CHAPTER 910

LAWS OF 19 77

SENATE BILL _____ ASSEMBLY BILL 3587-C

A. 3587-C Cal. No. 754

1977-1978 Regular Sessions

IN ASSEMBLY

February 10, 1977

Introduced by M. of A. LASHER—Multi-Sponsored by—M. of A. CONNELLY, LEVY, AMATUCCI, BARBARO, BETROS, BIANCHI, BOYLAND, BREWER, BUTLER, CALOGERO, CINCOTTA, COCHRANE, CONNERS, D'AMATO, D'ANDREA, DELLI BOVI, DIGGS, EVE, FINNERAN, FLACK, FLANAGAN, FREMMING, FRIEDMAN, GOODHUE, GORSKI, GRABER, GREENBERG, HARENBERG, HEALEY, HINCHEY, HOCHBRUECKNER, KELLEHER, KIDDER, LANDES, LENTOL, LEWIS, LIPSCHUTZ, LOPRESTO, MARCHISELLI, MARSHALL, MARTIN, McCABE, McGEE, McGRATH, McINERNEY, MEGA, G. W. MILLER, MIRTO, MOLINARI, NINE, ORAZIO, PROUD, REILLY, ROBACH, ROSS, SCHMIDT, SEARS, SERRANO, SILVER, SILVERMAN, SOLOMON, STEIN, VANN, VELELLA, WALSH, WARREN, WEPRIN, WILSON, YEVOLI, ZAGAME, ZIMMER, E. F. X. RYAN, GOLDSTEIN, TILLS, TEMPLE—read once and referred to the Committee on Codes—reported from said committee with amendments, ordered reprinted as amended and placed on the order of second reading—reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading—Passed by Assembly and delivered to the Senate, substituted for Senate Bill No. 2743-B by Senators MARINO, BABBUSH, BARTOSIEWICZ, BEATTY, BERNSTEIN, BRUNO, CAEMMERER, CALANDRA, CONKLIN, DUNNE, FARLEY, FLYNN, GARCIA, GAZZARA, GRIFFIN, HALPERIN, JOHNSON, KNORR, LaVALLE, LEVY, LEWIS, LOMBARDI, MARCHI, MASON, McFARLAND, NOLAN, PADAVAN, PATERSON, PISANI, PRESENT, ROLISON, SCHERMERHORN, B. C. SMITH, W. T. SMITH, STAFFORD, TRUNZO, VOLKER, WARDER, WINIKO—Passed by Senate and delivered to the Governor. Recalled from Governor, vote reconsidered, bill amended ordered reprinted and restored to third reading.

AN ACT to amend the penal law, in relation to sexual performances by children

JUN 24 1977

AUG 2 1977

ACTION MUST BE TAKEN BY:

AUG 13 1977 JUL 5 1977

GOVERNOR'S ACTION:

DATE AUG 11 1977

Memorandum No. _____

SENATE VOTE [illegible] Y 2 N Amended C 7/13/77

Date 7/13 [illegible] Bill is disapproved

ASSEMBLY VOTE [illegible] Y [illegible] N Amended-C 127 Y 1 N

Date [illegible] 7/14/77 Counsel to Governor

C-90

1977

ASSEMBLY

The Assembly bill by Mr. ASHER Calendar No. 1329 Assembly No. 3587-C
Entitled: " Sen. Rept. No. _____

3587 LASHER--

An act to amend the penal law, in relation to promoting or permitting obscene performances by children.

" was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	47	Mr. Anderson			15	Mr. Knorr	
	49	Mr. Auer			1	Mr. LaValle	
	16	*Mr. Babbush*			29	*Mr. Leichter*	
	45	Mr. Barclay			8	Mr. Levy	
	18	*Mr. Bartosiewicz*			22	*Mr. Lewis*	
	23	*Mr. Beatty*			50	Mr. Lombardi	
	25	*Ms. Bellamy*			24	Mr. Marchi	
	33	*Mr. Bernstein*	EXCUSED		5	Mr. Marino	
	19	*Mr. Bloom*			48	Mr. Mason	
	12	*Mr. Brenston*			28	*Mr. McCall*	
	41	Mr. Bruno			59	Mr. McFarland	
	9	*Ms. Burstein*			42	*Mr. Nolan*	
	7	Mr. Caemmerer			27	*Mr. Ohrenstein*	
	34	Mr. Calandra			17	*Mr. Owens*	
	21	Mr. Conklin			11	Mr. Padavan	
	46	Mr. Donovan			60	Mr. Paterson	
	6	Mr. Dunne			53	*Mr. Perry*	
	54	Mr. Eckert	EXCUSED		36	Mr. Pisani	
	10	Mr. Farber			57	Mr. Present	
	44	Mr. Farley			39	Mr. Rolison	
	35	Mr. Flynn			31	*Mr. Ruiz*	
	32	*Mr. Galiber*			40	Mr. Schermerhorn	
	30	*Mr. Garcia*			2	Mr. Smith, B.C.	
	14	*Mr. Gazzara*			51	Mr. Smith, W.T.	
	13	*Mr. Gold*			43	Mr. Stafford	
	26	Mr. Goodman	EXCUSED		55	*Mr. Tauriello*	
	37	Mr. Gordon			3	Mr. Trunzo	
	56	*Mr. Griffin*			58	Mr. Volker	
	20	*Mr. Halperin*			52	Mr. Warder	
	4	Mr. Johnson			38	*Mrs. Winikow*	

AYES 52
NAYS 2

Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

C 910

1977

ASSEMBLY

The Assembly bill by Mr. ASHER Calendar No. 1329 Assembly No. 3587-C
Sen. Rept. No. _____
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3587 LASHER---

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	19	*Mr. Bloom*			48	Mr. Mason	
	12	*Mr. Brouston*			28	*Mr. McCall*	
	41	Mr. Bruno			59	Mr. McFarland	
	9	*Ms. Burstein*			42	*Mr. Nolan*	
	7	Mr. Caemmerer			27	*Mr. Ohrenstein*	
	34	Mr. Calandra			47	*Mr. Owens*	
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	46	Mr. Donovan			60	Mr. Paterson	
	6	Mr. Dunne			53	*Mr. Perry*	
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	44	Mr. Farley			39	Mr. Rolison	
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	32	*Mr. Galiber*			40	Mr. Schermerhorn	
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	20	*Mr. Halperin*			52	Mr. Warder	
	4	Mr. Johnson			38	*Mrs. Winikow*	

AYES 52
NAYS 2

Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

1977

ASSEMBLY

The Assembly bill
by Mr. LASHER Calendar No. 1329
Entitled: "

Assembly No. 3587-B
Sen. Rept. No. _____

An act to amend the penal law, in relation to sexual performances by children

DEBATE WAS HAD THEREON

" was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

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	12	*Mr. Bronston*			28	*Mr. McCall*	
	41	Mr. Bruno			59	Mr. McFarland	
	9	*Ms. Burstein*			42	*Mr. Nolan*	
	7	Mr. Caemmerer			27	*Mr. Ohrenstein*	
	34	Mr. Calandra	EXCUSED		17	*Mr. Owens*	
	21	Mr. Conklin			11	Mr. Padavan	
	46	Mr. Donovan			60	Mr. Paterson	
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	20	*Mr. Halperin*			52	Mr. Warder	
	4	Mr. Johnson			38	*Mrs. Winikow*	

AYES 48
NAYS 2

* Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

3587-C Fischer 7/14 1977 C-910

No. 3-149-(Vacancy in Dist. 48)

(Republicans in Italics)

Those Who Voted In the Affirmative	Those Who Voted In the Negative
~~Mr. Abrahamson~~	
Miss Anastasi	
Mr. Barbaro	
Mr. Bianchi	
Mr. Bianchi	
Mr. Bianchi	
Mr. Boyland	
Mr. Brewer	
Mr. Burns	
Mr. Burrows	
Mr. Bush	
Mr. Butler	
Mr. Calogero	
Mr. Cincotta	
Mr. Cochran	
Mrs. Connelly	
Mr. Conners	
Mr. Connor	
Mr. Cook	
Mr. Cooperman	
Mr. Culhane	
Mr. Daly	
Mr. D'Amato	
Mr. D'Andrea	
Mr. Dearie	
Mr. DelBello	
Mr. Del Toro	
Mr. DeSalvio	
Mr. D'Urso	
~~Mr. Dyer~~	
Mr. Dobrachitz	
Mr. Durgin	
Mr. Dyer	
Mr. Emery	
Mr. Engel	
Mr. Esposito	
Mr. Exo	
~~Mr. Farrell~~	
Mr. Ferris	
Mr. Field	
Mr. Fink	
Mr. Finneran	
Mr. Ford	
Mr. Fossella	
Mr. Fortune	
Mr. Fremming	
Mr. Frey	
Mr. Friedman	
Mr. Gabelstein	
Mr. Garcia	
Mr. Garski	
Mr. Gottfried	
Mr. Graber	
Mr. Grannis	
Mr. Greco	
Mr. Greenberg	
Mr. Griffith	
Mr. Gioiotti	
~~Mr. Hanna~~	
Mr. Hannon	
Mr. Harenberg	
Mr. Harris	
Mr. Hawley	
Mr. Healey	
Mr. Henderson	
Mr. Herbst	
Mr. Hevesi	
Mr. Hinchey	
~~Mr. Hochbrueckner~~	
Mr. Hoyt	
Mr. Hurley	
Mr. Keane	
Mr. Kelleher	
Mr. Kidder	
Mr. Koppell	
Mr. Kremer	
Mr. Lafayette	
Mr. Landes	
Mr. Lane	
Mr. Lasher	
Mr. Lee	
Mr. Lehner	
Mr. Lentol	
Mr. Levy	
Mr. Lewis	
Mrs. Lipschutz	
Mr. Lopresto	
Mr. Marchiselli	
Mr. Marshall	
Mr. Martin	
Mr. McCabe	
Mrs. McGee	
Mr. McGrath	
Mr. McInerney	
Mr. Mega	
Mr. Miller (G.W.)	
Mr. Miller (H.M.)	
Mr. Miller (M.H.)	
Mr. Mirto	
Mr. Molinari	
~~Mr. Montano~~	
~~Mr. Murphy (J.)~~	
Mr. Murphy (M.J.)	
Mr. Nadler	
Mr. Nagle	
Mr. Nicolosi	
Mr. Nine	
Mr. Nortz	
Mr. Orazio	
Mr. Passannante	
~~Mr. Peace~~	
Mr. Posner	
Mr. Proud	
~~Mr. Pupatello~~	
Mr. Reilly	
Mr. Riford	
Mr. Robach	
Mr. Ross	
Mr. Ryan (A.W.)	
Mr. Ryan (E.F.X.)	
Mr. Schimminger	
Mr. Schmidt	
Mr. Schumer	
Mr. Sears	
Mr. Serrano	
Mr. Siegel	
Mr. Silver	
Mr. Solomon	
Mr. Stavisky	
~~Mr. Stein~~	
Mr. Stephens	
Mr. Strelzin	
Mr. Sullivan (E.C.)	
Mr. Sullivan (P.M.)	
Mr. Tallon	
Mr. Tills	
Mr. Vann	
~~Mr. Velella~~	
Mr. Virgilio	
Mr. Walsh	
Mr. Warren	
~~Mr. Weprin~~	
Mr. Weprin	
Mr. Wertz	
Mr. Wilson	
Mr. Yevoli	
Mr. Zagame	
Mr. Zimmer	
~~Mr. Speaker~~	

AYES ..... 137 .....

NOES ..... 9 .....

1977 C 91

Those Who Voted In the Affirmative	Those Who Voted In the Negative	Those Who Voted In the Affirmative	Those Who Voted In the Negative	Those Who Voted In the Affirmative	Those Who Voted In the Negative
Mr. Abrahamson		Mr. Gorski		Mr. Montano	
Miss Arrington		Mr. Gottfried		Mr. Murphy	
		Mr. Graber		Mr. Murphy (M.J.)	
		Mr. Grannis		Mr. Nadler	
		Mr. Greco			
Mr. Bianchi		Mr. Greenberg		Mr. Nicolosi	
Mr. Bochco		Mr. Griffith		Mr. Nine	
				Mr. Orazio	
		Mr. Hannon		Mr. Passannante	
				Mr. Pesce	
Mr. Butler				Mr. Posner	
				Mr. Proud	
Mr. Ciacotta					
Mrs. Connelly		Mr. Herbst		Mr. Reilly	
Mr. Conners		Mr. Hevesi		Mr. Riford	
Mr. Connor		Mr. Hinchey		Mr. Robach	
		Mr. Hochbrueckner			
Mr. Cooperman				Mr. Ryan (A.W.)	
		Mr. Hurley		Mr. Ryan (E.F.X.)	
Mr. Daly		Mr. Keane		Mr. Schimminger	
		Mr. Kelleher		Mr. Schmidt	
		Mr. Kidder		Mr. Schumer	
Mr. Dearie		Mr. Koppell			
		Mr. Kremer		Mr. Serrano	
Mr. DelToro		Mr. Lafayette		Mr. Siegel	
Mr. DeSalvio				Mr. Silver	
		Mr. Lane			
Mrs. Diggs		Mr. Lasher		Mr. Solomon	
		Mr. Lehner		Mr. Strelzin	
		Mr. Lentol		Mr. Sullivan (E.C.)	
		Mr. Levy		Mr. Sullivan (T.M.)	
Mr. Engel		Mr. Lewis		Mr. Tallon	
		Mrs. Lipschutz			
Mr. Exo				Mr. Vann	
		Mr. Marchiselli			
Mr. Ferris					
		Mr. Martin			
		Mr. McCabe		Mr. Walsh	
Mr. Finneran		Mrs. McGee			
				Mr. Weprin	
Mr. Fortune					
Mr. Frommer		Mr. Miller (G.A.W.)		Mr. Wilson	
Mr. Frey				Mr. Yevoli	
		Mr. Miller (M.H.)			
		Mr. Virto		Mr. Zimmer	

AYES ..... 115 .....

NOES ..... 43 .....

State of New York

In Assembly

Albany JULY 1977

By Mr. Lasher

Resolved (if the Senate concur), That a respectful message be sent to the Governor requesting the return to the Assembly of Assembly bill (No. 3587-B) entitled "

AN ACT to amend the penal law, in relation to sexual performances by children

"

for the purpose of amendment.
~~substitution.~~

IN SENATE
JUL 6 1977
Committee Bill ordering ~~recommitment~~ amendment
Pro tem of the Senate
Secretary

By order of the Assembly,
Catherine A. Cary
Clerk

Form No. 14
Rev. 1-8-69

A-3587-A

CALENDAR NO. 754

JUN 1 1977

BILL NO. A. 3587-A

S.

INTRODUCED BY: Mr. Lasher

AN ACT

to amend the penal law, in relation to promoting or permitting obscene performances by children.

SUMMARY OF PROVISIONS - Adds to Penal Law new Article 263, "Sexual Performance by a Child", to define as crimes:

1.) use of a child in sexual performance - Class C Felony - prohibits the employment or inducement of a child under 16 to engage in sexual conduct for a photograph or public exhibition.

2.) promoting a sexual performance by a child - Class D Felony - prohibits the production, direction, or promotion of any public exhibition including sexual conduct by a child under 16.

Anyone who appears to be under the age of 16 in any sexual performance is presumed to be under the age of 16.

RATIONALE - Intended to provide for the prosecution of promoters of sexual performances by children in public exhibitions and magazines.

LEGISLATIVE HISTORY - New Bill.

PERTINENT CONSIDERATIONS - Reports indicate that use of children in magazines, photographs and movies in the manner prohibited by this bill is harmful to the emotions and well-being of such children.

It has been argued that this bill will prevent the exploitation of children.

EFFECTIVE DATE - 90 days after bill becomes law.

FISCAL IMPLICATIONS - None.

JUN 2 2 1977

Multiple memorandum received from the State Comptroller dated JUN 20 1977 stating the following bill is of "No Interest" to the Department of Audit and Control.

Intro. No.	Print No.
A-3527-B	

The original memorandum filed with: A-42-B

10-DAY BILL

B-203 (12/75) BUDGET REPORT ON BILLS Session Year 1977

SENATE NO RECOMMENDATION ASSEMBLY

No. JUN 21 1977 No. 3587-B

Law: Penal

Title: An Act to amend the penal law, in relation to sexual performances by children.

The above bill has been referred to the Division of the Budget for comment. After careful review, we find that the bill has no appreciable effect on State finances or programs, and this office does not have the technical responsibility to make a recommendation on the bill.

We therefore make no recommendation.

SR:jh
6/16/77

Howard F. Miller, Deputy Director

10-DAY BILL

B-203 (12/75) BUDGET REPORT ON BILLS Session Year 1977

SENATE NO RECOMMENDATION ASSEMBLY

No. JUL 20 1977 No. 3587-C

Law: Penal

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We therefore make no recommendation.

SR:jh
7/19/77

Paul J. Elston

Paul J. Elston, Deputy Director

A-526

Multiple memorandum received from the State Comptroller dated JUL 28 1977 stating the following bill is of "No Interest" to the Department of Audit and Control.

Intro. No. Print No.

S-3587-C

The original memorandum filed with:

L 15-A

JUL 29 1977

JUL 29 1977

A 3587-C

THE SENATE
STATE OF NEW YORK

RALPH J. MARINO
5TH DISTRICT
CHAIRMAN
COMMITTEE ON CRIME AND CORRECTION

LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12247

August 2, 1977

AUG 2 19

The Honorable Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

Dear Mr. Gribetz: Re: A. 3587-C Child Pornography Bill

I am writing to urge the Governor's signature into law of Assembly Bill 3587-C which is an act to amend the penal law in relation to sexual performances by children.

The bill expands the crime of obscenity to include those persons who produce, present or promote obscene performances in which any person under the age of 16 years is depicted. A new section is added to make a crime the promotion of any sexual performance by a child without mandating the requirements of proving obscenity. Sexual performance and sexual conduct are defined to include actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals. The measure also includes provisions relating to the proof of age of the child, on recommendations of your staff in order to pass constitutional muster.

Certainly the most controversial portion of this bill concerns section 263.15 promoting a sexual performance by a child. I believe that by making criminal the promotion of sexual conduct by children, the Legislature has found and determined that conduct utilizing children to show deviate sexual intercourse, masturbation or sado-masochistic abuse is so abhorrent to the fabric of our society that it should be vigorously sanctioned. A substantial public interest exists to prohibit the exploitation of children as subjects in sexual performances. Studies, research and public testimony are all conclusive in that adequate statutes are needed to sanction the purveyors of such material as well as the parents who allow their children to appear in such performances. The harm of the emotional well being of the children who are permitted to engage in this form of sexual perversity is obvious and I strongly urge the Governor to sign into law Assembly bill 3587-C.

Sincerely,

Ralph J. Marino

RJM:afp

A 3587-C

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

HOWARD L. LASHER
46th DISTRICT
KINGS COUNTY
2634 WEST STREET
BROOKLYN, NEW YORK 11223
(212) 237-1387

CHAIRMAN
Committee on Child Care

VICE-CHAIRMAN
Sub-Committee on
Mitchell-Lama Housing

August 1, 1977

AUG 3 1977

Governor Hugh L. Carey
Executive Chambers
Capitol
Albany, N.Y. 12224

Dear Governor Carey:

My bill relating to the use of children in sexual performances, A3587-C, is on your desk awaiting your signature. I would appreciate attending the bill signing ceremony when this bill is signed into law.

This legislation is vital to the protection of children and the occasion of your signing such a bill is one that I would not want to miss.

Thank you for your kind attention to this matter.

Sincerely,

Howard L. Lasher

HOWARD L. LASHER
Member of Assembly

CC: Judah Gribetz, Counsel
Louis Catrona

HLL:eg

A-3587-C

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

HOWARD L. LASHER
46TH DISTRICT
KINGS COUNTY
2634 WEST STREET
BROOKLYN, NEW YORK 11223
(212) 237-1387

CHAIRMAN
Committee on Child Care

VICE-CHAIRMAN
Sub-Committee on
Mitchell-Lama Housing

August 2, 1977

AUG 3 1977

Hon. Judah Gribetz
Executive Chamber
State Capitol
Albany, N.Y. 12224

Re: Ten Day Bill
A. 3587-C

Dear Mr. Gribetz:

In accordance with your request enclosed is a copy of a memorandum in support of the above captioned bill.

Yours very truly,

Anthony Cantore

ANTHONY S. CANTORE
Counsel, Committee on Child Care

enclosure

ASC:eg

A 3587

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

PHILIP B. HEALEY
ASSEMBLYMAN 11TH A. D.
ALBANY, NEW YORK 12224

August 4, 1977

The Honorable Hugh L. Carey
Governor of New York
Executive Chambers
Albany, N. Y. 12248

RE: Bill #3587 Lasher

Dear Governor Carey:

I urge that you sign the above-mentioned legislation. Few other programs precede the requirements that government protect the innocent. In this legislation children are protected from being sexually exploited.

I do not feel a concern that the constitutionality of the matter is particularly germane. What is important is that we, as a State, making a statement to all, will not allow children to be abused. Let the courts decide as to the legality, if they are required to do so. But let us say, as the Legislative and Executive Branches of the New York State Government, that we stand up for the human rights of children. Please sign the bill.

Best wishes,

Philip B. Healey
Assemblyman 11th A.D.

PBH:h

A-3587-B

JUN 21 1977

C-910 of '77

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

HOWARD L. LASHER
46TH DISTRICT
KINGS COUNTY
2634 WEST STREET
BROOKLYN, NEW YORK 11223
(212) 237-1367

CHAIRMAN
Committee on Child Care

VICE-CHAIRMAN
Sub-Committee on
Mitchell-Lama Housing

June 20, 1977

Mr. Judah Gribetz
Counsel to the Governor
Executive Chamber
Albany, New York

Assembly Bill 3587-B
Ten Day Bill

Dear Judah:

Enclosed is a memorandum in support relating to my bill on child pornography. Also enclosed are copies of various editorials on the same subject.

I respectfully request that the Governor approve Assembly Bill 3587-B.

Sincerely,

Howard L. Lasher

HOWARD L. LASHER
Member of Assembly

enclosure

HLL:eg

A 3587-B

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

JUN 22 1977

JAMES W. McCABE, SR.
ASSEMBLYMAN 123RD DISTRICT
HOME: 127 MASSACHUSETTS AVENUE
JOHNSON CITY, NEW YORK 13790
(607) 797-8504
DISTRICT OFFICE
BINGHAMTON STATE OFFICE BUILDING
BINGHAMTON, NEW YORK 13901
(607) 773-7895

COMMITTEES
LOCAL GOVERNMENTS, CHAIRMAN
MENTAL HEALTH, VICE CHAIRMAN
EDUCATION

June 21, 1977

Hon. Hugh L. Carey
Governor of New York State
Executive Chambers
Capitol Building
Albany, New York 12224

Re: A 3587-B, Lasher
Children in Pornography

Dear Governor:

May I make a special appeal to you on behalf of the above-referenced bill that is on your desk. It addresses a crime in our society that must make God almost weep at the results of His human creation born of His infinite love. New York State must proclaim the official state revulsion at this heinous activity by the peddlers of pornography. This bill does that. I have a bill on the same subject, but I deferred to the judgment of the Codes Committee that Mr. Lasher's was the better bill. With all my being, I urge you to sign the bill. I know you share my great concern for the welfare of our children.

I am enclosing my February 2, 1977 news release that briefly reviews the problem.

My best personal regards.

Sincerely,

Jim McCabe

JAMES W. MC CABE, SR.
Vice Chairman
Committee on Mental Health

JWM:ag
encl.

HOWARD L. LASHER
46TH DISTRICT
KINGS COUNTY
2634 WEST STREET
BROOKLYN, NEW YORK 11223
(212) 648-1200
(212) 237-1387

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

CHAIRMAN
COMMITTEE ON CHILD CARE

COMMITTEES
AGRICULTURE
HOUSING
INSURANCE

MEMORANDUM IN SUPPORT

A. 3587-B by Mr. Lasher

Purpose of Bill:

To eliminate the sexual exploitation of children by establishing strict criminal sanctions against individuals who induce children to participate in sexual performances and who profit from the distribution of such material.

Summary of Provisions:

The bill adds a new Article 263, Sexual Performance by a Child, to the Penal Law to establish the crime of "Use of a Child in a Sexual Performance", a class C felony, prohibiting a person from employing a child under sixteen years of age to engage in sexual conduct in a play, motion picture, photograph, dance or other exhibition. Two similar sections-both class D felonies-would prohibit anyone from promoting sexual performances by children having knowledge of the character of the material. One section would require the performance to be obscene as defined by the Penal Law. A rebuttable presumption of age based upon the appearance of the child is established. An affirmative defense that the defendant in good faith reasonably believed the child to be of age would be created. Also, if the defendant is merely a peripheral employee and not a primary participant in the production or promotion of the sexual performance, an affirmative defense would be allowed. A separability clause is added to provide for constitutional challenges to any part of the article.

Statements in Support:

One cannot belabor the need to make every attempt to prevent children from being sexually exploited and to eliminate the child pornography industry. Prosecuters have lamented the lack of adequate criminal statutes to effectively prosecute the producers and distributors of child pornography. This bill closes that gap and establishes severe penalties for such crimes.

Although one promotion section of the new Article is based on an obscenity standard, the primary intent of the Article is to make

the inducement of children to engage in sexual performances and the promotion of such material absolutely prohibited. It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political or social value. In essence this Article would make material containing children in sexual performances, no matter what the purpose, against the public policy of this State.

The rebuttable presumption of age based upon appearance is necessary since it is almost an impossibility for District Attorneys to establish the age of unknown actors in photographs or movies brought from outside of New York State. As a general rule, even where knowledge is an element of the offense, knowledge of age is not a necessary part thereof unless specifically provided. [Penal Law, Section 15.20(3)] In addition, a defense based on lack of knowledge must be specified in statute. The bill, although creating a presumption of age, does make provision for an affirmative defense.

Fiscal Implications:

None

Memorandum in Support

A. 3587 by Mr. Lasher

AN ACT to amend the penal law, in relation to sexual performances by children

Purpose of Bill:

To impose criminal penalties against individuals who use children in sexual performances and who promote such materials

Summary of Provisions of Bill

The bill adds a new Article 263, Sexual Performance By A Child, to the Penal Law which would establish the crimes of Use of a Child in a Sexual Performance (Section 263.05), Promoting an Obscene Sexual Performance by a Child (Section 263.10), and Promoting a Sexual Performance by a Child (Section 263.15). Persons who reasonably believe that the child appearing in the performance is sixteen years of age or older or persons who are tangential participants in the crimes would have an affirmative defense to prosecution. Provision that certain evidence is admissible to prove the age of a child is also made in the bill.

