FREE EXPRESSION IN MOTION PICTURES: CHILDHOOD SEXUALITY AND A SATISFIED SOCIETY

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"*No subject is as publicly dangerous . . . as the subject of the child's body.*"[1]

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[1] ANNE HIGONNET, PICTURES OF INNOCENCE: THE HISTORY AND CRISIS OF IDEAL CHILDHOOD 133 (1998).

I. INTRODUCTION

Most people do not discuss childhood sexuality or its problematic extreme, child pornography.[2] The subjects are taboo. So too, are censorship discussions that surround 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 organised paedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights."[3] Vachss' comment too quickly dismisses discussions of censorship and child pornography by comparing those involved in the dialogue to pedophiles, thereby shaming them into silence. Censorship discussions, however, are essential because issues of childhood sexuality, child pornography, and the concomitant free expression reach each of us nearly every day—in the media,[4] on television,[5] in bookstores,[6] and certainly in motion pictures.

Motion pictures present childhood sexuality in ways both subtle and striking, and at times even explicit. Early in the movie *Babel*, a young teen masturbates on a hillside. In later scenes, a teenage schoolgirl reveals her pubic area to schoolboys (and moviegoers) and later, completely naked, attempts to force herself onto a man.[7] The ten-year-old protagonist in *Birth*, insisting he is a widow's reincarnated husband, appears nude, and joins the widow in the bathtub.[8] *Ken Park,* by controversial director Larry Clark, portrays the lives of four high school students in scenes of intercourse, masturbation, fellatio, and sadomasochism.[9] The Italian movie, *Malèna,* shows its fourteen-year-old protagonist masturbating and having explicit sexual relations in a brothel.[10]

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2 "Child" and "childhood" are used synonymously throughout this article and pertain to any person "under the age of eighteen years." 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, the focus of this article 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.

3 Andrew Vachss, *Age of Innocence*, *in* UNCENSORED, THE LONDON OBSERVER MAG., Apr. 17, 1994, at 14.

4 Consider the recent Mark Foley scandal involving congressional pages, the history of priest pedophilia, and images in clothing catalogues and numerous advertisements.

5 Consider episodes of *The Simpsons, South Park*, among others. *See also* Kaiser Family Foundation, *Sex on TV 4* (Nov. 9, 2005), http://www.kff.org/entmedia/upload/Sex-on-TV-4-Full-Report.pdf (biennial report of all sexual content, including content involving children, in television programming during the 2004-2005 season).

6 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 al.

7 BABEL (Anonymous Content 2006).

8 BIRTH (Fine Line Features 2004).

9 KEN PARK (Busy Bee Productions 2002).

10 MALÈNA (Medusa Produzione 2000).

These movies represent only several of a vast number of motion pictures that portray not only child sexuality, but illustrate an elusive and controversial line between free expression and exploitation within the realm of child sexuality.[11]

Using scenes from these movies, among others, the purpose of this article is to explore the boundary between free expression and child exploitation in motion pictures.[12] Part II of this article details the history of how the motion picture industry has depicted childhood sexuality—both prior to and during the development of laws created to protect children from exploitation. Part III specifically focuses on the evolution of child pornography law. Parts IV through VII explain that while child pornography law protects real children as subjects in overtly exploitative motion pictures ("kiddie porn"), in practice, due to issues of interpretation, application, and accessibility, free expression in mainstream motion pictures is supported more fully than protection of children or efforts to eradicate sexually explicit images of children. Moreover, in the wake of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*,[13] Congress' PROTECT Act[14]—and, possibly, any future litigation surrounding the Act's constitutionality—as well as decisions regarding "naturist" images,[15] the motion picture industry ostensibly may portray childhood sexuality freely, without fear that expression will become illegal. And, thus, Part VIII concludes, as this expression enters the marketplace, 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*

The sexualized portrayal of children was not always automatically connected to exploitation of children, particularly on the European continent. The ancient Greeks of Plato's era, for example, ritually initiated young boys into adulthood through

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11 *See* L.I.E. (Lot 47 Films 2001); WASSUP ROCKERS (Capital Entertainment 2005); THE KING (Content Film 2005); 12 AND HOLDING (Echo Lake Productions 2005).

12 Some people believe that children do not have a sexuality, but rather that child sexuality is a social construct. Others believe child sexuality is an innate, biological process that happens in each human being with cross-cultural similarity. *See* Lorretta Haroian, *Child Sexual Development*, 13 ELECTRONIC J. OF HUM. SEXUALITY (Feb. 1, 2000), http://www.ejhs.org/volume3/Haroian/body.htm; *see also* Wikipedia.com, Child Sexuality, http://en.wikipedia.org/wiki/Child_sexuality (last visited Apr. 1, 2007).

13 Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

14 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended at 18 U.S.C. §§ 2252, 2256, 1466A (2006)).

15 *See* United States v. Moore, 215 F.3d 681 (7th Cir. 2000); *see also* United States v. Various Articles of Merch., Schedule No. 287, 230 F.3d 649, 658 (3d Cir. 2000).

sexual relations with an adult male.[16] 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.[17] For centuries, people viewed images of children—primarily the bodies of boys in paintings and sculpture—that exuded sexuality.[18] Prior to the nineteenth century, boys were more likely than any other human figure in works of art to be completely naked.[19] After the nineteenth century, the bodies of girls became the focus of society's artistic gaze.[20] During the late nineteenth and early twentieth centuries, European and American photographers Julia Margaret Cameron, Wilhelm von Gloeden, Edward Weston, and Dorothea Lange each captured subtle and not so subtle images of the unclad bodies of children.[21] Such history reveals times in the past when the sexuality of children appeared appreciated, celebrated, and 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.*[22] The twenty-seven second silent film documents young boys jumping from a dock into the water, some boys wear swimming trunks, and some not.[23] 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 of its release people began advocating censorship of motion picture content. Early advocates believed motion pictures would have a "persuasive, narcotic influence over its huge, loyal audience . . . [and would provide] a safe place to

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16 *See* 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., 2004).

17 *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000).

18 *See* GERMAINE GREER, THE BEAUTIFUL BOY 7-11 (2003). Moreover, not only were the painted subjects children, but the models were children as well. The dissent in *Massachusetts v. Oakes*, 491 U.S. 576, 593 (1989) (Brennan, J., dissenting) noted that "[m]any of the world's great artists—Degas, Renoir, Donatello, to name but a few—have worked from models under eighteen years of age, and many acclaimed photographs and films have included nude or partially clad minors."

19 GREER, *supra* note 18, at 9.

20 *Id.* at 9-10.

21 *See, e.g.*, Julia Margaret Cameron, *Venus Chiding Cupid and Removing His Wings* (no date), Wilhelm von von Gloeden, *Three Boys on a Bench* (1895), Edward Weston, *Neil* (1925), and Dorothea Lange, *Torso, San Francisco* (1925).

This article references photography because the medium and its history, in many ways, mirror the imagery of children in motion pictures, and confront nearly identical censorship issues. Moreover, photographic images have generated most of the litigation that may affect what motion picture filmmakers produce.

22 BOYS DIVING, HONOLULU (American Mutoscope & Biograph 1902), *available at* The Open Video Project, http://memory.loc.gov/mbrs/awal/1228.mpg.

23 Most early films were documentaries of ordinary life.

express themselves physically and emotionally with laughter, tears, or sexual longing."[24] Even the Supreme Court in 1915 proffered that "a prurient interest may be excited and appealed to" by watching motion pictures.[25] Motion pictures, the Court reasoned, were "capable of evil, having the power for it, the greater because of their attractiveness and manner of exhibition."[26] And, still, in the midst of all this concern, unclad children regularly crossed the silver screen.[27]

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 filmmakers preferred the latter.[28] Member filmmakers agreed to submit motion pictures to the NBR and follow the organization's recommended cuts. While NBR review was not required—as independent filmmakers did not have to submit their films for review—a film bearing the organization's seal of approval led to increased theater screenings. Thus, filmmakers and distributors had an economic incentive to obtain the seal.[29] Contemporary motion picture censorship and distribution in many ways mirror this process, although the grip of organizations like the NBR—today's Motion Picture Association of America ("MPAA")—is weakened due to wide access to 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"). The MPPDA became the current MPAA in the 1940s.[30] MPPDA's first president, William Hays, created "The Don'ts [sic] and Be Carefuls" in 1927, which listed activities member filmmakers could not include in their motion pictures.[31]

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[24] JON LEWIS, HOLLYWOOD V. HARD CORE: HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY 89 (2000).

