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Child Pornography and the Right to Privacy

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CHILD PORNOGRAPHY AND THE RIGHT TO PRIVACY

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For the first time, the United States Supreme Court, in *Osborne v. Ohio*,[1] upheld a state statute prohibiting the in-home possession of child pornography for personal use.[2] At the same time, the Court delineated a new and broader definition of child pornography.[3] In these two respects, the *Osborne* ruling made significant inroads on the First and Fourth Amendment rights to speech and privacy.[4] The Fourth Amendment was affected because authorities can now inquire into the contents of an individual's personal library.[5] Previously, an individual had the right to possess any communicative material in the home that was for personal use.[6] The First Amendment was affected because the Court expanded the definition of child pornography permitting the states to regulate material that was formerly protected by the First Amendment.[7]

The Court limited the First and Fourth Amendment rights to speech and privacy because of the state's overriding interest in eliminating the use of children in pornographic films and photographs.[8] In *Osborne*, the Court balanced the nature of the harm that a child suffers against the effectiveness of a ban on private possession[9] as a means of curbing pornographic film production.[10] This article explores whether a prohibition against private possession of child pornography is warranted, and how child pornography should be defined.

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1. 110 S. Ct. 1691 (1990).

2. *Id.* at 1697.

3. *Id.* at 1698.

4. *See generally* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that although states retain broad power to regulate obscenity, the First and Fourth Amendments prohibit states from criminalizing in-home possession of obscene materials).

5. *Cf. Osborne*, 110 S. Ct. at 1696-97 (allowing prohibition of in-home possession of child pornography).

6. *See Stanley*, 394 U.S. at 565.

7. *See infra* text accompanying notes 110-14.

8. *Osborne*, 110 S. Ct. at 1696. *Cf.* New York v. Ferber, 458 U.S. 747, 756-62 (1982) (finding that the state could advance its interest in preventing sexual exploitation of children by prohibiting the advertisement and sale of child pornography).

9. In this article "private possession" is used as a shorthand expression for possession in one's home without intent to distribute or display.

10. *Osborne*, 110 S. Ct. at 1696-97.

I. CHILD PORNOGRAPHY

In *New York v. Ferber*,[11] the United States Supreme Court ruled on the constitutionality of a statute which prohibited the commercial production and distribution of non-obscene[12] material depicting children engaging in sexual conduct.[13] The statute was enacted "to prevent the abuse of children who are made to engage in sexual conduct for commercial purposes . . . ."[14] Prior decisions of the Court had permitted regulation of obscenity, but under the test for obscenity, the material had to be patently offensive, appeal to the prurient interest, and, when taken as a whole lack serious literary, artistic, political or scientific value.[15] In *Ferber*, the Court said that with material depicting children, these three criteria need not be met.[16] Rather, the Court determined that the commercial production and distribution of material depicting children involved in sexual conduct caused substantial harm to those children.[17] Therefore, the commercial production and distribution of such material could be regulated in order to protect the children[18] even if the material did not constitute obscenity under the *Miller v. California* test.[19] The Court reasoned that stopping the commercial distribution of the pornographic material will eliminate the economic incentive to produce the films and photographs.[20]

The Court's rationale for permitting the regulation of child pornography was different from its rationale for permitting the regulation of obscenity. Although the Court has been vague on the governmental interest that justifies regulating obscenity,[21] its test focused primarily on the offensive nature of the material to the public.[22] The Court has

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11. 458 U.S. 747 (1982).
12. For the Supreme Court's test for "obscenity," see *infra* text accompanying note 15.
13. *See Ferber*, 458 U.S. at 765 (reviewing N.Y. PENAL LAW § 263.15 (Consol. 1984)).
14. *Id.* at 753.
15. 413 U.S. 15, 24 (1973).
16. *Ferber*, 458 U.S. at 756, 761.
17. *Id.* at 756-58.
18. *Id.* at 764.
19. *See supra* text accompanying note 15.
20. *Id.* at 760.
21. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 635-40 (1982).
22. *See Miller*, 413 U.S. at 24. The Court's obscenity test also presumes that obscene materials lack social value. Redish, *supra* note 21, at 638-39. *See also* Comment, *The Price We Pay for Pornography, A Karamazov View*, 39 CASE W. RES. L. REV. 1395, 1397 (1988-89) (authored by Jeffrey L. Kirchmeier) (stating that obscenity's exclusion from First Amendment protection is justified because society benefits from the censorship of obscenity). The *Ferber* Court, however, found that the test for child pornography does not consider either the offensive nature or the social value of child pornography. *Ferber*, 458 U.S. at 764.

dismissed arguments that obscenity regulation is justified because of harm to the persons depicted, harm to the consumer, or harm to members of the public by consumers of obscene material.[23]