Statement in Support

The appearance of children, even as young as eight years of age, in sexual performances has been widely deplored as the increase in production of such pornography has become apparent. District attorneys have indicated that the present obscenity statutes do not provide adequate criminal sanctions against persons who use children in this manner or against those who profit from the sale material in which children are sexually exploited.

A-3587-C

MEMORANDUM

STATE OF NEW YORK
DIVISION OF CRIMINAL JUSTICE SERVICES

JUL 29 1977

TO: Judah Gribetz

FROM: Robert Schlanger

DATE: July 27, 1977

RE: Ten-Day Bill A.3587-C

Purpose

To add a new Article 263 to the Penal Law, defining a number of felonies relating to sexual performances by a child under 16 years of age.

Discussion

We have heretofore commented on the predecessor of the instant bill (A.3587-B) and pointed out what we considered to be major deficiencies therein. Our most serious criticism was reserved for that portion of the proposal that established a presumption that a person who appears to be under 16 years of age is in fact under that age. Primarily because of that objectionable feature we recommended disapproval.

The instant amended version deletes the presumption and substitutes a section on how proof of age of the child may be introduced. This deletion removes the objection that was most responsible for our recommendation of disapproval. Though, as we pointed out in our prior memo, the bill contains other questionable features, they are not of sufficient weight to compel our adherence to our former recommendation.

Recommendation

Approval.

A 3587-B

Memorandum

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES

JUL 6 1977

July 5, 1977

TO: Judah Gribetz

FROM: Robert M. Schlanger

SUBJECT: Ten-Day Bill A.3587-B

Purpose

To add a new Article 263 to the Penal Law, defining a number of felonies relating to sexual performances by a child under 16 years of age.

Discussion

This bill comes in the wake of recent publicity about the alleged widespread use of children in pornographic films. Particularly shocking have been the stories of parents who used or permitted the use of their children for such purposes. The legislative reaction, as evidenced by this bill, has been harsh.

The bill presents a considerable number of substantive and technical problems, the most prominent of which are:

The thrust of section 263.05, Use of a Child in a Sexual Performance, is not very clear. Presumably, this is the provision under which the most egregious conduct, i.e., a parent offering or permitting his child to appear in a pornographic performance, would be dealt with. We assume that the word "consents" (p. 2, l.49) is intended to cover this conduct but we are not sure.

It takes considerable study of sections 263.10 and 263.15 to distinguish the subtle difference between these Class D felony crimes. Apparently, in 263.10 the elements are (1) an "obscene" performance and (2) sexual conduct by a child within that performance. The elements of 263.15 are (1) any performance (not necessarily obscene) and (2) as in the first section, sexual conduct by a child within it. It could therefore be argued that 263.10 is unnecessary since the conduct defined therein already falls within the broader scope of section 265.15. Perhaps the draftsman lacked confidence in the constitutionality of section 263.15 since under it, the crime could be predicated

on an unobscene performance with real artistic values which happens to contain one short scene involving sexual conduct by a chid. Theoretically, a gift of a fine book containing one photograph of sexual conduct by a child would subject the donor to prosecution. This may explain the inclusion of the severability provision in bill section 3. If section 263.15 should fall, then 263.10, which appears to be constitutionally acceptable, would survive.

The most serious deficiency concerns the presumption in section 263.20 (1) that a person "who appears to be" under 16 is in fact under 16 years old. Though rebuttable, this presumption is probably invalid. The concept of a presumption in criminal cases has been closely and carefully circumscribed by decisional law because of the danger that it might unfairly shift the burden of proof.

Fundamentally, a presumption may be appropriate when proof of the fact presumed would cast so onerous a burden upon the prosecution as to be almost insupportable. Then, the fact presumed must be so related to the facts that are proved that the presumed one "assures a reasonably high degree of probability" that the presumed fact follows from those proved directly. (See e.g., People v. McCaleb, 25 N.Y.2d 394). Finally, the burden of rebutting the presumption which, for all practical purposes, is cast upon the defendant, should be one which the defendant can bear with relative ease.

The age presumption in this bill falls far short of meeting these standards. The rationale for it, as stated in the sponsors' supporting memo, is that:

> "Movies and other obscene materials which are produced outside of New York State are extremely difficult to trace and therefore would present an impediment to obtaining proof of age. However, no harsh burden would be required of those persons who produce such material to prove the age of the child involved." (emphasis supplied).

Even if accepted as valid, the statement is misleading. If only "producers" of child porn were subject to prosecution, the presumption might be conceptually acceptable. But the fact is that these crimes are more broadly directed at "promoting", not merely producing, the objectionable material. As defined in 263.00 (5), promoting covers every conceivable way in which the material may be made or disseminated. If the defendant were, for example, a movie theatre operator or a bookseller, his inability to rebut the presumption would be at least as difficult as the prosecution's ability to prove the presumed fact.

The relationship between the fact presumed (age 16) and the fact proved (appears to be 16-years old) is not so compelling as to support the presumption. Obviously, if the child appears to be seven years old, we may safely presume that it is under 16. But when the subject's appearance is that of a fairly mature young person there is certainly no "reasonably high degree of probability" that

he or she is in fact under 16 years of age. After all, there is no generally accepted standard of what a 16-year old looks like. Varying rates of physical maturation commonly cause 14-year olds to look 17 and vice versa. Therefore, the fact that must be proved (appears to be under 16) may often be of such tenuous validity as to be legally unacceptable as a basis for supporting the presumption.

There are those who may argue that we should not be so solicitous of the interests of such despicable characters as child porn promoters; that if the presumption is legally infirm, let that be established by the courts. Of course, it is the courts that would ultimately resolve the legal questions, but the problem with this legislation is one of a lack of fundamental fairness. Even child porn promoters should not be subjected to prosecution on such an ill-conceived premise.

Recommendation

We support the effort this bill represents to address a detestable condition that is all too prevalent. However, in view of its many deficiencies, we believe that the Governor should disapprove it.

RMS/fh

A 3587-B

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, NEW YORK 10007

JUN 22 1977

RICHARD J. BARTLETT
STATE ADMINISTRATIVE JUDGE

MICHAEL R. JUVILER
COUNSEL

June 21, 1977

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly 3587-B
Senate 2743-B

Dear Mr. Gribetz:

This will acknowledge receipt of your request for comment on the above-designated legislation.

This bill would amend the penal law by adding a new article, article two hundred sixty-three, making it a crime to exploit children as subjects in sexual performances.

This office is taking no position on the bill because it does not relate to court administration.

Sincerely,

Michael R. Juviler

MRJ:lr

NEWS RELEASE February 2, 1977

James W. McCabe, Sr.
123d Assembly District

RE: Bill to deal with exploitation of children by manufacturers and peddlers of pornography.

During my recent hearings around the state on mental health and the state's efforts to control alchohol and substance abuse, on two occasions we received testimony from Dr. Judianne Densen-Gerber, the director of Odyssey House Institute, a nonprofit organization for troubled youths. Dr. Densen-Gerber is a noted lawyer-psychiatrist. Part of her testimony was a shocking recital of the ways in which children between age 3 and 13 are used by profiteers in pornography.

Dr. Densen-Gerber's testimony left me utterly speechless and almost physically ill. Her revelations about this callous, wanton sexual exploitation of little children have haunted me ever since her appearances before the committee. As evidence of what she reported, she invited me to look through several magazines, entitled Moppit Nudies. The magazines were so revolting that I had to skim them to keep from becoming ill. To accompany these magazines, Dr. Densen-Gerber reported, there are films depicting explicit sex acts by children and decks of playing cards with nude children on the backs of the cards.

These various publications are readily available, the doctor said, for purchase in Times Square in New York City and around the state and beyond where so-called adult books are peddled. It is imperative that we respond as a society to Dr. Densen-Gerber's observations that our communities are permitting commercial child pornography and that society's sickest members are being permitted to sexually exploit children, even as young as 3 years old. The doctor's challenge to us to act to stop this most heinous kind of activity cannot go unanswered.

Dr. Densen-Gerber is very concerned as a mother of four children, as a lawyer, as a psychiatrist ministering to troubled youths, and as a human being. Every decent person must be equally concerned. Certainly, everyone interested in mental health and morality must be deeply concerned. We can all recall the revulsion we experienced as the bizarre, animal-like crimes of the Charles Manson "family" in California were revealed. Many of us have wondered how our society can produce such non-human, amoral, repulsive people who prey on the rest of us. Permitting people in our midst to get rich by the sexual exploitation of children may be a part of the answer. The Charles Mansons of our world may be the products and victims of the money-making schemes of those whose only God is money.

Information from Dr. Densen-Gerber indicates that ~~60,000~~ 1,000 boys, eight to sixteen years of age, in the New York City Metropolitan area have been involved in this seamy operation. She estimates that a like number of girls are also being so used. It is not clear how the manufacturers of these films and printed materials get these children in their clutches. Incredible as it may seem, it is possible that some parents are selling their children to profit from such a disgusting operation. These apparently are American children, not imports from abroad.

I am preparing a bill for introduction in the Assembly the week of February 7th to deal with this serious problem. The bill amends the Penal Law to define the crime of the use of children under 18 in the manufacture or promotion of offensive sexual material. It designates this crime as a Class D felony. Sentencing for a Class D felony gives the judge several options: unconditional discharge, conditional discharge, five years' probation, an indeterminate sentence with a maximum of seven years, an indeterminate sentence decided by the division of parole, and a definite sentence of one year or less. I

don't know whether this is the best bill that can be written to deal with the problem. If a better bill comes along, I will be pleased to have it move in place of my bill. I want to see passed the most effective law we can write. At the very least, the introduction of my bill will generate active discussion of the urgent matter by the appropriate committees, Child Care and Codes. I am optimistic that effective legislation will be passed this session.

Unless these pernicious peddlers of child pornography are prevented from preying on unsuspecting children, we will all have to share in the responsibility for unleashing on society thousands and thousands of amoral, sexual monsters to prey on innocent victims. Children hired and trained in such schools of explicit, sick sexuality will emerge almost certainly as adults hopelessly and dangerously mentally ill. Their capacity for violent, sexual crimes will be almost unlimited. Dr. Densen-Gerber has done a great service in highlighting this problem. Society must respond as fast as possible. I invite all individuals and groups interested in a moral society, in the welfare of children, in the welfare of families, in the mental health of all people to join the fight for immediate, effective legislation to wipe out the moral leprosy fostered by these monstrous peddlers of child pornography.

James W. McCabe, Sr.

JAMES W. MC CABE, SR.
Vice-Chairman of Mental Health

A 3587-C

STATE OF NEW YORK
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, NEW YORK 10007

RICHARD J. BARTLETT
STATE ADMINISTRATIVE JUDGE

MICHAEL R. JUVILER
COUNSEL

July 26, 1977

JUL 27 1977

Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly 3587-C

Dear Mr. Gribetz:

This will acknowledge receipt of your request for comment on the above-designated legislation.

This bill would amend the penal law, in relation to sexual performances by children.

This office is taking no position on the bill, because it does not relate to court administration. The constitutionality of new section 263.15 of the Penal Law (promoting a sexual performance by a child) would have to be determined in an appropriate judicial proceeding; the issue is particularly serious if the section were applied to a non-obscene motion picture not produced in New York State.

Sincerely,

Michael R. Juviler

MRJ:mv

Michael R. Juviler

June 24, 1977

Renee L. Tooley
Legal Assistant
Guggenheimer & Untermyer
80 Pine Street
New York, New York 10005

Re: Senate - Assembly Bill
S 2743-B, A. 3587-B

Dear Ms. Tooley:

This bill is exceedingly troublesome on a number of grounds.

A.) The draftsmanship is deficient. Aside from the bill's odd construction, I note that the definitional section (263.00) defines "simulated" conduct in terms of an "obscene sexual performance" with reference to "material which is obscene." But "sexual performance" is defined as "sexual conduct", which in turn is defined as including "actual" or "simulated" conduct. Accordingly, the crime of Promoting a sexual performance by a child (263.15) would appear not to authorize prosecution for simulated, non-obscene sexual conduct, while the crime of Promoting an obscene performance by a child would appear not to authorize a prosecution for actual, non-obscene sexual conduct. It is therefore apparent that pleading proper charges under these statutes will turn on extraordinarily subtle questions of proof, which in the overwhelming majority of cases will be equivocal on the issue of actual or simulated conduct. The suggestion manifests itself: why doesn't the legislature merely upgrade the penalties under section 260.10(1), Endangering the welfare of a child? Such an approach would circumvent entirely the endlessly complex constitutional issues of obscenity theories and require no distinction between simulated and actual sexual conduct.

B.) A more serious deficiency of section 263.05, Use of a child in a sexual performance, is the absence of a scienter requirement in connection with the content and character of the performance. As this statute is drafted, a parent who has given permission to a child to appear in a school production of Romeo and Juliet could be prosecuted if, without the parent's knowledge, the production involves "innovative" or "modern" sexual elements in the staging. The statute seems to establish a strict liability standard. On the other hand, Section 235.00 dealing with obscenity offenses, specifically includes a scienter requirement.

C.) A further deficiency is the presumption that a person who appears to be under sixteen shall be presumed to be under sixteen if the defendant by a preponderance of the evidence doesn't establish that the child is in fact over sixteen. In New York, age can be established by visual inspection, but as the grossness of deviation decreases, the standard becomes impossible to apply fairly. Any child in fact over the age of 12 can in most cases not be definitely distinguished, visually, from children in the age group 12 - 16. A presumption's validity is generally based on the proposition that the defendant possesses the factual proof to rebut the presumption. This clearly does not obtain in the case of "promoting", where the defendant accused of showing a film or selling a photograph would have no more access to the child performer in the material than the prosecution. Additionally, constitutional questions suggest themselves. The United States Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, ___ U.S. ___ (1977) has ruled that a state may not require a defendant to bear an ultimate burden of persuasion with respect to an element of a crime, in connection with statutory affirmative defenses. It is arguable that this logic applies to statutory presumptions as well, and particularly where the critical element of a felony, the age of the child, may be established by the prosecution merely by "appearance." The mixing of the presumption and the affirmative defense of good faith reasonable belief that the child was over 16 will invoke evidentiary chaos on burden of proof that will take years for the trial and appellate courts of the state to dispel.

D.) The affirmative defense under 263.20(3) inexplicably covers ticket takers, cashiers, candy countermen, projectionists, spotlight operators and other non-managerial employees in a motion picture theatre, but not the same class of persons in a playhouse. This does not appear to be a rational distinction.

In summary, the bill is poorly drafted and unsound in structure and design. The broader constitutional issues on First Amendment grounds need not be addressed.

Very truly yours,

Kenneth Conboy
Assistant District Attorney
In Charge of the Rackets Bureau

KC:par

A-3587-C

STATE OF NEW YORK

AUG 3 1977

SPECIAL STATE PROSECUTOR FOR NURSING HOMES
HEALTH AND SOCIAL SERVICES
270 BROADWAY. NEW YORK. N. Y. 10007
(212) 488-2600

CHARLES J. HYNES
eputy Attorney General

August 1, 1977

Judah Gribetz, Esq.
Counsel to the Governor
Executive Chamber
Albany, N. Y. 12224

Re: A. 3587-C

Dear Judah:

This will acknowledge receipt of your request for comment on the above-designated legislation.

I supported enactment of this bill, with some serious reservations, prior to its recall from the governor and subsequent amendment. My reservations principally concerned the constitutionality of prohibiting the involvement of children in sexual performances which do not meet the traditional tests for obsenity. I continue to believe that this is a serious constitutional question which can only be resolved by the courts.

The prior bill also presented some drafting problems, one of which is resolved by this amendment. The current bill eliminates the presumption that one who appears to be a child under sixteen is so, and instead provides -- perhaps unnecessarily -- that age is a fact to be proven under the traditional rules of evidence. This amendment is an improvement.

Very truly yours,

Charles J. Hynes
Deputy Attorney General

CJH:mk

A 3587-C

STATE OF NEW YORK
OFFICE OF THE SPECIAL PROSECUTOR
2 WORLD TRADE CENTER, NEW YORK, N. Y. 10047

JOHN F. KEENAN
SPECIAL PROSECUTOR

TEL: 212-466-1250

JUL 28 1977

July 27, 1977

Honorable Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

RE: Assembly 3587-C

Dear Mr. Gribetz:

At the request of Mr. Keenan, I have examined the above-mentioned proposed legislation, which addresses the problem of the use of children in obscene material. The proposed bill is a definite improvement over the bill previously presented. In the new bill, the questionable presumption--that a person who appears to be less than sixteen years old shall be presumed to be less than sixteen--has been removed, and a provision has been added which clarifies the method of proof of age of the child.

The proposed statute is sure to engender constitutional challenge, particularly in view of the fact that the proposed Section 263.05 would prohibit use of a child in any sexual performance, whether obscene or not. But the bill would probably withstand such a challenge, and in any event the severability clause would help insulate other portions of the bill from attack.

In view of the importance of the subject matter, for the reasons stated above, this Office supports the passage of this bill.

Very truly yours,

TAD/cl

THOMAS A. DUFFY, JR.
Special Assistant Attorney General
Chief, Appeals Bureau

A 3587-B

STATE OF NEW YORK

SPECIAL STATE PROSECUTOR FOR NURSING HOMES
HEALTH AND SOCIAL SERVICES
270 BROADWAY, NEW YORK, N.Y. 10007
(212) 488-2600

CHARLES J. HYNES
Deputy Attorney General

June 21, 1977

Judah Gribetz, Esq.
Counsel to the Governor
Executive Chamber
Albany, NY 12224

JUN 24 1977

RE: A 3587-B

Dear Judah:

This will acknowledge receipt of your request for comment on the above-designated legislation. This bill would amend the Penal Law by creating three new crimes involving sexual performances by children.

Proposed Section 263.10 would provide that a person is guilty of a class D felony if, knowing its character and content, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years old. There appears to be no constitutional impediment to this statute because anyone guilty of violating it would already be guilty of obscenity in the second degree (Penal Law Section 235.05) and the element of participation by a child would simply raise the degree of the crime. The prosecution would not have to show that the promotor knew that the participant was less than sixteen years of age, but it is an affirmative defense if the promotor can show that he reasonably believed that the participant was of age. What is unclear, however, is the meaning of the provision that a person "who appears to be under sixteen years of age" is presumed to be so. Does the presumption arise simply from the testimony of

a single witness as to his subjective perception, or must appearance be judged by the jury from objective facts such as the physical presence of the participant himself. Depending upon how much and what kind of evidence is required to raise this presumption, it may well be that the rule impermissibly shifts the burden of proof on the question of age to the defendent.

Sections 263.05 and 263.15 involve the use and promotion of a child in a "sexual performance." This term is defined as a performance or part thereof which includes sexual conduct but which is not necessarily obscene under the constitutional tests of Miller v. California, 413 U.S. 15 (1973). The United States Supreme Court has held that material which is not obscene for adults may be kept from minors under a statute which "adjusts the definition of obscenity" in terms of appeal to the prurient interests of minors. Ginsberg v. New York 390 U.S. 629, 638 (1968). Although the decision stressed the right of the state to protect the well-being of its youth, 390 U.S. at 640, the Supreme Court has never addressed the question whether a performance involving sex can be judged on different criteria when a child is a participant. The constitutionality of sections 263.05 and 263.15 will have to be determined by the courts and very likely by the Supreme Court.

Section 263.05 also contains one confusing term. It makes a person guilty of a class E felony if he consents [sic] a child less than sixteen years of age to engage in sexual performances. Persumably this is meant to refer to consent by a parent, guardian, or other person with responsibility for the child and not merely to a member of the audience who consents to see the performance.

In short, the bill is far from unassailable, but because of the severability clause in section 3 of the bill none of the above considerations is likely to vitiate the entire bill. The problem of child pornography is a serious concern and I therefore recommend that the governor sign the bill into law and leave to the courts the difficult questions of constitutionality and interpretation.

Very truly yours,

CHARLES J. HYNES
Deputy Attorney General

A - 3587-B

P.G.

STATE OF NEW YORK
OFFICE OF THE SPECIAL PROSECUTOR
2 WORLD TRADE CENTER, NEW YORK, N. Y. 10047

JOHN F. KEENAN
SPECIAL PROSECUTOR

TEL. 212-466-1250

JUL 1 1977

June 30, 1977

Honorable Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

RE: Senate 2743-B
Assembly 3587-B

Dear Mr. Gribetz:

The legislation would add a new article to the penal law creating three crimes, Use of a child in a sexual performance (§263.05), Promoting an obscene sexual performance by a child (§263.10) and Promoting a sexual performance by a child (§263.15), and would create a presumption and affirmative defense (§263.20) applicable to the new crimes. These new crimes would penalize those who participate in the production of sexually explicit material involving children under sixteen years of age and those who promote such material by manufacturing, selling or exhibiting it.

Such legislation is an important step toward eventually wiping out such vicious, loathsome and socially detrimental activity.

Serious constitutional flaws, however, are presented by the provisions of section 263.20. The section creates a presumption (subd. 1) and an affirmative defense (subd. 2). Subdivision one of the section provides that "a person who appears to be under the age of sixteen years in any obscene sexual performance shall be presumed to be under the age of sixteen years." In the first instance, the basic fact that a person appears to be under the age of sixteen is vague and not sufficiently susceptible to definite proof. Secondly, in order for the presumption to pass constitutional muster there must be "'a reasonably high degree of probability' that the presumed fact follows from those proved directly" (People v. Leyva, 38 N.Y. 2d 160, 166). Assuming that a prosecutor could successfully establish that a person appeared to be under the age of sixteen years, it is open to serious

question that such a fact carries with it "a reasonably high degree of probability" that the person is actually less than sixteen years of age. This is particularly true when it is realized that a well known attribute of many serious performers is that they appear and often endeavor to appear younger than their true age. Additionally, it is well recognized that children develop physically at widely varying rates. Perhaps the constitutional problems presented by the present language of subdivision one could be alleviated by a lowering of the age of the children whose performance is proscribed and a more precise description of them in terms of anatomical characteristics.

Subdivision two of section 263.20 provides that "it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was sixteen years of age or over." If this affirmative defense comes into play in a case where the presumption provided for in subdivision one is used to establish a prima facie case, the affirmative defense will be a clear violation of the constitutional rule that the state may not cast a burden upon a defendant to disprove an essential element of the crime charged (Mullaney v. Wilbur, 421 U.S. 684, and Patterson v. New York, _____ U.S. _____ 21 Cr.L. 3146).

Although section three of the legislation provides that the provisions of article 263 shall be severable, the serious constitutional flaws presented by section 263.20 militate against positive executive action.

Very truly yours,

TAD/cl

THOMAS A. DUFFY, JR.
Special Assistant Attorney General
Chief, Appeals Bureau

C-910 A-3587-C

PG

STATE OF NEW YORK
OFFICE OF THE LIEUTENANT GOVERNOR
ALBANY 12224

AUG 8 1977

MARY ANNE KRUPSAK
LIEUTENANT GOVERNOR

August 5, 1977

Honorable Hugh L. Carey
Executive Chamber
The Capitol
Albany, New York 12224

Dear Hugh:

The shocking exploitation of children through sexual activity by adults must be addressed by the State of New York which bears the responsibility to protect the well-being and interest of our children.

A bill, A3587C, is before you now that would amend the penal law by creating three new crimes in relation to sexual performances by children. I believe that this bill can be a vital tool to protect against this heinous exploitation which damages not only the emotional, psychological and physical health of our children, but the integrity of our society's moral and ethical principles.

Dr. Judianne Densen-Gerber, President of Odyssey Institute has stated "There is no obscene or non-obscene burning, flaying, or beating of a child, likewise there is no obscene or non-obscene sexual performance. Every use of a child for exploitive sexual needs of an adult is obscene by definition."

I agree with Dr. Densen-Gerber wholeheartedly that obscenity in such a cruel and irresponsible form must be dealt with immediately by the State.

While I know that objections to this bill have been raised both of a technical and constitutional nature, I believe the over-riding issue which initiated legislative action strongly argues for its approval. I therefore urge your favorable consideration.

Sincerely,

Mary Anne

NEW YORK OFFICE: HARLEM STATE OFFICE BUILDING, 163 WEST 125TH STREET, NEW YORK, NEW YORK 10027
WESTERN NEW YORK OFFICE: 67 CHESTNUT STREET, 6TH FLOOR, ROCHESTER, NEW YORK 14604

PG

A 3587-B

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

JUN 29 1977

LOUIS J LEFKOWITZ
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Assembly 3587-B

The purpose of this bill is to amend the penal law in order to prohibit the use of a child under the age of sixteen in an obscene sexual performance and the promotion of such use.

This bill takes effect on the ninetieth day after it becomes law.

The bill adds a new article, article 263, to the penal law, defining several new offenses, including use of a child in a sexual performance (class C felony), promoting an obscene sexual performance by a child (class D felony) and promoting a sexual performance by a child. The terms "obscene sexual performance", "deviate sexual intercourse" and "sado-masochistic abuse", are defined in accordance with existing definitions in the penal law. The bill also includes a rebuttable presumption that anyone who appears to be under the age of sixteen in an obscene sexual performance shall be presumed to be under sixteen.

Your Excellency may wish to note that the definition of "promoting" performances is very broad. An exclusion is provided for innocent employees in a motion picture theatre, but no corresponding exclusion is provided for persons who serve in a comparable capacity where books and magazines are sold. Proposed Penal Law, § 263.15, creates a class D felony, promoting a sexual performance by a child, which prohibits such promotion without regard to whether or not the performance is obscene. It would appear that legal challenge to this section can be expected.

This bill is identical to S. 2743-B. Legislation that was somewhat similar, although less comprehensive, was introduced in the 1975-1976 legislative session (S. 2004, A. 2198), but remained in committee.

I find no legal objection to this bill.

Dated: June 29, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General

A 3587.B

State University of New York at Buffalo

SCHOOL OF INFORMATION AND LIBRARY STUDIES

JUN 28 1977

23 June 1977

The Honorable Hugh L. Carey
Governor
Executive Chamber
State House
Albany, New York 12224

Dear Governor Carey:

I understand that you have access to my letter to the Honorable Assemblyman Howard Lasher concerning the legislation abuse of minors in sexual performance which is causing deep concern by librarians in this state. Therefore I will not repeat those statements here.

