THE CHILD PROTECTION ACT OF 1984: CHILD PORNOGRAPHY AND THE FIRST AMENDMENT

When she was ten years old, rights to photographs of her nude body were sold by her mother to a professional photographer. She did not understand the implications of her mother's act at that time, but by the time she was sixteen, the photographs came back to haunt her. Involved in a different lifestyle, and now aware of the reflection of such photographs on her good name, Brooke Shields, internationally known model and actress, attempted to stop publication of these reminders of an embarrassing past. Ultimately, the New York Court of Appeals held that Shields could not disaffirm her mother's consent to the sale of the photographs, and as a result, she was unable to prevent publication.[1]

Prior to that decision, however, a justice of the Appellate Division of the New York Supreme Court had sympathetically written in a concurring opinion to the lower court's decison that

> [c]ertainly, a girl of sixteen (still a minor), no matter how worldly and sophisticated she may appear in photographs, has the right to the sanctity of her bodily image, to be inviolate from the exposure of the private parts of her body, as well as the opportunity to change her public representation or the direction of her life.[2]

This statement by Justice Asch essentially cuts to the heart of the national concern over sexually explicit photographs and films of children. The focus of the concern is upon the children who are victimized as a consequence of the production of such material. Sexually explicit photographs or films of children, no matter how innocent or freely consented to, pose a danger to these children by the mere fact that the materials exist. Once photographed or filmed, such depictions of a child may circulate for years, eventually

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[1] Shields v. Gross, 58 N.Y.2d 338, 461 N.Y.S.2d 254, 448 N.E.2d 108 (1982).

[2] Shields v. Gross, 88 A.D.2d 846, 850, 451 N.Y.S.2d 419, 423 (N.Y. App. Div.) (Asch, J., concurring), *modified*, 58 N.Y.2d 338, 461 N.Y.S.2d 254, 448 N.E.2d 108 (1982).

turning up in the mass distribution system of child pornography.[3]

In *New York v. Ferber*,[4] the United States Supreme Court recognized that children deserve special protection against the harm that may result from sexually explicit depictions of their person. Accordingly, the Court held that a state statute could proscribe the production and distribution of visual materials which depicted children participating in sexual conduct even if such materials were not legally "obscene."[5] Provided the state statute "adequately defined"[6] the conduct to be proscribed and "suitably limited"[7] the definition of sexual conduct, that statute would be upheld. The decision effectively removed such child pornography from the protection of the First Amendment freedom of speech,[8] thereby providing states with substantially more leeway to protect against the exploitation of children.

Following the Supreme Court's approval of such state laws, Congress responded in 1984 by enacting legislation to provide greater federal protection for children against the harms of pornographic exploitation. On May 21, 1984, President Reagan signed into law the Child Protection Act,[9] an act which, among other

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[3] *See* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981).

[4] 458 U.S. 747 (1982).

[5] The term "obscene" has come to denote material which will not be afforded constitutional protection as speech under the first amendment. For a more specific delineation of the Supreme Court's present treatment of this term, which has come to be referred to as the "obscenity standard," *see infra* note 118 and accompanying text.

[6] 458 U.S. at 764.

[7] *Id.*

[8] The first amendment states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST., amend. I.

[9] 18 U.S.C.A. §§ 2251-2255 (West 1985), which reads as follows:
Chapter 110. Sexual Exploitation of Children.
Section 2251. Sexual exploitation of children.

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other person to engage in, sexually explicit conduct for the purpose

changes, amended federal law directed against child pornography

of producing any visual depiction of such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed.

(c) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

Section 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000 or imprisoned not more than 10 years, or both, but, if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

Section 2253. Criminal forfeiture.

(a) A person who is convicted of an offense under section 2251 or 2252 of this title shall forfeit to the United States such person's interest in

(1) any property constituting or derived from gross profits or other proceeds obtained from such offense; and

(2) any property used, or intended to be used, to commit such offense.

(b) In any action under this section, the court may enter such restraining orders or take other appropriate action (including acceptance of performance bonds) in connection with any interest that is subject to forfeiture.

(c) The court shall order forfeiture of property referred to in subsection (a) if the trier of fact determines, beyond a reasonable doubt, that such property is subject to forfeiture.

(d)(1) Except as provided in paragraph (3) of this subsection, the customs laws relating to disposition of seized or forfeited property shall

by deleting reference to an obscenity standard. This note will discuss the Child Protection Act of 1984 in detail. In order to do so, it will provide background into the *Ferber* decision. It is important to recognize that, consistent with the *Ferber* decision, the main thrust of

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apply to property under this section, if such laws are not inconsistent with this section.

(2) In any disposition of property under this section, a convicted person shall not be permitted to acquire property forfeited by such person.

(3) The duties of the Secretary of the Treasury with respect to dispositions of property shall be performed under paragraph (1) of this subsection by the Attorney General, unless such duties arise from forfeitures effected under the customs laws.

Section 2254. Civil forfeiture.

(a) The following property shall be subject to forfeiture by the United States;

(1) Any material or equipment used, or intended to for use, in producing, reproducing, transporting, shipping, or receiving any visual depiction in violation of this chapter.

(2) Any visual depiction produced, transported, shipped, or received in violation of this chapter, or any material containing such depiction.

(3) Any property constituting or derived from gross profits or other proceeds obtained from a violation of this chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) All provisions of the customs law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, insofar as applicable and not inconsistent with the provisions of this section, except that such duties as are imposed upon the customs officer or any other person with respect to seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Section 2255. Definitions for chapter.

For the purposes of this chapter the term—

(1) "minor" means any persons under the age of eighteen years;

(2) "sexually explicit conduct" means actual or simulated—(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B)

the Child Protection Act is to protect children; it is not so much a measure designed to combat pornography.[10]

Background

Although pornography in general has been regulated for over a century, statutes specifically addressing child pornography are a recent phenomenon.[11] The apparent reason for this prior lack of attention is that child pornography has only recently surfaced as a serious nationwide problem. Perhaps the best explanation for that is that it was only with the so-called "sexplosion"[12] of the late 1960's and 1970's that child pornographers were able to develop a market for their product.[13]

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bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, and

(4) "organization" means a person other than an individual.

10 Representative Hughes of New Jersey, a sponsor of the law, specifically stated during floor debate that "[t]his is a child protection law, a law which punishes child abuse, not pornography." 129 CONG. REC. H. 9780 (daily ed., Nov. 14, 1983).

11 *See* S. Rep. No. 438, 95th Cong., lst. Sess. 10 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 40, 48 (The Senate Report noted that a 1977 study conducted by the Congressional Research Service of the Library of Congress, entitled "Federal and State Law Regulating Use of Children in Pornographic Material," had found only six states at the time which specifically proscribed the use of children in such activities.) *See also*, Note, *Child Pornography Legislation*, 17 J. FAM. L. 505, 519-520 (1982). The author notes that "prior to 1977, only one state had enacted a statute directed at the use of children in pornographic media." *Id.*

12 The term "sexplosion" refers to the proliferation of sexually explicit material which first began in the 1960's. *See* Note, *supra* note 11, at 507 & n.9. The term "sexplosion" has been confused with the phrase "child sexploitation."

