CONSTITUTIONAL LAW — FIRST AMENDMENT — STATES MAY PROSCRIBE THE PRIVATE POSSESSION OF NON-OBSCENE CHILD PORNOGRAPHY — *Osborne v. Ohio*, 110 S. Ct. 1691 (1990)

The first amendment to the United States Constitution provides that Congress shall enact no law that abridges the freedom of speech.[1] This protection has never been interpreted, however, as an unconditional right. Over the last half-century, the United States Supreme Court has labored to clearly define the contours of the amendment.[2] This struggle took on a new dimension in the 1970s when it was widely reported that the circulation of child pornography had grown significantly.[3] In response, congressional and state lawmakers enacted legislation designed to combat this new national evil.[4]

While the law presumes that all forms of communication enjoy constitutional protection,[5] this supposition is rebutted when a court finds affirmative proof that the speech does not sufficiently advance the underlying intent of the first amendment.[6] Recently, in *Osborne v. Ohio*,[7] the United States Supreme Court concluded that the private, at-home possession of non-obscene child por-

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[1] U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." *Id.*

[2] *See* Note, *Private Possession of Child Pornography: The Tensions Between Stanley v. Georgia and New York v. Ferber*, 29 WM. & MARY L. REV. 187 (1987). *See also infra* notes 22-109 and accompanying text.

[3] *See* Note, *Child Pornography: A New Role for the Obscenity Doctrine*, ILL. L. FORUM 711, 711-14 (1978). Investigative reports indicated the existence of a substantial child pornography market. *Id.* at 713-14. For example, the New York Times ran a front page story that described the confiscation by the police of 4,000 copies of sexually explicit films featuring children. *Id.* at 714 (citing N.Y. Times, Apr. 27, 1977, at A1, col. 6). Other newspapers reported similar stories, several of which focused on child pornography. *Id.* (citations omitted).

But see Stanley, *The Child Porn Myth*, 7 CARDOZO ARTS & ENT. L. J. 295 (1989) (asserting that moral crusaders, law enforcement officials, media and politicians exaggerated the extent of child pornography market).

[4] *See* Note, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J. 327, 331-38 (1985); *see also* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 537-38 (1981). Prior to the enactment of these laws, states relied predominantly upon child welfare, incest and rape statutes to punish adolescent sex abusers. *Id.* at 538.

[5] *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983).

[6] *See id.*

[7] 110 S. Ct. 1691 (1990).

nography does not advance the purposes of the first amendment and therefore, was not constitutionally protected. [8]

On July 22, 1985, a warrant was issued in Columbus, Ohio pursuant to a sworn statement from Columbus Police Department Detective James A. Philips.[9] A search of Clyde Osborne's residence resulted in the confiscation of photographs of a naked fourteen-year old boy.[10] The pictures, found in a desk drawer in the appellant's bedroom, were stored in a personal photo album apparently in Osborne's possession for several years.[11] Osborne was arrested for violation of an Ohio statute[12] prohibiting the control or possession of any material depicting a minor "in a

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[8] *Id.* at 1697.

[9] State v. Young, 37 Ohio St. 3d 249, 525 N.E.2d 1363, 1366 (1988). The affidavit contained information disclosed to the detective during a conversation with an Ohio postal inspector. *Id.* The informant told Philips that Clyde Osborne, a Columbus resident, was recently implicated in a Florida investigation for possession of photographic negatives of adolescents engaged in sexual activity. *Id.*

[10] *Osborne*, 110 S. Ct. at 1695 n.11.

[11] *Id.* at 1712 (Brennan, J., dissenting). The photographs were apparently not sold through the child pornography market but were given to Osborne by a friend. *Id.*

[12] OHIO REV. CODE ANN. § 2907.323(A) (Anderson 1986 & Supp. 1989). The statute states, in pertinent part:

> (A) No person shall do any of the following:
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> (1) Photograph any minor who is not the person's child or ward in a state of nudity, or create, direct, produce or transfer any material or performance that shows the minor in a state of nudity, unless both of the following apply:
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> (a) The material or performance is, or is to be, sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having proper interest in the material or performance;
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> (b) The minor's parents, guardian, or custodian consents in writing to the photographing of the minor, to the use of the minor in the material or performance, or to the transfer of the material and to the specific manner in which the material or performance is to be used.
>
> (2) Consent to the photographing of his minor child or ward, or photograph his minor child or ward, in a state of nudity or consent to the use of his minor child or ward in a state of nudity in any material or performance, or use or transfer such material or performance, unless the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor,

state of nudity."[13]

In a pre-trial motion, Osborne asserted that the statute violated his first amendment right of expression.[14] Relying on a previous Ohio Supreme Court decision that upheld the constitutionality of the anti-possession law,[15] the trial court denied Osborne's motion.[16] Thus, Osborne was tried and found guilty by a jury.[17] Subsequently, the conviction was upheld by the court of appeals.[18]

Affirming the jury verdict, the Ohio Supreme Court judicially restricted the statute's reach from "in a state of nudity" to "lewd exhibition or. . .graphic focus on the genitals," in order to save it from unconstitutional overbreadth.[19] Osborne petitioned

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judge, or other person having a proper interest in the material or performance;

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

Id.

[13] *Id.*

[14] State v. Young, 37 Ohio St. 3d 249, 250, 525 N.E.2d 1363, 1366 (1988). Osborne also made a motion to suppress the photographs which was overruled. *Id.*

[15] State v. Meadows, 28 Ohio St. 3d 43, 52, 503 N.E.2d. 697, 704-05 (1986). *Meadows* was the first case to address the constitutionality of the Ohio child pornography anti-possession legislation. *Young*, 37 Ohio St. 3d at 250, 525 N.E.2d at 1366. Appellant John Meadows was arrested and convicted under the Ohio law for owning photographs of a minor engaged in sexual activity. *Meadows*, 28 Ohio St. 3d at 43, 503 N.E.2d at 698. Relying on Stanley v. Georgia, 394 U.S. 557 (1969), the Ohio Court of Appeals overturned the conviction because there was no indication that Meadows produced, distributed, or sold the confiscated materials. *Meadows*, 28 Ohio St. 3d at 45, 503 N.E.2d at 698. His conviction was reinstated by the Ohio Supreme Court which found that the principles expressed in New York v. Ferber, 458 U.S. 747 (1982), dictated a strong state interest in the protection of children. *Meadows*, 28 Ohio St. 3d at 47-52, 503 N.E.2d at 701-05. *See infra* notes 83-109 and accompanying text.

[16] *Young*, 37 Ohio St. 3d at 250, 525 N.E.2d. at 1366.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 251-52, 258, 525 N.E.2d. at 1367-68, 1373. A statute is facially over-

the United States Supreme Court for certiorari.[20] In upholding appellant's conviction, the Court determined that non-obscene child pornography was devoid of constitutional protection and therefore, the statute was not violative of Osborne's right to free speech.[21]

Despite the seemingly boundless scope of protections afforded by the first amendment, it is not an absolute guarantee of free speech.[22] The United States Supreme Court began classifying types of speech and levels of protection in *Chaplinsky v. New Hampshire*[23] where the appellant was convicted of calling a public official a "damned fascist" and a "damned racketeer."[24] Chaplinsky was charged under a state statute which forbade addressing derisive, offensive or annoying words to anyone who was legally in a public place or on a public street.[25]

The *Chaplinsky* Court unanimously held that no exposition of ideas or social value could be derived from such speech and that

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broad if it "does not aim specifically at evils within the allowable area of state control but, . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

20 Osborne v. Ohio, 109 S. Ct. 3212 (1989).

21 Osborne v. Ohio, 110 S. Ct. 1691, 1695 (1990).

22 Note, *supra* note 2, at 187. *See also* Note, *First Amendment Does Not Preclude Closure of Adult Bookstore Where Illegal Activity Occurs on Premises* — Arcara v. Cloud Books, Inc., 17 SETON HALL L. REV. 382 (1987) (first amendment guarantees are not absolute).

23 315 U.S. 568 (1942) (authored by Justice Murphy for a unanimous court).

24 *Id.* at 569. The criminal complaint charged that Chaplinsky:

> [W]ith force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names."

Id.

25 *Id.* Specifically, the statute provided:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. (citation omitted). Through various exceptions and motions, Chaplinsky asserted that the state law was an unconstitutional restriction on his freedom of the press, freedom of worship and freedom of speech because the language was vague and indefinite. *Id.* Appellant's various assertions were all subsequently denied in the lower courts. *Id.* The United States Supreme Court determined that only the freedom of speech argument merited review. *Id.* at 571.

the state's interest in morality and order outweighed the individual's right of expression.[26] In the now infamous dictum, Justice Murphy included obscenity among the areas of unprotected speech.[27] The early test found that these unconstitutional expressions, by their very nature, tended to incite a spontaneous breach of the peace, or to inflict an injury upon those who hear their utterance.[28]

Subsequent to *Chaplinsky*, the Court, on a piecemeal basis, continued to restrict the first amendment protection offered to various categories of speech.[29] The following year in *Prince v. Massachusetts*[30], the petitioner, a Jehovah's Witness and the guardian of a nine-year old girl, was arrested for allowing the child to peddle religious articles on the streets of Brockton, Massachusetts at night.[31] Prince was convicted of violating two provisions of the Massachusetts child labor law,[32] notwithstanding the

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[26] *Id.* at 572. Justice Murphy held that the Constitution did not forbid the criminal punishment of personal verbal abuse because no such utterance could be an essential element of the furtherance of ideas. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

[27] *Chaplinsky*, 315 U.S. at 571-72. While Justice Murphy did not classify obscenity as a "fighting word", he did consider it "disorderly." *Id.* at 573.

[28] *Id.* at 572 (citing CHAFEE, FREE SPEECH IN THE UNITED STATES 149-50 (1941)). The standard was judged objectively by "what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . ." *Id.* at 573. The majority dismissed the appellant's argument that the statute was vague, indefinite and violative of his right to due process of law. *Id.* at 574. Rather, the Court found that the punishing of verbal acts which did not unduly infringe upon protected speech was sufficiently narrow to avoid vagueness. *Id.* Justice Murphy proposed that the language used by Chaplinsky was likely to provoke retaliation from the average person and therefore, bring about a breach of the peace. *Id.*

[29] *See* Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 16 n.6 (1987-88).

[30] 321 U.S. 158 (1943).

