child pornography was *de minimus*, and that the market for such material had to be eliminated. Notably, the Court acknowledged that the production of materials considered child pornography required an act of abuse upon the child. The abuse to the child by itself takes the material out of First Amendment protection. Therefore, pornography depicting children need not be obscene to be constitutionally unprotected and illegal.

For the first time, child pornography became a category of speech not protected by the First Amendment. Unlike obscenity, which was worthless expression, *Ferber* excluded expression because of the underlying crime that produced it. The Court focused on the harm done to a child actor in the production, not the production’s appeal to the prurient interest of the audience. Child pornography could have no social or artistic value. The *Miller* test and its value analysis no longer mattered when considering child pornography. As Justice O’Connor so aptly put it,

a 12-year old photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph “edifying” or “tasteless.” The audience’s appreciation of the depiction is simply irrelevant to New York’s asserted interest in protecting children from psychological, emotional, and mental harm.<sup>60</sup>

Following *Ferber*, Congress passed the Child Protection Act of 1984.<sup>61</sup> The act had several purposes. First, Congress memorialized “the use of children as subjects of pornographic

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<sup>59</sup> *Id.* at 765, fn 18.

<sup>60</sup> *Id.* at 774-775 (O’Connor, J., concurring).

<sup>61</sup> P.L. 98-292, 98 Stat. 204 (1984).

materials is harmful to the psychological, emotional, and mental health of the individual child...”<sup>62</sup> Second, the act increased the age of majority from sixteen to eighteen. Third, along with subsequent amendments, the act codified a definition of child pornography, which currently reads: “‘child pornography’ means any visual depiction, including any photograph, film, video...of sexually explicit conduct.”<sup>63</sup> Further, “‘sexually explicit conduct’ means actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or public area of any person.”<sup>64</sup> This definition distinguished child pornography from other types of pornography vis-à-vis section v above, which banned the lascivious exhibition of a child’s genitals or pubic area.<sup>65</sup>

By 1989, “mere nudity” came under the definition of child pornography. The majority in *Massachusetts v. Oakes* held that as long as a child’s nude body was presented with “lascivious intent,” the image was child pornography.<sup>66</sup> Thus, any depiction of a child nude, including those considered “artistic” might be criminal because of the vagueness of “lascivious intent.” Later, a Third Circuit decision determined that child pornography did not require nudity.<sup>67</sup> The court

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<sup>62</sup> P.L. 98-292, §2(3).

<sup>63</sup> 18 U.S.C. §2256(8) (2003).

<sup>64</sup> *Id.* at §2256(2)(A)(i)-(v).

<sup>65</sup> Seven years later in *Osborne v. Ohio*, 495 U.S. 103, 138 (1990), the Court affirmed a statute that prohibited “graphic focus” on a child’s genitals.

<sup>66</sup> *Massachusetts v. Oakes*, 491 U.S. 576, 583 (1989). Oakes took color photographs of his partially nude fourteen-year-old stepdaughter. He was convicted of violating a statute that prohibited adults from posing minors “in a state of nudity” for photography, motion pictures, etc.

<sup>67</sup> *U.S. v. Knox*, 32 F. 3d 733 (3d Cir. 1994).

held that the depiction of a clothed child (clothing covering genitals) could constitute a “lascivious exhibition of the genitals.”<sup>68</sup> A child did not have to be harmed. Depictions of children now were judged upon representation in an image and no longer simply evidenced the commission of a crime. Child pornography now included much more than sexually explicit conduct, only a child’s body—clothed or not. Soon not even a child’s body would be required.

Photographic and computer technology attained increased sophistication throughout the 1990s, which made it possible to create visual depictions of children engaged in sexually explicit conduct without using actual children. Virtual computer-generated images (CGI)<sup>69</sup> and recombinant photos were indistinguishable from depictions of actual children.<sup>70</sup> Congress confronted the problem by broadening the scope of child pornography laws in passing the Child Pornography Prevention Act of 1996 (CPPA).<sup>71</sup> CPPA criminalized “any visual depiction...of sexually explicit conduct...[that] appears to be...[or] has been created, adapted, or modified to appear” as a minor.<sup>72</sup> Under the CPPA, CGI motion pictures depicting children in a sexually explicit manner were illegal. Even motion pictures presenting an adult who *looks* like a child engaged in sexually explicit conduct were illegal.

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<sup>68</sup> *Id.* at 736-737.

<sup>69</sup> While the harbinger of the capabilities of CGI technology was Hironobu Shakaguci’s full-length action film, *Final Fantasy: The Spirits Within* (2001)—where it was nearly impossible to distinguish between Shakaguci’s CGI characters and real human characters of other motion pictures—a new technology may supercede CGI. Santa Monica, California based Image Metrics has developed animation technology that presents even more “real” human images, perfectly mimicking eye, deep lip, and facial gesturing, which prior to this technology were most difficult to imitate. See Sharon Waxman, *Cyberface*, New York Times, Oct. 15, 2006, at S2, 1.

<sup>70</sup> See S. Rep. No. 104-358, at § 2, Findings No. 5.

<sup>71</sup> Child Pornography Prevention Act of 1995, P.L. 104-208.

<sup>72</sup> 18 U.S.C. §2256(8)(B)-(C) (Supp. IV 1998).

Congress' broadening of the law made suspect *any* depiction that *appears* like a child engaged in sexually explicit conduct—for example depictions of an adult who looks like a child or virtual images.<sup>73</sup> Scholar Germaine Greer argues the laws thus “criminalized any awareness of the desires and the charms of boys [and girls].<sup>74</sup> The grip of child pornography laws during this time removed the ability of filmmakers to express almost any form of childhood sexuality in a motion picture. Or, so it seemed.

Filmmakers interested in expanding the free expression of depictions of childhood sexuality received their good news in the form of *Ashcroft v. Free Speech Coalition*. The 2002 case concerned a challenge to the CPPA, which appellants argued was overbroad. The Court focused on two issues. First, whether images of adult actors who *appear* as a “minor engaging in sexually explicit conduct” are protected by the First Amendment?<sup>75</sup> Second, whether virtual CGIs and recombinant photo realistic images that “convey the impression” of a minor engaging in sexually explicit conduct are protected. *Ken Park*, for example, illustrates the former issue. The four main characters, played by adults, appear as sexually active high school students. Clearly, with multiple visible sexually explicit scenes—including cunnilingus—the motion picture would be illegal under CPPA. The latter issue encompassed virtual images of children—again, computer images, not *real* children—engaged in sexually explicit conduct. The court’s concern was that “such images whet the appetites of child molesters.”<sup>76</sup>

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<sup>73</sup> Many motion pictures (particularly porn) and magazines use models that have *just* turned 18, yet appear between 15- and 17-years-old. See “Bel Ami” productions films (boyish male pornography), *Barely Legal* (which pictures young looking females), *Freshman* (which pictures boyish male models).

<sup>74</sup> Greer, 10.

<sup>75</sup> 18 USC 2256(8)(B) (2002).

<sup>76</sup> *Free Speech Coalition*, 535 U.S. at 263.

