

1982

State of Utah v. Robert Jordan, Jr. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case Nos. 18235 & 18236
ROBERT JORDAN, JR., and :
TERRY FULLMER, :
Defendants-Appellants. :

BRIEF OF RESPONDENT

Appeal from Judgment of the Fourth Judicial District
Court in and for Utah County, the Honorable J. Robert Bullock,
Judge, presiding.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
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TERRY FULLMER, :
Defendants-Appellants. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellants were tried and found guilty of violating Utah Code Ann., § 76-10-1206.5 (1953), as amended, which provides:

- (1) A person is guilty of sexual exploitation of a minor who knowingly employs, uses, persuades, induces, entices or coerces any minor to pose in the nude for the purpose of sexual arousal of any person or for profit or to engage in any sexual or simulated sexual conduct for the purpose of photographing, filming, recording or displaying in any way the sexual or simulated sexual conduct.
- (2) Any person who photographs, films, or records, in any way minors in the nude for the purpose of sexual arousal of any person or for profit or engaged in any sexual or simulated sexual conduct is guilty of sexual exploitation of a minor.
- (3) Any person who displays, distributes, possesses for the purpose of distributing, or sells material depicting minors in the nude or engaging in sexual or simulated sexual conduct is guilty of sexual exploitation of minors.
- (4) It is not a defense to this section that the person who is charged with sexual exploitation of a minor is parent, legal guardian or other person exercising legal control of the child who was the subject of the exploitation.
- (5) A violation of this section is a felony of the second degree.

Under Utah Code Ann., § 76-10-1201(6) (1953), as amended, "nudity" is thus defined:

(6) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering, or the showing of a female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

"Sexual conduct" is defined in Utah Code Ann.,

§ 76-10-1201(7):

(7) "Sexual conduct" means acts of masturbation, sexual intercourse, or any touching of a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

From the guilty verdict, rendered in the Fourth Judicial District Court in and for Utah County, by Judge J. Robert Bullock, on December 14, 1981, the appellants appeal.

DISPOSITION IN THE LOWER COURT

The appellants were tried on December 9, 1981, in a bench trial before J. Robert Bullock, Judge of the Fourth Judicial District Court of Utah, in and for Utah County. The appellants were found guilty, and both were sentenced to the Utah State Prison for a period not to exceed five years and fined \$250.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the convictions.

STATEMENT OF FACTS

On November 3, 1981, Officer J. Stewart Winn of the Orem Police Department applied for a search warrant for 754 South 50 East, Orem, Utah, to search for snapshots indicative of the sexual exploitation of a minor. In the affidavit for the search warrant (Appendix "A"), Officer Winn stated that he had received information from a confidential informant that a quantity of nude photographs which pictured Holly Wilkerson, a minor, and Robert Jordan and Terry Fullmer "engaging in or simulating sex acts" (R. 4).¹ The search warrant issued by Judge Sumsion (Appendix "B") authorized the search during the daylight hours of the appellants' residence, "for the presence therein of child pornography and other evidence of sexual exploitation of a minor" (R. 6). The premises were searched on November 3, 1981 (R. 81), and various items were seized, including, according to the inventory of property taken from the residence (Appendix "C"), assorted instant photographs, unexposed 33-mm. film, flash cubes, a cloth sack, unexposed Polaroid film and a General Electric color television set (R. 5). Approximately 225 photographs were seized (R. 82), of which approximately 30 pictured Holly Wilkerson (see Exhibits 1-30).

On November 4, 1981, a criminal information was filed against the appellants (Appendix "D"), charging them with the violation of Utah Code Ann., § 76-10-1206.5 (1953), as amended,

¹References to the trial record will be designated as R. ____.

sexual exploitation of a minor:

. . . in that they, at the time and place aforesaid, knowingly and intentionally used, persuaded, induced or enticed Holly Wilkerson, a minor, to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording, or displaying sexual or simulating sexual conduct.

(R. 2).

On November 9, 1981, Jordan filed a Notice of Claim that the materials seized under the search warrant were not pornographic (R. 7). A hearing on whether the materials seized were pornographic was not held.

Appellants moved to suppress the evidence seized on the ground that the affidavit upon which the warrant was issued was defective in that it set forth hearsay allegations of a police informant, contained misrepresentations concerning the materials set out to be seized, and failed to comply with the requirements of Utah Code Ann., § 76-10-1212(1) (1953), as amended, in that no materials were attached to the affidavit. The motions further asserted that the requirements of Utah Code Ann., § 76-10-1212(3) (1953), as amended, were not followed in that the magistrate failed to hold a hearing within seven days of the Notice alleging the materials not to be pornographic, that in executing the warrant, the police officers exceeded the bounds of the warrant by seizing materials which were outside the scope of the warrant, and that the warrant did not specify with sufficient particularity the items to be seized (R. 15, 24-25).

A hearing to suppress evidence was held December 7, 1981, wherein the above arguments were made by appellants and were rejected by the court (R. 72-110).

On December 9, 1981, the appellants were tried without a jury by J. Robert Bullock. At trial, 30 of the photographs seized under the warrant were introduced into evidence over the appellants' objections (R. 128, Exhibits 1-30). The evidence indicated that the photographs were taken by Robert Jordan and were posed at his direction on approximately September 15, 1981 (R. 123-127).

Although conflicting evidence arose as to whether the appellants were aware that Holly Wilkerson was only 14 years of age at the time the photographs were taken (R. 134-136, 143-144), the trial court specifically found beyond a reasonable doubt that the defendants did know, primarily upon the testimony of Mrs. Wilkerson (Holly's mother), that both appellants knew that Holly Wilkerson was a minor at the time the photographs were taken (R. 49).

Despite the appellants' contentions that the court made no ruling on whether the photographs contained "simulated sex acts," and that no actual sex acts took place on the date the photographs were taken, the trial court found the appellants guilty of knowingly and intentionally using, persuading, inducing or enticing Holly Wilkerson to pose in the nude for the purpose of photographing, filming, recording, or displaying sexual or simulating sexual conduct, according to the charge in the information (R. 49).

The appellants were each sentenced to a term not to exceed five years at the Utah State Prison and to pay a fine of \$250.00.

ARGUMENT

POINT I

SINCE THERE ARE NO SPEECH OR EXPRESSION ACTIVITIES INVOLVED IN THE ACT OF SEXUAL EXPLOITATION OF A MINOR, A FIRST AMENDMENT ANALYSIS IS INAPPLICABLE IN THE INSTANT CASE.

Although the appellants have characterized this case as one in which First Amendment issues abound, the respondent submits that since there are no speech or expression issues involved in the act of sexual exploitation of a minor, the appellants have no standing to raise First Amendment arguments.

The recent United States Supreme Court case of New York v. Ferber, ____ U.S. ____, 31 Cr.L.R. 3139 (1982) (Appendix "E"), has lain to rest most of the issues raised by the appellants. Up until the time of the Ferber decision, the issue of what protection, if any, was to be afforded the production and distribution of "child pornography" had not been uniformly decided throughout the country. Many courts had treated the issues of production and distribution of child pornography within the context of the First Amendment. Others had seen issues of privacy, police protection of health, safety, and morals, or the power of the state to regulate minors. Indeed, some courts, including the court from which the Ferber case was appealed, found as controlling many issues raised by the appellants in this case. The confusion and lack of uniformity between the federal districts and among state courts was resolved by the landmark decision in Ferber, in which the United States Supreme Court specifically held that the distribution of child pornography was not protected under

the First Amendment and expressly recognized that the production of such was also unprotected.²

Ferber arose when the proprietor of a Manhattan, New York bookstore sold to an undercover police officer two films depicting young boys masturbating. He was indicted under the New York laws controlling the dissemination of child pornography and found guilty.

The New York statute provides:

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes, or induces a child less than 16 years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

A "sexual performance" is defined as:

Any performance or part thereof which includes sexual conduct by a child less than 16 years of age.

"Sexual conduct" is in turn defined as:

Actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

31 Cr.L.R. at 3140.

²Thus, the decisions cited as controlling by the appellants--Miller v. California, 413 U.S. 15 (1972), Ginsberg v. New York, 390 U.S. 629 (1968), Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968), Erznoznik v. City of Jacksonville, 402 U.S. 205 (1975), Stanley v. Georgia, 394 U.S. 557 (1969), People v. Ferber, 52 N.Y.2d 674, 439 N.Y.S.2d 863 (1981), Graham v. Hill, 444 F.Supp. 584 (W.D. Tex. 1978), People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391 (1965), St. Martin's Press, Inc. v. Carey, 440 F.Supp. 1196 (S.D.N.Y. 1977), Home Box Office, Inc. v. Wilkinson, Civil No. C 81-0331J (C.D. Utah 1982)--are rendered inapplicable to the extent that they contravene the holding in Ferber. Ferber, being dispositive of the child pornography issue, must control.

After a series of appeals, the decision of the latest of which is referred to as controlling by the appellants, the Court granted New York State's petition for certiorari to definitively decide the following question:

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

31 Cr.L.R. at 3141.

In upholding Ferber's conviction, the Court set out five specific reasons behind the holding that states are entitled to far greater leeway in the regulation of pornographic depictions of children than in the regulation of other materials. (These five reasons are set out in detail and analyzed within the context of this case in Point III of this brief.) In finding that child pornography is a special class of material, the distribution of which is not protected under traditional First Amendment rights, the Ferber court specifically rejected the test set out in Miller v. California, 413 U.S. 15 (1972), for determining whether a sexual depiction of a child is obscene.

While Ferber dealt specifically with the protections to be given distribution of child pornography, the case at bar involves the production of child pornography, which is at least one step removed from distribution. However, in Ferber, the Court recognized that the production of child pornography is "an activity illegal throughout the nation." 31 Cr.L.R. at 3143.

After noting that "the federal government and forty-seven states have sought to combat the problem with statutes specifically directed at the production of child pornography," (31 Cr.L.R. at 3140, citing specifically the Utah statute in question in the instant case--see fn. 1, Id., at 3140), the Court, quoting Gibboney v. Empire Storage and Ice Company, 336 U.S. 490 (1949), stated:

It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.

31 Cr.L.R. at 3143. The Court implicitly recognized the constitutionality of statutes which prohibit the production of child pornography. The Ferber court found that because the distribution of child pornography was an integral part of the production of child pornography, proscribed by law throughout the nation, "and the constitutionality of these laws have not been questioned" (31 Cr.L.R. at 3143), any First Amendment protections given the distribution of pornography would be outweighed by the State's interest in enforcing its constitutional laws. The Court found no First Amendment protection in the production of child pornography or sexual exploitation of children.

The valid legislative purpose in passing child pornography laws is the protection of children and youth from sexual exploitation and abuse. See 31 Cr.L.R. at 3142. This legislative purpose has been recognized by the appellant (see Appellants' Brief at page 5). The production of child

pornography is directly related to the sexual exploitation and abuse of children which the child pornography statutes, including Utah Code Ann., § 76-10-1206.5, are designed to proscribe. There are, however, no speech or expression activities involved in employing, using, persuading, inducing, enticing, or coercing a minor to pose in the nude for the purpose of sexual arousal or for profit, or to engage in sexual or simulated sexual conduct any more than there are speech or expression activities involved in rape, robbery, or murder. Thus, the appellants' assertions notwithstanding, in dealing with the production of child pornography, a First Amendment expression analysis is inapposite. Whether the material resulting from exploitation and/or abuse of a minor has value which would be otherwise protected under the First Amendment or not is a secondary consideration, if a consideration at all, to the State's interest in prohibiting exploitation and abuse of minors in the first place, for whatever reason. Thus, the cases cited by the appellants regarding the right of the public, even children, to view material protected under the decisions enunciated in Miller v. California; Ginsberg v. New York, 390 U.S. 629 (1968); Interstate Circuit, Inc., v. City of Dallas, 390 U.S. 676 (1968); and Erznoznik v. City of Jacksonville, 402 U.S. 205 (1975), are inapplicable. Those cases dealt with the invalidity of statutes designed to keep children from exposure to nudity, ideas, and other material which would, in the context of adult viewing, be entitled to First Amendment protections. Those cases did not deal with the exploitation and/or abuse of children in the production of child pornography.

In recognizing that the standard First Amendment Miller analysis is inadequate in treating the problem of the sexual abuse and exploitation of children through child pornography, the Ferber court stated:

The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political, or social value." Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem.

31 Cr.L.R. at 3143.

Nor are the cases of Tinker v. Des Moines School District, 393 U.S. 503 (1969); Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977); or Shanley v. Northeast Independent School District of Bexar County, Texas, 462 F.2d 960 (5th Cir. 1972), applicable to the case at hand. Those cases, which involved the expression of ideas through wearing armbands, publishing student newspapers, and distributing student newspapers, were directly related to First Amendment issues. In the instant case, there are no First Amendment issues. Here,

there is no expression of ideas through the photographs involved. First Amendment expression arguments are simply not applicable. This case, then, must be analyzed by the same standards as any other case in which free speech issues are not involved. Under those standards, the appellants' convictions must stand.

POINT II

EVEN WERE FREE SPEECH CONSIDERATIONS AT ISSUE IN THE INSTANT CASE, UTAH CODE ANN., § 76-10-1206.5, AS APPLIED AGAINST THE APPELLANTS, IS NOT AN OVERBROAD INFRINGEMENT ON THE RIGHT TO FREE SPEECH OR EXPRESSION, AND THE APPELLANTS SHOULD NOT BE ALLOWED TO RAISE THE OVERBREADTH ISSUE IN THEIR DEFENSE.

Even were there free speech issues in the instant case, the appellants have no standing to challenge Utah Code Ann., § 76-10-1206.5, either on its face on the basis of the possible application of the statute to third persons, or as applied to them.