However, I thought it might assist you in your deliberations to have 'Statement on Legislation To Control Sexual Abuse of Minors" passed unanimously by the Council of the American Library Association in their 97th Annual Conference in Detroit. The Council is an elected, representational body drawn from the 34,000 member association empowered to make policy statements of concern to librarians in the United States.

Most respectfully,

Gerald R. Shields

Gerald R. Shields
Assistant Dean

New York Library Association
Intellectual Freedom & Due Process
Committee

GRS/hsm
enc.
cc: Judah Gribetz, Esq.
Paul Joya, Esq.

LAWRENCE D. BELL HALL AMHERST, NEW YORK 14260 TEL.(716)636-2412

Department of Justice

STATEMENT

OF

JOHN KEENEY
'UTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIME
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

AND

SUBCOMMITTEE ON SELECT EDUCATION
COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

CONCERNING.

H.R. 3913 AND H.R. 4571
CHILD EXPLOITATION ACT

ON

JUNE 10, 1977

STATEMENT

My name is John C. Keeney and I am Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. It is a pleasure to appear before you today to discuss the position of the Department of Justice on several bills which would prohibit the sexual exploitation of children and the transportation and dissemination of photographs or films depicting such exploitation.

H.R. 4571 and H.R. 7093 amend the Child Abuse Prevention and Treatment Act (42 U.S.C. 5101-5106) by adding proposed sections 8, 9 and 10. Section 8 provides a fine of not more than $50,000 or imprisonment for not more than twenty years or both for any individual who causes or knowingly, in the case of H.R. 4571, or willfully, in the case of H.R. 7093, permits a child to engage in a prohibited sexual act as defined in the bill or the simulation of such an act if such individual knows, has reason to know or intends that such act may be photographed or filmed and that the resulting photograph or film may be transported, shipped or mailed through interstate or foreign commerce or may affect such commerce. The same penalty would apply to any individual who photographs or films a child engaging in a prohibited sexual act or in a simulation thereof if such individual knows, has reason to know, or intends that any resulting photograph or film may be transported, shipped, or mailed through interstate or foreign commerce or may affect such commerce. Section 9 provides that any individual who knowingly transports, ships, or mails through, or in such a manner as to affect, interstate or foreign commerce any photograph or film depicting a child engaging in a prohibited sexual act or in the simulation of such an act, or any individual who receives for the purpose of selling or sells any such photograph or film which has been

transported, shipped, or mailed through, or in such a manner as to affect, interstate or foreign commerce shall be fined not more than $25,000 or imprisoned not more than fifteen years or both. Section 10, as set forth in H.R. 4571, defines "child" as any individual who has not attained age sixteen and defines "prohibited sexual act" to include sexual intercourse, anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, "any other sexual activity" or "nudity; if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction." H.R. 7093 uses the terms "sexual sadism" and "sexual masochism" in place of "sadism" and "masochism" and uses "person" instead of "individual" throughout the bill. I should note here that the term "person" would appear to be preferable to the term "individual," since it would permit prosecution of business entities, as well as individuals, where appropriate. In all other respects the definitions are identical. Both bills vest enforcement authority in the Attorney General.

H.R. 3913 and several other bills amend Title 18, United States Code, by adding proposed sections 2251, 2252 and 2253. I note that Title 18 of the U.S. Code, which contains the bulk of our Federal criminal statutes, would be the most appropriate location for the proposed provisions. These bills are identical in all respects to H.R. 4571 except for H.R. 5474 and H.R. 6747, which impose minimum penalties of $10,000 and four years in section 2251 and minimum penalties of $5,000 and two years in section 2252, and H.R. 5522, which contains certain additional substantive provisions not found in the other bills. In addition to the other provisions, section 2251, as set forth in H.R. 5522, punishes with a maximum fine of $50,000 or a prison term of 20 years or both any individual who causes or knowingly permits a child to engage in a prohibited sexual act or simulation thereof if he knows, has reason to know or intends such act may form a part of a commercial live show and such show travels in or affects interstate or foreign commerce. The same penalty extends to an individual who travels in, uses a

facility in or otherwise affects interstate or foreign commerce to induce or permit a child to commit a sexual act for the purpose of prostitution.

I should like first to set forth the Department's views concerning the provisions of the bills which are common to all of them. For the sake of clarity my comments will be in terms of the provisions of H.R. 4571. I shall then comment on the provisions that are peculiar to H.R. 5522.

We share the concern of the Congress with regard to the production of films and photographs portraying sexual abuse of children. However, we think that the proposed legislation needs to be modified in certain ways in order to deal with the problem.

In the first place, the bill is, in our opinion, jurisdictionally deficient. It is well settled that Congress may bar articles it deems undesirable from interstate or foreign commerce or from the mails. E.g., United States v. Orito, 413 U.S. 139 (1973); United States v. Darby, 312 U.S. 100 (1941); and Periara v. United States, 347 U.S. 1 (1954). Leaving aside for the moment the effect of the First Amendment, there is little doubt that the Commerce Clause authorizes the enactment of criminal penalties for persons who mail or ship in interstate or foreign commerce or receive in the mail or from interstate or foreign commerce for sale films or photographs of the type in question.

It is also settled that Congress may prohibit the manufacture of an article within a state if the article will enter or affect interstate or foreign commerce. E.g., United States v. Darby, supra; Wickard v. Filburn, 317 U.S. 111 (1942); and United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). Congress may also punish conduct which has only a potential effect on commerce. E.g., United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971); and United States v. Prano, 385 F.2d 387 (7th Cir. 1967). Congress could,

therefore, prohibit the manufacture of the films or photographs in question if the producer knows, has reason to know or intends that they will move in or affect interstate or foreign commerce.

Congress could also prohibit causing or knowingly permitting a child to perform a prohibited sexual act where the person responsible knows, has reason to know or intends that the acts will be filmed or photographed and will be placed in or will affect interstate or foreign commerce. Congress could rationally conclude that children below age 16 are incapable of making a free and understanding decision to participate in the acts which the bill prohibits. See Ginsberg v. New York, 390 U.S. 629 (1968). Moreover, adults who permit children to participate in these activities play an essential role in the production process somewhat akin to the supplier of an essential material. See United States v. Ferry, 389 F.2d 103 (4th Cir. 1968); and Call v. United States, 265 F.2d 167 (4th Cir. 1959), wherein suppliers of sugar and containers to illicit distillers were convicted under 26 U.S.C. 5686(a), which forbids possession of property with intent to violate the internal revenue laws.

However, the bill extends liability to cases where a child "may" be filmed or photographed and the resultant material "may" enter the mailstream or enter or affect interstate or foreign commerce. Since what "may" occur also may not occur, the bill could cover a purely local act of child abuse in which there is, in fact, no filming or photographing and no possible effect on interstate or foreign commerce. The bill, therefore, would reach situations not properly cognizable under the Commerce Clause. This defect can be remedied by changing the word "may" where it occurs in the bill to "will".

The words "affect interstate commerce or foreign commerce" should also be deleted from the bill. Without this change the bill would cover a purely intrastate photographing and distribution operation on the theory that commerce is "affected" in that the processing of the film or photographs utilize materials that moved in interstate commerce. See United States v. Addonizio, supra, and United States v. Prano, supra. In our opinion, the investigation or prosecution of purely local acts of child abuse should be left to local authorities with Federal involvement confined to those instances in which the mails or facilities of interstate commerce are actually used or intended to be used for distribution of the film or photographs in question.

The same language which renders the bill jurisdictionally questionable also poses problems with regard to intent. Under the proposed legislation, a person may be convicted if he "intends" that the act in question "may" be photographed and "may" be shipped in interstate or foreign commerce or mailed. We suggest that a person may intend that something happen or that it not happen. The standard of intent used in this bill, which is based on the mere possibility that certain acts will occur, would seem to be an insufficient basis on which to predicate criminal liability. An individual may also be convicted if he "intends" to "affect interstate commerce or foreign commerce." While an individual may intend to mail or ship an article, which is a physical act, the question of whether an action "affects commerce" is an ultimate conclusion based upon the assessment of physical acts rather than a matter of intent. For these reasons also, we recommend that the bill be limited to situations in which a person knows, has reason to know or intends that the act in question will be photographed and mailed or shipped in interstate or foreign commerce.

Secondly, the bill does not distinguish between material which is obscene and material which is protected by the First Amendment. In Miller v. California, 413 U.S. 15 (1973), the Supreme Court required that material must be evaluated as a whole in determining whether it is obscene. However, the present bill would forbid the manufacture and distribution of a film containing one brief scene of prohibited conduct and otherwise innocuous. For example, the bill would apply to the film "The Exorcist," which contains a scene in which a minor simulates masturbation but is clearly not legally obscene.

I would like to emphasize at this point two very significant results which would follow from the enactment of this legislation. First, an existing motion picture, such as "The Exorcist," could no longer be distributed in interstate commerce so long as the simulated scene involving the minor is retained in the film, and second, any future production of a motion picture film which contains a depiction of a minor engaged in a prohibited sexual act would be criminally proscribed even though, as in the case of "The Exorcist," the offensive scene is merely a small part of the film which, taken as a whole, would not be legally obscene under the standards set forth by the Supreme Court in Miller. This would be a clear statement of public policy by the Congress which would undoubtedly create severe problems for the courts, particularly in situations where the offensive material is merely a small part of what is otherwise a socially acceptable product.

Certain infringements on protected expression have been justified under the principle expressed in United States v. O'Brien, 391 U.S. 367 (1968), wherein the Court ruled that a regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment rights is no greater than is essential to the furtherance of that interest. Viewed against the background of this principle it would appear that the bill would further government's legitimate interest in protecting the welfare of children. See Ginsberg v. New York, supra; and Prince v. Massachusetts, 321 U.S. 158 (1944).

On the other hand, the Court has held that, as a general rule, a criminal statute which would reach protected expression as well as obscenity is void on its face for overbreadth. See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); and Butler v. Michigan, 352 U.S. 380 (1957). Although the Court has modified this doctrine in the case of a statute dealing with distribution to children only, see Ginsberg v. New York, supra, the proposed bill would prohibit distribution to anyone. In the face of the strong constitutional protection accorded material which is not obscene, we cannot say with any certainty that the proposed legislation would withstand con-

stitutional challenge.

Thirdly, certain of the definitions of "prohibited sexual act" set forth in section 10 do not appear to be appropriate to deal with the conduct sought to be prohibited. "Sadism" and "masochism" are broad enough to cover activities which are not necessarily sexually oriented. They could include filmed episodes of physical mistreatment of orphans, child laborers, or inmates of a juvenile detention facility or a child inflicting injury upon himself. Such portrayals would have no sexual appeal except, perhaps, to some tiny segment of society. Either these terms should be deleted or the terms "sexual sadism" and "sexual masochism," found in H.R. 7093, should be used and the legislative history should state what forms of conduct are intended to be covered. The term "nudity . . . depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction" is also troublesome. This definition differs from the "average person" test for obscene material set forth in Miller v. California, supra, and it would be difficult to determine by what standard the "sexual stimulation or gratification" could be assessed. We would suggest as an alternative definition "lewd exhibition of the genitals," a phrase used by the Chief Justice in Miller v. California, supra, to describe one of a variety of types of conduct which could be prohibited under state obscenity statutes. Congress could make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within this definition.

Fourthly, the bill should be expanded in two respects. First, the coverage of the bill is limited to "photographs or films" of prohibited sexual acts. Since photographs may very well end up as inclusions within magazines before they are mailed or shipped in commerce, the title of the bill and subsections 8(a)(2), 8(b), 9(a)(1) and 9(a)(2) should be amended to include "printed matter containing photographs" in order to avoid possible problems of admissibility at trial based on the contention that the bill does not include such magazines. Second, since we view the bill as an attempt to deal with the commercial exploitation of sexual activity involving children, subsection 9(a)(2) should be amended to include any person who manufactures, reproduces or duplicates the subject films or photographs with the requisite intent as well as those who receive or sell such films or photographs. This will enable the bill to cover film processing laboratories and others who are instrumental in the distribution process and who are aware of the nature of the material and the use of the mails or facilities of interstate or foreign commerce.

Fifthly, there will be difficult problems of proof under the bill. The bill is limited in its application to activities involving children, and the term "child" is defined to mean "any individual who has not attained age sixteen." Since in a great many cases the age of the subject will not be readily apparent from an observation of the film or photograph, the Government will not be able to sustain its burden of proof in such cases unless the actor himself is identified and produced in court or other competent evidence of his age is available. In light of the clandestine fashion in which many of these films and photographs are produced, it will often not be possible for the Government to produce this necessary evidence. In addition, the Government will not be able to prove interstate transportation unless it can

establish where the films or photographs were made.

Sixthly, the word "knowingly" in the second line of section 8 is unnecessary and should be stricken. It can be established that the defendant knew that he was permitting a child to engage in a prohibited sexual act by proving, as the Government is required to do, that the defendant knew, had reason to know or intended that "such act" would be photographed and the product transported in the mail or in interstate or foreign commerce. In the context in which it appears, "such act" clearly means a prohibited sexual act. Unless "knowingly" is deleted here, the bill might be subject to an interpretation requiring the Government to prove the defendant's knowledge of everything that follows "knowingly", including the age of the child. We assume that it is not the intention of the drafters to require the Government to prove that the defendant knew the child was under age sixteen. In this respect, the bill would resemble 18 U.S.C. 2423, that portion of the White Slave Traffic Act which makes it an offense to knowingly induce or coerce girls under the age of eighteen to travel by common carrier in interstate commerce for immoral purposes. There is no requirement under that statute that the Government prove the defendant knew the girl's age. See United States v. Hamilton, 456 F.2d 171 (3rd Cir. 1972).

On the other hand, the use of the word "knowingly" in subsection 9(a)(1) is appropriate to make it clear that the bill does not apply to common carriers or other innocent transporters who have no knowledge of the nature or character of the material they are transporting. To clarify the situation, the legislative history might reflect that the defendant's knowledge of the age of the child is not an element of the offense but that the bill is not intended to apply to innocent transportation with no knowledge of the nature or character of the material involved.

Finally, the penalties are excessive to the point of making convictions extremely difficult to obtain except in the most aggravated cases. We suggest that the penalties should be comparable to those found in 18 U.S.C. 2423, namely, a fine of not more than $10,000 or a prison sentence of not more than ten years or both.

As noted above, we have concerns about the bill, as to both its constitutionality and the problems of proof it creates. We also believe its utility would be limited. Nevertheless, if the changes we recommend are incorporated, the Department of Justice would not object to this legislation.

It is our understanding that many of the photographs and films the legislation would attempt to cover are in fact produced abroad; the legislation would not apply to such materials except for that portion of subsection 9(a)(2) which punishes receipt from foreign commerce. Moreover, with regard to material which is produced in the United States, recent newspaper accounts have indicated that law enforcement agencies who have investigated in this area for years have had little if any success in ascertaining where and how the films and photographs are made and in discovering where and how the films and photographs are made and in discovering the persons responsible for making them. Finally, to the extent that such investigations may prove fruitful, there are appropriate local statutes and ordinances, such as child abuse laws and laws prohibiting contributing to the delinquency of a minor, which would apply to the conduct made criminal in section 8 of the proposed bill; and we do not think it likely that local prosecutors would hesitate to bring charges. The principal advantage to be gained from enactment of this legislation would be to provide the Federal Bureau of Investigation and the Postal Service with investigative jurisdiction in an area that is basically a local law enforcement problem.

To the extent that section 9 deals with obscene material, the offenses are covered by existing Federal statutes. See 18 U.S.C. 1461-1465. The Postal Service and the FBI have informed us that they presently have several cases dealing with obscene material involving the use of children under investigation. In one respect, the proposed bill is more restrictive than present law because it requires mailing across state lines. The offense denominated in 18 U.S.C. 1461 is complete once material is deposited in the United States mail. Of course, to the extent that the bill deals with material which is not obscene, it is an extension of present law.

I would like to conclude by discussing the provisions which are found only in H.R. 5522.

We are not aware of the existence of any live sex shows traveling in interstate commerce. In the absence of a showing that there is, in fact, a problem to be addressed by Federal legislation, we see no necessity for the provisions punishing an individual who causes or permits a child to engage in a prohibited sex act for the purpose of such a show. In any event, because this provision deals directly with sexual conduct rather than the shipment of materials in the mails or interstate commerce, it would appear to cover conduct peculiarly appropriate for prosecution by local authorities under local sex offense statutes.

That portion of section 2251 that imposes penalties upon an individual who travels in, or otherwise affects, interstate or foreign commerce to induce a child to engage in prostitution would appear to reach an individual

who travels in interstate commerce with the intent to induce a child but who takes no further action. If no overt act takes place it would be extremely difficult to prove a violation, since it would not be possible to establish the defendant's subjective intent.

If the defendant, in fact, thereafter induces a child to engage in prostitution, the conduct would be punishable under present law. See 18 U.S.C. 1952, which makes it a criminal offense to travel in interstate or foreign commerce with intent to promote or carry on prostitution activities in violation of state or Federal law, and the White Slave Traffic Act, 18 U.S.C. 2421-2423, mentioned earlier in my testimony, which deals broadly with the transportation of females in interstate or foreign commerce for the purpose of prostitution or other immoral conduct. This latter statute could easily be amended to include the prostitution of males should there be a demonstrated need.

In closing, let me offer the services of the professional staff of the Criminal Division to work with the staff of either or both Committees in developing the best possible legislative approach to the problem of sexual abuse and exploitation of children.

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR

2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

TELEPHONES:
MAJORITY—225-4527
MINORITY—225-3725

May 26, 1977

Ms. Arlynn Greenbaum
Publicity Director
St. Martin's Press, Inc.
175 Fifth Avenue
New York New York 10010

Dear Ms. Greenbaum:

I appreciate receiving a copy of SHOW ME for our Members to use in considering the question of the use of children in pornographic materials.

The book, along with the fine explanation by Tom McCormack, goes a long way, I believe, towards showing that merely photographing a child in the nude does not represent abusive acts. In fact, in my opinion in the case of this book it appears to be the representation of a healthy family relationship.

Once again, thank you for sending me the book. I am circulating it to the Members of the Education and Labor Committee along with Mr. McCormack's statement.

With every good wish, I am

Sincerely,

Martin L. LaVor
Senior Legislative Associate

MLV:sg

A 3587-B

DISTRICT ATTORNEY
OF THE
COUNTY OF NEW YORK
155 LEONARD STREET
NEW YORK, N. Y. 10013
(212) 732-7300

ROBERT M. MORGENTHAU
DISTRICT ATTORNEY

NEIGHBORHOOD COMPLAINT OFFICES
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55 WEST 125 STREET
NEW YORK, N.Y. 10027
(212) 831-8661
WEST SIDE BRANCH
2112 BROADWAY
NEW YORK, N.Y. 10023
(212) 595-0760

June 24, 1977

Renee L. Tooley
Legal Assistant
Guggenheimer & Untermyer
80 Pine Street
New York, New York 10005

Re: Senate - Assembly Bill
S 2743-B, A. 3587-B

Dear Ms. Tooley:

This bill is exceedingly troublesome on a number of grounds.

A.) The draftsmanship is deficient. Aside from the bill's odd construction, I note that the definitional section (263.00) defines "simulated" conduct in terms of an "obscene sexual performance" with reference to "material which is obscene." But "sexual performance" is defined as "sexual conduct", which in turn is defined as including "actual" or "simulated" conduct. Accordingly, the crime of Promoting a sexual performance by a child (263.15) would appear not to authorize prosecution for simulated, non-obscene sexual conduct, while the crime of Promoting an obscene performance by a child would appear not to authorize a prosecution for actual, non-obscene sexual conduct. It is therefore apparent that pleading proper charges under these statutes will turn on extraordinarily subtle questions of proof, which in the overwhelming majority of cases will be equivocal on the issue of actual or simulated conduct. The suggestion manifests itself: why doesn't the legislature merely upgrade the penalties under section 260.10(1), Endangering the welfare of a child? Such an approach would circumvent entirely the endlessly complex constitutional issues of obscenity theories and require no distinction between simulated and actual sexual conduct.

B.) A more serious deficiency of section 263.05, Use of a child in a sexual performance, is the absence of a scienter requirement in connection with the content and character of the performance. As this statute is drafted, a parent who has given permission to a child to appear in a school production of Romeo and Juliet could be prosecuted if, without the parent's knowledge, the production involves "innovative" or "modern" sexual elements in the staging. The statute seems to establish a strict liability standard. On the other hand, Section 235.00 dealing with obscenity offenses, specifically includes a scienter requirement.

C.) A further deficiency is the presumption that a person who appears to be under sixteen shall be presumed to be under sixteen if the defendant by a preponderance of the evidence doesn't establish that the child is in fact over sixteen. In New York, age can be established by visual inspection, but as the grossness of deviation decreases, the standard becomes impossible to apply fairly. Any child in fact over the age of 12 can in most cases not be definitely distinguished, visually, from children in the age group 12 - 16. A presumption's validity is generally based on the proposition that the defendant possesses the factual proof to rebut the presumption. This clearly does not obtain in the case of "promoting", where the defendant accused of showing a film or selling a photograph would have no more access to the child performer in the material than the prosecution. Additionally, constitutional questions suggest themselves. The United States Supreme Court in Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, ___ U.S. ___ (1977) has ruled that a state may not require a defendant to bear an ultimate burden of persuasion with respect to an element of a crime, in connection with statutory affirmative defenses. It is arguable that this logic applies to statutory presumptions as well, and particularly where the critical element of a felony, the age of the child, may be established by the prosecution merely by "appearance." The mixing of the presumption and the affirmative defense of good faith reasonable belief that the child was over 16 will invoke evidentiary chaos on burden of proof that will take years for the trial and appellate courts of the state to dispel.

D.) The affirmative defense under 263.20(3) inexplicably covers ticket takers, cashiers, candy countermen, projectionists, spotlight operators and other non-managerial employees in a motion picture theatre, but not the same class of persons in a playhouse. This does not appear to be a rational distinction.

In summary, the bill is poorly drafted and unsound in structure and design. The broader constitutional issues on First Amendment grounds need not be addressed.

Very truly yours,

Kenneth Conboy
Assistant District Attorney
In Charge of the Rackets Bureau

KC:pam

A 3587-B

JUN 23 1977

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

June 21, 1977

A.3587B - by Mr. Lasher

AN ACT to amend the penal law, in relation to sexual performances by children

APPROVAL RECOMMENDED

Honorable Hugh L. Carey
Governor of the State of New York
Albany, New York

Dear Governor Carey:

The above bill is before you for executive action.

This bill voices the Legislature's disgust and displeasure with the proliferation of exploitation of children as subjects in sexual performances. I share these sentiments.

The bill adds to the Penal Law, Article 263, "Sexual Performance By A Child." This article creates the new crimes of "use of a child in a sexual performance," a class C felony, promoting "an obscene sexual performance by a child", a class D felony, and "promoting a sexual performance by a child", also a class D felony.

The gravamen of these crimes is that the prescribed conduct involved a child less than sixteen years.

The bill creates a presumption that a person who appears to be under the age of sixteen years shall be presumed to be under the age of sixteen years. It also authorizes affirmative defenses of good faith belief that the child was over sixteen, or that the person charged belonged to one of the enumerated categories of non-managerial employees, and had no financial interest in the promotion, presentation, direction or a sale of the illegal sexual performance.

This bill focuses on the callous, cynical exploitation of children by pornographers lusting after the squalid dollars gained from purveying these materials.

It imposes more stringent penalties on those persons who spice their illicit representations and performances with young children than they would be subject to if persons over sixteen were used. This legislation is an appropriate response. There is something ineffably sad about the loss of innocence, especially in the way it befalls these defenseless victims of perverse appetites.

What deep scars will etch themselves into the psyches of these children? What chance for normal social adjustment will exist for them. These youngsters have no adequate means to protect themselves. We must supply this protection.

Accordingly, I urge your enactment of this bill which is part of the City's 1977 Legislative Program.

Very truly yours,

ABRAHAM D. BEAME, Mayor

By
Legislative Representative

A-3587-C

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

JUL 28 1977

July 26, 1977

A.3587-C - by Mr. Lasher

AN ACT to amend the penal law, in relation to sexual performances by children

APPROVAL RECOMMENDED

Honorable Hugh L. Carey
Governor of the State of New York
Albany, New York

Dear Governor Carey:

The above bill is before you for executive action.

I had urged your approval of the "B" version of this bill prior to its recall and amendment to its present form.

The "C" version has rectified certain problems that arose from the "B" print.

It wisely eliminates the presumption of age less than sixteen based solely on the actor's appearance. In its stead the bill specifies a test for proof of age based on inspection by court or jury of the child, or photograph or motion picture which constituted the sexual performance. It also permits oral testimony by a witness to the sexual performance, and expert medical testimony. These standards are more specific and concrete than the presumption they replace.

In addition it adds to the category of persons who can raise an affirmative defense in a prosecution pursuant to

this article librarians acting within the scope of their employment. This langauge is salutory since it affords protection to a class of persons who might be the target of an ill considered indictment.

I reaffirm the request contained in my letter of June 21, 1977, and urge that you enact this bill which is part of the City's 1977 Legislative Program.

Very truly yours,

ABRAHAM D. BEAME, Mayor

By Richard Lurie
Legislative Representative

A 3587-B

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

June 20, 1977

Honorable Hugh L. Carey
Governor
Executive Chamber
The Capital
Albany, N.Y. 12227

Dear Hugh:

I am writing to urge you to sign into law a bill, A3587B, which would impose severe penalties on those who exploit children for pornographic purposes.

As you know, I endorsed this measure several months ago. At that time, I said it was needed to give enforcement officials an added weapon to protect children of tender years from those who would use them for pornographic purposes.

This bill is needed to protect our children. It is also a necessary tool in the continuing fight we have been waging against those forces which have so blighted some areas of our City.

Sincerely,

Abraham D. Beame
M A Y O R

C-910

Honorable Howard Lasher
New York State Assembly
Legislative Office Building
Room 422
Albany, New York 12224

Dear Mr. Lasher:

As a librarian with twelve years of specialization in library information services to adolescents, currently serving as President of the Young Adult Services Division of the American Library Association, and employed as the Young Adult Consultant for the Westchester Library System, I find myself in the position of supporting the intent of A3587 but confused about its possible implementation with regard to librarians. As professionals committed to youth's right to have access to information, we circulate legitimate sex education materials which could be easily confused with those proscribed in your bill if they include nude photographs for the purpose of showing physiological development in puberty. It is well documented that such developmental problems and the differing rate at which they occur among adolescents are of great concern to all young people. Line drawings, however well executed, do not adequately convey to young people the legitimate physiological differences which occur and which are normal.