The majority declared unconstitutional the two portions of CPPA at issue because they were overbroad.<sup>77</sup> No longer would filmmakers worry about presenting adults as children performing sexually explicit scenes or virtual CGIs of children in sexually explicit scenes. For the first time since *Ferber*, the Court limited child pornography jurisprudence in favor of free expression.

The history of child pornography law evolved to criminalize nearly all depictions of childhood sexuality, or at best make all images suspect. Clearly illegal is kiddy-porn—motion pictures depicting sex crimes perpetrated against real children, or of sexually explicit conduct between adults and children or between children filmed by an adult. Child pornography laws eradicate abhorrent exploitation caused in the production of kiddy-porn and, hopefully, decrease one of society’s worst crimes.<sup>78</sup> Less clear, but just as illegal, motion pictures may not contain imagery that *suggests* a sexual act—whether actual or simulated. Nor can motion pictures depict

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<sup>77</sup> *Id.* at 256-257.

<sup>78</sup> Arizona, for example, developed daunting child pornography laws by imposing a mandatory minimum sentence of ten years in prison for each conviction. The presumptive sentence for such a conviction is seventeen years with a maximum sentence of twenty-four years. A.R.S. §§ 13-604.01(D), (F), (G), (K), *available at*, <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/13/00604-01.htm&Title=13&DocType=ARS>. See James J. Kirkpatrick, *Arizona v. Morton Berger: A Picture of Injustice*, *LTVN*, Sept. 21, 2006 (on file with author) (reporting that Arizona’s minimum sentence for possession of a single piece of child pornography is equal to the maximum sentence for this offense in nine states, and greater than the maximum in 35 states), *available at*, [http://www.legalnews.tv/james\\_j\\_kilpatrick/arizona\\_v\\_morton\\_berger\\_a\\_picture\\_of\\_injustice\\_20060921.html](http://www.legalnews.tv/james_j_kilpatrick/arizona_v_morton_berger_a_picture_of_injustice_20060921.html) (last viewed Nov. 27, 2006). See also, *Arizona v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006) (affirming 200 year sentence as not grossly disproportionate to appellant’s crime of 20 counts of sexual exploitation of a minor based on his possession of child pornography).

a nude child, or suggestive images of a child—whether clothed or unclothed. Suspect, yet legal, are motion pictures that depict a child in a sexual act but an adult actor plays the child’s role. Children depicted in sexually explicit virtual CGI motion pictures also are legal.<sup>79</sup>

These restrictive “Do’s and Don’ts of Child Porn” seem clear. Yet, an analysis of recent mainstream motion pictures in light of image interpretation, law application, product accessibility, and current cultural mores reveals otherwise: outside of protecting children from clear, overt sexual exploitation, free expression trumps child protection.<sup>80</sup> The bodies of children on a motion picture screen—particularly adolescent bodies—are in demand, and society, through what it consumes and where it places its implicit and explicit interests, gives voice to this demand. And just like ancient Greek sculptors, Renaissance painters, and 20<sup>th</sup> Century photographers, filmmakers respond with motion pictures that not only feed the public’s desire but also push the limits of legitimate free expression.

#### ***IV. Free Expression Trumps Child Protection***

Free expression flows out of the First Amendment<sup>81</sup> The First Amendment bars the government from dictating what a person sees, reads, hears, or speaks. Freedom of speech is

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<sup>79</sup> Legal only if 18 USC §1466A is not violated.

<sup>80</sup> From this point on I make a distinction between kiddy porn and mainstream (read non-kiddy porn) motion pictures. By mainstream motion pictures I mean those listed on the Internet Movie Data Base, available at <http://imdb.com> (last viewed Oct. 25, 2006). Essentially, all mainstream motion pictures listed on the IMDB are experimental works, narrative driven fiction or nonfiction, and legal adult pornography—although, as you will eventually realize, some aspects of the list’s documentary selections could be considered child pornography.

<sup>81</sup> See <http://www.law.cornell.edu/constitution/constitution.billofrights.html>. (on file with author) (last viewed Oct. 25, 2006).

freedom of expression—to express as one desires. Everyone is entitled to freedom of expression, which is sacrosanct *unless* it brings harm—very narrowly defined—upon another. As the court in *Ferber* emphasized a number of times, the focus of child pornography law is the “welfare of children engaged in production” of such material.<sup>82</sup> The mere image of a child engaged in sexually explicit conduct evidences a crime. The First Amendment does not protect sexually explicit material depicting real children, regardless of whether obscene under *Miller*. Accordingly, child pornography law “is where the greatest encroachments on free expression are now accepted.”<sup>83</sup>

Writers experience the purest form of free expression. Since harm is not inflicted on real children, and there is no visual depiction, nothing limits a writer’s portrayal of childhood sexuality. Consider the extreme, Dennis Cooper’s “George Miles Cycle.”<sup>84</sup> The five books in Cooper’s cycle present an unsettling examination of violence and eroticism from the perspective of a fifteen-year-old boy. Pornography-obsessed and a practitioner of sadomasochism, the boy is fascinated with “snuff”<sup>85</sup>, and throughout the cycle is accomplice to multiple sexual thrill-kill

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<sup>82</sup> *Ferber*, 458 U.S. at 764.

<sup>83</sup> Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 1002, 922 (2001).

<sup>84</sup> Dennis Cooper, *Closer* (Grove, 1989), *Frisk* (Grove, 1991), *Try* (Grove, 1994), *Guide* (Grove, 1997), *Period* (Grove, 2000). Consider also “Gossip Girl,” “A-List,” and “Clique” best-selling serial novels for teenagers. Sex saturates the “Gossip Girl” books, which are about private school girls in Manhattan, some under 18-years of age. In one book, a boy has sex in a Bergdorf’s dressing room. “A-List” details the lives of Beverly Hills High girls and sex with a boy named Ben, among others. Some books are titled, “Invasion of the Boy Snatchers,” where one learns how a girl’s “massive boobs jiggled.” See Naomi Wolf, *Wild Things*, *The New York Times Book Review*, Mar. 12, 2006, at 22-23.

<sup>85</sup> In this sense, “snuff” means murder of a sex partner at the end of a sexual act in order to achieve orgasm.

murder of other adolescents. Cooper’s sexually explicit (and clearly obscene, although a court never would make such a declaration) depictions of children are legal.<sup>86</sup>

Artists—painters, sculptors, among others—do not share the same freedom of expression as writers. Contrary to popular belief, artists may not create obscene visual representations of “a minor engaged in sexually explicit conduct.”<sup>87</sup> Even though no real child is involved, as long as *Miller’s* test for obscenity is satisfied, the representation is illegal.<sup>88</sup> Once a court holds the material obscene, only then does it become illegal. If the depiction possesses some literary, artistic, political, or scientific value, it may be legal (which brings up issues of interpretation)—although *Ferber* explained that with sexually explicit images of children “any...expressive interests”<sup>89</sup> with regard to artistic expression were “*de minimus*.”<sup>90</sup> Thus, the expressive freedom most artists believe they have regarding children is quite limited with regard to sexually explicit depictions. While the legality of artistic renderings of children has not been tested, this twist in child pornography laws contradicts *Free Speech Coalition*, which allows virtual images to fall within First Amendment protection (apparently as long as the material is not obscene, neither violating *Miller* nor 18 USC 1466A).