> The term *child sexploitation* refers to the sexual exploitation of minors for the commercial profit of adults using children as prostitutes and as subjects in pornographic materials, both obscene and non-obscene. Although the term is directed chiefly at adults who exploit the children in sexual poses and acts for commercial benefit, it may also include the acts of those who do so for their own gratification.

Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 809 & n.2 (1978).

13 *See* H.R. REP. No. 536, 98th Cong., lst Sess. 15 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 492, 506 (Statement of Charles R. Clauson, Assistant Chief Postal Inspector for Administration). Mr. Clauson stated that:

> [f]or many years traffic in child pornography was limited in scope and was investigated in connection with other obscenity cases, especially cases involving large commercial dealers. Over the years, prosecutions under the postal obscenity statutes declined due to a series of Supreme Court decisions and due to American society in general growing more

Whatever the explanation, the strength of the movement to legislate against it has only gained momentum since the late 1970's.[14]

The movement can be traced to a Tennessee statute[15] enacted in 1975, which in addition to prohibiting the publishing, exhibiting and distributing of obscene matter, also made it unlawful to employ or use minors in such activities. It has been noted that the Tennessee statute provided a round-about method of dealing with child pornography. It appears to have been aimed primarily at minors employed in adult entertainment establishments as projectionists and sales clerks.[16] The statute's salutary effect proved more far-reaching however, as it raised consciousness about child involvement in all facets of the pornography business.

It was not long before other states followed Tennessee's

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tolerant of pornographic material. Unfortunately, during the period of greater tolerance, the distribution of obscene material depicting children was on the increase.

Id.

14 *See* Stack, *Preventing the Sexual Exploitation of Children: The New York Experience*, 56 N.Y. ST. B. J., Feb. 1984, at 11, 12. The author noted that "[s]exual abuse and exploitation of children, while not a new phenomenon, had received only limited attention until 1977 when revelations about the abundance and variety of available materials depicting children in explicit sexual situations shocked and provoked citizens and legislators." *Id.*

15 Tenn. Code Ann. § 39-3013 (1975), reading as follows:

(A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

. . . .

(C) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in subsection (A) with knowledge that a person is a minor under eighteen (18) years of age, or while in possession of such facts that he or she should reasonably know that such person is a minor under eighteen (18) years of age.

16 Note, *supra* note 9, at 519-20. The statute was directed at conduct rather than speech. At that time, no other Tennessee statute prohibited the dissemination of child pornography. Although it was illegal to produce pornography using children, the material itself could be sold without penalty. In 1981, Tennessee passed a law which prohibits not only the use of children in sexual performances, but also the dissemination of obscene depictions of children. TENN. CODE ANN. § 39-6-1131 (1981).

lead in enacting statutes to punish and prevent the exploitation of children through pornography.[17] Yet, these state statutes varied in scope and severity, thereby impeding uniform enforcement. State enforcement was also limited by the financial constraints within each state. Finally, the interstate nature of large child pornography operations outstripped the scope of law enforcement capabilities of individual states.[18] It therefore became apparent that federal involvement would be necessary to augment state efforts. In fact, at the same time that states were enacting their anti-child pornography laws, state and local officials began calling upon Congress to enact Federal criminal child protection laws.[19]

Federal involvement commenced in 1977, when Congress, sufficiently prompted by public outrage over the child pornography issue,[20] enacted the Protection of Children Against Sexual Exploitation Act.[21] The Act was designed to fill several voids in

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17 *See, e.g.*, N.H. REV. STAT. ANN. § 650.2 (1977); MINN. STAT. § 617.246 (1977); FLA. STAT. § 847.014 (1977); N.Y. PENAL LAW §§ 263.10, 263.15 (McKinney 1977).

18 S. REP. No. 438, *supra* note 11, at 10, 1978 U.S. Code Cong. & Ad. News at 48. "It is quite true that the general responsibility for dealing with criminal activity is normally not a matter of federal concern. At the same time, however, the [Senate] Committee [on the Judiciary] is convinced that the use of children in the production of pornographic materials is a matter that cannot be adequately controlled by state and local authorities. What is needed is a coordinated effort by federal, state and local law enforcement officials aimed at eradicating this form of child abuse."

19 *See* H.R. REP. No. 536, *supra* note 13, at 4, 1984 U.S. Code Cong. & Ad. News at 495.

20 *See id.* at 15, 1984 U.S. Code Cong. & Ad. News at 506 (Statement of Charles R. Clauson, Assistant Chief Postal Inspector for Administration).

21 The Protection of Children Against Sexual Exploitation Act of 1977, PUB. L. No. 95-225, 92 Stat. 7 (1978) (amended May 21, 1984), was codified at 18 U.S.C. §§ 2251-2253 (Supp. II 1978), and provided as follows:

Chapter 110. Sexual Exploitation of Children.

Section 2251. Sexual exploitation of children.

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(b) Any parent, legal guardian or person having custody or control of a minor who knowingly permits such minor to engage in, or to

federal law.[22] At that time, no federal statute prohibited the use of children in the production of child pornography. Through the Act, Congress established this prohibition, premising its jurisdiction over such activity as an extension of its command over inter-

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assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct shall be punished as provided under subsection (c) of this section, if such parent, legal guardian, or person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed or if such visual or print medium has actually been transported in interstate or foreign commerce or mailed.

(c) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.

Section 2252. Certain activities relating to material involving the sexual exploitation of minors.

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and (B) such visual or print medium depict such conduct; or

(2) knowingly receives for the purpose of sale or distribution for sale or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed if (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and (B) such visual or print medium depicts such conduct; shall be punished as provided in subsection (b) of this section.

(b) Any person who violates this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both.

Section 2253. Definitions for chapter.

For the purposes of this chapter, the term—

(1) "minor" means any persons under the age of sixteen years;

(2) "sexually explicit conduct" means actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sado-masochistic abuse (for the purpose of sexual stimulation); or (E) lewd exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising, for pecuniary profit; and

(4) "visual or print medium" means any film, photograph, negative, slide, book, magazine, or other print medium.

[22] *See* S. REP. No. 438, *supra* note 11, at 3, 1978 U.S. Code Cong. & Ad. News at 41.

state commerce.[23]

This ambitious project contained a number of flaws, however, which allowed some child pornography to escape its proscriptions. According to the terms of the statute, the prosecution had to prove that the defendant had "knowingly produced or transported" the materials in interstate commerce with the purpose of sale.[24] This language failed to address child pornography which was produced for the purpose of non-commercial trade.[25]

A second shortcoming was that the 1977 Act only forbade materials which depicted a minor under the age of sixteen.[26] Because the child models could rarely, if ever, be located, it was very difficult to prove beyond a reasonable doubt from the photographs alone that the subject was under sixteen years of age.[27]

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[23] Article I, section eight of the Constitution states, in pertinent part: "Congress shall have power . . . to regulate commerce with foreign nations, and among the several states. . . ." U.S. CONST., art. I, § 8, cl. 3.

