

# FREEDOM WATCH

TONI MARIE ANGELI

## No excuse

Zona Labs and its legal allies should have known better

by Harvey Silverglate

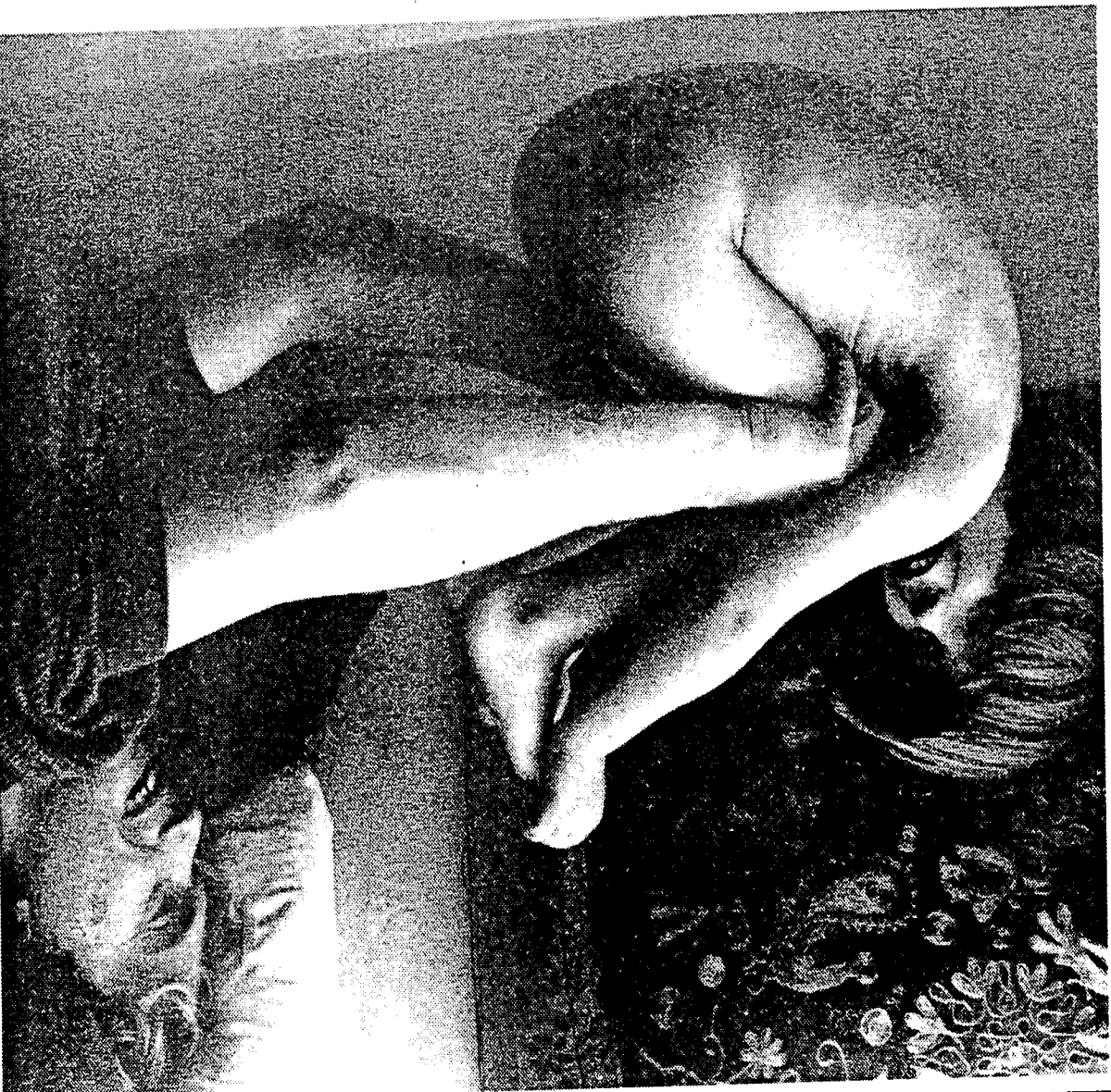
**T**he Cambridge Police detectives who arrested Toni Marie Angeli on suspicion of child abuse because of nude photographs she took of her four-year-old son — and for the ruckus that resulted at the arrest scene — have been accorded an outsized portion of blame in this free-speech comic opera.