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<sup>86</sup> Interestingly, Cooper’s website and fan blog reveal his readership consists mainly of 20-something men and women—almost all the site interaction and posts are from this age group. See <http://groups.myspace.com/denniscooper> or <http://www.denniscooper.net>. (last viewed on Oct. 25, 2006).

<sup>87</sup> 18 USC §1466A(a).

<sup>88</sup> The statute clearly states that “[i]t is not a required element of any offense under this section that the minor depicted actually exist.” 18 USC §1466A(d).

<sup>89</sup> *Ferber*, 458 U.S. at 764.

<sup>90</sup> *Id.* at 762.

Photographers share with artists essentially the same freedom of expression, except their depictions involve real children. Therefore, child pornography laws specifically circumscribe a photographer's right to free expression.<sup>91</sup> Although contentious, photographs of children, whether nude, partially nude, or clothed, are quasi-legal in many states as long as the child's body is neither presented with "lascivious intent"<sup>92</sup> nor portrayed with "lascivious exhibition of the genitals."<sup>93</sup> I write "quasi-legal" because courts have acknowledged that books with this visual content are sold in the U.S., and those courts did not seem too concerned about it.<sup>94</sup> Moreover, grand juries have refused to indict photographers for their images of fully nude children.<sup>95</sup> Even after battles with critics and attempted litigation, images by Sally Mann of her own children, as well as images by Robert Mapplethorpe, David Hamilton, and Jock Sturges, escape prosecution. As I will discuss later, these images of children are not necessarily considered lascivious when paired with artistic value, and, thus, avoid legal wrangling, which has implications upon future motion picture images that may be considered pornographic.

Now consider free expression in motion pictures.

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<sup>91</sup> 18 USC §§2251-2256.

<sup>92</sup> *Oakes*, 491 U.S. at 583.

<sup>93</sup> *Knox*, 32 F. 3d at 736-737.

<sup>94</sup> *U.S. v. Various Articles of Merchandise, Schedule No. 287*, 230 F.3d 649, 651 (3<sup>rd</sup> Cir. 2000) (recognizing books that contain images of nude children, many depicting genitals, "are regularly available for purchase within the jurisdiction of the [US District Ct of] New Jersey"). Books listed in the opinion are those by David Hamilton and Jock Sturges.

<sup>95</sup> For example, a grand jury refused to indict Sturges for his images of nude children. See Philip Hager, *U.S. Grand Jury Refuses to Indict Photographer*, Los Angeles Times (Sept. 17, 1991), at A3.

Dressed in a suit and tie, Renato holds Lupetta's hand as she walks him to the center of her bedroom.<sup>96</sup> She takes off his jacket, removes his shirt and tie, unties and removes his shoes. The fourteen-year-old boy stands in front of her. She unbuckles the belt holding up his trousers. After the trousers and undershirt are removed, the scene changes to reveal a wide view of Lupetta's room. She kneels in front of the boy, who now wears only his underwear. Grabbing each side of the briefs, she pulls them down. Renato moves his hands to cover his genitals, which are briefly exposed. Behind him, the black of his pubic hair is seen in a mirror. Lupetta takes one of the boy's hands to lead him to her bed. Renato is about to experience first sex. Lupetta lays over him, kissing and licking down his chest, until she moves out of the picture's frame. Renato's father waits one floor below with the brothel's madam.

The scene of Renato and Lupetta pushes, if not exceeds, the legal limit of free expression. The scene portrays the visual depiction of a child's genitals (however briefly), which may be considered lascivious. Moreover, many may consider Lupetta kissing down his chest with the suggestion that she perform an explicit sexual act on the boy, the sexually explicit depiction of a child. Both of these situations trigger application of child pornography laws. But the "unrated" *Malèna* is available in the U.S., where child pornography law outlaws such expression.<sup>97</sup> Why is this?

Scenes such as this illustrate that free expression may sometimes trump child pornography law. Visual interpretation, law application, and product accessibility each create difficulties that enable free expression to overcome legitimate efforts to protect children.

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<sup>96</sup> *Malèna* (2000).

<sup>97</sup> Another version of the film, distributed by Miramax and released in theaters, was rated R by CARA. The scene just described was essentially cut from that version, although the unrated version stands.

## V. Visual Interpretation

Since the 1990s when a “sex panic” began, society has seen a vast expansion in the general policing of images of children.<sup>98</sup> Both consciously and unconsciously, many people scan nearly every image of a child, either in motion pictures, books, billboards, or advertisements, et alia, noticing not only the child’s appeal, but to see if that appeal is too much, which requires interpretation of the image.

Interpretation is problematic. As a general rule, pornography may be banned only if obscene. Pornography depicting children, however, may be proscribed whether or not the images “taken as a whole” appeal to “prurient interests” or have “serious literary, artistic, political or scientific value” under *Miller*.<sup>99</sup> Child pornography makes no exception for value. Remember, *Ferber* explained that while an image may possess value, such value “bears no connection to the issue of whether or not a child has been physically or psychologically harmed in the production of the work.”<sup>100</sup> Yet, a determination of whether or not a motion picture may contain illegal sexually explicit images of children requires interpretation of isolated scenes before review under standards applicable to child pornography—the steps necessary to ban a motion picture.

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<sup>98</sup> Sex panic is what many call the period of time from the late 1980s through 1990s when Christian Fundamentalists, anti-pornography proponents—like Catherine McKinnon and Andrea Dworkin—and many others, pushed for laws that suppressed prostitution and pornography in any form. At the time, and now, I suppose, every image of a child was suspect. See Lisa Duggan, *Sex Panics, in Sex Wars: Sexual Dissent and Political Culture* 74ff (Lisa Duggan & Nan Hunter eds., Routledge, 1995).

<sup>99</sup> *Miller*, 413 U.S. at 24.

<sup>100</sup> *Ferber*, 458 U.S. at 761.

*Minor Question.* One must interpret whether or not the child is a child—a “minor”...under the age of eighteen years.”<sup>101</sup> Even though *Free Speech Coalition* removed the need to determine if a child “is, or appears to be” a minor, one must still interpret if the suspect image is of a child.<sup>102</sup> A child must be an “identifiable minor” who is recognizable as an actual person under eighteen.<sup>103</sup> Age interpretation is critical particularly when viewing a child who appears over the age of eighteen. Traci Lords, for example, made nearly seventy pornographic motion pictures as a child. No one realized she was under the age of eighteen. Now, all her films are child pornography.<sup>104</sup> With regard to Renato, the boy described above, he appears under the age of eighteen, but what about the schoolgirl in *Babel*? When she reveals her pubic area on screen, one cannot help but contemplate this question. An adult plays the role of this schoolgirl. In addition to determining whether a child is a minor, one must also interpret whether the “visual depiction” is lascivious.<sup>105</sup>

*Lascivious.* The difficulty of interpreting whether or not the “visual depiction” is lascivious is two-fold: (1) determining what lascivious describes, and (2) the use of court developed factors, the *Dost* Factors, to determine if a depiction is lascivious.<sup>106</sup>

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<sup>101</sup> 18 USC §2252. (2003).