[25] Mutual Film Corp. v. Indus. Comm., 236 U.S. 230, 242 (1915).

[26] *Id.* at 244.

[27] *See, e.g.*, TARZAN OF THE APES (National Film Corporation of America 1918) (rear nudity of boy Tarzan, and two other boys); THE LION'S DEN (Metro Pictures Corporation 1919) (brief child nudity); HIGH SOCIETY (Hal Roach Studios Inc. 1924) (full frontal nudity of boy); PETER PAN (Famous Players-Lasky Corporation 1924) (rear nudity of boy).

[28] LEWIS, *supra* note 24, at 88. Jewish filmmakers supported the federal judiciary controlling censorship, while Christian filmmakers supported self-censorship as opposed to government control. *Id.*

[29] *Id.* at 64.

[30] *See id.* at 92-97.

[31] *See id.* at 138, 301-02.

The list memorialized the first clear content guidelines regarding children. Motion pictures unequivocally could not contain images of "[c]hildren's sex organs," "[a]ny licentious or suggestive nudity—in fact or in silhouette," nor "[a]ny inference of sex perversion."[32] The list also warned about the "[d]eliberate seduction of girls" or exhibiting "[a]pparent cruelty to children."[33] Yet, even with such clarity about what not to exhibit, filmmakers avoided self-censorship and found ways to get around the censorship of, among other things, childhood nudity.[34]

In 1934, the MPPDA further codified its censorship guidelines into the more restrictive Production Code ("PC"), also known as the Hays Code.[35] The PC required member filmmakers of the MPPDA to submit their motion pictures for approval. Child censorship recommendations under the PC changed little, becoming only somewhat more pointed, as "children's sex organs are never to be exposed."[36] Virtually every Hollywood filmmaker complied with the PC—fearing more the idea of state-controlled censorship—and did so until the 1960s.[37] Although rare, child nudity continued to appear in motion pictures simply because the images were not considered censorable,[38] though sex organs were not pictured.[39] The nakedness portrayed in these motion pictures was not licentious, nor suggestive, and did not "stir the sex impulses";[40] most images were associated with bathing scenes or innocent childhood activities, like skinny-dipping.[41] Moreover, filmmakers never contemplated whether the images of children

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[32] *Id.* at 301.

[33] *Id.* at 302.

[34] *See, e.g.*, THE CROWD (Metro-Goldwyn-Mayer 1928); TABU: A STORY OF THE SOUTH SEAS (Marnau-Flaherty Productions 1931); BLONDE VENUS (Paramount Pictures 1932).

[35] Named after William Hays, the president of the Motion Picture Producers and Distributors of America, who promulgated the guidelines.

[36] ArtsReformation.com, The Motion Picture Production Code of 1930 (Hays Code), *available at* http://www.artsreformation.com/a001/hays-code.html.

[37] During this time period there was a thriving underground pornography market, which the government was trying to control through anti-obscenity laws, namely, through analysis of materials using the test developed in *United States 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 . . . lead to sexually impure or lustful thoughts." Filmmakers were not interested in government censorship of the content of their materials, choosing self-censorship instead. Consequently, American motion pictures during this period, while at times racy, were far from pornographic by today's standards.

[38] *See, e.g.*, ANTHONY ADVERSE (Warner Bros. Pictures 1936); BIG FELLA (Beaconsfield 1937); TOM BROWN'S SCHOOL DAYS (The Play's The Thing 1940); A CHILD WENT FORTH (National Association of Nursery Educators 1941); LORD OF THE FLIES (Two Arts 1963).

[39] However, a number of foreign films from this period display full frontal nudity of children.

[40] *One Book Called "Ulysses,"* 5 F. Supp. at 184.

[41] *See, e.g.*, CHILD BRIDE (Kroger Babb 1938) (portraying a nude girl skinny-dipping).

appealed to a viewer's sexual longings, as a "child's body was supposed to be naturally innocent of adult sexuality."[42] However, in the wake of the 1957 Supreme Court decision *Roth v. United States*, Hollywood thinking began to shift.[43]

The Court in *Roth* wrestled with obscenity to determine if it was a category of expression that fell within the First Amendment's protection of 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 the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important social importance*.[44]

The Court determined that obscene materials did encroach on areas of social importance, were not protected, and thus could be regulated by states. Of equal import, the *Roth* Court defined obscenity as "material which deals with sex in a manner appealing to prurient interest," such that when "considered as a whole, its predominant appeal is . . . a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."[45] Post-*Roth*, filmmakers had to contend with whether images depicting childhood sexuality—even the most innocent depictions, like *Boys Diving*, *Honolulu*—might appeal to such "prurient interests."[46]

Yet, contemporary communities would not have found such displays prurient. People still unknowingly appreciated the subtle displays of childhood sexuality since a shadow over such appreciation had not yet been cast. Additionally, since nearly all of these motion pictures contained at least some literary or artistic value, the few images that innocently revealed a child's unclad body did not meet the *Roth* definition of "obscene." By the mid-1960s, however, thoughts on censorship—and what held literary

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42 HIGONNET, *supra* note 1, at 8.

43 Roth v. United States, 354 U.S. 476 (1957). *Roth* upheld the conviction of a well-known pornographer, Samuel Roth, who was convicted of mailing obscene material. One judge who upheld Roth's conviction 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 for new standards and laws to allow people like Roth to sell his product. LEWIS, *supra* note 24, at 238.

44 *Roth*, 354 U.S. at 484 (emphasis added) ("This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).").

45 *Id.* at 487, 488 n.20 (citing MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6 1957)).

46 *See supra* notes 22-26 and accompanying text.

and artistic value—underwent great change. Enormous social upheaval marked the whole period: i.e., sexual revolution, the Vietnam War, civil rights, women's liberation.

On the one hand, courts continued what began in *Roth* by further questioning obscenity, pornography, and state-controlled censorship.[47] Courts balanced obscenity with freedom of sexual expression. Feminist groups fostered 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 consciously attempted to test its limits. Finding the Production Code archaic, the MPAA abolished it in 1967, and the following year instituted a new voluntary ratings system.[48] A board of parents who comprised the Classification and Ratings Administration ("CARA") determined the rating of a motion picture. Distributors and theater operators enforced the four-category system: G, M, R, and X.[49] Under the 1968 rating system, filmmakers in big cities such as Los Angeles, New York, and San Francisco moved x-rated motion pictures out of adult bookstores and male-only stag parties and

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[47] *See, e.g.*, Grove Press, Inc. v. Gerstein, 378 U.S. 577 (1964) (reversing a finding that Henry Miller's book, *Tropic of Cancer*, was "obscene"); Jacobellis v. Ohio, 378 U.S. 184 (1964) (reversing a conviction for possession and exhibition of an allegedly obscene motion picture that Justices Brennan, Stewart, and Goldberg did not find obscene); A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney Gen., 383 U.S. 413 (1966) (affirming that, notwithstanding its prurient interest, a book's redeeming social value entitled it to the protection of the First and Fourteenth Amendments); Stanley v. Georgia, 394 U.S. 557 (1969) (holding unconstitutional a state statute that criminalized private possession of obscene matter); *cf.* Mishkin v. New York, 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 are permissible); Stanley v. Georgia, 394 U.S. 557, 563 (1969) (affirming the *Roth* test as the standard governing obscenity and holding that the First and Fourteenth Amendments protect private possession of obscene material); United States v. Reidel, 402 U.S. 351 (1971) (affirming as constitutional a federal prohibition of dissemination of obscene materials through the mail).

[48] *See* The Motion Picture Association of America, Ratings History, http://www.mpaa.org/Ratings_history1.asp (last visited Feb. 13, 2007).