[24] 18 U.S.C. § 2251(a) (Supp. II 1978) (amended 1984), *see supra* note 21, only covered materials produced for the purpose of being transported in interstate or foreign commerce or mailed. 18 U.S.C. § 2253(3) (Supp. II 1978) (amended 1984) defined the production of such material as "producing, directing, manufacturing, issuing, publishing, or advertising *for pecuniary profit*." (Emphasis added). 18 U.S.C. § 2252(a) (Supp. II 1978) (amended 1984) provided for punishment of anyone who "knowingly transports, receives or sells such material in interstate commerce *for the purpose of sale or distribution for sale*." (Emphasis added) *See supra* note 21 for the full text of 18 U.S.C. § 2251-2253 (Supp. II 1978) (amended 1984).

[25] *See* H.R. REP. No. 536, *supra* note 13, at 2, 1984 U.S. Code Cong. & Ad. News at 493. "Many of the individuals who distribute materials covered by 18 U.S.C. § 2252 do so by gift or exchange without any commercial motive and thus remain outside the coverage of this provision. Those persons who use or entice children to engage in sexually explicit conduct for the purpose of creating child pornography do not violate 18 U.S.C. § 2251 unless their conduct is for pecuniary profit." *See also id.* at 11, 1984 U.S. Code Cong. & Ad. News at 502 (Statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division). "It is a fact, however, that many, perhaps even most, of the individuals who distribute materials covered by 18 U.S.C. § 2252 do so by trade or exchange, without any commercial purpose and thereby avoid violating this provision." *See also* S. REP. No. 169, 98th Cong., 2d Sess. 6, available on microfiche of the Congressional Information Service, Washington, D.C. (CIS-S523-12) (1983). "The FBI also confirmed that although most child pornography was produced for private use, it was frequently pirated for production and distribution by commercial operators."

[26] 18 U.S.C. § 2253(1) (Supp. II 1978) (amended 1984), *supra* note 21.

[27] *See* H.R. REP. No. 536, *supra* note 13, at 2, 1984 U.S. Code Cong. & Ad. News at 493 (Statement of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division). "Some obscene material depicts children who are clearly under the age of sixteen; however, the age of the child is not so readily apparent in other obscene material. In the latter cases it may be necessary to identify the child and offer proof of age in order to establish this element of the offense. In light of the

The major deficiency in the Act, however, was that Congress, constrained at the time by case law, limited proscription of child pornography to "obscene" materials. The most recent Supreme Court opinion on the issue of pornography, *Miller v. California*,[28] decided in 1973, had specifically delineated the lines of "obscenity." The Court in *Miller* announced that the legal definition of obscenity involved a three-pronged standard, stating that "obscenity is limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."[29] It is important to note that this pronouncement had two significant effects on the enforcement of the 1977 Act. First, the *Miller* standard posed a formidable hurdle to prosecution because of its complexity and its narrow scope of application.[30] Second, because the Court had yet to draw a distinction between adult and child pornography, Congress was forced to assume that only one standard existed for all pornography.[31]

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clandestine fashion in which such obscene films and magazines are produced, this is often extremely difficult."

28 413 U.S. 15 (1973).

29 *Id.* at 24.

30 *See* S. REP. No. 169, *supra* note 25, at 7. "Mr. Pitler, who is Chief of the Appeals Bureau for the District Attorney's Office of Manhattan, and is the attorney who argued the *Ferber* case for the State of New York, testified that 'the deterrent value of a statutory ban on obscenity is effectively undercut by the difficulties in prosecuting obscenity cases successfully. The same difficulties in the prosecution of obscenity are present in a prosecution for disseminating materials depicting sexual conduct of children when a successful prosecution turns on proof of the obscenity of those materials. To begin with, the deterrent effect of obscenity laws is diminished because the concept of obscenity is complex, and its application to particular cases is a matter of considerable delicacy, resting often on highly elusive criteria.' Testimony before the Senate Subcommittee on Juvenile Justice, Dec. 10, 1982, pp. 106-07)."

31 *See* H.R. REP. No. 438, *supra* note 11, at 12-13, 1978 U.S. Code Cong. & Ad. News at 49-50. "Finally the Justice Department concluded that since the section . . . would cover both obscene and non-obscene materials, there was a very strong possibility that the courts would declare this section unconstitutional on its face. . . . In the judgment of the [Senate] Committee [on the Judiciary], the enactment of such a questionable provision would be unwise." *See also* Note, *supra* note 11, at 524-525. "Thus, while it is not impossible that the Supreme Court will carve out another exception to first amendment protection for expressive materials which was produced through acts harmful to minors, under present obscenity case law, statutes banning material thus produced would be unconstitutional insofar as they suppress publishing and distribution of non-obscene erotica."

On the state level at that time, most of the legislatures that had enacted laws against child pornography had also chosen to conform with the obscenity standard.[32] Some states, however, evidently felt that there was a need to further clamp down on this form of child exploitation. Recognizing that the obscenity standard had not adequately addressed the problems of child pornography, these jurisdictions began adopting more stringent laws to focus upon the special concerns created by pornography involving children.[33] The New York statute[34] typified this type of

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32 Child pornography statutes can be divided into four categories. All of these statutes proscribe the use of children in sexual performances and productions, but they differ in their treatment of material depicting such performances. The first type prohibits the dissemination of obscene depictions of children. The definition of "obscene" may be adjusted, producing a second type of statute prohibiting dissemination of material considered too obscene to be shown to a minor. A third type does not prohibit the dissemination of child pornography at all, merely banning the production of such material. Lastly, the statute may prohibit all depictions of a child engaged in sexually explicit conduct, regardless of whether or not it is legally obscene.

Fourteen states presently prohibit not only the use of children in sexual performances and productions, but also the dissemination of obscene depictions of children. *See* ALA. CODE § 13A-12-190; ARK. STAT. ANN. § 41-4201 (Supp. 1984); CAL. PENAL CODE ANN. § 311.2 (Supp. 1984); IND. CODE § 35-49-2- 2 (Supp. 1984); IOWA CODE § 728.12 (Supp. 1984); ME. REV. STAT. ANN., tit. 17, § 2923 (Supp. 1984); MICH. COMP. LAWS § 750.145(c); MINN. STAT. § 617.246 (Supp. 1984); NEB. REV. STAT. § 28-1463 (1979); N.H. REV.STAT. ANN. § 649-A:3 (Supp. 1984); OHIO REV. CODE ANN. § 29-7.321(A) (1982); ORE. REV. STAT. § 163 485(1981); S.D. COMP. LAWS ANN. § 22-22-24 (1979); TENN. CODE ANN. § 39-6-1131 (1981).

