Constitutionality of H.18: Amending Vermont's Sexual Abuse of Children Statute to Include a Prohibition Against "Simulation" of Prohibited Sexual Conduct

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I. Introduction

My name is Peter Teachout. I am a professor of law at Vermont Law School where I have been a member of the faculty since 1975. My areas of special interest and expertise include Constitutional Law and First Amendment Law.

The question before the House Judiciary Committee, as I understand it, is whether H.18, which would add "simulation" to the list of prohibited conduct in Vermont's "sexual abuse of children" statute, would be found to violate free speech protections under the First Amendment. The language of the proposed amendment is set forth in paragraph (7):

> "(7) 'Simulation' means the explicit depiction of any conduct described [above] that creates the appearance of such conduct and that exhibits the uncovered portion of the breasts, genitals, or buttocks."

It may be that by the time I testify, the language of this provision will have been changed in which case some of the testimony below may no longer apply. However, as written, the language does pose constitutional problems which I identify and discuss briefly below. I suggest the language of paragraph (7) be changed as follows to cure potential vulnerabilities:

"(7) 'Simulation' means the explicit depiction of any conduct described [above] that creates the appearance that children participated in the conduct and involved the use of actual children in the production of the depictions of sexual conduct."

II. Rationale for Special Treatment of Child Pornography: The Harm Suffered by Children who are Used in the Production of Child Pornography

Depictions of sexually explicit conduct involving adults are treated as forms of protected speech under the First Amendment unless they fall into the narrow category of "technical obscenity" as defined by the Court in *Miller v. California.* To qualify as technical obscenity three requirements must be met: (1) the work taken as a whole must be found to appeal to the prurient interest judged by local community standards; (2) the work taken as a whole must depict "sexual conduct" in a "patently offensive way;" and (3) the work must lack serious literary, artistic, or scientific value.

Laws that criminalize "child pornography" however do not have to meet these restrictive requirements. The leading case is *N.Y. v. Ferber* in which the Court upheld New York's child pornography law even though New York law did not require a showing that the prohibited work taken as a whole appealed to the prurient interest, or depicted sexual conduct in a patently offensive way, or lacked serious literary, artistic, or scientific value. The Court found that the state had a compelling interest in protecting children from the physical and psychological damage suffered from being used in the production of the sexually-explicit material whether or not the works produced appealed to the prurient interest, or depicted that conduct in a patently-offensive way, or had serious literary, artistic, or scientific value.

That is the rationale for suspending the requirements that apply to sexually-explicit adult pornography in the case of child pornography: the state's compelling interest in preventing the harm suffered by children in the actual production of the depictions of sexual conduct.

This rationale was reaffirmed in *Ashcraft v. Free Speech Coalition.* In that case, the Court struck down a provision in a federal statute criminalizing the production and distribution of digital images ("virtual child pornography") where the images conveyed the appearance of minors engaging in sexually explicit conduct in a wide range of contexts including those in which children may not have been used in the production of the depictions. The challenged provision made it a crime even if adults had been used in the production or the images were the result of computer manipulation. The court struck down the provision since it was not limited to those situations where there was a risk of children being harmed from having been used in the production of the materials. Only that interest, the Court stressed, could justify criminalizing depictions of sexual conduct that otherwise would be protected under First Amendment law.

III. Application of *Ferber* and *Ashcraft* to the proposed amendment to Vermont's Sexual Abuse of Children Statute

The proposed amendment would add to Vermont's Sexual Abuse of Children statute a new paragraph (7) making "simulation" of the prohibited depictions of sexual conduct listed above in the statute also a crime:

> "(7) 'Simulation' means the explicit depiction of any conduct described [above] that creates the appearance of such conduct and that exhibits the uncovered portion of the breasts, genitals, or buttocks."

This raises two questions: The first is whether, generally speaking, producing and distributing depictions of "simulated" sexual conduct can be criminalized on the same terms producing and distributing depictions of "actual" sexual conduct. The second is whether the language of paragraph (7) limits the application of criminal sanctions only to those contexts where children have actually been used in the production of the simulations and thus the state has a compelling interest in avoiding the harm caused to the children who have been so used.

A. Treatment of "Simulated" Conduct by the Court

There is reason for assuming that the Court will treat laws that criminalize depictions of "simulations" of prohibited sexual conduct the same as depictions of "actual" conduct. In both the *Miller* case and the *Ferber* case, the Court explicitly treats the two as interchangeable at least as far as depictions of "sexual intercourse" are concerned. In both cases, the Court specifically uses the term "actual or simulated" after depictions of "sexual intercourse" or "the ultimate sexual act." Although the Court has not so held with respect to depictions of the other forms of intimate sexual conduct – fellatio, sodomy, beastiality – I think it is fair to assume the Court would afford similar treatment to depictions of "actual" or "simulated" sexual conduct in those contexts.

I am not so sure whether it would do so for the provision in Vermont's Child Abuse statute that prohibits production and distribution of depictions of "petting" when teenagers are involved, 13 VSA 2821(2)(C) (making criminal depictions of the intentional touching, "not through the clothing, the . . . breasts of another" with intent to arouse desire).