In Points I and III of their brief, the appellants argue that the State's position appears to be that nudity in and of itself is a sufficient violation of the law to justify conviction. Further, the appellants argue that when the definition of nudity is read into Utah Code Ann., § 76-10-1206.5, the statute is rendered hopelessly overbroad. To illustrate their point, in fact, the appellants have attached to their brief a greeting card which, under their reading of the statute, involved "nudity for profit," and would thus be proscribed by law.

In this case, the appellants have no standing to raise a "parade of horrors." Under the information charging the appellants with sexual exploitation of a minor, no charge or mention of photographing a minor in the nude for profit was made. Rather, the information filed against the appellants narrowly states:

The undersigned Pete Hansen under oath states on information and belief that the defendants committed the crimes of:

sexual exploitation of a minor, a second-degree felony, at Utah County, Utah, on or about September 15, 1981, in violation of § 76-10-1206.5, Utah Criminal Code, as amended, in that they, at the time and place aforesaid, knowingly and intentionally used, persuaded, induced, or enticed Holly Wilkerson, a minor, to pose in the nude while simulating sexual conduct for the purpose of photographing, filming, recording, or displaying sexual or simulated sexual conduct.

(R. 2) (see Appendix "C").

Since Utah Code Ann., § 76-10-1206.5 is worded in the disjunctive, i.e.:

A person is guilty of sexual exploitation of a minor who knowingly employs, uses, persuades, induces, entices or coerces any minor to pose in the nude for the purpose of sexual arousal of any person or for profit or to engage in any sexual or simulated sexual conduct . . . ,

neither a recitation in the complaint nor a finding by the trial court of posing in the nude for profit was necessary. There was no problem in charging and finding the appellants guilty of sexual exploitation of a minor without any mention of nudity for profit. Thus, at this point in the proceedings, the appellants are

petitioning this Court for a Declaratory Judgment on a statutory interpretation which has not been applied to them. This petition should be ignored.

Because the appellants were not charged with photographing a minor in the nude for profit, the respondent submits that they have no standing to assert the defense of overbreadth of the statute based on a reading of "nudity for profit." See State v. Phillips, Utah, 540 P.2d 936 (1975):

Also important to be considered as pertaining to the problem in this case, is the principle that no one should be entitled to challenge a statute and have it declared void because it may unjustly affect someone else, but could properly do so only if his own rights are adversely affected.

Id. at 940. See also: Dileo v. Greenfield, 541 F.2d 949 (2d Cir. 1976). This, coupled with the fact that the appellants have never asserted that the statute was erroneously applied to them, should preclude the appellants from raising any possible "overbreadth" issues as they may affect third persons, under either the United States or Utah Constitutions.

The appellants assert standing to facially challenge Utah Code Ann., § 76-10-1206.5 (1953), as amended, now as it may affect third persons based on Doran v. Salem Inn, 422 U.S. 930 (1975), stating:

Appellants in this case, then, clearly have the right to challenge the statute in question, even if the acts alleged by the State in this particular instance could validly be prohibited.

See appellants' brief, page 7. Doran, however, is distinguishable both on its facts and in its holding, and is inapplicable in

determining the appellants' standing. In Doran, the plaintiff sought federal injunctive relief from the prospective application of a local ordinance banning topless dancing. Although the plaintiff asserted that he was threatened with possible prosecution under the statute, he had not, at the time he filed the injunction, in fact, had any charges filed against him. In Doran, the Court, after finding that the practical effect of injunctive relief and declaratory relief is identical, and stating:

Moreover, neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute,

422 U.S. at 931, found that because the plaintiff had met the requirements for the issuance of an injunction, i.e., a showing of prospective personal irreparable injury and a likelihood of success on the merits, the issuance of the injunction by the federal court was proper. The court, after stating that the case was "a close one," found that since the plaintiffs had shown that absent preliminary relief they would suffer substantial economic harm through the application of the statute, an injunction was proper, even though the statute could possibly have been constitutionally applied to the plaintiffs. The Court expressly intimated "no view as to the ultimate merits of respondent's contentions." 422 U.S. at 916.

In the instant case, the appellants are not seeking to prospectively enjoin, through federal process, the application of

a state statute which, in the future, may impact on them economically, as were the plaintiffs in Doran. Rather, the appellants here have been convicted and now seek, too late, to challenge on its face the statute which was constitutionally applied to them as it may be applied to third persons. This type of challenge, retrospective rather than prospective, challenging a conviction rather than applying for an injunction, and based on a possible application of a statute to third persons rather than the challengers, is not allowed under the Doran standards. In fact, the Doran court stated that even where an injunction had issued, state prosecutions could proceed against other potential defendants.

Here, then, the appellants are too late to challenge Utah Code Ann., § 76-10-1206.5 (1953), as amended, on its face under Doran. For the appellants to have had standing to make such a challenge under Doran, an application for injunctive relief, coupled with a showing of prospective irreparable harm through prosecution and a likelihood of success on the merits, must have been made. Having failed to follow these procedures specifically set out by the Supreme Court in Doran, the appellants cannot now twist the policies behind injunctive relief to apply retrospectively once a prosecution has proceeded and a conviction properly obtained. Under Doran, the appellants have no standing to challenge the statute.

The same policies which were controlling in Doran also preclude the appellants from challenging the statute at this

point on the basis of violation of the Utah State Constitution. While a challenge to the statute on that basis could have been brought under the Utah Uniform Declaratory Judgments Act, Utah Code Ann., § 78-33-1, et seq. (1953), as amended, upon a showing that the appellants' rights would be impaired by the contested legislation, this Court has indicated that such a challenge must be brought before an actual prosecution under the challenged statute has occurred. In Baird v. State, Utah, 574 P.2d 713 (1978), this Court stated:

A plaintiff may seek and obtain a declaration as to whether a statute is constitutional by averring in his pleading the grounds upon which he will be directly damaged in his person or property by its enforcement; by alleging facts indicating how he will be damaged by its enforcement; that defendant is enforcing such statute or has a duty or ability to enforce it; and the enforcement will impinge upon plaintiff's legal or constitutional rights. A complaint is insufficient which merely challenges the constitutionality of a statute, without in some way indicating that plaintiff will be affected by its operation or is subject to its terms and provisions.

Id. at 716.

Under Baird and Doran, the appellants are too late to petition for a declaratory judgment on the constitutionality of Utah Code Ann., § 76-10-1206.5 (1953), as amended. Had the appellants been as concerned about the possible unconstitutional application of the statute to them or third persons at the time when they could properly have challenged the statute under either the Federal or State constitutions as they profess to be now, they could and should have brought the necessary actions in opposition

to the prospective application of the statute. Their attempt to petition this Court now for a sweeping declaratory ruling on the statute's constitutionality is too little too late. At this point, the appellants are without standing to raise those issues.

Just as Doran and Baird prohibit the appellants from now raising a challenge based on prospective application of the statute to third persons, the recent case of New York v. Ferber, cited supra, leaves the appellants without standing to raise an "overbreadth" challenge as a defense after their convictions.

In Ferber, the United States Supreme Court dealt directly with whether, after conviction, a defendant could raise the defense of the "First Amendment overbreadth" of a child pornography statute as it may be applied to third persons. The Court recognized the traditional rule that a person to whom a statute may constitutionally be applied may not challenge that statute on grounds that it may conceivably be applied unconstitutionally to others in situations not before the Court. 31 Cr.L.R. at 3145 (see also: State v. Phillips, supra). While recognizing that what has come to be known as the "First Amendment overbreadth doctrine" is one of the few exceptions to this general principle and must be justified by "weighty countervailing policies," United States v. Raines, 362 U.S. 17 (1960), the Court stated that because the wide-reaching effects of striking a statute down on its face is "strong medicine" to be employed "only as a last resort," Broadrick v. Oklahoma, 413 U.S. 600 (1973), there must be a showing of "substantial overbreadth" before a statute will be invalidated. 31 Cr.L.R. at 3145.

In Broadrick, the Court found that where conduct as well as speech is involved, a greater showing of "substantial overbreadth" must be made than where "pure speech" is involved, stating:

. . . the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the state to sanction moves from "pure speech" toward conduct, and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interest in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect--at best a prediction--cannot, with confidence, justify invalidating a statute on its face and so prohibiting a state from enforcing the statute against conduct that is admittedly within its power to proscribe [citation omitted]. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

412 U.S. at 615.

The Court then held that the Oklahoma Hatch Act statute challenged in Broadrick, which prohibited classified service employees from soliciting, receiving, or in any way being concerned in soliciting or receiving any assessment or contribution for political organizations, candidacies, or other political purposes, as well as prohibition against an employee belonging to any national, state or local committee of a political party, was not "substantially overbroad" as it affected conduct as well as speech, stating:

It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured by case-by-case analysis of the fact situations to which its sanctions, assertively, may not be applied.

Id. at 615-616.

The Ferber Court, in finding that the New York child pornography law was not "substantially overbroad," recognized the principle enunciated in Broadrick and further stated:

The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel. On most occasions involving facial invalidation, the court has stressed the embracing sweep of the statute over protected expression. Indeed Justice Brennan observed in his dissenting opinion in Broadrick:

"We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine."
413 U.S. at 630.

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between a publisher or bookseller in doubt as to the reach of New York's child pornography law and the situation faced by the Oklahoma State Employees with respect to that state's restrictions on partisan political activity. Indeed, it could be reasonably argued that the bookseller, with an economic incentive to sell

materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity. Cf. Bates v. State Bar of Arizona, 433 U.S. 350, 380-381 (1977) (overbreadth analysis inapplicable to commercial speech).

31 Cr.L.R. at 3146. In the instant case, as was mentioned above, appellants' activities essentially amounted to conduct only. If any "speech" was involved, such speech deserves de minimus protection since it is coupled with conduct, and is thus, at most, within the "substantial overbreadth" standard enunciated in Broadrick and Ferber. While neither Broadrick nor Ferber gave a standardized test for determining "substantial overbreadth," it is worth noting that in both cases, the Court upheld the statutes in question. In finding the New York statute, § 263.15, constitutional, the Court stated:

. . . [W]e consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of materials specified in § 263.15.

31 Cr.L.R. at 3146. The Court expressed "serious doubt" that the arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach, and further stated:

[n]or will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition(s) of the genitals."

31 Cr.L.R. at 3146. Applying this logic to the instant case, this court should affirm the findings of the lower court that as applied to these appellants, the statute is not unconstitutionally overbroad, and that the arguably impermissible applications of the statute, exemplified by the "parade of horrors" referred to in the appellants' brief and exhibited in the appendix to their brief, do not amount to more than a tiny fraction of the materials within the statute's reach, or that the courts will widen the possibly invalid reach of the statute by giving an expansive and unconstitutional construction to the language of the statute.

Under the circumstances, Utah Code Ann., § 76-10-1206.5 (1953), as amended, is "not substantially overbroad and whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions assertively may not be applied." Broadrick, supra, at 615-616; Ferber, supra, 31 Cr.L.R. at 3146. Thus, even if the appellants could show that the activities of which they were convicted are entitled to First Amendment protections, because their actions involved conduct as well as speech, a showing of "substantial overbreadth" must be made. Since no "substantial overbreadth" has or can be shown by the appellants in their case, they are without standing to assert the "overbreadth" issue and should be precluded from raising the issue on appeal. See also: H. L. v. Matheson, ___ U.S. ___, 101 S.Ct. 1164 (1981), and Parker v. Levy, 417 U.S. 733 (1974).

POINT III

UNDER NEW YORK V. FERBER, UTAH CODE ANN.,
§ 76-10-1206.5 (1953), AS AMENDED, AS APPLIED
TO THESE APPELLANTS, IS NOT AN UNCONSTITU-
TIONAL INFRINGEMENT ON THE RIGHT OF FREE
SPEECH OR EXPRESSION.

As pointed out in Point I, the recent landmark decision
of New York v. Ferber, ____ U.S. ____, 31 Cr.L.R. 3139 (1982),
definitively resolved the issue of what protection the
dissemination of child pornography was to be given under the First
Amendment of the United States Constitution. Assuming, arguendo,
that the appellants had standing to raise the issues of free
speech and expression under the First Amendment, Ferber's holding
that no First Amendment protections extend to the distribution of
child pornography render the appellants' arguments without merit.

In Ferber, a 9-0 Court specifically found five grounds
for denying First Amendment protection to the distribution of
child pornography.

The Court first found that the State's interest in
"safeguarding the physical and psychological well being of a
minor" is "compelling." Globe Newspapers v. Superior Court,
____ U.S. ____, ____ (1982), cited at 31 Cr.L.R. at 3142. The
prevention of sexual exploitation and abuse of children
constitutes a government objective of surpassing importance. The
Court held:

The legislative judgment, as well as the judgment
found in the relevant literature, is that the use of
children as subjects of pornographic materials is
harmful to the physiological, emotional, and mental
health of the child. That judgment, we think,
easily passes muster under the First Amendment.

31 Cr.L.R. at 3142.

The Court's second reason for its holding was that the standard previously set out in Miller v. California, 413 U.S. 15 (1973), that in order to find a work pornographic, it must, taken as a whole, appeal to the prurient interest of the average person, "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." 31 Cr.L.R. at 3143. Thus, because the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children, it is irrelevant to the determination of the overriding issue of the protection of children whether the material has a literary, artistic, political, or social value, and "we therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem." 31 Cr.L.R. at 3143.

Third, the Court recognized that the production of child pornography is illegal throughout the nation, and that since the advertising and selling of child pornography provides an economic motive for that production, the First Amendment protections given the advertising are outweighed by the State's interest in protecting children. See Point I, supra.

The fourth reason for upholding Ferber's conviction was based upon the finding that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is "exceedingly modest, if not de minimus."