[49] G: General Audiences, including children; M: Mature audiences; R: Restricted, children under sixteen not admitted without a parent or guardian; X: No one under sixteen admitted. *See id.* The initial rating group has been amended several times, and its current classifications are as follows: G: General audiences; PG: Parental guidance suggested, some material may not be suitable for children; PG-13: Parents strongly cautioned, some material may be inappropriate for children under thirteen; R: Restricted, under seventeen requires accompanying parent or adult guardian; NC-17: No one seventeen and under admitted. *See* The Motion Picture Association of America, What Do the Ratings Mean?, http://www.mpaa.org/FlmRat_Ratings.asp (last visited Mar. 8, 2007). Regarding the X rating specifically, while X was an MPAA rating that the rating board issued to films not suitable for minors, the X was not trademarked. Thus, anyone could apply X to his film if he knew the content was not suitable for minors, and, indeed, pornographers applied X to their films. Eventually, pornographers added additional Xs in their own ratings—XX and XXX—to give the impression that a film was more graphic. Thereafter, X became synonymous with pornography. In 1990, the MPAA ceased use of the non-trademarked X rating, instead using the trademarked NC-17 notation, which could be applied to motion pictures only by the MPAA. *See id.*

into mainstream theaters.[50]

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 involving twelve-year-old Regan, including one scene involving a crucifix and another where Regan pushes her mother's face between her legs.[51] Film distributor and publisher, Grove Press, a harbinger of anti-censorship efforts, published Larry Clark's *Tulsa*, which featured a 1969 photograph of three teenagers.[52] The focus of critic's interest was not on the nude girl injecting methamphetamine, or the nude boy holding her tourniquet, or even on the slightly averted face of the third boy; rather, the critic's focus was instead on this boy's erection.[53]

When the Supreme Court decided the 1973 landmark obscenity case, *Miller v. California*, it was aware of the culture that had followed the *Roth* decision.[54] In *Miller*, the Supreme Court reworked the test for obscenity to specifically target hardcore pornography. The Court limited the permissible scope of obscenity regulation to conduct "specifically defined by the applicable state law" and materials "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[55] Each of the criteria would be evaluated from the perspective of the "average person, applying community standards."[56] Thus, places like Los Angeles and New York City could maintain liberal standards, while, simultaneously, small towns and conservative regions could have extremely conservative standards. Because of this variability, one practitioner labeled the test an "unworkable . . . hit or miss situation [that] depends on the prosecutor . . . [and] on the juries."[57] In legal scholarship, others have described the test as "spongy," leaving "much to the vagaries of juries asked to evaluate expert testimony on literary merit,

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50 *See, e.g.*, PORNOGRAPHY IN DENMARK (1970); SEX U.S.A. (Cinex 1971); A HISTORY OF THE BLUE MOVIE (Graffiti 1970); BEHIND THE GREEN DOOR (Jartech 1972); DEEP THROAT (Arrow 1972).

51 THE EXORCIST (Warner Bros. Pictures 1973).

52 LARRY CLARK, TULSA (1971).

53 *Id.* Later, Clark published *The Perfect Childhood* (1995), which features twenty pages of black-and-white photography of a prostitute performing fellatio on a sixteen-year-old boy.

54 Miller v. California, 413 U.S. 15 (1973).

55 *Id.* at 24.

56 *Id.*

57 Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313, 323 (2001).

offensiveness, and other unmeasurables."[58] In developing this test, the *Miller* Court sought to balance freedom of sexual expression with the need for obscenity regulation. Additionally, the Court wanted to craft 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 less thought to the harm inflicted upon the actors, including children, who produced materials that a jury might or might not find obscene.

Miller is but one thread of history within a rich web of legislation, motion picture production, social upheaval, and the depiction of children in images. What makes the entire era up to and including *Miller* distinct, 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 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. Realizing that a substantial amount of pornographic materials "used and exploited [children] for pornographic purposes" and were "very harmful to . . . children,"[59] Congress passed the Protection of Children Against Sexual Exploitation Act in May 1977 ("the Act").[60] The Act made it unlawful to use children engaged in "sexually explicit conduct for the purpose of producing any visual or print medium."[61] A significant flaw in the Act was that, as per the *Miller* decision, "sexually explicit conduct" was constrained to hard-core pornography.[62] 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 protection of children from exploitation.

Not long after the passage of the Act, in 1982, Manhattan adult bookstore owner, Paul Ferber, sold two motion pictures,

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58 RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 329 (1988); *see also* Clay Calvert & Robert D. Richards, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member*, 13 GEO. MASON U. CIV. RTS. L.J. 185, 219 (2003) (Ms. Strossen calls the *Miller* test "ambiguous, open-ended, and subject to interpretation").

59 *See* S. REP. NO. 95-438, at 40 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 40, 41, 43.

60 Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2252, 2256 (2006)).

61 *Id.*

62 Miller v. California, 413 U.S. 15, 36 (1973).

which depicted boys under eighteen masturbating. Ferber was convicted under a New York law prohibiting any non-obscene child pornography. The statute forbid the knowing promotion of children in "sexual performance," meaning "any play, motion picture, photograph or dance" that includes "sexual conduct by a child less than sixteen years of age."[63] The meaning of "sexual conduct" included "simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."[64] The New York Court of Appeals overturned Ferber's conviction and held that the statute was unconstitutional because its reach extended to material protected under the *Miller* obscenity test.[65] The State appealed to the United States Supreme Court.

The plurality in *New York v. Ferber* reversed the New York Court of Appeals and upheld the constitutionality of New York's child pornography law prohibiting the "lewd exhibition of the genitals" of the two minors.[66] The Court noted that, even in the case of nudity that focuses on the genitals, "nudity, without more is protected expression."[67] New York's law required more than nudity to render a work obscene, specifically the depiction of one or more enumerated acts that would place it outside of constitutional protection.[68] One of these acts, the one that applied in this case, was the depiction of masturbation.[69]

Emphasizing the reasonableness of the Court of Appeals' holding, the majority recognized that serious harm was inflicted on children in making such pornographic material,[70] that the value of child pornography is "exceedingly modest, if not *de minimis*,"[71] and therefore, the market for such material had to be eliminated.[72] Notably, the Court acknowledged that the production of materials classified as child pornography required an act of abuse upon the child. The abuse to the child is sufficient to deny First Amendment protection. Therefore, pornography depicting children need not be obscene to be constitutionally

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63 New York v. Ferber, 458 U.S. 747, 751 (1982) (quoting N.Y. PENAL LAW § 263.00(1), (3), (4)).

64 *Id.* (quoting N.Y. PENAL LAW § 263.00(3)).

65 *See id.* at 751-52.

66 *Id.*

67 *Id.* at 765 n.18 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975)).

68 *Id.* at 765.

69 *Id.*

70 *See id.* at 759 (noting that the distribution of child pornography and sexual abuse are "intrinsically related").

71 *Id.* at 762.

72 *See id.* at 759 ("[T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

unprotected and illegal.

For the first time, child pornography became a category of speech not protected by the First Amendment. Unlike obscenity, which is excluded from protected speech as worthless expression, the *Ferber* decision excluded the protection of child pornography because of the underlying crime in its production. 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. The Court found that the social harm caused by child pornography always exceeded its social or artistic value. The *Miller* test and its value analysis no longer mattered when considering child pornography. As Justice O'Connor aptly noted:

> [A] 12-year old child 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.[73]

Following *Ferber*, Congress passed the Child Protection Act of 1984 ("CPA").[74] The CPA had several purposes. First, Congress memorialized the decision in *Ferber* by stating "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the individual child."[75] Second, the CPA increased the age of majority from sixteen to eighteen.[76] Third, along with subsequent amendments, the CPA codified a definition of child pornography as "any visual depiction, including any photograph, film, video, [or] picture . . . of sexually explicit conduct."[77] The statute defines sexually explicit conduct as "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."[78] This definition distinguished child pornography from other types of pornography that banned the lascivious exhibition of a child's genitals or pubic area.[79]

By 1989, "mere nudity" came under the definition of child

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[73] *Id.* at 774-75 (O'Connor, J., concurring).

[74] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 42 U.S.C. §§ 522, 2251-2255 (2006)).

[75] *Id.* § 2251.

[76] *Id.* § 2253(1).

[77] *Id.* § 2256(8).

[78] *Id.* § 2256(2)(A).

[79] Seven years later, in *Osborne v. Ohio*, 495 U.S. 103, 138 (1990), the Supreme Court affirmed a statute that prohibited "graphic focus" on a child's genitals.

pornography. The majority in *Massachusetts v. Oakes* upheld a Massachusetts statute defining nude photographs of children and child pornography, which required that the child's nude body be presented with "lascivious intent."[80] Thus, any depiction of a child nude, including those considered "artistic," might be criminal because of the vagueness of "lascivious intent." Five years after *Oakes*, the Third Circuit held, in *United States v. Knox*, that child pornography did not require nudity.[81] The court held that the depiction of a clothed child (clothing covering genitals) could constitute a "lascivious exhibition of the genitals or pubic area under the federal child pornography laws."[82] As a result of the *Knox* decision, child pornography now included much more than just sexually explicit conduct. To constitute a crime, a child no longer had to be harmed through child pornography. A child's body, clothed or not, could be depicted in such a way as to be criminal. Soon, not even a child's body would be required.

