

In the

ORIGINAL

Supreme Court of the United States

NEW YORK,

Petitioner

v.

PAUL IRA FERBER

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NO. 81-55

Washington, D. C.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in New York against Paul Ira Ferber. Mr. Pitler, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT M. PITLER, ESQ.

ON BEHALF OF THE PETITIONER

MR. PITLER: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether New York can make it a crime to disseminate materials, for example, a movie, which show a 12-year old child actually having sex with an animal or an adult without requiring that the entire movie be obscene.

The purpose of this kind of legislation is, of course, to protect children from sexual abuse. This purpose distinguishes this case and New York Penal Law Section 263.15 from the obscenity cases and statutes which have previously come before this Court.

In the previous cases, in the obscenity cases, the interests of the state are generally to protect the viewer, not to protect the people who participated in the film. That much is made clear by the opinion for the Court by Chief Justice in the Paris Adult Theater case. In that case three state interests were mentioned in support of general obscenity legislation, and all of

1 those interests, without going into them, are aimed at
2 protecting the viewer or the community from seeing the
3 film.

4 Indeed, the obscenity standard itself is
5 designed, in talking of terms of community standards,
6 appeal to the prurient interests, the standard itself is
7 designed to protect the viewer.

8 Here, the statute in question is not at all
9 designed to protect the viewer. You know, one can say,
10 pardon the expression, in terms of obscenity legislation
11 to some extent you deal with a victimless crime. This
12 statute and the concern here, we are not dealing with a
13 victimless crime. We are dealing with a crime against a
14 child who is made to perform any and every kind of
15 sexual conduct by an adult. And that child is made to
16 do so generally, I would think, involuntarily.

17 He is case in a role which will have a
18 profound adverse effect upon him, and that adverse
19 effect is both physical and mental. And I am not going
20 to repeat what we have set forth in Appendix B to our
21 brief about all the damage that is done to children.

22 And the harm to children is not limited to the
23 production process itself. The child's privacy when he
24 is made to appear in that film is forever invaded. He
25 knows in his mind that he is on that film and that film

1 is being disseminated all throughout the United States.
2 The embarrassment caused to him, the emotional and
3 psychic trauma to him is quite grave.

4 Now, our adversaries recognize that the state
5 interest here is compelling at least with respect to the
6 production part of the statute, in prohibiting people
7 from using children in production of the materials.
8 There is no challenge to that part of the statute.

9 But once the production is completed and the
10 sexual abuse, as we call it and I think properly so, is
11 memorialized on film, our adversaries say the First
12 Amendment then comes into play and you may not prohibit
13 the dissemination of that material even though it was
14 committed by committing a crime against a child. They
15 say this is especially so, because there are less
16 restrictive ways to deal with the problem than an
17 outright ban on dissemination.

18 They point to two. One less restrictive way
19 they think of dealing with the problem involved here is
20 the production statute itself. It is good enough just
21 to ban the use of children. We submit to the Court that
22 that is not an effective alternative to the
23 dissemination statute. And the reason it is not an
24 effective alternative, the dissemination statute, is
25 because most of the production is done secretly. They

1 cannot be found out. The producers are very, very
2 difficult to infiltrate, very difficult to find.

3 QUESTION: Your submission is that the
4 dissemination prohibition is essential to supplement the
5 production prohibition, which you say you can validly do.

6 MR. PITLER: Yes. In effect, it is part of a
7 statutory scheme which is designed to protect children,
8 and you cannot protect children just by the production
9 statute.

10 QUESTION: Well, how can you -- then how do
11 you -- I am sure you will get to this sooner or later
12 and you may do it in your own course if you want to, but
13 how do you explain then your prohibition of distribution
14 on production that has taken place outside the state?
15 That certainly is not as a supplement to any kind of
16 production that you are legally authorized to prohibit.

17 MR. PITLER: Well, one of the problems is that
18 you cannot determine where the production takes place in
19 a lot of these films. It's impossible. They don't say
20 -- they don't have a list of credit --

21 QUESTION: But suppose it's quite possible.
22 Suppose in a particular case everybody concedes the
23 production took place in California. Then what's your
24 --

25 MR. PITLER: We would say that those films, in

1 effect, would feed a market that would make it likely
2 that children in New York would be used to make other
3 films. Basically, it's a kind of market analysis. It
4 doesn't make a difference where the film is made. It
5 feeds a market. People want to buy the films, there's a
6 desire for more films, and then children, regardless of
7 where they live, in effect, will be made to appear in
8 these films. And therefore, it would serve that purpose
9 as well.

10 QUESTION: More pressure, more invitation to
11 secret production in New York. More likely that --

12 MR. PITLER: Or taking the New York children
13 elsewhere to make films, as well.

14 Now, it's our position that the only way that
15 you can get at the use of children is to ban the
16 dissemination. It's really the least restrictive
17 alternative. So in effect, the distributors provide the
18 economic incentive for making these films. And this is
19 something that's recognized in testimony before the
20 Congress and from rather diverse sources. From Charles
21 Rembar to the L.A. Police Department, from Professor
22 Tribe of Harvard to a senior editor of Playboy Magazine,
23 everyone recognizes the best way, the most effective way
24 and the most realistic way to get at the abuse of
25 children in the production is to ban the dissemination.

1 The second alternative to the dissemination
2 ban of New York is the obscenity standard. In effect,
3 limit the ban on dissemination to materials that are
4 obscene.

5 We believe that most theoretically and
6 realistically, that does not work. First of all, as a
7 matter of theory, as I said in my opening remarks, the
8 obscenity statute is designed, and the standards that
9 this Court has enunciated, is designed to protect the
10 viewer, not the child who is made to perform.

11 Moreover, even a work is not obscene in the
12 legal definition, a child has been abused in the
13 production of that work. You cannot get away from that
14 fact. And moreover, the obscenity standard, we would
15 submit, is not a sufficient deterrent to deal with this
16 particular kind of issue. You have to prove -- the
17 obscenity standard requires you look at community
18 standards, to the prurient interests, to whether there's
19 a particular group involved.

20 And I think no case better illustrates why
21 this is an ineffective deterrent than the instant case.
22 The defendant here was charged with both disseminating
23 an obscene movie and just disseminating a movie
24 containing sexual conduct of a child. He was acquitted
25 with respect to the obscenity on charges. And if you

1 read the record, I thought that this would be a
2 relatively simple case. You show the film to the jury
3 -- I don't know if the Court has seen the film yet but
4 it is in the courthouse and it would be relatively
5 simple.

6 The entire trial was devoted in this case,
7 despite the fact that these films were entirely devoted
8 to sexual conduct, to -- does this appeal to the
9 prurient interest of a particular group? Now, I would
10 think when a child is abused in the making of a film,
11 society shouldn't be interested in whether or not the
12 film appeals to the prurient interest of a particular
13 group. We shouldn't be interested in whether there are
14 other films out there similar to this film that are sold
15 regularly. And we shouldn't be concerned about any
16 particular group.

17 The jury was out approximately 12 hours in
18 this case, all focusing on -- all their questions show
19 they were focusing on the obscenity question.

20 QUESTION: Twelve hours on both counts?

21 MR. PITLER: Yes. All focusing on the
22 obscenity question.

23 QUESTION: Does the record show here where the
24 film was made?

25 MR. PITLER: No, Your Honor. In most of these

1 films, it is virtually impossible to see where they are
2 made.