The Court stated:

We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or education work.

31 Cr.L.R. at 3143.

Fifth, the Court found that a recognition and classification of child pornography as a special category outside the protection of First Amendment protections is not incompatible with earlier decisions construing the First Amendment. In this regard, the Court stated:

. . . It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of a given classification, the evil to be restricted to overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

31 Cr.L.R. at 3144.

After setting forth these five criteria, the Court enunciated a new test governing child pornography cases, separate from the obscenity standard of Miller, stating:

The Miller formulation is adjusted in the following respects: a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

31 Cr.L.R. at 3144.

In the instant case, even assuming, arguendo, that the appellants' brief presented valid free speech issues to this Court, both the rationale and the holding of the Ferber case render the appellants' points without merit.

Here, the state's interest in protecting minors is at least as compelling as was that of New York in passing the legislation upheld in Ferber. In fact, the appellants recognize that the legislative purpose behind the Utah statute, as well as other state statutes dealing with child pornography, is "to prohibit the use of minors in pornographic photographs and films" (see appellants' brief, page 5). Such is a valid state purpose. Here, also, as in Ferber, analysis of the child pornography problem is not adequately handled under the Miller standard (see Point I of this brief). Since the purpose of the statute at issue here is to prohibit the abuse of children, the issue of the resulting work's literary, artistic, or social value is, if an issue at all, to be weighed in light of the statute's purpose.

As mentioned supra, this case involves the production rather than the distribution of child pornography. Even were production of child pornography to be seen as holding the same free speech protection of distribution, no First Amendment protection can be found for such activity since any free speech protections are outweighed by the State's interest in protecting children.

Here, as well, the value of producing child pornography through the sexual exploitation of a minor is "exceedingly modest, if not de minimus." It can hardly be argued that the photographs

entered into evidence in the appellants' trial constitute an important and necessary part of a literary performance or a scientific or educational work (see Exhibits 1-30).

Given these facts, coupled with the United States Supreme Court's determination that child pornography falls without the pale of First Amendment protection, it cannot be asserted that the trial court's finding of guilt deprived the appellants of free speech protection, either under the United States Constitution or under the Utah Constitution, Article I, § 15, which provides in pertinent part:

No law shall be passed to abridge or restrain the freedom of speech or of the press.

For the same reasons underlying the United States Supreme Court's decision in Ferber that child pornography is not protected under the First Amendment to the United States Constitution, this Court should find that the Utah Constitution, the provisions of which closely parallel those of the United States Constitution, does not include child pornography within its protective ambit.

The Supreme Court's adjustment in Ferber of the formulation of the Miller standard as regards child pornography renders the cases relied upon by the appellants--Roth v. United States, 344 U.S. 476 (1957); Miller, cited supra; and Home Box Office, Inc. v. Wilkinson, Civil No. C-81-0331J (D.C. Utah 1982) inapplicable in this case, even were this case to be seen as one involving free speech issues. Strict adherence to the requirements that materials appeal to the prurient interest, portray sexual conduct in a patently offensive manner, and as

a whole offend community standards is, under Ferber, not required. Those cases cited by the appellant which hold to the contrary are old law, and irrelevant within the context of this case.

Under Ferber, then, the First Amendment issues raised by the appellants are meritless, and the appellants' cause based on free speech issues should be rejected.

POINT IV

SINCE NEITHER THE RIGHT TO PRIVACY NOR FAMILY RIGHTS ARE INVOLVED IN THIS CASE, THE APPELLANTS SHOULD NOT BE ALLOWED TO CHALLENGE UTAH CODE ANN., § 76-10-1206.5 ON THOSE GROUNDS.

In Point II of their brief, the appellants have raised the defense of a right of privacy, citing Stanley v. Georgia, 394 U.S. 557 (1969), arguing that because "a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch," 394 U.S. at 565, the acts of the appellants constituting the production of child pornography are protected. Such an argument is patently illogical. In the instant case, there was no issue raised as to the appellants' right to read, watch, or observe sexually explicit materials, the central issue in Stanley. Here, as has been previously mentioned and has been recognized by the appellants, the purpose behind the child pornography statute in question goes beyond the acts of an adult in the privacy of his own home. It extends to the prohibition, within the state's police power, of the employment or use of a child to engage in activities from which the State has validly chosen to protect him. In view of this State goal, the

appellants' right of privacy, like First Amendment rights, if any be extant, must be weighed in the balance of competing policies and factors. See Ferber, supra, at 3134.

The appellants' attempt to assert the minor's right of privacy as a shield for the appellants (see appellants' brief, page 21) is misplaced in any case. While it may be true that a minor is protected, under a right of privacy, to view obscene materials, under the Stanley doctrine (although under Ginsberg v. New York, 390 U.S. 629 (1968), this is not clear), and are, as asserted by the appellants, entitled to limited guarantees of free speech, the minor's rights cannot be asserted by third parties charged with employing, using, or enticing that minor for criminal purposes.

It is ironic that the appellants, by whose conduct the minor's privacy was in a real sense violated, should rely on a defense of an unwarranted governmental intrusion into their privacy by prosecution under the child pornography statute. In essence the appellants are asserting a right of privacy to shield them in violating another person's privacy. Such an assertion is, at best, puzzling.

Equally baffling is the appellants' argument, raised for the first time on appeal, that Utah Code Ann., § 76-10-1206.5 interferes with the relationship of a parent to his child. As a general rule, this Court will not consider an issue for the first time on appeal. State v. Hales, Utah, No. 18083, decided July 7, 1982; State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972); State v. Starlight Club, 17 Utah 2d 174, 408 P.2d 912 (1965).

Even assuming, arguendo, that there were no problems with raising this issue for the first time on appeal, the appellants have no standing to raise the "family rights" argument. Here, neither of the appellants was related in any way to the minor, nor were they related legally to each other, despite the fact that they were apparently cohabitating (see appellants' brief, page 2). It is interesting to note that the minor's mother, who testified against the appellants, indicated that if the relationship between parent and child had in this case been interfered with, it had been done by the appellants (R. 143-146). For this reason, coupled with the fact that the appellants have no standing to raise the "family rights" issue as regards third persons for the reasons enunciated in the "overbreadth" and "vagueness" arguments above, the appellants' arguments regarding "family rights" are without merit and should not be countenanced.

POINT V

UTAH CODE ANN., § 76-10-1206.5 (1953), AS
AMENDED, IS NOT VOID FOR VAGUENESS.

In Point III of their brief, the appellants argue that since there is no statutory definition of "simulated sexual conduct," which is proscribed by statute and is charged in the information against the appellants, a defense that the statute is void for vagueness applies.

Under current standards, a law is not unconstitutionally vague unless it fails to give a person of ordinary intelligence reasonable opportunity to know what the statute proscribes.

Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

The courts have recognized that where commonsense understanding reveals the general nature of the conduct prohibited, the due process clause of the Fourteenth Amendment does not mandate complete certainty about the meaning of statutory terms. Thus, in a recent case, the Colorado Supreme Court held that:

Where fairness can be achieved by a commonsense reading of the statute, we will not adopt a hypertechnical construction to invalidate the provision.

People v. Garcia, Colo., 595 P.2d 228, 231 (1979). See also: State v. Randolph, Kan., 597 P.2d 672 (1979). In Boyce Motor Lines v. United States, 342 U.S. 337 (1952), the Supreme Court of the United States wrote:

. . .[F]ew words possess the precision of mathematical symbols. Most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

342 U.S. 337, 340.

This Court has also recognized the principle in State v. Packard, 122 Utah 369, 250 P.2d 561 (1952). The Court there

stated:

The limitations of language are such that neither absolute exactitude nor complete precision of meaning are to be expected, and such standard cannot be required.

250 P.2d 561, 564. Respondent submits that the phrase "simulated sexual conduct" is sufficiently precise to give a person of ordinary intelligence notice that the type of conduct in which appellants engaged is prohibited. The term "sexual conduct" is precisely defined in Utah Code Ann.,
§ 76-10-1201(7):

"Sexual conduct" means acts of masturbation, sexual intercourse, or any touching of a person's clothes or unclothed genitals, pubic area, buttocks, or, if the person is a female, breast, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent or actual sexual stimulation or gratification.

Contrary to the appellants' assertion, the definition entails acts that can be performed by one person. In fact, it can hardly be envisioned that a person of ordinary, common intelligence would not, based upon the definition of "sexual conduct" and the explicit prohibitions of Utah Code Ann., § 76-10-1206.5 (1953), as amended, be able to discern what type of activity is statutorily proscribed, simply because a precise definition of "simulated" is not given in the statute.

The respondent submits that in the absence of a statutory definition, the word "simulated" should be given its dictionary meaning. For example, Webster's New Collegiate Dictionary (1973), gives as the definition of "simulate":

To copy, represent, feign,
1: to assume the outward qualities or appearance
of, usu. with the intent to deceive.

It should be pointed out that since the term "simulate" is not a legal term, reference to standard works of common usage, such as the dictionary, is appropriate. This common definition of "simulate" is a far cry from the appellants' seemingly intentional twisting of the definition to mean "almost." It strains the imagination to believe that the appellants were so ignorant of the common usage of common phrases proscribing their behavior that they did not know it was illegal.

In dealing with a similar challenge to statutory language the United States Supreme Court, in Broadrick v. Oklahoma, 413 U.S. 600 (1973), discussed supra, found that Oklahoma's Hatch Act, which did not include definitions of the terms "direct or indirect contribution," was not void for vagueness. The court recognized that the appellants in that case had conceded that the state's purpose in enacting the act was proper, but contended that:

. . . [i]ts language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be proscribed and conduct that must be permitted. . . .

413 U.S. at 608. The Court responded by saying that:

We have little doubt that § 818 is . . . not so vague that "men of common intelligence must necessarily guess at its meaning" . . . [cites omitted] . . . Whatever other problems there are with § 818, it is all but frivolous to suggest that

the section fails to give adequate warning of what activities it proscribes or fails to set out "explicit standards" for those who must apply it . . . In the plainest language it prohibits any state classified employee from being "an officer or member" of a partisan political club" or a candidate for "any paid public office." It forbids solicitation of contributions "for any political organization, candidacy or other political organization, candidacy or other political purpose" and taking part "in the management or affairs of any political party or in any political campaign." Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in § 818 as "partisan," or "take part in," or "affairs of" political parties. But what was said in Letter Carriers, *supra*, 413 U.S., at 578-579, 93 S.Ct., at 3897, is applicable here: "There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

Id. at 607-608 (Emphasis in original).

The instant matter is very similar to that presented to the Court in Broadrick. Here, as has been previously pointed out, the appellants recognize the valid state purpose behind the statutory prohibition of sexual exploitation of a minor. Here, as in Broadrick, the fact that words of common everyday use are not statutorily defined is used as a subterfuge to avoid punishment under the statute. It cannot be asserted, however, based on the evidence and the exhibits in this case, that the appellants could not sufficiently understand the statute and comply with its requirements because of a misunderstanding of the word "simulated." See Salt Lake City v. Piepenburg, Utah, 571 P.2d 1299 (1977). In fact, although the appellants were not charged

with using Holly Wilkerson to engage in "actual," rather than "simulated," sexual conduct, it appears from the exhibits in this case that such a charge could have been properly made.

It is interesting to note that the appellants apparently accept the federal statute, 18 U.S.C. § 2252 as sufficiently specific (see appellants' brief, page 14), although that statute defines "sexually explicit conduct" as "actual or simulated" acts, without a statutory definition of "simulated." The constitutionality of 18 U.S.C. § 2251 also seems to have been impliedly accepted by the United States Supreme Court in Ferber. See 31 Cr.L.R. at 3143, fn. 15.

Because the appellants' activities clearly fall within the "hard core of the statute's proscriptions," Broadrick, supra, at 609, the appellants are without standing to challenge the statute on the basis of vagueness. See Parker v. Levy, 417 U.S. 733, 756:

[O]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

Thus, the appellants' resurrection of a "parade of horrors" for the second time in their brief, in the context of a distorted hypothesis of the meaning of the word "simulated," proposed by the appellants to mean "almost," should not be seen as raising any valid issues. The exhibits in this case indicate that the appellants were not concerned with how closely or far apart from the victim's nude body they could get before "almost touching," as their brief would indicate. Such arcane semantical distinctions

are simply not at issue in this case, in which a finding of use of the victim to simulate sexual conduct was justified and appropriate. If, as the appellants assert, there is an "apparent difficulty in using a 'common sense' approach to the meaning" of the word "simulated," such a difficulty appears to be found only with the appellants (see appellants' brief, page 27). Common sense would indicate to the ordinary person that the appellants' actions were illegal. The appellants' actions being within the "hard core of the statute's proscriptions" precludes the appellants from having standing to raise "vagueness" as a defense.

In asserting, without follow-up, that the state's position in this case appears to be that nudity without more is a sufficient violation of the law to justify conviction, the appellants unnecessarily obscure the "vagueness" issue, confusing it with that of "overbreadth," treated supra. As has been previously pointed out, the appellants were not charged solely with using the victim to pose in the nude, nor were the appellants' convictions based on such a finding. The appellants' attempt to raise the "nudity without more" issue under the rubrik of vagueness is illogical and unwarranted. Since the appellants were neither charged nor convicted under such a standard, they have no standing to raise it under any theory. See State v. Phillips, supra.

If the appellants' point in raising the "nudity" issue is to show statutory vagueness in the definition of "nudity," although that is by no means clear in their argument, it should be

pointed out that "nudity" is specifically defined statutorily in Utah Code Ann., § 76-10-1201(6):

"Nudity" means the showing of the human male or female genitals, pubic area, or buttocks, with less than an opaque covering, or the showing of a female breast with less than an opaque covering, or any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

The appellants neither have nor can assert, based on either a statutory or "common sense" definition, that at the time of the crime they did not know their conduct was illegal because they could not understand the meaning of the word "nudity." The definition is not vague.