Only one state presently prohibits, in addition to the use of children in sexual performances and productions, the dissemination of material considered too obscene to be shown to a minor. *See* CONN. GEN. STAT. ANN. § 53a-196b (Supp. 1984).

Nine states presently prohibit not only the use of children in sexual performances and productions, but do not specifically forbid the dissemination of child pornography. *See* GA. CODE § 16-12-100 (1981); IDAHO CODE § 44-1306 (1979); KAN. STAT. ANN. § 21-3516 (1981); MD. CRIM. LAW CODE ANN., tit. 27, § 419A (Supp. 1984); MO. REV. STAT. § 568.060 (1979); NEV. REV. STAT. § 200.509 (1981); N.C. GEN. STAT. § 14-190.6 (1981); S.C. CODE ANN. § 16-15-380 (Law Co-op 1984); WYO. STAT. ANN. § 14-3-102 (1977).

33 Twenty-five states prohibit not only the use of children in sexual performances and productions, but also the dissemination of sexually explicit depictions of children whether obscene or not. *See* ALASKA STAT. ANN. § 13A-12-190 (1982); ARIZ. REV. STAT. § 13-3552 (Supp. 1984); COLO. REV. STAT. § 18-6-403 (Supp. 1984); DEL. CODE ANN., tit. 11, §§ 1108-1109 (1979); FLA. STAT. §§ 827.014, 827.071 (Supp. 1984); HAW. REV. STAT. § 707-751 (Supp. 1984); ILL. STAT. ch. 38, § 11-20.1 (Supp. 1984); KY. REV. STAT. §§ 531.320, 531.340-.360 (Supp. 1984); LA. REV. STAT. § 14:81.1 (West Supp. 1984); MASS. GEN. LAWS. ANN. ch. 272, §§ 29A-29B (West 1984); MISS. CODE ANN. § 97-5-33 (Supp. 1984); MONT. CODE ANN. § 45-5-625 (1984); N.J. STAT. ANN. § 2C:24-4 (West Supp. 1984); N.M. STAT. ANN.

legislation, prohibiting the promotion of performances or sale of materials depicting a child under sixteen engaged in sexual conduct. A showing that the performances or materials were not obscene did not constitute a defense to prosecution under the statute. It was enforcement of this statute which set the stage for the landmark case of *New York v. Ferber*.[35]

The facts of the *Ferber* case concerned Paul Ira Ferber, a proprietor of a New York bookstore, who sold films to an undercover police officer. These films depicted young boys masturbating. Ferber was charged under New York law with two counts of promoting an obscene sexual performance of a minor,[36] and two counts of promoting a sexual performance of a minor.[37] In compliance with the law, the first two counts required that the performances be "obscene."[38] The second two counts, however, only required proof of sexual conduct by a child less than sixteen years of age.[39] The statute defined sexual conduct as "actual or simulated sexual intercourse, deviate sexual

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§ 30-6A-1 (1984); N.Y. PENAL LAW § 263.15 (McKinney 1980); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1984); PA. CONS. STAT. § 6312(c) (1982); R.I. GEN. LAWS § 11-9-1.1 (1981); TEX. PENAL CODE ANN. tit. 9, § 43.25 (1982); UTAH CODE ANN. § 76-10-1206.5(3) (Supp. 1984); VT. STAT. ANN. tit. 13, § 2824 (1983); VA. CODE § 18.2-374.1 (1984); WASH. REV. CODE § 9.68A.040-.070 (Supp. 1985); W. VA. CODE § 61-3C-3 (Supp. 1984); WIS. STAT. § 940.203(4) (West Supp. 1984).

34 N.Y. PENAL LAW §§ 263.00-263.15 (McKinney 1980).

35 458 U.S. 747 (1982).

36 *Id.* at 752. *See* N.Y. PENAL LAW § 263.10 (McKinney 1980).

37 458 U.S. at 752. *See* N.Y. PENAL LAW § 263.15 (McKinney 1980).

38 N.Y. PENAL LAW § 263.10 reads as follows:

Section 263.10. Promoting an obscene sexual performance by a child.

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

Promoting an obscene sexual performance by a child is a class D felony.

"Promote" is defined in § 263.00(5) as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute [sic], publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

39 N.Y. PENAL LAW § 263.15 reads as follows:

Section 263.15. Promoting a sexual performance by a child.

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

Promoting a sexual performance by a child is a class D felony.

intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."[40]

Mr. Ferber was acquitted on the obscenity charges, but was convicted of two counts of promoting the sexual performance of a minor.[41] This verdict was affirmed without opinion by the Appellate Division of the New York Supreme Court.[42] On appeal to the state's highest court, however, the New York Court of Appeals reversed the lower court, holding that the statutory scheme violated the First Amendment of the United States Constitution.[43] The court held that, without inclusion of the obscenity standard, the law was invalid because it prohibited dissemination of material traditionally entitled to constitutional protection.[44]

The United States Supreme Court granted the state's petition for certiorari[45] on the question of whether the New York State Legislature could prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene. The Court answered this question in the affirmative, expressly recognizing for the first time that child pornography is different from adult pornography. The opinion gave five reasons why statutes drafted to eliminate this evil should be judged under a lesser standard.

First, the Court asserted that states have the right to protect the health and well-being of children within their jurisdiction.[46] In fact, the Court found this to be a compelling interest.[47] Accordingly, the Court refused to second-guess the legislative judgment that pornography is harmful to the children involved in it.[48]

Second, and consistent with the first reason, the Court advanced the notion that states have the right to enforce their criminal laws designed to protect children.[49] The Court reasoned that the production of photographs depicting such illegal acts,

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40 N.Y. PENAL LAW § 263.00(3) (McKinney 1980).

41 458 U.S. at 752. "A state judge rejected *Ferber*'s first amendment attack on the two sections in denying a motion to dismiss the indictment. 93 Misc.2d 669, 409 N.Y.S.2d 632 (1978)."

42 74 A.D.2d 558, 424 N.Y.S.2d 967 (1980).

43 52 N.Y.2d 674, 422 N.E.2d 523 (1981).

44 *Id.* at 678, 422 N.E.2d at 525.

45 454 U.S. 1052 (1981).

46 458 U.S. at 756.

47 *Id.*

48 *Id.* at 758.