3 QUESTION: And there was no proof in this case
4 about that, I gather.

5 MR. PITLER: At one time there was an offer of
6 proof that they wanted to prove that the film was made
7 in Europe, and the judge rejected that saying that was
8 not relevant to the statutory scheme, for the reasons
9 that I gave Justice White, in order to deter the abuse
10 in New York.

11 QUESTION: I take it you were surprised at the
12 verdict.

13 MR. PITLER: I didn't try the case, but upon
14 reading the trial transcript, I was not surprised at the
15 verdict.

16 QUESTION: You were not surprised at the
17 acquittal on the one count and --

18 MR. PITLER: No, because so much confusion was
19 caused between the experts on the group involved, that
20 I'm not sure the jury could follow any intelligent
21 instructions with respect to that.

22 QUESTION: Well, can't that also be explained
23 under the ancient proposition of inconsistent verdicts,
24 which the system has found tolerable? We have never
25 expected consistent verdicts, necessarily, from the --

1 MR. PITLER: Well actually, I think the
2 verdicts in this case are consistent.

3 QUESTION: One explanation could be for some
4 people, but inconsistent verdicts are part of the system.

5 MR. PITLER: That is certainly true, Your
6 Honor.

7 QUESTION: May I just clarify one thing? Is
8 it correct that there were two films and as to each film
9 there was a charge both on the obscene section of the
10 statute, and also on the non-obscene statute.

11 MR. PITLER: That is correct.

12 QUESTION: So it's kind of like a lesser
13 included defense.

14 MR. PITLER: No.

15 QUESTION: What if they found him guilty on
16 all four counts? Could that verdict have stood?

17 MR. PITLER: Yes. I think --

18 QUESTION: That the film had been both obscene
19 and not obscene?

20 MR. PITLER: No, they wouldn't have to -- in
21 other words, obscenity would be irrelevant. They could
22 say that the theme of the film is obscene -- I have to
23 withdraw that. I'm not sure exactly what instructions
24 were given to the jury in this case. They could have
25 been instructed that once you find the conviction on the

1 obscenity, you don't reach the second. But I don't
2 think -- I'm not --

3 QUESTION: What is your view of the statute?
4 Supposing the films had been obscene. Your view is that
5 they could be convicted under all four counts? It seems
6 to me there's kind of a double punishment problem there,

7 MR. PITLER: No. In New York you would only
8 have a double punishment problem if they were served --
9 if consecutive sentences were to be imposed. You would
10 have what I think we call a multiplicity. But the only
11 remedy with respect to multiplicity is you do not allow
12 the sentences to be increases.

13 QUESTION: There's nothing about the portion
14 of the statute that is before us that requires
15 non-obscenity as an element, is there?

16 MR. PITLER: That is correct. And that
17 question was suggested: the non-obscenity would not be
18 a lesser included offense of the obscenity count. I
19 think they would stand together.

20 QUESTION: So you could violate this
21 particular statute even if the movies were obscene.

22 MR. PITLER: Yes, but the prosecution --

23 QUESTION: If you used children in producing
24 an obscene movie, do you violate this statute?

25 MR. PITLER: The answer is yes, but the people

1 would not have to prove the film --

2 QUESTION: I understand. But you could.

3 MR. PITLER: Yes, you could violate the
4 statute. But it's the problem of the proof of obscenity
5 is why the legislature did away --

6 QUESTION: I understand, I understand.

7 MR. PITLER: Now, it may well be that when
8 we're dealing with protecting the viewer in the
9 obscenity context, that we're prepared to pay the price
10 of standards that may not effectively deter abuse. In
11 that circumstance, as I said before, we're sort of
12 dealing with a victimless crime.

13 But I don't think when we're dealing with
14 protection of children, that the New York legislature
15 decide and I would hope this Court would hold, that we
16 have to run the risk of acquittals in having an
17 ineffective deterrent to the abuse of children.

18 That brings us to the statute on its face.
19 Now, one of the problems before this Court is that the
20 New York Court of Appeals held that obscenity was like a
21 threshold question. If the statute didn't require proof
22 of obscenity, the statute was unconstitutional, and
23 therefore, there'd be no limiting construction
24 possible. They didn't deal with any proposed limiting
25 constructions or even go to it, because they said

1 obscenity was the bottom line.

2 What I'd like to do is to go through the
3 statute and at least show why, on its face, the statute
4 is not over-broad, and in the course of that, to at
5 least offer some potential limiting constructions that
6 the New York Court of Appeals might and probably would
7 consider.

8 First, -- and it is 263.15 of New York's Penal
9 law and it is found, I believe, on page 3a of the
10 Appendix to our brief.

11 Now, we have shorthanded the statute a little
12 bit, but basically, it prohibits dissemination of
13 material depicting the sexual conduct of children. And
14 the sexual conduct we think is defined in pretty precise
15 terms. It's bestiality, sexual intercourse, sodomy,
16 lewd display of the genitals, explicit simulated -- any
17 of the conduct simulated. And if these terms sound
18 familiar, they certainly are because they are right from
19 the Miller versus California standard talking about the
20 hardcore kind of sexual conduct that could be prohibited
21 in the obscenity context.

22 Now, amici and our adversary have suggested
23 that the term "lewd display of the genitals" is vague
24 and that would deal with just simple nudity. I think
25 that a reading of this Court's opinion in the Miller

1 case and the Paris Art Theater case and the New York
2 Court of Appeals case in People versus Heller shows that
3 that concern is totally unwarranted.

4 Now, it's true the New York court has not yet
5 had a chance to interpret the statute, but lewd
6 exhibition or lewd display of the genitals, at least as
7 far as this Court is concerned and the New York court is
8 concerned, feels it a patently offensive depiction,
9 designed to appeal to an interest in sex.

10 Now, the amici point to medical texts saying
11 these medical texts would be covered by this statute.
12 But I don't think there is any way, I don't think any
13 reasonable person, I don't think any prosecutor, I don't
14 think any jury, I don't think any judge and I don't
15 think any bookseller can really look at a medical text
16 and think for a second that that is a lewd display of
17 the genitals within the meaning of the statute.

18 QUESTION: Mr. Pitler, can I interrupt you
19 there? At page 3a of the jurisdictional statement -- or
20 I guess it is the cert petition rather -- there's a
21 paragraph in which the court of appeals describes what
22 it says the statute covers. And one of the things it
23 says it covers is just what you have described. It
24 says, "It would also prohibit the sale, showing or
25 distributing of medical or educational materials

1 containing photographs of such..." --

2 MR. PITLER: Judge, I think that they were
3 dealing with the statute on its face, saying, in effect,
4 --

5 QUESTION: Haven't they construed their own
6 statute?

7 MR. PITLER: Judge, I don't think that you can
8 read the court of appeals' decision as construing their
9 own statute because I think even though they said that,
10 I don't think they were focusing on lewd display of the
11 genitals at the time. They would have to find it
12 inconsistent with their own decision in People versus
13 Heller.

14 And I think a fair reading of the opinion,
15 which I must say, in all deference to the court of
16 appeals, not one of the great exhibits of judicial
17 craftsmanship. Because they were saying look, the
18 statute -- we will allow you -- I was going to say
19 hopefully, this case will go back to the court and I am
20 perfectly prepared to tell that to them during the
21 argument as well.

22 But I think that they were concerned about the
23 obscenity part of the statute, the absence. And they
24 said look, obscenity is not covered by this statute, and
25 that everything else just follows. I don't think they

1 were really focusing on it. And indeed, I don't recall
2 even our brief or in our adversary's brief really
3 focusing on the term "lewd display of the genitals" at
4 the time before the court of appeals.