POINT VI

THERE WAS NO DEFECT IN THE ISSUANCE OF THE SEARCH WARRANT.

In Point IV of their brief, the appellants raise two issues regarding the adequacy of the affidavit upon which the search warrant was issued. First, the appellants assert that because Officer Stewart Winn of the Orem Police Department, the affiant, did not personally view the materials to be seized under the warrant, but relied upon information from a confidential informant, the warrant was fatally defective. Second, the appellants state that there was a lack of sufficient specificity in the affidavit to allow the magistrate to "searchingly focus" on the First Amendment issue of obscenity as required under Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1969), Utah Code Ann., § 76-10-1212(1), and State v. Piepenburg, Utah, 602 P.2d 702 (1979).

It should be noted at the outset that both of the appellants' arguments were presented to the court below at a suppression hearing, and were found to be without merit (R. 85-92). The finding of the trial court should be considered by this Court in a light most favorable to the State. State v. McCardell, Utah Supreme Court Case No. 17718 (decided August 27, 1982).

Under the standards set forth in the United States Supreme Court cases of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 394 U.S. 410 (1969), there is no requirement that an affiant personally view the material to be seized where information relied on comes from a confidential informant. Under the Aguilar-Spinelli test, where information from an informant is relied upon in the issuance of a warrant, the warrant is valid if the information received from the informant can be shown to be reliable. This is done by the satisfaction of what has been characterized as a "two-prong test." Under the first prong, it must be shown that the informant had a "basis of knowledge" for the information given the affiant. The second requirement of Aguilar-Spinelli is that underlying facts be given the magistrate from which he could conclude that the informant himself was reliable. This has been characterized as the "veracity" prong of Aguilar-Spinelli. See Spinelli v. United States, 393 U.S. at 416, and LaFave, Search and Seizure: A Treatise on the Fourth Amendment (1978), § 3.3, Information from an Informant. In the present case, both prongs of the Aguilar-Spinelli test were fully satisfied. There has never been

a constitutional requirement that the affiant actually see the materials to be seized, regardless of the appellants' assertions to the contrary. Rather, as in Spinelli, an officer-affiant is justified in relying upon the representations made by an informant where the informant's reliability can be shown. See State v. Treadway, 28 Utah 2d 160, 499 P.2d 846 (1972). In fact, the "basis of knowledge" prong of Spinelli may be satisfied by relating credible hearsay which indicates that the confidential informant has observed firsthand or has reason to believe, based again on credible hearsay, the facts to which he has attested to the affiant. Spinelli v. United States, 393 U.S. at 425 (concurring opinion by White, J.). See also: United States v. Freeman, 532 F.2d 1098, 1100 (7th Cir. 1976), and State v. Yaw, Hawaii, 572 P.2d 856 (1977).

Despite the appellants' argument that the information in the affidavit is insufficiently detailed and is based solely on conclusory assertions, the evidence indicates that the information contained in the affidavit was sufficiently detailed and indicative of the informant's "basis of knowledge" as to have justified the issuance of the warrant. The affidavit specifically stated:

Confidential informant "Gorgo" visited Robert Jordan at 754 South 50 East, Orem, Utah County, Utah, on November 1, 1981. Terry Fullmer offered to sell "Gorgo" some stolen unexposed film. "Gorgo" asked what they used the film for. They then showed him a stack of approximately 50 Polaroid snapshots. They all showed Holly Wilkerson, Terry Fullmer, and Robert Jordan engaging in, or simulating sex acts. "Gorgo" describes Holly as approximately 15 years

old, tall and redheaded. That matches the physical description of the runaway Holly Wilkerson. "Gorgo" was told that they intend to sell the photographs to "Penthouse Magazine."

(R. 4). The fact that the informant had personally seen the Polaroid snapshots, had described a victim as "approximately 15 years old, tall, and redheaded," which description matched that of the victim, Holly Wilkerson, and set out in detail the circumstances under which he became aware of the information which was relayed in the affidavit indicates a sufficient "basis of knowledge" on the informant's part to indicate the reliability of the information given.

The "veracity" prong of the Aguilar-Spinelli test was satisfied in the officer-affiant's recitation that the informant "has proven reliable in the past assisting this department in numerous narcotic operations now pending prosecution" (R. 4). Under Spinelli, this description is sufficiently detailed, going beyond a mere conclusory allegation that the informant is "reliable." See also: McCray v. Illinois, 386 U.S. 300 (1967); United States v. Freeman, supra. In the instant case, then, the informant's "basis of knowledge" and "veracity" were shown in the affidavit, satisfying both prongs of the Aguilar-Spinelli test.

The appellants' second argument, that the affidavit was insufficiently detailed to allow the magistrate to "searchingly focus" on the issue of obscenity to establish probable cause for issuance of the warrant, as required by State v. Piepenburg, cited supra, is also meritless.

Notwithstanding the appellants' attempt to assert the claim that this case deals with First Amendment issues, it should once again be pointed out that the central issue in this case is the abuse and exploitation of children through use of minors to pose in the nude for the sexual arousal of any person (see Point I of this brief; New York v. Ferber, supra). Thus, Piepenburg's arguably more stringent standards for issuance of a warrant where First Amendment issues are present are inapplicable. In this case, as in any case where First Amendment issues are not present, the standard for the establishment of probable cause is a requirement of sufficient information to indicate that criminal activity has occurred and that evidence of that criminal activity will be found at the place to be searched. Brinegar v. United States, 338 U.S. 160 (1949); Camara v. Municipal Court, 387 U.S. 523 (1967); Terry v. Ohio, 392 U.S. 1 (1968). Under that standard, the affidavit underlying the search warrant was sufficient. Here, the detailed affidavit gave information from which a reasonable magistrate could conclude that sexual exploitation of a minor had occurred, and that evidence of such would be found at the appellants' residence. Under the accepted Fourth Amendment standards for issuance of a search warrant, there was no defect in the issuance of the warrant.

Alternatively, even if this case were analyzed within the context of a First Amendment free speech case, the affidavit here was sufficiently detailed to pass muster under Lee Art Theatre, Inc. v. Virginia, supra, Utah Code Ann., § 76-10-1212(1) (1953), as amended, and State v. Piepenburg, supra.

The appellants' reliance on Lee Art Theatre, Inc. v. Virginia, supra, is misplaced. There the United States Supreme Court found insufficient the procedure followed by a justice of the peace which allowed a search warrant to issue upon a police officer's affidavit which stated the conclusory allegations that a film sought to be seized was "obscene." The court found this procedure did not allow the magistrate to "focus searchingly on the question of obscenity," a standard the Court had previously set out in Marcus v. Search Warrants of Property at 104 East Tenth St., 367 U.S. 717 (1961). If the requirements of Utah Code Ann., § 76-10-1212(1) (1953), as amended, are complied with, a challenge under Lee Art Theatre cannot stand, the procedure found objectionable by the United States Supreme Court being fully avoided. In the instant case, the requirements of Utah Code Ann., § 76-10-1212(1) (1953), as amended, were fully met. That Section provides:

(1) An affidavit for search warrant shall be filed with the Magistrate describing with specificity the material sought to be seized. Where practical, the material alleged to be pornographic shall be attached to the affidavit for search warrant so as to afford the Magistrate the opportunity to examine this material.

The appellants correctly cite the holding of Piepenburg, supra, that where the affiant's affidavit is sufficiently detailed it is not necessary that the magistrate personally view the material to be seized. Rather, the court stated that where the affidavit gives sufficient information to allow the magistrate to searchingly focus on the issue of obscenity, the issuance of the

warrant will be upheld. The respondent submits that the affidavit in the instant case met the standard set forth in Piepenburg and Lee Art Theatre. The Piepenburg court, in adopting the standard that required that the magistrate be able to "focus searchingly on the question of obscenity," specifically referred to the Oklahoma case of State v. Conaughty, Okl. Cr., 561 P.2d 554 (1977), in which that Court of Criminal Appeals held that an affidavit which specified that a film viewed by the affiant was a "lewd and obscene film" was insufficient. The Oklahoma court held that:

A magistrate may find probable cause to issue a warrant when an affiant views a film and in his affidavit or attendant testimony he factually describes the film in detail [citations omitted]. The affidavit must simply allow the magistrate an opportunity to "focus searchingly on the question of obscenity" [citations omitted].

561 P.2d at 555 (emphasis added).

Sufficient detail is found in the affidavit at issue in this case. Here the affiant relates information from the informant that is both factual and detailed, i.e., that the approximately 50 Polaroid snapshots shown him by the appellants "showed Holly Wilkerson, Terry Fullmer, and Robert Jordan engaging in, or simulating, sex acts" (R. 4). The affidavit goes on to describe Holly Wilkerson's physical appearance, "approximately 15 years old, tall and redheaded." The description and detail are far from an objectionable, conclusory statement that the photos were "obscene," such as that in Conaughty.

For all the legal standards set forth in the cases regarding sufficient detail to withstand a challenge to the

probable cause underlying the issuance of an affidavit, the finding of sufficiency in this case is basically one of fact, one that was resolved in the State's favor in the court below. The detail given in the affidavit from Officer Winn indicates that even if this case were viewed as coming within the context of the First Amendment, which it does not, such a finding was justified.

POINT VII

THE SEARCH WARRANT ADEQUATELY DESCRIBED THE ITEMS TO BE SEIZED.

In Point V of their brief, the appellants assert two arguments. First, because the warrant itself was not sufficiently specific in its description of the items to be seized, the evidence taken under the warrant should have been suppressed. Second, because unexposed film, a cloth sack and a television set were seized, the broad execution of the warrant somehow rendered the warrant's issuance invalid.

The affidavit underlying the search warrant, which gave the magistrate sufficient probable cause to issue the warrant (See Point VI, supra), indicated that the affiant was aware that his confidential informant, "Gorgo," had been shown a stack of approximately 50 Polaroid snapshots depicting Holly Wilkerson, Terry Fullmer, and Robert Jordan engaging in or simulating sex acts (R. 4, See Appendix "A"). Based upon this probable cause finding by the magistrate, a search warrant was issued which directed an immediate search of appellants' residence:

For the presence therein of child pornography, and other evidence of sexual exploitation of a minor.

(R. 6, See Appendix "B"). The search was carried out on November 3, 1981, the same day the warrant was issued (R. 81, 6), and several items of property were taken from the appellants' residence. The inventory of property lists the following:

1. Assorted instant photographs,
2. Unexposed 35-MM film,
3. Flash Cubes,
4. Cloth Sack,
5. Unexposed Polaroid Film,
6. General Electric Color Television Set.

(R. 5, Appendix "C").

The appellants first argue that because the magistrate authorized the seizure of "child pornography and other evidence of sexual exploitation of a minor," without a specific definition of "child pornography," this case is brought within the ruling of Marcus v. Search Warrants, Property at 104 East Tenth Street, Kansas City, Missouri, 367 U.S. 717 (1961). In so arguing, the appellants once again muddy the issues by implying that First Amendment issues of "obscenity" and "pornography," free speech and free expression are involved. Such is simply not the case (See Point I, supra).

The magistrate's unfortunate use of the term "child pornography," which is understandable in light of the pre-Ferber interpretations of sexual exploitation statutes (See Point I, supra), may, at first blush, be seen as invoking judgments by the police that would have First Amendment implications. Even though

the magistrate's use of the term "child pornography" was included within and considered by the magistrate to be a part of the larger concept of "sexual exploitation of a minor," resort to First Amendment considerations is still inappropriate. The magistrate's direction to search "for the presence of child pornography, and other evidence of sexual exploitation of a minor" plainly indicates the magistrate's intention that the search was to be conducted primarily for any evidence of sexual exploitation of a minor, regardless of whether such evidence was legally obscene or not. This direction is permissible and sufficient.

Evidence of sexual exploitation of a minor may or may not be considered legally obscene (See Point VIII of this brief). Thus, where the police are directed to search for evidence of sexual exploitation of a minor, as in the instant case, the officers' focus in carrying out the search is not in determining whether evidence of sexual exploitation is obscene, which determination is arguably proscribed under Marcus, supra, but rather is whether such evidence is relevant to the determination of whether the crime alleged has been committed. The constitutional safeguards which due process demands in an obscenity case, which assure that non-obscene material is not kept from distribution, would be erroneously applied where they are invoked solely to keep relevant non-obscene evidence from seizure where obscenity is not at issue. Nor is Lo-Ji Sales, Inc., v. New York, 442 U.S. 319 (1979), cited by the appellants, controlling. Not only did that case deal with First Amendment issues, but the

holding was based on the insufficiency of the underlying affidavit for the search warrant, as well as the sufficiency of an "open-ended" search warrant which was to be completed only after the magistrate himself helped to carry out the search. In the instant case, none of the objectionable factors in Lo-Ji Sales is present here. Here, the affidavit underlying the warrant was sufficient (See Point VI, supra), the warrant was not open-ended or to be completed by the issuing magistrate, nor did the magistrate help to carry out the search authorized by the warrant. The appellants' reliance on the language of the case is misplaced in light of the fact that none of the factors leading to the United States Supreme Court's decision in that case is present here.

Where there is no issue of First Amendment protections for obscenity, or free speech, but rather where child abuse is at issue, the fact that the executing officers were authorized to determine whether evidence seized was evidence of child abuse, was not objectionable. The search warrant was sufficiently specific under Fourth Amendment requirements.