I feel you are in danger of intimidating those of us trying to provide adequate sex education materials by not defining in some way when such presentations might be considered legitimate. One of the major requests our Film Services receives from Girl Scout groups in Westchester, for example, is for films showing physiological development during puberty.

Recently, during an H.E.W. sponsored workshop on adolescent sexuality in Westchester, health and information specialists viewed a play on family life showing adolescents' views on the breakdown of communications between themselves and their parents. Now, this entire play was written and produced by adolescents and provided a way for them to express feelings and to present their problems to an adult audience. One of the scenes in the play showed an unsupervised teenage party in which unhappy sexual relationships were developing because of no guidance or help from adults. Frankly, I feel your bill would also inhibit such therapeutic and educational dramatic efforts of this type which would be a great loss, because that play was essential to the intent of the workshop and important information for the adults to receive from the youthful participants.

To fail to distinguish between adult exploitation of children for commercial purposes and answering the natural sexual curiosity of children themselves is to continue to encourage children to feel that sex and sexuality are evil. All present day authorities in sex education are in agreement that healthy attitudes toward the human body are best instilled during youth, and toward that goal, many reputable sex educators are producing extremely useful materials which could, under Section 263.15 be considered felonious. This would be most unfortunate, since we need more, not less, good material in this area.

Respectfully yours,

Mary K. Chelton

Mary K. Chelton
Young Adult Consultant
Westchester Library System
280 North Central Avenue
Hartsdale, New York 10530

cc: Steingut, Fink, Anderson, Marino

bc: Shapiro, Reiben, Martoche, McKenna

C-910

The New York Public Library

THE BRANCH LIBRARIES

8 EAST 40TH STREET, NEW YORK, N. Y. 10016
Office of Children's Services

June 10, 1977

Honorable Howard Lasker
New York State Assembly
Legislative Office Building
Room 422
Albany, New York 12224

Dear Assemblyman Lasker:

As Coordinator of Children's Services in The New York Public Library, your efforts on behalf of children has come to my attention. It is of particular interest to me that at your urging some attempt will be made to eliminate the exploitative and harmful abuses involving children.

However, as a librarian who has worked for more than twenty years with children and their book interests, I realize that adults play a large part in the introduction of books which may satisfy some developmental need in the child's life. Since children also share many of their life experiences with adults I would urge you to consider that part of the pending legislation which might create an outright ban on all books that depict children in certain poses which some may misconstrue as obscene or "promoting" obscene acts, but which in fact have as their intent serious instructional value for some responsible adults who wish to study or share a viewpoint with children.

The media exposure which today's children experience, the differing lifestyles to which many are exposed, predicate that as a public librarian I support a wide range of books to serve children and their parents who might seriously be seeking representative contemporary thought in the area of sex education.

While librarians do exercise judgment in selection of books and other materials for children, those of us in the public library recognize the inherent danger in misinterpretation and the levels of subjectivity and emotionalism attached to any book material on sexual subjects for children.

Thank you for your consideration.

Sincerely,

Barbara Rollock

(Mrs.) Barbara Rollock
Coordinator of Children's Services

BR/fe

S-2743-B
A-3587

The New York Public Library

Astor, Lenox and Tilden Foundations

Fifth Avenue and 42nd Street

New York, N. Y. 10018

RICHARD W. COUPER
President & Chief Executive Officer

July 26, 1977

Honorable Judah Gribetz
Counsel to the Governor
The Executive Chamber
Capitol
Albany, New York 12224

RE: The Obscenity Bill - S.2743-B

Dear Judah:

You have not asked us for an opinion on the above, but we feel almost compulsive about giving you one.

We feel the proposed legislation is badly drawn. Clearly libraries should be among the listing of exemptions, or there will be all kinds of hell to pay. Also, there is absolutely no provision for grandfathering with respect to retrospective collections. This makes the Bill obscene with respect to libraries.

We strongly urge veto of this legislation in its form.

Sincerely,

RWC:an

And good wishes always,

Developing Federal and State Legislation to Combat the Exploitation of Children in the Production of Pornography

Submitted by

Judianne Densen-Gerber, J.D., M.D., F.C.L.M.

President

Odyssey Institute

and

Stephen F. Hutchinson, Esq.

Executive Director

Institute for Law and Medicine
Division of Odyssey Institute
24 West 12th Street
New York, New York 10011

April 6, 1977

ACKNOWLEDGEMENTS

The authors wish to acknowledge the assistance and contributions of Anthony Simonetti, Esq. of the National Obscenity Law Center in New York, Professor George E. Stevens of Purdue University and Robin M. Lloyd of Los Angeles, California. Finally, we wish to acknowledge the assistance of the staff of Odyssey Institute.

This research was supported in part by N.I.D.A. Grant: #81 DA 01798-02)

The American attitude toward its children manifests itself in many ways, including, unfortunately, a tolerance for child abuse and neglect in significant proportions and varieties. One such form of mistreatment recently the subject of considerable public outcry is the exploitation of children used in the production of sexually explicit films and magazines. This statement is offered to acquaint the reader with the nature of the sexploitation problem and the impact of these activities on the children involved. A survey and analysis of present and proposed legislation, and a brief review of cases is also offered for consideration. Finally, a look at the legislative response in terms of possible constitutional issues is appropriate as this aspect is the basis for whatever opposition seems to have surfaced.

THE SEXPLOITATION PROCESS

The use of children, ranging in age from three to sixteen, has become a multimillion dollar industry. By recent count, there are at least 264 different magazines being sold in adult bookstores across the country dealing with sexual acts between children or between children and adults. These magazines--well produced--sell for prices averaging over $7.00 each.

Until recently, it was assumed that child pornography was mostly produced in Europe, but investigations have now revealed that much of it is produced in the United States--even some materials which are packaged in such a manner as to represent foreign origin.

Film makers and magazine photographers have little difficulty recruiting youngsters for these performances.

Some simply use their own children, others rely on runaways. Recent findings of Senator Bayh's subcommittee on juvenile delinquency and other studies show that more than one million American children run away from home each year. From this vast army of dispossessed children, exploiters select literally thousands of participants for their production needs.

Los Angeles police estimate that adults sexually exploited over 30,000 children under 17 in 1976, and photographed many of them in the act.

In 1975, Houston police arrested Roy Ames after finding a warehouse full of pornography included 15,000 color slides of boys in homosexual acts, over 1,000 magazines and paperback books plus a thousand reels of film.

In New York City, Father Bruce Ritter of Covenant House, a group of shelters for runaway children, has reported that the first ten children who entered Covenant House had all been given money to appear in pornographic films. These children, in their early teens, could not return to their homes because of intolerable conditions of abuse and neglect, and could not find jobs or take care of themselves.

Many are not runaways, but come from broken homes. They can be induced to pose for $5 or a trip to Disneyland, or even a kind word. Sometimes the mothers are porn queens; often parents or guardians are addicts or alcoholics.

Recently, at the Crossroads Store in New York's Times Square, we purchased "Lollitots", a magazine showing girls eight to fourteen, and "Moppits", children aged three to twelve as well as playing cards which pictured naked, spread eagled children. We also looked at a film depicting children violently deflowered on their communion day at the feet of a "freshly crucified" priest replacing Jesus on the cross. Next, we saw a film showing an alleged father engaged in uralalia with his four year old daughter. Of sixty-four

films able to be seen, nineteen showed children and an additional sixteen involved incest.

THE VICTIMIZATION OF CHILD-PORN STARS

Despite the highly secretive nature of the recruitment and sexploitation process, a growing body of information about the children involved confirms that psychological scarring and emotional distress which occur in the vast majority of these cases lead to significant other problems.

Dr. Judianne Densen-Gerber, ~~J.D., M.D., F.C.L.M.,~~ ~~founder and President of Odyssey Institute,~~ states as a psychiatrist that such inappropriate sexuality is "...highly destructive to children. It leads them to join our deviant populations: drug addicts, prostitutes, criminals and pre-adult parents.... There is no proven connection that I know of between adult pornography and sexual abuse, but this degradation of children scars them for life".

There have also surfaced a number of children and young adults who had been involved in posing and/or performing for sexually explicit films and magazines. These children are now or have been in treatment programs for substance abuse, delinquency or other aberrent behavior. Some of these children have voluntarily recounted their experiences to law enforcement and news media persons who are attempting to learn more about the recruitment process and the type of activities involved.

Many are victimized in more brutal fashion. Los Angeles Police Investigator Jackie Howell rejects the commonly stated belief that nude posing is harmless to the children. "We have found that a child molester is often also the photographer. Photography is only a part of it, a sideline more often than not to prostitution, sexual abuse, and drugs".

APPLICATION OF EXISTING LEGISLATION

There are currently a number of federal and state laws which relate directly or indirectly to this problem. On the federal level, there are five laws prohibiting the distribution of "obscene" materials. One prohibits any mailing of such material (18 U.S.C. § 1461); another prohibits the importation of obscene materials into the country (19 U.S.C. § 1305); another prohibits the broadcase of obscenity (18 U.S.C. §1464); and two others prohibit the interstate transportation of obscene materials or the use of common carriers to transport such materials (18 U.S.C. § 1462 and 1465). Also, there is the Anti-Pandering Act of 1968 (39 U.S.C. § 3008) which authorizes postal patrons to request no further unsolicited mailings or advertisements which are sexually offensive.

There is no federal statute specifically regulating the distribution of sexual materials to children. There is likewise no federal statute involving interstate commerce which specifically regulates or restricts the production, distribution or marketing of this material.

Forty-seven states and the District of Columbia have some form of laws pertaining to the dissemination of obscene material to minors. However, only six states specifically prohibit the participation of minors in an obscene performance which could be harmful to them (Connecticut General Statutes Annotated, § 53-25; North Carolina General Statutes, § 14-190.1, et seq; North Dakota Century Code, § 12.1-27.1-03; Code of Laws of South Carolina, § 16-414.1 et seq; Tennessee Code Annotated, § 39-3013; Texas Code Annotated, § 43.24).

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State criminal statutes which deal with sex crimes often are not helpful, either because the physical activity does not meet the criteria of the statute, e.g., rape, sodomy, sexual abuse, or because they are so broadly worded as to discourage courts from applying them in terms of significant sanctions.

Many states have child welfare provisions within their education law, which regulate the employment of children in commercial activities. Unfortunately, these same laws either abdicate control when the child is working for a parent (Michigan Act 157 of the Public Acts of 1947 (as amended) § 409.14), or the sanctions are so limited as to pose no deterrent, (Education Law of New York, § 3231 (a), (c).

Given the paucity of legislation which specifically relates to this activity, there can be little wonder at the relatively scarce attempts at law enforcement. The problems of case-finding and evidence are compounded by a confusion of the nature of sexploitation as a form of child abuse with adult obscenity matters.

These problems and the attitudes of many judges discourage and actually thwart the few criminal investigations attempted. By way of illustration, we excerpt the following from The Washington Post article of January 30, 1977 by Myra MacPherson:

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"...Morgenthau believes "there ought to be stiffer sentences regarding the use of these children and the sale of the material." He noted that, following a year's investigation, New York police seized 1,200 films and magazines, many using children. Arrests were made. "They convicted a major wholesaler, Edward Mishkin, (62, of Yonkers, N.Y.). He could have gotten seven years in jail -- he got six months of 'weekends' in jail. On Jan. 5, he was rearrested."

Morgenthau's is a familiar tale, repeated by law enforcement officials across the country. For example, Kent Master, a New York distributor of "chicken films" -- the vernacular for porn films involving children -- advertises 10 films in its "lollypops" series. The ads show cartoons of two nude, very young boys licking lollipops, the slogan "Checken Films Come of Age" and graphic descriptions of sex acts, including "Ronnie, Bobby and Eddie -- three preteens on a bed." The movies are 8 mm, in color, 200 feet and $20 a piece. There is an address, but directory assistance has no phone listed. Undercover agents last week arrested the firm's owner, charging him with the misdemeanor of promoting obscenity.

"Under present criminal statutes we can't go in with a search warrant and confiscate the films. He would not sell us more copies, and so the only thing we could do is charge him with a misdemeanor," says Morgenthau. "And we still don't know who the children are or where they come from."....."

There has been some reported case law which bears mention.

In People v. Byrnes, 33 N.Y. 2d 343, 308 N.E.2d 435, 352 N.Y.S.2d 913 (1974), Father appealed his convictions for rape, sodomy, and incest after his eleven-year-old daughter testified that on two occasions she and her father went to the home of a photographer who filmed them engaging

in sexual acts. The father argued on appeal that he was convicted solely on the uncorroborated testimony of his daughter. But the court found that photos of the illicit acts had been properly admitted as evidence. An interesting case in that it involved, in part, photos in which one of the participants was not clearly identified. A somewhat similar case is State v. Kasold, 110 Ariz. 558, 521 P.2d 990 (1974), photos of defendant with private parts exposed and fully-clothed little girl with back to camera. For a discussion of the use of photos of parts of the anatomy as evidence in criminal trials, see 9 A.L.R.2d 899, 923-26 (1950).

City of St. Paul v. Campbell, 287 Minn. 171, 177 N.W.2d 304 (1970) (conviction for disorderly conduct reversed where defendant had photographed a thirteen-year-old girl in the nude but had not created a disturbance in doing so). The court did indicate that if the charge had been contributing to delinquency or employing a minor for immoral purposes a conviction might have been reasonable.

In People v. Burrows, 260 Cal. App. 2d 228, 67 Cal. Rptr. 28 (1968) (conviction for false imprisonment and using minor in the preparation of obscene materials affirmed where evidence showed that an adult had bound the complainant hand and foot, abused him sexually, and photographed him in indecent positions).

An interesting question is whether a parent who photographs a nude offspring and circulates the photo to others, or who allows his unclothed child to be photographed even though the picture will be distributed publicly, could be criminally responsible. The photo may not be legally obscene (see below) and a parent may have a legal right to waive his offspring's right to privacy. That an infant

should have a right of privacy in the dignity of his body is argued in 12 DUQUESNE L. REV. 645 (1974). But to what extent an infant has a right of privacy independent of the activities and directives of his parent is unclear. See Note, Parental Consent Requirements and the Privacy Rights of Minors: The Contraceptive Controversy, 88 HARV. L. REV. 1001, 1008-09 (1975). A child's constitutional rights may be subject to the control of a parent, at least until the child becomes an adolescent. See Note, Torture Toys, Parental Rights and the First Amendment, 46 SO. CALIF. L. REV. 184, 188-201 (1972), and decisions discussed therein. However, there is no constitutional right to engage in an unlimited variety of sexual activities in the home. See Cheesebrough v. State, 255 So.2d 675 (Fla. 1971), cert. denied, 406 U.S. 976 (1972). And there is no right of privacy in family sexual affairs if photographs of such activities are taken with parental approval and are allowed to fall into the hands of others. Cf. Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), aff'd on other grounds, 539 F2d 349 (4th Cir.), cert. denied, 97 S. Ct. 485 (1976).

In such situations (parental photos of nude offspring), a conviction for contributing to delinquency under present laws might still make sense if the reasoning in State v. Locks, 94 Ariz. 134, 382 P.2d 242 (1963) is followed. In Locks, the proprietor of a hobby shop allegedly induced an underaged youth to purchase a magazine containing photos of unclothed adults. In discussing the defendant's possible liability for contributing to delinquency the court focused on the conduct suggested by the photos. "The suggestion that meretricious sexual relations are acceptable social conduct may be more injurious to the welfare of the child than an act of physical ravishment." Id. at 137, 382 P.2d at 243. ~~Obviously this isn't much to go on.~~

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All of the present federal statutes have a single major failing--their lack of specificity regarding children. On both federal and state levels, the need to identify the materials as "obscene" has effectively blocked effective intervention to protect the children or to prosecute the exploiters.

PROPOSED LEGISLATION

It is well established that the state has a valid special interest in the well-being of its children. Prince v. Com. of Massachusetts, 321 U.S. 158 (1944).

In Ginsberg v. New York, 390 U.S. 629 (1968), the U.S. Supreme Court upheld a New York criminal statute that barred commercial dissemination to minors. The defendant in Ginsberg contended that the state statute violated the First Amendment. In response, the Court stressed that the statute applied only to sexually oriented material that was found obscene under a constitutionally acceptable definition of obscenity. There was no First Amendment violation since, as the Court had noted in prior decisions involving "general" (adult) obscenity statutes, obscene material is not protected speech under the First Amendment. The Ginsberg opinion also noted that the state had ample justification to sustain its regulation of an activity that was not protected by the First Amendment. The Court noted two state interests that combined to support the New York prohibition against the commercial dissemination of obscene material to minors. First, the legislature could "rationally conclude" that the exposure of minors to obscene material was "harmful" to the youths' "ethical and moral development."

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Second, the state could appropriately seek to support the interest of parents in controlling their children's access to obscene material.

From a perspective of controlling obscene activities involving minors, it cannot logically be disputed that the state can constitutionally and properly protect their welfare by restricting materials available to them without, at the same time, possessing the authority and right to also protect the children from having to participate in the production of these materials.

On the federal level, the power to legislate with respect to obscenity has been derived from the constitutional power to regulate commerce. (Art. I, Sec. 8, cl. 3) The development of our child labor laws and the constitutional challenges thereto reflect a present recognition of broad Congressional powers, reaching all phases of our national industrial system.

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944). Therefore, it would appear that Federal legislation could be proposed which would operate similarly to the child labor provision of the F.L.S.A. This law could have the effect of prohibiting the shipment into commerce any motion picture or photograph in which children under a certain age have appeared in the nude or depicted in some other objectionable manner.

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A similar analysis is productive in the power to regulate intrastate activities--the production of the materials involving the sexual conduct of children--where such activities clearly impact on interstate commerce. Maryland v. Wirtz, 392 U.S. 183 (1968); Atlanta Motel v. United States, 379 U.S. 241 (1964).

Consequently, it is clear that legislation can be developed to prohibit the sexual conduct itself (and related activities) regardless of whether the ultimate product will enter into commerce, inasmuch as it can be expected to "affect commerce".

Specifically, the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the states of origin and destination, which might have a substantial and harmful effect upon that commerce. 379 U.S. at 258.

The proposed legislation is designed to address the sexual conduct and the activities related thereto, from soliciting the child to marketing the product. There must be an awareness that the printed product cannot be isolated or removed from the process. This process creates substantial harm to children. The protections inherent in the First Amendment provisions regarding freedom of speech are not without some limit. Such guarantees cannot be rationally interpreted to include a right to abuse and exploit young children.

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We are not going to produce mentally healthy and happy children by issuing an executive order that all children must be loved...but we can author legislation to protect them and give them a fighting chance in this world. To paraphrase Camus, who spoke for all of us who in some way work with children:

> Perhaps we cannot prevent this America from being an America in which children are tortured... but we can reduce the number of tortured children. And if you don't help us in this... Who else in this world can...

SFH:eis

A D D E N D U M

We have been asked to review the federal statutes for any historical precedent wherein the Congress may have acted to forbid the sale or distribution of products in commerce based not upon any intrinsic features of such products but rather upon conditions or circumstances of their manufacture or production. Congress has acted when the manufacturing or production process so violates the public interest, and where sale and distribution of such products would otherwise continue to foster and encourage such practices.

Specifically, there is statutory precedent for prohibiting the shipment in commerce of goods manufactured by any person illegally employing child labor. Under the Fair Labor Standards Act, 29 USC §201-219, § 212 (a) of the Act states "(n)o producer, manufacturer or dealer shall ship or deliver for shipment into commerce any goods produced in an establishment situated in the United States or about which thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed..." Oppressive child labor "means a condition of employment under which (1) any employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for

the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well being) in any occupation, (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau (Secretary of Labor) shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being;..." § 203(l).

Specifically exempted from §212 (a) is "any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions." §213(c)(3).

We observe that but for the §213 (c)(3) exemption, shipment of pornographic motion pictures utilizing child actors would be illegal. This would be true even if the child were employed by his parent or guardian, as the use of a child in such materials is detrimental to that child's health and wellbeing § 203 (L) (1).

The existence of sanctions (a maximum fine of $1,000 per incident of shipment of goods utilizing children in contravention of § 212, 29 VSC § 216 (e)) for the shipment of goods identified on the basis of their mode of production is by analogy precedent for federal intervention to regulate distribution of sexually explicit materials the manufacture of which utilizes children as models and actors.

PREPARED STATEMENT OF JEDIANNE DENSEN GERBER, J.D., M.D., F.C.L.M.

On January 19th of this year, I gave the first of many news conferences designed to move America from an overall attitude of hating its children to concern and caring by each and every community for its young. The Odyssey family asked then and asks now that other Americans join with us in proclaiming 1977 "The Year of the Child" and making such the reality.

During the Bicentennial Year, Odyssey Institute's Concerns of Children Division commenced a petition campaign to collect one million signatures to present to President Carter urging that he declare America's children the nation's first priority and most valuable natural resource, an that he establish a Special Action Office within the White House which would eventually evolve into a Cabinet Post for the Concerns of Children. America should have a Secretary committed to the future sitting beside the Minister of War, euphemistically called the Secretary of Defense. While our petition campaign moves ahead, many more volunteers and names are needed.

Due to the establishment of this Concerns of Children Division, Odyssey has become a clearing house nationwide for the identifying and reporting of the many atrocities against our young: for instance, first, the admission by the National Center on Child Abuse and Neglect, a federal agency, that one million children at any given moment are in danger of their lives at the hands of their parents

of custodians. (Odyssey believes the number to be closer to four million); second, while America gave the world the polio vaccine which potentially can eradicate this scourge from the face of the earth as we have done with smallpox, five and one half million American children under the age of five remain unprotected; and third, America ranks 31st worldwide in infant mortality for her non white peoples and 16th overall. We, who are first in the space race, cannot be first in our own children's survival.

But, today, I want to share with you yet another atrocity that has come to my attention through Odyssey's Concerns of Children Division--the million dollar sex for sale industry exploiting America's children ages three to sixteen--both through prostitution and pornography.

In August of 1976, Senator Birch Bayh sent me the excellent book by Robin Lloyd, an investigative reporter for NBC in Los Angeles, entitled For Money or Love: Boy Prostitution in America. Senator Bayh was struck by the fact that both Lloyd and I, working at opposite ends of the country on two different areas of child abuse (he, sexual--I, drug-related physical abuse and neglect) should reach a similar solution; namely the establishment of a Cabinet Post on behalf of our young.

Lloyd's book documented the involvement of 300,000 boys, aged eight to sixteen, in activities revolving around sex for sale. He noted there were over 264 different boy and girl magazines being sold in adult book stores nationwide. These magazines--well-produced--sell for prices averaging over $7.00 each. Most of the children

exploited are runaways from extremely abusive and neglectful homes--most, that is, if the children are eight years old and above. However, younger children used in the production of pornography, some as young as three, must be provided by their parents or guardians who are themselves often drug addicts, porn performers, or prostitutes, or more frequently, parents having incestuous relationships with their children which they wish to memorialize in photographs or movies to exchange with others who belong to clubs or groups advocating this type of activity. There is one group in Southern California whose slogan is "sex by eight or it's too late." Too late for what? To grow up unscarred, loved and protected; this one representation of the kooky fringe claims 2,500 members.

A common sense guesstimate on my part leads me to believe that if there are 300,000 boys, there must be a like number of girls--heterosexual conduct still being more prevalent than homosexual--but no one has bothered to count the females involved. Lloyd postulates but cannot substantiate that only half of the true number of children are known. Therefore, the possible figure is closer to 1.2 million nationwide--a not improbable figure, considering the nation's one million runaways. How else can a twelve year old support him or herself?

In an April Ms. Magazine article the following startling fact was noted: "one girl out of every four in the United States will be sexually abused in some way before she reaches the age of 18." Researchers working with deviant women report that 50 to 70 percent have been sexually traumatized as children. This is

truly an illustration of the sins of the fathers being reaped by the children. While we hide from the knowledge of the incest violation, our concern in the area of the commercial sexual abuse of children is even less. Only six states specifically prohibit the participation of minors in an obscene performance which could be harmful to them (Connecticut, North Carolina, North Dakota, South Carolina, Tennessee, and Texas). There is no federal statute specifically regulating the distribution of sexual materials to children. There is likewise no federal statute involving interstate commerce which specifically regulates or restricts the production, distribution, or marketing of this material. Forty-seven states and the District of Columbia have some form of laws pertaining to the dissemination of obscene materials to minors.

State criminal statutes which deal with sex crimes often are not helpful, either because the physical activity does not meet the criteria of the statute, e.g., rape, sodomy, sexual abuse, or because they are so broadly worded as to discourage courts from applying them in terms of significant penalties.

Many states have child welfare provisions within their education law which regulate the employment of children in commercial activities. Unfortunately, these same laws either abdicate control when the child is working for a parent or the sanctions are so limited as to pose no deterrent, e.g., ten dollar fine or ten days in jail.

Given the paucity of legislation which specifically relates to this activity, there can be little wonder at the relatively scarce attempts at law enforcement. The problems of case-finding and evidence are compounded by a confusion between sexploitation

as a form of child abuse and adult obscenity matters. These problems and the attitudes of many judges discourage and actually thwart the investigations attempted. This year, when one of America's leading pornographers, Edward Mishken, was arrested in New York, one third of the 2,000 square feet of material confiscated involved children. Mr. Mishken pleaded guilty and in spite of the fact that he had many previous convictions, Judge Irving Lang sentenced him to twenty-seven consecutive weekends in jail-- I assume so that his work week destroying children would not be interrupted. We, as citizens, must ask why Judge Lang did not give Mishken the seven year sentence permitted. Mishken was convicted on like charges within one week.

On January 12th at the Crossroads Store in New York, I purchased "Lollitots", a magazine showing girls eight to fourteen, and "Moppets", children aged three to twelve, as well as playing cards which pictured naked, spread-eagled children. Also I looked at a film depicting children violently deflowered on their communion [illegible] of a "freshly crucified" priest replacing Jesus [illegible]. Next, I saw a film showing an alledged father engaged in coitalia with his four year old daughter. Of sixty-four films presented for viewing, nineteen showed children and an additional sixteen involved incest.