5 QUESTION: Well maybe they were careless and
6 didn't look at the word "lewd" as carefully as they
7 should have. But it seems to me that paragraph tells us
8 what they think the statute prohibits. And maybe that's
9 crazy for them to read it that way, but can we reread a
10 New York statute differently?

11 MR. PITLER: No, clearly not. But I would
12 urge Your Honor to read the opinion in its whole and
13 entirety. -- mention that, but I think a fair reading
14 is that the court did not focus on that issue, and their
15 --

16 QUESTION: Well, they clearly did not focus on
17 the meaning of the word "lewd", I agree with you
18 completely.

19 MR. PITLER: And if we are right, if they say
20 you must prohibit obscenity and only obscenity, and this
21 Court says no, the state can go further, this case could
22 go back to the New York Court of Appeals for them to
23 decide precisely how they think "lewd" should be
24 defined. And I can assure Your Honor that we are going
25 to urge the court that lewd has to be defined exactly as

1 we have suggested to this Court, and that's the way it
2 should be defined.

3 And I think if the case goes back and the
4 court decides to give a limiting construction, that is
5 precisely what the court will hold. They have not so
6 held yet. Even though, again, the language read
7 literally might cover that, I think you have to read a
8 little bit more into it, though.

9 QUESTION: Do you know if the argument was
10 made to them at the time of that appeal, what the word
11 "lewd" meant or how --

12 MR. PITLER: My recollection is that it was
13 not focused on. I don't think the argument was made.

14 QUESTION: Do you think the point is fatal to
15 your case, Mr. Pitler?

16 MR. PITLER: Pardon?

17 QUESTION: Do you think the point is fatal to
18 your case, is critical to your case? Suppose the court
19 meant exactly what it said. What would your response
20 be? Would you say that you cannot forbid -- would you
21 agree, or would you say that the state can forbid the
22 use of children in non-lewd photographs displaying the
23 genitals?

24 MR. PITLER: Unless there were some other
25 exception for medical treatise is required by the

1 Constitution, I would say the state could not do that.

2 QUESTION: Could not do that.

3 MR. PITLER: Could not. Unless there were an
4 exception somewhere else dealing with legitimate
5 scientific works. And our adversary cited a number of
6 books, very fine and legitimate treatises where there
7 are pictures --

8 QUESTION: But then you would say but the only
9 reason the statute would be invalid then is because it
10 was over-broad.

11 MR. PITLER: Yes, the statute would be
12 over-broad.

13 QUESTION: Don't you think it would
14 substantially over-broad, if that's all it -- if that
15 was the only degree of its over-breadth; that it just
16 happened to ban medical treatises?

17 MR. PITLER: We certainly then could use the
18 broad analysis there and say that the statute might be
19 unconstitutional as applied in a particular group of
20 cases, but the statute still would survive, thank you
21 very much.

22 QUESTION: These people certainly weren't
23 publishing medical treatises, were they?

24 MR. PITLER: Oh, no, sir, they certainly were
25 not.

1 So the term "lewd" I think really has not been
2 defined by the court of appeals. I think this Court has
3 looked at the term similarly, and it is clearly the
4 legislative intent. The fact, that they use the word
5 "lewd" and they didn't use simple nudity to describe the
6 kind of conduct, so there really isn't a problem with
7 respect to the term "lewd."

8 Next, the question is: is there really a real
9 fear of over-breadth with respect to the statute. And
10 we think really not. Our adversary -- amici points to a
11 whole number of books that say look, they are covered by
12 the statute. By and large, those are books that may
13 have some display of genitalia but not in a lewd way at
14 all, and I don't think anyone could disagree with that.

15 There is some simple nudity but this statute
16 is very carefully drawn, it does not cover simple
17 nudity. What it does cover is nudity when accompanied
18 by an explicit, simulated sexual act. And to the best
19 of my knowledge, almost all these books do not.

20 And if there is one somewhere, or two
21 somewhere, it seems to me that that's a pretty small
22 price to be paid for the statute in the way it protects
23 children.

24 QUESTION: So you would not regard the frieze
25 in this building, that one, with its display of nudity,

1 both sides, as not being offense to the statute?

2 MR. PITLER: Judge, my quick look around shows
3 me that there's nothing lewd in any of that. And
4 anyway, I would doubt --

5 QUESTION: Well, there are children on both
6 ends of that one up there.

7 MR. PITLER: Still looking, I don't see
8 anything -- and I don't think there's a prosecutor in
9 this country or a jury in this country -- You know what
10 you have to do is you have to take a picture and then
11 disseminate it in New York. I don't think there's a
12 real fear of that at all.

13 Now, even assuming that the First Amendment
14 somehow requires some kind of limited exception for
15 educational, medical and scientific material, it
16 certainly can be read into the statute if the New York
17 Court of Appeals would choose to do so. Amici has
18 suggested what we think is a fine standard, and that is
19 educational, medical and scientific materials which as
20 an essential part of their presentation contain
21 depiction of sexual conduct by children.

22 The fact that the statute doesn't have it
23 doesn't make the statute fatally over-broad. It's
24 something that, once, could be dealt with on a
25 case-by-case basis, or even the court of appeals if it

1 chose to do so, could read it in.

2 The other kind of over-breadth that is pointed
3 to, and I think it can't be serious, is what I call the
4 dissemination kind of over-breadth. Previously I was
5 talking about content over-breadth. What I mean by
6 dissemination over-breadth, I sent these films to the
7 court, pursuant to a request from the court. Literally
8 under the statute, I have disseminated the films.

9 Now, even though I was a prosecutor, I didn't
10 feel prosecution, -- I don't think anyone -- I wasn't
11 discouraged at all, I wasn't worried about it at all,
12 and I think the so-called dissemination over-breadth is
13 just not a real threat, at least with respect to the
14 situations that they posit.

15 For example, giving the copies of the films to
16 the news media to show so that the news media will write
17 stories about the films, and give them to the television
18 media. I don't think there's a real fear and certainly
19 could be limited.

20 By the way, the statute expressly gives an
21 affirmative defense to librarians. So you don't have
22 any concern with respect to them. And although the
23 statute uses the word "procure", I don't think it means
24 in the possessory sense, but rather, procure for the
25 purposes of further distribution.

1 Put simply, the statute, we think, is crafted
2 to deal with a very, very serious problem. A problem
3 that cannot be dealt with by simply prohibiting the use
4 and production.

5 Seeing my white light, I have five minutes, I
6 would like to reserve that time for rebuttal. Thank you.

7 CHIEF JUSTICE BURGER: Mr. Fahringer?

8 ORAL ARGUMENT OF HERALD PRICE FAHRINGER, ESQ.

9 ON BEHALF OF THE RESPONDENT

10 MR. FAHRINGER: Mr. Chief Justice, and if it
11 please the Court:

12 It is our view that if this statute is
13 resurrected, it would mark an abrupt departures from an
14 unbroken series of cases extending over a long stretch
15 of this Court's history, holding as postulate the
16 proposition that whenever any law is conceded, as this
17 one is, to suppress constitutionally-protected material,
18 or non-obscene material, despite the compelling state
19 interest, where there are available alternatives less
20 restrictive, it has never been tolerated.