In determining whether the objects of a search were adequately described in a search warrant, the test is one of reasonableness, and elaborate specificity is not required. United States v. Ventresca, 380 U.S. 102 (1965); United States v. Freeman, 532 F.2d 1098, 1100 (7th Cir. 1976). The degree of specificity required when describing goods to be seized may necessarily vary according to the circumstances and type of items involved. United States v. Davis, 542 F.2d 743 (8th Cir. 1976),

cert. denied, 429 U.S. 1004 (1976). Courts have upheld as sufficiently specific search warrants which authorize the seizure of "paraphernalia for making coins," United States v. Wilson, 451 F.2d 209 (5th Cir. 1971), cert. denied; Fairman v. United States, 405 U.S. 1032 (1971), "cooking utensils," State v. Walker, 202 Kan. 475, 449 P.2d 515 (1969), "various instruments and tools used in performing an abortion," State v. Brown, Kan., 470 P.2d 815 (1970), "narcotics, dangerous drugs, and narcotic paraphernalia," People v. Henry, Colo., 482 P.2d 357 (1971), and "any item in five separate places relating to the death of an unknown individual whose body had been found at described location," State v. Ferrari, 80 N.M. 714, 460 P.2d 244 (1969).

Where, as here, the crime suspected involves child abuse, it has been held that the specificity requirements of a search warrant, while they must comport with Fourth Amendment standards, are somewhat less stringent than where other considerations are involved. In State v. Massey, Ore. App., 594 P.2d 1274 (1979), the court upheld a search warrant which authorized a search "for evidence of the crimes of child abuse and/or failure to send and maintain child at school." The court stated:

Here, there was a strong probability that a crime involving danger to human life was underway and that imminent action to prevent harm to human life was warranted. The means of committing that harm, however, could not be known in advance of the search. In such a case, a general description with a limitation is a reasonable way to proceed. See State v. Tidymen, 30 Ore. App. 537, 568 P.2d 666 review denied (1977). The description in this warrant, although broad, was sufficient to direct the officers to search for the child and to limit

their search to places and items relating to the child. The search for the child did not exceed that purpose or that limitation. We do not recommend the wrrant as a model of description but we hold it to be constitutionally sufficient.

Id. at 1276.

In the instant case, while the affidavit underlying the search warrant did not indicate that a crime involving danger to human life was under way, there was sufficient indication that a crime involving danger to a minor's psychological well being, a state interest which the Ferber court found to be as compelling as the physical well being of a minor, 31 Cr.L.R. at 3142, was underway. Thus, using the Massey standards, the nature of the crime itself rendered the warrant's specificity sufficient. Certainly a warrant which authorizes the seizure of "child pornography, and other evidence of sexual exploitation of a minor" is as specific as that warrant in Massey which authorized a search "for evidence of the crimes of child abuse, and/or failure to send and maintain child at school." Given the circumstances of this case, the trial court's determination that the search warrant was sufficiently specific was not error.

The appellants' second argument, that the broad execution of the warrant rendered the warrant's issuance invalid, constitutes "bootstrapping" and is without merit. Despite the appellants' assertion that:

it is difficult to imagine what relevance unexposed film, a cloth sack and a television set would have to do with child pornography or evidence of sexual exploitation of a minor,

and that "the seizure of 265 photographs, the majority of which do not picture the minor at all, would appear to exceed even the broad discretion set forth in the warrant" (see appellants' brief, page 32), there are several theories under which the police could validly seize those items, none of which would render the warrant's issuance invalid. It is probable that in seizing the unexposed Polaroid film, the 35-mm film, the cloth sack and the television set, the police were validly exercising their discretion within the "plain view" doctrine. See Coolidge v. New Hampshire, 403 U.S. 443 (1971); Harris v. United States, 390 U.S. 234 (1968); Recznik v. Lorraine, 393 U.S. 166 (1968). It is possible that the police seized the items as "mere evidence" of the crime. See Warden v. Hayden, 387 U.S. 294 (1967), and Andresen v. Maryland, 427 U.S. 463 (1976). In either case, seizure of the evidence would not mandate its suppression nor render a sufficiently specific warrant invalid. In the instant case, however, regardless of the theory under which the items were seized, the appellants have no grounds for complaint since none of the items seized, with the exception of 30 photographs, was introduced into evidence.

The appellants' argument that the broad execution of a warrant renders the warrant's issuance invalid is not supported by case law. In fact, the appellants' implied argument that they were somehow harmed in their trial by the seizure of evidence which was never introduced against them falls of its own weight.

An argument that the broad execution of the warrant is indicative that the warrant itself was not sufficiently particular

must also fail here. While the rule in determining a warrant's specificity is that the warrant's validity must be determined without reference to actions taken under the warrant, it should be pointed out that even if references to a warrant's execution were permitted in determining the validity of the warrant's issuance, the appellants in this case have conceded that the execution of the warrant, through seizure of 265 photographs, appears to exceed the discretion set forth in the warrant (See appellants' brief, p. 32). Here, then, even were reference to a warrant's execution allowed in determining the validity of a warrant's issuance, the appellants have indicated that in the instant case such reference is inappropriate.

Here, the search warrant was sufficiently specific to pass muster under the constitutional requirements for search warrants. The trial court's ruling to that effect was not error.

POINT VIII

SINCE UTAH CODE ANN., § 76-10-1212(3) IS NOT APPLICABLE TO THE INSTANT CASE, THERE WAS NO ERROR BY THE TRIAL COURT IN NOT CARRYING OUT ITS REQUIREMENTS.

The appellants argue, in Point VI of their brief, that error arose in the trial court's noncompliance with the provisions of Utah Code Ann., § 76-10-1212(3), which provides:

(3) In the event that a search warrant is issued and material alleged to be pornographic is seized under the provisions of this section, any person claiming to be in possession of this material or claiming ownership of it at the time of its seizure may file a notice in writing with the magistrate within 10

days after the date of the seizure, alleging that the material is not pornographic. The magistrate shall set a hearing within seven days after the filing of this notice, or at such other time as the claimant might agree. At this hearing evidence may be presented as to whether there is probable cause to believe the material seized is pornographic, and at the conclusion of the hearing the magistrate shall make a further determination of whether probable cause exists to believe that the material is pornographic. A decision as to whether there is probable cause to believe the seized material is pornographic shall be rendered by the court within two days after the conclusion of the hearing. If at the hearing the magistrate finds that no probable cause exists to believe that the material is pornographic, then the material shall be returned to the person or persons from whom it was seized. If the material seized is a film, and the claimant demonstrates that no other copy of the film is available to him, the court shall allow the film to be copied at the claimant's expense pending the hearing.

Notice of Claim that the Material Seized is Not Pornographic on November 9, 1981 (R. 7), six days after the search of his residence was carried out. Other than the trial, no hearing to decide whether the material was in fact pornographic was held. It is respondent's position that because First Amendment issues of obscenity and pornography are not applicable in determining the appellants' guilt, compliance with the statute cited above to determine whether the material seized was pornographic is unnecessary and inappropriate.

As was pointed out in the appellants' brief, the Utah statute at issue was provided for by the Legislature in order that the requirements set out in the United States Supreme Court case of Heller v. New York, 413 U.S. 483 (1973), be complied with. In Heller, the Supreme Court held that where a prompt adversary

hearing is afforded a defendant charged with obscenity violations after seizure of allegedly obscene materials, no "prior restraint" which violated the defendant's rights had occurred. The Court did indicate, however, that in order to insure that non-obscene materials were not restricted, a hearing on whether material seized is pornographic should be held promptly after the seizure if such had not been held prior to the seizure. Utah Code Ann., § 76-10-1212(3) is a direct response, on the state level, to that constitutionally mandated requirement of a prompt adversary hearing enunciated in Heller.

The instant case is easily distinguishable from the Heller-type case which requires a hearing either before or promptly after a seizure of material. Where Heller dealt directly with the violation of obscenity laws, the crime involved in this case is the sexual abuse of minors, a crime unrelated to obscenity. Where the purpose of the hearing requirements of Heller, and the resulting Utah Code Ann., § 76-10-1212(3), are to protect free speech and expression rights, no such purpose need or can be served here.

The necessity of adhering to a statute's requirements must be seen in light of the statute's purpose and design. Guinyard v. State, S.C., 195 S.E.2d 392, 395 (1973). Where a statute is inapplicable, or the purpose of the statute would not be served by slavish adherence to its requirements, there is no error in ignoring the statute's directions. Such is the case here.

A judicial determination of whether the material seized is pornographic would not resolve the issue of a defendant's guilt of sexual exploitation, nor would it serve any other purpose. If the photographs were seized under a valid warrant, and were otherwise admissible into evidence, there would have been no error in so admitting them whether the evidence was obscene or not. Thus, even if the evidence were found to be non-pornographic through a hearing held under Utah Code Ann., § 76-10-1212(3), if the evidence were otherwise relevant to determining the ultimate issue of guilt, it could be used at trial.

Here, the question of whether the evidence of sexual exploitation of a minor is pornographic bears no more relevance to a determination of the guilt or innocence of the appellants than would a question of whether evidence of a robbery or rape is pornographic. Surely the appellants would not insist that a prompt post-seizure hearing be carried out where evidentiary photographs of a rape are seized under a valid warrant. Whether such photographs are or are not legally obscene is irrelevant in determining their probative value as evidence of a crime. Such is also the case here where, although the crime involved may be seen as a "sex crime," obscenity is not at issue.

Characterizing this case as one involving free speech issues, protections and safeguards is an attempt to fit a square peg into an unyielding round hole. Because free speech, free expression, and other First Amendment rights are not at issue here, neither are statutory requirements set up to insure that those rights are not violated.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the decision of the trial court be affirmed.

Respectfully submitted this 16th day of September, 1982.

DAVID L. WILKINSON
Attorney General



EARL F. DORIUS
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing, postage prepaid, to Michael D. Esplin, 43 East 200 North, P.O. Box "L," Provo, Utah, 84603, and W. Andrew McCullough, 930 South State Street, Orem, Utah, 84057, Attorneys for Appellants, this 17th day of September, 1982.



CIRCUIT COURT, OREM DEPARTMENT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,)	: PETITION FOR AFFIDAVIT FOR
:)	
COUNTY OF UTAH.)	: SEARCH AND SEIZURE WARRANT

I, J. Stewart Winn, being first duly sworn on oath, depose and say;

1. That your affiant is a Police Officer employed by the City of Orem and has been so employed for the past three years.

2. That in that capacity on or about the 3rd day of November 1981, I received information from a confidential informant, whose code name is "Gorgo," that a quantity of nude photographs, commonly referred to as "child pornography" is being secreted at the address of 754 South 50 East, Orem, Utah County, Utah. The pornography is in the possession of Terry Fullmer, a white female and of Robert Jordan, a black male. The minor involved is a 15-year old female runaway, by the name of Holly Wilkerson.

3 Detective Ralph Crabb has been involved in the investigation of Holly Wilkerson as a runaway child. The most recent runaway report came in at 4:36 p.m. on October 31, 1981. The evening of October 31, 1981, Detective Crabb met with W.G. Wilkerson, Holly's father, who supplied him with a list of names, any of whom Holly could have been staying with. Two of the names on the list were Terry Fullmer and a black named Robert Jordan. Mr. Wilkerson's information is that Fullmer and Jordan are living together at 754 South 50 East, Orem, Utah County, Utah. Holly Wilkerson is still a runaway.

4. Confidential informant "Gorgo" visited Robert Jordan at 754 South 50 East, Orem, Utah County, Utah, on November 1, 1981. Terry Fullmer offered to sell "Gorgo" some stolen unexposed film. "Gorgo" asked what they used the film for. They then showed him a

stack of approximately fifty polaroid snapshots. They all showed Holly Wilkerson, Terry Fullmer, and Robert Jordan engaging in, or simulating sex acts. "Gorgo" describes Holly as approximately 15-years old, tall and redheaded. That matches the physical description of the runaway Holly Wilkerson. "Gorgo" was told that they intend to sell the photographs to "Penthouse Magazine."

5. Robert Jordan and Terry Fullmer are living at 754 South 50 East, Orem, Utah County, Utah. This has been verified through Walls Harlow, their landlord. 754 South 50 East, Orem, Utah County, Utah, is further described as a red, brick four-plex on the west side of 50 East street at 754 South, and is the south apartment on the second level with the numbers 754 next to the door.

6. The materials sought by this application for a search warrant are being held in violation of the Utah Criminal Code and are evidence of sexual exploitation of a minor. Wherefore, I respectfully request that this court issue its warrant for the search at any time of the day the south apartment on the upper level of 754 South 50 East, Orem, Utah County, Utah, for the presence therein of child pornography and other evidence of sexual exploitation of a minor.

7. The above-mentioned informant has proven reliable in the past assisting this department in numerous narcotic operations now pending prosecution.

J. Stewart Winn
A F F I A N T

Subscribed and sworn to before this 3rd day of November, 1981

[Signature]
J U D G E

CIRCUIT COURT, OREM DEPARTMENT
UTAH COUNTY, STATE OF UTAH

SEARCH WARRANT

THE STATE OF UTAH TO: J. Stewart Winn, OREM CITY POLICE DEPARTMENT, and
to any other peace officer in Utah County in assistance:

Proof by affidavit having been made before me this ____ day
of November, 1981, that there is probable and reasonable cause to
believe that there is presently located in the following described
premises the property set forth below;

NOW, THEREFORE YOU AND EACH OF YOU are hereby directed to
conduct an immediate search during the daylight hours of an apartment
on the south side of the upper level of a red, brick four-plex, further
identified by the number 754 by the door, said apartment being located
at 754 South 50 East Street, Orem, Utah County, Utah, for the presence
therein of child pornography, and other evidence of sexual exploitation
of a minor. If you find the same, you are directed to bring it forth-
with before me at the above Court or hold the same in your possession
pending further order of this Court.

Date this 3rd day of November, 1981.