Photographic and computer technology attained increased sophistication throughout the 1990s, making it possible to create visual depictions of children engaged in sexually explicit conduct without using actual children. Computer-generated images ("CGI")[83] and recombinant photos were indistinguishable from depictions of actual children.[84] Congress confronted the problem by broadening the scope of child pornography laws in passing the Child Pornography Prevention Act of 1996 ("CPPA").[85] The CPPA criminalized "any visual depiction . . . of . . . sexually explicit conduct . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct; or . . . has been created, adapted, or modified to appear . . . as an identifiable minor."[86] The CPPA, therefore, not only made CGI motion pictures depicting children in a sexually explicit manner illegal, but also criminalized motion

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80 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.

81 United States v. Knox, 32 F.3d 733 (3d Cir. 1994).

82 *Id.* at 736-37 (citing 18 U.S.C. §§ 2252(a)(2), (4), 2256(2)(E)).

83 The harbinger of the capabilities of CGI technology was Hironobu Shakaguci's full-length action film, *Final Fantasy: The Spirits Within* (Chris Lee Productions 2001), in which it is nearly impossible to distinguish between Shakaguci's CGI characters and real human characters in other motion pictures. A new technology may take CGI to the next level. Santa Monica-based Image Metrics has developed animation technology that presents even more "real" human images, perfectly mimicking eye, deep lip, and facial gesturing, which prior technology could not imitate. *See* Sharon Waxman, *Cyberface*, N.Y. TIMES, Oct. 15, 2006, at B1.

84 *See* S. REP. NO. 104-358, § 2(5) (1996).

85 Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (codified as amended at 18 U.S.C. §§ 2251-2252, 2256 (2006)), *invalidated in part by* Ashcroft v. Free Speech Coalition, 535 US. 234 (2004).

86 18 U.S.C. § 2256(8)(B)-(C).

pictures depicting an adult who *looks* like a child engaged in sexually explicit conduct.

Congress' broadening of the law made suspect *any* depiction that *appears* to be a child engaged in sexually explicit conduct—depictions of adults who look like children and virtual images included.[87] Scholar Germaine Greer argues that "[a]t the end of the twentieth century guilty panic about paedophilia completed the criminalization of awareness of the desires and the charms of boys."[88] The grip of child pornography laws during this time prevented filmmakers from expressing almost any form of childhood sexuality in a motion picture.

In 2001, the Supreme Court decided *Ashcroft v. Free Speech Coalition*, a ruling that proved favorable for filmmakers interested in depicting childhood sexuality more freely.[89] In *Free Speech Coalition,* an adult entertainment trade association had challenged the CPPA's definition of child pornography as overbroad and in contravention to the First Amendment's protection of speech.[90] The Court in *Free Speech Coalition* focused on two issues in the CPPA's language: first, whether images of adult actors who *appear* as a "minor engaging in sexually explicit conduct" are protected by the First Amendment, and second, whether virtual images and recombinant photorealistic images that "convey the impression" of a minor engaging in sexually explicit conduct are protected.[91] Larry Clark's 2002 movie, *Ken Park*, for example, illustrates the former issue.[92] The four main characters, played by adults, portray sexually active high school students. With multiple sexually explicit scenes—including cunnilingus—the motion picture would be illegal under CPPA. The latter issue encompassed virtual images of children—computer-generated images, not *real* children—engaged in sexually explicit conduct. Chief Justice Rehnquist and Justice Scalia joined Justice O'Connor's dissenting opinion regarding the overbreadth issue, reasoning that "[s]uch images whet the appetites of child molesters."[93]

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87 Many motion pictures and magazines, particularly pornographic ones, use models who have *just* turned eighteen, yet appear between fifteen and seventeen years old. *See, e.g.,* Bel Ami Productions' films (depicting boyish male pornography); *Barely Legal* (magazine depicting young-looking females), and *Freshman* (magazine depicting boyish male models).

88 GREER, *supra* note 18, at 10.

89 Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

90 *Id.* at 241, 243 (citing 18 U.S.C. § 2256(8)(B)).

91 *Id.* at 243, 257 (the Free Speech Coalition alleged that the "appears to be" and "conveys the impression" provisions were overbroad and vague, chilling the Coalition from producing works protected by the First Amendment).

92 *See supra* note 9; *see also* Wikipedia.com, Ken Park, http://en.wikipedia.org/wiki/Ken_Park#Production (last visited Mar. 8, 2007).

93 *Free Speech Coalition*, 535 U.S. at 263 (O'Connor, J., concurring in judgment in part and dissenting in part) (citing Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, Congressional

The majority declared the two portions of CPPA at issue to be unconstitutionally overbroad.[94] 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 the *Ferber* decision, the Court limited child pornography jurisprudence in favor of free expression.

Less than two years later, however, under the aegis of Senator Orin Hatch, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act").[95] The language of the new legislation appears to cast a pall over expressive freedom perceived in the *Free Speech Coalition* decision. Congress reintroduced uncertainty into the law of virtual and adult acted visual images of children engaging in sexually explicit conduct after the Supreme Court dealt with both so decisively in *Free Speech Coalition*. In part, the Act addresses Congress' fear about virtual images—that defendants could avoid prosecution by creating a reasonable doubt that a sexually explicit depiction of a real child was rather a technologically created virtual image.[96] The PROTECT Act criminalizes

> any visual depiction . . . of sexually explicit conduct, where the production . . . involves the use of a minor . . . is a digital image, computer image, or [CGI] that is, or is indistinguishable from . . . a minor . . . or [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[97]

The legislation also criminalizes

> any person who . . . produces . . . a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting that depicts a minor engaging in sexually explicit conduct *and* is obscene; or depicts an image that is, *or appears to be*, of a minor engaging in [sexually explicit conduct] *and* lacks serious literary, artistic, political, or scientific value.[98]

Findings (4), (10)(B), notes following 18 U.S.C. § 2251).

94 *Id.* at 256-57 (majority opinion). Because 18 U.S.C § 2256(8)(B) "abridges the freedom to engage in a substantial amount of lawful speech," and because "[t]he First Amendment requires a more precise restriction" than that in § 2256(8)(D), both sections are unconstitutionally overbroad. *Id.* at 256, 258.

95 Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended at 18 U.S.C. §§ 2252, 2256, 1466A (2006)).

96 *See id.* § 501, Findings (4) and (13).

97 18 U.S.C. § 2256(8)(A)-(C). "Minor" is defined as "any person under the age of eighteen years." *Id.* § 2256(1).

98 *Id.* § 1466A(a)(1)-(2) (emphasis added).

Clearly criminalized by the legislation is *any* image involving the use of a minor—even an image that appears to be an identifiable child—engaged in sexually explicit conduct.[99] Yet, because the legislation highlights value language previously expunged by the Court in *Ferber*—if the sexually explicit depiction of a child (not an actual, identifiable minor) has value under the test in *Miller* or is not obscene, the depiction is legal. Thus, the Act allows for value analysis when expressions of childhood sexuality are considered, as long as those expressions do not involve the use of an actual, identifiable minor.

The PROTECT Act also creates a tension within constitutional law. A court could determine that a depiction illegal on its face under the Act nonetheless is legal using constitutional overbreadth arguments from *Free Speech Coalition*. In fact, the Supreme Court may once again revisit the issues that led to its decision in *Free Speech Coalition*, as it recently granted certiorari on the Eleventh Circuit case, *United States v. Williams*.[100] The defendant in *Williams* argues that the "pandering" portion of the PROTECT Act is unconstitutionally overbroad and vague.[101] The outcome of the Court's decision in this case could portend additional appeals that attempt to have other portions of the Act declared unconstitutional, thereby allowing for the possibility of more expansive free expression. But, until the Court rules otherwise, the PROTECT Act is valid law, and thus, the tension it creates in child pornography law, as well as its value analysis, persist.

The history of child pornography law has 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 law aims to eradicate the exploitation caused in the production of kiddy-porn and decrease the incidence of one of society's worst

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99 "Identifiable minor" is defined as

> a person who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic.

Id. § 2256(9)(A).