21 It is my view, Your Honors, that the New York
22 Court of Appeals condemned this statute because it
23 imposed significant burdens on freedom of speech without
24 any assurances that it would give any added protection
25 to the young people of this country, beyond those

1 already provided by two, what I consider to be, very
2 effective statutes: the law that makes it a felony to
3 use a child in the production of a film or a book, and
4 the law that makes it a felony, increases punishment, if
5 a person sells that book --

6 QUESTION: What do you think about the
7 validity of that law? The felony to use a child in
8 making a non-obscene movie.

9 MR. FAHRINGER: I believe it's valid, Your
10 Honor. And I say --

11 QUESTION: Why is that?

12 MR. FAHRINGER: Because, Your Honor, I --

13 QUESTION: What case supports that in this
14 Court, for example?

15 MR. FAHRINGER: Your Honor, let me say this:
16 I am talking, of course, about sexual conduct. I can
17 understand --

18 QUESTION: Well, but you concede that the
19 state may make a felony out of producing a non-obscene
20 movie. Is that right or not?

21 MR. FAHRINGER: Yeah. Your Honor, what I'm
22 suggesting is -- if I can correct my answer to this
23 extent -- I think in terms of not nudity, not even lewd
24 nudity. I think in terms of --

25 QUESTION: Well, I just asked you a simple

1 question -- making a non-obscene movie.

2 MR. FAHRINGER: I welcome it, Your Honor.

3 Then I would say no, they cannot. What I was thinking
4 of was taking --

5 QUESTION: All right. May they make it a
6 felony to use a child in producing any non-obscene movie
7 that you can think of?

8 MR. FAHRINGER: No, Your Honor, they cannot.
9 What I say is this -- if they used --

10 QUESTION: Suppose they could. I thought you
11 conceded in the first place that they could make --

12 MR. FAHRINGER: Because, Your Honor, I was
13 only thinking in terms of sexual conduct, using young
14 children in commission of sexual acts, which per se is
15 obscene.

16 QUESTION: I know, but there's -- I suppose
17 there's a lot of things that might be sexually
18 stimulating that aren't obscene.

19 MR. FAHRINGER: Your Honor, you may be correct.

20 QUESTION: All right. May a state forbid
21 using children in sexually-oriented movies that aren't
22 obscene?

23 MR. FAHRINGER: If, Your Honor, there were
24 findings that that would be harmful to the children, I
25 think the state has the power to do that. In other

1 words, I --

2 QUESTION: You don't need to argue about this
3 distribution business. You just say that the law
4 against production is bad, and a fortiorari, the
5 distribution is bad.

6 MR. FAHRINGER: Your Honor, that's not the
7 issue, but I am happy to discuss it with you if you
8 like. What I'm saying is this: I think throughout this
9 whole area, if it please Your Honor, what happens to all
10 of us is there have been very few actual scientific
11 findings in this area. They take for granted, Your
12 Honor, that the distribution of a film -- and they make
13 this second argument in this case -- that this would
14 have some sort of an impact upon the child.

15 Let's take a 14 or 15-year old who is
16 photographed nude. Putting aside sexual conduct. They
17 say that that, of course, is clearly condemned under the
18 statute and there has to be no finding of obscenity.
19 I'm not sure what they --

20 QUESTION: Well, legislatures don't have to
21 make a finding, though. This was sufficient for the New
22 York legislature, I take it.

23 MR. FAHRINGER: Well, Your Honor, they
24 obviously had great misgivings about the
25 constitutionality of this statute or they --

1 QUESTION: Well, they passed it, didn't they?

2 MR. FAHRINGER: But they wouldn't have enacted
3 the other section which this section completely
4 duplicates. I don't agree with the prosecution in terms
5 of the trial of this case, and I tried it, Your Honor.
6 Obviously, you have no need for the section that makes
7 it obscene to sell these films if you have a section
8 that says just sexual conduct in itself is enough.

9 QUESTION: Well, the New York legislature
10 didn't take your judgment on that point, it passed both
11 statutes, did it not?

12 MR. FAHRINGER: But, Your Honor, all I'm --

13 QUESTION: Did it or did it not?

14 MR. FAHRINGER: Well, Your Honor, all --

15 QUESTION: Can you answer a question?

16 MR. FAHRINGER: Yes, Your Honor.

17 QUESTION: Can you answer it either yes or no?

18 MR. FAHRINGER: Well, yes, they did, Your
19 Honor. They had misgivings about Section 6 -- the 15,
20 .15 section, obviously, because there would have been no
21 need for the one requiring the obscenity.

22 All I'm saying, Your Honor, if it please you,
23 is that creating the two sections, obviously you have to
24 conclude from that, as they did in the commentary under
25 the legislative history, that there would be no need for

1 this section -- I'm sorry, there would be no need for
2 the obscenity section if this section was constitutional.

3 It seems to me the only conclusion you can
4 draw is their fear that this section would be declared
5 unconstitutional and they have an obscenity section.

6 QUESTION: They have a fallback.

7 MR. FAHRINGER: That's correct, Your Honor. I
8 didn't mean to suggest otherwise to the Court.

9 And, Your Honor, I think in the trial of this
10 case, as a matter of fact, to follow that logic to its
11 conclusion, in the trial of this case if they had found
12 the defendant guilty under either one of the sections,
13 the verdicts would have been repugnant then. Because
14 obviously, one duplicates oneself inclusive of the other.

15 QUESTION: I thought from your adversary's
16 comment that since he says that non-obscenity is not a
17 requirement for this section before us now, that they
18 aren't duplicative.

19 MR. FAHRINGER: Well, one is inclusive. The
20 non-obscenity section obviously would include the
21 obscenity section because it means -- if the two
22 children were just shown participating in anything that
23 was not obscene, the man is convicted. There would
24 absolutely be no need then to find the obscenity
25 section. If you found the obscenity section, I suppose

1 there would be no need to go further and find the
2 non-obscenity.

3 QUESTION: So you regard this as kind of a
4 lesser included offense?

5 MR. FAHRINGER: Yes, Your Honor, I would. And
6 I would think, Your Honor, that a verdict that would
7 have been returned on both counts would have posed very
8 serious --

9 QUESTION: Could a state legislature make it
10 unlawful, make it a criminal act for an adult to arrange
11 for or induce children aged 7, 8, 9, to engage in these
12 acts?

13 MR. FAHRINGER: I think they could, Your Honor.

14 QUESTION: Isn't that what they have done here?

15 MR. FAHRINGER: No, not --

16 QUESTION: In essence, isn't that what they
17 have done? Then they have added to that the filming of
18 it, which simply compounds the situation. But the
19 conduct you admit could be made a criminal act.

20 MR. FAHRINGER: Absolutely, Your Honor. I
21 have never had a quarrel with the fact -- I don't know
22 scientifically how sound this is, but it seems to me the
23 state has a legitimate interest in regulating the
24 conduct of children below the age of 16 involved in
25 sexual activity, where there is a serious question of

1 whether they're consenting to it and the harmfulness
2 that, of course, can occur to them.

3 QUESTION: Can you add one -- non-obscene
4 conduct? Does a state have a legitimate interest in
5 prohibiting non-obscene conduct by children?

6 MR. FAHRINGER: I think they could, Your Honor.

7 QUESTION: Yes. And could they then prohibit
8 the filming of it?

9 MR. FAHRINGER: I think they could.

10 QUESTION: Non-obscene.

11 MR. FAHRINGER: I think they could, because --

12 QUESTION: So now you agree that the state may
13 prohibit the production of non-obscene films in which
14 children are the actors.