I have urged citizens to write to their federal and state legislators urging support of the three pronged approach suggested by Odyssey's Law and Medicine Institute. First, to makechanges in your state educational law to require licensing of all media

[illegible] children and to prohibit children from participating [illegible] which are sexually explicit. Any materials produced in violation could be confiscated and fines would be imposed for violations. Second, to strengthen the child abuse and neglect statutes to include commercial sexual exploitation of children and to make the finding of venereal disease in children under twelve an automatic presumption of child abuse and neglect. In 1976, Connecticut passed a law on venereal disease because there had been two cases of gonorrhea of the throat in children under 18 months of age and one in a child 9 months old within that state. And third, to create greater penalties under the criminal obscenity laws where the offending material involves persons under sixteen. Within this area, there must be both federal and state legislation and law enforcement roles.

In the recent months since January 1977 when I have personally purchased magazines carrying the titles "Nudist Moppets", "Lollitots", "Children Delight", "Lust for Children", "Schoolgirls", "Naughty Pre-Teens", "Chicken Love", "Child Discipline" and films such as "Children Love" and "Lollipops #10" in cities such as New York, Philadelphia, Boston, Washington, New Orleans, Detroit, Flint, Chicago, San Francisco, San Jose, Los Angeles, Sydney, Melbourne, and Canberra, I have become angered beyond description. There comes a point where we can no longer defend by intellectualiztion or [illegible] debate. We must simply say "I know the difference between right and wrong and I am not afraid to say 'no' or demand that limits be imposed."

Common sense and paternal instinct tell me that this goes way beyond free speech. Such conduct mutilates children's spirits; they aren't consenting adults, they're victims. The First Amendment isn't absolute. Furthermore, even if I had to give up a portion of my First Amendment rights to stop this stuff, then I'd be willing to do it. When our Constitution and Bill of Rights were written, Franklin, Jefferson, Adams, and Washington were interested in guaranteeing the right to religious, political, and philosophical debate, not to publish a primer instructing a sex molester on how to pick up a child in the park and subsequently assault her ("Lust for Children") or a booklet advocating that a father have incest with his daughter and illustrating positions to be used if she, at nine, is too small for normal penetration ("Schoolgirls", Los Angeles, and "Preteen Sexuality", Philadelphia). If we use constitutional rights to justify intercourse with children....! In summary, sadly, there is many a scoundrel wrapped in the American Flag.

We are not going to produce mentally healthy and happy children by issuing an executive order that all children must be loved...but we can author legislation to protect them and give them a fighting chance in this world. To paraphrase Camus, who spoke for all of us who in some way work with children:

> Perhaps we cannot prevent this America from being an America in which children are tortured...but can we reduce the number of tortured children. And if you don't help us in this... who else in this world can...?

You and I can make a difference. Since my initial news conference in January, much of "kid porno" has disappeared from the nation's adult book stores. It was so simple--the answer was so real--if we can still be outraged, if we can still care, we can begin to nurture a soil for all children to grow straight and strong!

As Erik Erikson wrote: "Someday, maybe, there will exist a well-informed, well-considered, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit; for such mutilation undercuts the life principle of trust, without which every human act, may it feel ever so good, and seem ever so right, is prone to perversion by destructive forms of consciousness."

Judianne Densen-Gerber, M.D.

HOLIDAY HOUSE

18 East 53rd Street, New York, N.Y. 10022 **MU 8-0085**

July 12, 1977 JUL 15 1977

Dear Governor Carey:

I want to let you know that I agree 100% with the enclosed N. Y. TIMES letter by Dr. Densen-Gerber. She makes important distinctions and important points--the most basic being that the present law allows a situation leading to rape of children.

Rape, as I understand it, is a crime.

Though this is a personal letter, I wish you to know that some members of the publishing community are against your vetoing the bill referred to.

Sincerely yours,

Edward Lindemann
Science Editor

Harper & Row, Publishers, Inc.
New York Hagerstown San Francisco London

Simon Michael Bessie
Senior Vice President

10 East 53d Street, New York, New York 10022

July 26, 1977

Honorable Hugh L. Carey
Governor of the State of New York
Executive Chambers
State Capital
Albany, N.Y. 12224

Dear Governor Carey:

Your previous actions in respect to the Lasher Child Abuse bill, A3587-C, should bring you praise and support from all of us who were concerned over the freedom issue involved in Section 263.15. I have previously written you about that and I would like to praise you for the position that you took. Unfortunately, the bill that's now come back to your desk continues to include that undoubtedly unconstitutional and totally unnecessary section. In order to deal with child abuse - as indeed it should be dealt with - no such section is necessary and the insistance of those in the State Legislature who supported this section is where the blame should lie for the defectiveness of the legislation and for your veto of it in its present form, as I urge you to do.

Sincerely yours,

cc: Paul Joya, Esq.
Assistant Counsel to the Governor

NEW YORK POST

The oldest continuously published daily in the United States. Founded by Alexander Hamilton in 1801.

RUPERT MURDOCH Publisher and Editor-in-Chief
EDWIN BOLWELL Editor
RON MARTIN, ROBERT SPITZLER Managing Editors
ANDREW PORTE Metropolitan Editor
JAMES A. WECHSLER Editorial Page Editor

Poverty profiteers

William Del Toro is back on the job as executive director of the $3 million-a-year program of MEND, the East Harlem anti-poverty program funded through the city's Human Resources Administration. His return is as incredible as it is indefensible.

Del Toro was director of the program in 1973 when he was convicted on eight counts of conspiracy, bribery and perjury in a scheme by a landlord to offer a Model Cities official a bribe in return for a $1 million lease.

Now, as Post reporter Edmund Newton revealed yesterday, Del Toro went right back to his old job with the blessing of the agency's board of directors almost immediately after his release from prison. They contend that, with his conviction and serving of sentence, his credentials are impeccable.

We disagree, and so does the city's Department of Investigations. We hope the Human Resources Administration will respond quickly and decisively by retiring Del Toro.

The incident in East Harlem follows recent scandals in the South Bronx and Bedford-Stuyvesant anti-poverty operations.

To put it mildly, stricter supervision by the city is obviously needed before the public loses total faith in a program that often performs vital neighborhood services.

It is exactly such revelations that degrade the conscientious efforts of people who care, and compound the problems of the poor. There have been too many poverty profiteers.

The dirtiest business

Child pornography is despicable. It is the dirtiest business in this or any other town. It is inconceivable that the First Amendment can be used to protect it.

In an effort to stop and stamp out the growing market, the Assembly has passed a bill calling for stiff penalties for persons permitting and promoting these wretched productions.

The bill now goes to the Senate, where we trust it will be swiftly approved. The use and abuse of children in this "adult" trade is the lowest form of exploitive child labor.

A worthy choice

John G. Heimann has displayed imagination and initiative as the state's Superintendent of Banks and most recently as the state's Commissioner of Housing and Community Renewal.

He eminently deserved nomination by President Carter to the key post of Comptroller of the Currency. We salute Heimann for his valuable contribution to the

David Frost, cor

WASHINGTON.

Something happened the other night when I was watching the fourth David Frost-Richard Nixon interview, which a friend of mine calls the "Rich Man, Poor Man and Now Richer Man" series.

I found myself more interested in watching David Frost than I did Nixon. There is something compelling about Frost's personality that Nixon lacks. Perhaps it's his forthright manner, or maybe it's his striped shirt, but every time he asked a question I sat up in my chair and when Nixon answered it I dozed off to sleep.

After watching Frost for four programs I started to ask myself, "When did Frost know about Watergate, and how much did he know?" We have been told that Frost taped 29 hours with Nixon. We have only seen six of them. What happened to the

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NEW YORK POST EDITORIAL

Degradation depths

Maybe it isn't possible to flush the streets of New York clean of sleazy sex. But there is finally some hope for an official hosing of "adult" entertainment involving the degradation of children.

More than a dozen persons have just been indicted on obscenity charges here, 10 of them accused of peddling films showing children as young as 6 years engaged in assorted sexual activities. The charges do not mean conviction; they do reflect official activism.

Meanwhile several state legislators are sponsoring measures to make this form of child abuse a felony, with parents as well as the squalid moviemakers subject to imprisonment. The proposed penalties range up to 15 years. For this loathsome form of adult delinquency, no pleas of mercy are in order.

Feb 18, 1977

Declaration of war

I applaud your editorial (Feb. 9) maintaining that "no pleas of mercy are in order" for the 10 persons recently indicted on obscenity charges for peddling films showing children in sexual activities. Unfortunately, the present laws governing such activities are too weak and general for the effective prosecution of dealers, producers, and distributors as well as the people, including parents, who permit children to be used for such purposes.

As a remedy I have introduced legislation, co-sponsored by 50 of my Assembly colleagues, which would make the exploitation of children in pornographic material a specific felony offense with a prison sentence of up to 15 years. Any parent or legal guardian who allows his or her children to engage in obscene acts which are displayed, photographed, filmed or recorded would be charged with a Class C felony. Anyone who produces, promotes or profits from obscene performances by children would be charged with a Class D felony.

HOWARD L. LASHER,
Assemblyman.

A-3587

PARAMOUNT PICTURES CORPORATION

JUL 14 1977

July 12, 1977

Governor Carey
Albany, New York

Dear Governor:

The enclosed letter from Dr. Densen-Gerber says exactly what should be said and I add my urging to hers. It is absolutely vital that children be protected from such obvious abuse.

Sincerely,

Dyanne Stewart

Child Misuse: 'Obscene by Definition'

To the Editor:

On June 29 The Times reported that various groups such as The Association of American Publishers and The American Library Association were urging Governor Carey to veto the bill before him protecting children from sexual exploitation for commercial or other purposes. My outraged surprise at this action by groups who should know better was turned into horror upon reading the Topics column in your July 1 edition.

First, the bill, passed by the Legislature, but later withdrawn, is an amendment to the Child Abuse and Neglect statutes, not an anti-pornography bill. Therefore, words such as "obscene" do not apply. There is no obscene or non-obscene burning, flaying, or beating of a child. Likewise, there is no obscene or non-obscene sexual performance. Every use of a child for exploitive sexual needs of an adult is obscene by definition.

There are no First Amendment issues here. The First Amendment was written to protect freedom of expression, not freedom of action. One should not be able to defend the ovens at Auschwitz because they were part of a Cecil B. de Mille spectacular.

Unless the Governor signs such legislation, the law now stands as follows: It is prohibited for a man to have intercourse with his five-year-old daughter, but not for him to hire her out as "an actress" to star in a film where she is repeatedly raped, as long as there is a disclaimer that such does not reflect on her personal conduct? In the latter instance, her emotional, psychological or physical needs remain unprotected.

On January 13, 1977, knowing that the United States produces each month over 264 different pornographic magazines using children, Odyssey Institute began the campaign against the use of children for pornographic purposes, (not against pornography). On that date, only six states in the Union so safeguarded their children: Connecticut, North Carolina, North Dakota, South Carolina, Tennessee, and Texas —and now Rhode Island.

I urge all New Yorkers who care about children to press the Governor for prompt action. New York, along with California the leading producer of "kiddie porn," must join the states that protect rather than destroy children.

JUDIANNE DENSEN-GERBER, M.D.
President, Odyssey Institute
New York, July 6, 1977

A-3587-B

NEW YORK STATE CATHOLIC CONFERENCE
11 NORTH PEARL STREET, ALBANY, NEW YORK 12207 • TELEPHONE (518) 434-6195

July 29, 1977

Hon. Judah Gribetz
Executive Chambers
State Capitol
Albany, N. Y.

RE: A. 3587-B - Lasher, et al

Relating to the penal law concerning sexual performances by children

Dear Mr. Gribetz:

The above-numbered bill is now pending before the Governor for executive action and you have very kindly asked for our comments and recommendation with respect to it.

The New York State Catholic Conference supports this proposal and it urges that it be given favorable executive action.

This proposal would add to the penal law the specific provision to make a crime the exploitation of children in the performance of sexual acts. The tragic consequences of this abnormal activity by these exploiters of children is a grave mark upon our American society. It is hopes that this moderate statute will be able to penalize adequately the culprits and thereby bring about an elimination of these degrading, immoral activities.

We urge that the bill be approved.

Respectfully submitted,

NYS CATHOLIC CONFERENCE

By Charles J. Tobin
Charles J. Tobin
Executive Secretary

CJT/las

NYCLU

New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011. Telephone (212) 924-7800

Legislative Department
Barbara Shack, Director
Arthur Eisenberg, Staff Counsel
Kenneth P. Norwick, Counsel

State Legislative Office
90 State Street
Albany, N.Y. 12207
(518) 436-8594

MAY 24 1977

May 23, 1977

Summary of Civil Liberties Bills on Assembly Calendar

Several bills involving civil liberties concerns are presently on the Assembly calendar. To assist you in considering these bills, we shall briefly summarize and set forth our position on each here. Where time permits, we shall issue more extensive memoranda on these bills for your consideration. For further information and assistance on these or any other civil liberties issues, please feel free to call our Albany office: (518) 436-8594.

CAL. 532

5662-B - Cooperman

APPROVED. This bill streamlines and unifies the system of grand and petit jury selection and democratizes the jury pool, thus making it easier to select a more representative jury. Its desirable reforms are:

(a) Jurors may be qualified by mailing the jury questionnaire. A personal interview is at the option of the jury commissioner or county clerk, instead of being mandatory as under present law for some counties. This makes it easier and cheaper to obtain a larger, more democratic pool, § 509(b);

(b) The methods of selecting the grand jury are assimilated to those of selecting the petit jury thereby making the grand jury more democratic, § 614.

Cal. 754

3587-B - Lasher

DISAPPROVED. Although we join the sponsors of this bill in deploring the exploitation of children in the production of sexually explicit materials, and although we acknowledge the sponsors' attempts to amend it to make it constitutional, we must continue to oppose it because it still contains a blatantly unconstitutional violation of the First Amendment. In amending the bill, the sponsors have included two virtually identical new Class D felonies (§263.10 and §263.15) -- the only difference between them being the requirement in §263.10 that the material in question be

"obscene" under the Penal Law, while §263.15 has no such requirement. Obviously, all materials that might qualify under §263.10 would also qualify under §263.15, thus making the latter wholly redundant and unnecessary. Equally obviously, §263.15 is plainly unconstitutional, since it punishes speech that is not obscene and is thus protected by the First Amendment. At best, this bill is an attempt at "contingent" legislation -- in other words, "since we're not sure of the constitutionality of one new Class D felony, let's enact a back-up just in case." We respectfully submit that this is an inappropriate way to enact serious new crimes. Surely this legislature is able to decide which of these versions it wishes to adopt, and not leave that purely legislative choice to the courts.

CAL. 986

4262-A - Schumer

DISAPPROVED. This bill makes it a crime for anyone other than a police officer to mechanically record most telephone or face-to-face conversations without informing all other participants. NYCLU opposes this bill because we can see no justification -- in privacy terms -- for the blanket exception for police officers, especially when they are acting as undercover infiltrators; because it would prevent recording by everyone except police officers of police and other official misconduct; and because it would put criminal defendants at a disadvantage, since such recording is often an essential means of preserving exculpatory evidence.

CAL. 843

7027 - Siegel

APPROVED. This bill makes it clear that a class action may not be dismissed because relief is requested against a governmental body or officer. All of the reasons that motivated the overwhelming legislative support for the class action bill in 1975 are equally applicable to class actions against a governmental body or officer, and there is no rational justification to preclude such actions. The government is just as capable of injuring the large classes of people as is private entities, and class actions are just as necessary to allow such people meaningful access to judicial relief through class actions.

Cal. 907

5510-A - Butler

DISAPPROVED. This bill would create a broad exception to the comprehensive law enacted last year to seal records of arrests not followed by convictions and to prohibit inquiry into such arrests in connection with employment or licencing. Under A5510-A such arrest records become unsealed and available in connection with applications for employment with police agencies. An arrest not followed by a conviction proves nothing and can lead to arbitrary and discriminatory results, in blatant violation of the presumption of innocence. The NYCLU believes applicants for police jobs should be entitled to the same protection the present law affords all other citizens and that this bill should be rejected.

NYCLU

New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011. Telephone (212) 924-7800

Legislative Department
Barbara Shack, Director
Arthur Eisenberg, Staff Counsel
Kenneth P. Norwick, Counsel

State Legislative Office
90 State Street
Albany, N.Y. 12207
(518) 436-8594

June 23, 1977

Hon. Hugh L. Carey
Governor
State Capitol
Albany, N.Y. 12224

RE: A.3587-B, Lasher, et al.

Dear Governor Carey:

Although we sympathize with the apparent purpose of this bill -- i.e., to deter and punish those who exploit children in the production of sexually explicit materials -- we are convinced that key provisions of it are clearly unconstitutional and would seriously infringe basic constitutional rights. For that reason, we strongly urge you not to sign it into law.

This bill creates three new substantive crimes. The first, a new Penal Law §263.05, creates a new Class C felony called "Use of a child in a sexual performance." Although we have reservations about the vagueness of the word "consents" in this new crime, we do not have fundamental civil liberties objection to it. The second new crime, a new Penal Law §263.10, creates a new Class D felony called "Promoting an obscene sexual performance by a child." To the extent that this new crime requires the material in question to be "obscene," as that term is defined by §235 of the Penal Law, we do not believe it is unconstitutional under the current decisions of the United States Supreme Court.

The third new crime, a new Penal Law §263.15, creates an almost identical new Class D felony called "Promoting a sexual performance by a child." The only difference between this new crime and the one created by the new §263.10 is that there is no requirement here that the material in question be obscene. It is this new crime that we believe to be unquestionably unconstitutional under the First Amendment

and to present a grave threat to the legitimate exercise of basic First Amendment rights.

Under the new §263.15, the mere sale or exhibition of books or movies that are indisputably not obscene, and thus fully protected by the First Amendment, could nevertheless give rise to serious felony convictions. There is absolutely no constitutional authority for such a result; indeed, the constitutional law is clearly to the contrary.

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court expressly noted that state laws that authorize the regulation of so-called "obscene" materials were an exception to the basic protection generally afforded speech and expression by the First Amendment, and that as a result "state statutes designed to regulate obscene materials must be carefully limited." Further, the Court continued:

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. 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 23-24.

If all these tests are not met, the Court made clear, the material in question would be protected by the First Amendment and could not be made the subject of state regulation.

It seems clear that even the sponsors of this bill recognize the constitutional defects of this new crime. In the earlier versions of the bill, there was no requirement whatever that the material in question be "obscene." But, after we and others pointed out the constitutional defects of those bills, the sponsors added the new §263.10, which does require that the materials be obscene. However, they also left in what is now §263.15, which is just as unconstitutional

now as it was before. Clearly, §263.15 includes all material that would be covered by §263.10, thus making the latter wholly redundant and superfluous. The only possible reason for both sections to be included in this bill is for §263.10 to serve as a fall-back when §263.15 is inevitably struck down as unconstitutional. In the meantime, however, countless booksellers, motion picture exhibitors, librarians, and others will be forced either to self-censor materials that are fully protected by the First Amendment or else be willing to face prosecution for a Class D felony if they don't. Such a result, we submit, is wholly intolerable and should not be countenanced, even for a minute.

A similar conclusion has been reached by the United States Department of Justice in response to similar bills now pending in Congress. As Deputy Assistant Attorney General John Keeney recently testified:

> "Secondly, the bill does not distinguish between material which is obscene and material which is protected by the First Amendment. In Miller v. California, 413 U.S. 15 (1973), the Supreme Court required that material must be evaluated as a whole in determining whether it is obscene. However, the present bill would forbit the manufacture and distribution of a film containing one brief scene of prohibited conduct and otherwise innocuous. For example, the bill would apply to the film "The Exorcist," which contains a scene in which a minor simulates masturbation but is clearly not legally obscene....
>
> "On the other hand, the Court has held that, as a general rule, a criminal statute which would reach protected expression as well as obscenity is void on its face for overbreadth. See Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); and Butler v. Michigan, 352 U.S. 380 (1957). Although the court has modified this doctrine in the case of a statute dealing with distribution to children only, see Ginsberg v. New York, supra, the proposed bill would prohibit

> distribution to anyone. In the face of the strong constitutional protection accorded material which is not obscene, we cannot say with any certainty that the proposed legislation would withstand constitutional challenge."

(Statement of John Keeney, Deputy Assistant Attorney General, Criminal Division, before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives, and Subcommittee on Select Education, Committee on Education and Labor, House of Representatives, concerning H.R. 3913 and H.R. 4571, Child Exploitation Act on June 10, 1977.)

Significantly, this constitutional defect in the bill was explicitly called to the attention of the bill's sponsors before it was acted on by either house, and the simple and obvious solution of deleting the redundant and unconstitutional §263.15 was strongly urged upon them. However, solely because the principal Assembly sponsor flatly refused to adopt such an amendment, the bill has reached your desk in its present unconstitutional form.

There is still another major constitutional defect in the bill. The crucial element of each of the bill's new crimes is the requirement that the performance in question involve "a child less than sixteen years of age." However, §263.20(1) of the bill then provides: "For purposes of this article, a person who appears to be under the age of sixteen years in any obscene sexual performance shall be presumed to be under the age of sixteen years." (Inexplicably, this presumption is expressly limited to "obscene sexual performances," and thus does not apply to the more serious crime of "use of a child in a sexual performance" or to the crime of "promoting a sexual performance by a child." This anomalous, and utterly absurd, selective presumption is reason enough to render this bill an embarrassment to the legislature and wholly unworthy of your signature.)

But there is an even more basic reason to conclude that this presumption is unquestionably unconstitutional. In the leading case of In re Winship, the Supreme Court declared that the "due process" clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358,

364 (1970). Five years later, in Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court unanimously reaffirmed that holding. Moreover, just last week, the Court again reiterated, referring to the Mullaney case, that

> "a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is true even though the State's practice, as in Maine, had been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." Patterson v. New York, 45 L.W. 4708, 4713 (June 17, 1977)

These decisions are directly applicable to this bill. Instead of requiring the prosecution to prove beyond a reasonable doubt the essential element of the new crime it creates, the bill merely declares that if the person "appears to be under the age of sixteen" -- however that is to be established -- such person "shall be presumed to be under the age of sixteen years." Such a presumption is indisputably unconstitutional under Winship, Mullaney and Patterson.

The use of children in the production of sexually explicit materials is obviously a most serious and disturbing problem, and one to which responsible state legislation could well be addressed. Unfortunately, this bill is so rife with constitutional and drafting defects as to render it wholly unenforceable and ineffectual. For these reasons, we urge you to veto it.

Respectfully submitted,

Kenneth P. Norwick

Kenneth P. Norwick
Legislative Counsel

KPN:dpj

A-3587-C

NYCLIU

New York Civil Liberties Union, 84 Fifth Avenue, New York, N.Y. 10011. Telephone (212) 924-7800

Legislative Department
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JUL 28 1977

July 21, 1977

Hon. Hugh L. Carey
Governor
State Capitol
Albany, New York 12224

Re: A 3587-C, Lasher, et al.

Dear Governor Carey:

On June 23, 1977 we wrote you expressing our opposition to the predecessor version of this bill (A 3587-B). (A copy of that letter is attached.) Since then, that bill was recalled by the legislature, certain amendments were made to it, and as amended it was repassed by both houses and returned to you. We write again to reiterate our strong opposition to this amended bill and to again urge you to veto it.

In our letter of June 23, we asserted two separate reasons why we believed that earlier bill was unconstitutional. In its present amended form, only one of those constitutional problems has been addressed -- i.e., the previous version's "presumption" provisions -- with no changes whatever made to deal with the other constitutional problem, namely, its provisions authorizing severe criminal sanctions for publishing and selling books and movies and the like that are concededly not obscene or otherwise unlawful. As a result, all of our arguments on that question set forth in our June 23 letter remain unaffected, and we reiterate those arguments here.

In addition, we believe several other observations should be made with respect to this amended bill. First, it seems absolutely clear that in effect this bill is intended as both a bill of attainder and an ex post facto law addressed to one particular book, "Show Me!," published in 1975 by St. Martin's Press, a highly respected and well-known New York

publisher. Indeed, Assemblyman Lasher -- the bill's principal sponsor -- has made it clear that he fully intends this bill to apply to that book. Especially in view of the fact that that book has expressly been found not obscene by several different courts, and that it is clearly a serious attempt to treat the subject of sex education for children in a meaningful and responsible way, we believe the bill is particularly offensive, improper, and unconstitutional. It is simply not the proper function of the state to create a whole new Class D felony to censor one particular book.

Secondly, we believe it important to emphasize that in no sense could or should a veto of this bill on constitutional grounds be interpreted as an endorsement of the indefensible use of children in the preparation of explicit sexual materials. As The New York Times observed in its July 1, 1977 editorial calling for a veto of the predecessor version of this bill:

> "The veto of any bill aimed at pornography would not enhance Governor Carey's popularity, but that is what this ill-drawn censorship measure deserves. It should be clarified to make certain that it hits the right target -- the people who in fact recruit and photograph children for pornography, in obscene and not just vaguely sexual context. The Governor should urge the legislators to try again -- and to watch their language."

In your three years as Governor, you have demonstrated your courage and commitment to constitutional values by vetoing bills that were politically popular but constitutionally or morally flawed. We most respectfully urge you to demonstrate that courage and commitment again by rejecting this ill-considered, dangerous and unconstitutional bill.

Respectfully submitted,

Kenneth P. Norwick
Legislative Counsel

KPN:ht

A 3587-B

HAROLD BAER, JR.

June 28, 1977

Hon. Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

JUL 5 1977

Dear Judah:

I have, from time to time, received bills forwarded to me, I presume as chairman of a subcommittee of the Governor's Task Force on Crime. In any event, those bills which appear to hold particular interest or concern will be circulated to a member of the subcommittee.

Since the time periods are so short within which you require a response, I am asking that the memo be returned to me within 48 hours. It will be immediately forwarded to you with my comments, if any. Although this does not provide for a subcommittee majority, to say nothing of unanimity, it may be of some help.

Happily, members of the subcommittee have particular expertise in one or more areas touching the criminal justice system. I will attempt to secure comments from the members with particular knowledge in the area to which the bill addresses itself.

I am pleased to associate myself with Ken Conboy's comments with respect to S.2743-B and A. 3587-B.

Sincerely,

Harold Baer

HB:ks

Harold Baer, Jr.

Harold Baer, Jr.
80 Pine Street
New York, New York 10005

cc: Hon. Paul Gioia
Alfred Scotti, Esq.
Kenneth Conboy, Esq.
Edward J. Meyer, III, Esq.
Edward M. Shaw, Esq.
Paul Kelly, Esq.