[31] *Id.* at 159-60. Appellant Prince and the young girl were both ordained ministers in the Jehovah's Witnesses. *Id.* at 161. Prince distributed the order's magazines "Consolation" and "Watchtower" on a weekly basis in Brockton. *Id.* Prince would generally request a small sum for publications, however the magazines could be obtained free of charge. *Id.* at 161 n.4. Prince would often take the children with her even though the school attendance officer warned her to stop such practices. *Id.* at 161-62. Prince rarely took the children out at night. *Id.* at 162. As an exception, one evening at the child's behest, both Prince and the girl went out to solicit the publications. *Id.* Although the child was unsuccessful in selling even a single copy that evening, a confrontation took place between Prince and the school attendance officer, and she was subsequently arrested. *Id.*

[32] MASS. GEN. L. ch. 149, §§ 69, 80, 81 (1939). In pertinent part, the statutes read, respectively, "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." *Id.* at § 69.

Whoever furnishes or sells to any minor any article of any description

fact that the materials in question were constitutionally protected by the first amendment.[33] While stressing that the holding was limited to the facts of the case before the Court[34], Justice Rutledge made it clear that because the state had a significant interest in protecting children, the state could regulate expansively the first amendment rights of children.[35]

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with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.

Id. at § 80.

> Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty-nine to seventy-four, inclusive, . . . shall for a first offence [sic] be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than five days or both. . . .

Id. at § 81. Specifically, Prince was convicted of violating §§ 80 and 81 of the statute. *Prince*, 321 U.S. at 162.

[33] See *Prince*, 321 U.S. at 164. Appellant claimed the charges were a violation of her right to freedom of religious expression as guaranteed by the first and fourteenth amendments and therefore, denied her the equal protection of the laws. *Id.* at 160. The simple determination, however, that the state could not prohibit adults from selling the same articles did not indicate that children have an equal right. *Id.* at 168.

Justice Rutledge explained:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.

Id. The majority particularly found the "crippling effects" of child employment to be an appropriate evil which justified such restraint. *Id.* Acts which are wholly permissible for adults may not be for minors, even when acting with the consent of the child's parents. *Id.* at 169.

[34] *Id.* at 171. Justice Rutledge limited the *Prince* holding to the proclamation of religion on public streets. *Id.* The Court refused to lay the foundation for state intervention into the religious development of children nor did the Court grant absolute power to the states to regulate every religious activity or training. *Id.*

[35] *Id.* at 170. The Court held that state legislatures could legitimately determine that parents need the aid of public laws in the care, custody and nurture of their children. *Id.* at 166. Justice Murphy, in dissent, professed:

> If the right of a child to practice its religion in that matter is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals, or welfare of the child. The vital freedom of religion, which is 'of the very essence of a scheme of ordered

In 1957, the Court in *Roth v. United States*,[36] squarely addressed the level of protection offered to obscene speech.[37] Appellant Roth used circulars to solicit sales of pornographic books, magazines and photographs in New York.[38] He was convicted on four counts of violating a federal obscenity statute that outlawed the mailing of any lewd, lascivious, filthy or obscene communication.[39] Appellant Alberts, who ran a mail order business in Los Angeles, was charged under a California law that proscribed making available for sale indecent and obscene books, as well as for publishing, writing and composing an obscene advertisement.[40]

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liberty' cannot be erased by slender references to the state's power to restrict the more secular activities of children.

Id. at 174 (Murphy, J., dissenting) (citations omitted). Justice Murphy determined that the state failed to meet such a heavy burden in this case. *Id.*

Commentators, explaining the rationale of the *Prince* ruling, articulated:

> Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults.

Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 940 (1963).

[36] 354 U.S. 476 (1957).

[37] *Id.* at 481-82.

[38] *Id.* at 480.

[39] *Id.* The federal obscenity statute, 18 U.S.C. § 1461, provides in pertinent part:

> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and—
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> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
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> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1461 (1948).

[40] *Roth*, 354 U.S. at 481. The California Penal Code, provides in pertinent part: "Every person who wilfully and lewdly, either:

> Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise

Writing for the Court, Justice Brennan explained that all ideas containing even the slightest social importance are worthy of first amendment protection.[41] Although the issue had never been directly addressed, the Court implied that obscene speech was utterly devoid of redeeming social importance.[42] Justice Brennan reasoned that the Constitution was never intended to protect every utterance and that the first amendment's phrasing did not prevent the Court from concluding that other modes of speech, such as libel, were not within the amendment's purview.[43] Noting that universal judgment was in favor of restricting obscenity,[44] Justice Brennan cautioned that the standards for such determinations must also safeguard the first amendment protections of press and speech for materials that did not deal with sex in a manner that appealed to the actor's prurient interest.[45]

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prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or, . . .

Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print, or figure; . . .

. . . is guilty of a misdemeanor. . . ." Cal. Penal Code § 311 (West 1955).

41 *Roth*, 354 U.S. at 484.

42 *Id.*

43 *Id.* at 483 (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)). When the first amendment was adopted libel law was more developed than obscenity law. *Id.* Justice Brennan, however, found that contemporaneous evidence indicated that obscenity was also considered outside the protection of the first amendment. *Id.* Such protection was designed to assure an uninhibited exchange of political and social ideas. *Id.* at 484. Justice Brennan found that this objective was set forth in 1774 in a letter to the citizens of Quebec from the Continental Congress, which provides:

> The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and acts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

Id. (quoting 1 Journal of the Continental Congress 108 (1774)).

44 *Id.* at 484-85, 485 n.15-17. Justice Brennan found restrictions on obscene speech in the Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511, Treaties in Force 209 (U.S. Dept. State, October 31, 1956) (an international treaty of over fifty nations), and all Congressional obscenity laws enacted between 1842-1956 (citations omitted). *See Hearings Before Subcommittee to Investigate Juvenile Delinquency of the Senate Subcommittee on the Judiciary*, pursuant to S. Res. 62, 84th Cong., 1st Sess. 49-52 (1955) (discussing obscenity statute of all 48 states). *Id.*

45 *Roth*, 354 U.S. at 488. For that reason, the *Roth* majority expressly rejected the test of Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868), which had been adopted in several jurisdictions. *Roth*, 354 U.S. at 489. Rendered by Lord Chief Justice

Cockburn, the *Hicklin* test was the first commonly accepted definition of obscenity. *Id.* at 488-89. According to Lord Cockburn, "the test of obscenity is . . . , whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Hicklin*, 3 L.R.-Q.B. at 371. *See* Note, *supra* note 3, at 717.

The *Roth* Court chose to instruct the jury that the test for obscenity should be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests." *Roth*, 354 U.S. at 489. The *Roth* Court also concluded that obscene expression was devoid of constitutional protection. *Id.* at 485. Concurring in the result of Alberts v. California and dissenting in Roth v. United States, Justice Harlan criticized the majority by suggesting that "lurking underneath [the Court's] disarming generalizations [are] a number of problems which . . . leave me with serious misgivings as to the future effect of today's decisions. . . ." *Id.* at 496 (Harlan, J., concurring in part and dissenting in part). Justice Harlan further advocated:

> The Court seems to assume that 'obscenity' is a peculiar *genus* of 'speech and press' which is as distinct, recognizable, and classifiable as poison ivy is among other plants. On this basis the *constitutional* question before us simply becomes, as the Court says, whether 'obscenity,' as an abstraction, is protected by the [f]irst and [f]ourteenth [a]mendments, and the question whether a *particular* book may be suppressed becomes a mere classification, of 'fact,' to be entrusted to a factfinder and insulated from independent constitutional judgment. But surely the problem cannot be solved in such a generalized fashion. Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must decide for *itself* whether the attacked expression is suppressable within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.

Id. at 497 (Harlan, J., concurring in part and dissenting in part) (emphasis in original).

Despite Justice Harlan's concerns, the elements of the *Roth* test have survived, albeit in an altered fashion. Nine years after the decision in *Roth*, the Court took a liberal turn and articulated a new obscenity test in Memoirs v. Massachusetts, 383 U.S. 413 (1966). The *Memoirs* plurality of three Justices stated:

> [A]s elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. at 418. The key point of the break from *Roth* was the new emphasis that the speech must be "*utterly* without redeeming *social value*," as opposed to *Roth*'s "social importance" standard. *Id.* at 419 (emphasis on "utterly" in original; emphasis on "social value" added).

The current test was developed in Miller v. California, 413 U.S. 15 (1973). Refusing to affirm the "*utterly* without redeeming social value test" of *Memoirs*, Chief Justice Burger established the new guidelines for the trier of fact as:

Eleven years later in *Ginsberg v. New York*,[46] the Court further restricted the protection of the first amendment by acknowledging a state interest in the protection of children from the dangers of pornography.[47] Appellant Ginsberg and his wife operated a luncheonette and stationery store in Bellmore, Long Island.[48] Ginsberg was arrested under a New York law[49] for personally selling a "girlie" magazine to a sixteen-year old boy.[50] The state statute established a different obscenity test for minors than for adults.[51] Because the magazines were not considered obscene for adults under the applicable constitutional standard[52], the Court's inquiry was whether a different test for minors was permissible.[53]

Once again, Justice Brennan, found that two interests justified the statutory limitations on the first amendment rights of minors.[54] Primarily, the majority posited that because a parent's authority to rear his child is basic to our society, it is legitimate for a state legislature to conclude that parents are entitled to the support of the laws to assist in that responsibility.[55] Justice Brennan also argued that the state maintains an independent interest

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(a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

(b) [W]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) [W]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

See generally Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974) (traces history of obscenity definitions from fourteenth century up to modern constitutional theories).

46 390 U.S. 629 (1968).

47 *Id.* at 637-43.

48 *Id.* at 631.

49 N.Y. PENAL LAW § 484(h) (McKinney 1965).

50 *Ginsberg*, 390 U.S. at 631.

51 *Id.* at 632-33. Subsection (1)(f) of N.Y. PENAL LAW § 484(h) states that the magazines are harmful to minors if the "quality of . . . representation . . . of nudity . . . (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and is utterly without redeeming social importance for minors." N.Y. PENAL LAW § 484(h)(1)(f) (McKinney 1965).

52 *Ginsberg*, 390 U.S. at 634 (citing Redrup v. New York, 386 U.S. 767 (1967)).

53 *Id.* at 636-37.

54 *Id.* at 639.

55 *Id.*

in protecting the well-being of the nation's youth.[56] Accordingly, the Court concluded that the statute did not invade first amendment rights traditionally secured to minors.[57]

The Court finally put a temporary halt to its confining interpretation of the first amendment in *Stanley v. Georgia*[58], where a valid search warrant for appellant's home uncovered three reels of film deemed obscene by the arresting officer.[59] Stanley was found guilty of possession of obscene materials and his conviction was upheld by the Georgia Supreme Court.[60] The United States Supreme Court considered the question of whether Georgia could proscribe the private possession of obscene materials and still remain within constitutional limits.[61]

Georgia contended obscenity was devoid of first amendment protection[62] and therefore, its possession could be criminalized.[63] The Court, however, asserted that previous decisions[64]

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56 *Id.* at 640.