<sup>102</sup> Filmmakers are now required to keep age records, particularly if the depiction is sexually explicit.

<sup>103</sup> 18 USC §2256(9)(A) (2003). Again, this requirement seems to contradict protected virtual depictions, which also could be construed to protect painted and sculpted sexually explicit images. In either case, the issue of remaining protected depends on not falling within *Miller’s* test for obscenity.

<sup>104</sup> See <http://www.imdb.com/name/nm0000183> (on file with author) (last viewed Oct. 25, 2006).

<sup>105</sup> 18 USC §2251.

<sup>106</sup> *U.S. v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986), *aff’d*, *U.S. v. Wiegand*, 812 F.2d 1239 (9<sup>th</sup> Cir. 1987).

1. *Determining What Lascivious Describes.* Does lascivious describe the child, the child's act, the filmmaker, or the viewer? *Ferber* held that the images must "visually depict sexual conduct by children."<sup>107</sup> So lascivious must describe the child's conduct, not necessarily the child. On the other hand, *Knox* held that lascivious describes depictions "presented by the photographer...to arouse or satisfy the sexual cravings of a voyeur."<sup>108</sup> So lascivious must describe the person viewing? The court in *U.S. v. Wiegand* determined that lascivious should be interpreted from the perspective of the "audience that consists of [the filmmaker] or like-minded pedophiles."<sup>109</sup> So lascivious describes not only the viewer (including pedophiles), but also the filmmaker. But how does one interpret lascivious from the perspective of the pedophile?<sup>110</sup>

Interpretation of what lascivious describes harkens back to the comment by Justice Potter Stewart when determining obscenity, "I know it when I see it."<sup>111</sup> Building on *Roth's* "average person" inquiry, the standard of interpretation should flow from that of the reasonable person: what would a reasonable person watching the depiction determine is lascivious?<sup>112</sup> From this perspective, the trier-of-fact applies the *Dost* Factors to arrive at a conclusion.

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<sup>107</sup> *Ferber*, 458 U.S. at 764.

<sup>108</sup> *Knox*, 32 F.3d at 747.

<sup>109</sup> *Wiegand*, 812 F.2d at 1244.

<sup>110</sup> For example, how does one determine lascivious a pedophile's viewing of children at a playground?

<sup>111</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>112</sup> *Roth*, at 487. *See also* Adler, 952-955, where Professor Adler discusses in full the problematic interpretation of lascivious based on a material's affect on an audience of pedophiles. Such inquiry over-complicates interpretation. The reasonable person can ascertain lascivious without necessarily contemplating what may or may not sexually arouse a pedophile. Even though *Dost* asks for such inquiry, the reasonable person, in most cases, can arrive at a determination of lascivious prior to contemplating such an extreme.

2. *The Dost Factors*. The court in *Dost* developed factors for determining whether or not a “visual depiction” is a “lascivious exhibition of the genitals or pubic area” of a child.<sup>113</sup> The six factors are: (1) if the image’s focal point is upon the genitals; (2) if the setting of the image is sexually suggestive; (3) if the child’s pose is unnatural or the attire inappropriate for the child’s age; (4) if the child was fully or partially clothed or nude; (5) if the child displays sexual coyness or willingness to engage in sexual activity; and, (6) if the image is designed to elicit sexual response in the viewer.<sup>114</sup> Critical here, again, is what is interpreted. The image is not just the documentation of an event but an image that expresses an intention, which is then interpreted by the trier-of-fact.

Scholar Anne Higonnet suggests that the *Dost* Factors use some “rather vague language,” which poses great interpretive difficulty.<sup>115</sup> “[T]he frame of legal interpretation slips and slides in every direction” when attempting to unravel the meaning of the words.<sup>116</sup> What exactly are the meanings of “sexually suggestive,” “sexual coyness,” and “designed to elicit sexual response in the viewer” when referencing, among other things, an image or scene in a movie?<sup>117</sup>

Within the vagueness of the factors, for example, a reasonable person may not likely find lascivious the depiction of six-year-old Tristram, in *Tristram Shandy: A Cock & Bull Story* (2005), peeing out the window of an English country house, penis exposed. He simply, naturally pees. On the other hand, the reasonable person may determine lascivious the depiction of Renato in *Malèna*. He stands nude in a prostitute’s bedroom—his genitals exposed, pubic area visible.

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<sup>113</sup> 18 USC §2256 (2003).

<sup>114</sup> *Dost*, 636 F.Supp. at 832.

<sup>115</sup> Higonnet, 160-161.

<sup>116</sup> *Id.* at 161.

<sup>117</sup> *Dost*, 636 F.Supp. at 832.

She prepares him for first sex. This depiction triggers at least half of the *Dost* Factors. Yet, what if you are the reasonable person who, based on the *Dost* Factors, interprets such a scene as plausible, discerning, and valuable, despite its explicitness, or the person who interprets Tristram peeing as lascivious?

While law sometimes enjoys clarity and precision, interpretation of images of children may never be ascribed these attributes. Interpretation is not the same for everyone. Whether a filmmaker, the public, or triers-of-fact, each interpret from a *sitz im leben*—situation in life. Cultural values, education, tolerance levels, politics, religious beliefs, et alia, drive and complicate one’s interpretation, and whether or not public outcry develops over a sexually explicit depiction. The age-old legal question remains: who *is* the reasonable person?

In addition to the *Dost* Factors, should a reasonable person interpret the environment in which images are produced (such as the brothel in *Malèna*), or the experience upon a child (such as Giuseppe Sulfaro, the actor playing Renato), or the notoriety and success of the filmmaker (Giuseppe Tornatore, director of *Malèna*, as well as *The Legend of 1900* and *Cinema Paradiso*)? Each of these may be valid for interpreting whether or not an image is in fact lascivious—with regard to childhood sexuality in mainstream motion pictures. Did the boy actor Sulfaro receive direction and explanation about his scene with Lupetta? Were his parents present? Was his emotional and intellectual development considered when his presence in the scene was first contemplated? Photographer Edward Weston wrote, with regard to child portraits, “another way to sell [to a parent] more than one position is to suggest a nude study, *if the child is well formed.*”<sup>118</sup> Interpretation of mainstream motion pictures then may require moving beyond

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<sup>118</sup> Edward Weston, *Photographing Children in the Studio*, *American Photography*, vol. 6, no. 2 (Feb. 1912) in Peter C. Bunnell, *Edward Weston on Photography* 4 (Gibbs M Smith, 1983) (emphasis added).

isolated scenes and limited criteria to include analysis of a larger motion picture and its production from the work of writers, producers, directors, actors, et alia. Such expanded analysis may curtail what some argue is “[t]he law [continuing] to threaten a vast array of innocent and valuable depictions of children.”<sup>119</sup>

Interpretation complicates the overall analysis of childhood sexuality in motion pictures. Interpretation difficulties may allow some suspect depictions to go unnoticed and child protection to falter, while other “innocent and valuable depictions” are lost to censorship. Could this be part of why *Malèna* has not raised an eyebrow? Thankfully, even with interpretive difficulty, the focus of the *Dost* Factors is monitoring images to increase child pornography prosecutions, thus catching child pornographers and saving child victims.