49 *Id.* at 760.

and the advertising and sale of such photographs adds to the harm caused by the criminal sexual abuse.[50] It was also noted in the opinion that the creation of a permanent record of such illegal and socially unacceptable acts has been said to cause serious psychological and social harm.[51]

Third, the Court recognized that the advertising and sale of such materials helps to provide an economic incentive for the production of new pornography.[52] The Court noted that the performance of sexual acts by minors is prohibited by statute in every state.[53] In the Court's view, without regulation of those who profit from distribution, criminal laws aimed at stopping criminal sexual abuse in the production of child pornography will merely ensure that the producers shift their operations further underground.[54]

As a fourth reason, the Court stated that the social value of such pornography, according to the majority opinion, is "exceedingly modest, if not de minimis."[55]

Fifth, the Court found precedent for the proposition that a content-based classification of speech[56] is permissible if "the evil to be restricted so overwhelmingly outweighs the expressive interests . . . that no process of case-by-case adjudication is required."[57] The Court admitted that there could be "arguably impermissible applications," but these, it asserted, are only a "tiny fraction" of the permissible applications.[58] The opinion suggested that "whatever overbreadth exists should be cured

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50 *Id.* at 761.
51 *Id.* at 759.
52 *Id.*
53 *Id.* at 761.
54 *Id.* at 760, n.11.
55 *Id.* at 762.
56 The phrase "content-based classification" refers to the placing of a category of material outside the protection of the first amendment, based solely on its content. This type of restriction is not considered preferable. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963). However, in the field of obscenity, certain content-based classifications have been allowed. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (plurality opinion of Stevens, J.), *cited in* New York v. Ferber, 458 U.S. 747, 763 (1982). *See generally* J. Nowak, R. Rotunda & J. Young, Constitutional Law 1021-1024 (2d ed. 1983) [hereinafter referred to as Nowak].
57 458 U.S. at 763.
58 *Id.* at 773.

through case-by-case analysis of the fact situations to which its sanctions may not be applied."[59]

It has been observed that *Ferber* "failed to develop an explicit test for child pornography, merely stat[ing] a negative application of the *Miller* obscenity standard."[60] The Court cryptically announced that the test for child pornography is different from the *Miller* obscenity standard,[61] but nonetheless avoided specifically defining the term "child pornography." Rather, the Court adjusted the *Miller* standard to lessen its stringent protection of sexually explicit material. The opinion carefully excised two of the three prongs of the *Miller* test, as follows: "A trier of fact need not find that the material appeals to the prurient interest of the average person, it is not required that sexual conduct portrayed be done so in a patently offensive manner, and the material at issue need not be considered as a whole."[62]

This leaves only the third and final prong of the standard to be considered. That portion of the test accords first amendment protection to works which have serious literary, artistic, political or scientific value.[63] The *Ferber* opinion did not specifically exclude from first amendment protection child pornography which has serious literary or other merit. In a concurring opinion, Justice Brennan indicated that child pornography having such value would be protected by the first amendment.[64] Justice O'Connor disagreed in her separate concurrence, stressing that there is no constitutional requirement that such material be given first amendment protection.[65] Justice Stevens advocated an intermediate position, but postponed an exact formulation of the proper standard until such time as a case shall arise involving child pornography having literary or other value.[66] Thus, it is unclear at

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59 *Id.* at 773-74. The Court applied its holding in Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

60 Note, *A New Standard for the State's Battle Against Child Pornography*, 19 WAKE FOREST L. REV. 95, 114 (1983).

61 458 U.S. at 764.

62 *Id.*

63 *Id.* at 755 (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

64 458 U.S. at 776.

65 *Id.* at 774.

66 *Id.* at 780.

this time whether the third prong of the *Miller* standard applies to child pornography.

The vagueness of the *Ferber* opinion should not be unduly emphasized. The special importance of *Ferber* lies not in its opposition to the promulgation of sexually explicit material, but in its favorable attitude towards the protection of children. It recognizes that child pornography is different from adult pornography, because sexual activity involving minors is a criminal act which may lawfully be prohibited by criminal sanctions.

The Child Protection Act of 1984

In 1982, Congress re-initiated hearings to investigate the problem posed by the interstate dissemination of child pornography. Encouraged by the *Ferber* decision and aware of the fact that the 1977 effort had not proved effective, Congress set out to reidentify the nature of the nemesis and to produce more potent legislation to combat it. Congress confronted the reality that the child pornography market yields multi-million dollar profits and involves thousands of children.[67] In addition, Congress acknowledged the fact that the 1977 law contained a number of stumbling blocks to enforcement and lacked the teeth necessary to properly discourage child pornographers.[68]

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67 *See* H.R. 3635, sec. 2, 98th Cong., lst Sess., 129 CONG. REC. H. 9778 (daily ed. Nov. 14, 1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News (98 Stat.) 204.

> The Congress finds that—(1) child pornography has developed into a highly organized, multi-million dollar industry which operates on a nationwide scale; (2) thousands of children including large number of runaways and homeless youth are exploited in the production and distribution of pornographic materials; and (3) the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the individual child and to society.

Id. There are indications that the child pornography industry is more extensive than stated above. *See* 129 CONG. REC. H.9798 (daily ed. Nov. 14, 1983) (Statement of Representative Shaw) ("Law enforcement officials estimate that as many as one million younsters . . . are filmed or photographed") (quoting the *Ladies' Home Journal.*) Representative Fish said that the production and distribution of child pornography yields $5 billion dollars in profits. *Id. But cf.* Stack, *supra* note 14, at 12 n.16 ("The child pornography trade grosses about a half billion dollars a year. . . .") (citing U.S. NEWS & WORLD REP., June 13, 1977, at 66).

68 *See* 129 Cong. Rec. H.9779 (daily ed. Nov. 14, 1983) (Statement of sponsor Representative Hughes of New Jersey). "H.R. 3635 [The Child Protection Act of 1984] is designed to correct deficiencies in the [1977] Act identified in six years of implementation. . . ."

The House Subcommittee on Crime of the House Judiciary Committee held hearings in which it heard testimony from Congressmen and representatives of the United States Department of Justice, the United States Postal Service, and the United States Customs Service.[69] A Deputy Assistant Attorney General of the Criminal Division revealed that not one individual had been convicted for "producing" child pornography under the prior federal statute from the time of its enactment in 1977.[70] The Attorney General was able to obtain only twenty-three convictions for "selling" child pornography in that same time period.[71] The Postal Inspection Service was somewhat more successful, obtaining seventy-seven convictions for the mailing of child pornography under both federal and state laws.[72]

To remedy the failure of the 1977 Act, several bills were introduced during the 98th Congress in 1982.[73] The Senate took action first, passing a bill, S.1469, on July 16, 1983.[74] The House chose a more deliberate path. The House Subcommittee on Crime considered all the various House proposals together in order to glean provisions out of each. Finally, after considerable review, Representative Hughes of New Jersey and Representative Sawyer of Michigan, both of whom were subcommittee members, offered H.R. 3635, a subcommittee substitute bill which incorporated the best attributes of these previously submitted bills.[75] The Hughes- Sawyer proposal was later approved by the House Committee on the Judiciary without substantial change,[76] and the House passed this version on November 13, 1983.[77] After staff discussions and a meeting between Congressmen Hughes and

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69 *See* H.R. REP. No. 536, *supra* note 13, at 6, 1984 U.S. Code Cong. & Ad. News at 494.

70 *Id.* at 9, 1984 U.S. Code Cong. & Ad. News at 500.