57 *Id.* at 637. The Court found that nothing in the act prevented parents from buying the magazines and giving them to their children. *Id.* at 639.

58 394 U.S. 557 (1969).

59 *Id.* at 558. The appellant was charged with a violation of GA. CODE ANN. § 26-6301 (Supp. 1968), which stated:

> Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to the prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion.

Id. at 558-59 n.1 (quoting GA. A CODE ANN. § 26-6301 (Supp. 1968)).

60 *Stanley*, 394 U.S. at 558-59.

61 *Id.* at 559.

62 *Id.* at 560 (citing Roth v. United States, 354 U.S. 476, 485 (1957)). *See supra* notes 36-45 and accompanying text.

63 *See Stanley*, 394 U.S. at 560. Georgia contended that states are unconstrained, subject to other constitutional limits, to regulate obscenity in any way deemed necessary. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 637-45 (1968)).

64 *Id.* at 563. The majority explained:

> *Roth* and its progeny certainly do mean that the [f]irst and [f]ourteenth [a]mendments recognize a valid governmental interest in

did not address the precise question of anti-possession legislation.[65] Instead, the Court emphasized that the Constitution protects the right to receive information and ideas, regardless of their value to society.[66] Coupled with the added importance that the appellant was prosecuted for materials found in his own home, the *Stanley* court recognized that the first amendment assumed a new dimension when privacy rights were at issue.[67]

> dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither Roth, or any other decision of this Court, reaches that far.

Id. The Court noted that both *Roth* and *Ginsberg* dealt with public actions. *Id.* at 561 & n.6. Roth was convicted of advertising and mailing obscene circulars. *Id.* at 560. Ginsberg was convicted of selling obscene materials to children. *Id.* at 561 n.6.

65 *Id.* at 560-62. The only case uncovered by the majority which dealt with the subject was State v. Mapp, 170 Ohio St. 427, 166 N.E.2d 387 (1960). *Id.* at 562 n.7 (citing *Mapp*, 170 Ohio St. at 427, 166 N.E.2d at 387). In *Mapp*, appellant packed up the belongings of a former tenant with the intention of retaining them until the tenant returned to claim his possessions. *Mapp*, 170 Ohio St. at 429, 166 N.E.2d at 388. Among the items were several pornographic books and pictures. *Id.* Following an illegal search of appellant's residence, appellant was arrested and convicted under an Ohio statute which criminalized the unlawful possession and control of obscene materials. *Id.* at 429-30, 166 N.E.2d at 389. Due to a provision of the Ohio Constitution which required the concurrence of six of the state supreme court's seven justices in order to declare a law unconstitutional, the conviction was upheld because only four members of the court determined that the statute was invalid. *Id.* at 434, 166 N.E.2d at 391.

One of the judges advocating the overruling of the statute expressed:

> I cannot agree that the mere possession of such [obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his private library seems to the writer to be a clear infringement of his constitutional rights as an individual.

Id. at 437, 166 N.E.2d at 398 (Herbert, J., dissenting).

66 *Stanley*, 394 U.S. at 564. Relying heavily on precedent, the Court opined "[i]t is now well established that the Constitution protects the right to receive information and ideas. 'This freedom [of speech and press]. . .necessarily protects the right to receive. . . .'" *Id.* (quoting Martin v. City of Struthers, 319 U.S. 141, 143 (1943)). *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (state statute forbidding use of birth control violated appellant's right of marital privacy); Lamont v. Postmaster General, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring) (federal law requiring Postmaster General to detain and deliver "communist political propaganda" only upon the addressee's specific request was unconstitutional); Winters v. New York, 333 U.S. 507, 510 (1948) (Court struck down state law prohibiting distribution of a magazine consisting principally of news stories of criminal deeds, bloodshed and lust in such detail as to become vehicles for inciting depraved and violent crimes because the statute was so indefinite and vague that it violated the first and fourteenth amendments).

67 *Stanley*, 394 U.S. at 564. Stanley was asserting his right to view and read what he pleased in order to satisfy his emotional and intellectual needs. *Id.* at 565.

The Court denied a variety of arguments proffered by Georgia in its effort to ban possession.[68] Justice Marshall found little empirical support for Georgia's claim that possession of obscene material was directly related to the commission of deviant sexual behavior.[69] Anti-social behavior, the Court reasoned, can be deterred by education and penalties for breaking the law rather than by imposing an unconstitutional statute.[70] Justice Marshall distinguished the valid proscription of public distribution from the unlawful regulation of private possession based on the latter's diminished susceptibility to create public disorder.[71] The Court also rejected Georgia's argument that possession laws were a necessary antecedent to distribution statutes, therefore, determining that while the states could regulate obscenity, they could not punish the mere ownership of pornographic materials.[72] Finally, the Court concluded that the mere fact the materials were obscene could justify other regulations but did not extend to statutes that forbade private viewing in one's home.[73]

Despite its broad holding in *Stanley*, the Court in *FCC v. Pacifica Foundation*[74] refused to retreat from its strict interpretation of the first amendment as it pertained to minors.[75] In 1973, a radio station, owned by Pacifica Foundation, broadcasted a segment by comedian George Carlin at two o'clock in the after-

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Stanley was also asserting the right to be free from government inquiry into the subject matter of his personal library. *Id.* Georgia asserted no such rights existed and any minimal liberty which may exist was lost when the materials were declared obscene. *Id.* Justice Marshall posited that the "right to be let alone" was the most comprehensive and valued right of civilized man. *Id.* at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)).

68 *Id.* at 559-67.

69 *Id.* at 566 n.9. *See* Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence*, 46 MINN. L. REV. 1009 (1962).

70 *Stanley*, 394 U.S. at 566-67 (citing Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)).

71 *Id.* at 567. The key distinction concerned the reduced possibility with private possession that the materials would fall into the hands of children or intrude upon the morals of the community at large. *Id.*

72 *Id.* at 568.

73 *Id.* The majority found that Georgia was asserting the power to control the moral content of man's thoughts. *Id.* at 565. Whatever power Georgia possessed to censor the distribution of ideas to the public for morality purposes, such power did not extend to the control of private thoughts. *Id.* at 565-66. The majority detailed the parameters of its holding by declaring that it did not intend to infringe upon the state's power to regulate the possession of other items such as firearms, stolen goods or narcotics. *Id.* at 568 n.11. The Court also left open the areas of printed, recorded or filmed materials dealing with national defense secrets. *Id.*

74 438 U.S. 726 (1978).

75 *Id.* at 748-50.

noon.[76] The piece, entitled "Filthy Words," was designed to demonstrate the seven "dirty words" that could not be said on public airwaves.[77] Several weeks after the broadcast, a man who claimed to have heard the segment while driving in his car with his young son complained about the language in a letter to the Federal Communications Commission (FCC).[78] In 1975, the FCC granted the complaint and issued a declaratory order.[79] In an opinion by Justice Stevens, the Court upheld the FCC order which threatened administrative sanctions against Pacifica[80] by creating a new level of "indecent speech.[81] The Court posited that one of its reasons for upholding the order was the unique accessibility of children to radio broadcasts, and the harm that might be caused by airing indecent segments at times when minors may be listening.[82]

In 1982, the Court took a decisively different step in advanc-

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76 *Id.* at 729. The segment was aired at two o'clock p.m. on Tuesday, October 30, 1973. *Id.*

77 *Id.* The 12-minute segment was recorded live in a California theater and listed "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." *Id.* Carlin proceeded to repeat the words several times in a variety of contexts. *Id.*

78 *Id.* at 730. Pacifica was forwarded a copy of the complaint and answered it by saying that the segment was part of an entire program devoted to an examination of modern society's attitude toward language. *Id.* The station also indicated it ran a disclaimer prior to the broadcast which informed sensitive listeners about the nature of the monologue. *Id.*

79 *Id.*

80 *Id.* at 741.

81 *Id.* at 731-32. The FCC defined "indecent" speech as "intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* (quoting 56 F.C.C.2d 94, 98 (1975)).

The Commission suggested that if such a segment also contained artistic, scientific or political value and was preceded with a warning for sensitive listeners, it might not be considered "indecent" when broadcast late in the evening. *Id.* Regardless of its value to society, the same segment would be "indecent" at times when children were more likely to be listening. *Id.*

In a later opinion, the Commission indicated the *Pacifica* ruling was "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children would most likely not be exposed to it." *Id.* at 732-33 (quoting 59 F.C.C.2d 829 (1976)).

82 *Id.* at 731-32. The FCC found four important considerations which dictate that special treatment should be given to broadcasted speech:

ing its protective attitude toward children.[83] In *New York v. Ferber*, a state law criminalized the knowing approbation of sexual activity by a minor through the promotion or distribution of material depicting the child's performance.[84] Paul Ferber, manager of a Manhattan sex shop, was arrested under the statute for selling

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(1) children have access to radios and in many cases are unsupervised by parents;

(2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ;

(3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and

(4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.

Id. at 731 n.2 (quoting 56 F.C.C.2d at 94, 97 (1975) (citation omitted)).

Justice Stevens' opinion, issued for a divided Court, recognized the classic first amendment exposition of Justice Holmes in Schenck v. United States, 249 U.S. 47 (1918), which opined:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it was done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Pacifica, 438 U.S. at 744-45 (quoting *Schenck* 249 U.S. at 52).

[83] New York v. Ferber, 458 U.S. 747 (1982).

[84] *Id.* at 750-51 (citing N.Y. PENAL LAW § 263 (McKinney 1980)). "Sexual performance" was defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." N.Y. PENAL LAW, § 263.00(1) (McKinney 1980). The statute also criminalized the consent to such activity by the child's parent, custodian or guardian. *Id.*

"Sexual conduct" was defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of genitals." *Id.* at § 263.00(3).

"Performance" was defined as "any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience." *Id.* at § 263.00(4).