## VI. Law Application

The confusing application of child pornography laws to motion pictures flows from two very real issues: (1) not all child nudity is the same and (2) “naturist” films will influence future child pornography law.

*1. Not all Child Nudity is the Same.* Freedom of expression is paramount in adult obscenity law. Therefore, sexually explicit material, no matter how vile, is protected under the First Amendment if it contains some semblance of value, as determined under *Miller*.<sup>120</sup> Courts declare material obscene only when it is completely worthless expression. *Ferber* excludes any notion of expression in child pornography because of the underlying crime that produces it. Child pornography, under *Ferber*, has no social or artistic significance. Yet, a number of

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<sup>119</sup> Adler, 927.

<sup>120</sup> See *Miller*, 413 U.S. at 20-23.

depictions of children, otherwise considered pornographic, are nonetheless valid for reasons that appear to value expression.

In 1998, for example, an Oklahoma court was asked to validate the expression in Günter Grass' famous novel turned motion picture, *The Tin Drum* (1979).<sup>121</sup> The German motion picture was at that point nearly 19 years old, never encountering a single censorship question. The court declared valid expression in several sexually suggestive scenes, including one where the 12 year-old protagonist sticks his face directly on the genitals of his nude female friend (according to the director, a "tissue" was placed over the woman's privates). Additionally, scenes depicting this young boy nude were also held valid expression. While seemingly suspect, were these images acceptable because of Grass' notoriety and the "classic" nature of his book?

Other images of nude children, such as those described above (photographs by Mann, Sturges, Mapplethorpe, et al) and images by Will McBride, also escape prosecution while falling within child pornography laws. Consider McBride's images of Uli Hager, who he photographed as a young boy through adolescence.<sup>122</sup> In the image *Uli, Frankfurt, Germany*, this boy's post-pubescent nude body, exposed genitalia, and pose—as if contemplating whether the viewer will follow him into the dark room beyond the door he leans upon—could be interpreted under *Dost* Factors to express coyness and lasciviousness. Does the image arouse a viewer? Would the image be considered child pornography if duplicated in a motion picture? Or is the image simply an innocent valuable depiction? Although a court has not made such a determination, McBride's images, like those of the other artists, escape prosecution. Again, grand juries and courts don't seem bothered by the content.<sup>123</sup> Many people may not be bothered because the images

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<sup>121</sup> *Oklahoma ex rel. Macy v. Blockbuster Videos, Inc.*, 1998 WL 1108158 (W.D. Okla. 1998).

<sup>122</sup> Will McBride, *Coming of Age 40-41* (Aperture, 1999).

<sup>123</sup> *Various Articles of Merchandise, Schedule No. 287*, 230 F.3d at 651.

seemingly contain the expressive value *Ferber* rejected. The depictions of the children harkens back to the classics—to ancient Greek statuary and Renaissance paintings; people are not bothered because they’ve been fascinated by the content for centuries. Moreover, the photographers themselves enjoy wide acceptance by the art and museum communities.<sup>124</sup> Their images are widely published. Both of these factors add to the images’ expressive “value.” Yet, the images still trigger application of child pornography laws.

Again, not all child nudity is the same. As society further recognizes expressive value in depictions of childhood sexuality, the more acceptable such expression becomes. More and more, courts will confront cases where they are asked to find valid expression in depictions of naked children. The future may portend filmmakers of high regard creating motion pictures that push the limits of child pornography law. The possibilities may be endless, particularly when famous open-minded filmmakers pair with equally famous writers. Imagine the highly creative, experimental filmmaker-director Michael Winterbottom<sup>125</sup> making a third version of Nabokov’s *Lolita*—where Dolores Haze is both brazenly sexual and explicitly depicted. Or, imagine still, legal motion pictures with nothing but relentless images of naked children frolicking about. These motion pictures already exist.

2. *The Influence of “Naturist” Film.* Naturists are dedicated to the nude lifestyle. While primarily located in Europe—where entire naturist towns exist<sup>126</sup>—some naturists groups reside

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<sup>124</sup> Metropolitan Museum of Art, for example, owns Sturges’ photographs.

<sup>125</sup> Director of *9 Songs* (2003), *Tristram Shandy: A Cock and Bull Story* (2005), *The Road to Guantanamo* (2006), among others.

<sup>126</sup> Cap d’Agde, France.

in the United States.<sup>127</sup> Commercial groups publish various naturist magazines and “documentary” motion pictures, which present images of nude adults and children.<sup>128</sup> Some naturist motion pictures contain only images of nude children. *Andrey and Friends* (2004),<sup>129</sup> one example of many, is a motion picture about four high school boys who range in age from 14 to 17-years old. The liner notes describe the “unrated” motion picture as:

A naturist day in the banya [baths] is their chance to blow off steam and engage in teenage goofiness and camaraderie. Remember when you were fifteen and had so much energy you thought you would explode? Live it again with Andrey and his friends.

While the movie does not contain sexually explicit depictions, its moving pictures document the boys’ fully exposed genitals as they undress, shower, swim in the pool, shower again, and dress. The film may simply be the documentary it purports, but one may infer a different purpose from the marketing materials included on the DVD.<sup>130</sup> Images of young boys

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<sup>127</sup> San Diego, CA; Lacanto, FL; Miami, FL; Pasco County, FL; Oshkosh, WI (where The Naturist Society is based).

<sup>128</sup> “...Europa Sun Productions ‘day in the life’ documentaries...,” available at <http://www.azovfilms.com/> (last viewed Oct. 25, 2006), formerly, [www.baikalfilms.com](http://www.baikalfilms.com) (company name prior to Oct. 20, 2006), and prior to that [www.moviebizz.com](http://www.moviebizz.com).

<sup>129</sup> Available at <http://www.azovfilms.com/proddetail.asp?prod=80204> (on file with author) (last viewed Oct. 25, 2006).

<sup>130</sup> Available at <http://www.azovfilms.com/proddetail.asp?prod=80204>. Pay particular attention to “viewer discretion,” which states “[t]here is NO sexual content in this film. Suitable for viewing by naturists and those interested in the naturist lifestyle.” The website contains extensive legal disclaimers regarding child pornography (on file with author), available at <http://www.azovfilms.com/legal.asp>. (last viewed Oct. 25, 2006). In particular:

- “Our naturist titles contain nudity of people of all ages. We do not sell or condone the sale of child pornography.
- We do not cater to, encourage, or seek out people who have an interest in nude children out of the context of naturism.