100 United States v. Williams, No. 06-694, 2007 U.S. LEXIS 3581 (Mar. 27, 2007).

101 *See* 18 U.S.C. § 2252(a)(3)(B). Williams was charged under this statute with one count of promoting, or "pandering" material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography. United States v. Williams, 444 F.3d 1286, 1289 (11th Cir. 2006), *cert. granted*, 2007 U.S. LEXIS 3581.

crimes.[102] Less clear, but equally prohibited, are motion pictures that contain imagery that *suggests* a sexual act—whether actual or simulated—and motion pictures that contain suggestive images of a child—whether clothed or nude. Motion pictures that depict a child in a sexual act with an adult actor playing the child's role are illegal unless a court determines the depiction has value or is not obscene. Similarly, sexually-explicit visual images of children produced without using an actual, identifiable child are illegal unless the image is found to have value or is not obscene.

The categories of child pornography law that pertain to the use of a real child seem clear—depictions of sexually explicit conduct of a minor or the suggestion of such conduct are illegal. Yet, analysis of recent mainstream motion pictures reveals otherwise. In light of image interpretation, law application, product accessibility, and current cultural mores, outside of protecting children from unambiguous, overt exploitation, free expression trumps child pornography law. The bodies of children, particularly adolescent bodies, are in demand on the motion picture screen, and society gives voice to this demand, through what it consumes and where it places its implicit and explicit interests. As did ancient Greek sculptors, Renaissance painters, and twentieth-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 PORNOGRAPHY LAW

The First Amendment protects free expression, which bars the government from, among other things, abridging what a person may say.[103] Freedom of speech is freedom of expression—to express as one desires. Freedom of expression is sacrosanct *unless* it brings "harm"—very narrowly defined—upon another. As the court emphasized in *Ferber*, the focus of child pornography legislation is the "welfare of children engaged in [the] production" of such material.[104] The image of a child engaged in sexually explicit conduct evidences a crime. The First Amendment does not protect sexually explicit material depicting

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[102] 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. ARIZ. REV. STAT. § 13-604.01(D), (F), (G), (K) (LexisNexis 2007); *see* Arizona v. Berger, 134 P.3d 378 (Ariz. 2006) (affirming a two hundred year sentence as not grossly disproportionate to appellant's crime of twenty counts of sexual exploitation of a minor based on his possession of child pornography).

[103] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .).

[104] New York v. Ferber, 458 U.S. 747, 764 (1982).

actual children, regardless of whether the material meets the *Miller* obscenity test. Accordingly, child pornography law "is where the greatest encroachments on free expression are now accepted."[105]

Writers enjoy the broadest range of unimpeded expression. Since harm is not inflicted on real children through the mere creation of a literary work, and there is no visual depiction, nothing limits a writer's portrayal of childhood sexuality. Consider the extreme, Dennis Cooper's five-novel series "*George Miles Cycle*."[106] Cooper's books 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,"[107] and throughout the cycle is an accomplice to multiple sexual thrill-kill murders of other adolescents. Cooper's sexually explicit depictions of children are entirely legal.[108]

Painters, sculptors, and other artists do not enjoy the same freedom of expression as writers. Even though no child is involved, artists may not create obscene visual representations of "a minor engaging in sexually explicit conduct,"[109] when the *Miller* obscenity test is satisfied.[110] If the depiction possesses some literary, artistic, political, or scientific value[111]—all issues of interpretation—it may be legally permissible. Yet, the *Ferber* Court reasoned that any "expressive interests"[112] in sexually explicit images of children are "exceedingly modest, if not *de minimis*."[113] Thus, the expressive freedom most artists believe they have is quite limited with regard to sexually explicit depictions of children. While the legality of artistic renderings of children has not been

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105 Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 922 (2001).

106 DENNIS COOPER, CLOSER (1989); FRISK (1991); TRY (1994); GUIDE (1997); PERIOD (Grove 2000); *see also* Cecily von Ziegesar's *Gossip Girl* series, Zoey Dean's *A-List* series, and Lisi Harrison's *Clique* series, bestselling serial novels for teenagers. Sex saturates the *Gossip Girl* books, which are about private school girls in Manhattan, some under eighteen years of age. In one book in the series, *Nothing Can Keep Us Together* (2005), two of the characters have sex in a Bergdorf's dressing room. *A-List* details the lives of Beverly Hills High girls and describes their sexual escapades. In *Invasion of the Boy Snatchers*, the fourth book in the *Clique* series, one learns how a character's "massive boobs jiggled." *See* Naomi Wolf, *Wild Things*, N.Y. TIMES BOOK REV., Mar. 12, 2006, at 22-23.

107 Cooper's books use the term "snuff" to describe the murder of a sex partner at the end of a sexual act in order to achieve orgasm.

108 Interestingly, Cooper's website and fan blog reveal that his readership consists mainly of twenty-something men and women—almost all the site's interaction and posts are from this age group. *See* http://www.denniscooper.net (last visited Feb. 15, 2007).

109 18 U.S.C. § 1466A(a)(1)(A) (2006).

110 "It is not a required element of any offense under this section that the minor depicted actually exist." *Id.* § 1466A(c).

111 *Id.* § 1466A(a)(2)(B); *see* Miller v. California, 413 U.S. 15, 24 (1973).

112 New York v. Ferber, 458 U.S. 747, 764 (1982).

113 *Id.* at 762.

tested, this twist in child pornography law contradicts *Free Speech Coalition*—which brings virtual images under First Amendment protection as long as the material is not obscene under the test put forth in *Miller*—but aligns with laws under the PROTECT Act.[114]

Photographers have essentially the same limitations on freedom of expression as painters and sculptors, except that photographers' depictions involve real children. Therefore, child pornography laws further circumscribe a photographer's right to free expression.[115] Although contentious, photographs of children, whether nude, partially nude, or fully clothed, are quasi-legal in many states as long as the child's body is neither presented with "lascivious intent"[116] nor portrayed with "lascivious exhibition of the genitals."[117] Further, at least one grand jury refused to indict a photographer on the basis of his images of fully nude children.[118] Even after battles with critics and attempted litigation, Sally Mann's photographs of her own children, as well as controversial images by Robert Mapplethorpe, David Hamilton, and Jock Sturges have escaped prosecution. As discussed, these images of children are not necessarily considered lascivious when paired with artistic value, and thus avoided legal wrangling, which has implications upon future motion picture images that may be considered pornographic.

Now consider free expression in motion pictures with the following example: dressed in a suit and tie, Renato holds Lupetta's hand as she walks him to the center of her bedroom.[119] 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 Lupetta removes Renato's trousers and undershirt, the frame 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

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114 *See* 18 U.S.C. § 1466A(a)(1)-(2).

115 *Id.* §§ 2251-2256.

116 Massachusetts v. Oakes, 491 U.S. 576, 583 (1989).

117 United States v. Knox, 32 F.3d 733, 736-37 (3d Cir. 1994).

I write "quasi-legal" because courts have acknowledged that books with this visual content are sold in the United States, and those courts did not seem concerned about the sale of such books. *See, e.g.*, United States v. Various Articles of Merch., 230 F.3d 649, 651 (3d Cir. 2000) (recognizing that books that contain images of nude children, many depicting genitals, "are regularly available for purchase within the jurisdiction of the [United States District Court of] New Jersey"). Books listed in that court's opinion are those by David Hamilton and Jock Sturges.

118 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*, L.A. TIMES, Sept. 17, 1991, at A3.

119 MALÈNA (Medusa Produzione 2000).

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 sex for the first time. 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, Lupetta kissing down Renato's chest, suggesting that she performs a sexual act on the boy, could be interpreted as a sexually explicit depiction of a child. Both of these situations trigger application of child pornography laws. But the "unrated" *Malèna* is available in the United States, where child pornography law outlaws such expression.[120] Why is this?

Scenes such as the one described above illustrate that free expression may sometimes trump child pornography law. Due to disparities in visual interpretation and the law's application, as well as greater product accessibility, artistic expression that might otherwise have been illegal—because of the use of a child in its production—does not cause alarm.

V. VISUAL INTERPRETATION

Since the 1990s, when a "sex panic" began, there has been a vast expansion in the general policing of images of children.[121] Both consciously and unconsciously, many people scan nearly every image of a child in motion pictures, books, billboards, or advertisements, among others, 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 if obscene. Pornography produced using actual children, however, may be proscribed regardless of whether the images "taken as a whole" appeal to "prurient interests" or have "serious literary, artistic, political or scientific

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120 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. MALÈNA (Miramax Films & Pacific Pictures 2000).