"Promote" was defined as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." *Id.* at § 263.00(5). N.Y. PENAL LAW § 263.15 (McKinney 1980) provides that "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." *Id.* Promoting an obscene sexual performance by a child is governed by section 263.10 and establishes guilt upon the same guidelines of § 263.15. *Id.* at § 263.10.

two prohibited films to undercover police officers.[85] Ferber was found guilty of two counts of promoting the sexual performance of a minor.[86] The Appellate Division of the New York Supreme Court affirmed the convictions without an opinion.[87] The New York Court of Appeals reasoned that the statute violated the first amendment and overturned the conviction.[88]

The United States Supreme Court granted certiorari to determine whether New York could prohibit the distribution of non-obscene child pornography.[89] Writing for the Court, Justice White balanced the competing interests and determined that the danger to minors from the distribution of child pornography created a compelling state interest.[90]

First, the Court acknowledged that New York had a valid concern in safeguarding children against psychological and physical abuse.[91] Refusing to challenge the findings of the New York legislature, Justice White posited that the sexual acts committed during the production of pornographic materials were psychologically, emotionally, and mentally harmful to minors.[92] Justice

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85 *Ferber*, 458 U.S. at 752. The films depicted teenage boys engaged in masturbation. *Id.*

86 *Id.* Ferber was arrested under N.Y. PENAL CODE § 263.15 and was indicted pursuant to both section 263.15 and section 263.10 but found guilty only under section 263.15. *Ferber*, 458 U.S. at 752. Section 263.15 does not require proof of obscenity. *Id. See supra* note 84.

87 *Ferber*, 458 U.S. at 752 (citing People v. Ferber, 74 A.D.2d 558, 424 N.Y.S.2d 967 (1980)).

88 *Id.* (citation omitted). First, the New York court held that the statute did not express or imply an obscenity requirement. *Id.* The New York court found that while section 263.10 contained express language which included an obscenity standard, the section under which Ferber was charged, section 263.15, did not contain similar language. *Id.* The New York court refused to imply its existence into the statute. *Id.*

Secondly, in the absence of such language, the regulation unconstitutionally reached protected materials. *Id.* Despite noting a strong state interest in protecting the welfare of children, New York's highest court deemed the statute was fatally underinclusive because it criminalized the depiction of children engaged in sexual activity while failing to regulate the production or distribution of other dangerous activities. *Id.* The court of appeals also determined the statute was overbroad because it reached protected materials such as educational and medical books which dealt with the prohibited subject matter in a non-obscene, realistic manner. *Id.* at 752-53.

89 New York v. Ferber, 454 U.S. 752 (1981).

90 *Ferber*, 458 U.S. at 756-64.

91 *Id.* at 756-57. *See* FCC v. Pacifica, 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

92 *Ferber*, 458 U.S. at 758. The Court relied upon numerous commission reports which found that the use of children as pornographic subjects was harmful to both the participating minor and society as a whole. *Id.* at 759 n.10. Among these reports were findings that suggested the production of child pornography often includes

White also recognized a causal relationship between the distribution of child pornography and the sexual abuse of adolescents.[93] The *Ferber* Court perceived that child pornography creates a permanent record of the minor's performance and the harm suffered by the child is aggravated by the circulation of the material.[94] Therefore, in order to prevent further injury to the child, Justice White concluded that New York was justified in prosecuting the appellant for promoting the sexual performance of a minor.[95]

Most importantly, the Court determined that speech need not be obscene in order to be regulated.[96] The Court reasoned that New York's interest in protecting children from the dangers of premature exposure to sexual activity justified the prohibition of otherwise protected speech.[97] Therefore, as long as one small aspect of the material contained a prohibited depiction, the entire work was subject to regulation regardless of its social, artistic, political or literary value.[98]

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child molestation. *Id.* (citation omitted). The reports also suggested that the child's privacy interests are invaded by the distribution of the materials and that sexually exploited children tend to develop sexual dysfunctions and become sex abusers later in life due to an inability to develop affectionate relationships. *Id.* (citation omitted). Finally, minors exposed through pornography are predisposed to dangerous behavior such as prostitution, alcoholism and drug use. *Id.* (citation omitted).

93 *Id.* at 759. Justice White noted the writings of Professor David P. Shouvlin, a former attorney for Covenant House in New York, who found:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Id. at 759 n.10 (quoting Shouvlin, *supra* note 4, at 545).

94 *Id.* at 759.

95 *Id.* at 759-60. The production, according to the Court, made the criminalization of distribution the most expeditious method of cutting off production. *Id.* at 760.

96 *Id.* at 761. The *Ferber* Court determined that the obscenity standard professed in Miller v. California, did not reflect the particular state interest in punishing the sexual exploitation of minors. *Ferber*, 458 U.S. at 761. *See supra* note 45. The *Miller* test required the Court to examine "whether a work, taken as a whole, appeal[ed] to the prurient interest of the average person." *Ferber*, 458 U.S. at 761. The Court found this test to be totally unrelated to the issue of whether the child was harmed. *Id.* The same was true with the *Miller* requirement that the work be "patently offensive." *Id.*

97 *Ferber*, 458 U.S. at 761.

98 *Id.* The Court further rejected Ferber's contention that the work must be taken as a whole to determine if it appeals to the average person's prurient interest. *Id.* Instead, the Court found this aspect of the obscenity test had no bearing on whether the child was injured or abused during the production stage. *Id.* The issue

Justice White's third rationale asserted that the economic motive provided by the selling and advertising of child pornography increased the demand and thereby, exacerbated the potential for harm.[99] Because the economic motive created an intimate relationship between marketing and production, the Court deemed the prohibition on distribution of illegally created pornography to be within constitutional limits.[100]

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was irrelevant because it did not adequately address the state's legitimate interest in preventing harm. *Id. See supra* note 47. A child could be sexually exploited, according to Justice White, regardless of whether the depictions appealed to the prurient interests. *Ferber*, 458 U.S. at 761.

At least one commentator believes New York could have expanded the obscenity guidelines by prohibiting only those depictions which appeal to the "prurient interests of pedophiles." *See* Note, *Child Pornography: Ban the Speech and Spare the Child?*—New York v. Ferber, 32 DEPAUL L. REV. 685, 708 (1983) "Pedophilia" is a "sexual perversion in which children are the preferred sex object." *Id.* at 708 n.113 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 838 (8th ed. 1981)).

For example, in Mishkin v. New York, 383 U.S. 502 (1966), the Court found published books describing homosexuality and sado-masochistic affairs to be obscene despite finding that the material would not appeal to the prurient interests of the average heterosexual. *See* Note, *supra* note 98, at 708-09. Instead, because the books were aimed at "deviant sexual groups" the Court allowed the limited class to act as the determining factor in judging prurient interest. *Id.*

In Ginsberg v. New York, 390 U.S. 629 (1968), the sale of over-the-counter pornography, not considered obscene when viewed by adults, was criminalized when sold to a minor. *See* Note, *supra*, at 709-10. Using a rational basis test, the Court upheld the statute as forwarding the state's legitimate interest in protecting children from harmful materials. *Id.*

The pictures of young boys masturbating in *Ferber* would most likely not appeal to the prurient interest of the average person but may have a certain allure to pedophiles. *Id.* at 710. Therefore, because the photographs appealed to the prurient interests of their intended audience, it was at least possible to declare them obscene on that limited basis. *Id.* Therefore, it has been argued that it was possible for the Court to stay within precedental bounds and avoid the creation of an entirely new area of unprotected speech. *Id.*

99 *Ferber*, 458 U.S. at 761.

100 *Id.* at 761-62. The Court noted that the production of child pornography was criminalized in every state. *Id.* at 761. It was also a federal offense to produce pornographic materials using a subject under the age of sixteen. *Id.* at 762 n.15 (citing 18 U.S.C. § 2251 (1976 ed. & Supp. IV 1986). *Id.* The Court noted that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 762 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

The Court also held similarly in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973), where a newspaper was practicing an illegal form of sex discrimination by placing job descriptions in columns designated by gender. *Ferber*, 458 U.S. at 762 n.14. In upholding an injunction against the paper, the Court held:

> Any [f]irst [a]mendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether ab-

The fourth concern was the modest, or *de minimis* value in protecting pornographic reproductions or live performances of children engaged in sexual activity.[101] Justice White considered it highly unlikely that such material could be contained within a literary, educational or scientific work.[102] Finally, the majority added that content-based restrictions were not without precedent.[103] Therefore, according to Justice White, New York's ability to restrict speech by using a content-based classification was justified, because the alleged evil overwhelmingly outweighed the individual's first amendment right of expression.[104] In light of the pervasive dangers of producing child pornography and the narrow tailoring of the New York law, Justice White balanced the interests in favor of the state.[105]

Justice White also used *Ferber* to extend the "substantial overbreadth" doctrine to traditional modes of expression.[106] According to Justice White, *Ferber* convinced the Court that the "substantial overbreadth" doctrine should be extended to the distribution of sexually explicit materials featuring children.[107]

> sent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Id. (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973)).

101 *Ferber*, 458 U.S. at 762.

102 *Id.* at 762-63. Justice White suggested that instead of using children for literary works, other options, such as simulated sexual activity outside the statute's reach or the use of young-looking actors above the statutory age, were preferable alternatives. *Id.* at 763.

103 *Id.* at 763. The Court continued "[t]he question whether speech is, or is not, protected by the [f]irst [a]mendment often depends on the content of the speech." *Id.* (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976)). *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

104 *Ferber*, 458 U.S. at 763-64.

105 *Id.* at 764. It was not unusual, according to Justice White, for content-based restrictions to be found constitutional. *Id.* No case by case adjudication was needed as long as the statute's definable class of restricted material was appropriately tailored to combat the intended evil. *Id.*

106 *See* Note, *supra* note 2, at 196. The substantial overbreadth doctrine was articulated in Broadrick v. Oklahoma, 413 U.S. 601 (1973). In *Broadrick*, appellants, all Oklahoma state employees, sought to have a state law which prohibited civil servants from participating in political activities declared unconstitutional. *Id.* at 602 (citing OKLA. STAT. ANN. tit. 21 § 1021.2 (Supp. 1979)). Appellants suggested that the statute reached such constitutionally protected areas as placing bumper stickers on one's own car or wearing political buttons. *Id.* at 618. The Court concluded that because the law prohibited only political activity which was clearly partisan, it could not be declared void even though some protected conduct was within its reach. *Id.* The *Ferber* Court noted that the *Broadrick* decision involved political campaign activity and therefore did not "reach traditional forms of expression such as books and films." *Ferber*, 458 U.S. at 771.

107 *Ferber*, 458 U.S. at 771.