B. Paragraph (7) Not Limited to Contexts Where Children have Actually Been used in the Production of the Simulations

The real problem with Paragraph (7), at least in the version I have been given, is that it would make it a crime to produce or distribute depictions of "simulations" of prohibited sexual conduct whenever those simulations "create the appearance of such conduct" even when no children may have been involved in the production of the simulations. Simulations using adults who appear to be children would be covered. Simulations using images of children which have been manipulated to make it appear that the children are engaging in the conduct would be covered. But in neither case would children have actually been used in the production of the simulations. Thus in neither case could the state argue that criminal prosecution is required to protect children from the harm that results from having been used in the production. I need to stress that that is the only interest that the Court has found sufficient to justify suspension of the normal rules that apply to the production and distribution of sexually-explicit material under the First Amendment.

To deal with that potential problem, I suggest therefore that paragraph (7) be amended to read:

> "(7) 'Simulation' means the explicit depiction of any conduct described [above] that creates the appearance that children participated in the conduct and involved the use of actual children in the production of the depictions of sexual conduct."

That would bring it in line with the Court's rulings in the *Ferber* and *Ashcraft* cases. But it would have consequences:

If the "simulation" paragraph were amended as proposed, it could no longer be used as a basis for prosecuting those who produce and distribute depictions of sexual conduct that "create the appearance that children participated in the conduct" if adults instead of children were used in producing the simulations or if images of children were manipulated to make it appear as if they were engaged in the conduct even though the children themselves were not used in the production of the simulations.

The proposed change requires distinguishing between "the use of images of actual children" in the simulation (not made criminal) and "the use of actual children" in the production of the simulations. I am not sure that is what the Committee wants to do, but I do think it is required by the Court's decisions in *Ferber* and *Aschroft.*

IV. Eliminating Reference to "Uncovered Portion of the Breasts, Genitals, or Buttocks"

You may have noticed that in my proposed amendment to paragraph (7) I have eliminated the requirement that the "simulations" exhibit "uncovered portion of the breasts, genitals, or buttocks." I do so in part because I do not think it is necessary from a constitutional standpoint. I do not see what First Amendment purpose it serves.

I do so also because I don't think it is at all clear: "What is an uncovered portion of the breasts?" Displaying a little cleavage? Is the portion of the breasts revealed when one wears a bikini bathing suit, "uncovered"?

But I do so primarily because I think it would prohibit prosecution under the state's Sexual Abuse of Children statute where prosecution might be warranted. Take for instance a video that depicts a large adult male pulling what appears to be a child's head toward his crotch area after having unbuckled his belt and unzipped his fly. The camera then shifts to focus on the man's face which appears to show him having an orgasm. Simulated fellatio? Yes. But not covered by paragraph (7) in its current form.

Would it be covered under the proposed amendment to the language of paragraph (7). The answer, I think, would be yes, if a child was used in the "simulation" even though no actual fellatio occurred and even though actual fellatio is not depicted. Whether the Committee wants to include this kind of simulated sexual-conduct in the prohibitions of the state's Child Sexual Abuse statute I leave to the Committee.

V. Conclusion

For the reasons outline above, I think paragraph (7), in the form that I received it, should be changed to read as follows to avoid possible constitutional problems:

> "(7) 'Simulation' means the explicit depiction of any conduct described [above] that creates the appearance that children participated in the conduct and involved the use of actual children in the production of the depictions of sexual conduct."

I have no special pride of authorship in this particular version and the proposed language might benefit from a little massaging, but I hope that the rationale for suggesting that the paragraph be amended along these lines is clear.

Postscript

Two comments:

(1) How distinguish legitimate films from child porn?

As a follow up to the discussion at the Committee's hearing this morning, let me suggest one way to distinguish between "legitimate films" (like Taxi Driver) that simulate sexual conduct using actual child actors and "child porn films" in which actual children are used and abused in the production of depictions, actual or simulated, of sexual conduct, that the Committee consider adding to paragraph (7) a proviso to this effect:

"provided that, it shall be a defense to prosecutions under this paragraph to show that the simulated depictions formed [important] elements of a work that, viewed as a whole, has serious literary, artistic, sociological, or scientific value."

While this is not required under *Ferber*, there is nothing in that decision that would prohibit a state from including such a provision in its Child Sexual Abuse laws as a matter of statutory law.

That way the producer and distributor of a movie like Taxi Driver or a filmed version of Romeo and Juliet – in which depictions of simulated sexual conduct involving children are included, even films that reveal a little bare butt or bare breast - would have a defense to a prosecution under the statute.

(2) In response to Representative Rachelson's first question:

Here is the relevant passage from the *Ashcraft* case in which the Court declines to address the provision of the federal law that made production and distribution of depictions of sexual conduct involving children criminal when the depictions used "images of actual children" even though the children themselves may not have been involved in the production of the depictions.

> "Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. *Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in Ferber.* Respondents do not challenge this provision, and we do not consider it." (emphasis supplied)

Since this provision was not challenged and not considered by the Court, we do not know how the Court would rule on such a provision, but the Court's treatment in this passage suggests that one could add to paragraph (7) language to this effect: "or when pictures of real children are used making it appear that those children engaged in sexual activity."