EDITORIAL # 248

THIS IS AN EXPRESSION OF EDITORIAL OPINION BROADCAST ON TUESDAY, JANUARY 25, 1977, AND WEDNESDAY, JANUARY 26, 1977, BY PERRY B. BASCOM, VICE PRESIDENT AND GENERAL MANAGER OF WNBC RADIO.

X-RATED CHILDREN

A group of New York City activists recently called for a police crackdown on the "sexploitation" of children. And the management of WNBC certainly agrees that smut peddlers, pimps and parents who destroy children in this way should be dealt with harshly.

Unfortunately, the use of children as quote "models" unquote in dirty books and "actors" in X-rated movies is only a misdemeanor in New York State. And while criminal statutes provide stiff penalties for "turning out" boys and girls under 16, as in adult prostitution, nabbing the pimp is a great deal more difficult than arresting the prostitute.

Nevertheless, we have a problem. Its exact dimensions are unknown. Unofficial estimates indicate that millions of dollars are involved and thousands of New York City area children participate.

What's urgently needed is an overview of this aspect of child abuse. Before an effective law enforcement and legislative assualt can be mounted, hard facts and reliable information are necessary.

Perhaps the place for an investigation to start is the State Assembly Committee on Child Care, headed by Assemblyman Howard L. Lasher of Brooklyn. Meanwhile, every possible legal weapon, no matter how inadequate, should be exercised in behalf of rescuing our X-rated children.

WCBS NEWSRADIO 88

EDITORIAL

...CBS STREET
...W YORK 10019
...212) 975-4321/CBS OWNED

This is one of a continuing series of WCBS Radio ... the opinion of station management on topics of ... community. Responsible representatives of opposing ... the opportunity to reply on the air. If you missed the ... editorial, we hope you will read it. Your comments ...

...L. Nelson, Vice President, CBS Radio Division
General Manager, WCBS Radio

Subject: Children in Pornography Films
5-1

Broadcast: January 14, 1977, 5:51, 9:43, 11:51 AM
1:51, 3:51, 7:51 PM
January 15, 1977, 1:51 AM

America has become a world leader in producing sex films starring children twelve-years-old and under.

And in Denmark, where pornography is legal, American sex films are now in great demand, Dr. Judianne Densen-Gerber of the Odyssey Institute tells why:

Gerber: "They do not permit their children to be used this way so the only source of really good material -- technically good material is the United States."

American pornographers are making a lot of money producing best selling films by getting children to perform sexual acts in front of the cameras. But what does it do to the children?

Gerber: "It destroys them because during the period of pre-pubscent eight to twelve -- sexualizing a child then becomes the only way that child channelize most of the energy. Channelizes the energy from work productivity from normal development. It's like forcing a child to walk before it can even crawl."

These pornographers are destroying the minds and spirits of our children. These children get involved in prostitution and drug addiction -- they get infected with veneral disease and may become pregnant.

What kind of parents sell their kids into pornography? What kind of people make these movies?

Gerber: "My gut tells me very sick people."

In the past year there's been dozens of pornography raids. But they haven't resulted in any stiff sentences.

We asked Congressman Ed Koch who has been trying to prod Manhattan D.A. Morgenthau and U.S. Attorney Robert Fiske into action -- why?

-more-

Koch: "The judges live in Ivory Towers and just don't know what is going on. I believe that if they viewed these films they would come away with the same sickening feeling that everybody who viewed them came away with and say, that the people who are producing these films, the people who are selling these films involving children committing explicit sexual acts -- those people belong in jail."

The children of America have enough problems growing up in this society. And the people who try to make money by exploiting and destroying their spirits are committing the most treacherous of crimes.

In future editorials we'll be talking to some of the victims of childhood sex exploitation. And we'll be pointing the finger at some of the public officials who we believe haven't been doing what they should to eliminate the problem.

That was Director of Editorials, Joe Feurey, speaking for the management of this station. For a copy of that editorial, or to express your views, write WCBS, New York, 10019.

-WCBS Radio-

Pornographic motion pictures starring children? That's our subject matter today. Now, we're not going to get into a debate in this broadcast over pornographic motion pictures per se, but we do heartily endorse proposed legislation to crack down on parents who permit the exploitation of children in such movies and books.

The State Assembly Committee on Mental Health recently viewed films showing children--some as young as eight years of age--engaging in explicit sexual behavior. The problem is urgent because the United States reportedly is becoming the world's leading supplier of pornography involving children as a result of the weakness of our laws in this field.

The committee also heard testimony that children exploited sexually often wind up as drug addicts or in the adult sex market and are frequently destroyed human beings by the time they are 18 years of age.

Assemblyman Howard Lash of Brooklyn, Assemblywoman Elizabeth Connelly of Staten Island, and Assemblyman Eugene Levy of Rockland County have offered a bill to provide fifteen year prison terms for parents who allow their children to be so exploited.

We think that's a mild enough penalty for parents who shirk the responsibility of child rearing in order to make a quick buck by corrupting children. We hope this bill sails through the legislature.

-0-

No. 18 "Children in Pornographic Movies" J C January 26, 1977

EDITORIAL - Jerry Carr, WHLI Radio

The Lowest Depths Of Pornography

You might think that exploiting children for pornographic purposes would be clearly against the law. Not so, according to law enforcement spokesmen; they say it's very difficult to discover, arrest and prosecute the exploiters.

In the case of very young children—some as young as three—film-making and picture-taking could hardly take place without the knowledge and consent of parents or guardians. But most of the children are young teenage runaways who need money to survive.

Movies like "The Texas Chainsaw Massacre" suggest that there's a market for just about any kind of obscenity, including dismemberment. But putting children in pornographic films flouts even the crudest standard of decency. Three state assemblymen are introducing a bill that would explicitly make it a felony to exploit children under 16, or allow them to be exploited, for pornographic purposes.

The bill certainly should be passed, but we can't help thinking that the biggest hurdle to successful prosecution is the difficulty of tracing the exploiter rather than the absence of applicable legislation. The very nature of the pornographer's trade makes it clandestine for both producer and procurer, especially if the procurer is a parent. Laws prohibiting child labor and penalizing child neglect already exist. Why shouldn't they apply to pornographers along with everyone else?

NEWSDAY, THURSDAY, FEBRUARY 3, 1977

220 E. 42 St. DAILY NEWS NEW YORK'S PICTURE NEWSPAPER (212) 949-1234

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NEW FACE, OLD IDEAS

Secretary-designate Bob Bergland vows that the Agriculture Department will be "innovative and imaginative" under his direction and to prove it he is proposing to turn the clock back 40 years.

Bob Bergland

What else is his scheme for creating a "food reserve" out of surplus wheat but the "Ever-normal Granary" of New Deal vintage tricked out in a catchy new slogan?

What started in the 1930s as emergency aid for distressed farmers became fixed policy under a succession of price-support programs. Only in the last few years, when anything that grew would sell, did Washington manage to end the costly subsidies.

The growers gloried in the free market when prices were constantly rising. Now that supplies and demand are back in balance, they are bellying back up to the handout trough.

When agriculture is concerned, people like Bergland have a unique pricing policy: What goes up must stay up.

The hell with that! How about somebody standing up for the consumer occasionally—like once every half a century?

THE BIG GAS SCARE

Government agencies are frantically trying to secure additional supplies of natural gas, which is running short because of heavy demand arising from the long, cold winter.

There would probably be no emergency now if Congress had heeded a series of warnings over the last several years and de-regulated gas prices at the wellhead, thereby stimulating production.

But the lawmakers accused the industry of using scare tactics to pull a gouge on the public. When no crisis occurred—thanks to milder-than-normal weather

Inquiring Photographer

By JOHN STAPLETON

THE QUESTION:

Do you think Bob McAdoo can lead the Knicks to an NBA championship?

THE ANSWERS

Mrs. Roberta Lavalle, actress: "I have four sons who are sports fanatics, so I have to be familiar with sports to keep up with them. With McAdoo, the Knicks may not win the championship, because there is an element of luck in that, but he will help them reach the playoffs."

Lavalle Allen

Ron Allen, pharmacist: "McAdoo may not give them a championship, but he is a hustling ballplayer and he is making the rest of the Knicks hustle. He seems to have picked up the entire team. The Knicks haven't had a good, strong, high scoring center since Willis Reed. It's about time."

Linda Kuplen, graduate student: "I know Ken Charles from his playing days at Fordham and then at Buffalo, where McAdoo was the star of the team. McAdoo is one of the top NBA stars and the Knicks were fortunate to get him. With McAdoo, the Knicks will be contenders for years."

VOICE OF THE

Please give name and address with letter. We

A SILVER LINING

Manhattan: Your editorial **concerning** the current **political situation** in Israel was **surprising.** "You characterized **Prime Minister** Rabin's **position as that** of a "lame-duck **caretaker,"** and maintain that **there can be** no substantial **progress** for peace during the **course** of the election **campaign that** may be in six **months. To** argue that Israel's

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Op Ed Department
New York Times
229 West 43rd Street
New York, New York

Gentlepersons - Pray Tell - What is a Non Obscene Sexual Performance by a Child?

Before next Wednesday, Governor Carey must decide whether he will sign into law an Amendment to New York State's Child Abuse and Neglect Statutes that will protect children from being victims of commercial sexploitation. The intent of this Law is clear. It declares: "The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. When parents and other adults expose young children to physical and psychological damage by promoting performances of sexual conduct by these young children, then legislative action is necessary. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the State demands the protection of children from exploitation through sexual performances."

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This is not an obscenity law, but a child abuse protection statute. I was shocked to read in the press that various groups who should know better and who have no experience in the Child Abuse field or in the treatment of sexually abused children, such as the Association of American Publishers and the American Library Association, would presume in an area so outside of their expertise to urge that the Governor not sign this vitally needed piece of legislation. My outraged suprise at this action turned to horror to see the same view expressed in the Topics column of the New York Times on July 1st.

This bill is not a censorship bill, but it is clearly a child protection measure. Therefore, words such as obscene do not apply. There is no obscene or non-obscene burning, flaying, or beating of a child - likewise there is no obscene or non-obscene sexual performance. Every use of a child for exploitative sexual needs of an adult is obscene by any definition!

There are no first amendment issues here. The first amendment was written to protect freedom of expression, not freedom of action. One should not be able to

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use as an affirmative defense that the ovens at Auschwitz are part of a Cecil B. de Mille spectacular.

The present law now prohibits a father from having intercourse with his five year old daughter, but it does not enjoin him from hiring her out as "an actress" to star in a film wherein she is repeatedly raped, as long as there is a disclaimer that such does not reflect on her personal conduct. Presently, she remains unprotected regardless of the emotional, psychological, and physical harm she experiences.

Odyssey Institute's research with socially deviant women has shown that 44% were incest victims, 75% before they were twelve and 45% before they were nine. Is this what the American Publishers wish to protect?

In August of 1976, Senator Birch Bayh sent me the excellent book by Robin Lloyd, an investigative reporter for NBC in Los Angelos, entitled <u>For Money or Love: Boy Prostitution in America</u>. Senator Bayh was struck by the fact that both Lloyd and I, working at opposite ends of the country on two different areas of child abuse (he, sexual - I, drug-related physical abuse and neglect)

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should reach a similar solution; namely the establishment of a Cabinet Post for the Concerns of Children.

Lloyd's book documented the involvement of 300,000 boys, aged eight to sixteen, in activities revolving around sex for sale. He noted that there were over 264 different boy and girl magazines being sold in adult bookstores nationwide. These magazines - well produced - sell for prices averaging over $7.00 each. Most of the children exploited are runaways from extremely abusive and neglectful homes - most, that is, if the children are eight years old and above. However, younger children used in the production of pornography, some as young as three, must be provided by their parents or guardians who are themselves often drug addicts, porn performers, or prostitutes, or more frequently, parents having incestuous relationships with their children which they wish to memorialize in photographs or movies to exchange with others who belong to clubs or groups advocating this type of activity. There is one group in Southern California whose slogan is "sex by eight or it's too late." Too late for what? To grow up unscarred, loved and protected; this one representation of the kooky fringe claims 2,500 members.

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A common sense guesstimate on my part leads me to believe that if there are 300,000 boys, there must be a like number of girls - heterosexual conduct still being more prevalent than homosexual - but no one has bothered to count the females involved. Lloyd postulates but cannot substantiate that only half of the true number of children are known. Therefore, the possible figure is closer to 1.2 million nationwide - a not improbable figure, considering the nation's one million runaways. How else can a twelve year old support him or herself?

Sadly, however, the effects of sexploitation of children go beyond just the child actor. Authorities in Rockingham County, New Hampshire, report that in 1977, everyone of the 27 cases of incest in their jurisdiction, (150,000 population), "kiddie porn" preceeded and accompanied the acting out of the father against his child. Similiar cases are reported in California and Ohio. Many of these magazines carry articles promoting incest. Some describe in both picture and word how to best penetrate a prepubescent child who would otherwise be torn because she is too small for the "normal missionary" position. The men who buy these magazines are borderline in

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their behavior and seek rationalization and justification for their desire to molest children. One magazine in my possession, "Lust For Children," is a sex primer for the child molester. It instructs him to go to the park, how to entice the children to his apartment, what games to play to seduce them to respond, and which sex acts to perform which will leave the least evidence for subsequent police action. As a mother of four, I trust that Carey, a father of twelve, knows full well that our children must be protected.

The New York Times worries about the suppression of Show Me, which it correctly reports has been found not to be obscene in several courts. I strongly suggest that the test used by the courts, namely "does the material presented have any redeeming social value" is inappropriate. The material should be evaluated on the basis of the damage done to the children participating and the purpose for which it is designed. Show Me purports to be a sex education text for seven to eight year olds, and many a well meaning parent might so use it. Not only does it promote and show sexual intercourse between unmarried young teenagers (at a time of an epidemic of teenage venereal disease

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and pregnancy), pictorial represent labor as an excruti-atingly painfull process (a horrendous distortion which will template on a young girl's memory forever), make fun of the values and morals of the parent generation, but it also illustrates fellatio. My feminist ire causes me to question whether the dirty old men on the bench, our judges, would have found cunnilingus represented to six year olds equally socially redeeming. I tend to sadly believe that they, like the Judge in the Wisconsin rape case, believe whatever little girls are forced to do for little boys is acceptable to present community standards.

Six year olds need to be educated to and can integrate the values of relationships within a context of committment, love and the beauty of their bodies, not to the techniques of oral genital sex or the fear of labor.

These problems and the attitudes of many judges discourage and actually thwart the few criminal investigations attempted. This year, when one of America's leading pornographers, Edward Mishken, was arrested in New York, one third of the 2,000 square feet of material confiscated involved children. Mr. Mishken pleaded guilty in spite of the fact that he had many previous convictions, Judge

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Irving Lang sentenced him to twenty-seven consecutive weekends in jail - I assume so that his work week destroying children would not be interrupted. We, as citizens, must ask why Judge Lang did not give Mishken the seven year sentence permitted. Mishken was rearrested on like charges within one week.

Lastly, it is essential that the protective law also be against the distributors and sellers of this material. For it is here that organized crime participates and profits from this annual billion dollar industry. Such an extension of criminal sanctions has great precedent in our legal system. For instance, anyone who benefits from the fruits of illegal child labor is equally culpable before the law.

On January 13th, 1977, Odyssey Institute began the campaign against the use of children for pornographic purposes (not against pornography). On that date, only six states safeguarded children: Connecticut, North Carolina, North Dakota, South Carolina, Tennessee and Texas - and now Rhode Island. I urge all New Yorkers who care about children to press Governor Carey to sign.

New York, the leading producer of "kiddie porn"

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along with California, must join the states that protect rather than destroy children.

As Eric Ericson wrote: "Someday, maybe, there will exist a well-informed, well-considered, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit; for such mutilation undercuts the life principle of trust, without which every human act, may it feel ever so good, and seem ever so right, is prone to perversion by destructive forms of consciousness."

Judianne Densen-Gerber, J.D.,M.D.
President
Odyssey Institute

To whom it may concern:

Portions marked in red may be deleted for considerations of space. I can be reached at (203) 255-4198 if discussion is needed.

JDG

Odyssey Institute, Inc.

P.O. JUL 6 1977 Journal A 3587

EXECUTIVE OFFICES
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Mr. Kalman Seigal
Letters To The Editor
New York Times
229 West 43rd Street
New York, New York

To The Editor,

The June 29th New York Times reported that various groups such as The Association of American Publishers and The American Library Association were urging Governor Carey to veto the bill befor him protecting children from sexploitation for commercial or other purposes. My outraged suprise at this action by groups who should know better was turned into horror upon reading the topics column under the Editorials in your July 1st edition.

First, the Act passed by our legislature is an amendment to the Child Abuse and Neglect Statutes of our state, not an anti-pornography bill. Therefore, words such as obscene do not apply. There is no obscene or non-obscene burning, flaying, or beating of a child. Likewise, there is no obscene or non-obscene sexual performance. Every use of a child for exploitive sexual needs of an adult is obscene by definition!

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There are no first amendment issues here. The first amendment was written to protect freedom of expression, not freedom of action. One should not be able to defend the ovens at Auschwitz because they were part of a Cecil B. de Mille spectacular.

Unless the Governor signs the act, the law as it now stands is as follows: It is prohibitted for a man to have intercourse with his five year old daughter, but not for him to hire her out as "an actress" to star in a film wherein she is repeatedly raped, as long as there is a disclaimer that such does not reflect on her personal conduct. In the latter instance, her emotional, psychological or physical needs, remain unprotected.

On January 13th, 1977, knowing that the United States produces each month over 264 different pornographic magazines using children, Odyssey Institute began the Campaign against the use of children for pornographic purposes, (not against pornography). On that date, only six states in the Union so safeguarded their children: Connecticut, North Carolina, North Dakota, South Carolina, Tennessee, and Texas - and now Rhode Island.

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I urge all New Yorkers who care about children to press the Governor to sign this bill. New York, the leading producer along with California of "kiddie porn," must join the states that protect rather than destroy children.

Judianne Densen-Gerber, J.D.,M.D.
President
Odyssey Institute

A-3587-B

pg

NEW YORK STATE CONGRESS OF PARENTS AND TEACHERS, INC.

BRANCH OF THE NATIONAL CONGRESS OF PARENTS AND TEACHERS

JUN 28 1977

PTA LEGISLATIVE MEMO

The Honorable Judah Gribetz
Executive Chamber

June 27, 1977

A 3587,B Child Pornography SUPPORT

The PTA urges the Governor to sign this Bill which will impose criminal penalties against persons involved in using children for pornographic purposes.

It is difficult to contemplate what kind of parents would allow (or encourage) the use of their children in pornographic films, but we know there are such parents and they must be held accountable. They, and the producers of these films, must find out that society will not allow this kind of denigration of its young.

We know there was some feeling that present child labor laws and laws prohibiting prostitution could be used to prosecute people involved in this sort of activity. We do not believe these laws are adequate. This proposed law, which speaks directly to the problem, is needed.

We know, also, that there was some question of First Amendment "rights" of those involved in the making of such films. We hope the amendments to the Bill have allayed the fear that this could prove to be a problem. PTA cannot believe, however, that the framers of our Constitution expected the First Amendment to be interpreted as providing some sort of protection just because "something" was put on film or in print. Using children for pornographic purposes is surely not protected by the Constitution.

The State must try to do what it can to protect children from being used for this heinous purpose.

PTA urges that this Bill become New York State Law this year.

Joan Ball
Legislation
Chairman

P4

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JUL 1 1977

GOVERNOR HUGH CAREY
ALBANY NY 12224

REFERENCE A3587-A52713-B BILL AWAITING SIGNATURE WE OBJECT TO THE ABOVE
BILL AND URGE YOU NOT TO SIGN IT. THE PENDING BILL, INTENDED TO PROTECT
CHILDREN, IN FACT WILL ACT AS AN EFFECTIVE MEANS OF CENSORSHIP OF BOOKS
WHICH WOULD NOT BE "OBSCENE" AS DEFINED BY THE SUPREME COURT OF THE
UNITED STATES. THE AMERICAN BOOKSELLERS ASSOCIATION STRONGLY ENDORSES
LEGISLATION INTENDED TO PUNISH THOSE WHO USE, OR PERMIT THE USE OF,
MINORS IN A SEXUAL PERFORMANCE UNFORTUNATELY, THE PROPOSED BILL, IN AN
ATTEMPT TO ATTACK THIS VERY SERIOUS PROBLEM, DEFINES THE WORD
"PROMOTION" OF A MINOR'S SEXUAL PERFORMANCE TO INCLUDE THE SALE OF
BOOKS WHICH ARE NOT OBSCENE BY THE SUPREME COURT STANDARDS AND ARE
THEREFORE ENTITLED TO FIRST AMENDMENT PROTECTION AS THE TRADE
ASSOCIATION REPRESENTING THE VAST MAJORITY OF BOOKSTORES, BOOKSTORE
CHAINS, AND BOOK DEPARTMENTS OF DEPARTMENT STORES, WE MUST STRENUOUSLY
REGISTER OUR OBJECTION TO ANY LAW WHICH WOULD IMPOSE FELONY PENATIES
UPON BOOK SELLERS FOR THE SALE OF BOOKS ENTITLED TO FIRST AMENDMENT
PROTECTION WE URGE YOU TO VETO THIS BILL. SINCE, ALTHOUGH WELL
INTENDED, IT WILL SERVE AS A SERIOUS DETERRENT TO CONSTITUTIONALLY
PROTECTED BOOKS SOLD IN LEGITIMATE BOOKSTORES THROUGHOUT THE COUNTRY

G ROYSCE SMITH
EXECUTIVE DIRECTOR
AMERICAN BOOKSELLERS ASSN

1112 EST

MGMCOMP MGM

CABLE ADDRESS: SAINTMAR

ST. MARTIN'S PRESS, Incorporated

175 FIFTH AVENUE, NEW YORK, N. Y. 10010

Telephone (212) 674-5151

June 20, 1977

Hon. Hugh L. Carey
Governor
Executive Chambers
State Capitol
Albany, New York 12224

Re: Senate Bill S.2743-B, Marino, et al.
Assembly Bill A.3587-B, Lasher, et al.

Dear Governor Carey:

I am President of St. Martin's Press, a New York City publishing company. Our company is a subsidiary of Macmillan Publishers Limited, the 125 year old British publisher. St. Martin's Press, however, is in its own right a reputable, established publisher, producing books of fiction, poetry and art, reference books, college textbooks and other books of general interest.

I understand that the above bill, which deals with the problem of sexual performances by children, has been passed by the Assembly and Senate and has been submitted to you for signature. I wish to convey my concern to you about the impact of the legislation on the continued publication of a book that St. Martin's Press publishes entitled SHOW ME! A Picture Book of Sex for Children and Parents. Specifically, the problem we face is caused by the inclusion in the bill of §263.15, which makes it a crime to promote a sexual performance by a child even if not obscene.

I am enclosing for your reference a copy of SHOW ME!. For your further information about the book, I am also enclosing a copy of my letter of June 9, 1977 to Hon. Howard Lasher, the sponsor of the bill in the Assembly, together with the enclosures referred to in such letter.

SHOW ME! represents a serious and responsible approach to sex education for children. As such, it has received praise from an immense number of parents, psychologists, teachers, librarians, clergymen and reviewers. Approximately 100,000 copies of the book have been sold in North America.

Probably because of its controversial nature and its explicit photographs SHOW ME! has been the subject of three cases in this country where attempts were made to ban its sale. In each case the court held that SHOW ME! is clearly not obscene (in all cases in the initial stages of the proceeding). No court, anywhere, has found it to be obscene. Indeed, the finding has always been that it is a serious, educational book and constitutionally protected.

I have found that a recurrent problem has been to convince people that are initially opposed to SHOW ME! that we could possibly have produced this book with an honest and approvable intent. The paper written by me entitled DEFENDING "SHOW ME!" referred to in my letter to Assemblyman Lasher and enclosed herewith tells why it was published by St. Martin's Press and why I deeply believe it is a valuable, needed, sincere effort in an important area by informed and reputable authors.

I suggest to you that if §263.15 of the bill, as currently adopted by the Legislature, would ban a book such a SHOW ME!, then the legislation is uninformed, harmful and unconstitutional. Section 263.10 of the bill (concerning the promotion of obscene sexual performances by a child) is certainly sufficient. Section 263.15 (concerning the promotion of sexual performances by a child and carrying the same severe felony penalties as §263.10) is, at the same time, duplicative, conflicting, illogical and confusing; and its unnecessary inclusion in the legislation would very likely have a chilling effect on the further publication, distribution and sale of worthwhile books such as SHOW ME!

I am hopeful that, after a review of this letter and the enclosed material, by you or your staff, you will recognize the seriousness of the matter. I urge that you do everything in your power not to allow the final enactment of the bill, unless §263.15 is first deleted therefrom.

Unfortunately, I am at present in London, England, from where this letter has been dictated, and will not return to the United States until the week of July 4th. However, I would be glad to have another representative of St. Martin's Press meet with your staff at any time at their convenience. Alternatively, I would be happy to call your staff from London if you thought this would be helpful. My office can accept any instructions you or your staff would care to give.

Respectfully yours,

Thomas J. McCormack,
President

Encs.
cc: Judah Gribetz, Esq.
Counsel to the Governor

Paul Joya, Esq.
Assistant Counsel to the
Governor

St. Martin's Press
175 Fifth Avenue, New York, New York 10010
Telephone (212) 674-5151

DEFENDING "SHOW ME!"

by Tom McCormack

President, St. Martin's Press

This past year St. Martin's published a book that was the only hardcover book issued in 1975 to be prosecuted for obscenity.

The book is SHOW ME! A Picture Book of Sex for Children and Parents. The authors are a Swiss child psychologist named Dr. Helga Fleischhauer-Hardt and an American photographer, Will McBride. She wrote the text. He took the pictures.

In this article I'd like to tell why I went to court to defend the book, and what I learned there.

First, I should describe the book. It is large -- 13½ x 9½. It has 176 pages, 32 of which are given over to text by Dr. Fleischhauer-Hardt explaining how to use the book and the rationale behind it. ("We are of the opinion that only an explicit and realistic presentation of sex can spare children fear and guilt feelings related to sexuality. For this reason we chose photography as a medium.") The rest of the book is comprised of Will McBride's photos. The book begins with pictures of two children of about eight who examine their anatomical differences and express wonder and bafflement about sex. The succeeding pictures show the developing sexuality of older children, through to adulthood and, finally, parenthood.