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- We discourage the focusing of attention of children who are not engaged in the naturist lifestyle.
  - Movies of authentic naturism are not obscene, lewd, sexually oriented, lascivious, or pornographic.
  - WE HAVE NO PORNOGRAPHY, OBSCENE MATERIAL, LEWD MATERIAL, LASCIVIOUS EXHIBITION OF THE GENITALS, PRUIENT CONDUCT, VULGARITY, OR CLOSE-UPS OF BODY PARTS.
  - There is no posing for the camera.
  - We do not encourage, support, or take responsibility for individuals or groups who have a pedophilic/voyeuristic interest. We DO NOT advertise in newsgroups (legal or not), SPAM email, or other websites.
  - ...
  - We do not, nor do we intent to, cater to those with a particular interest in nude children outside of the context of nudism and that of this website. Your correspondence shows such an interest we will not deal with you and your email will be ignored.
  - These films are not “adult”, sexually oriented (R) or (X) Videos. You do not have to be 21 or older to order.
  - Participants, and where applicable parents and/or guardians, had full knowledge of video cameras filming their activities and were willing contributors. [Although, parents cannot consent to their child contributing to material that is otherwise child pornography.]

In supporting the laws of the United States of America, Canada and Europe azovfilms.com (and its owners/operators) vehemently opposes what is commonly referred to as “child pornography” as legally defined by United States Code Title 18 Part 1 Chapter 110 Section 2256 and Canadian Criminal Code Section 163.1(1).”

U.S.C. Title 18, Section 2257 Compliance Notice: All visual depictions displayed on this Website may be exempt from the provisions of 18 U.S.C. section 2257 and 28 C.F.R. 75 as said visual depictions do not consist of depictions of conduct as specifically listed in 18 U.S.C. section 2256 (2) (A) through (D) [but does not include section E, which states “lascivious exhibition of the genitals or pubic area of any person], but are merely

(pre- and post- pubescent) that surround the distributor's California address imply that its "naturist" motion pictures focus on boys under eighteen.<sup>131</sup> Is the consumer simply watching this naturist documentary of nude boys to learn about naturism?<sup>132</sup>

In a decision that may be applicable to naturist motion pictures, the Third Circuit, applying the *Miller* test, declared naturist magazines depicting nude children not obscene.<sup>133</sup> The court held that the "imported French and German magazines devoted to nudists' lifestyles, which included nude minors, did not depict or describe, in a patently offensive way, sexual conduct...since magazines did not depict either lewd exhibitions of the genitals or patently offensive hard core sexual conduct."<sup>134</sup> The decision reversed a New Jersey district court that determined the depictions obscene.

This treatment of naturist material may impact future motion picture litigation. Filmmakers may argue that child nudity, like Renato's in *Malèna*, is not pornographic, or that full child nudity without a sexually explicit act is not pornographic. Courts have heard these arguments before. In cases from the early 1990s, "naturist" arguments were not accepted.<sup>135</sup> In

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depictions of non-sexually explicit nudity. This site contains NO visual depiction of "lascivious exhibition(s) of the genitals or public area," clothed or unclothed."

<sup>131</sup> Insider Video Club, P.O. Box 93399, Hollywood, CA 90093; 1.800.634.2242. In addition to Azov Films, I.C. Movie Rentals (<http://www.icmovierentals.net>) (last viewed Oct. 25, 2005), a Las Vegas, Nevada based website, sells "naturist" titles, such as *Andrey and Friends*.

<sup>132</sup> Interest appears high for this material. The website selling these naturist materials received 176,805 first time visitors in October 2006 (on file with author). See <http://www.azovfilms.com/default.asp> (last visited Nov. 25, 2006).

<sup>133</sup> *Various Articles of Merchandise, Schedule No. 287*, 230 F.3d 649.

<sup>134</sup> *Id.* at 656.

<sup>135</sup> See *U.S. v. Cross*, 928 F.2d 1030, 1037 (11<sup>th</sup> Cir (1991) (defendant argues he had "never exchanged child pornography but only 'naturist photographs' of the kind found in 'nudist

a more recent case, however, the court *validated* two depictions of nude boys in the Australian Outback based on “naturist” arguments.<sup>136</sup> The first depiction—a boy crossing a stream—focused on the boy’s exposed genitals. The second—a boy climbing a tree—focused on his spread buttock. Using the *Dost* Factors, the court concluded, “neither appear to depict sexual activity or sexuality,” yet “the poses...seem designed to provoke a sexual response.”<sup>137</sup> Future cases may further present such arguments, which, when well crafted, may validate materials otherwise considered pornographic. Content similar to that in *Andrey and Friends* one day may find its way into mainstream motion pictures because the content is neither lewd nor lascivious, but how U.S. audiences react to the continual presence of child genitalia is a completely different issue.

## VII. Product Accessibility

Greater product accessibility has led to the erosion of the voluntary rating system. In general, explicit sexual content in films is policed by the voluntary MPAA rating system.<sup>138</sup> A filmmaker submits his motion picture to CARA, where it is reviewed and rated.<sup>139</sup> The final

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magazines”). *See also U.S. v. Duncan*, 896 F.2d 271, 274 (7<sup>th</sup> Cir. 1990) (defendant argued that photos of minors involved in sexually explicit conduct, which he ordered through the mail, “had been misrepresented, as he thought the items would be “naturist” pictures rather than child pornography”).

<sup>136</sup> *U.S. v. Moore*, 215 F.3d 681 (7<sup>th</sup> Cir. 2000).

<sup>137</sup> *Id.* at 687.

<sup>138</sup> *Supra* at fn 41.

<sup>139</sup> *Supra* at 7-8.

rating determines the expansiveness of the motion picture's distribution. NC-17,<sup>140</sup> for example, generally has a very restricted market, as many theaters and distributors will not present material rated for an adult-only audience, while R-rating garners a much wider audience with distribution in those theaters that refuse NC-17 material.<sup>141</sup>

The rating board, therefore, exerts great influence over the success of motion pictures. Since most of the members of the MPAA are major studios that submit motion pictures to the MPAA, distribution tends to be wide for studio products, since many distributors and theaters also deal only with material bearing the MPAA seal of approval. Independent and foreign filmmakers—whose material generally tests the limits of censorship, *if* presented to the MPAA raters—typically receive the NC-17 death knell. Knowing that the rating board could actually kill their market or force them to edit their picture's content to attain an R rating, independent and foreign filmmakers entertain another, now more alluring option: remaining unrated.

The Supreme Court in *Joseph Burstyn v. Wilson* held that due to constitutional conflicts the government could not enforce the rating system by statute.<sup>142</sup> The decision created an

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<sup>140</sup> In 1990, the MPAA replaced the ubiquitous and uncontrollable 'X' rating with the newly named and copyrighted, NC-17—no longer would the adult pornography industry be associated with the MPAA ratings. See Jack Valenti, *How It All Began*, (on file with author), available at, <http://www.filmratings.com/about/content.htm> (last viewed May 10, 2006)

<sup>141</sup> Sexually explicit material does not make it into the coveted PG-13 or PG ratings. These ratings were held by all ten of the highest grossing movies of all time. The R-rated *Passion of Christ*, number 10 on the list for a long time, was bumped off the top listing by the 2006 movie, *Pirates of the Caribbean: Dead Man's Chest*. See <http://www.imdb.com/boxoffice/alltimegross>. (last viewed Nov. 27, 2006).