Appellant claimed that the statute unconstitutionally reached the distribution of materials with serious educational, literary, and scientific value which did not conflict with New York's interest in preventing harm to minors.[108] The majority, however, concluded that the minimal overbreadth which did exist was not substantial and reached only a tiny fraction of protected speech.[109]

In 1990 against the background of *Ferber* and *Stanley*, the United States Supreme Court[110] approached *Osborne v. Ohio*.[111] Writing for the majority, Justice White considered the threshold question to be whether Osborne's possession of the statutorily banned photographs was constitutionally protected.[112] Emphasizing the limits of *Stanley*[113] and the *de minimis* value of child pornography established in *Ferber*,[114] the Court held that even if Osborne had a first amendment right to view the photographs, the state interest in preventing harm to minors exceeded Osborne's interest.[115]

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108 *Id.* at 766. Even though Ferber's conduct was clearly within its main sweep, he was able to challenge the statute on its face because constitutional overbreadth is one of the few exceptions to the general principle forbidding such challenges. *Id.* at 767-68. The exception is based upon the sensitive nature of first amendment expression. *Id.*

109 *Id.* at 773. There has been a great deal of criticism hurled at the *Ferber* holding. The decision has been called an unfortunate episode in first amendment law which created a new level of second class speech whose danger was in its production, not its propagation. *See* Note, *The Supreme Court 1981 Term: Freedom of Speech and Association*, 96 HARV. L. REV. 141, 145 (1982); Note, *supra* note 98, at 686. The focus on the evils of development set a dangerous precedent which made the recent decision in *Osborne* possible. *Id.* at 705. "The *Ferber* principle, in its most general terms, is that government can censor speech which is the result of a societal harm that government has the authority to prevent." *Id.*

110 Numerous commentators predicted the clash between the two conceivably incompatible holdings. *See* DiGennaro, *Child Pornography: Issues of Statutory Vagueness*, 10 CRIM. JUST. J. 197 (1988); Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY.L.J. 15 (1987-88); Note, *supra* note 109, at 141; Note, *Taking Ferber a Step Further: Stanley Loses in the Battle Against Child Pornography*, 14 OHIO N.U.L. REV. 157 (1987); Note, *supra* note 2.

111 110 S. Ct. 1691 (1990).

112 *Id.* at 1695.

113 *Id. See* Stanley v. Georgia, 394 U.S. 557 (1969). *See supra* notes 58-73 and accompanying text. The majority noted previous decisions which posited that *Stanley* was a narrow holding. *See* United States v. 12 200-ft. Reels of Super 8 MM Film, 413 U.S. 123, 126-30 (1973).

114 *Osborne*, 110 S. Ct. (citing New York v. Ferber, 458 U.S. 747, 762 (1982)). *See supra* notes 100-02 and accompanying text.

115 *Osborne*, 110 S. Ct. at 1695. The majority recognized a significant distinction from *Stanley*. *Id.* The key difference, according to Justice White, was Georgia's paternalistic attitude in *Stanley* that the obscenity would "poison the minds of its viewers." *Id.* at 1691. In OSBORN, however, Ohio's protectionist disposition sought to shield exploited children by minimizing the market for child pornography. *Id.* The

Primarily, the majority dismissed Osborne's freedom of speech argument finding that Ohio had a compelling interest in safeguarding the psychological and physical well-being of a minor.[116] The Court further advocated that anti-possession prohibitions may decrease the demand for the product and thus, may have a subsequent chilling effect on production.[117] According to Justice White, the first amendment rarely broadens its immunity to writing or speech that abets the violation of a criminal statute.[118]

Justice White perceived that because the child pornography market consists primarily of underground operations, it was imperative to extend criminal punishment to possessors.[119] The Court maintained that it would be practically impossible to eradicate child pornography merely by imposing sanctions on the distributors and producers.[120] Therefore, the Court refused to

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Stanley Court posited that the state may control the dissemination of ideas which were offensive to the public morality, but could not use that power to control a person's private thoughts. *Id.* (quoting *Stanley*, 394 U.S. at 566).

Justice White noted that every court to decide the issue balanced the interests similarly. Id. at 1695-96. *See* United States v. Boffardi, 684 F. Supp. 1263, 1267 (S.D.N.Y. 1988) (motion to dismiss criminal charge of violating a New York state law which forbade the knowing receipt of child pornography was denied); Felton v. State, 526 So.2d 635, 637 (Ala. Crim. App. 1986), *aff'd sub nom.* Ex parte Felton, 526 So.2d 638 (Ala. 1988) (Alabama state court held an anti-possession law was constitutional); People v. Geever, 122 Ill.2d 313, 327-28, 522 N.E.2d. 1200, 1206-07 (1988) (Illinois Supreme Court denied appellant's argument that child pornography anti-possession law was unconstitutional); Savery v. Texas, 767 S.W.2d 242, 245 (Tex. Crim. App. 1989) (Texas Court of Appeals upheld constitutionality of a state law outlawing simple possession of child pornography); State v. Davis, 53 Wash. App. 502, 505, 768 P.2d 499, 501 (1989) (Washington law, making it a gross misdemeanor to possess printed or visual sexual explicit material depicting minors, was constitutional).

116 *Osborne*, 110 S. Ct. at 1696. The Court held that it was "evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling,' " especially since such harm could easily befall children used as subjects of pornographic materials. *Id.* (quoting *Ferber*, 458 U.S. at at 756-57).

117 *Id.* The Court found that advertising and sales were an integral part of the production of child pornography because they provided the manufacturer and retailer with an economic motive. *Id.* The same state interest was recognized in *Ferber*. *See supra* notes 99-100 and accompanying text.

118 *Osborne*, 110 S. Ct. at 1696 (citing *Ferber*, 458 U.S. at 761-62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949))).

119 *Id.* at 1697. The majority refused to challenge the means chosen by the Ohio legislature and noted that "[g]iven the importance of the state's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain." *Id.*

120 *Id.* Justice White noted that 19 other states were compelled to pass similar laws in an attempt to limit the production and distribution of child pornography. *See* ALA. CODE § 13A-12-192 (1988); ARIZ. REV. STAT. ANN. § 13-3553 (1989);

force Ohio to employ less intrusive means of combatting the underground operations before resorting to the anti-possession law.[121]

The Court also indicated that child pornography created a permanent record of child abuse and its possession caused continued harm to its victims.[122] The majority deemed it reasonable for Ohio to conclude that pedophiles seduce children to perform sexual acts by showing them pornographic materials of their peers.[123] The Court emphasized that the culmination of state interests combined to legitimize the possession regulation.[124]

The majority also rejected Osborne's overbreadth argument even though, on its face, the statute purported to criminalize possession of nude photographs of children, a practice previously considered within the protection of the first amendment.[125] Instead, the Court declared that the statute was not overbroad because the potential reach of the statute was not substantial,[126]

COLO. REV. STAT. § 18-6-403 (Supp. 1989); FLA. STAT. § 827.071 (1989); GA. CODE ANN. § 16-12-100 (1989); IDAHO CODE § 18-1507 (1987); ILL. REV. STAT., ch. 38, para. 11-20-1 (1987); KANS. STAT. ANN. § 21-3151 (Supp. 1989); MINN. STAT. § 617.247 (1988); MO. REV. STAT. § 573.037 (Supp. 1989); NEB. REV. STAT. 28-809 (1989); NEV. REV. STAT. § 200.730 (1987); OHIO REV. CODE ANN. §§ 2907.322 and 2907.323 (Supp. 1989); OKLA. STAT., TIT. 21, § 1021.2 (Supp. 1989); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (1988); TEX. PENAL CODE ANN. § 43.26 (1989 & Supp. 1989-90); UTAH CODE ANN. § 76-5a-3(1)(a) (Supp. 1989); WASH REV. CODE § 9.68A.070 (1989); W. VA. CODE § 61-8C-3 (1989).

121 *Osborne*, 110 S. Ct. at 1696-97. Osborne pointed to the holding in *Stanley* where the Court overturned a Georgia statute criminalizing possession in order to control distribution. *Id.* Justice White, however, noted that the *Stanley* Court found Georgia did not have a compelling state interest sufficient to override Stanley's first amendment right to privacy. *Id.*

Additionally, the Court posited that the *Stanley* decision did not infringe upon the rights of the states to make mere possession of other items punishable because typically no first amendment rights are involved in statutes which criminalize possession. *Id.* (citing Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969)).

122 *Id.* at 1697 (citing *Ferber*, 458 U.S. at 759). *See supra* notes 94-95 and accompanying text.

123 *Osborne*, 110 S. Ct. at 1697. The majority relied upon the Attorney General's Commission on Pornography which found "[c]hild pornography is often used as part of a method of seducing child victims." *Id.* at 1697 n.7.

124 *Id.* at 1697-98.

125 *Id.* at 1698. In Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), an ordinance prohibiting drive-in theaters from showing nude scenes viewable from public places was struck down because the Court found nudity by itself was protected expression. *Id.* at 213.

126 *Osborne*, 110 S. Ct at 1697. Specifically, the Court stated "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statutes plainly legitimate sweep.'" *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

and the statute provided for proper exemptions.[127] Justice White maintained that the statute survived because the Ohio Supreme Court construed the law to prohibit only the possession of materials which included a vivid focus on the minor's genitals or a lewd display of nudity.[128] The majority advocated that this judicial construction avoided punishing the viewing or possession of innocent photographs of naked children.[129]

Additionally, the Court maintained that Ohio could employ the state supreme court's narrow construction of the statute against Osborne's behavior as long as the defendant received fair warning that his conduct was illegal.[130] Justice White determined

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127 *Id.* at 1698. *See supra* note 12.

128 *Osborne*, 110 S. Ct. at 1698 (citing State v. Young, 37 Ohio St. 3d, 249, 252, 525 N.E.2d 1363, 1368 (1988)).