71 *Id.*

72 *Id.* at 16, 1984 U.S. Code Cong. & Ad. News at 507.

73 *See* H.R. 2106, 98th Cong., lst Sess. (1983) (Representative Pashayan); H.R. 2432, 98th Cong., lst Sess. (1983) (Representative Hutto); H.R. 3062, 98th Cong., lst Sess. (1983) (Representative Sawyer); H.R. 3635, 98th Cong., lst Sess. (1983) (Representative Hughes). For a summary of the provisions of these bills, *see* H.R. REP. No. 536, *supra* note 13, at 5, 1984 U.S. Code Cong. & Ad. News at 494.

74 *See* 129 CONG. REC. S.10,208 (daily ed. July 16, 1983).

75 *See* H.R. REP. No. 536, *supra* note 13, at 6, 1984 U.S. Code Cong. & Ad. News at 494.

76 *Id.*

77 *See* 129 Cong. Rec. H.9778 (daily ed. Nov 14, 1983).

Sawyer and Senators Specter and Grassley, the Senate and House agreed to a compromise. The compromise was in the form of an amendment to the House bill, and it was reached without convening a formal conference. The Senate unanimously agreed to the amendments on March 30, 1984,[78] and the House passed the amendments on May 8, 1984 by a vote of 400 to 1.[79] After this overwhelming show of bipartisan support, the Hughes-Sawyer proposal was sent to the President, who signed it and promised renewed efforts in the areas of pornography control.[80] The President also announced at the signing that the Customs Service had increased its seizures of pornography by two hundred percent, sixty percent of which was child pornography.[81]

The Child Protection Act of 1984 effected a number of major changes designed to facilitate the prosecution and enforcement of child pornography laws. First, the age of majority for purposes of this Act has been raised from sixteen to eighteen years of age.[82] Part of the rationale for this change was articulated by Congressman Hughes, who noted that "with this change, perhaps we can actually protect children up to age sixteen."[83]

Second, the commercial purpose requirement was removed. Under the 1977 Act, reproduction and receipt of sexually explicit depictions of children were not prohibited, and distribution was considered criminal only if done with the intent to sell for money.[84] As a consequence, the 1977 Act could not reach the clandestine subculture which, for self-gratification, traded photographs of children engaged in sexual conduct. With the enactment of the Child Protection Act, production, reproduction, distribution and receipt may now be prosecuted without proof of

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78 *See* 130 Cong. Rec. S.3514 (daily ed. Mar. 30, 1984).

79 *See* 130 Cong. Rec. H.3457 (daily ed. May 8, 1984).

80 *See* 20 Weekly Comp. Pres. Doc. 743, 744 (May 28, 1984).

81 *Id.*

82 18 U.S.C.A. § 2255(l) (West 1985), *supra* note 9, defines "minor" as any person under the age of eighteen years. 18 U.S.C. § 2253(a)(1) (Supp. II 1978) (amended 1984), *supra* note 21, defined "minor" to be any person under the age of sixteen years.

83 129 Cong. Rec. H.9779 (daily ed. Nov. 14, 1983) (Statement of sponsor Representative Hughes of New Jersey).

84 *See supra* note 24.

the ultimate objective of sale for money.[85]

Third, the serious purpose of Congress to clean up child pornography was made clear by the drastic increase in penalties under the Act. For individuals, the fine for a first offense is not more than $100,000.[86] Under the prior statute the threshold was only $10,000.[87] For organizations, defined as a person other than an individual,[88] the fine is $250,000 for any offense.[89] In addition to their punitive and deterrent effect, these increased penalties reflect the sad reality of the enormous profits reaped by child pornographers.[90]

A fourth major provision of the Act provides for civil and criminal forfeiture provisions which permit the government to confiscate materials, equipment and proceeds of child pornographers.[91] Thus, a conviction may effectively close down a publisher's entire operation, thereby preventing future repetition of the offense by the same violator.[92]

Fifth, Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[93] has been amended to authorize investigators to use wiretaps on alleged offenders.[94] Such electronic interception of wire or oral communication has been reserved for the enforcement of our most severe crimes. The compendium of crimes for which wiretapping has heretofore been authorized includes espionage, sabotage, treason, bribery, murder, kidnapping, robbery and extortion.[95] The crime of child pornography

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85 *See generally supra* note 9.

86 *See* 18 U.S.C.A. §§ 2251(c), 2252(b) (West 1985), *supra* note 9.

87 *See* 18 U.S.C. §§ 2251(c), 2252(b) (Supp. II 1978) (amended 1984), *supra* note 21.

88 *See* 18 U.S.C. § 2254(4) (Supp. II 1978) (amended 1984), *supra* note 21.

89 *See* 18 U.S.C.A. §§ 2251(c), 2252(b) (West 1985), *supra* note 9.

90 *See* H.R. REP. No. 536, *supra* note 13, at 3, 1984 U.S. Code Cong. & Ad. News at 494 ("Current fine levels generally reflect values of prior decades and are too low to be a realistic measure of the gravity of the offense committed.").

91 *See* U.S.C.A. §§ 2253-2254 (West 1985), *supra* note 9.

92 "[T]he provisions that the bill contains will allow the Attorney General to go after the assets and profits of the enterprise used to produce the illegal materials." 130 CONG. REC. S.3514 (daily ed. Mar. 30, 1984) (statement of Senator Denton).

93 Omnibus Crime Control and Safe Streets Act of 1968, §§ 801, 802, PUB. L. No. 90-351, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. §§ 2510-2520 (1982)).

94 *See* Child Protection Act of 1984, § 8, PUB. L. No. 98-292, 98 Stat. 204 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 98 (Stat. 204).

95 18 U.S.C.A. § 2516 (West 1985) provides in part:

is properly annexed to this list, for it directly implicates the major legislative concern of Title III: to combat organized crime.[96] The large profits to be made from child pornography has attracted the attention of organized crime elements, who are now deeply involved in the production and distribution of such material.[97] The Senate Judiciary Committee, in its 1968 Report on

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(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter, an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having the responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

. . .

(c) Any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), sections 1503, 1512, 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1715 (Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by wire, radio, or television), *section 2252 or 2253 (sexual exploitation of children), sections 2251 and 2252 (sexual exploitation of children)*, sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping and assault). (Emphasis added).

The section numbering with reference to sexual exploitation of children may be a typographic error in the original.

96 S. REP. No. 1097, 86th Cong., lst Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2157.

97 *See* 129 Cong. Rec. H.9781 (daily ed. Nov. 14, 1983) (Statement of Representative Smith). "[I]n the annals of organized crime it has recently become a major source of revenue for them. And the names of the same people associated with crime keeps cropping up in city after city and in state after state as local law enforcement tries to deal on a patchwork basis with the problem." *See also* 129 Cong. Rec. E.5561 (daily ed. Nov. 15, 1983) (Speech of Hon. Ron Wyden). *But cf.* S. REP. No. 169, *supra* note 25 at 11, (letter from Robert McConnell, Assistant Attorney

Title III, stated that "[o]rganized criminals must hold meetings to lay plans. Where the geographical area over which they operate is large, they must use telephones."[98] Wiretapping can intercept these communications, which law enforcement officials can use to break open the clandestine operations of child pornography.