The children learn about sex by seeing it enacted by their

elders. The photos are thoughtful, affectionate, loving, warm--and totally explicit, far more explicit than anything ever before devised for use with children. Moreover, they are not confined to depictions solely of copulation. They show childhood sex games, masturbation, and oral sex as well. Why? Because these things are a natural part of human sexuality, and it is intended that none of them be condemned, hidden, secret, unshowable. The rationale behind this total explicitness is the authors' firm conviction that a completely open, relaxed and non-restrictive sexual education is the best way to develop a normal, happy sexuality. Putting it the other way around, they point out that no one is born with a feeling of shame, guilt, fear or anxiety about sex. It is taught to them. And the lesson is communicated less in this era by outright condemnation of sex than by silent suppression. The muzzling aura of taboo soon conveys its message to the growing child; he is scolded for touching or showing his own genitals, for looking at his sister's, for repeating some sex joke he heard at school. He soon senses his mother would not want him looking at those pictures of naked ladies that his friend has. He notices his parents' embarrassment or scandal when he uses certain words or asks certain questions. In a burst of enlightenment, they may buy him a book about the birds and the bees. It's a cartoon book and the one thing he is desperately looking for is the one thing shielded--the Mommy and the Daddy are in bed together with the blankets up to their chins. Why can't he see what's going on? Is it so awful? It must be, because it is never shown. And never discussed in specific terms. And so the message gets across.

Some 70,000 copies of SHOW ME! have been sold in North America. It is in book stores from coast to coast. It has received supreme praise and total condemnation. In many communities, the book has been called to the attention of the local prosecutor who has examined it and declined to prosecute. The general opinion has been that it would be a waste of time and money because conviction was impossible. At least one prosecutor added, "And I'd end up looking like a damn fool."

But, four times, prosecutors went ahead: In Massachusetts, New Hampshire, Oklahoma and in Toronto, Canada.

I found that as a witness--and as a publisher answering his mail--the first task we had was convincing antagonists that the authors and the publisher could possibly have been sincere in their arguments for SHOW ME! The child psychologist in Switzerland must have wanted to produce pornography. She could never have believed that revealing the facts of sex to young children was good thing. Here is a child touching her own anus. How can that be justified? Here is a picture of a woman kissing a man's penis. Here is a totally explicit photo of a penis penetrating a vagina. There can be no sincere defense of such things.

The impasse here stems from a denial of the book's basic premise. Behind the accusation is the critic's assumption that there is something shameful, something deserving suppression, about sex. And that the author knows it. But if Fleischhauer-Hardt's honest belief is that shame about sex is a harmful and unjustified attitude, and that shame is not innate but rather is taught, and that the best way to avoid teaching shame is to be totally open, relaxed, and non-condemning about sex right from infancy, then she resolutely did write this book with sincerity of intent.

The publisher, the one who figured to make money from the book, I was fair game for some skeptical cross-examination in court. Did St. Martin's really have no qualms about this book? Really? I said that when I first saw the book in German--which I cannot read--I was startled and skeptical too. But Paul DeAngelis, St. Martin's editor on the book, translated the text for me, and soon I had to start questioning the grounds for my skepticism. Well, you don't show such things to kids. Why not? Because they're too young. But that's circular. You don't show them to the young because they are young. Now really, focus in on it: Why shouldn't children be told about sex? We tell them about eating, exercise, germs and other things about the body. We tell them about rockets to the moon, how bridges are built, how a car works. Why not sex? The two responses that opponents regularly came up with were:

"The kids aren't <u>ready</u> for it."

"Is it really necessary to show them these things?"

The answers to these remarks sum up my own conversion, and they have been borne out since SHOW ME! was published. To the first we say: Children don't become <u>ready</u> for the book; they become <u>unready</u> for it. No young child is embarrassed or frightened or appalled by it. They have to be taught these reactions as they grow. We haven't received a single letter from any parent who bought the book and then found their child was upset, distressed, made anxious. Only adults are, not children. There have been bizarre scenes in bookstores as adults first encountered SHOW ME! such as the man in Oklahoma who tore it to pieces. I testified in court that my son Daniel, who is eight, has the book. He turns a few pages, puts it down and goes and watches Star Trek--with the same equanimity of response. If I can get him through puberty with a similar lack of embarrassment and tension about sex, I'll be thankful. Sex is as natural a part of life as eating, sleeping, growing taller. Why in God's name hide <u>anything</u> about it? If you <u>do</u> hide it, suppress it, stigmatize it, the child <u>will</u> become <u>unready</u> for it.

"But they can't use it, they're so young, so why do they need it?" Two reasons. The first, I've given: If you suppress it while they're young, they'll get a message, a deeply negative one, and

it will contaminate their response when the time comes when they are "ready." The second reason is this: In absolutely no other area of life do we deny children knowledge because they can't use it yet. I don't refuse to tell Daniel about shaving because he doesn't have a beard. I don't tell him I won't discuss computers or diabetes or the electoral process until he "needs to know."

This fundamental premise can't be repeated often enough: Expose children to the facts of sex as openly and naturally as everything else and they will accept it as naturally as everything else. As Fleischhauer-Hardt notes, in those non-Western societies where there is no sexual censorship there are no sexual hang-ups.

So that was the first reason for publishing SHOW ME!--I believed in what it was trying to do. The second reason is that I'm on The Freedom to Read Committee of The Association of American Publishers. I'm on this committee because censorship--being told what I can and cannot publish, read or think--is intolerable to me. I knew that there would be parents who would want to use this book with their children, and I could see that there were others who would want to stop them. "I will not have this book for my children, therefore you shall not have it for yours." That seems to me obviously unacceptable.

One persistent problem for the defense is: Not having read SHOW ME! is no deterrent to attacking it. Three months before the book was even published, I received a letter from the pastor's secretary at a church in Ohio saying, "Nothing personal, but if you print this book, I hope your shop goes up in smoke." In Toronto, Marshall McLuhan of the-medium-is-the-message fame, declared the book to be "Nazi." (The book was first published four years ago by a Lutheran Church-supported children's book company in Germany.) He claimed that his expertise allowed him to make this judgment without having read it.

The defense of the book in the United States was based squarely upon the Supreme Court's opinion as expressed in the famous Miller vs. California case, and supplemented in the Jenkins vs. Georgia case. The Miller opinion cited three conditions that needed to prevail before a book could be ruled obscene:

1. The average person applying contemporary community standards would find that the work, as a whole, appeals to a prurient interest in sex.

2. The work depicts, in a patently offensive way, sexual conduct.

3. The work, taken as a whole, lacks serious literary, artistic, political or scientific value.

testified--an educator and a psychologist--and after asking the second witness the question, "Is this book in your opinion a valuable educational tool that should be used with discretion by parents teaching children?" The answer was, "Yes, sir." This was enough to persuade him that serious professionals could sincerely argue for the book's value. (Besides, the two witnesses took an hour, and he saw we had nine more lined up.)

In Oklahoma, Special District Judge Creston B. Williamson ruled, "The book...is not an obscene book within the definition set out by the United States Supreme Court in Miller vs. California... By so holding, this Court determines that there is no factual issue which would require a jury determination..." What he was saying is that the questions of fact that a jury would consider--what are the community standards? is this book patently offensive? etc.--were not pertinent in the face of the court's prior determination that the book had serious value.

In all three cases--and in Toronto--the bench's tenacity in defending First Amendment freedoms impressed me. In Canada, Judge Lloyd Graburn in finding SHOW ME! not guilty said, "Freedom of expression is a hallmark of a free society. Curtail and erode such freedom, and liberty withers away."

Judge Graburn had listened to the book being attacked on every conceivable ground. Marshall McLuhan called it "Nazi"; a clergyman called it an "organ recital;" someone condemned it for having no blacks or orientals; for its hostile attitude toward prudish older people; for describing the pain of childbirth; for its "anti-privacy attitude;" for having only "beautiful people" in it; for having children in it. The prosecution even found sinister meaning in the datum that the book has sixty-nine photographs. But there is no binding connection between any of these charges and obscenity, Judge Graburn said. Nor does a non-obscenity (a picture of a penis) become an obscenity merely because the picture is enlarged. Nor does the assertion that the photos would frighten a child entail obscenity, even if it were true (which, experience has shown, it is not). He summed up his remarks about the more general attacks on the book by saying, "I find it incomprehensible to conceive of a picture book about sex in the purview of the author's aims which would not deal with sexual intercourse, masturbation and bodily exploration."

In effect, the prosecution's initial angle of assault on the book ignored the purpose of the work and simply cited various photographs, saying, these are obviously dirty pictures. The defense would then counter by saying the Supreme Court has repeatedly said we must consider the work as a whole, not just isolated pictures or lines; we need to look at the educational intent on the work as a whole. The prosecution would then veer off its angle and try to attack SHOW ME! for not doing its announced job well. But as soon as they did this, they were no longer attacking the book as obscene. And we had scores of teachers,

This opinion left a good deal unresolved, because of confusion about definitions of terms and about procedure. The SHOW ME! cases have contributed to some clarity of procedure.

The Jenkins case followed Miller. The object of the indictment was the movie CARNAL KNOWLEDGE. The prosecution in Georgia assumed, rightly, that it could find twelve local jurors who would decide that, by the standards of the community where they lived, the film was offensive. The defense appealed and the Supreme Court agreed to hear the case because they perceived that their Miller decision was being misinterpreted or misused. The justices went to the movies and came back to overturn the conviction. A key line in the Jenkins decision reads, "It would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is patently offensive."

Of the three proceedings against SHOW ME! in the United States, two were pre-trial hearings--in effect, to decide if the book or booksellers who were arrested should be tried--and the third, in New Hampshire was an actual trial (before a judge, not a jury) because New Hampshire, has no provision for a pre-trial hearing.

In all three states, judges ruled that as a matter of law, SHOW ME! was not obscene. How the SHOW ME! cases contribute to a clarity of procedure is this: Each of the judges perceived that their duty lay in applying the three-pronged Miller decision in reverse. That is, they examined prong three: Does the book have serious literary, artistic, political or scientific--i.e. educational--value? If it does, then it is unnecessary to proceed to the blurry question of community standards or of how offensive some people may find it.

In Massachusetts, Superior Court Justice David Nelson wrote "In order to protect citizens' rights under the First Amendment... the court is required to apply the constitutional test of obscenity in the preliminary stages of these proceedings... even a cursory examination of the book allows for the determination that it has serious literary and scientific value...The First Amendment protects (such) works...regardless of whether the government or the majority of the people approve the ideas these works represent." Judge Nelson declared the book not to be obscene. (He added a compelling postscript, "My own appraisal of the book, for whatever my own subjective judgment is worth, for legally it is worth nothing, is summarized succinctly on page 73 of the book as verbalized by a young child, 'YICHH!'" In Toronto, the prosecution quoted this line to me on the stand, and I said I thought it was very forthright of the judge. He didn't like the book himself, but he saw that this was irrelevant to the judgment.)

In the New Hampshire trial, Justice Alvin Taylor accepted a defense motion to dismiss after only two defense witnesses had

parents, psychologists, clergymen, librarians and others prepared to testify that it was doing its job superbly. The judge quickly perceived that his job was not to decide which of the expert witnesses had "won" the dispute. The fact that there was a sincere, informed dispute was enough to free SHOW ME! from the charge of obscenity.

It is interesting how often critics of the book seem totally unaware of what the book is saying or trying to do. One accuser declared, "It is a systematic introduction to shamelessness," as though that revelation were all one needed to see. But that's exactly what the book intends to be, a tool to take the shame out of sex. The prosecutor in Massachusetts remarked, "The more tender the mind, the more obscene the book." (By "tender" I assume he means "young," but other interpretations might work better for him.) But consider: Would SHOW ME! be "obscene" to a three-year old? No. He hasn't been taught about the "awfulness" of any of this stuff yet. How about an eight-year old? Well, not quite, because he doesn't yet know about the "heinousness" of masturbation, or the "wickedness" of oral sex. In fact, the prosecutor has it exactly reversed. The older the mind, the more likely the agitation.

I close with two random further lessons from my SHOW ME! experience:

* Researchers qualify their own results. Every prosecution witness who showed the book to friends testified that they were uniformly appalled. Every defense witness testified to uniform approval.

* You can win them all, but you can't persuade them all. In Toronto, after the judge dismissed the case, the prosecutor said the judge's ruling was a "well-reasoned, enlightened judgment." In Oklahoma, the prosecutor said, " I say the judges are being pressured by a minority who get their kicks out of reading such trash."

The prosecutor in Oklahoma evidently listened to no one who supported the book. He didn't notice Dr. Edwin O. Carlson say, "SHOW ME!...is a meaningful, accurate means of dealing with sex education. While intended for children, I feel it would be an enriching and enlightening experience for adults as well." Or Morley Cowan, president of Children's Rights Organization, " It is time someone presented a thorough, outspoken work explaining sexuality and sensuality without instilling lies and shame..." Or educator Gilbert Salk, "It is beautiful, warm, informative... I recommend it without reservation."

This fall, St. Martin's is issuing a paperback edition of SHOW ME! and I'm certain someone will tear a copy up in rage. The same person who, twenty five years ago, would have torn up the Kinsey Report. What will they be tearing up in the year 2001?

xxxx

A 3587-C

AUG 1 1977

Association of American Publishers, Inc.

1707 L Street, N.W., Suite 480
Washington, D.C. 20036
Telephone 202 293-2585

Arsend Hoopes

August 1, 1977

The Honorable Hugh L. Carey
Governor of the State of New York
Executive Chambers
State Capitol
Albany, New York 12224

Dear Governor Carey: Re: A3587-C, Lasher Child Abuse

We believe you are aware of the strong concern of the Association of American Publishers and other segments of the book community -- including librarians and library groups, booksellers, book distributors and book publishers -- over Section 263.15 of the Lasher Child Abuse bill, A3587-C. Section 263.15 is most certainly unconstitutional because it would result in banning certain books even where no child exploitation or abuse is involved, and even where the books have evident scientific or educational value.

We did not previously urge a veto of the Lasher bill, for we were convinced that an amendment deleting Section 263.15 could readily have resolved our concerns, while leaving the bill's child abuse provisions intact. Unfortunately, despite your most welcome and commendable efforts to secure appropriate action by the Legislature after recall, the bill that finally passed both houses on July 14 contains the unconstitutional Section 263.15.

We now urge you to veto A3587-C. We do so most reluctantly, for we believe that conduct involving the abuse and exploitation of children -- whether in sexual "performances" or in any other form -- ought to be deterred and punished by all appropriate means. You have often demonstrated by your courageous and principled actions that you take seriously the Governor's responsibility to assure that legislation enacted in New York State -- however valid its general purpose -- be enforceable and constitutional. If you do not exercise that gubernatorial responsibility in the case of A3587-C, then nothing can prevent that bill from imposing a "chilling" effect on the exercise of First Amendment rights -- unless or until there has been a court test followed by corrective judicial action. As you well know, that could take a long time. Meanwhile, all concerned would be forced to operate on the basis of a constitutionally impermissible law.

We do not underestimate the political problems attendant upon such a veto. We believe, however, that the onus of delaying effective child abuse legislation must rightfully be placed upon the sponsor of this bill (and the Legislature as a whole) who surely recognized the unconstitutional character of Section 263.15. We believe that the Legislature will understand the wisdom of a gubernatorial veto, and will then overwhelmingly support a properly drafted child abuse bill in the next Legislative session.

Sincerely,

Townsend Hoopes

c.c.: Judah Gribetz, Esq., Counsel to the Governor
Paul Joya, Esq., Assistant Counsel to the Governor

A 3587-B

P.G

DISTRICT ATTORNEYS ASSOCIATION

STATE OF NEW YORK

JUL 1 1977

June 29, 1977

Honorable Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

Re: S. 2743-B
A. 3587-B

Dear Mr. Gribetz:

The New York State District Attorneys Association recommends approval of the above referenced legislation. The use of children as subjects in sexual performances is surely an activity which must be made criminal in our society.

Very truly yours,

B. Anthony Morosco

B. ANTHONY MOROSCO
Legislative Secretary

BAM/JPP/pag

McGraw-Hill Book Company
1221 Avenue of the Americas
New York, New York 10020
Telephone 212/997-1221

July 26, 1977

Honorable Hugh L. Carey
Governor of the State of New York
Executive Chambers
State Capital
Albany, New York 12224

Dear Governor Carey:

I am writing to urge you to veto the Lasher Child Abuse bill, A3587-C. While the notion of exploiting children in sexual performances is totally abhorent -- destructive, demeaning, morally numbing -- this particular bill carries a crippling defect in Section 263.15. That section is constitutionally indefensible for it permits certain books to be banned despite their educational value and regardless of whether or not the book's publication involves actual child exploitation.

I can imagine the very great pressures on you to allow a defective bill to slip through, and the strength of purpose a veto shall require. It is a difficult test for any governor, and a measure of leadership for the best.

Sincerely,

Frederic W. Hills
Editor-in-Chief

FWH:fjn

cc: Paul Joya, Esq.

RECEIVED
JUL 28 1977
P.L.Q.

Association of American Publishers, Inc.

One Park Avenue
New York, N.Y.10016
Telephone 212-689-8920
Cable • BOOKASSOC NEWYORK

July 18, 1977

JUL 25 1977

The Editor
The New York Times
229 West 43 Street
New York, New York 10036

Dear Sir:

Recognizing the profound difficulty of achieving reasoned debate over the intensely emotional issue of the abuse of children in pornography, I nonetheless venture to respond briefly to Dr. Judianne Densen-Gerber's letter to the editor published in the Times on July 12.

Dr. Densen-Gerber challenges the Association of American Publishers (AAP), the New York Times and others for their actions concerning child abuse in pornography legislation proposed for New York State. She states that the proposed legislation applies solely to the use of children for pornographic purposes; that it is not an "anti-pornography" bill; and that, therefore, no First Amendment issue is involved. On this basis, she implies that to oppose any aspect of the proposed New York legislation is to oppose protecting children from sexual exploitation.

Dr. Densen-Gerber has apparently neglected to read the proposed New York legislation or to consult AAP's position papers. Contrary to the impression her letter conveys, the AAP, along with prominent librarians and library groups, leading book publishers and booksellers, and civil liberties groups, has not

opposed the enactment of legislation to deter and punish the use of children in sexual performances. However, the New York bill goes beyond this laudable purpose. According to the bill's own sponsor, one section of the bill could be used to impose severe criminal sanctions on the publisher or seller of any book depicting children in certain poses. These penalties could be imposed even if the book involved no child exploitation or abuse, and even if the book had serious scientific or educational value. This is the single aspect of the bill that the AAP opposes.

In short, this section of the pending New York bill is intended -- despite Dr. Densen-Gerber's assurances -- to ban books. Therefore, the bill does raise a very serious First Amendment issue.

The AAP did not, at the time Dr. Densen-Gerber wrote, advocate a veto of the bill, but rather an amendment to render it constitutional (on this point, the New York Times account of June 29 was in error). The AAP continues to urge the Legislature to pass, and the Governor to sign, a strong bill aimed at the child abuser. At the same time, we oppose even high-minded efforts to ban constitutionally-protected literature. There is no need to flay the Constitution in order to flay the child-abuser.

Very truly yours,

Henry R. Kaufman
Legal Counsel
Association of
American Publishers
New York, July 18, 1977

HRK:as

bcc: Judianne Densen-Gerber
Walter Goodman
Simon Michael Bessie
Richard P. Kleeman
Paul Joya, Esq.

A-3587

43 Bronx River Road
Yonkers, New York 10704
July 27, 1977

Governor Hugh L. Carey
Governor of New York
Executive Chambers
Albany, New York 12224

Re: Judianne Densen-Gerber, J. D., M. D.
Odyssey Institute on Child Abuse

Dear Governor Hugh Carey:

As a citizen of the United States and a resident of Yonkers, I urge you to support the founder and president of Odyssey Institute, Judianne Densen-Gerber, J. D., M. D. in the three-pronged approach suggested by Odyssey's Law and Medicine Institute.

- First, to make changes in your state education law to require licensing of all media involving children and to prohibit children from participating in any sexually explicit acts, any material produced in violation to be confiscated;

- Second, to strengthen the child-abuse and neglect statutes to include commercial sexual exploitation of children and to make the finding of venereal disease in children under 12 an automatic presumption of child abuse and neglect. (In 1976 Connecticut passed such a law on venereal disease because there had been two cases of gonorrhea of the throat in children under 18 months of age and one in a child nine months old within that state); and

- Third, to create greater penalties under the obscenity laws if the offending material involves persons under 16.

Very truly yours,

Justine M. Rode

A 3587-C

DISTRICT ATTORNEYS ASSOCIATION

STATE OF NEW YORK

JUL 25 1977

July 22, 1977

Hon. Judah Gribetz
Executive Chamber
State Capitol
Albany, New York 12224

Dear Sir: Re: A 3587-C

The New York State District Attorneys Association recommends approval of the above-captioned bill.

Sincerely yours,

B. Anthony Morosco

B. ANTHONY MOROSCO
Legislative Secretary

BAM/pa;

A 3587-B

Odyssey Institute, Inc.

EXECUTIVE OFFICES
24 West 12th Street, New York, New York 10011, (212)741-9570

JUL 5 1977

June 29th, 1977

Honorable Judah Gribetz
Counsel to the Governor
State Capitol
Albany, New York

RE: A-3587-B

Dear Mr. Gribetz:

As promised in my telegram to you of this date, I am pleased to enclose for your information and use, materials prepared by Dr. Judianne Densen-Gerber and our legal staff.

We strenuously urge a favorable action by the Governor on this Bill because of the singularly difficult and tragic circumstances of New York children continuously exploited in this manner. I am sure you are aware of the tremendous volume of information and testimony generated in recent Congressional hearings on the Federal child pornography legislation. In these hearings, witness after witness confirmed the statistically significant portion of this industry which is based in New York. As the enclosed materials indicate, the numbers of children involved in the New York area runs into the many thousands, with little or no effective prevention, intervention or enforcement possible under existing statutes. The mature of this activity and the sophisticated organizational framework promoting these materials are not likely to be deterred or otherwise dissuaded by misdemeanor level prosecution.

I hope you will take a few moments to review this submission and recommend to the Governor that he sign this Bill as a symbolic act of independence for these thousands of children on our nation's birthday.

If we can be of any assistance or provide further clarification on any of these issues, please feel free to call on us as a resource to the Governor.

Very truly yours,

Stephen F. Hutchinson
Vice President and General Counsel

SFH:eis
Encls.

A 3587-B

THE LEGAL AID SOCIETY

Fifteen Park Row
New York, N. Y. 10038
(212) 577-3300
(518) 465-2497

JUN 24 1977

June 24, 1977

The Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

RE: A. 3587-B - by Mr. Lasher, et.al.

Dear Mr. Gribetz:

You have requested our comments on the above-referenced bill which awaits executive action.

This bill amends the Penal Law to add a new Article 263 dealing with the use or promotion of children under age sixteen in sexual performances. Proposed §263.10 elevates the penalty for the promotion of an obscene performance from a class A misdemeanor to a class D felony when sexual conduct by a child under age sixteen is involved. §263.15 provides that it would be a D felony to promote any sexual performance, whether obscene or not, which includes sexual conduct by a child under sixteen. Similarly, §263.05 provides class C felony liability for the use of a child under sixteen in any sexual performance. This section would cover a broad range of activity from mere consent to the performance (perhaps by an unassertive parent) to actual employment of the child. §263.00 defines "sexual performance" to include a variety of conduct including masturbation, actual or simulated intercourse, etc. §263.20 provides a presumption that the person is under the age of sixteen if the person "appears" under sixteen in the performance, and the defendant must prove affirmatively that he reasonably believed the person was over the age of sixteen.

This bill imposes liability for performances which are not necessarily obscene, and thus, prohibits activity presumptively protected by the First Amendment. The over broad and vague provisions do not give fair notice of the prohibited conduct. It would be subject to arbitrary and discriminatory enforcement, allow arrests on less than probable cause, and have a chilling effect on legitimate expression. On these grounds alone, the bill cannot meet constitutional standards. As the Supreme Court has stated:

> "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such a statute's inclusion of prohibitions against expressions, protected by the principles of the First Amendment, violates an accused's rights under procedural due process and freedom of speech. . ."

Winters v. People of State of New York, 333 U.S. 507, 508 (1948). See also Baggett v. Bullitt, 377 U.S. 360 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965); People v. Berck, 32 N.Y. 2d 567 (1973).

Additionally, although this bill requires a defendant to have knowledge of the character of the performance, it lacks this crucial scienter requirement as to the most important element in the charge---the age of the performer. Liability would be imposed without a showing that the defendant knew or reasonably should have known the age of the child. Specific knowledge and intent should be a necessary pre-requisite under due process before the imposition of penal sanctions.

Furthermore, proposed §263.20(1) permits the performer's age to be presumed from his or her appearance in the performance. Such a statutory presumption not only violates basic notions of due process but the common law of evidence as well. The due process clause of the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970) Mullaney v. Wilbur, (421 U.S. 684 (1975).

The Supreme Court in upholding the New York murder statute, held unequivocally that the due process clause permits shifting the burden to the defendant to prove an affirmative defense only after the prosecution has proven every element of the crime beyond a reasonable doubt. Patterson v. New York, No. 75-1861 Cr. L. Rep. 3146 (June 17, 1977). This bill relieves the prosecution of proving the actual age of the alleged "child" performer. To rely on appearance for proof would be impermissible in any case. In this situation, where clever lighting and make up are used deliberately to make people appear younger, it is not only unconstitutional but patently irrational. Under this bill, a defendant can be convicted without any proof of an essential element of the crime.

Presumptions which shift the burden of proof to the defendant to prove innocence must be carefully conceived and narrowly drawn from proven facts. This bill would presume knowledge and intent as to the unproven age of the performer. Conviction could be based upon circumstantial evidence which is at best equivocal and at worst pure conjecture. Yet, it is a long settled rule of law that it is impermissible to base inference on inference. As long ago as 1865, the New York Court of Appeals stated:

> "Circumstantial evidence. . .consists in reasoning from facts which are known or proven, to establish such as are conjectured to exist; but the process is fatally vicious if the circumstances from which we seek to deduce this conclusion depends itself upon conjecture."

People v. Kennedy, 32 N.Y. 141, 146 (1865).

More recently, the court stated:

> "It is familiar law that when the People rely exclusively on circumstantial evidence to establish guilt beyond a reasonable doubt, 'the facts from which the inference of the defendant's guilt is drawn must be established with certainty - they must be inconsistent with his innocence and must exclude to a moral certainty every other hypothesis.'"