Unlike the cases in which obscenity was regulated, the Court in *Ferber* specifically delineated its justification for regulating child pornography. The *Ferber* Court based its decision on the harm children suffer as a result of their posing for pornographic films or photographs.[24] Specifically, the Court found two types of harm.[25] First, a child who is posing and being photographed while engaging in sexual conduct suffers physical and psychological harm from the actual process itself.[26] The Court cited studies that indicated that posing and photographing a child engaging in sexual conduct may affect a child's personal relationships and sense of personal worth later in life.[27]

Second, the Court found that the commercial distribution of the depictions was harmful to the children.[28] Dissemination in the "mass distribution system for child pornography" created the possibility that the depiction might be used in later years in a fashion detrimental to the child.[29] The Court said that if the commercial distribution can be stopped, there will be no economic incentive to produce the depictions.[30]

The *Ferber* Court was cognizant that it was creating a new category of First Amendment material subject to regulation.[31] Therefore, the Court set limits as to what would constitute "child pornography."[32] To be considered child pornography, material must "*visually* depict sexual conduct by children below a specified age."[33] Additionally, the state must prove the accused had scienter as to the character and content of the depiction.[34]

The Court in *Ferber* accepted the New York statute's definition of "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic

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23. Stanley v. Georgia, 394 U.S. 557, 565-67 (1969).
24. *Ferber*, 458 U.S. at 758-60.
25. *Id.*
26. *Id.* at 758.
27. *Id.* at 758 n.9.
28. *Id.* at 759.
29. *Id.* at 759 n.10 (quoting Shouvlin, *Preventing the Social Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).
30. *Id.* at 760.
31. *Id.* at 763.
32. *Id.* at 764.
33. *Id.* (emphasis in original).
34. *Id.* at 765.

abuse, or lewd exhibition of the genitals."[35] The Court was initially concerned with the definition of "lewd exhibition of the genitals,"[36] because the Court had previously ruled that depictions of nudity are protected speech.[37] In *Miller*, the Court distinguished "lewd exhibition of the genitals" from nudity.[38] Therefore, the *Ferber* Court added a cautionary note that its definition not be read too broadly.[39]

Because the New York statute did not prohibit possession of pornographic materials, the *Ferber* Court did not address the constitutionality of a ban on possession.[40] In the wake of *Ferber*, however, eighteen states adopted legislation prohibiting the possession of *Ferber*-defined child pornography regardless of whether there was an intent to distribute.[41] Moreover, with regard to the penalty, these statutes typically did not distinguish between distribution and possession.[42] Rather, they made possession as serious an offense as production and distribution.[43]

In addition to the eighteen states which have recently enacted child pornography legislation, the federal government also stepped

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35. *Id.* (quoting N.Y. PENAL LAW § 263.00(3) (Consol. 1984)).

36. *Id.*

37. *Id.* at 765 n.18 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)).

38. *See Miller*, 413 U.S. at 25 (giving examples of depictions a state could constitutionally regulate as obscenity).

39. *Ferber*, 458 U.S. at 764-65.

40. Kent & Truesdell, *Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography*, 68 OR. L. REV. 363, 367 (1989) (noting that the *Ferber* Court did not address the question of the constitutionality of prohibiting possession of child pornography). Potuto, Stanley + Ferber = *The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 17-18 (1987-88) (asserting that *Ferber* left unclear whether states could prohibit possession of pornographic materials).

41. ARIZ. REV. STAT. ANN. § 13-3553 (1989); COLO. REV. STAT. ANN. § 18-6-403 (West 1990); FLA. STAT. § 827.071 (1989); GA. CODE ANN. § 16-12-100 (1988); IDAHO CODE § 18-1507A (1987); ILL. ANN. STAT. ch. 38, para. 11-20.1 (Smith-Hurd Supp. 1991); KAN. STAT. ANN. § 21-3516 (Supp. 1990); MINN. STAT. ANN. § 617.247 (West 1987); MO. ANN. STAT. § 573.037 (Vernon Supp. 1991); NEB. REV. STAT. § 28-813.01 (1989); NEV. REV. STAT. ANN. § 200.730 (Michie Supp. 1989); OHIO REV. CODE ANN. § 2907.322 (Anderson Supp. 1990); OKLA. STAT. ANN. tit. 21, § 1021.2 (West Supp. 1991); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (Supp. 1991); TEX. PENAL CODE ANN. § 43.26 (Vernon Supp. 1991); UTAH CODE ANN. § 76-5a-3 (1990); WASH. REV. CODE ANN. § 9.68A.070 (West Supp. 1991); W. VA. CODE §§ 61-8C-3, 61-8D-6 (1989).

42. *See, e.g.*, WASH. REV. CODE ANN. §§ 9.68A.050 to .070 (making distribution, transportation into state, or possession of material depicting minors in sexually explicit conduct a "class C felony").