<sup>142</sup> *Joseph Burstyn v. Wilson*, 343 U.S. 495, 503 (1952) (holding that the “requirement by statute of permission to communicate ideas to be obtained in advance from state officials who judge the

alternative to the self-policing system: filmmakers are not required to submit motion pictures to the rating board. Again, while *not* submitting may portend commercial disaster, many independent and foreign filmmakers decide to avoid ratings. Motion pictures not submitted to the rating board are simply labeled “not rated” or “unrated” and a great number of theaters and distributors do not carry the movie.<sup>143</sup> Although with the dramatic rise in art-house theaters, many unrated movies still find a broad audience.

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content of the words and pictures sought to be communicated is a form of infringement upon freedom of expression condemned by the First and Fourteenth Amendments”).

<sup>143</sup> Wal-Mart, the largest distributor of DVDs, carries motion pictures up to and including R-rated (R rated for violence, not sexual content). The Wal-Mart website includes the following statement:

“We carry movies that are rated by the Motion Picture Association of America (MPAA), made-for-television movies as well as other television programming. We take our role as a responsible retailer seriously and, since we do carry some “R” rated selections, we have set our cash registers to prompt the cashier to ask for identification showing that the customer is 17 before a customer may purchase this rating. We do not carry any adult-rated titles.”

*Available at* <http://www.walmartfacts.com/keytopics/merchandising.aspx#a162>. (last visited May 10, 2006). Where the retailer’s website describes MPAA ratings, NC-17 is excluded. See <http://www.walmart.com/catalog.gsp?cat=116018&path=0%3A4096%3A116018#movie> (last visited May 10, 2006). Anecdotally, chains such as Blockbuster Video and Hollywood Video refuse to carry NC-17 rated movies. See [http://www.reference.com/browse/wiki/MPAA\\_film\\_rating\\_system](http://www.reference.com/browse/wiki/MPAA_film_rating_system) (last visited Oct. 25, 2006). Moreover, “most major theaters will not accept a film rated NC-17 for showing...[and] many newspapers and other media such as TV and radio stations will not advertise a film rated NC-17.” MPAA Rating System (on file with author), *available at*, <http://hometheaterinfo.com/mpaa.htm> (last visited Oct. 25, 2006).

The decision to release an unrated motion picture is much easier now than, say, ten years ago, because of major changes in the motion picture marketplace. Success no longer depends only on factors such as the fame of the filmmaker, the actors, and hype surrounding the motion picture, or rated-film distribution and theater networks. Today, record DVD sales and expansive internet availability allow an unrated motion picture to achieve unprecedented success.<sup>144</sup> The success of the DVD market is illustrated by the recent action of filmmaker Steven Soderbergh. He broke a coveted movie industry marketing barrier by simultaneously releasing his motion picture, *Bubble* (2005), in theaters *and* on DVD—beginning the move to lessen the influence of major market distributors and theaters owners.

With regard to the internet, movie enthusiasts and niche interest groups communicate on the net more freely about their interests and the products available to satisfy those interests. Moreover, potential purchasers are more willing to purchase or download from the internet while using a computer in the privacy of their own home. The result of this expanded consumer and market base is that independent and foreign filmmakers no longer are limited to small markets with limited sales. And with each unrated motion picture sale, the potential that motion pictures

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<sup>144</sup> According to Plunkett Research, Ltd., an entertainment market research company, \$23.4 billion dollars was spent in the U.S. in 2005 on DVD purchases and rentals, a 30.3 percent increase over 2003 (\$16.3 billion). Total U.S. box office revenues for 2005 were \$8.95 billion. See Plunkett Research, Ltd report, *Entertainment and Media Statistics: Entertainment and Media Industry Overview* (on file with author), available at, <http://www.plunkettresearch.com/Industries/EntertainmentMedia/EntertainmentMediaStatistics/abid/227/Default.aspx>. (last visited Nov. 27, 2006).

will contain suspect scenes of children—that push or cross the limits of child pornography law—only increases.<sup>145</sup> Unfortunately, almost everything boils down to supply and demand.

Enforcement problems also allow for increased product accessibility and more suspect material to enter the marketplace without question. Prosecutors have an extremely difficult time prosecuting filmmakers and photographers, particularly since the court held virtual images protected by the First Amendment in *Free Speech Coalition*. Defendants now “almost universally raise the contention that the images in question could be virtual,” forcing prosecutors to prove the depicted child is *real*.<sup>146</sup> Prosecutors must also prove beyond a reasonable doubt that the defendant *knew* the image was a real child. This is a difficult task, which could result in the “de facto legalization” of any child pornography in the hands of consumers.<sup>147</sup>

The National Center for Missing and Exploited Children testified before Congress in 2003, stating “prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as [the] decline [in] potentially meritorious prosecutions.”<sup>148</sup> In a Congressional report, the implication was made that even with

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<sup>145</sup> Consider movies that have already escaped censorship by circumventing the rating board: *Is-slottet* (1987)(12-year old girls nude including genitals); *Tom and Lola* (1990) (boy and girl nude throughout); *Angela* (1995) (girls 6 and 10 in several nude scenes, also in sexually suggestive scene with a boy); *Apt Pupil* (1998) (the 16-year-old star appears nude; the one minute sequence is cut from the R version but remains in the uncut, unrated version); *The Devils (Diables, Les)*(2002) (full nudity of 13-year old boy and girl main characters, as well as fondling and kissing between them); *I am Dina* (2002) (nudity of girl); *Song for a Raggy Boy* (2003)(boy nudity); *Anatomy of Hell* (2004)(three little boys play doctor with a nine-year-old girl, who removes her underwear; explicit sexual suggestion); et alia.

<sup>146</sup> P.L. 108-21, Title V, §501(10), Apr. 30, 2003, 117 Stat. 676.

<sup>147</sup> *Id.* §501(13).

<sup>148</sup> P.L. 108-21, Title V, §501(9).

greater efforts to curtail child pornography, prosecutors will have an uphill battle.<sup>149</sup> The difficulties prosecutors experience in convicting filmmakers implicitly allows filmmakers more expressive freedom, because they know the likelihood their motion pictures will meet judicial intervention is low. Moreover, with knowledge of precedent such as *Moore*—which, again, dealt with naturist materials—filmmakers understand that even if their productions push the legal envelope with depictions of child genitalia, based on such arguments, a court is not likely to hold such depictions illegal.

In this morass of interpretational difficulties, law application, and product accessibility, ratings and child pornography laws suffer, while free expression seemingly expands. This means an increase in motion pictures that push the bounds of child pornography with suspect depictions of childhood sexuality. When these depictions go unnoticed into the market place, more and more children go unprotected. But this should surprise no one. The market place is only supplying society with what it demands.