15 MR. FAHRINGER: But I think, Your Honor, as a
16 part and parcel that I have to say in answer to your
17 question that there would have to be an indication, some
18 finding, that it was harmful to the children.
19 Obviously, to do it with children that are --

20 QUESTION: All right. Let's suppose the
21 legislature found it. Then you would accept it?

22 MR. FAHRINGER: I think, Your Honor, under the
23 circumstances I would.

24 But what we are dealing with here, Your Honor,
25 is a far cry from that. And it seems to me that to

1 sustain this statute really does imperil a large body of
2 literature that could be of some worth to society. And
3 I would like to --

4 QUESTION: Mr. Fahringer, would you concede
5 that not only is the legislative interest legitimate,
6 but it is compelling in the area of child pornography?

7 MR. FAHRINGER: Absolutely, Your Honor.

8 QUESTION: It is the most compelling interest
9 that one could imagine for a legislative act?

10 MR. FAHRINGER: I'm not sure it's the most
11 compelling. I would say drugs might go above that, Your
12 Honor.

13 But what I say to you is that two statutes, if
14 it please Your Honor, that we now have in existence
15 which came out of that same offensive against child
16 pornograph, are more than adequate to deal with the
17 problem. That's my only thesis here in this Court.

18 QUESTION: But not in the legislative view,
19 obviously, or they wouldn't have passed this additional
20 statute which obviously the legislature determined was
21 essential to get at the problem.

22 MR. FAHRINGER: There's no question, Your
23 Honor, it was an adventure on the part of the
24 legislature to go one step further and to get
25 convictions in this area without the proof of obscenity.

1 What I've said -- you know, when they
2 conducted congressional hearings in this matter and
3 experts came from all over the country, as Mr. Pitler
4 pointed out, and the federal government enacted law,
5 with equal concerns just as compelling to them, the
6 conclusion of the consensus of experts was that the
7 child pornograph we're talking about can be easily
8 convicted under an obscenity statute. And there is no
9 need to eliminate this element and jeopardize all this
10 other literature which could be of some use to society.

11 That's what the federal government came to,
12 and I think that's persuasive, and I think the fact that
13 26 other states in this country presumably conducting
14 hearings also concluded that they could wage war
15 successfully against pornography --

16 QUESTION: So it's your position that it's
17 very easy for the state to uncover where these films are
18 made and to put a stop to it?

19 MR. FAHRINGER: No, I'm not. What I'm saying
20 is it's being prosecuted all over the country, it's
21 being prosecuted in Miami, Florida right now and federal
22 court in cases I know about it. And I'll tell you this,
23 Your Honor. It seems to me, if I may say this in all
24 due respect, you have that same problem in the drug
25 trade, but no one has ever suggested we reduce the

1 burden of proof in the drug business and eliminate proof
2 beyond a reasonable doubt or presumption of innocence
3 because it's hard to get convictions.

4 I think the drug problem in this country is
5 probably paramount to everything else, and yet we
6 haven't discarded these procedural safeguards that this
7 Court has built up over the years so that it's easier to
8 convict drug distributors, which is also done in --

9 QUESTION: Well presumably, the promoter or
10 distributor is well able to know what's in the film. It
11 isn't as though they're innocent of knowledge of what's
12 contained in what they're selling.

13 MR. FAHRINGER: Well let me give you an
14 example, Your Honor. This book, Show Me, that is
15 prominently featured in both of the briefs is a
16 respectable book, it was produced in Germany with very
17 young children in it, and the book is avowedly for the
18 purpose of educating children in adolescent sex.

19 Now, that book, Your Honor, certainly -- I
20 don't think anybody in the world would doubt that that
21 book could be prosecuted under this section. There are
22 people in New York -- and this is a matter of public
23 record -- that have spoken out against the book and have
24 gone on the air and condemned the book. So much so that
25 the publisher of that book, of course, launched the

1 declaratory judgment action --

2 QUESTION: Is there anything in the record
3 about that book?

4 MR. FAHRINGER: Yes, Your Honor, there's --

5 QUESTION: Did I understand you to say or
6 imply that you need some experts of some kind to
7 indicate that the conduct involved here is damaging,
8 injurious to young children?

9 MR. FAHRINGER: What I said is this, Your
10 Honor, that I could conceive of the state's interest in
11 terms of making non-obscene films, people who put
12 children together in non-obscene films and the children
13 are actually engaged in the conduct, that that might be
14 prohibited with a finding that this would be harmful to
15 the children. I certainly would assume that it's
16 harmful to the children.

17 QUESTION: Do you think the members of the
18 legislature need someone else to tell them that this is
19 damaging to children?

20 MR. FAHRINGER: Your Honor, let me give you an
21 example. If you took a 15-year old boy and a 17- --

22 QUESTION: Let's take a 7 or 8 or 9, because
23 that's what you've got here.

24 MR. FAHRINGER: Your Honor, I don't think the
25 legislature would need anybody to tell them that. But

1 you certainly have 14 and 15-year olds under a 16-year
2 statute, a headline, a top, and it seems to me if you
3 took a 15-year old boy and a 16-year old girl and used
4 them to make a sex manual where they were not involved
5 in explicit sexual acts but used it for the purposes of
6 educating adolescents about sexual behavior but it was
7 quite explicit, they were touching one another, I can
8 understand how people might come forward and say that
9 this would not damage these children for the rest of
10 their life if it was done in a clinical environment.

11 QUESTION: Are you suggesting that this
12 material is beneficial, educational material for
13 children?

14 MR. FAHRINGER: Oh, Your Honor, --

15 QUESTION: Do you seriously advance that?

16 MR. FAHRINGER: Well, Your Honor, what we're
17 saying is -- if it please the Court -- I don't mean to
18 offend you, but in the amicus brief, --

19 QUESTION: You don't offend me and I don't
20 mind if I do offend you on this point.

21 MR. FAHRINGER: But the point of it is in the
22 amicus brief, we have listed the growing number of books
23 that are being used today to educate adolescents in
24 sexual behavior with pictures and photographs, and
25 that's basically the book Show Me which is discussed in

1 both briefs here and they brought a declaratory action
2 under this statute because they were fearful they were
3 going to be prosecuted.

4 QUESTION: What if New York simply passed a
5 law, akin to its child labor law, saying that no child
6 shall appear in a moving picture who is under the age of
7 16?

8 MR. FAHRINGER: Because of the historic
9 difference in this Court that we have always made
10 between goods and things of that sort and the First
11 Amendment. When the picture goes into a book, Your
12 Honor, it becomes an idea, and then it comes --

13 QUESTION: Well, can you give me an answer to
14 my question?

15 MR. FAHRINGER: I'm sorry, Your Honor.

16 QUESTION: It's answerable I think yes or no.
17 I asked whether or not if New York should, analogously
18 to its child labor laws, pass a statute that said no
19 child under 16 shall appear in a motion picture, just
20 like no children under 16 are allowed to work most other
21 places. Would that be violative of the First Amendment?

22 MR. FAHRINGER: Yes, I can see how it would
23 be, Your Honor.

24 QUESTION: Do you think it would be?

25 MR. FAHRINGER: Well, I could certainly -- you

1 mean if you eliminated all 16-year old actresses in this
2 country, they couldn't make a film and Brooke Shields
3 and everybody else would be out of business?

4 QUESTION: Right.

5 MR. FAHRINGER: I think that would be
6 unconstitutional, Your Honor, because I think they're an
7 integral part of the First Amendment in terms of making
8 these films, and the same way if you said that --

9 QUESTION: So that the state can prohibit
10 working children under 16 and any other area, but it
11 can't prohibit them from working in films?