43. *But see* ALA. CODE. § 13A-12-192 (making private possession of child pornography a less serious felony than possession "with intent to disseminate"); FLA. STAT. § 827.071 (making commercial possession a second degree felony while private possession is a third degree felony); GA. CODE ANN. § 16-12-100(g) (making commercial possession a felony, but private possession a misdemeanor).

into the arena. Recently, Congress enacted a law that almost completely prohibited the possession of child pornography.[44] The Child Protection Act of 1984 forbade the receipt, in interstate or foreign commerce, of visual materials depicting minors engaged in sexually explicit conduct.[45] The federal government's executive branch supported a ban on private possession. In 1986, the Attorney General's Commission on Pornography recommended that state legislatures make the knowing possession of child pornography a felony.[46]

II. THE RIGHT TO PRIVACY

The eighteen post-*Ferber* state statutes which banned the possession of child pornography[47] did not explicitly exempt private possession.[48] Therefore, it is unclear whether these states intended to prohibit the private possession of child pornography as well. Although they may have assumed that the private possession of child pornography was protected by the Fourth Amendment's right to privacy, the states may have also intended that their statutes prohibit private possession.[49]

Regardless of what the state legislatures may have intended, local prosecutors brought charges for private possession of *Ferber*-defined child pornography under these statutes.[50] Trial courts convicted and state appellate courts affirmed these convictions.[51] In 1986, the Ohio

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44. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 206 (codified at 18 U.S.C. §§ 2251-2255 (1988)).

45. 18 U.S.C. § 2252 (1988). The penalty for a first offense is a maximum ten years imprisonment, a $100,000 fine, or both. *Id.* § 2252(b). *See generally* United States v. Boffardi, 684 F. Supp. 1263 (S.D.N.Y. 1988) (denying a privacy challenge and upholding a prosecution under 18 U.S.C. § 2252(a)(2) for in-home receipt of child pornography shipped in interstate commerce), *aff'd mem.*, 872 F.2d 1022 (2d Cir. 1989); Myers, *'Sting' Nets 15 Child-Pornography Recipients*, NAT'L L.J., Sept. 8, 1986, at 28, col. 2 (describing indictments under Child Protection Act for receipt of child pornography as result of U.S. Postal Service establishing a fake child pornography mail order company that sent advertisements to persons suspected of trafficking in child pornography).

46. 1 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 648 (1986) [hereinafter COMMISSION ON PORNOGRAPHY].

47. *See supra* note 41.

48. *See supra* text accompanying notes 41-43. For definition of "private possession," see *supra* note 9.

49. Potuto, *supra* note 40, at 18 n.18.

50. *See infra* text accompanying notes 52-54.

51. *Id.*

Supreme Court upheld a conviction for private possession[52] after an intermediate appellate court reversed the conviction as a violation of the defendant's Fourth Amendment right to privacy.[53] Similarly, in 1988, the Illinois Supreme Court upheld a conviction for private possession under an Illinois statute.[54] Both the Ohio and Illinois Supreme Courts found that the harm to the child used in the production and distribution of child pornography outweighed an individual's privacy interest in possessing such material in the home for personal use.[55]

The right to privacy has been recognized in a variety of situations.[56] The right unsuccessfully asserted by the defendants in the Ohio and Illinois cases was the privacy right to receive information in the home.[57] As applicable to printed or visual matter possessed in the home, this right derives from two separate guarantees found in the Bill of Rights. First, the First Amendment protects the right to speech including the concomitant right to receive information from others.[58] Second, without reliable information that evidence of a crime might be found, the Fourth Amendment prohibits governmental intrusion into the home.[59]

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52. State v. Meadows, 28 Ohio St. 3d 43, 503 N.E.2d 697 (1986) (upholding OHIO REV. CODE ANN. § 2907.322(A)(5)), *cert. denied*, 480 U.S. 936 (1987). This is not the statute at issue in *Osborne v. Ohio*.

53. State v. Meadows, No. C-850091, at 5 (Ohio Ct. App., 1st Dist. Dec. 18, 1985) (WESTLAW, 1985 WL 4501), *rev'd* 28 Ohio St. 3d 43, 503 N.E.2d 697 (1986), *cert. denied*, 480 U.S. 936 (1987).

54. People v. Geever, 122 Ill. 2d 313, 522 N.E.2d 1200 (upholding ILL. REV. STAT. ch. 38, para. 11-20.1 (1989)), *appeal dismissed*, 488 U.S. 920 (1988).

55. *Geever*, 122 Ill. 2d at 327, 522 N.E.2d at 1206-07; *Meadows*, 28 Ohio St. 3d at 52, 503 N.E.2d at 703; *see also* Savery v. State, 767 S.W.2d 242, 245 (Tex. Ct. App. 1989) (denying a privacy challenge and upholding a prosecution for private possession of child pornography under TEX. PENAL CODE ANN. § 43.26); State v. Davis, 53 Wash. App. 502, 504, 768 P.2d 499, 501 (Wash. Ct. App. 1989) (denying a privacy challenge and upholding a prosecution under WASH. REV. CODE ANN. § 9.68A.070 for private possession of child pornography).