There is plenty of fault to find in the officers' conduct, but, at the risk of sounding cynical, I'd say the police acted the way police tend to act. Responding to a tip from Zona Photography Labs in East Cambridge, where Angeli had taken her film for processing, they saw nude pictures of the child and immediately associated child nudity with child pornography and, in their lexicon, its close cousin, child abuse. They confronted Angeli, and, when she gave them some lip, they started to get rough. Nothing so surprising there.

What is surprising is how little criticism has been aimed at more subtle participants in the Angeli debacle: Rowena Otremba and Mary Osgood, co-owners of Zona Photographic Labs; Cambridge

District Court Judge Roanne Stragow, who got so personally involved that she lost her objectivity; assistant Middlesex County DA Marilee Denelle and her superiors at the DA's office, who allowed her to proceed with this ill-considered prosecution; and Harvard University, which didn't lift a finger to protect and support its student. As the case unfolded, this unholy alliance produced the one result that all piously claimed they wanted to avoid: namely, damage to Angeli's four-year-old child, Nico.

The story, broken December 29 by *Phoenix* reporter Sarah McNaught, involves Angeli's project, "Innocence in Nudity," for a Harvard Extension School photography course given by well-known local photographer/artist Jack E. Lueder-Booth. Angeli's portfolio included a number of pictures of her son, in some of which he was naked. I have examined all of these photographs, and, as an attorney experienced in the fields of free speech, obscenity, and child pornography, I can say that not a single one comes close to being pornographic. They perfectly illus-



**INNOCENCE in nudity, if not in conduct: with no evidence of lascivious intent, the DA couldn't prosecute Angeli for pornography.**

trated Angeli's theme — that child nudity, without lascivious adult overlay, is among the most innocent of human phenomena. (Her style is, in fact, obviously modeled on the family portraiture of Sally Mann, one of the most respected photographers in the country.) And no pornog-

raphy charges were brought because, according to Martin Murphy, first assistant Middlesex DA, the material didn't meet the "lascivious intent" test required for prosecution under Massachusetts law.

But when Zona developed the roll of 35-mm film, an employee was reportedly

disturbed by the nude images, and the lab called the police. Upon examining the negatives, the police prevailed upon Zona to join them in what can be reasonably described as a sting. Zona lured Angeli to the lab and kept her there until the police could swoop down to confront the suspected child pornographer and sexual abuser.

Zona, one of the best-known photo labs in the state, does work for professional photographers, including many with national reputations. (My wife, portrait photographer Elsa Dorfman, was a Zona client until this incident caused her to turn elsewhere.) Considering Zona's sophisticated photo-art customers, it is inconceivable that the lab has not processed thousands of these kinds of images over the years. Yet a written statement submitted to Sragow by co-owners Otremba and Osgood at Angeli's sentencing claimed that the folks at Zona "were deeply troubled by the images we saw on Ms. Angeli's film" and had "heartfelt concerns." As a result, they told the judge, "We chose to contact those who are experienced in investigating possible child abuse.

"What occurred subsequently was not of our doing," they added.

But Zona can't absolve itself so quickly of responsibility for "what occurred subsequently." For one thing, the uncontradicted testimony is that while Angeli was arguing with the police who had just arrested her, a Zona employee took Nico by the hand and escorted him out of the room. The employee claimed that he did this in order to protect the child from exposure to the increasingly confrontational scene that was developing between his mother and the police. From Angeli's point of view, a total stranger was walking off with her child. A parent would have to be inhuman not to react with anger and fear in such a situation. So here again, Zona's expressed concern for the welfare of the boy boomeranged.

At the sentencing, however, Zona stooped considerably lower in causing Angeli — and, consequently, her son — grief. In its written "victim impact statement" submitted to Judge Sragow, Zona lambasted Angeli for assaulting and injuring a Zona employee (despite Angeli's acquittal on the assault charge), and for damaging the lab's reputation and causing it to lose customers.

"What cannot be so easily repaired," they wrote, "is the harm Ms. Angeli and her supporters have done and continue to do to the reputation and good name of Zona Photographic Labs." Since the supporters (including, by way of disclosure, my wife and me) who voiced their views on radio and television could not be punished, obviously it was Angeli who was to bear the full brunt of others' exercise of free speech.

And in an as-yet-unreported pre-trial incident, prosecutor Denelle threatened Angeli's chief trial lawyer, Boston's John G. Swomley, saying that she was considering charging Angeli with "tampering with a witness" — because some Zona customers, out of sympathy for Angeli, were threatening to take their business elsewhere. Swomley challenged her to go right ahead, and Denelle backed down. Since Angeli would have been within her constitutional rights if she'd urged a boycott of Zona, this was just another example of an effort to punish her for her supporters' legally protected actions.