Representative Weiss (D-N.Y.), the only Representative to vote against the Act, found this provision to be objectionable when viewed in combination with the extremely broad definition of the offense of child pornography.[99] In his view, with the elimination of the commercial purpose requirement and the criminalization of mere receipt of forbidden material, many persons only peripherally involved with child pornography would now be considered offenders. In light of this, Representative Weiss had urged the need for caution, stating that the wiretapping provision lends itself to great potential abuse.

Sixth, both sadistic and masochistic abuse are prohibited, without the former qualification "for the purpose of sexual stimulation."[100] This amendment broadens the prohibition to the depiction of children subjected to bizarre types of humiliations or restraint.[101] Such scenes may not include lascivious exhibition of the genitals, but nevertheless involve an element of sexual gratification for a portion of the child pornography subculture. The same harm resulting from explicit sexual depictions also oc-

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General). "We question the accuracy of these [Congressional] findings. It has been our understanding that . . . participants in organized crime generally have shunned any involvement in the production or distribution of child pornography."

98 S. REP. No. 1097, *supra* note 96, 1968 U.S. Code Cong. & Ad. News at 2157, 2161

99 129 Cong. Rec. H.9785-H.8786 (daily ed. Nov. 13, 1985).

100 *Compare* 18 U.S.C.A. § 2255(2)(D) (West 1985), *supra* note 9, *with* 18 U.S.C. § 2253(2)(D) (Supp. II 1978) (amended 1984), *supra* note 21.

101 The 1977 Senate Report recommended that the terms "sadism" and "masochism" should be modified to refer to sexually oriented conduct. It was felt that the Act should not include within its prohibition "filmed episodes of physical mistreatment of orphans, child laborers or inmates of a juvenile detention facility, or a juvenile inflicting injury upon himself [because] [s]uch portrayals would have no sexual appeal except, perhaps, to a tiny segment of society." *See* S. REP. No. 438, *supra* note 11, at 27-28, 1978 U.S. Code Cong. & Ad. News at 63. This flawed proposal was rectified by the 1984 Act, which eliminated the sexual purpose requirement so that the statutory reach might be broadened. *See* 130 Cong. Rec. S.3511 (Statement of Senator Grassley), "In making these changes, any accompanying legislative history must and it is our resolve that it reflect intent in altering the act to broaden the scope of the act."

curs when children are subjected to sadistic or masochistic abuse, whether or not an overt sexual purpose exists.

Next, the Act closes a loophole which allowed producers of child pornography to escape conviction. Under the 1977 law, there was no successful prosecution for the offense of inducing a child to pose for pornographic pictures.[102] This occurred because of the difficulty of showing a direct connection between the manufacturer of the magazines or films and the original photographer.[103] The Child Protection Act of 1984 now includes within its prohibition all those who pirate photographs from other sources, or who purchase photographs or negatives for the purpose of reproduction.[104]

Finally, the most significant change brought about by the Act is the elimination of all reference to obscenity, so that even non-obscene material is now proscribed.[105] The result is that the standard for obscenity developed in *Miller v. California*[106] is no longer applicable to child pornography cases. In order to appreciate the significance of the elimination of this standard, background into the Court's treatment of the obscenity issue is necessary.

The Court's consideration of the constitutional rights of those involved in pornography began with the decision of *Chaplinsky v. New Hampshire*.[107] In that case, the Court recognized that certain classes of speech do not have the protection of the first amendment guarantee of free speech.[108] The Court stated that "[t]here are certain well-defined and narrowly limited classes

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102 *See supra* note 70 and accompanying text.

103 *See* 129 Cong. Rec. H.9779 (Statement of sponsor Representative Hughes of New Jersey). "[W]e close a loophole which lets producers of child pornography escape prosecution unless it is also proven that they were directly involved in inducing the child to pose for the photography in question. Because of the difficulty in proving this connection, there has been no successful prosecution for the production offense. This new reproduction offense in H.R. 3635 would permit prosecution of the producer who pirates photos from other publications, or who purchases photos for production, as well as the producer who has direct involvement with the taking of the photographs or the filming." *See also* H.R. REP. NO. 536, *supra* note 13, at 5, 1984 U.S. Code. Cong. & Ad. News at 496.

104 *See* 18 U.S.C.A. § 2252(2) (West 1985), *supra* note 9.

105 *See* Child Protection Act of 1984, *supra* note 94, at § 4(e) ("striking out 'obscene' at each place it appears").

106 413 U.S. 15 (1973).

107 315 U.S. 568 (1942).

108 *See supra* note 8.

of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. The opinion explicitly included the lewd and obscene[109] among these classes of speech, observing that such utterances do not involve the "exposition of ideas" and are of small benefit as a "step to truth."[110] In this regard, the Court noted that the public interest in order and morality outweighs the expressive value of such speech.[111]

This holding was reaffirmed twelve years later, in *Roth v. United States*.[112] In that case, the Court attempted to delimit the minimum standards for the exclusion of sexually explicit material from the ambit of the first amendment. It declared that the first amendment had been designed and consistently interpreted to afford no protection to material which is "utterly without redeeming social importance."[113] In furtherance of this intent, the Court accepted a definition which drew a line between protected speech and unprotected obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[114] This definition accorded great protection to pornography, some of which had only the merest glimmer of "redeeming social importance."[115] The subjective nature of this definition plagued the Court for years to come.[116]

More than thirty years after *Chaplinsky* the Court decided *Miller v. California*[117] in which it enunciated a less protective standard for testing obscenity. As already indicated, under the *Miller* formulation, obscenity is "limited to works which, taken as a whole appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific

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109 315 U.S. at 571.

110 *Id.* at 572.

111 *Id.*

112 354 U.S. 476 (1957).

113 *Id.* at 484.

114 *Id.* at 489.

115 *See infra* note 118.

116 As the court stated in *Ferber*, "*Roth* was followed by fifteen years during which this Court struggled with 'the intractable obscenty problem.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (opinion of Harlan, J.). *See, e.g.*, Redrup v. New York, 386 U.S. 767 (1967)." New York v. Ferber, 458 U.S. at 754.

117 413 U.S. 15 (1973).

value."[118] Since 1973, the standard set forth in *Miller* has remained the litmus test for obscenity.[119] Notwithstanding this fact, the *Ferber* decision carved out a new area of pornography to which the *Miller* standard does not apply.[120]

While the Supreme Court had dealt with the issue of pornography in general, it had not confronted the specific issue of child pornography. In fact, until *Ferber*, it was widely believed that child pornography would be judged under the same standard as adult pornography.[121] Simultaneously, there was a strand of Supreme Court precedent which indicated that the Court might be willing to take a stronger position when the protection of children from indecent material was involved.