121 "Sex panic" is a term used to describe the period between the late 1980s through 1990s when Christian Fundamentalists, anti-pornography proponents such as Catharine MacKinnon and Andrea Dworkin, and many others, advocated for laws to suppress prostitution and pornography in any form. At the time, and even today, every image of a child is suspect. *See* Lisa Duggan, *Sex Panics*, *in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 74 (Lisa Duggan & Nan D. Hunter eds., 1995).

value" under *Miller*.[122] When child pornography law is triggered, it makes exception for value only if an actual child is not used to create the depiction. Again, under this circumstance, if such a depiction possesses some literary, artistic, political, or scientific value, it may be legally permissible.[123]

Remember, *Ferber* explained that while an image may possess value, such value "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[124] Yet, determining whether to ban a motion picture because it contains illegal images of children requires complex interpretation of isolated scenes prior to its review under legal standards specifically applicable to child pornography.

A. *Is the Child a Minor?*

As an initial step in determining if a particular depiction is illegal, one must interpret whether the child is a child—a "'minor' . . . under the age of eighteen years."[125] 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, particularly in light of the PROTECT Act.[126] A child must be an "identifiable minor" who is recognizable as an actual person under eighteen.[127] Age perception is critical particularly when viewing a child who appears to be at least eighteen. Traci Lords, for example, made nearly seventy pornographic motion pictures before she reached majority; all of those films are child pornography.[128] *Maléna*'s Renato appears younger than eighteen, but what about the schoolgirl in *Babel*? 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.[129]

B. *Is the Scene Lascivious?*

The difficulty in interpreting whether a "visual depiction" is lascivious is two-fold: (1) determining what lascivious actually

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122 Miller v. California, 413 U.S. 15, 24 (1973).

123 *Id.* at 24; 18 U.S.C. § 1466A(a)(2)(B) (2006).

124 New York v. Ferber, 458 U.S. 747, 761 (1982).

125 18 U.S.C. § 2256(1); *see also supra* note 99.

126 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002). Filmmakers are now required to keep age records, particularly if the depiction is sexually explicit. *See* 18 U.S.C. §§ 2257, 1466A(a)(1)-(2).

127 18 U.S.C. § 2256(9)(A).

128 *See* IMDB, Traci Lords, http://www.imdb.com/name/nm0000183 (last visited Feb. 15, 2007).

129 18 U.S.C. §§ 2251, 2256(2)(a)(5).

describes and (2) determining if a depiction is lascivious based on the factors developed by the District Court for the Southern District of California in *United States v. Dost.*[130]

1. Determining What Lascivious Describes

Does lascivious describe the child, the child's act, the filmmaker's intent, or the viewer's reaction? *Ferber* held that the images must "visually depict sexual conduct by children."[131] Therefore, under *Ferber* lascivious describes 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."[132] Under this interpretation, lascivious describes the viewer. In *United States v. Wiegand*, the Ninth Circuit held that lascivious should be interpreted from the perspective of the "audience that consists of [the filmmaker] or likeminded pedophiles."[133] 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?[134]

Interpretation of what lascivious describes harkens back to Justice Stewart's explanation of obscenity: "I know it when I see it."[135] 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?[136] From this perspective, the trier-of-fact applies the *Dost* factors to arrive at a conclusion.

2. The *Dost* Factors

Dost developed factors for determining whether a "visual depiction" is a "lascivious exhibition of the genitals or pubic area" of a child.[137] The six factors are: (1) if the image's focal point is on

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130 United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.*, United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).

131 New York v. Ferber, 458 U.S. 747, 764 (1982).

132 United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994) (citing United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987)).

133 United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987).

134 For example, how does one determine whether it is lascivious for a pedophile to view children at a playground? Nearly any image can be sexualized by a viewer.

135 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

136 Roth v. United States, 354 U.S. 476, 489 (1957). See Adler, *supra* note 105, at 952-55, where Professor Adler discusses in full the problematic interpretation of lascivious based on a material's effect on an audience of pedophiles. Such an 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 without this inquiry.

137 United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (quoting 18 U.S.C

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 is 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.[138] 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 describes the *Dost* factors as "rather vague language," which poses great interpretive difficulty.[139] "[T]he frame of legal interpretation slips and slides in every direction" when attempting to unravel the meaning of the words.[140] What exactly are the meanings of "sexually suggestive," "sexual coyness," or "designed to elicit a sexual response in the viewer," when referencing, among other things, an image or scene in a movie?[141]

Within the vagueness of the factors, for example, a reasonable person may not find lascivious the scene in *Tristam Shandy: A Cock & Bull Story,* where six-year-old Tristram urinates out the window of an English country house, penis exposed.[142] The act simply may be natural. On the other hand, a reasonable person may determine that the depiction of Renato in *Malèna* is lascivious. Renato stands nude in a prostitute's bedroom—his genitals exposed, pubic area visible. The prostitute prepares him for his first sexual experience. This depiction in *Malèna* triggers at least half of the *Dost* factors. Yet, a reasonable person, based on the *Dost* factors, may interpret the scene in *Malèna* as plausible, discerning, and valuable, despite its explicitness, and at the same time interpret the depiction of Tristram as lascivious.

While law sometimes enjoys clarity and precision, interpretation of images of children can never be clear or precise because interpretation is not the same for everyone. Whether one is a filmmaker, a pedestrian, or a trier of fact, everyone interprets situations from a *sitz im leben*—situation in life. Cultural values, education, social awareness, political persuasion, and religious beliefs drive and complicate one's interpretation, regardless of whether public outcry develops over a sexually explicit depiction. The age-old legal question remains: who *is* the reasonable person?

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§ 2256 (2006)), *aff'd sub nom.*, United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).

138 *Id.*

139 HIGONNET, *supra* note 1, at 160-61.

140 *Id.* at 161.

141 *Dost*, 636 F. Supp. at 832.

142 TRISTRAM SHANDY: A COCK & BULL STORY (BBC Films 2005).

3. Additional Considerations

In addition to the *Dost* factors, should a reasonable person also consider the environment in which images using an actual child are produced (here, the brothel in *Malèna*), the experience of the child-actor (here, Giuseppe Sulfaro, who played 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 factors may be valid for interpreting whether 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, "[a]nother way to sell [to a parent] more than one position is to suggest a nude study, *if the child is well formed*."[143] Interpretation of mainstream motion pictures may thus require moving beyond isolated scenes and limited criteria to include analysis of a larger motion picture and its production from the work of writers, producers, directors, and actors. Such expanded analysis may curtail "the law [continuing] to threaten a vast array of innocent and valuable depictions of children."[144]

Interpretation complicates the overall analysis of childhood sexuality in motion pictures. Interpretation difficulties may allow some suspect depictions to go unnoticed, while other "innocent and valuable depictions" are lost to censorship. Could this be part of why *Malèna* has not raised an eyebrow?

VI. LAW APPLICATION

The confusing application of child pornography law to motion pictures flows from two very real issues: not all child nudity is the same, and "naturist" films will influence future child pornography law.

A. *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*.[145] Courts declare

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143 Edward Weston, *Photographing Children in the Studio*, 6 AM. PHOTOGRAPHY 2 (1912), *in* PETER C. BUNNELL, EDWARD WESTON ON PHOTOGRAPHY 4-5 (1983) (emphasis added).

144 Adler, *supra* note 105, at 927.

145 Miller v. California, 413 U.S. 15, 20-23 (1973).

material obscene only when it is completely worthless expression. *Ferber* excludes any notion of expression in child pornography using an actual child because of the underlying crime that produces it. This type of child pornography, under *Ferber*, has no social or artistic significance. Yet, a number of depictions of actual 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 Academy-award winning motion picture, *The Tin Drum*.[146] The German motion picture was already nearly nineteen years-old, and this was the first time it encountered a censorship challenge. The District Court for the Western District of Oklahoma found valid expression in several sexually suggestive scenes, including one in which the twelve-year old protagonist positions his face directly on the genitals of his nude female friend.[147] Additional scenes depicting the boy nude were also deemed valid expression. While seemingly suspect, were these images acceptable only because of Grass' notoriety and the "classic" nature of his book?

Other images of nude children, such as those photographs by Mann, Sturge, and Mapplethorpe, which were described previously, as well as images by Will McBride, also escape prosecution under child pornography law. Consider McBride's images of Uli Hager, whom McBride photographed as a young boy through adolescence.[148] 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 the *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 and artistically valuable depiction?