In a final insult to Angeli, Otremba and Osgood urged Judge Sragow "to make it clear to Ms. Angeli that her actions on November 2 were unconscionable" and to "require counseling therapy for Ms. Angeli" because "we believe she needs that help."

Sragow did indeed "make it clear." Over the objections of Swomley, she accepted the Otremba/Osgood statement as part of the sentencing proceeding. Next, Judge Sragow offered to let Angeli off with 18 months probation, rather than a prison sentence, if she would compensate Zona and perform 50 hours of community service. (The DA also demanded that Angeli apologize.) Angeli refused. In a fit of pique at such defiance of her authority, Judge Sragow, apparently unconcerned for the welfare of the child, ordered the mother locked up immediately.

Sragow compounded the insult and the injury by refusing to allow Swomley even to argue that Angeli had suffered sufficient physical punishment and brutality at the hands of the police and that incarceration would be overkill. It is extraordinary for a judge to refuse to allow a lawyer to argue a point, yet the judge by this time was so personally offended at

being defied that she decided to throw the book at Angeli, rather than withdraw in favor of a more dispassionate judge. Sragow went so far as to refuse to allow Angeli to remain free pending an appeal, meaning that, if Angeli wins her appeal (and she has very substantial legal issues on her side), she will have already served her sentence.

Perhaps the DA's position was predictable. The DA often depends on police cooperation and doesn't like to cross the department. But in a case where the police obviously overreacted on the basis of erroneous judgment (one detective testified that only a sick person would take such photographs), and where Angeli was reacting pretty much as most parents would under similar circumstances, the prosecutor's office should have resisted pressure to vindicate police conduct by prosecuting.

Harvard, for its part, was strikingly silent. After the trial, Angeli's instructor, Lueders-Booth, told the *Crimson* that he supported Angeli, that the case resulted from "a misjudgment on the part of the photo lab," and that "there was absolutely no question of anything being wrong with the pictures." But Harvard hasn't made a single public statement supporting its student or its instructor's contentions.

In 1989, the Massachusetts Supreme Judicial Court (SJC) acquitted a father charged with pornography for photographing his 15-year-old stepdaughter bare-breasted. The court ruled that the pictures were "expressive" activity protected by the First Amendment's free-speech guarantee, and that to be constitutional, the state's child-pornography statute could target nude child photography only if engaged in with lascivious intent. The fatal defect in the statute, in not requiring that such intent be proven, was illustrated by the court with the following observation:

*The overbreadth of [the child-pornography] statute is substantial. It criminalizes conduct that virtually every person would regard as lawful. [It would], for example, make a criminal of a parent who takes a frontal view picture of his or her naked one-year-old running on a beach or romping in a wading pool. The artists who painted some of the world's greatest paintings engaged in behavior made unlawful under [this statute] if they used child models.*

Subsequently, the statute was amended to require proof of lascivious intent before a prosecution could be brought.

Both Zona and the police were obviously unaware that the SJC had bestowed First Amendment protection on these kinds of pictures. Even so, if Zona had simply telephoned its client rather than call the police and engage in a sting, the lab would have learned that the photo was of Angeli's son, and that she had taken the pictures for a project at Harvard.

It's surprising that Zona didn't take this step, since, as the *New York Times* reported, "Mrs. Otremba says she had no way of knowing that the photographs were taken by the boy's mother or that [the] clothed man in the pictures was the boy's father" — suggesting that had she known Angeli was the boy's mother, none of this would have happened.

In 1990, the *Boston Globe* carried the following wire-service report, datelined Beijing, about a crackdown on kiddie porn in the People's Republic of China:

*Students in an elementary school class, fired up but confused by the government's anti-pornography campaign, turned in their nude baby pictures to their teacher, a letter in a state-run newspaper said yesterday. The letter in the China Youth News from a "concerned citizen" cautioned that there is such a thing as too much propaganda and warned that bringing the anti-smut campaign to the elementary school level had created confusion among youngsters.*

Given the puritanical zealots who have run rampant in our society in recent years, it is no wonder that the Cambridge Police detectives who arrested Toni Marie Angeli were confused. However, the Middlesex District Attorney's office, Zona Photographic Labs, Judge Roanne Sragow, and Harvard University have no such excuse. □

*Dana M. Gurwitch assisted in the research for this piece.*



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