56. Michigan v. Clifford, 464 U.S. 287, 297 & n.7 (1984) (reaffirming "reasonable" privacy expectations in the contents of fire-damaged buildings); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (finding that the right of privacy can extend to decisions on whether to publicize one's entertainment performance); Roe v. Wade, 410 U.S. 113 (1973) (finding that constitutional right to privacy extends to a woman's decision to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a constitutional right to privacy in the marital relationship).

57. *Geever*, 122 Ill. 2d at 327, 522 N.E.2d at 1206-07; *Meadows*, 28 Ohio St. 3d at 52, 503 N.E.2d at 704.

58. Martin v. Struthers, 319 U.S. 141, 143 (1943). The First Amendment prohibits abridgment of the "freedom of speech, or of the press." U.S. CONST. amend. I.

59. *See* Aguilar v. Texas, 378 U.S. 108, 112-14 (1964), *overruled in part by*, Illinois v. Gates, 462 U.S. 213, 238 (1983) (holding that *Aguilar* "two-pronged test" abandoned in favor of the broader "totality-of-the-circumstances" analysis for determining probable cause). The

In *Stanley v. Georgia*,[60] the United States Supreme Court said that the government may not dictate what printed or visual materials persons may possess in their home for their own personal use.[61] *Stanley* involved Georgia's effort to prohibit the private possession of obscene films.[62] The Supreme Court, relying on the "fundamental" First and Fourth Amendment rights, found this prohibition to be unconstitutional.[63] The Court reasoned that both the First and Fourth Amendments guarantee the freedom of speech and "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[64]

The *Stanley* Court said that its decision still permitted criminalizing the possession of certain printed or visual materials.[65] For example, a federal statute may prohibit the possession of classified national security materials that might be used against the United States.[66] Prohibiting the possession of classified national security materials is permissible because of the possible harm that the materials could cause.[67] In contrast, obscenity was possessed solely for personal uses, so the *Stanley* Court held that its regulation would be unconstitutional.[68]

Although the *Stanley* Court permitted the private possession of obscene materials, the production and sale of those materials constitutionally may be prohibited.[69] This differed from the rule applicable to the possession of materials such as weapons or narcotics where not only production and sale, but also private possession, may be proscribed.[70] Therefore, the *Stanley* privacy right applied only to com-

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Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV.

60. 394 U.S. 557 (1969).

61. *Id.* at 565.

62. *Id.* at 559.

63. *Id.* at 564. The Court later disputed whether it had based *Stanley* entirely on the First Amendment or on both the First and Fourth Amendments. *See* Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (finding that *Stanley* was "firmly grounded in the First Amendment"); *but see id.* at 207-08 (Blackmun, J., dissenting) (arguing that *Stanley* protected both a First and Fourth Amendment right).

64. *Stanley*, 394 U.S. at 564.

65. *Id.* at 568 n.11.

66. *Id.* (referring to 18 U.S.C. § 793(d) (1988)).

67. *Cf. id.* at 566-68 (arguing that if obscenity causes behavior which harms others, then states should regulate the behavior rather than regulate the consumption of ideas contained in obscenity).

68. *Id.*

69. *See id.* at 563-64, 568.

70. *See id.* at 568 n.11.

municative materials possessed in the home for their personal communicative value.[71] This treatment of communicative materials reflected the preferred status of First Amendment rights.[72]

After *Stanley*, the Supreme Court declined to extend the possession right to contexts other than the home. In various cases, the Court held that this right did not cover the possession of obscene materials in public,[73] the receipt of obscene materials by mail,[74] the importation of obscene materials from abroad,[75] or the exhibition of an obscene film in a commercial movie theater.[76] Although the Court never renounced *Stanley*, the Court's failure to extend the *Stanley* holding to other situations led some commentators to question *Stanley*'s continuing validity.[77]

III. THE PRIVATE POSSESSION OF CHILD PORNOGRAPHY

The clash between the state's right to regulate child pornography recognized in *Ferber*, and the individual's right to privacy recognized in *Stanley* came before the United States Supreme Court in 1989 in a case from Ohio. In *Osborne v. Ohio*,[78] Osborne was convicted for the possession of four photographs of nude minors under an Ohio statute.[79] The statute, unlike the child pornography statute challenged in the earlier Ohio case,[80] used extremely broad language to define sexually-oriented material involving minors.[81] The other post-*Ferber* statutes defined the prohibited material as anything involving sexual conduct or lewd depictions.[82] In *Osborne*, the statute prohibited, with

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71. *See id.* at 566-67, 568 n.11.

72. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); *see, e.g.*, Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (examining Supreme Court overbreadth doctrine and arguing for an approach which voids any statute which is construed to infringe on First Amendment rights of the party challenging the statute or any hypothetical parties).

73. *See* United States v. Orito, 413 U.S. 139, 142-43 (1973).

74. United States v. Reidel, 402 U.S. 351, 355 (1971).

75. United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 128-29 (1973); United States v. 37 Photographs, 402 U.S. 363, 376 (1971).

76. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973).

77. Potuto, *supra* note 40, at 16-17.

78. 110 S. Ct. 1691 (1990).