Although a court has not made such a determination, McBride's images, like those of the other artists, have escaped prosecution. Grand juries and courts have not reacted adversely to the content of McBride's images.[149] Many people may not be disturbed because the images seemingly contain the expressive value that *Ferber* rejected when actual children are used as subjects. The depictions of the children harken back to ancient Greek

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146 Oklahoma *ex rel.* Macy v. Blockbuster Videos, Inc., Civ. No. 97-1281-T, 1998 WL 1108158 (W.D. Okla. Oct. 20, 1998); THE TIN DRUM (Argos Films 1979).

147 According to the director, a "tissue" was placed over the woman's genital area.

148 WILL MCBRIDE, COMING OF AGE 40-41 (1999).

149 United States v. Various Articles of Merch., 230 F.3d 649, 651 (3d Cir. 2000); *see* Hager, *supra* note 118.

statuary and Renaissance paintings, and thus people may not be bothered by these depictions because they have been fascinated by similar content for centuries. Moreover, the photographers themselves enjoy wide acceptance by the art and museum communities,[150] and their images are widely published. Both of these factors add to the images' expressive "value." Yet, because the images can be determined to be lascivious, child pornography law can be triggered and the material found illegal.

Not all child nudity is the same. As society continues to recognize expressive value in depictions of childhood sexuality, the more acceptable such expression becomes. Courts will confront cases where they are asked to find valid expression in depictions of naked children with increasing frequency. Filmmakers of high regard will create motion pictures that push the limits of child pornography law. The possibilities may be endless, particularly when famous, open-minded filmmakers partner with equally famous writers. Imagine the highly creative, experimental filmmaker-director Michael Winterbottom,[151] making a third version of Nabokov's *Lolita,* in which fourteen-year-old Dolores Haze is both brazenly sexual and explicitly depicted.

Or, imagine legal motion pictures with nothing but relentless images of naked children frolicking about.

B. *The Influence of "Naturist" Film*

Naturists are dedicated to the nude lifestyle. While primarily located in Europe, where entire naturist towns exist,[152] some naturist groups reside in the United States.[153] Commercial groups publish various naturist magazines and "documentary" motion pictures, which present images of nude adults and children.[154] Some naturist motion pictures contain only images of nude children. *Andrey and Friends*,[155] one example of many, is a motion picture about four high school boys who range in age from fourteen to seventeen-years-old. The liner notes describe the "unrated" motion picture as: "A naturist day at the banya (Russian baths) is their chance to blow off steam and engage in teenage goofiness and camaraderie. Remember when you were fifteen and

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150 The Metropolitan Museum of Art in New York City, for example, owns several of Sturges' photographs.

151 Michael Winterbottom directed *9 Songs* (Revolution Films 2003), *Tristram Shandy: A Cock and Bull Story* (BBC Films 2005), and *The Road to Guantanamo* (FilmFour 2006), among others.

152 E.g., Cap d'Agde, France.

153 Places where Naturist communities exist include San Diego, CA; Lacanto, FL; Miami, FL; Pasco County, FL; Oshkosh, WI (where The Naturist Society is based).

154 *See, e.g.,* Azov Films, http://www.azovfilms.com/ (last visited Mar. 8, 2007).

155 ANDREY AND FRIENDS (Europa Sun 2004).

had so much energy you thought you would explode? Live it again with Andrey and his friends."[156]

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 that it purports to be, but one may infer a different purpose from the marketing materials included on the DVD jacket.[157] Many images of pre- and post-pubescent boys surround the distributor's California ordering address, and imply to the viewer that the distributor's "naturist" motion pictures focus on boys under eighteen.[158] Is the consumer simply watching this naturist documentary of nude boys to learn about naturism?[159]

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156 Azov Films, Andrey and Friends, http://www.azovfilms.com/proddetail.asp?prod=80204 (last visited Mar. 8, 2007).

157 *See id.* The description states "[t]here is NO sexual content in this film. This DVD is suitable for viewing by naturists and those interested in the naturist lifestyle."

The website contains extensive legal disclaimers regarding child pornography. Azov Films, http://www.azovfilms.com/legal.asp (last visited Mar. 8, 2007). In particular, the warnings regarding naturist and nudist movies include:

- We do not sell nor condone the sale of child pornography.
- Our Naturist/nudist films are of authentic naturism and are not obscene, lewd, sexually oriented, lascivious, or pornographic. They are not illegal to own, sell or distribute. Our naturist films are suitable for viewing by all family members.
- We have no pornography, obscene material, lewd material, lascivious exhibition of the genitals, prurient conduct, vulgarity, or close-ups of body parts.
- We do not encourage, support, or take responsibility for individuals or groups who have a pedophilic/voyeuristic interest in our products.
- We DO NOT advertise in newsgroups or SPAM email. We have NO association whatsoever with such groups or persons.
- We reserve the right to deny sale to anyone for any reason.
- 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.
- Be sure to check out www.nudistlaw.com for more information on nudists, nudist films and much more!
- We have attorneys and consultants routinely monitoring our website content and films to ensure we comply with all applicable laws.
- We always co-operate with police and other government officials for investigations regarding the films we sell. You may contact us for information regarding our attorneys.

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 are merely 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.

Id.

158 In addition to Azov Films, I.C. Movie Rentals, http://www.icmovierentals.net (last visited Mar. 8, 2007), a Las Vegas, Nevada-based website, sells "naturist" titles, such as *Andrey and Friends*.

159 Interest appears high for this material. The website selling these naturist materials

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.[160] 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."[161] The decision reversed a New Jersey district court that determined the depictions obscene.[162]

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.[163] In a more recent case, however, the Seventh Circuit *validated* two depictions of nude boys in the Australian Outback, based on "naturist" arguments.[164] 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 buttocks. Using the *Dost* factors, the court concluded, "neither appear[s] to depict sexual activity or sexuality," yet "the poses . . . seem designed to provoke a sexual response."[165] Future cases may further present such arguments, which, when well-crafted, may validate mainstream motion pictures with content similar to that in *Andrey and Friends*. Yet, how American 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.[166] A filmmaker submits his motion picture to CARA, where it is

reported 176,805 first time visitors in October 2006.

160 United States v. Various Articles of Merch., 230 F.3d 649 (3d Cir. 2000).

161 *Id.* at 656.

162 *Id.* at 651.

163 *See* United States v. Cross, 928 F.2d 1030, 1037 (11th Cir. 1991) (defendant argues that he had "never exchanged child pornography but only 'naturist photographs' of the kind found in 'nudist magazines'"); *see also* United States v. Duncan, 896 F.2d 271, 274 (7th Cir. 1990) (defendant argues 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").

164 United States v. Moore, 215 F.3d 681 (7th Cir. 2000).

165 *Id.* at 687.

166 *See supra* notes 48-49 and accompanying text.

reviewed and rated. The final rating determines the expansiveness of the motion picture's distribution. NC-17, for example, generally has a very restricted market, as many theaters and distributors will not present material rated for an adult-only audience. An R-rating, however, garners a much wider audience with distribution in those theaters that refuse NC-17 material.[167]

The rating board, therefore, exerts great influence over the success of motion pictures. Since most MPAA members are major studios that submit motion pictures for rating, distribution tends to be wide for studio products—many distributors and theaters deal only with material bearing the MPAA seal of approval. Independent and foreign filmmakers—whose material generally tests the limits of censorship—if presented at all to 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 a rating, independent and foreign filmmakers frequently choose another option: remain 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.[168] The decision created an alternative to the self-policing system: filmmakers are not required to submit motion pictures to the rating board. While *not* submitting may portend commercial disaster, many independent and foreign filmmakers decide to avoid ratings altogether.[169] Motion pictures

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167 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*, http://www.filmratings.com/about/content.htm (last visited Mar. 8, 2007).

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 ten on the list for a long time, was bumped off the top ten list by the 2006 movie, *Pirates of the Caribbean: Dead Man's Chest*. *See* IMDB, All-Time USA Box Office, http://www.imdb.com/boxoffice/alltimegross (last visited Mar. 8, 2007).

168 Joseph Burstyn v. Wilson, 343 U.S. 495, 503 (1952). This case held that the statute:

> [R]equires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned.