J U D G E

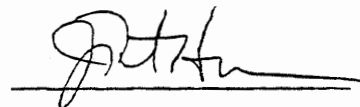
THIS WARRANT SHALL EXECUTE WITHIN TEN DAYS OF THE DATE OF ITS ISSUANCE.

STATE OF UTAH)
 :
 COUNTY OF UTAH)

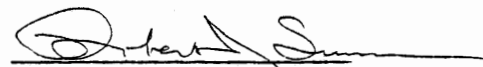
INVENTORY of property taken from the residence of Robert Jordan and Terry Fullmer, located at 754 South 50 East, Orem, Utah County, Utah by authority of the Search Warrant issued by Robert J. Sumsion, Judge, 8th Circuit Court, Orem, County of Utah, dated November 3, 1981.

1. Assorted Instant Photographs
2. Unexposed 35mm Film
3. Flash Cubes
4. Cloth Sack
5. Unexposed Polaroid Film
6. General Electric Color Television Set

I, J. Peter Hansen, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed statement of all property taken by me on the said warrant.

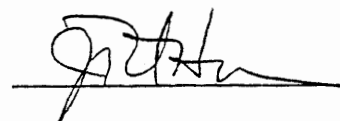


Subscribed and sworn to before me this 10 day of November, 1981.


 J U D G E

STATE OF UTAH)
 :
 COUNTY OF UTAH)

I hereby certify that I have served the warrant and have the property described therein in the Orem Police Department Evidence Room and have the goods detailed in the inventory endorsed hereon in Court.



NOALL T. WOOTTON
Utah County Attorney
Room 107, County Building
Provo, Utah 84601

OREM
DEPARTMENT
EIGHTH CIRCUIT COURT, UTAH COUNTY
FOURTH JUDICIAL DISTRICT, STATE OF UTAH

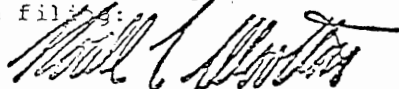
STATE OF UTAH, :
Plaintiff, :
-vs- : INFORMATION
ROBERT JORDAN, JR., :
TERRY L. FULLMER, :
Defendant(s). : Criminal No. 81 CR 685
322

The undersigned PETE HANSEN under oath
states on information and belief that the defendant(s) committed the
crime(s) of:

SEXUAL EXPLOITATION OF A MINOR, a Second Degree
Felony, at Utah County, Utah, on or about ~~November 3,~~ September 15,
1981, in violation of 76-10-1206.5, Utah Criminal Code,
as amended, in that they, at the time and place aforesaid,
knowingly and intentionally used, persuaded, induced and/or
enticed Holly Wilkerson, a minor, to pose in the nude while
simulating sexual conduct for the purpose of photographing,
filming, recording, or displaying sexual or simulated sexual
conduct.

This information is based on evidence obtained from the
following witnesses: Pete Hansen

Authorized for presentment
and filing:



County Attorney


COMPLAINANT

Subscribed and sworn to before me
this 4th day of Nov, 1981



OPINIONS OF THE UNITED STATES SUPREME COURT

NEW YORK v. FERBER, No. 81-55

FIRST AMENDMENT ▶254.70 — A New York criminal statute that, in order to prevent the sexual exploitation and abuse of children, prohibits persons from knowingly producing, directing, or promoting material that visually depicts sexual conduct by children under 16, regardless of whether such material is obscene, is not substantially overbroad and does not violate the First Amendment; child pornography, like obscenity, is unprotected by the First Amendment, and thus material containing visual depictions of specified sexual conduct by children below a specific age may be proscribed even if the material does not appeal to the prurient interest of the average person and the sexual conduct is not portrayed in a patently offensive manner.

which depicts such a performance. The statute defines "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. Respondent bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the Appellate Division of the New York Supreme Court affirmed. The New York Court of Appeals reversed, holding that the statute violated the First Amendment as being both underinclusive and overbroad. The court reasoned that in light of the explicit inclusion of an obscenity standard in a companion statute banning the knowing dissemination of similarly defined material, the statute in question could not be construed to include an obscenity standard, and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment.

Held: As applied to respondent and others who distribute similar material, the statute in question does not violate the First Amendment as applied to the States through the Fourteenth Amendment.

(a) The States are entitled to greater leeway in the regulation of pornographic depictions of children for the following reasons: (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child, easily passes muster under the First Amendment; (2) the standard of *Miller v. California*, 413 U. S. 15, for determining what is legally obscene is not a satisfactory solution to the child pornography problem; (3) the advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the Nation; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis*; and (5) recognizing and classifying child pornography as a category of material outside the First Amendment's protection is not incompatible with this Court's decisions dealing with what speech is unprotected. When a definable class of material, such as that covered by the New York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection.

(b) The New York statute describes a category of material the production and distribution of which is not entitled to First Amendment protection. Accordingly, there is nothing unconstitutionally "underinclusive" about the statute, and the State is not barred by the First Amendment from prohibiting the distribution of such unprotected materials produced outside the State.

(c) Nor is the New York statute unconstitutionally overbroad as forbidding the distribution of material with serious literary, scientific, or educational value. The substantial overbreadth rule of *Broadrick v. Oklahoma*, 413 U. S. 601, applies. This is the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. "[W]herever overbreadth exists should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may be applied." *Broadrick v. Oklahoma*, *supra*, at 615-616.

52 N.Y. 2d 674, 422 N.E. 2d 523, reversed and remanded.

Full Text of Opinion

No. 81-55

NEW YORK, PETITIONER v. PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

Syllabus

No. 81-55. Argued April 27, 1982—Decided July 2, 1982

A New York statute prohibits persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material

NOTICE: These opinions are subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released *** at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. BLACKMUN, J., concurred in the result. STEVENS, J., filed an opinion concurring in the judgment.

JUSTICE WHITE delivered the opinion of the Court.

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

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.¹ The federal government and forty-seven States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; twenty States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.²

¹"Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." S. Rep. No. 95-438, p. 5 (1978). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.*, at 6. In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the Subcommittee on Select Education of the House Comm. on Ed. and Labor, 95th Cong., 1st Sess., 41-42 (1977).

²In addition to New York, nineteen States have prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene. Ariz. Rev. Stat. Ann. § 13-3553 (Supp. 1981); Colo. Rev. Stat. § 18-6-403 (Supp. 1981); Del. Code Ann., Tit. 11, § § 1108, 1109 (1979); Fla. Stat. § 847.014 (1976); Haw. Rev. Stat. § 707-751 (Supp. 1981); Ky. Rev. Stat. § § 531.320, 531.340-531.360 (1980); La. Rev. Stat. § 14:81.1(A)(3) (West Supp. 1982); Mass. Gen. Laws Ann., ch. 272, § 29A (West Supp. 1982); Mich. Comp. Laws § 750.145c(3) (1982); Miss. Code Ann. § 97-5-33(4) (Supp. 1981); Mont. Code Ann. § 45-5-625 (1981); N. J. Stat. Ann. § 2C:24-4(b)(5) (West 1981); Okla. Stat., Tit. 21, § 1021.2 (Supp. 1981-1982); Pa. Cons. Stat. § 6312(c) (1982); R. I. Gen. Laws § 11-9-1.1 (1981); Tex. Penal Code Ann. Tit. 9, § 43.25 (1982); Utah Code Ann. § 76-10-1206.5(3) (Supp. 1981); W. Va. Code § 61-8C-3 (Supp. 1981); Wis. Stat. § 940.203(4) (West) (Supp. 1981-1982).

Fifteen States prohibit the dissemination of such material only if it is obscene. Ala. Code § 13-7-231, 13-7-232 (Supp. 1981); Ark. Stat. Ann. § 41-4201 (Supp. 1981); Cal. Penal Code Ann. § 311.2(b) (1970) (general obscenity statute); Ill. Stat. ch. 38, § 11-20a(b)(1) (1979); Ind. Code § 35-30-10-1-2 (1979); Me. Rev. Stat. Ann., Tit. 17, § 2923(1) (Supp. 1981-1982); Minn. Stat. § 617.246(3) and (4) (Supp. 1982); Neb. Rev. Stat. § 28-1463(2) (1979); N. H. Rev. Stat. Ann. § 650:2(II) (Supp. 1981); N. D. Cent. Code § 12.1-27.1-01 (1976) (general obscenity statute); Ohio Rev. Code Ann. § 2907.321(A) (1982); Ore. Rev. Stat. § 163.485 (1981); S. D. Comp. Laws Ann. § 22-22-24, 22-22-25 (1979); Tenn. Code Ann. § 39-1020 (1981); Wash. Rev. Code § 9.68A.030 (1981). The federal statute also prohibits dissemination only if the material is obscene. 18 U. S. C. § 2252(a) (1976 Supp. IV). Two States prohibit dissemination only if the material is obscene as to minors. Conn. Gen. Stat. Ann. § 53a-196b (Supp. 1982); Va. Code § 18.2-374.1 (1982).

Twelve States prohibit only the use of minors in the production of the material. Alaska Stat. Ann. § 11.41.455 (1981); Ga. Code § 26-9943(a) (Supp. 1981); Idaho Code § 44-1306 (1979); Iowa Code § 728.12 (1979); Kan. Stat. Ann. § 21-3516 (1981); Md. Crim. Law Code Ann. § 419A (Supp. 1981); Mo. Rev. Stat. § 568.060(1)(b) (1979); Nev. Rev. Stat. § 200.509 (1981); N. M. Stat. Ann. § 30-6-1 (1980); N. C. Gen. Stat. § 14-190.6 (1981); S. C. Code § 16-15-380 (1981); Wyo. Stat. Ann. § 14-3-102(a)(v)(E) (1977).

New York is one of the twenty. In 1977, the New York legislature enacted Article 263 of its Penal Law. Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance:

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

A "sexual performance is defined as 'any performance or part thereof which includes sexual conduct by a child less than sixteen years of age,'" § 263.1. "Sexual conduct" is in turn defined in § 263.3:

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

A performance is defined as "any play, motion picture, photograph or dance" or "any other visual presentation exhibited before an audience." § 263.4

At issue in this case is § 263.15, defining a class D felony:

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

To "promote" is also defined:

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

A companion provision bans only the knowing dissemination of obscene material. § 263.10.

This case arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of § 263.10 and two counts of § 263.15, the two New York laws controlling dissemination of child pornography.⁴ After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court. 72 A.D. 2d, 558, 424 N.Y.S. 2d, 967.

The New York Court of Appeals reversed, holding that § 263.15 violated the First Amendment. 52 N.Y. 2d, 674, 422 N.E. 2d, 523 (1981). The court began by noting that in light of § 263.10's explicit inclusion of an obscenity standard, § 263.15 could not be construed to include such a standard. Therefore, "the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional

⁴Class D felonies carry a maximum punishment for up to seven years as to individuals, and as to corporations a fine of up to \$10,000. N.Y. Penal Law § § 70.00, 80.10. Respondent Ferber was sentenced to 45 days in prison.

⁵The trial judge rejected Ferber's First Amendment attack on the two sections in denying a motion to dismiss the indictment. 96 Misc. 2d 669, 409 N.Y.S. 2d 632 (1978).

protection from government interference under the First Amendment." 52 N.Y. 2d at 678, 422 N.E. 2d at 525. Although the court recognized the State's "legitimate interest in protecting the welfare of minors" and noted that this "interest may transcend First Amendment concerns," 52 N.Y. 2d at 679, 422 N.E. 2d at 526, it nevertheless found two fatal defects in the New York statute. Section 263.15 was underinclusive because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity. It was also overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which "deal with adolescent sex in a realistic but nonobscene manner." 52 N.Y. 2d at 681, 422 N.E. 2d at 526. Two judges dissented. We granted the State's petition for certiorari, — U. S. — (1981), presenting the single question:

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

II

The Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in § 263.10, which follows the guidelines enunciated in *Miller v. California*, 413 U. S. 15 (1973),³ constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography. It was on the premise that "nonobscene adolescent sex" could not be singled out for special treatment that the court found § 263.15 "strikingly underinclusive." Moreover, the assumption that the constitutionally permissible regulation of pornography could not be more extensive with respect to the distribution of material depicting children may also have led the court to conclude that a narrowing construction of § 263.15 was unavailable.

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

A

In *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), the Court laid the foundation for the excision of obscenity from the realm of constitutionally protected expression:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest and morality. . . ." *Id.*, at 571-572.

Embracing this judgment, the Court squarely held in *Roth v. United States*, 354 U. S. 476 (1957), that "obscenity is not

within the area of constitutionally protected speech or press." *Id.*, at 485. The Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment: The original states provided for the prosecution of libel, blasphemy and profanity and the "universal judgment that obscenity should be restrained [is] reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956." *Ibid.*

Roth was followed by fifteen years during which this Court struggled with "the intractable obscenity problem." *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 704 (1968) (Harlan, J.). See, e. g., *Redrup v. New York*, 386 U. S. 767 (1967). Despite considerable vacillation over the proper definition of obscenity, a majority of the members of the Court remained firm in the position that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller v. California*, 413 U. S., at 19; *Stanley v. Georgia*, 394 U. S. 557, 567 (1969); *Ginsberg v. New York*, 390 U. S. 629, 637-643 (1968); *Interstate Circuit, Inc. v. Dallas*, *supra*, at 690; *Redrup v. New York*, *supra*, at 769; *Jacobellis v. Ohio*, 378 U. S. 184, 195 (1964).