### ***VIII. Conclusion: A Satisfied Society***

Society remains enchanted with childhood sexuality. Arguably, *Free Speech Coalition* and the decisions regarding “naturist” materials illustrate that society continues to find appeal in expressions of childhood sexuality, be it in stone, paint, print, film, or virtual images. Just like societies millennia ago, twenty-first century citizens appreciate both childhood sexuality and form—whether nude, partially or fully clothed—particularly from their first sexual awakening until no longer called “boys” and “girls.”

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<sup>149</sup> See “PROTECT Act,” H.R. Conf. Rep. 108-66, Apr. 9, 2003.

Many argue such appreciation is perverted, while at the center of the busiest city intersections billboards loom, for example, with images of boys clad only in lily-white boxer briefs or girl clutching perfume bottles at the end of arms barely covering their bare breasts.<sup>150</sup> In the privacy of cars, people stare, averting their eyes only if caught by passersby.

Children's bodies advertise a plethora of society's products, as "every industry based on the display of adult bodies spawns a juvenile counterpart."<sup>151</sup> Swimsuits, fragrances, clothing, or electronics—routinely, society's commodities are situated next to a ravishing young boy or girl. Today, "approximately half of all advertisement photographs show children."<sup>152</sup> Calvin Klein, J. Crew, and Abercrombie and Fitch regularly use teenage boys and girls to sell their products.<sup>153</sup> In the past, both Abercrombie and J. Crew have produced clothing catalogues that sport the

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<sup>150</sup> See Matt Reed, *Designer Briefs on Kids?*, Cincinnati Enquirer, Feb. 23, 1999, at C1; Lenore Skenazy, *Calvin's Not-So-Model Behavior*, New York Daily News, Mar. 1, 1999, at 29; Robert Peters, *Calvin Klein Kiddie Underwear Ads May Not Be Child Porn, But They Aren't Morally Innocent and Harmless Either* (on file with author), available at <http://store.soliscompany.com/kpoco.html> (last viewed Oct. 25, 2006). I remember in the early 1990s a billboard located at Sheffield and Belmont in Chicago with the image of Marky Mark (Mark Wahlburg) wearing Calvin Klein briefs, although he was no longer a boy.

<sup>151</sup> Higonnet, 144.

<sup>152</sup> *Id.* at 9.

<sup>153</sup> An interesting PhD thesis on the subject of Calvin Klein's 1995 jeans campaign featuring teenage models is Anne Cunningham, *Calvin Klein Unzipped: A Look at the Morality of Selling Teen Sexuality* (on file with author), available at, <http://list.msu.edu/cgi-bin/wa?A2=ind9612B&L=aejmc&P=R44055&D=0>. (last viewed Oct. 25, 2006). See also, Daniel Gross, *Abercrombie & Fitch's Blue Christmas: The Dirty Little Secret Behind the Racy Catalogue*, Slate, Dec. 8, 2003 (on file with author), available at, <http://www.slate.com/id/2092175>. (last visited Nov. 21, 2006) (detailing Abercrombie's past troubles with its catalogue).

bodies of unclothed teens more than clothes. Abercrombie began *selling* their catalogue, rather than giving it away, because the provocative photos of its teenage models were so successful, the images of the bodies became the commodity. Indeed, some believe a child's portrayal in almost all of advertising is as the "overtly sexualized and commodified child"<sup>154</sup> Scholar Anne Higonnet suggests "eroticism in mainstream images of children...[and] sexualization of childhood is not a fringe phenomenon inflicted by perverts on a protesting society, but a fundamental change furthered by legitimate industries and millions of satisfied customers."<sup>155</sup>

Consider the largest selling visual entertainment to married women in Japan: graphic sexual interactions between young *bishoonen*—beautiful boys (the *shootakon* genre).<sup>156</sup> Illustrated in comic books, these visual images depict boy-with-boy love stories. Another example of this mass consumed *Anime (manga)* are the portrayals of little girls, sex partners to grown men (the *rori-kon* genre), which sell to adult males.<sup>157</sup>

Japan is not alone in their demand for the childhood sexuality depicted in cartoons. In the U.S., Trey Parker and Matt Stone's animated feature, *South Park*, routinely portrays child characters in sexually explicit scenes.<sup>158</sup> In the 2006 season opener, for example, the Chef

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<sup>154</sup> J. Conrad, *Lost Innocence and Sacrificial Delegate: The JonBenet Ramsey Murder*, *Childhood*, 1999 (6/3), at 319.

<sup>155</sup> Higonnet, 153.

<sup>156</sup> See S. Kinsella, *Adult Manga: Culture and Power in Contemporary Japanese Society* (Richmond: Curzon Press, 2000). See also Mark McLelland, *Local Meanings of Global Space: A Case Study of Women's "Boy Love Websites in Japanese and English"* in *Mots Pluriels* No. 19, October 2001 (on file with author), available at <http://www.arts.uwa.edu.au/motspluriels/mp1901mcl.html>. (last viewed Oct. 25, 2006).

<sup>157</sup> *Id.*

<sup>158</sup> Distributed and aired by Comedy Central.

propositions pre-teen boys for sex.<sup>159</sup> Additionally, Matt Groening's *The Simpsons* routinely depicts provocative scenes of childhood sexuality.<sup>160</sup>

Citizens in the southern United States are infatuated with child beauty pageants.<sup>161</sup> Little girls—some as young as three- and four-years-old—are judged based solely upon appearance of makeup, hairstyle, and outfit—either bathing suit or evening gown. JonBenet Ramsay, the famous little girl murdered in 1996, participated in child beauty pageants and was described as a “...little beauty queen, posing coquettishly in a tight dress, wearing bright red lipstick, her hair bleached blond.”<sup>162</sup> Infatuated with child beauty, parents are exhilarated when their provocatively posed, six-year-old is proclaimed the reigning queen.

Certainly, from these examples, one can understand why the judicial system has such a difficult time crafting and enforcing laws that protect children from anything other than clear, overt sexual exploitation. Society, both legally through what it consumes and where it places its implicit and explicit interests, supports the sexualization of children, as it has *ab initio*. Concomitantly, filmmakers respond with motion pictures that not only satisfy society's desires, but also may push the bounds of legitimate free expression.<sup>163</sup> Unfortunately, the perverse and

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<sup>159</sup> See James Bone, *South Park has last word in row over Scientology*, *The Times*, Mar. 24, 2006 (on file with author), available at, <http://www.timesonline.co.uk/article/0,,11069-2100867,00.html>. (last viewed Oct. 25, 2006).

<sup>160</sup> Fox Network.

<sup>161</sup> For a more detailed encounter of this topic read C. Calvert, *The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation*, Cal. W. L. Rev. 231 (2004).

<sup>162</sup> Henry A. Giroux, *Stealing Innocence: Corporate Culture's War on Children* 45 (Basingstoke: Palgrave, 2000).

<sup>163</sup> Consider among others *Ken Park* (2002), *Birth* (2004); *Mysterious Skin* (2004); *Innocence* (2004), *Babel* (2006), *Notes on a Scandal* (2006).

unintended consequence of all of this is that crimes against children continue because child protection efforts forever languish in this history.