79. *Osborne*, 110 S. Ct. at 1695.

80. State v. Meadows, 28 Ohio St. 3d 43, 503 N.E.2d 697 (1986) (reviewing OHIO REV. CODE ANN. § 2907.322(A)(5) (Anderson Supp. 1990)), *cert. denied*, 480 U.S. 936 (1987).

81. OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson Supp. 1990) (prohibiting possession of material "that shows a minor . . . in a state of nudity").

82. For citation to post-*Ferber* statutes, see *supra* note 41.

certain exceptions, the possession of depictions of nude minors.[83] The statute was thus an unlikely one to raise the *Stanley-Ferber* conflict because it was not based on child pornography as defined by the *Ferber* Court.[84] Consequently, the Ohio statute in *Osborne* prohibiting the possession of depictions of nude minors was problematic in light of the Supreme Court's statements in *Ferber* and an earlier case[85] that depictions of nudity constitute protected speech.[86]

The statute came before the United States Supreme Court after the Ohio Supreme Court narrowly construed the statutory language to cover only "lewd" depictions or those that involved a "graphic focus on the genitals."[87] The Ohio court thereby attempted to limit the ambit of the statute to material which satisfied the *Ferber* definition of child pornography.[88] Notwithstanding the Ohio Supreme Court's narrow interpretation of the statute, Osborne's conviction presented the United States Supreme Court with a case of first impression. The question in *Osborne* was whether private possession of child pornography could be prohibited consistent with the First and Fourth Amendments.[89]

In *Osborne*, the United States Supreme Court decided six votes to three that the Ohio Supreme Court's formulation was adequate to limit the Ohio statute's coverage to *Ferber*-defined child pornography.[90] The Supreme Court reasoned that the individual's privacy right was subordinate to the state's interest in prohibiting the private possession

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83. OHIO REV. CODE ANN. § 2907.323(A)(3).

84. *See Osborne*, 110 S. Ct. at 1706-08 (Brennan, J., dissenting) (noting substantial differences between statutes in *Ferber* and the instant case).

85. Erznoznik v. Jacksonville, 422 U.S. 205 (1975).

86. *See Ferber*, 458 U.S. at 765 n.18; *Erznoznik*, 422 U.S. at 213.

87. State v. Young, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363, 1368 (1988), *rev'd sub nom.* Osborne v. Ohio, 110 S. Ct. 1691 (1990).

88. *See Ferber*, 458 U.S. at 764 (stating that child pornography is material which "visually depict[s] sexual conduct by children below a specified age") (emphasis omitted).

89. The question was not presented quite as neatly as the text suggests. Because Ohio Revised Code § 2907.323(A)(3) was overbroad as written, there was a serious issue as to whether it could be used against Osborne. The six-member majority decided that it could. *Osborne*, 110 S. Ct. at 1697-1703. Thus, the Court could consider whether Osborne could be prosecuted for private possession. For an argument that the Court should have decided in Osborne's favor on this issue and should not have reached the issue of the constitutionality of a ban on private possession of child pornography, see Quigley & Shank, *The Invalidity of an Overbroad Statute*, 40 U. KAN. L. REV. 45 (1991). In *Osborne*, the Court did find that because the limiting construction had been made only at the appellate level, and Osborne's conviction was affirmed on the basis of that construction, Osborne had been denied due process and was entitled to a new trial. *See Osborne*, 110 S. Ct. at 1703-05. It, therefore, reversed the Ohio Supreme Court's decision and remanded. *Id.*

90. *Osborne*, 110 S. Ct. at 1698.

of child pornography.[91] The Court distinguished *Stanley* by stating that child pornography was different from obscenity for purposes of a privacy analysis.[92] Writing for the majority in *Osborne*, Justice White stressed that "*Stanley* should not be read too broadly."[93] Justice White accepted Ohio's argument for overriding the right to privacy. According to Ohio, because the state has a compelling interest in protecting its citizens, it may regulate child pornography more effectively by prohibiting not only production and distribution, but also private possession of child pornography.[94]

In *Stanley*, the Court refused to allow a prohibition on the private possession of obscenity on the alleged theory that the prohibition would reduce the trade in obscene materials.[95] The Court thus permitted Georgia to proscribe the circulation of obscene matter without prohibiting its private possession.[96] In *Osborne*, however, the Court concluded that the state had a stronger interest in the regulation of child pornography than in the regulation of obscenity.[97] The protection of children depicted in pornography, according to the *Osborne* Court, justifies this stronger interest overriding the possessor's privacy right.[98] The Court accepted Ohio's contention that a significant amount of distribution of child pornography occurs outside commercial channels.[99] Therefore, the Court concluded that a prohibition on distribution alone was insufficient.[100]

In addition, Ohio argued that a ban on the possession of child pornography was necessary to protect children from two forms of possible abuse.[101] First, child molesters who possess child pornography may use the depictions to convince a child to engage in sexual conduct.[102] The Supreme Court agreed that this was a legitimate harm which entitled Ohio to prohibit private possession.[103] Second, the Court reasoned that child pornography "permanently record[ed] the victim's