169 A number of movies have escaped censorship by circumventing the rating board. *See, e.g.,* IS-SLOTTET (Norsk Film A/S 1987) (twelve-year old girls nude including genitals); TOM AND LOLA (Caroline Productions 1990) (boy and girl nude throughout); ANGELA (Tree Farm Productions 1995) (six and ten year-old girls in several nude scenes and in a sexually suggestive scene with a boy); APT PUPIL (Apt Pupil Productions 1998) (the sixteen-year-old star appears nude; the one minute sequence is cut from the R version of the film, but remains in the uncut, unrated version); THE DEVILS (LES DIABLES) (Lazennec & Associés 2002) (full nudity of thirteen-year old boy and girl main characters, as well as fondling and kissing between them); I AM DINA (ApolloMedia 2002) (nudity of a girl); SONG FOR A RAGGY BOY (Fantastic Films 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).

not submitted to the rating board are simply labeled "not rated" or "unrated," and a great number of theaters and distributors will not carry the movie.[170] However, with the dramatic rise in art-house theaters, many unrated movies still find a broad audience.

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, hype surrounding the motion picture, and rated-film distribution and theater networks. Today, record DVD sales and expansive Internet availability allow an unrated motion picture to achieve unprecedented success.[171] The success of the DVD market is illustrated by the recent action of filmmaker Steven Soderbergh. Soderbergh broke a coveted movie-industry marketing-barrier by simultaneously releasing his motion picture, *Bubble*,[172] in theaters *and* on DVD—beginning the move to lessen the influence of major market distributors and theater owners.[173]

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.

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170 Wal-Mart carries motion pictures up to and including those that are 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.

Wal-Mart, Wal-Mart Facts, http://www.walmartfacts.com/keytopics/merchandising.aspx#a162 (last visited Mar. 8, 2007).

Chains such as Blockbuster Video and Hollywood Video refuse to carry NC-17 rated movies. *See* Reference.com, Motion Picture Association of America Film Rating System, http://www.reference.com/browse/wiki/MPAA_film_rating_system (last visited Mar. 8, 2007).

Moreover, "[m]ost major theaters will not accept a film rated NC-17 for showing . . . [and] many news[]papers and other media such as TV and radio stations will not advertise a film rated NC-17." MPAA Ratings, http://hometheaterinfo.com/mpaa.htm (last visited Mar. 8, 2007).

171 According to Plunkett Research, Ltd., an entertainment market research company, $24.9 billion was spent in the United States in 2005 on DVD and VHS purchases and rentals, a 30.3% increase over 2003 ($16.3 billion). Total United States box office revenues for 2005 were $8.99 billion. *See* PLUNKETT RESEARCH, LTD., ENTERTAINMENT & MEDIA STATISTICS, http://www.plunkettresearch.com/Industries/EntertainmentMedia/EntertainmentMediaStatistics/tabid/227/Default.aspx (last visited Mar. 8, 2007).

172 BUBBLE (HDNet Films 2005).

173 *See* Xeni Jardin, *Thinking Outside the Box Office*, WIRED (Dec. 2005), http://www.wired.com/wired/archive/13.12/soderbergh.html; *see also* John Borland, *Soderbergh Does a DVD-Theater Release Combo*, CNET NEWS.com (Jan. 12, 2006), http://news.com.com/Soderbergh+does+a+DVD-theater+release+combo/2100-1025_3-6026218.html.

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.

The issues surrounding visual interpretation, law application, and product accessibility allow motion pictures with suspect and illegal depictions of children to enter the marketplace unnoticed. And with every motion picture, free expression expands while the limits of child pornography law contract. But this should surprise no one. The marketplace is simply supplying society with what it demands.

VIII. CONCLUSION: A SATISFIED SOCIETY

Society remains enchanted with childhood sexuality. Arguably, the decision in *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."

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 white boxer briefs or girls clutching perfume bottles at the end of arms barely covering their bare breasts.[174] 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."[175] 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."[176] Calvin Klein, J. Crew, and Abercrombie & Fitch regularly use teenage boys and girls to sell their products.[177] In the past, both Abercrombie and J.

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174 *See* Matt Reed, *Designer Briefs on Kids?*, CINCINNATI ENQUIRER, Feb. 23, 1999, at C1; Lenore Skenazy, *Calvin's Not-So-Model Behavior*, N.Y. 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*, http://store.soliscompany.com/kpoco.html (last visited Mar. 8, 2007).

175 HIGONNET, *supra* note 1, at 144.

176 *Id.* at 9.

177 An interesting Ph.D. thesis on the subject of Calvin Klein's 1995 jeans campaign

Crew have produced clothing catalogues that sport the bodies of unclothed teens more than clothes. Until recently, Abercrombie *sold* its catalogue, rather than give it away, because the provocative photos of its teenage models were so successful that the images of the bodies became the commodity.[178] Indeed, some believe a child's portrayal in almost all of advertising is as the "overtly sexualized and commodified child."[179] According to scholar Anne Higonnet, "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."[180]

Consider the immensely popular visual entertainment of married women in Japan: graphic sexual interactions between child *bishoonen*—beautiful boys (the *shootakon* genre).[181] 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 are sold to adult males.[182]

Japan is not alone in its demand for the childhood sexuality depicted in cartoons. In the United States, Trey Parker and Matt Stone's animated television show, *South Park,* routinely portrays child characters in sexually explicit scenes.[183] In the first episode of the 2006 season, for example, adult-character "Chef" propositions pre-teen boys for sex.[184] Additionally, Matt Groening's animated television show *The Simpsons* routinely depicts provocative scenes of childhood sexuality.[185]

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featuring teenage models is Anne Cunningham, *Calvin Klein Unzipped: A Look at the Morality of Selling Teen Sexuality* (Dec. 10, 1996), *available at* http://list.msu.edu/cgi-bin/wa?A2=ind9612B&L=aejmc&P=R44055&D=0. *See also* Daniel Gross, *Abercrombie & Fitch's Blue Christmas: The Dirty Little Secret Behind the Racy Catalog: Lousy Sales*, SLATE, Dec. 8, 2003, http://www.slate.com/id/2092175 (detailing Abercrombie's past troubles with its catalog).

178 The Abercrobmie & Fitch catalogue is now free and much less provocative. Abercrombie & Fitch, Help—Catalog, http://www.abercrombie.com/anf/onlinestore/html/catalog.html (last visited Mar. 31, 2007).

179 Joann Conrad, *Lost Innocence and Sacrificial Delegate: The JonBenet Ramsey Murder*, CHILDHOOD 319 (1999).

180 HIGONNET, *supra* note 1, at 153.

181 *See* SHARON KINSELLA, *ADULT* MANGA: CULTURE AND POWER IN CONTEMPORARY JAPANESE SOCIETY (2000); *see also* Mark McLelland, *Local Meanings of Global Space: A Case Study of Women's "Boy Love" Websites in Japanese and English*, MOTS PLURIELS, Oct. 19, 2001, http://www.arts.uwa.edu.au/motspluriels/mp1901mcl.html.

182 SHARON KINSELLA, *ADULT* MANGA: CULTURE AND POWER IN CONTEMPORARY JAPANESE SOCIETY (2000).

183 *South Park* (Comedy Central Television Broadcast).

184 *See* James Bone, *South Park Has Last Word in Row over Scientology*, THE TIMES, Mar. 24, 2006, *available at* http://www.timesonline.co.uk/article/0,,11069-2100867,00.html.

185 *The Simpsons* (Fox Network television broadcast).

Citizens in the southern part of the United States are infatuated with child beauty pageants.[186] 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."[187] Infatuated with child beauty, parents are exhilarated when their provocatively posed six-year-old is proclaimed the reigning queen.

From these examples, one can understand why society, both through what it consumes and where it places its implicit and explicit interests, supports the sexualization of children, as it has *ab initio*. Accordingly, Congress and the judicial system work to craft and enforce laws that protect children from sexual exploitation, while contemplating the possibility that expressions of childhood sexuality may have value. Concomitantly, filmmakers respond with motion pictures that not only respond to and satisfy society's desires, but also may push the bounds of legitimate free expression.[188] As society and its desires evolve, motion pictures will reflect the points where free expression and the law controlling it, collude and collide.

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186 For a more detailed discussion of this topic, see Clay Calvert, *The Perplexing Problem of Child Modeling Web Sites: Quasi-Child Pornography and Calls for New Legislation*, 40 CAL. W. L. REV. 231 (2004).

187 HENRY A. GIROUX, STEALING INNOCENCE: CORPORATE CULTURE'S WAR ON CHILDREN 45 (2000).

188 *See, e.g.*, KEN PARK (Busy Bee Productions 2002); BIRTH (Argentina Home Video 2004); MYSTERIOUS SKIN (Desperate Pictures 2004); INNOCENCE (Ex Nihilo 2004); BABEL (Anonymous Content 2006); NOTES ON A SCANDAL (BBC Films 2006).