129 *Id.* The Court noted similar language survived overbreadth challenges in other cases. *Id.* The New York statute in *Ferber* criminalized the promotion of "lewd exhibition of [a child's] genitals." *Id.* (quoting New York v. Ferber, 458 U.S. 747, 751 (1982)). In *Miller*, the Court noted "lewd exhibition of the genitals" was within the area of permissible regulation. *Id.* (quoting Miller v. California, 413 U.S. 15, 25 (1973)). The Court also found that the Ohio law was more narrowly tailored than the statute in *Ferber* because it contained exceptions that limited the permissible prohibitions to conduct which are possessed or viewed for "prurient purposes." *Id.* at 1699 n.11. The New York statute did not contain such a limitation but survived an overbreadth challenge because the Court felt any impermissible application of the statute would touch only a small portion of the materials affected by the statute. *Id.*

In his dissent, Justice Brennan distinguished the two statutes by showing Ohio's law punished "lewd exhibition of nudity" while New York's addressed "lewd exhibition of genitals." *Id.* at 1707 (Brennan, J., dissenting). The dissent noted that Ohio defined nudity to include depictions of buttocks, female breasts, pubic areas, and covered, erect male genitals. *Id.*

The majority disagreed, however, and found Justice Brennan's distinction between specific body parts and general body areas to be constitutionally insignificant. *Id.* at 1699 n.11. Justice White noted, even if the distinction was valid, it did not apply because the Ohio Supreme Court limited the term nudity to mean exhibition of the genitals. *Id.* (citing *Young*, 37 Ohio St.3d at 258, 525 N.E.2d. at 1373 (1988)). The majority rejected the contention that the prohibition potentially reached protected conduct, such as the possession of photographs of an unclothed infant by a family friend. *Id.* The Court also noted that because such photographs would not contain a "lewd exhibition or graphic focus on the genitals" they were outside the purview of the statute. *Id.*

130 *Id.* at 1699. The Court also took notice of Hamling v. United States, 418 U.S. 87 (1974), where appellants were arrested and convicted of mailing and conspiring to mail obscene brochures and advertisements. *Osborne*, 110 S. Ct. at 1699. Their conduct was in violation of federal law, making it a crime to mail any "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." *Id.* The legislation was judicially restricted to define obscenity as "patently offensive representations or depictions of that specific 'hard core' sexual conduct given as examples in Miller v. California." *Id.* (quoting *Hamling*, 418 U.S. at 114). Justice White noted that Hamling's overbreadth argument was rejected, because the appellants had fair notice that their behavior was illegal. *Id.* at 1699-1700.

that Osborne was aware that his actions were in violation of the statute because the sexually explicit photographs of adolescent boys clearly constituted child pornography.[131] The Court added that even though the statute was ambiguous in parts, the reasonable person in petitioner's position would have had adequate notice.[132] Therefore, because Osborne was aware that his conduct was criminal, the Court perceived his reliance on previous decisions allowing facial overbreadth challenges to be unjustified.[133]

Having rejected the overbreadth and freedom of speech arguments, Justice White addressed Osborne's due process claim.[134] The majority concluded that the statute required a

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131 *Osborne*, 110 S. Ct. at 1700. The Court found it obvious from the face of the regulation that Ohio intended the legislation to eradicate child pornography. *Id.* The Ohio Code listed the statute in the Sex Offenses chapter and criminalized the possession and viewing of naked children for other than "proper purposes." *Id.* The statute was preceded and followed in the Ohio Code by similar regulations. *Id.*

132 *Id.*

133 *Id.* at 1700-02. Justice White determined that the petitioner incorrectly relied on Marks v. United States, 430 U.S. 188 (1977), Rabe v. Washington, 405 U.S. 313 (1972), and Bouie v. City of Columbia, 378 U.S. 347 (1964). *Osborne*, 110 S. Ct. at 1700. In *Bouie*, defendants failed to leave a restaurant after the manager asked them to do so. *Id.* (citing *Bouie*, 378 U.S. at 348). Even though the manager had not objected to the defendants entering the propriety, they were arrested under a South Carolina trespass law which criminalized "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry." *Id.* (quoting *Bouie*, 378 U.S. at 349). The South Carolina Supreme Court, in affirming the convictions, construed the statute to make it unlawful to remain on the property of another after a request to vacate. *Id.* (citing *Bouie*, 378 U.S. at 350-52). Holding that the expanded interpretation of the statute was unforeseeable, the United States Supreme Court reversed on the basis of inadequate notice. *Id.* (citing *Bouie*, 378 U.S. at 350-52).

In *Rabe*, the defendant was convicted under a Washington obscenity law which, as written, did not criminalize defendant's actions. *Id.* (citing *Rabe*, 405 U.S. at 314-15). The Washington Supreme Court, construing the statute to reach defendant's conduct, upheld the conviction. *Id.* (citing *Rabe*, 405 U.S. at 315). The United States Supreme Court reversed, holding the broadening of the statute to be unforeseeable and depriving the defendant of a warning that his conduct was criminal. *Id.* (citing *Rabe*, 405 U.S. at 315).

The *Marks* Court held that the replacement of the Memoirs v. Massachusetts, 383 U.S. 413 (1966) obscenity standards, with those of Miller v. California, 413 U.S. 15 (1973), could not be used retroactively against the defendant because it was unexpected that the Court would expand the range of conduct which was constitutionally proscribable. *Osborne*, 110 S. Ct. at 1700 (citing *Marks*, 430 U.S. at 196).

See Massachusetts v. Oakes, 109 S. Ct. 2633 (1989); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

134 *Osborne*, 100 S. Ct. at 1703. Justice White noted that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged." *Id.* at 1703 n.17 (quoting *In Re* Winship, 397 U.S. 358, 364 (1970)).

Justice Frankfurter stated in a dissenting opinion in Leland v. Oregon, 343 U.S. 790 (1952) "[i]t is the duty of the Government to establish guilt beyond a

knowing possession of materials which depicted a "graphic focus" or "lewd exhibition" of the genitals.[135] The Court noted that both sides admitted that the jury instructions did not include a scienter charge.[136] The Court recognized, however, that Ohio contended that the state code's default provision sufficiently implied a *mens rea* requirement into the statute even though the jury was not instructed on that element.[137]

The Court concluded that Osborne waived his right to object to the faulty instruction when he failed to assert it at trial.[138] Next, the Court remanded the case upon determining that Osborne's rights were infringed by the trial court's failure to instruct the jury on the "graphic focus" and "lewd exhibition elements."[139] Justice White articulated that procedural deficiencies do not prevent the Court from reaching the substance of an appellant's due process claim.[140] Accordingly, the Court posited

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reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural context of 'due process.' " *Id.* at 802-03 (Frankfurter, J., dissenting).

135 *Osborne*, 110 S. Ct. at 1703. Scienter, or *mens rea*, in the Ohio Revised Code refers to the "requisite degree of culpability" necessary for each element of a criminal offense. OHIO REV. CODE ANN. § 2901.21(A) § (2) (Anderson 1986 & Supp. 1989).

136 *Osborne*, 110 S. Ct. at 1703.

137 25 O. Jur.3d. § 57 (1981). The provision implies "recklessness" as the proper *mens rea* in statutes which do not specify the mental state required to convict the defendant. *Id.* The OHIO REV. CODE ANN. § 2901.22(C) (Anderson 1986 & Supp. 1989) further provides:

> A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a knowing risk that such circumstances are likely to exist.

Id.

138 *Osborne*, 110 S. Ct. at 1703. The majority stipulated that "Osborne's counsel's failure to urge that the court instruct the jury on scienter constitutes an independent and adequate state law preventing us from reaching Osborne's due process contention on that point." *Id.*

139 *Id.* at 1703-05.

140 *Id.* at 1703-04. The Court stipulated that the case at bar was analogous to Douglas v. Alabama, 380 U.S. 415 (1965). In *Douglas*, the appellant did not object to the admission of a confession statement at trial. *Id.* at 418. Although appellant waived his right of appeal, the Court determined the substance of the statement was reviewable. *Id.* at 422. The Court held:

> In determining the sufficiency of objections [the Court has] applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.

that because Osborne moved for dismissal based on overbreadth, he was not required to object to the jury instructions.[141] Therefore, despite finding Osborne's first amendment arguments unconvincing, the Court reversed the conviction and remanded the case to determine whether the verdict rested upon proof of the elements.[142]

In a spirited dissent, Justice Brennan vehemently denied that Ohio was free to prosecute Osborne under the anti-possession law because the *Stanley* decision prohibited criminalizing private possession of photographs depicting simple nudity.[143] Examining the statute on its face, the dissent determined it to be overexpansive.[144] According to Justice Brennan, one section made it a crime to view or possess any performance or material that depicted a minor in a state of nudity while another section[145] defined nudity as a representative showing or depiction of particular body parts.[146] Justice Brennan interpreted the two statutes, when read together, to define child pornography in terms of simple nudity.[147] The dissent reasoned that the statute's

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Id. (citing Love v. Griffith, 266 U.S. 32, 33-34 (1924); Davis v. Wechsler, 263 U.S. 22, 24 (1923)). The *Douglas* Court concluded that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection" and therefore, the state procedural ruling could not thwart defendant's constitutional claim. *Id.*

141 *Osborne*, 110 S. Ct. at 1704. Justice White found defense counsel filed a motion to dismiss for vagueness and overbreadth immediately before the short trial. *Id.* When the motion was overruled, counsel immediately proposed various jury instructions. *Id.*

142 *Id.* at 1705.

143 *Osborne*, 110 S.Ct. at 1705 (Brennan, J., dissenting).

144 *Id.* The dissent noted that even if as the statute is "construed authority by the Ohio Supreme Court, [it] is still fatally overbroad." *Id.*

145 *Id.* (quoting OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson 1986 & Supp. 1989)).

146 *Id.* (quoting OHIO REV. CODE ANN. § 2907.01(H) (Supp. 1989)). The statute defined nudity as a representative showing or depiction of the buttocks, genitals, pubic area, covered male penis in an apparently erect state, or the female breast, below the top of the nipple, with less than a full, dark covering. *Id.* (quoting OHIO REV. CODE ANN. § 2907(H) (Anderson 1986 & Supp. 1989)).

147 *Id.* Justice Brennan advocated that " 'nudity alone' does not place otherwise protected speech outside the mantle of the [f]irst [a]mendment." *Id.* (quoting Schad v. Mount Ephraim, 452 U.S. 61, 66 (1981)). Justice Brennan stated that other provisions in the Ohio Code did not phrase child pornography in terms of "nudity." *Id.* at 1705 n.1 (Brennan, J., dissenting). The dissent cited OHIO REV. CODE ANN. § 2907.321 (Supp. 1989) which criminalizes the "knowing creation, sale, distribution, or possession of 'obscenity involving a minor' ". *Osborne*, 110 S. Ct. at 1705 n.1 (quoting OHIO REV. CODE ANN. § 2907.321 (Anderson 1986 & Supp. 1989)). OHIO REV. CODE ANN. § 2907.322 (Supp. 1989) prohibits the "knowing creation, sale, distribution, or possession of materials depicting a minor engaging in 'sexual activity' ". *Osborne*, 110 S. Ct. at 1705 n.1 (quoting OHIO REV.

"proper purposes" provisions and exemptions failed to save its facially overbroad language.[148] The dissent similarly argued that the Ohio Supreme Court's construction of the statute[149] not only failed to remedy the overbreadth, but also generated a vagueness question.[150]

Justice Brennan perceived the majority's exclusive reliance on *Ferber* to be unjustified because the New York statute was substantially different from the Ohio law.[151] Distinguishing the two, Justice Brennan showed that the New York regulation was concerned with the "lewd exhibition of genitals" in the depiction of sexual conduct, whereas the Ohio statute focused on the "lewd exhibition of nudity."[152] The dissent observed that this distinction rendered the Ohio law more sweeping than New York's.[153]

The dissent further asserted that the Ohio legislature failed to clearly define "lewd exhibition of nudity."[154] According to Justice Brennan, the word "lewd" did not appear in the Sex Of-

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CODE ANN. § 2907.322 (Supp. 1989)). Justice Brennan noted that the latter statute defined sexual activity as sexual conduct, bestiality, or masturbation. *Id.* (citation omitted).