91. *Id.* at 1695-97.
92. *Id.*
93. *Id.* at 1695.
94. *Id.* at 1696-97.
95. *Stanley*, 394 U.S. at 568.
96. *Id.*
97. *Osborne*, 110 S. Ct. at 1696-97.
98. *Id.*
99. *Id.* at 1697.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*

abuse," causing potential harm to the child in the future.[104] The Court held that these possible harms gave Ohio a compelling reason to override the possessor's privacy right.[105]

IV. A COMMERCIAL PURPOSE AS AN ELEMENT OF CHILD PORNOGRAPHY

Ohio asserted that *Ferber* drove the child pornography market underground, and thus states were no longer able to curtail child pornography by raiding retail shops alone.[106] Ohio claimed that the economic incentive to produce or distribute child pornography would be eliminated only if private possession was prohibited.[107] Although the Court accepted Ohio's factual assertions about child pornography as a basis for overriding the privacy right, the Court did not examine Ohio's factual claims in detail.[108] The Supreme Court in *Osborne* analyzed the privacy issue in only four paragraphs.[109]

In *Ferber*, the Supreme Court authorized the prohibition of commercial production and distribution of child pornography, in order to eliminate the economic incentive to produce it.[110] The eighteen post-*Ferber* statutes prohibited the possession of child pornography even if it was not commercially produced or distributed.[111] The Supreme Court in *Osborne* accepted Ohio's argument that "since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution."[112] Consequently, the Court permitted Ohio's broad prohibition against possession of child pornography regardless of whether the material had been commercially produced or distributed.[113] Moreover, the Court upheld the ban on possession even if the possessor had no intent to distribute the prohibited material.[114]

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104. *Id.*

105. *Id.*

106. Brief for Appellee at 20, Osborne v. Ohio, 110 S. Ct. 1691 (1990) (No. 88-5986).

107. *Id.* at 19-21.

108. *See Osborne*, 110 S. Ct. at 1697.

109. *Id.* at 1696-97.

110. *See Ferber*, 458 U.S. at 765-66.

111. See statutes cited *supra* note 41. Also, the federal Child Protection Act of 1984 eliminated the requirement under federal law that sexual material depicting children be commercially produced and distributed. 18 U.S.C. § 2252 (1988), *noted in* Kent & Truesdell, *supra* note 40, at 369; Weiss, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J. 327, 344-45 (1985).

112. *Osborne*, 110 S. Ct. at 1697.

113. *Id.*

114. *See id.* at 1696-97.

Ohio's argument in *Osborne* against limiting the prohibition to commercially produced child pornography was based on a report by the Attorney General's Commission on Pornography.[115] The Commission determined that although depictions of children engaged in sexual conduct are often "homemade," "a homemade item may eventually be sold to a commercial child pornography publication."[116] Thus, Ohio argued, a ban on the private possession of child pornography was the only way to eliminate the underground market that existed after *Ferber*.[117]

In stating that private distribution had replaced commercial distribution of child pornography, the Court in *Osborne* was only partially correct. Commercial production and distribution of child pornography existed in the United States in the 1970s,[118] but virtually ceased after 1980.[119] However, this commercial network was not replaced by any

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115. Brief for Appellee at 22-23, *Osborne* (No. 88-5986).

116. COMMISSION ON PORNOGRAPHY, *supra* note 46, at 650. It should be noted with respect to this and other factual findings of the Commission that no independent research was commissioned as a result of "budgetary and time constraints." *Id.* at 218. *See generally* Richards, *Pornography Commissions and the First Amendment: On Constitutional Values and Constitutional Facts*, 39 ME. L. REV. 275 (1987) (comparing the Commission's report with prior reports which had utilized independent research). Also, the Commission was composed primarily of persons strongly inclined to expand governmental controls on obscenity and pornography. Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 28-29 (1986) ("The Commission is chaired by Henry Hudson, . . . who was commended by President Reagan several years ago for his zealous opposition to pornography. Among the other ten members of the Commission are . . . people who also have records indicating a bias against sexually-oriented speech.").

117. *See* Brief for Appellee at 20-21, *Osborne* (No. 88-5986).

118. *See* COMMISSION ON PORNOGRAPHY, *supra* note 46, at 601. The scope of this industry is difficult to ascertain. A committee established by the Illinois Legislature in 1977 found it to be modest. ILLINOIS LEGISLATIVE INVESTIGATING COMM'N, SEXUAL EXPLOITATION OF CHILDREN: A REPORT TO THE ILL. GEN. ASSEMBLY 30 (1980) [hereinafter SEXUAL EXPLOITATION] ("Pornography and other sex-related 'industries' continue to be enormous operations in this country. However, neither child pornography nor child prostitution has ever represented a significant portion of the industry.").