Throughout this period, we recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller v. California*, 413 U. S., at 23. Consequently, our difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but to devise substantive limits on what fell within the permissible scope of regulation. In *Miller v. California*, *supra*, a majority of the Court agreed that "a state offense must also be limited to works 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." 413 U. S., at 24. Over the past decade, we have adhered to the guidelines expressed in *Miller*,⁴ which subsequently has been followed in the regulatory schemes of most states.⁵

³ *Hamling v. United States*, 418 U. S. 87 (1974); *Jenkins v. Georgia*, 418 U. S. 153 (1974); *Ward v. Illinois*, 431 U. S. 767 (1977); *Marks v. United States*, 430 U. S. 188 (1977); *Pinkus v. United States*, 436 U. S. 293 (1978).

⁴ Thirty-seven States and the District of Columbia have either legislatively adopted or judicially incorporated the *Miller* test for obscenity. Ala. Code § 13A-12-150 (Supp. 1981); Ariz. Rev. Stat. Ann. § 13-3501(2) (1978); Ark. Stat. Ann. § 41-3502(6) (Supp. 1981); Colo. Rev. Stat. § 18-7-101(2) (Supp. 1981); Del. Code Ann., Tit. 11, § 1364 (Supp. 1981); *Lakin v. United States*, 363 A. 2d 990 (DCCA 1976); Ga. Code § 26-2101(b) (1978); Haw. Rev. Stat. § 712-1210(6) (Supp. 1981); Idaho Code § 18-4101(A) (1979); Iowa Code § 228.4 (1979) (only child pornography covered); Ind. Code § 35-30-10.1-1(c) (1979); Kan. Stat. Ann. § 21-4301 (2)(A) (1981); Ky. Rev. Stat. § 531.010(3) (1975); La. Rev. Stat. § 14:106(A)(2) & (A)(3) (West Supp. 1982); *Ebert v. Md. St. Bd. of Censors*, 19 Md. App. 300, 316 A. 2d 536 (1974); Mass. Gen. Laws Ann., ch. 272, § 31 (West Supp. 1982); *People v. Neumayer*, 405 Mich. 341, 275 N. W. 2d 230 (1979); *State v. Welke*, 298 Minn. 402, 216 N. W. 2d 641 (1974); Mo. Rev. Stat. § 573.010(1) (1979); Neb. Rev. Stat., § 28-807(9) (1979); Nev. Rev. Stat. § 201.235 (1981); N. H. Rev. Stat. Ann. § 650:1(IV) (Supp. 1981); N. J. Stat. Ann. § 2C:34-2 (West Supp. 1981); N. Y. Penal Law § 235.00(1) (1980); N. C. Gen. Stat. § 14-190-1(b) (1981); N. D. Cent. Code § 12.1-27.1-01(4) (1976); *State v. Burgun*, 56 Ohio St. 2d 354, 384 N. E. 2d 255 (Ohio 1978); *McCrary v. State*, 533 P. 2d 629 (Okla. Crim App. 1974); Ore. Rev. Stat. § 167.087(2) (1981); 18 Pa. Cons. Stat. § 5903(b) (1982); R. I. Gen. Laws § 11-31-1 (1981); S. C. Code § 16-15-260(a) (1981); S. D. Comp. Laws Ann. § 22-24-27(10) (1979); Tenn. Code Ann. § 39-3001(17) (1981); Texas Penal Code Ann. § 43.21(a) (1982); Utah Code Ann.

⁵ New York Penal Law § 235.00 (1) (1980); *People v. Illardo*, 48 N.Y. 2d 408, 415 and n. 3; 399 N.E. 2d 59, 62-63 and n. 3 (1979).

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

First. It is evident beyond the need for elaboration that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." *Globe Newspapers v. Superior Court*, — U. S. —, — (1982). "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U. S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York*, 390 U. S. 629 (1968), we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U. S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

"There has been a proliferation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances." Laws of N.Y., 1977, ch. 910, § 1.⁸

§ 76-10-1203(1) (1978); Va. Code § 18.2-372 (1982); 1982 Wash. Laws., Ch. 154, § 1(2).

Four States continue to follow the test approved in *Memoirs v. Massachusetts*, 383 U. S. 413 (1966). Calif. Penal Code Ann. § 311(a) (Supp. 1982); Conn. Gen. Stat. § 53a-193 (Supp. 1982); Fla. Stat. § 847.07 (1976); Ill. Rev. Stat. ch. 38, § 11-20(b) (1979). Five States regulate only the distribution of pornographic material to minors. Me. Rev. Stat. Ann., Tit. 17, § 2911 (Supp. 1981-82); Mont. Code Ann. § 45-8-201 (1981); N. M. Stat. Ann. § 30-37-2 (1980); Vt. Stat. Ann., Tit. 13, § 2802 (1981); W. Va. Code, § 61-8A-2 (1977). Three State obscenity laws do not fall into any of the above categories. Miss. Code Ann. § 97-29-33 (1973), declared invalid in *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123 (Miss. 1976); Wisc. Stat. § 944.21(1)(a) (1977), declared invalid in *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 292 N. W. 2d 807 (1980); Wyo. Stat. § 6-5-303 (1977). Alaska has no current state obscenity law.

A number of States employ a different obscenity standard with respect to material distributed to children. See, e.g., Fla. Stat. § 847.0125 (1976).

⁸ In addition, the legislature found:

"[T]he sale of these movies, magazines, and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of this filth by vigorously applying the sanctions contained in this act." Law of N.Y., 1977, ch. 910, § 1.

We shall not attempt to justify this decision. Respondent has not intimated that we do so. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combatting "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.⁹ That judgment, we think, easily passes muster under the First Amendment.

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.¹⁰ Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively

⁹ "The use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole." S. Rep. No. 95-438, p. 5 (1978). It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 296 (1980) (hereafter cited as *Child Exploitation*); Schoettle, *Treatment of the Child Pornography Patient*, 137 Am. J. Psych. 1109, 1110 (1980); Densen-Gerner, *Child Prostitution and Child Pornography: Medical, Legal and Societal Aspects of the Commercial Exploitation of Children*, reprinted in U. S. Dept. of Health and Human Services, *Sexual Abuse of Children: Selected Readings at 80* (1980) (hereafter cited as *Commercial Exploitation*) (sexually exploited children predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution). See generally A. Burgess & L. Holmstrom, *Accessory-to-Sex: Pressure, Sex and Secrecy*, in Burgess, *Sexual Assault of Children and Adolescents* 85, 94 (1978); V. DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 169 (1969); Ellerstein & Canavan, *Sexual Abuse of Boys*, 134 Am. J. Diseases of Children 255, 256-257 (1980); Finch, *Adult Seduction of the Child: Effects on the Child*, 7 Med. Aspects of Human Sexuality 170, 185 (1973); Groth, *Sexual Trauma in the Life Histories of Rapists and Child Molesters*, 4 *Victimology* 10 (1979). Sexual molestation by adults is often involved in the production of child sexual performances. *Sexual Exploitation of Children. A Report to Illinois General Assembly by the Illinois Legislative Investigatory Comm'n at 30-31* (1980) (hereafter cited as *Ill. Comm'n*). When such performances are recorded and distributed, the child's privacy interests are also invaded. See n. 10, *infra*.

¹⁰ As one authority has explained:

"Pornography poses an even greater threat to the child victim than does sexual abuse of prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for the camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouvlis, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 *Wake Forest L. Rev.* 535, 545 (1981).

See also Schoettle, *Child Exploitation*, at 292 ("[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions"); Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 J. 295, 301 (1979) U. Mich. J. Law Reform (hereafter cited as *Use in Pornography*) (interview with child psychiatrist) ("the victims knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child").

Thus, distribution of the material violates "the individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U. S. 589, 599-600 (1977) (footnotes omitted). Respondents cannot undermine the force of the privacy interests involved here by looking to *Cox Broadcasting Corp v. Cohn*, 420 U. S. 469 (1975) and *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97 (1979), cases protecting the right of newspapers to publish, respectively, the identity of a rape victim and a youth charged as a juvenile offender. Those cases only stand for the proposition that: "if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information absent a need of the highest order."

controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions." Cf. *United States v. Darby*, 312 U. S. 100 (1941) (upholding federal restrictions on sale of goods manufactured in violation of Fair Labor Standards Act).

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political, or social value." Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem."

"See Sexual Exploitation of Children, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the House Judiciary Comm., 95th Cong., 1st Sess., 34 (1977) (statement of Charles Rembar) ("It is an impossible prosecutorial job to try to get at the acts themselves."); *id.*, at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology) ("[W]e have to be very careful . . . that we don't take comfort in the existence of statutes that are on the books in the connection with the use of children in pornography . . . There are usually no witnesses to these acts of producing pornography."); *id.*, at 69 (statement of Investigator Lloyd Martin, Los Angeles Police department) (producers of child pornography use false names making difficult the tracing of material back from distributor). See also L. Tribe, *American Constitutional Law*, 666, n. 62 (1978); Pope, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L. Forum, 711, 716, n. 29; Note, *Use in Pornography at 315* ("passage of criminal laws aimed at producers without similar regulation of distributors will arguably shift the production process further underground.").

"In addition, legal obscenity under *Miller* is a function of "contemporary community standards." 413 U. S., at 24. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Id.*, at 32. It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation. Furthermore, a number of States rely on stricter ob-

Third. The advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation." "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).¹⁴ We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws have not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed."

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As the trial court in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not protected by the First Amendment often depends on the content of the speech." *Young v. American Mini Theatres*, 427 U. S. 50, 66 (Opinion of JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST). See also *FCC v. Pacifica Foundation*, 438 U. S. 726, 742-748 (1978)

scenity tests, see note 7 *supra*, under which successful prosecution for child pornography may be even more difficult.

"One state commission studying the problem declared, "The act of selling these materials is guaranteeing that there will be additional abuse of children." Texas House Select Comm. on Child Pornography, Its Related Causes and Control 44 (1978). See also Densen-Gerber, *Commercial Exploitation at 80* ("Printed materials cannot be isolated or removed from the process involved in developing them.").

"In *Giboney*, a unanimous Court held that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973), the Court allowed an injunction against a newspaper's furtherance of illegal sex discrimination by placing of job advertisements in gender-designated columns. The Court stated:

"Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the government interest supporting the regulation is altogether absent when the commercial activity is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.

"In this connection we note that 18 U. S.C. § 2251 (1979 Supp.), making it a federal offense for anyone to use children under the age of 16 in the production of pornographic materials, embraces all "sexually explicit conduct" without imposing an obscenity test. In addition, half of the state laws imposing criminal liability on the producer do not require the visual material to be legally obscene. Note, *Use in Pornography*, at 307-308 (1979).

"96 Misc. 2d at 676, 409 N.Y.S. 2d at 637. This is not merely a hypothetical possibility. See Brief for Petitioner at 25 and examples cited therein.

(Opinion of JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST). "It is the content of an utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'" *Young v. American Mini Theatres, supra*, at 66. See *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942). Leaving aside the special considerations when public officials are the target, *New York Times v. Sullivan*, 376 U. S. 254 (1964), a libelous publication is not protected by the Constitution. *Beauharnais v. Illinois*, 343 U. S. 250 (1952). Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

C

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combatted requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.¹⁷ The category of "sexual conduct" proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith v. California*, 361 U. S. 147 (1959); *Hamling v. United States*, 418 U. S. 87 (1974).

D

Section 263.15's prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene:

¹⁷ Sixteen States define a child as a person under age 18. Four States define a child as under 17 years old. The federal law and 16 States, including New York, define a child as under 16. Illinois and Nebraska define a child as a person under age 16 or who appears as a prepubescent. Ill. Ann. Stat. ch. 38 § 11-20a (1978); Neb. Rev. Stat. § 28-1463 (Supp. 1978). Indiana defines a child as one who is or appears to be under 16. Ind. Code. §§ 35-30-10.1-2 to 3 (Supp. 1978). Kentucky provides for two age classifications (16 and 18) and varies punishment according to the victim's age. Ky. Rev. Stat. §§ 531.300-.370 (Supp. 1978). See Note, Use in Pornography, at 307, n. 71 (collecting statutes).

"actual or simulated sexual intercourse, sexual bestiality, masturbation, sadoomasochistic abuse, or lewd exhibition of the genitals." § 263.3. The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation. 413 U. S., at 25. A performance is defined only to include live or visual depictions: "any play, motion picture, photograph or dance . . . or other visual representation before an audience." § 263.4. Section 263.15 expressly includes a scienter agreement.

We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally "underinclusive" about a statute that singles out this category of material for proscription.¹⁸ It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.¹⁹

III

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific or educational value or material which does not threaten the harms sought to be combatted by the State. Respondent prevailed on that ground below, and it is to that issue that we now turn.

The New York Court of Appeals recognized that overbreadth scrutiny has been limited with respect to conduct-related regulation, *Broadrick v. Oklahoma*, 413 U. S. 601 (1973), but it did not apply the test enunciated in *Broadrick* because the challenged statute, in its view, was directed at "pure speech." The court went on to find that § 263.15 was fatally overbroad: "[T]he statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose." 52 N.Y. 2d, at 678, 422 N.E. 2d, at 525.

While the construction that a state court gives a state statute is not a matter subject to our review, *Wainwright v. Stone*, 414 U. S. 21, 22-23 (1973); *Gooding v. Wilson*, 405 U. S. 518, 520 (1972), this Court is the final arbiter of whether the federal constitution necessitated the invalidation of a state law.

¹⁸ *Erznoznik v. City of Jacksonville*, 422 U. S. 205 (1975), relied upon by the Court of Appeals, struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, *id.*, at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance impermissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that.

¹⁹ It is often impossible to determine where such material is produced. The Senate Report accompanying federal child pornography legislation stressed that "it is quite common for photographs or films made in the United States to be sent to foreign countries to be reproduced and then returned to this country in order to give the impression of foreign origin." S. Rep. No. 95-438, p. 6 (1978). In addition, States have not limited their distribution laws to material produced within their own borders because the maintenance of the market itself "leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured." 52 N.Y. 2d at 686; 422 N.E. 2d at 531 (Judge Jason, dissenting).