The dissent also pointed to the decision in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), where the Court struck down an ordinance which reached films depicting a baby's buttocks, scenes of cultures where nudity is endemic, or the naked bodies of war victims. *Osborne*, 110 S. Ct. at 1706 (Brennan, J., dissenting). Justice Brennan found the Ohio law in question to be equally unconstitutional. *Id.*

148 *Osborne*, 110 S. Ct. at 1706 n.2 (Brennan, J., dissenting). Instead, Justice Brennan articulated that the specified "proper purposes," such as medical, scientific, and bona fide artistic or educational purposes were too narrow and vague to pass constitutional muster. *Id.* (citation omitted). The dissent stressed that words such as "educational," "scientific," or "artistic" are open to numerous definitions. *Id.* The dissent also found the provision too limited because it ignored permissible uses such as fashion photographs or exchanges of pictures between family friends or grandparents. *Id.*

149 *Id.* at 1706 (Brennan, J., dissenting). The statute was limited by the Ohio Supreme Court to "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals. . . ." State v. Young, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363, 1368 (1988). *See supra* note 19 and accompanying text.

150 *Osborne*, 110 S. Ct. at 1706 (Brennan, J., dissenting).

151 *Id.* *See* New York v. Ferber, 458 U.S. 747 (1982).

152 *Osborne*, 110 S. Ct. at 1707 (Brennan, J., dissenting). The majority maintained that the Ohio court, in the context of its restriction, presumed the term "nudity" to refer to a "lewd exhibition of the genitals." *Id.* at 1707 n.4 (Brennan, J., dissenting) (citing *Young*, 37 Ohio St. 3d at 258, 525 N.E.2d at 1373). Justice Brennan criticized the Court's holding and determined that this construction clearly showed the Ohio court intended its limitation to pertain solely to nudity. *Id.* Additionally, Justice Brennan noted that even if the majority was correct in its belief that Ohio created an acceptable standard, the contradictory references to "genitals" and "nudity" created a new problem of vagueness. *Id.*

153 *Id.* at 1708 (Brennan, J., dissenting).

154 *Id.* at 1708-10 (Brennan, J., dissenting).

fenses chapter of the Ohio Revised Code.[155] Additionally, the dissent declared that no commonly recognized definition of the term could be drawn upon to save it from vagueness.[156] The dissent noted that the common law subjectively[157] defined "lewd" as "any gross indecency so notorious as to tend to corrupt community morals."[158] Moreover, Justice Brennan found that often a state's label of the term is too uncertain and indefinite to be enforced.[159]

The dissent further distinguished the two statutes by finding that while the Ohio "lewd exhibition of nudity" test stood alone, New York's test was restricted by a list of examples describing sexual conduct that was subjected to the statute.[160] Justice Bren-

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155 *Id.* at 1709 (Brennan, J., dissenting) (citing OHIO REV. CODE ANN. § 2907.01 (Anderson 1986 & Supp. 1989)). The word "lewd" did appear in OHIO REV. CODE ANN. § 2905.26(B), but that section was repealed in 1974. *Osborne*, 110 S. Ct. at 1709 n.8 (Brennan, J., dissenting). It defined "lewd" as "any indecent or obscene act." *Id.* The current code contains no use of the term, despite defining other sex-related terms such as "importuning," "prostitution," and "public indecency." *Id.*

The term is used in non sex-related statutes. *Id.* For example, "[a]ny municipal corporation may . . . [p]rovide for the punishment of all lewd and lascivious behavior in the streets or other public places." *Id.* (quoting OHIO REV. CODE ANN. § 715.52 (Anderson 1976)). Also, an obscene phone call is defined as the "use or address to . . . [another] person of any words or language of a lewd, lascivious, or indecent character . . . ." *Id.* (quoting OHIO REV. CODE ANN. § 4931.31 (Anderson 1977)). Finally, public nuisance is defined as "any place in or upon which lewdness, assignation, or prostitution is conducted . . . or upon which lewd, indecent, lascivious, or obscene films . . . [are exhibited]." *Id.* (quoting OHIO REV. CODE ANN. § 3767.01(C) (Anderson 1988)).

The dissent found that the Ohio court did not point to any of the above provisions in limiting the scope of the child pornography statute. *Id.* Justice Brennan also noted that the most descriptive statute, OHIO REV. CODE ANN. § 3767.01 (Anderson 1988) (public nuisance), was not interpreted to include possession of photographs or other printed materials within its scope, but instead criminalized only conduct or behavior. *Osborne*, 110 S. Ct. at 1709 n.8. Additionally, the dissent recognized that Ohio was among the states which had concluded "lewdness" did not apply to the sale of pornography. *Id.*

156 *Id.* at 1710 (Brennan, J., dissenting). Prohibitions on lewdness grew, historically, from the "archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion." *Id.* at 1710 n.10 (Brennan, J., dissenting) (quoting Pryor v. Municipal Ct., 25 Cal.3d 238, 248, 158 Cal. Rptr. 300, 335, 599 P.2d 636, 641 (1979)).

157 *Id.* at 1710 (Brennan, J., dissenting) (citing Morgan v. Detroit, 389 F.Supp. 922, 930 (E.D. Mich. 1975)).

158 *Id.* (quoting Collins v. State, 160 Ga. App. 680, 682, 288 S.E.2d 43, 45 (1981)).

159 *Id.* (quoting Courtemanche v. State, 507 S.W.2d 545, 546 (Tex. Crim. App. 1974)). *See* Attwood v. Purcell, 402 F.Supp. 231, 235 (D. Ariz. 1975); District of Columbia v. Walters, 319 A.2d 332, 335-36 (D.C. 1974).

160 *Osborne*, 110 S. Ct. at 1707-08 (Brennan, J., dissenting) (citing New York v. Ferber, 458 U.S. 747, 751 (1982)).

nan determined that the descriptive clause of examples was the dispositive element of the *Ferber* decision.[161] The dissent maintained that even though the New York statute was susceptible to some degree of overbreadth, the *Ferber* Court assumed that the elaborate definition provided in the statute prevented New York from reading the statute expansively.[162] According to Justice Brennan, the Ohio statute did not contain such a detailed delineation of prohibited conduct.[163] Thus, while the Ohio legislation reached numerous materials which did not comprise lewd exhibitions, the dissent reasoned that the lack of a pronounced test made it impossible to predict exactly what conduct could be reached.[164] The dissent emphasized that although some might find any depiction of nudity "lewd," nudity alone does not render the expression void of first amendment protection.[165]

Additionally, the dissent asserted that Ohio's failure to specify how lewdness is to be determined rendered the statute unconstitutionally vague.[166] According to Justice Brennan, Ohio insufficiently attempted to quell the obscurity by inserting the "graphic focus" element into the statute.[167] The dissent recognized that the state's failure to provide any direction resulted in a definition that encompassed every representation that contained nothing more than a prominent or central focus on the geni-

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161 *Id.* at 1707 (Brennan, J., dissenting).

162 *Id.* at 1707-08 (Brennan, J., dissenting) (citing *Ferber*, 458 U.S. at 751).

163 *Id.* at 1708 (Brennan, J., dissenting).

164 *Id.* Justice Brennan suggested that, under the statute, Ohio could criminalize such conduct as depictions of a small portion of a child's buttocks or even a small part of a female's breast. *Id.* at 1708 n.5 (Brennan, J., dissenting). Accordingly, the dissent noted that the statute could also reach pictures of topless bathers in the Mediterranean, unclothed toddlers, teenage children in revealing attire, such as transparent bathing suits or dresses, or even fully clothed males whose genitals appear turgid. *Id.*

The Ohio law could also criminalize numerous pictures of unclothed babies and the works of great artists such as Degas, Donatello and Renoir who have depicted nude models less than eighteen years of age. *Id.* The dissent suggested that such conduct is not child pornography as determined under the *Ferber* test, but rather materials deserving of first amendment protection. *Id.*

165 *Id.* at 1708 (Brennan, J., dissenting).

166 *Id.* at 1711 (Brennan, J., dissenting). There was no mention, according to Justice Brennan, whether the perspective should be of a reasonable person or pedophile, or whether the scope was national or local. *Id.*

167 *Id.* Justice Brennan promulgated that under a subjective "graphic focus" standard even Michelangelo's "David" could be considered to portray a graphic focus on the genitals. *Id.* at 1711-12 (Brennan, J., dissenting). Additionally, because the statute made "view[ing]" a crime, art gallery patrons could find themselves subject to criminal charges. *Id.* at 1712 n.13 (Brennan, J., dissenting) (citing OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson 1986 & Supp. 1989)).

tals.[168] The dissent declared that the "graphic focus" and "lewd exhibition" standards, even as limited by the Ohio Supreme Court, were too overbroad to provide a workable test and therefore, Osborne should not be retried under the statute.[169]

Justice Brennan reiterated that the Constitution prohibits the proscription of personal ownership of child pornography.[170] Emphasizing that non-obscene child pornography was on the same constitutional level as obscene adult pornography,[171] the dissent vehemently advocated the distinction between the types of materials that can be regulated and the means of regulation.[172] The dissent claimed that the ability to ban distribution and production of child pornography does not imply an equal authority to criminalize possession.[173] Justice Brennan noted that the Court frequently granted first amendment protection to viewers or listeners of pornographic materials, but not suppliers or producers.[174] While acknowledging that certain limitations on possession were constitutionally permissible, Justice Brennan

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168 *Id.* at 1711-12 (Brennan, J., dissenting).

169 *Id.* at 1712 (Brennan, J., dissenting).

170 *Id.* *See supra* notes 64-65 and accompanying text. Under the circumstances, the dissent determined that the majority's reliance on *Ferber* was unjustified because *Ferber* simply classified the distribution and production, not private possession, of child pornography as a category of material devoid of first amendment protection. *Osborne*, 110 S. Ct. at 1712-13 (Brennan, J., dissenting) (citing New York v. Ferber, 458 U.S. 747, 765 (1982)).

171 *Osborne*, 110 S. Ct. at 1713 (Brennan, J., dissenting). *Compare* Note, *supra* note 4.

172 *Osborne*, 110 S. Ct. at 1713 (Brennan, J., dissenting). *See* United States v. Miller, 776 F.2d 978 (11th Cir. 1985) (per curiam) (appellant was convicted for receiving child pornography through mail under federal statute which was found not violative of the right to privacy); People v. Keyes, 135 Misc.2d 993, 517 N.Y.S. 696 (1987) (dismissed indictment under New York state law against a defendant who obtained child pornography for personal use without intent to distribute or sell).