119. Stanley, *The Child Porn Myth*, 7 CARDOZO ARTS & ENT. L.J. 295, 315 (1989); *see* SENATE COMM. ON GOVT. AFFAIRS, PERM. SUBCOMM. ON INVESTIGATIONS, CHILD PORNOGRAPHY AND PEDOPHILIA, S. REP. NO. 537, 99th Cong., 2d Sess. 4, 29, 36, 42-43 (1986) (finding there is little importation or commercial bookstore sales of child pornography, little domestic videotape production, and few police discoveries of child pornography operations); SEXUAL EXPLOITATION, *supra* note 118, at 27, 30 (reporting that F.B.I., despite two years of diligent efforts, had been unable to find child pornography through raids and placing orders with suspected sellers); AMERICAN CIVIL LIBERTIES UNION, POLLUTING THE CENSORSHIP DEBATE: A SUMMARY AND CRITIQUE OF THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 104 (1986) ("[T]here is virtually no commercial marketing of

substantial private production distribution network.[120] The Attorney General's Commission failed to cite any evidence establishing the existence of such a network.[121] Likewise, in *Osborne* neither Ohio nor the Supreme Court cited any evidence establishing the existence of a private child pornography network.[122] Thus, the Court relied on supposition in concluding that large quantities of child pornography were being distributed privately.

In order to override the First and Fourth Amendment rights, the Court needed to find that Ohio had a compelling interest in protecting children used in child pornography, that Ohio's methods of regulation of child pornography served that compelling interest, and that the regulation effectuated that interest in the least restrictive way.[123] In *Osborne*, the Court easily determined, citing *Ferber*, that Ohio had a compelling interest in protecting children from being posed in child pornography.[124] In *Ferber*, however, the Court determined that child pornography was unprotected speech because of the harms specifically flowing from commercial production and distribution of child pornography.[125] In *Osborne*, to the contrary, the commercial element was absent. The evidence presented established that Osborne received the photographs from a friend who had taken them himself.[126] Thus, an additional rationale was needed for Ohio to satisfy the "compelling interest" criterion and in turn regulate the private production and distribution of child pornography and the private possession that would follow.

Consequently, Ohio argued that a commercial purpose was not an element of *Ferber*-defined child pornography.[127] "While it is true that

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child pornography in the United States."); Criminal Justice Newsletter, Sept. 16, 1986, at 7 (stating that child pornography is no longer readily available in the United States since "[f]ew commercial pornography dealers appear willing to risk handling child pornography").

"Prior to the late 1970s, when awareness end [sic] concern about child pornography escalated dramatically, commercially produced and distributed child pornography was more prevalent than it is now." COMMISSION ON PORNOGRAPHY, *supra* note 46, at 408. "When the Supreme Court in 1982 approved of child pornography laws . . . enforcement efforts accelerated, and the sum total of these enforcement efforts has been to curtail substantially the domestic commercial production of child pornography." *Id.* at 408-09.

120. Stanley, *supra* note 119, at 315-16.

121. *See* COMMISSION ON PORNOGRAPHY, *supra* note 46, at 601.

122. *See Osborne*, 110 S. Ct. at 1697; Brief for Appellee at 20-21, *Osborne* (No. 88-5986).

123. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

124. *Osborne*, 110 S. Ct. at 1696 (quoting *Ferber*, 458 U.S. at 756-58).

125. *Ferber*, 458 U.S. at 757.

126. *Osborne*, 110 S. Ct. at 1712 (Brennan, J., dissenting).

127. Brief for Appellee at 33-34, *Osborne* (No. 88-5986).

Ferber was directed at commercial distribution of child pornography, the [C]ourt's opinion in *Ferber* clearly indicates that a commercial purpose [was] not required . . . ."[128] In *Ferber*, however, the sole issue before the Court was whether New York might "prohibit the dissemination of material which shows children engaged in sexual conduct," in order "[t]o prevent the abuse of children who are made to engage in sexual conduct for commercial purposes . . . ."[129] The *Ferber* opinion was thus directed at the evils of the child pornography industry when the final product is used for "commercial purposes." The Court in *Ferber* never mentioned private production or distribution.[130]

To support a ban on the commercial production and distribution of child pornography, the Supreme Court in *Ferber* cited legislative findings from the New York Legislature.[131] The Court determined that the statute was aimed at "those who seek to profit through a commercial network based upon the exploitation of children."[132] The Court also found that the mass distribution of child pornography achieved by commercial production and distribution resulted in substantial harm to the children depicted.[133] Thus, the criminalization of the commercial production and distribution of child pornography was authorized to "prevent the abuse of children who are made to engage in sexual conduct for commercial purposes . . . ."[134]

As with commercial production, private production of child pornography presents the same possibility of substantial harm to the child through the photographing process itself. Private production, however, does not involve the additional harm involved in the mass circulation of child pornography. In fact, the Court in *Ferber* found that the additional harm from commercial distribution was a necessary element justifying a state to regulate child pornography.[135] The *Ferber* Court determined that a commercially-produced depiction of a child engaged in sexual conduct would eventually circulate widely and possibly be detrimental to the child in the future.[136] Supporting this conclusion, the Illinois Supreme Court cited a study that concluded: "A child who has posed for a camera must go through life knowing that