12 MR. FAHRINGER: Your Honor, I'm sorry, if it
13 were not discriminatory. In other words, if you're
14 saying they just took 16-year olds and said they
15 couldn't work in films. If they said 16-year olds
16 couldn't work in any industry at all, couldn't do any
17 kind of --

18 QUESTION: Including in films.

19 MR. FAHRINGER: I'm sorry, then, Your Honor, I
20 would have to say that would be consistent if the state
21 made that judgment. It eliminates it then from the
22 First Amendment concern because you're talking about it
23 across the board -- that a 16-year old can't work at
24 anything in this country, and that would seem to me that
25 --

1 QUESTION: No First Amendment problem?

2 MR. FAHRINGER: There would be no First
3 Amendment problem.

4 QUESTION: The state is arguing I think in
5 part that the injury that is being prohibited or avoided
6 by this particular statute is the constant distribution
7 for others to see the recorded pictures or films of
8 these children in sexual conduct, and that it's the
9 subsequent exhibition and display to other people that
10 adds further harm to the children. That there is harm
11 above and beyond merely the initial taking of the
12 photograph in the constant viewing by others and the
13 subsequent psychological damage to the children as these
14 acts are reproduced and shown to others.

15 Now, does the state have no substantial
16 interest in addressing those problems?

17 MR. FAHRINGER: Yes, Your Honor, and I think
18 it's accommodated by the obscenity statute, because
19 those films would be found obscene and they would be
20 illegal anyway in the distribution line.

21 What I keep coming back to here -- and I
22 really think this is the core of our argument -- and
23 that is, the statutes that are on the books of New York
24 right now, as the New York Court of Appeals really
25 found, are more than adequate to accommodate these

1 problems. The problem you just posed is certainly taken
2 care of by an obscenity statute. You don't need for
3 that purpose a statute that says any conduct of any kind
4 is forbidden and make it a felony for a person to sell a
5 book like Show Me or Young and Sex or some of the other
6 books that we demonstrate in the amicus brief here.

7 I might say this, if it please Your Honor,
8 that there are indications in the amicus brief that this
9 literature, which certainly could lend itself to
10 prosecution under this statute -- the district attorney
11 says we would never prosecute anybody like that, but
12 certainly this Court has seen enough evidence of people
13 coming forward and inaugurating prosecutions through
14 prosecutors in small rural communities which are
15 shocking to all of us. Taking The Fixer out of the
16 library, the Naked Ape, Slaughterhouse Five.

17 QUESTION: Well, couldn't we, instead of
18 concentrating on other people's books and pictures,
19 concentrate on your client's pictures and books for a
20 moment. Do you think that your suggestion that the
21 obscenity statute was more than adequate to cover this
22 type of abuse would be agreed to by the person who
23 prosecuted this --

24 MR. FAHRINGER: Absolutely. Your Honor, let
25 me tell you what happened in this case. They went on --

1 QUESTION: I'd like to finish my question if
2 you'd allow me to. There was a conviction on the
3 section of the statutes before us, but an acquittal on
4 the obscenity count. And I take it if there had been
5 just the obscenity statute in effect, it would have been
6 an acquittal on the only count that was brought.

7 MR. FAHRINGER: The reason for that, if I can
8 tell Your Honor, was that the prosecutor in this case
9 decided to proceed under the unique theory established
10 this by Court in Michigan versus New York and said that
11 these films would only appeal to male homosexuals.

12 Now, Your Honor, from my standpoint as a trial
13 lawyer, I tell you, that took it right out of the jury's
14 lap. The question was, would these movies appeal only
15 to a male homosexual. Two experts came in and testified
16 that surveys had been run in prisons in Connecticut, and
17 that 87% of the people were heterosexual and had
18 families.

19 And another expert came in and testified -- at
20 that time, Your Honor, the Kinsey Report on homosexuals
21 had just come out which absolutely contradicted that.
22 It was a guess on his part, so the jury had a very easy
23 decision. It was confusing, there was a lot of expert
24 testimony.

25 But I am convinced, Your Honor, as the person

1 who tried the case that what they found is that the
2 overwhelming empirical evidence was that these films
3 would not appeal to a male homosexual.

4 Now, I submit to Your Honor as an officer of
5 this Court, had it been tried on the straight obscenity
6 level with the average person sitting in that jury box
7 saying would these films appeal to my morbid or shameful
8 interest in sex, there is no doubt in my mind there
9 would have been a conviction.

10 QUESTION: What's that got to do with the
11 injuries to the children, which is the focus of this
12 statute?

13 MR. FAHRINGER: Because, Your Honor, what I'm
14 saying is that the injury to the children is
15 accommodated by the law that makes it a crime to use
16 them and by the law that makes their crime --

17 QUESTION: Is there anything new about having
18 three statutes that you could use alternatively to
19 prosecute particular conduct?

20 MR. FAHRINGER: Only that, Your Honor, the
21 third statute in this case, based upon a long line of
22 decisions out of this Court, goes much further. It will
23 imperil, it will suppress a good deal of useful
24 literature.

25 Now, it may not be that medical books are

1 going to be suppressed here, but Your Honor, may I put
2 this question. What if someone wanted to write a book
3 on child pornography and use some examples of it? What
4 about Sixty Minutes? What about the woman that we cite
5 in our brief who actually took some of the material
6 before she wrote the Law Review article?

7 There's no question she's guilty under this
8 statute, and if she had wanted to use any of the
9 examples in her book -- if Covenant House, Morality in
10 Media, wanted to advocate their cause with visual
11 pictures in their publication showing what a horrible
12 thing child pornography is in this country, they would
13 be guilty under this section. And I just think that's
14 preposterous.

15 And I also want to talk about the books that
16 come in from -- how about the book, Prostitutes in
17 Bombay? How about Incest in Peru? If these books come
18 into this country, books that are surveys of serious
19 sexual problems today dealing with adolescents, none of
20 those books would be available for sale in New York
21 under this section. Because there's no question, I
22 think in many of those instances there would be lewd
23 pictures, and there is no question that there might even
24 be sexual conduct. And yet you could not sell those
25 books in this country, even though they were worthwhile

1 and had some scientific value.

2 Incidentally, I wanted to just --

3 QUESTION: Mr. Fahringer, may I interrupt you
4 just a second. You've given the example of the book,
5 Show Me, two or three different times. Would that book
6 have been lewed within the meaning of the statute?

7 MR. FAHRINGER: Your Honor, I think that there
8 are people who say it would. Obviously, you know my
9 bias and I don't think it is. But I want to tell you
10 this: that there is touching among the young children
11 and --

12 QUESTION: To what extent did the question of
13 what lewd means -- was that presented to the court of
14 appeals in argument?

15 MR. FAHRINGER: It wasn't, Your Honor.

16 QUESTION: It wasn't argued?

17 MR. FAHRINGER: I agree with Mr. Pitler. I
18 was there and I think he was in the courtroom and it was
19 never discussed at all. But it's clear to me --

20 QUESTION: What you're saying is that a book
21 like that could be argued -- could be subject of
22 argument.

23 MR. FAHRINGER: And then you see, it seems to
24 me we come to the most troublesome aspect of all in this
25 case, the chilling effect, the impact it's going to have

1 on responsible publishers. A book like Show Me may not
2 be put out because maybe, maybe somewhere in Watertown,
3 New York or in an outlying area, someone might come in
4 and bring a criminal action against the publisher. So
5 we'll never know what books, either in sexual manuals,
6 descriptions of adolescent sex or books that have to do
7 with exposes of the problem, will never be published
8 because --

9 QUESTION: The chilling effect doesn't have
10 anything on your clients because they don't even let you
11 know where they made them. They don't even want you to
12 know who did it.