In *Ginsberg v. New York*,[122] the Court upheld a statute defining obscenity on the basis of its prurient appeal to minors under seventeen. Mr. Ginsberg, operator of a luncheonette which sold "girlie" magazines, sold two such magazines to a sixteen year old boy. He was convicted under a New York statute which prohibited the sale to minors of sexually explicit material not obscene as to adults.[123]

The United States Supreme Court held that states may adjust the definition of obscenity, changing it from the original formulation handed down in *Roth*, and assessing it in terms of the

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118 *Id.* at 24. The *Miller* standard was designed to ease the burden on the prosecution in obscenity cases. *Roth*, as interpreted by later cases, "called on the prosecution to prove a negative, *i.e.*, that the material was *utterly* without redeeming social value—a burden virtually impossible to discharge under our criminal standards of proof." 413 U.S. at 21-22. *See generally*, Nowak, *supra* note 56, at 1016.

119 The *Ferber* Court noted that "[o]ver the past decade, we have adhered to the guidelines expressed in *Miller*, which subsequently has been followed in the regulatory scheme of most states." 458 U.S. at 755 (citing Hamling v. U.S., 418 U.S. 87 (1974)); Jenkins v. Georgia, 418 U.S. 153 (1974); Ward v. Illinois, 431 U.S. 767 (1977); Marks v. U.S., 430 U.S. 188 (1977); Pinkus v. U.S., 436 U.S. 293 (1978)).

120 New York v. Ferber, 458 U.S. 747 (1982).

121 *See supra* note 31.

122 390 U.S. 629 (1968).

123 *Id.* at 631. N.Y. PENAL LAW § 484(h) (McKinney 1965) prohibited the sale to minors of material harmful to them. The term "harmful to minors" was defined in subsection (1)(f) as "that quality of any description or representation in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interests of minors; (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (iii) is utterly without redeeming social importance for minors." 390 U.S. at 646.

sexual interests of minors.[124] It rejected the argument that there should be no relationship between the protection afforded the material and the age of its reader.[125] The opinion distinguished prior decisions involving the rights of minors to study German, attend private schools and refuse to salute the flag.[126] The Court noted that the German language "cannot reasonably be regarded as harmful [which] cannot be said by us of minors' reading and seeing sex material."[127]

The Court cited two interests justifying the statute. First, the legislature could properly conclude that parents and teachers are entitled to the support of laws designed to aid them in their duty towards their charges.[128] Second, the state's independent interest in the well-being of its youth allows it to safeguard them from abuses, hindering their "growth into free and independent well-developed men and citizens."[129] The opinion held that the state's power to control the conduct of children is greater than its power over adults, and may be exercised even where there is an invasion of protected freedoms.[130]

Ten years later, in *Federal Communications Commission v. Pacifica Foundation*,[131] the Court upheld the FCC's punishment of a radio station for an indecent, but not obscene, broadcast. At two o'clock on a weekday afternoon, a man driving in a car with his young son heard a radio broadcast entitled "Filthy Words." It was a twelve minute comedy monologue performed by a well-known satiric humorist, George Carlin. The Federal Communication Commission, acting on a complaint from the man, reviewed the broadcast. The Commission found the monologue to be indecent, but did not impose formal sanction. The order was placed in the station's license file, to be acted upon only if new complaints arose.

The United States Supreme Court, *inter alia*, considered the narrow issue of whether the FCC had the power to regulate a

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124 *Id.* at 638.
125 *Id.* at 636-37.
126 *Id.* at 637-38.
127 *Id.* at 641.
128 *Id.* at 639.
129 *Id.* at 640-41.
130 *Id.* at 638.
131 438 U.S. 726 (1978).

radio broadcast that is indecent but not obscene.[132] The Court answered in the affirmative, citing *Ginsberg* for the proposition that the regulation of otherwise protected expression is justified by the government's twin interests in the well-being of youth and the support of parental authority.[133]

It is important to note that the opinion in *Pacifica* distinguished its holding from that of other cases involving different broadcast media, such as newspapers.[134] In so doing, the Court first observed that the "uniquely pervasive presence"[135] of the broadcast media insures that offensive material will be received in the privacy of the home. In light of this fact, the Court concluded that the first amendment rights of an intruder into the home are plainly outweighed by one's right to be left alone.[136] Second, the Court took notice of the fact that broadcasting is "uniquely accessible to children, even those too young to read."[137] The Court stated that the broadcast in question "could have enlarged a child's vocabulary in an instant."[138] In summary, the *Pacifica* opinion held that the easy access of broadcasting to children, coupled with the state's interests in the upbringing of its youth "amply justify special treatment of indecent broadcasting."[139]

These two decisions demonstrate that the Court had been gradually moving toward a clear distinction in first amendment protection between situations which involve adults and those which involve children. Yet, until 1982, when the Court decided *New York v. Ferber*, it had not addressed situations where minors were the subject of pornography.

Conclusion

Child pornography is correctly regarded as a form of child abuse. It makes victims of innocent children, scarring their per-

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132 *Id.* at 729. The Court also answered other questions unrelated to the first amendment question. *Id.* at 734.
133 *Id.* at 749-50.
134 *Id.* at 748.
135 *Id.*
136 *Id.*
137 *Id.* at 749.
138 *Id.* For a transcript of the broadcast in question, *see* Appendix to Opinion of the Court. *Id.* at 751.
139 *Id.* at 750.

sons for life and often leading them down a dark road of crime, drugs and violence. It is a problem warranting different consideration than pornography involving adults.

Certain states, such as Tennessee and New York, were the first to recognize this reality. These states acted to protect children from pornographic exploitation without regard to the legal issue of obscenity. The concern upon which these states focused was the harm to the children involved in such activity, not the ill effects upon society in general. It was this concern that the Supreme Court agreed was compelling in *New York v. Ferber*. The Court clearly stated that the interest in protecting children overrode the potential abridgement of the first amendment guarantee of expression. In other words, child pornography, provided it is not defined in an overly broad manner, is not protected speech.

As is often the case when criminal activity has links to organized crime, or is otherwise characterized by extensive internal networks, state enforcement efforts are of limited effectiveness. Indeed, with increasing frequency it results to the federal government to augment state measures with uniform national measures. This is essentially the story of the Child Protection Act of 1984. Congress took heed of what the Supreme Court decided and stated in its opinion in *New York v. Ferber*. Accordingly, Congress enacted changes in our federal law that will protect children from pornographic exploitation. These changes impose drastic fines upon and sanctions against all those involved in child pornography production and distribution. The new federal provisions also allow prosecution of child pornographers without regard to the legal obscenity of the material. By so doing, they provide children with the full extent of constitutional protection permitted. With this increased federal involvement and commitment to eradicate child pornography, it can be confidently predicted that fewer children will fall victim to such heinous activity.

Todd J. Weiss