It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state court decisions giving the Constitution too little shrift. A state court is not free to avoid a proper facial attack on federal constitutional grounds. *Bigelow v. Virginia*, 421 U. S. 809, 817 (1975). By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution.

A

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. *Broadrick v. Oklahoma*, 413 U. S., at 610; *United States v. Raines*, 362 U. S. 17, 21 (1960); *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 219-220 (1912). In *Broadrick*, we recognized that this rule reflect two cardinal principles of our constitutional order: the personal nature of constitutional rights, *McGowan v. Maryland*, 366 U. S. 420, 429 (1961), and prudential limitations on constitutional adjudication.²⁰ In *United States v. Raines*, *supra*, at 21, we noted the "incontrovertible proposition" that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," (quoting *Barrows v. Jackson*, 346 U. S. 249, 256 (1953)). By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule,²¹ we face "flesh-and-blood"²² legal problems with data "relevant and adequate to an informed judgment."²³ This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervailing policies." *United States v. Raines*, *supra* at 22-23. The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 634 (1980); *Gooding v. Wilson*, 405 U. S. 518, 521 (1972). It is for this

reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity. *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965); *Thornhill v. Alabama*, 310 U. S. 88, 97-98 (1940); *United States v. Raines*, *supra* at 21-22; *Gooding v. Wilson*, *supra*, at 521.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking a statute down on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." *Broadrick*, 413 U. S., at 613. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.²⁴

In *Broadrick*, we explained the basis for this requirement:

[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is the exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise protected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman v. United States*, 394 U. S. 165, 174-175 (1969). 413 U. S., at 615.

We accordingly held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ibid.*²⁵

²⁰ When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. *Crowell v. Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g.*, *Haynes v. United States*, 390 U. S. 85, 92 (1968) (dictum); *Schnieder v. Smith*, 390 U. S. 17, 27 (1968); *United States v. Rumely*, 345 U. S. 41, 45 (1953); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (Brandeis, J. concurring). Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated. *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971).

A state court is also free to deal with a state statute in the same way. If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct. Here, of course, we are dealing with a state statute on direct review of a state court decision that has construed the statute. Such a construction is binding on us.

²¹ *Parker v. Levy*, 417 U. S. 733, 760 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable conduct . . . conduct . . . CSC v. Letter Carriers, 413 U. S. 548, 580-581 (1973)."). See Bogen,

²² In addition to prudential restraints, the traditional rule is grounded in Article III limits on the jurisdiction of federal courts to actual cases and controversies.

²³ "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.' *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39." *United States v. Raines*, 362 U. S. 17, 21 (1960).

²⁴ Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face. See, *e. g.* *Terminello v. City of Chicago*, 337 U. S. 1, 5 (1949). See generally Monaghan, *Overbreadth*, 1981 Sup. Ct. Review 1, 10-14.

²⁵ A. Bickel, *The Least Dangerous Branch* 115-116 (1962);

²⁶ *Frankfurter & Hart, The Business of the Supreme Court at October Term 1934*, 49 Harv. L. Rev. 68, 95-96 (1935).

Broadrick was a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.

The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.²⁸ Indeed, JUSTICE BRENNAN observed in his dissenting opinion in *Broadrick*:

"We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 413 U. S., at 630.

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.²⁹ This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach

of New York's child pornography law and the situation faced by the Oklahoma state employees with respect to that state's restriction on partisan political activity. Indeed, it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity. Cf. *Bates v. State Bar of Arizona*, 433 U. S. 350, 380-381 (1977) (overbreadth analysis inapplicable to commercial speech).

This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment. Cf. *Parker v. Levy*, 417 U. S. 733, 760 (1974). Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Edwards v. South Carolina*, 372 U. S. 229 (1973). We recognize, however, that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial. We simply hold that the fact that a criminal prohibition is involved does not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth.

B

Applying these principles, §263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in §263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in *National Geographic* would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the §263.15 in order to produce educational, medical or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, §263.15 is "not substantially overbroad and whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U. S., at 615-616.

IV

Because §263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth.³⁰ The decision of the

First Amendment Ancillary Doctrines, 4 Maryland L. Rev. 679, 712-714 (1978); Note, First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 860-861 (1970).

²⁸ In *Gooding v. Wilson*, 405 U. S. 518, 527 (1972), the Court's invalidation of a Georgia statute making it a misdemeanor to use "opprobrious words or abusive language tending to cause a breach of the peace" followed from state judicial decisions indicating that "merely to speak words offensive to some who hear them" could constitute a "breach of the peace." Cases invalidating laws requiring members of a "subversive organization" to take a loyalty oath, *Baggett v. Bullitt*, 377 U. S. 360 (1964), or register with the government, *Dombrowski v. Pfister*, 380 U. S. 479 (1965), can be explained on the basis that the laws involved, unlike §263.15, defined no central core of constitutionally regulable conduct; the entire scope of the laws was subject to the uncertainties and vagaries of prosecutorial discretion. See also *Bigelow v. Virginia*, 421 U. S. 809, 817 (1975) ("the fact of this case well illustrate the statute's potential for sweeping and improper applications.") (citation omitted); *NAACP v. Button*, 371 U. S. 415, 433 (1963) ("We read the decree of the Virginia Supreme Court of Appeals . . . as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys."); *Thornhill v. Alabama*, 310 U. S. 88, 97 (1940) (the statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.").

²⁹ "A substantial overbreadth rule is implicit in the chilling effect rationale . . . the presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "without a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Note, First Amendment Overbreadth Doctrine, 83 Harv. L. Rev., at 859 and n. 61.

³⁰ There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here "does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan*, 376 U. S. 254, 285 (1964).

New York Court of Appeals is reversed and the case is remanded to that Court for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BLACKMUN concurs in the result.

JUSTICE O'CONNOR, concurring.

Although I join the Court's opinion, I write separately to stress that the Court does not hold that New York must except "material with serious literary, scientific or educational value," *ante*, at 19, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion, see *ante*, at 9-16, suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, 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.

An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment. As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or photographing children." *Ante*, at 15. Thus, the statute attempts to protect minors from abuse without attempting to restrict the expression of ideas by those who might use children as live models.

On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous "kiddie porn" market that New York and other States have attempted to regulate. Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of *National Geographic*, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York's statute.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in *Ginsburg v. New York*, 390 U. S. 629 (1968), the State has a special interest in protecting the well-being of its youth. *Id.*, at 638-641. See also *Globe Newspapers v. Superior Court*, — U. S. —, — (1982) (slip. op. at 11). This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when

it seeks only to protect consenting adults from exposure to such material. *Ginsburg v. New York*, *supra*, at 637, 638 n. 6, 642-643, n. 10. See also *Jacobellis v. Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.). I also agree with the Court that the "tiny fraction", *ante*, at 25, of material of serious artistic, scientific or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See *Broadrick v. Oklahoma*, 413 U. S. 601, 630 (1973) (BRENNAN, J., dissenting).

But in my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific or medical value, would violate the First Amendment. As the Court recognizes, the limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly "slight social value," and the State has a compelling interest in their regulation. See *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571-572 (1942). The First Amendment value of depictions of children that are in themselves serious contributions to art, literature or science, is, by definition, simply not "de minimis." See *ante*, at 14. At the same time, the State's interest in suppression of such materials is likely to be far less compelling. For the Court's assumption of harm to the child resulting from the "permanent record" and "circulation" of the child's "participation," *ante*, at 10, lacks much of its force where the depiction is a serious contribution to art or science. The production of materials of serious value is not the "low-profile clandestine industry" that according to the Court produces purely pornographic materials. See *ante*, at 11. In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed "material outside the protection of the First Amendment." See *ante*, at 15.

I, of course, adhere to my view that, in the absence of exposure, or particular harm, to juveniles or unconsenting adults the State lacks power to suppress sexually oriented materials. See, e. g., *Paris Adult Theatre I v. Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting). With this understanding, I concur in the Court's judgment in this case.

JUSTICE STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

Before addressing that issue, I shall explain why respondent's conviction does not violate the Constitution. The two films that respondent sold contained nothing more than lewd exhibition; there is no claim that the films included any material that had literary, artistic, scientific, or educational value.¹ Respondent was a willing participant in a commer-

¹ Respondent's counsel conceded at oral argument that a finding that the films are obscene would have been consistent with the *Miller* definition. Tr. of Oral Arg. 41.

cial market that the State of New York has a legitimate interest in suppressing. The character of the State's interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films. In this respect my evaluation of this case is different from the opinion I have expressed concerning the imposition of criminal sanctions for the promotion of obscenity in other contexts.²

A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection. The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.

The Court's holding that this respondent may not challenge New York's statute as overbroad follows its discussion of the contours of the category of nonobscene child pornography that New York may legitimately prohibit. Having defined that category in an abstract setting,³ the Court makes the empirical judgment that the arguably impermissible application of the New York statute amounts to only a "tiny fraction of the materials within the statute's reach." *Ante*, at 25. Even assuming that the Court's empirical analysis is sound,⁴ I believe a more conservative approach to the issue would adequately vindicate the State's interest in protecting its children and cause less harm to the federal interest in free expression.

A hypothetical example will illustrate my concern. Assume that the operator of a New York motion picture theater specializing in the exhibition of foreign feature films is offered a full-length movie containing one scene that is plainly

lewd if viewed in isolation but that nevertheless is part of a serious work of art. If the child actor resided abroad, New York's interest in protecting its young from sexual exploitation would be far less compelling than in the case before us. The federal interest in free expression would, however, be just as strong as if an adult actor had been used. There are at least three different ways to deal with the statute's potential application to that sort of case.

First, at one extreme and as the Court appears to hold, the First Amendment inquiry might be limited to determining whether the offensive scene, viewed in isolation, is lewd. When the constitutional protection is narrowed in this drastic fashion, the Court is probably safe in concluding that only a tiny fraction of the materials covered by the New York statute is protected. And with respect to my hypothetical exhibitor of foreign films, he need have no uncertainty about the permissible application of the statute: for the one lewd scene would deprive the entire film of any constitutional protection.

Second, at the other extreme and as the New York Court of Appeals correctly perceived, the application of this Court's cases requiring that an obscenity determination be based on the artistic value of a production taken as a whole would afford the exhibitor constitutional protection and result in a holding that the statute is invalid because of its overbreadth. Under that approach, the rationale for invalidating the entire statute is premised on the concern that the exhibitor's understanding about its potential reach could cause him to engage in self censorship. This Court's approach today substitutes broad, unambiguous state-imposed censorship for the self censorship that an overbroad statute might produce.

Third, as an intermediate position, I would refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit. Specifically, I would postpone decision of my hypothetical case until it actually arises. Advocates of a liberal use of overbreadth analysis could object to such postponement on the ground that it creates the risk that the exhibitor's uncertainty may produce self censorship. But that risk obviously interferes less with the interest in free expression than does an abstract, advance ruling that the film is simply unprotected whenever it contains a lewd scene, no matter how brief.

My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors: they are qualitatively less reliable than the products of case-by-case adjudication.

Moreover, it is probably safe to assume that the category of speech that is covered by the New York statute generally is of a lower quality than most other types of communication. On a number of occasions, I have expressed the view that the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech.⁵ Today the Court accepts this view, putting the cat-

² See *Burch v. Louisiana*, 441 U. S. 130, 139 (STEVENS, J., concurring); *Pinkus v. United States*, 436 U. S. 293, 305 (STEVENS, J., concurring); *Ballew v. Georgia*, 435 U. S. 223, 245 (STEVENS, J., concurring); *Smith v. United States*, 431 U. S. 291, 311-321 (STEVENS, J., dissenting); *Marks v. United States*, 430 U. S. 188, 198 (STEVENS, J., concurring in part and dissenting in part); see also *Schad v. Borough of Mount Ephraim*, 452 U. S. 61, 84 (STEVENS, J., concurring in the judgment); *FCC v. Pacific Foundation*, 438 U. S. 726, 750 (Opinion of STEVENS, J.).

³ "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ante*, at 16.

⁴ "The Court's analysis is directed entirely at the permissibility of the statute's coverage of nonobscene material. Its empirical evidence, however, is drawn substantially from congressional committee reports that ultimately reached the conclusion that a prohibition against obscene child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem. The Senate Committee on the Judiciary concluded that "virtually all of the materials that are normally considered child pornography are obscene under the current standards," and that "[i]n comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential." S. Rep. No. 438, 95th Cong., 1st Sess., 13 (1977); see also H.R. Rep. No. 696, 95th Cong., 1st Sess., 7-8 (1977). The coverage of the federal statute is limited to obscene material. See 18 U. S. C. § 2252(a).

⁵ See, e.g., *Schad v. Borough of Mount Ephraim*, *supra*, at 80, 83 (STEVENS, J., concurring in the judgment); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U. S. 530, 544-548 (STEVENS, J., concurring in the judgment); *FCC v. Pacific Foundation*, *supra*, at 744-745 (Opinion of STEVENS, J.); *Carry v. Population Services International*, 431 U. S. 678, 716-717 (STEVENS, J., concurring in part and concurring in the judgment); *Smith v. United States*, *supra*, at 317-319 (STEVENS, J., dissenting); *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 66-71 (Opinion of STEVENS, J.).

egory of speech described in the New York statute in its rightful place near the bottom of this hierarchy. *Ante*, at 14-15. Although I disagree with the Court's position that such speech is totally without First Amendment protection, I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine.'

Because I have no difficulty with the statute's application in this case, I concur in the Court's judgment.