13 MR. FAHRINGER: Your Honor, let me say this in
14 all --

15 QUESTION: That's true, isn't it?

16 MR. FAHRINGER: Your Honor, that is not true.
17 In this case we tried to prove that these films --

18 QUESTION: Well, is there anything on this
19 film that shows who produced it, anywhere?

20 MR. FAHRINGER: No, Your Honor, all I'm saying
21 is -- I wanted to come back to the fact that in the
22 record we made an effort here, we made an offer of
23 proof, to show that these films came in from out of the
24 country. The judge sustained the objection and we
25 weren't able to --

1 QUESTION: You made an offer to prove anything
2 that you wanted to prove, but that wouldn't have proved
3 it.

4 MR. FAHRINGER: I realize that, Your Honor.
5 But the fact of the matter is that an awful lot of books
6 and films -- and I'm talking now about material that has
7 some scientific value or some literary value -- are
8 produced overseas. And certainly, when they come into
9 this country the American public should have a right to
10 see them.

11 QUESTION: Could the New York constitution
12 provide by statute that every film must have the name of
13 every actor and participant, every producer, every
14 cameraman and the locations?

15 MR. FAHRINGER: That has already been
16 foreclosed in New York by a case up there, Your Honor,
17 that forbids that under the First Amendment.

18 QUESTION: In the New York --

19 MR. FAHRINGER: In the New York Court of
20 Appeals. They ruled on it, Your Honor -- it had to do
21 with publications, but they said that it was
22 unconstitutional to require a publisher to put his name
23 on the pamphlet or the book because it might, of course,
24 inhibit his putting out controversial books.

25 QUESTION: Under state law.

1 MR. FAHRINGER: Under state law, that's right,
2 Your Honor. Under our New York State Constitution.

3 QUESTION: Does that add weight, then, to the
4 state's argument that this kind of a statute is
5 necessary under those circumstances to reach the problem?

6 MR. FAHRINGER: I don't think so, Your Honor,
7 because all -- all we come back to, it seems to me, is
8 that everything we're talking about in this Court would
9 be found obscene under the obscenity statute.

10 One of the things that is disturbing to me is
11 the prosecution hasn't come forward with any figures,
12 any statistics of any kind to indicate that we simply
13 cannot go forward with these prosecutions without this
14 third section. There's no statistics here that we've
15 tried 37 child pornography cases and we have only been
16 able to get two convictions. And I don't know of any
17 other statistics across the country.

18 The few Law Review articles that are cited are
19 really very self-serving and they're speculative by
20 people who have views in the industry. But it seems to
21 me the only way to go about that in a logical fashion is
22 to say that we can't get -- 26 states apparently feel
23 that they can conduct this campaign against child
24 pornography successfully with what they've got, and the
25 federal government feels that way.

1 Now that, I think, lends force to my position
2 here today that until they come in and show this court,
3 we simply cannot prosecute child pornographers unless we
4 have this third arm, it seems to me that recognizing
5 that it imperils all this other literature, it seems --

6 QUESTION: But they obviously wanted to go
7 further and prosecute some who were not child
8 pornographers but who violated this third portion of the
9 statute. I mean, the evil they were striking at was
10 broader than the child pornography in the sense of the
11 constitutionally obscene.

12 MR. FAHRINGER: And what I'm saying in answer
13 to that, Your Honor, because I think that is an incisive
14 question. One is if it's the protected material, that
15 they are never going to go after the books and things of
16 that sort, obviously there's never going to be a
17 prosecution under the so-called legitimate material.

18 If it's the other material, that is the 42nd
19 Street Times Square material, that's going to be found
20 obscene under the obscenity doctrine anyway.

21 QUESTION: Except in the one case in which
22 you've just successfully or partially successfully
23 tried, where they found it not obscene but convicted him
24 under this statute. Now you have a reason you say that
25 happened, but nonetheless, that is what happened.

1 MR. FAHRINGER: No question. But, Your Honor,
2 I do think that's a compelling reason. We don't have a
3 case were they tried it under a straight obscenity
4 statute where it went to the jury and the jury
5 themselves had to decide whether or not this would
6 appeal to our morbid or shameful interest in sex. And
7 that's the case, it seems to me, you need, not a case
8 where it would appeal to a deviant group. Because I
9 could easily understand how a jury would find this would
10 appeal to us, our own morbid or shameful interest in
11 sex, but it certainly -- the evidence is to the contrary
12 with another group.

13 Your Honor, I would only -- since I see that
14 my time is expiring, -- the language you used in the
15 Shad case which is one of your most recent cases and one
16 that we rely very heavily on in our brief, where you
17 said that the state has really not established its
18 interests could not be met by methods that are less
19 restrictive on protected forms of expression. And there
20 you said -- and I think it applies to this case -- that
21 even if the infringement is incidental and only applies
22 to a small number of cases in the First Amendment area,
23 we must still scrutinize that regulation with great care
24 to see whether or not there are other methods available
25 to reach the state's objective.

1 QUESTION: Counsel, you mentioned scrutinize
2 with great care. Your brief, as I understand it, agrees
3 that the state has a compelling interest in this area.
4 Did the New York Court of Appeals agree that the state
5 has an interest of that level of scrutiny?

6 MR. FAHRINGER: I think they did, Your Honor.

7 QUESTION: Would you indicate where it said so?

8 MR. FAHRINGER: You mean in the decision?

9 QUESTION: In the opinion.

10 MR. FAHRINGER: I'm sorry, I can't. I thought
11 it was implied. I don't think --

12 QUESTION: Do you think it was stated
13 expressly?

14 MR. FAHRINGER: It may not have been, Your
15 Honor, I'm sorry. What I wanted to read to you is this,
16 the very end of --

17 QUESTION: How can we tell what standard it
18 applied, if it didn't say so?

19 MR. FAHRINGER: I never doubted for a moment
20 that they agreed that there is a concern, but they said
21 in the end of their opinion those who employ children in
22 obscene plays, films, books are still subject to
23 prosecution in this state, as are those who sell or
24 distribute obscene material. All we hold today is that
25 those who present films, plays or books portraying

1 adolescent sex in a realistic but not obscene manner
2 cannot be prosecuted under this statute.

3 QUESTION: But the only interest that I recall
4 the court of appeals having identified is a legitimate
5 interest, which is far short of the compelling interest
6 standard.

7 MR. FAHRINGER: Well, that may be correct,
8 Your Honor. One of the things that you've just alerted
9 me to that I haven't even discussed with this Court is
10 that they spent an awful lot of time finding that this
11 statute was under-inclusive. They said that if the
12 state's real concern is the welfare of children, then
13 why isn't it that they do the same thing with children
14 who over-work long hours and are not paid or whatever,
15 and do dangerous stunts and things of that sort.

16 And to me, that does make a lot of sense. I
17 don't think the court has to go that far. They even say
18 that it appears as though they've just selected this
19 class of material --

20 QUESTION: It's not the First Amendment
21 argument, is it?

22 MR. FAHRINGER: Well, it --

23 QUESTION: What do you think it is? It's the
24 due process or an equal protection argument. It's not a
25 First Amendment argument.