People v. Montanez, 41 N.Y. 2d 53 (1976). See also United States v. Ross, 92 U.S. 281, 283; People v. Razezicz, 206 N.Y. 249, 269-271 (1912). In effect, this merely reasserts the principle that guilt must be proven beyond a reasonable doubt in a criminal case ---a principle which the drafters of this bill have ignored.

Finally, the bill has been carelessly drafted. For example, §263.10 is unnecessary. That section, which makes it a D felony to promote an obscene sexual performance, is subsumed under §263.15, which makes it a D felony to promote any sexual performance by a child.

The Legal Aid Society strongly urges disapproval of this bill.

Sincerely,

Milton Beller
Legislative Director

MB:cag

A-3587-C

AUG 1977

RANDOM HOUSE, INC.

201 EAST 50TH STREET, NEW YORK, N.Y. 10022
TELEPHONE 212 572-2276

August 1, 1977

Honorable Hugh L. Carey
Governor of the State of New York
Executive Chambers
State Capital
Albany, New York 12224

A3587-C, Lasher
Child Abuse

Dear Governor Carey:

I am president and chairman of the board of Random House, Inc., as well as a past chairman of the Association of American Publishers and of its Committee on International Freedom to Publish.

Through the various divisions of our corporation--Random House, Alfred A. Knopf, Pantheon, Modern Library, Vintage, Ballantine Books--we are a major publisher of books for and about children. And we are, as a group, deeply concerned about the dangers posed by censorship to our constitutionally guaranteed right to legitimately publish and disseminate information.

I believe you are aware of the strong concern of the Association of American Publishers and other segments of the book community--including librarians and library groups, booksellers, book distributors and book publishers--over Section 263.15 of the Lasher Child Abuse bill, A3587-C. Section 263.15 is most certainly unconstitutional because it would result in banning certain books regardless of whether they involved child exploitation or abuse, and even if they have serious scientific or educational value.

I did not previously urge you to veto the Lasher bill because I was convinced that an amendment deleting Section 263.15 could readily have resolved my concerns while leaving the bill's child abuse provisions intact. Unfortunately, despite your most welcome and commendable efforts to secure appropriate action by the Legislature after recall, the bill that was passed by both houses on July 14 still contains the unconstitutional Section 263.15.

I now urge you to veto A3587-C. I do so most reluctantly because I believe that conduct abusing and exploitating children--whether in sexual "performances" or in any other form--ought to be deterred and punished by all appropriate means. You have often demonstrated by your courageous and principled actions that you take seriously your responsibility as Governor to insure that legislation enacted in

RANDOM HOUSE, INC.

New York State--however valid its general purpose--is enforceable and constitutional. The importance of this function is magnified with regard to A3587-C, because no severability clause and no eventual judicial action can prevent the constitutionally impermissible "chilling" effect that enactment of such a provision would surely have on the exercise of First Amendment rights.

I do not underestimate the political problems attendant upon such a veto. However, the onus of delaying effective child abuse legislation must rightfully be placed upon the sponsor of this bill (and the Legislature) who surely recognized the grave constitutional dilemma that enactment of the bill in this form would unavoidably present. I am confident that the Legislature will understand the wisdom of a gubernatorial veto and overwhelmingly support a properly-drafted child abuse bill in the next Legislative session.

Very truly yours,

Robert L. Bernstein

RLB:kr
cc: Judah Gribetz, Esq.
Counsel to the Governor
Paul Joya, Esq.
Assistant Counsel to the Governor

A-3587-C

RANDOM HOUSE, INC. ALFRED A. KNOPF, INC.

201 EAST 50TH STREET, NEW YORK, N. Y. 10022 (212) 572-2214

July 27, 1977

Honorable Hugh L. Carey
Executive Chambers
State Capitol
Albany, N. Y. 12224

Dear Governor Carey:

I would like to add my voice to those of other members of the book publishing and bookselling community in this state who urge you to veto the Lasher Child Abuse bill, A3587-C.

This bill--wholly laudable in every other respect in its intent to define, deter and appropriately punish the sexual abuse and exploitation of children--is intentionally drafted so that it will have the effect of banning, by threat of felony penalties, the publication or sale of any book, no matter how legitimate its scientific or educational value, depicting children in certain poses. An example of such a book, specifically acknowledged by the bill's sponsor to be a target of this legislation, is SHOW ME!, a higly praised book published several years ago by the highly reputable publisher, St. Martin's Press.

I urge you to veto this bill, so that it can be re-submitted at next year's session of the legislature, without the almost certainly unconstitutional section 263.15.

Thank you.

Sincerely yours,

Anthony M. Schulte
Executive Vice President

AMS:ec

CABLE ADDRESS: SAINTSMART

ST. MARTIN'S PRESS, Incorporated

175 FIFTH AVENUE, NEW YORK, N. Y. 10010

Telephone: (212) 674-5151

June 9, 1977

Hon. Howard Lasher
New York State Assembly
Legislative Office Building
Room 422
Albany, New York 12224

Re: Assembly Bill A.3587-B, Lasher, et al.
Senate Bill S.2743-B, Marino, et al.

Dear Assemblyman Lasher:

I am President of St. Martin's Press, a New York City publishing company. Our company is a subsidiary of Macmillan Publishers Limited, the 125 year old British publisher. St. Martin's Press, however, is in its own right a reputable, established publisher, producing books of fiction, poetry and art, reference books, college textbooks and other books of general interest.

I understand that the above bill, which deals with the problem of sexual performances by children, was introduced by you in the Assembly. I'm concerned about the impact of the legislation on the continued publication of a book that St. Martin's publishes titled SHOW ME! A Picture Book of Sex for Children and Parents.

I realize that SHOW ME! is a controversial book, and that there are people who disapprove of it. I do think people have a right to disapprove of it, and to refrain from buying it. But it seems to me essential to recognize that an immense number of parents, psychologists, teachers, librarians, clergymen and reviewers have praised the book, have seen it as a serious and responsible approach to sex orientation for children. These are sober, balanced people who approve of the book and want it available to them. I'm deeply distressed at the prospect of their being told that, because there are some who choose not to own the book, nobody shall own it.

The question I myself have had to address most often is that of the motive behind publishing it. Some adversaries who know nobody at St. Martin's (and often haven't read the book) assume without question that nobody could have produced SHOW ME! with an honest and approvable intent. So I wrote a paper titled DEFENDING SHOW ME! telling why St. Martin's published the book, and why I deeply believe it is a valuable, needed, sincere effort in an important area by informed and reputable authors.

I enclose a copy, which I hope you'll read.

I don't at all mean it as an attempt to persuade you that SHOW ME! is a wonderful book. I think you have a right to your own opinion about it, even if it is an adverse one. I mean only to convey that it was published with sincere intent, and that there are estimable people who honestly do value it highly.

If the proposed legislation would deprive them of the book, I think that the effect is one that neither one of us would want to tolerate. You can be sure that there are people who would condemn some controversial but well-intended work that you and I cherish, and I think we'd both agree that their disagreement is not sufficient grounds for allowing them to tell us we cannot read it.

As you know, the United States Congress is also considering the passage of a bill concerning sexual abuse of children which is similar in intent to the New York bill. In this connection, I am also enclosing a copy of a letter dated May 26, 1977 from a staff member of the House of Representatives Committee on Education and Labor giving his opinion of SHOW ME! insofar as any such bill is concerned. Such letter views SHOW ME! in its proper perspective and is a strong indication that the Committee would not want to include the bock within the ambit of the House Bill.

Unfortunately, I must be abroad for three weeks commencing June 12th. However, I would be glad to have another representative of St. Martin's Press meet with you at any time at your convenience. Alternatively, I would be happy to call you from London if you thought this would be helpful. My office can accept any instructions you'd care to give.

Cordially yours,

Thomas J. McCormack
President

Encs.

P.S. I enclose a copy of the book.

cc: Hon. Stanley Steingut
Speaker of the Assembly
New York State Assembly
Legislative Office Building
Room 930
Albany, New York 12224

(Continued)

cc: Hon Stanley Fink
Majority Leader
New York State Assembly
Legislative Office Building
Room 925
Albany, New York 12224

Hon. Warren M. Anderson
Majority Leader
New York State Senate
Legislative Office Building
Room 910
Albany, New York 12224

Hon Ralph Marino
New York State Senate
Legislative Office Building
Room 412
Albany, New York 12224

STATEMENT ON LEGISLATION TO CONTROL SEXUAL ABUSE OF MINORS

The American Library Association is in accord with the intent of proposed legislation that would make it illegal for adults to recruit and use minors in circumstances that constitute their sexual exploitation and/or sexual abuse.

Consistent with this intent, the American Library Association is concerned that the legislation, in seeking to suppress the abuse of minors, not suppress the creation and dissemination of educational and scientific works designed to help young people understand their own physiological development and human sexuality.

For example, books using photographs of minors for the purpose of furthering the understanding of their sexuality and physical development should not be affected by legislation designed to control the abuse of minors.

Librarians who are aware of proposed legislation which might chill the development and dissemination of information and materials, not intended to exploit minors or contribute to their delinquency, should counsel with the Office for Intellectual Freedom.

Submitted by the
Intellectual Freedom Committee

Moved by Zoia Horn, Councilor-at-Large

REVIEWED FOR CONFORMANCE WITH
GUIDELINES
by Council Resolutions Committee

6/23/77

THE SEABURY BOOKSTORE
THE SEABURY BOOKSTORE
THE SEABURY BOOKSTORE

815 Second Avenue New York, N.Y. 10017
(212) 557-0514 557-0500

C 9/0

June 10, 1977

Hon. Howard Lasher
New York State Assembly
Legislative Office Building
Room 422
Albany, New York 12224

Re: Assembly Bill A.3587-B, Lasher, et al.
Senate Bill S.2743-B, Marino, et al

Dear Assemblyman Lasher:

The Seabury Bookstore, affiliated with the Protestant Episcopal Church of America, serves the religious and educational community of the New York metropolitan area. As president of the Bookstore's parent company, The Seabury Press, and during more than 20 years of executive positions in religious publishing, I have had extensive experience with publications in the field of sex education.

I understand that you are the sponsor of the abovementioned bill in the New York State Assembly and that you have been a leader in the effort to come to grips with the most troubling phenomenon of the abuse of minors in sexual performances. I am sure that everyone applauds your tireless work on behalf of the young children of our state.

I believe you are already aware, however, that there is one aspect of the pending legislation that troubles me and my colleagues in the book and education community greatly. That is the provision of your bill which would create an outright ban in New York on all books that depict children in certain actual or simulated poses even though the book may be a serious scientific or educational work that is not obscene by any standard and is therefore a book of value that must be considered a form of constitutionally-protected expression.

Our company has published and distributed a number of important sex education works, and we are seriously concerned with the direct adverse affects of this legislation in its present form.

We urge you to give most serious consideration to an appropriate admendment that would delete this questionable provision. We cannot believe tha such an action to conform your critically-important legislation to the constitutional mandate protecting freedom of speech would in any significant manner dilute the effectiveness of your anti-child abuse bill. Indeed, elimination of potential litigation over the constitutionality of this legislation should help to guarantee the success of your laudable efforts.

-/-

June 10, 1977
Hon. Howard Lasher

Re: Assembly Bill A.3587-B, Lasher,et al
Senate Bill S.2743-B, Marino, et al.

In closing, we urge you, as a progressive legislator, to recognize the very serious threat that this secondary aspect of your bill may pose to responsible members of the book community. We hope that you will recognize that publishers, booksellers, librarians, and educators, should not be confronted with the unnecessary and constitutionally-impermissible choice of either pulling books of serious value out of circulation or else risking serious felony prosecution.

Sincerely,

W. M. Linz
President

cc: Hon. Stanley Steingut
Hon. Stanley Fink
Hon. Warren M. Anderson
Hon. Ralph Marino

Association of American Publishers, Inc.

One Park Avenue
New York, N.Y. 10016
Telephone 212 689-8920

Analysis of S2743-B, Marino, et al.
A3587-B, Lasher, et al.
(AN ACT to amend the penal law, in relation to promoting or permitting sexual performances by children)

The Association of American Publishers, Inc. (AAP) supports the New York Legislature's effort to deter and punish the exploitation of minors in sexual performances. Misuse of children in this manner should be discouraged in every legal and constitutional way possible.

AAP Supports Section 263.05 (Use of a child in a sexual performance)

The AAP supports the passage of Section 263.05 which creates a new C felony directed at persons who actually use or permit the use of minors in sexual performances. The severe felony penalties that would be imposed provide a powerful law enforcement tool quite properly targeted directly at the child abuser.

AAP Does Not Oppose Section 263.10 (Promoting an obscene sexual performance by a child)

Because of the gravity of the harm sought to be prevented, the AAP does not oppose the passage of Section 263.10 which creates a new D felony directed at persons who "promote" obscene sexual performances by minors. This section quite properly recognizes that persons not directly connected with the actual abuse of a minor who publish, distribute, sell or lend a photograph or movie depicting a sexual performance, are entitled to the legal protections provided in New York's obscenity laws, including the constitutionally-mandated defense of serious educational or scientific value.

AAP Opposes Section 263.15 (Promoting a sexual performance by a child)

Section 263.15 duplicates the provisions of Section 263.10 but omits the requisite constitutional defense of non-obscenity. The AAP believes that this apparent effort to circumvent the protections mandated by the First and Fourteenth Amendments is clearly unconstitutional and should be deleted from the pending legislation. The inclusion of such a constitutionally-suspect and to a great extent duplicative provision can only dilute and sidetrack New York's effort to prevent child abuse. Responsible publishers, distributors, booksellers and librarians who publish or disseminate serious books and educational materials which are not obscene by any standard, but which might be affected by Section 263.10, should not be confronted with the constitutionally-impermissible dilemma of either pulling these books of value off their shelves or else risking serious felony prosecution.

A- 3587

HOLT, RINEHART AND WINSTON

JUN 22 1977

June 17, 1977

The Honorable Hugh Carey
Governor of New York
Executive Chambers
State Capitol
Albany, New York 12224

Dear Governor Carey:

I write you as an officer of the School Department of Holt, Rinehart and Winston, as a member of the Freedom to Read Committee of the Association of American Publishers, and as a resident of the State of New York to express my concern over the passage of the Lasher-Marino Child Abuse and Pornography bill (A3587-B/S2743-B) in a form that included Section 263.15. The Association expressed its opposition to this section of the bill with the following statement.

> Section 263.15 duplicates the provisions of Section 263.10 but omits the requisite constitutional defense of non-obscenity. The AAP believes that this apparent effort to circumvent the protections mandated by the First and Fourteenth Amendments is clearly unconstitutional and should be deleted from the pending legislation. The inclusion of such a constitutionally-suspect and to a great extent duplicative provision can only dilute and sidetrack New York's effort to prevent child abuse. Responsible publishers, distributors, booksellers and librarians who publish or disseminate serious books and educational materials which are not obscene by any standard, but which might be affected by Section 263.15, should not be confronted with the constitutionally-impermissible dilemma of either pulling these books of value off their shelves or else risking serious felony prosecution.

Section 263.15 does in effect create an outright ban on any publication that depicts children under 16 in actual or simulated sexual activities even though the work involved might be scholarly, scientific or educational in nature. Such a ban surely goes beyond what would be generally construed as being beneficial in the creation and publication of scholarly, scientific, or educational works that would consider the sexuality of minors.

Therefore, I highly recommend that you not sign this bill in its present form.

Sincerely,

Vincent A. Alexander

Vincent A. Alexander
Vice President and
Editor-in-Chief
School Department

VAA:lh

cc: Judah Gribetz, Esq.

Harper & Row, Publishers, Inc.
New York Hagerstown San Francisco London

Simon Michael Bessie
Senior Vice President

JUN 27 1977

10 East 53d Street, New York, New York 10022

June 22, 1977

Honorable Hugh L. Carey
Governor of the State of New York
Executive Chambers
State Capitol
Albany, New York 12224

Re: Assembly Bill A.3587-B, Lasher, et al.
Senate Bill A.2743-B, Marino et al.

Dear Governor Carey:

I write to you as chairman of the Freedom to Read Committee of the Association of American Publishers (AAP), and as an officer and director of a book publishing house which has long been active in the publication of books in many fields, including school, college, juvenile, medical and religious, to state our position regarding Bill No. A.3587-B/S.2743-B now on your desk for consideration. I believe our position reflects as well the broader concerns of the entire book community in New York State--publishers, librarians, booksellers and book distributors.

I should state at the outset, that the AAP unequivocally condemns the outrageous sexual exploitation of young children that has recently come to light. We support legislative action to deter and punish such child abuse to the fullest extent possible within legal and constitutional restraints. It is my understanding that at a recent press conference on June 14 you indicated your concern over such child abuse, but you too expressed the belief that any legislative remedy must be properly and constitutionally drafted..

For this reason, we know that you will want to be made aware that there is one aspect of the bill before you that troubles us and our colleagues in the book community greatly. That is the provision in the bill, Section 263.15, which would create an outright ban in New York on all books that depict children in certain actual or simulated poses even though the book may be a serious educational or scientific work that is not obscene by any standard and is therefore a book of value that must be considered a form of constitutionally-protected expression.

Phone: 212-593-7000

There are, of course, books in several areas which represent serious efforts to inform and enlighten the public but which disturb one or another individual or group. Occasionally, serious books of great value to educators and the public have depicted sexual activity in such a way as potentially to come within the broad and absolute language of a provision such as Section 263.15. Such books should not -- and cannot constitutionally -- be denied to those who want and need them because their nature is controversial to some. This, if anything, is the meaning of the First Amendment to the Constitution.

It was on this basis that responsible members of the book community urged the Legislature to delete Section 263.15 in order to incorporate the constitutional protections that must be accorded to works of serious educational or scientific value. We believe that many legislators were impressed by the seriousness of this constitutional dilemma and by the fact that the bill could be cured of this defect without in any way significantly diluting the effectiveness of the legislation as a tool against child abuse. Even the sponsor of the bill in the Assembly, Howard Lasher, implicitly recognized the serious constitutional defect in this legislation when he amended his own bill to add Section 263.10, a new provision that incorporates the constitutionally-mandated reference to "obscenity" as defined in other sections of the Penal Law.

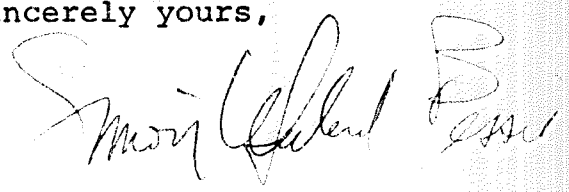
Unfortunately, Assemblyman Lasher in our view failed to give due consideration to the grave problems of constitutionality and enforceability inherent in Section 263.15, and ignored the opinion of his colleagues in the Legislature who uniformly do not oppose an amendment deleting Section 263.15, when he refused to delete his patently unconstitutional provision. Thus, in what can only be viewed as a dangerous and wholly unwarranted experiment with sensitive First Amendment liberties, the bill before you preserves within it an unprecedented dual provision creating two identical class D felonies -- one that conforms to legal requirements and the other that is quite clearly constitutionally infirm. No severability clause can cure this defect because of the obvious and impermissible "chilling effect" that the presence of Section 263.15 would have on legislative publishers, booksellers and librarians.

In light of all these considerations, we urge you to do everything in your power to prevent the final enactment of the Lasher bill unless Section 263.15 is deleted. We are convinced -- and we are certain that upon study you will also conclude -- that the bill without Section 263.15 would be a better drafted and more effective bill that will receive overwhelming support in the Legislature. Indeed, elimination of potential litigation over the constitutionality of this legislation would be of immense help in guaranteeing the success of the Legislature's laudable effort to prevent child abuse.

To assist you and your staff in considering these consequential issues, we have taken the liberty of enclosing the following additional items each of which demonstrates the real concerns of responsible groups in regard to the framing of child abuse legislation that remains within proper constitutional bounds: i) A brief analysis of the Lasher bill prepared by the AAP Legal Counsel; ii) An analysis by the U.S. Department of Justice of similar constitutional and legal issues posed in federal legislation now pending before the Congress (see in particular pp. 6-8); and iii) Materials previously sent to Assemblyman Lasher by several prominent publishers, librarians and booksellers opposing Section 263.15.

In closing, we urge you to recognize the very serious threat that Section 263.15 of the bill before you may pose to responsible members of the book community. We hope that you will take action to assure that publishers, booksellers and librarians will not be confronted -- particularly in this State, the nation's center of legitimate book publishing -- with the unnecessary and constitutionally-impermissible choice of either pulling books of serious value off their lists and shelves or else risking serious felony prosecution.

Sincerely yours,



cc: Judah Gribetz, Esq.
Counsel to the Governor

Paul Joya, Esq.
Assistant Counsel to the Governor

C-910

Association of American Publishers, Inc.

aap

One Park Avenue
New York, N.Y. 10016
Telephone 212 689-8920

Analysis of S2743-B, Marino, et al.
A3587-B, Lasher, et al.
(AN ACT to amend the penal law, in relation to promoting or permitting sexual performances by children)

The Association of American Publishers, Inc. (AAP) supports the New York Legislature's effort to deter and punish the exploitation of minors in sexual performances. Misuse of children in this manner should be discouraged in every legal and constitutional way possible.

AAP Supports Section 263.05 (Use of a child in a sexual performance)

The AAP supports the passage of Section 263.05 which creates a new C felony directed at persons who actually use or permit the use of minors in sexual performances. The severe felony penalties that would be imposed provide a powerful law enforcement tool quite properly targeted directly at the child abuser.

AAP Does Not Oppose Section 263.10 (Promoting an obscene sexual performance by a child)

Because of the gravity of the harm sought to be prevented, the AAP does not oppose the passage of Section 263.10 which creates a new D felony directed at persons who "promote" obscene sexual performances by minors. This section quite properly recognizes that persons not directly connected with the actual abuse of a minor who publish, distribute, sell or lend a photograph or movie depicting a sexual performance, are entitled to the legal protections provided in New York's obscenity laws, including the constitutionally-mandated defense of serious educational or scientific value.

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Section 263.15 duplicates the provisions of Section 263.10 but omits the requisite constitutional defense of non-obscenity. The AAP believes that this apparent effort to circumvent the protections mandated by the First and Fourteenth Amendments is clearly unconstitutional and should be deleted from the pending legislation. The inclusion of such a constitutionally-suspect and to a great extent duplicative provision can only dilute and sidetrack New York's effort to prevent child abuse. Responsible publishers, distributors, booksellers and librarians who publish or disseminate serious books and educational materials which are not obscene by any standard, but which might be affected by Section 263.15, should not be confronted with the constitutionally-impermissible dilemma of either pulling these books of value off their shelves or else risking serious felony prosecution.

DOUBLEDAY

A COMMUNICATIONS CORPORATION

C-910

DIVISIONAL PRESIDENT
DOUBLEDAY BOOK SHOPS
673 FIFTH AVENUE
NEW YORK 10022
(212) 953-4815

June 10, 1977

Hon. Howard Lasher
New York State Assembly
Legislative Office Building
Room 422
Albany, New York 12224

Dear Assemblyman Lasher:

As President of Doubleday Book Shops, a leading chain of first-class bookstores since 1910, I applaud your work on behalf of sexually abused minors, but question Section 263.15 of Assembly Bill A 3587-B. This section would, in effect, create an outright ban on any book that depicts children under 16 in actual or simulated sexual activities even though the work involved is a scholarly, scientific or educational book.

This provision would make censors out of retailers under threat of severe criminal penalties.

We strongly feel that it is our responsibility to offer for sale any books published by a reputable publisher. I urge the elimination of Section 263.15 to protect publishers and booksellers from criminal penalties for publishing or selling reputable works that are a constitutionally protected form of expression.

Sincerely,

Edward G. Stoddard

EGS/dw

cc: Hon. Stanley Steingut
Hon. Stanley Fink
Hon. Warren M. Anderson
Hon. Ralph Martino

State University of New York at Buffalo

SCHOOL OF INFORMATION AND LIBRARY STUDIES

C-710

June 10, 1977

Honorable Howard Lasher
New York State Assembly
Legislative Office Building
Room 422
Albany, New York 12224

Dear Assemblyman Lasher:

I am writing to you as the Chairman of a 15 member Committee on Intellectual Freedom and Due Process of the New York Library Association and as a professional serving libraries and their publics for nearly 20 years. I teach a 3 credit course in this department which carefully explores the relation of the library to the access to materials collected by libraries with a particular emphasis on censorship and pornography.

I understand that you are the sponsor of Assembly Bill A.3587-B, Senate Bill S.2743-B (Marino, et. al.). I know from press reports that you are a leader in the laudable effort to tackle the abuse of minors in sexual performances.

In reviewing the language of the bill with members of the Committee and with the President of the New York Library Association, Mary Cassata, we have come upon an aspect that gives us very serious concern. That is the provision of the bill which would create an outright ban in New York on all books and materials that depict children in certain actual or simulated poses even though the work may be a serious educational or scientific work that is not obscene by any standard and is, therefore, a work of value and able to be defended as a form of constitutionally-protected expression.

Already in library collections in both public and private research and general public libraries are works of a serious scientific and educational nature which would well be pulled from the shelves or circulated at the risk of a felony prosecution. In many academic libraries, materials used in the study of the very phenomenon you are trying so tirelessly to legislate into a controlled situation, could become locked away, destroyed or denied to serious use. Many educational materials used with various age levels and curriculum support could well become instead of tools for enlightenment, weapons of suppression and threat of imprisonment.

LAWRENCE D. BELL HALL AMHERST, NEW YORK 14260 TEL.(716)636-2412

It is my sincere belief, shared by the President of NYLA, that such is not your intent. We do not feel that you intend to place libraries and their staffs under threat of ligitation. We believe that you could not have expended the amount of energy and time for that reason. We want to see the exploitation of children stopped as do you and would not like to see the legislation enabling New York to cope with the situation tied up in litigation over its consitutionality.

I am urging you on behalf of the libraries and professional librarians in the State of New York to give serious consideration to an appropriate amendment that would delete such provision which denies the requisite constitutional defense of non-obscenity. We do not want to see your efforts sidetracked into the kind of litigation which will thwart your efforts on behalf of children everywhere. I am certain that you know from personal experience that librarians should not have to face the choice of pulling materials out of their collection or risk serious felony charges.

Most respectfully,

Gerald R. Shields

Gerald R. Shields
Assistant Dean

GRS/nsm