In a different context in United States v. Reidel, 402 U.S. 351 (1971), Justice White remarked:

> The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution.

Id. at 356 (Justice White was explaining the holding in *Stanley* and distinguishing it from the facts in *Reidel*).

In *Osborne*, Justice White promulgated that "[t]he interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*." *Osborne*, 110 S. Ct. at 1695.

173 *Osborne*, 110 S. Ct. at 1712 n.15 (Brennan, J., dissenting).

174 *Id.* at 1712 & n.15 (Brennan, J., dissenting) (citations omitted).

advocated such power to be limited to national defense issues.[175] The dissent denounced placing child pornography on an equal plane with military information and considered it inconsistent with constitutional precedent.[176]

Moreover, the dissent declared that less intrusive means of combating the sexual exploitation of minors can be employed which are more plausible than Ohio's approach.[177] According to Justice Brennan, the state's failure to demonstrate the inadequacy of laws prohibiting the creation, distribution, and sale of child pornography resulted in a regulation that was fatally unsubstantiated and premature.[178] Similarly, Justice Brennan criticized the majority's holding that Ohio's anti-possession laws defused the production of child pornography.[179] According to the dissent, the mere fact that nineteen other states chose similar paths did not prove anti-possession laws to be an indispensable corollary to successful prosecution of producers and distributors.[180]

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175 *Id.* at 1713 n.16 (Brennan, J., dissenting). Justice Brennan found the Court frequently gave paramount importance to national defense issues but still required a definite showing of immediate danger before allowing an infringement of first amendment freedoms. *Id.*

176 *Id.* (citing Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969)).

177 *Id.* at 1713 (Brennan, J., dissenting). Ohio already had laws in effect prohibiting the creation, sale and distribution of child pornography. Id.

178 *Id.* at 1715 (Brennan, J., dissenting).

179 *Id.* at 1713-14 (Brennan, J., dissenting).

180 *Id.* at 1713-14 n.17 (Brennan, J., dissenting). Justice Brennan opined that the issue was already answered in *Stanley*, which held:

> [W]e are faced with the argument that the prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on the alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

Id. at 1714 (Brennan, J., dissenting) (quoting *Stanley*, 394 U.S. at 567-68).

The federal experience, according to Justice Brennan, also illustrated that the criminalizing of possession is not a necessary element of an effective enforcement strategy. *Id.* at 1713-14 n.17 (Brennan, J., dissenting). For example, The Protection of Children from Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977) chose not to criminalize possession but instead concentrated on production, sale, and distribution of materials depicting minors engaged in sexually-exploitive conduct. *Osborne*, 110 S. Ct. at 1713 (Brennan, J., dissenting). Also, 18 U.S.C. § 2252(a) (1982 ed.) criminalized the receipt, trafficking, or mailing of such materials in interstate commerce. *Osborne*, 110 S. Ct. at 1714 n.17 (citing 18 U.S.C. § 2252(a) (1982)). Although the Act was amended in 1984, it did not include an amendment to criminalize possession. *Id.* Despite the omission, the Attorney Gen-

While sympathizing with Ohio's concern in protecting minors, the dissent determined that the state failed to strike the proper balance between the prevention of child abuse and appellant's first amendment rights.[181] The dissent opined that the statute was overinclusive despite Ohio's interest in destroying the physical, permanent record of the child's sexual activity.[182] Conceding that evidence suggested pedophiles often use child pornography to lure minors into performing sexual acts, the dissent pointed out that the same source also indicated pedophiles were just as likely to use adult pornography.[183] While recognizing that the power to punish actual sexual abuse belonged to the states, the dissent stressed that simple private possession of child pornography could not be criminalized.[184]

Finally, the dissent concurred with the majority in holding that Osborne's conviction should be reversed on the basis of a due process violation.[185] Justice Brennan, however, asserted that the reversal should be based both on the trial court's failure to instruct the jury on the "graphic focus" and "lewd exhibition" elements as well as the scienter element.[186] The dissent suggested that the recognition of both due process violations led the majority to confuse Osborne's due process and overbreadth arguments.[187]

In conclusion, the dissent strongly disagreed that the trial court's failure to instruct the jury on the scienter element could be remedied by reading the Ohio statute in conjunction with the *mens rea* default provision of the Ohio Revised Code.[188] Accord-

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eral's Commission on Pornography found that "the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry." *Id.* (quoting 1 U.S. Dept. of Justice, Attorney General's Commission on Pornography, Final Report 607 (1986)).

181 *Osborne*, 110 S. Ct. at 1715 (Brennan, J., dissenting). The dissent's determination was made in light of Ohio's inability to establish a link between anti-possession laws and production. *Id.*

182 *Id.* at 1714-15 n.18 (Brennan, J., dissenting). The statute does not require the state to prove the child was abused during the production or even that the minor was aware a picture or film was being taken. *Id.* Further, if the law's purpose was solely to prevent child abuse, the statute was underinclusive because it granted immunity to parents for the same conduct. *Id.*

183 *Id.*

184 *Id.*

185 *Id.* at 1715 (Brennan, J., dissenting).

186 *Id.* at 1715-16 (Brennan, J., dissenting).

187 *Id.* at 1715-16 & n.20 (Brennan, J., dissenting).

188 *Id.* at 1716 (Brennan, J., dissenting) (citing OHIO REV. CODE ANN. § 2901.21(B) (Anderson 1986)). The Code "provides that recklessness is the ap-

ing to Justice Brennan, Osborne raised an objection to the faulty charge when he challenged the statute's potential overbreadth.[189] The dissent proffered that the overbreadth challenge sufficiently reserved the due process challenge stemming from the trial court's lack of a scienter charge.[190] Because scienter was a necessary element of anti-possession laws,[191] Justice Brennan determined that the Ohio Supreme Court contradicted itself by implying a scienter requirement in order to elude the overbreadth challenge while refusing to recognize Osborne's objection to the court's failure to instruct on the scienter element at trial.[192] Therefore, Justice Brennan opined that the omission from the jury charge violated the sound and long held principal that the state must prove every element of the offense.[193] Accordingly, the dissent emphasized that this plain error denied Osborne his constitutional right to due process of the law, thus rendering his conviction invalid.[194]

It is difficult, if not impossible, to imagine a form of speech as indefensible as child pornography. The first amendment, however, was never intended to garrison the morals of the dominating class; rather, it was enacted to protect the unpopular, but constitutional, views of the minority.[195] While most Americans consider child pornography incorrigible, some regard it as enjoyable or even educational.

The *Ferber* Court correctly concluded that non-obscene child pornography was on the same constitutional plane as obscene adult materials. The decision was justified by the unique harm that occurs in the production of child pornography. The statute's regulations were warranted because restrictions on the sale

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propriate *mens rea* where a statute 'neither specifies culpability nor plainly indicates a purpose to impose strict liability.'" *Id.* (quoting OHIO REV. CODE ANN. § 2901.21(B) (Anderson 1980)).

189 *Id.* Justice Brennan noted that the objection to "mere possession" included "[a] natural inference . . . that intent is one of the additional elements that the state should have been required to prove." *Id.*

190 *Id.*

191 *Id. See* New York v. Ferber, 458 U.S. 747, 765 (1982).

192 *Osborne*, 110 S. Ct. at 1716 (Brennan, J., dissenting). *Ferber* recognized that the addition of a *mens rea* requirement narrowed a potentially overbroad statute, thus overbreadth challenges should be viewed accordingly. *Id.* (citing *Ferber*, 458 U.S. at 747).

193 *Id.* at 1716-17 (Brennan, J., dissenting) (citing Francis v. Franklin, 471 U.S. 307, 313 (1985) (quoting In re Winship, 397 U.S. 358, 363 (1970))).

194 *Id.*

195 *See* COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 5-10 (1958).

and distribution of other unprotected speech were constitutionally permissible.

The *Osborne* holding, however, traverses into unchartered territory that cannot be justified by an exclusive reliance on *Ferber*. While the private possession of other unprotected speech has been steadfastly safeguarded by *Stanley*, the *Osborne* Court refused to recognize a similar protection when the depictions featured minors. By holding that the mere possession of child pornography can be proscribed, the *Osborne* Court goes well beyond *Ferber* and essentially places child pornography on a lower plane of first amendment protection than its obscene adult counterpart.

Justice White's opinion was flawed in three significant ways. First, Ohio was unable to demonstrate through empirical evidence that the physical harm to the child actor was exacerbated by the private possessor viewing the films or books in his own home. To the contrary, Justice White disregarded evidence indicating that federal laws that did not contain anti-possession provisions managed to halt not only the commercial market but also its mutated underground operations. The majority's failure to uncover even a single authoritative finding in support of its holding exemplifies the current Court's willingness to forsake established principles and employ conclusionary reasoning to achieve conservative results.

Second, the Court's reliance on opinions regarding the possibility that psychological injuries may befall the adolescent actors is evidence that the statute was not narrowly tailored to the state's interest. The Ohio law does not require that the child has knowledge that the representations were being made, distributed or possessed. In the absence of such awareness, there is no psychological harm. Similarly, even though the law was designed to protect minors against the permanent recording of sexual activity, the statute did not require the portrayal of any libidinous act, but simply a "lewd exhibition of nudity."

Finally, Justice White allowed Ohio to invade the sanctity of a private home without a showing that less intrusive means of combatting the harms of child pornography production were insufficient. The lack of such important evidence places serious doubts upon the intentions of both the legislature and the Court. While the threat of having an Ohio police officer invade his bedroom may not cause the reasonable pedophile to destroy his library, it does shatter the faith of the reasonable first amendment

advocate in the Rehnquist Court's willingness to protect individual liberties.

This is not to say prohibitions on the private possession of child pornography cannot be justified. Until other means of prevention prove unsuccessful or more substantiated proofs regarding harm resulting from simple possession are offered, however, this new means of combatting recorded child abuse remains premature. The Court could have advanced the state's compelling interest and remained true to the first amendment by encouraging Ohio to employ other less intrusive means, before it submitted to this unprecedented approach. For example, Ohio could have established a legislative task force to increase the state's law enforcement efforts.

Recalling the words of Justice Marshall, "[i]f the [f]irst [a]mendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[196] Although it may be difficult to envision a mode of speech less tenable than child pornography, it is even more arduous to accept the unnecessary overruling of such an entrenched constitutional principal.

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196 Stanley v. Georgia, 394 U.S. 557, 565 (1969).