1 MR. FAHRINGER: Well, it wasn't Erznoznik
2 because there, what you said in Erznozkik with the
3 drive-in theater that they only picked nudist films to
4 foreclose --

5 QUESTION: That's a content-oriented thing.

6 MR. FAHRINGER: Content-oriented. Well,
7 that's what this basically is, Your Honor,
8 content-oriented.

9 QUESTION: I don't know about that.

10 MR. FAHRINGER: The distribution part is.

11 In any event, there was an awful lot of
12 preoccupation in the court of appeals with that phase of
13 it. And what I wanted to simply state, the court of
14 appeals said it seems as though they just selected this
15 one narrow area because of the legislator's distaste for
16 this type of material.

17 Your Honors, I'll end as I began, by simply
18 saying that it really seems to me the evidence in this
19 case is compelling, and there's none to the contrary,
20 that the two statutes that are in existence in New York
21 are more than adequate to deal with this problem. And
22 it's unnecessary to impose significant restraints on free
23 speech where there are existing alternatives. Thank you.

24 QUESTION: Mr. Fahringer, let me ask you one
25 question before you sit down. I take it this statute

1 has no civil sanctions or remedies of any kind for this
2 kind of material.

3 MR. FAHRINGER: No, it doesn't, Your Honor.

4 QUESTION: Would you say that the constitution
5 would tolerate some kind of civil control of this sort
6 of material, the distribution of it?

7 MR. FAHRINGER: Well, Your Honor, I would
8 still have some problems with that if it were going to
9 -- if it is civil or not, it seems to me it has a
10 deterrent effect, and I would think that it could run
11 afoul of the First Amendment.

12 CHIEF JUSTICE BURGER: You have five minutes
13 remaining, counsel.

14 ORAL ARGUMENT OF ROBERT M. PITLER, ESQ.

15 ON BEHALF OF THE PETITIONER -- Rebuttal

16 MR. PITLER: Thank you. May it please the
17 Court, Mr. Chief Justice, let me turn to the
18 under-inclusive argument first.

19 In Erznoznik, you didn't have a situation like
20 you have here. Here you have a market that's being fed,
21 a dissemination market that's being fed. The only way
22 you can get at that market is to ban the dissemination
23 of these materials. There's no market for pictures of
24 circus performers made clandestinely, whether they are
25 children walking on tightropes, being shot out of a

1 canon, swinging on the trapeze. There's no problem with
2 respect to that market at all, and therefore, the
3 legislature had a very good reason for choosing --

4 QUESTION: Mr. Pitler, how can we
5 intelligently decide the extent that this market really
6 exists, as a court?

7 MR. PITLER: Judge, we have cited in our
8 appendix --

9 QUESTION: I know, but can we really rely on
10 that?

11 MR. PITLER: Judge, the Virginia Supreme Court
12 was prepared to say that the industry was \$500 million a
13 year. And certainly, if the Virginia --

14 QUESTION: How do I know that? I mean, if I
15 were a congressman I could find it out, but --

16 MR. PITLER: And if you were a state
17 legislator you could, and the New York state legislature
18 did find out and they did make that determination. And
19 it seems to me that that's a pretty good finding.

20 QUESTION: Did they find the volume of the
21 business and so forth? Or did they just pass the
22 statute?

23 MR. PITLER: No. There, if you look at what
24 we call the bill jacket, you will see comments from
25 various legislators that they had hearings. One on the

1 Mental Health Committee had a hearing, for example, and
2 they were shown any number of films that were freely
3 produced in the market --

4 QUESTION: I understand. But your argument is
5 that these other statutory provisions are not an
6 adequate solution to the problem.

7 MR. PITLER: That's correct, Your Honor.

8 QUESTION: And those comments were made before
9 these other statutory provisions were passed. I mean,
10 how do we know how much of the job would have been
11 accomplished by the prohibition against the obscene
12 materials and the prohibition against the non-obscene
13 performances? We really don't, do we?

14 You may be dead right, but I just don't know
15 how to --

16 MR. PITLER: Judge, I can't prove it
17 empirically, it's true. But it seems to me that a
18 legislature is entitled to make some findings based on
19 the information that is available to them. And they did
20 make a finding.

21 I might say that our adversaries have never
22 disputed the size of the child pornography market. They
23 have never said we are wrong about that. They never
24 took us up on that. And we under-estimated in our
25 brief. We talked about \$200 million a year. Whether

1 it's \$200 million or \$500 million, we've never been
2 challenged by either the amici or the respondent in that
3 regard. And it seems to me that, along with the
4 legislature's finding, should be good enough for this
5 Court.

6 I can see from your reaction that I'm not
7 persuading you --

8 QUESTION: I just don't know. When was the
9 statute passed?

10 MR. PITLER: 1977.

11 QUESTION: Yes, so it's five years. And has
12 there been any change in the amount of the market during
13 the five years? Do we know?

14 MR. PITLER: There was some testimony in a
15 hearing by a police officer -- I think Police Officer
16 Rice -- who said when this statute was passed, the stuff
17 started to disappear.

18 QUESTION: And we know it's because of the
19 provision in dispute here, or because of the other two
20 provisions?

21 MR. PITLER: No, we do not. But it
22 disappeared from adult bookstores. It's still a very
23 big mail order business in New York.

24 QUESTION: Let me ask one other question. I
25 noticed in your reply brief you indicated that most of

1 the horrible examples that the amici and so forth
2 describe in their briefs really wouldn't be covered by
3 the statute. But what about the category the Show Me
4 book falls in?

5 MR. PITLER: You know, Show Me is an
6 interesting case. You know, we were hauled into
7 district court in New York about Show Me. As soon as
8 the statute was passed. And you know, we went in and we
9 said we've never even heard of this book; we have no
10 plans to prosecute it, we don't know --

11 QUESTION: But what about it? Could a
12 prosecutor in a small community in New York successfully
13 prosecute a book seller for selling that book? Maybe
14 you would not do it in Manhattan.

15 MR. PITLER: Your Honor, I don't know the
16 answer to the question. It is possible that he could.
17 There's at least one picture in there that would cause
18 some concern.

19 But let me say, Judge, that we're talking
20 about one book out of so many that --

21 QUESTION: Well, I think that could be used as
22 an example of a category of educational materials.

23 MR. PITLER: No, -- let me try to respond to
24 that. Because in the future, people that are making
25 these books that want to sell them, all they have to do

1 is not use these kind of photographs. You can get the
2 exact same idea across in sexual education of children
3 without showing children engaged in actual sexual
4 conduct or simulated sexual conduct. You don't need to
5 use the children with respect to that.

6 And if this statute is upheld, people will be
7 aware of that fact. So I don't think there is a real
8 fear. And you can trot out so many books, but there's
9 -- for example, during argument, Prostitutes of Bombay.
10 There's nothing in that book that comes within the
11 statute. And --

12 QUESTION: That case is not before us.

13 MR. PITLER: I understand that.

14 CHIEF JUSTICE BURGER: Your time has expired,
15 counsel.

16 MR. PITLER: Okay. In sum, the First
17 Amendment is not absolute. It has to be balanced, and
18 we believe this statute strikes the appropriate
19 balance. Thank you.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen,
21 the case is submitted.

22 (Whereupon, at 2:18 p.m., the oral argument in
23 the above-entitled matter was submitted.)

24

25

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New York, Petitioner v. Paul Ira Ferber No. 81-55

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BY Deene Hammond

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