128. *Id.* at 34.
129. *Ferber*, 458 U.S. at 753.
130. *See id.* at 774.
131. *Id.* at 757, 757 n.8 (citing 1977 N.Y. Laws ch. 910, § 1).
132. *Id.*
133. *See id.*
134. *Id.* at 753.
135. *Id.* at 756, 759-60.
136. *Id.* at 759 n.10.

the recording is circulating within the mass distribution system for child pornography."[137]

A commercially produced and distributed photograph presents a much more significant danger to the depicted child than a photograph produced by an individual for personal use only. Moreover, Ohio's concern that material produced privately will eventually move into the commercial network was only realistic in the 1970s when such a commercial network existed.[138] When that network vanished after 1980,[139] Ohio's concern lost its validity.

Thus, while production of child pornography for non-commercial purposes may harm the children involved, the harm is not nearly as substantial as with child pornography intended for commercial production and distribution. The result is that a state's interest justifying the regulation of child pornography is weak. That weaker interest in turn gives the state a weaker basis to argue that private production and possession should be prohibited. When a state prohibits private possession, however, this weaker interest must be assessed against the possessor's privacy interest.

If child pornography involved only the posed depiction of children performing sex acts, the harm involved in the photographing would provide a stronger basis for overriding the privacy interest of the possessor. However, in *Osborne*, the Court approved a definition of child pornography that, as will be shown below, did not require sex acts,[140] or that the person depicted be below the age of consent for sexual conduct,[141] or even that the depiction be posed,[142] rather than a candid photograph of activity being done for other reasons. In light of this broad definition of child pornography, the rationale is not strong for overriding the privacy interest of a possessor.

V. THE USE OF CHILD PORNOGRAPHY FOR SEDUCTION

In *Osborne*, the State of Ohio pressed upon the Supreme Court the argument that child molesters show child pornography to children

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137. People v. Geever, 122 Ill. 2d 313, 326, 522 N.E.2d 1200, 1206 (citing Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)), *appeal dismissed*, 488 U.S. 920 (1988).

138. *See* COMMISSION ON PORNOGRAPHY, *supra* note 46, at 601; *supra* note 118 and accompanying text.

139. *See supra* note 119 and accompanying text.

140. *See infra* text accompanying notes 271-316.

141. *See infra* text accompanying notes 321-28.

142. *See infra* text accompanying notes 342-47.

in order to convince the children to engage in sexual activity.[143] The Attorney General's Commission on Pornography stated that

> there is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children. Children are shown pictures of other children engaged in sexual activity, with the aim of persuading . . . [the] young child that if it is in a picture, and if other children are doing it, then it must be all right for this child to do it.[144]

The Commission did not, however, provide any details about the "substantial evidence" on which this statement was based.[145] In fact, the Commission acknowledged that a child molester might also use pictures of adults engaged in sexual conduct to convince children to engage in sexual conduct with them.[146] One analyst of child molesters' behavior also suggested that child pornography may be used for seduction, but he too provided no foundation for his statement.[147] Nonetheless, the Supreme Court in *Osborne* accepted the factual assertion that child molesters use child pornography to entice children to engage in sexual activity as an aspect of Ohio's compelling interest to justify a prohibition on the private possession of child pornography.[148] The Court said that "pedophiles use child pornography to seduce other children into sexual activity."[149]

The assertion that child pornography is used as a "tool" in the commission of a crime[150] places the prohibition on the possession of child pornography in the category of preventing "anticipatory criminal

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143. *Osborne*, 110 S. Ct. at 1697.

144. COMMISSION ON PORNOGRAPHY, *supra* note 46, at 411, *cited in Osborne*, 110 S. Ct. at 1697 n.7.

145. *See id.*

146. *Id.* at 411 n.74. *But cf.* Potuto, *supra* note 40, at 27 (rejecting the possibility that a possessor of child pornography might thereby be encouraged to engage in sexual conduct with children, "at least until a direct causative link is shown").

147. K. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW-ENFORCEMENT OFFICERS INVESTIGATING CASES OF CHILD SEXUAL EXPLOITATION 23-24 (1986); *see also* K. Lanning, *Collectors*, in CHILD PORNOGRAPHY AND SEX RINGS 83, 86 (A.W. Burgess ed. 1984) (asserting that child pornography lowers children's inhibitions).

148. *Osborne*, 110 S. Ct. at 1697.

149. *Id.* (citing COMMISSION ON PORNOGRAPHY, *supra* note 46, at 649 ("Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity.") (citations omitted)).

150. *See* Potuto, *supra* note 40, at 45.

offenses." The premise of such offenses is that the activity, while not harmful in itself, may lead to harm.[151] An example is a statute prohibiting the possession of burglar tools.[152] Statutes which prohibit anticipatory criminal offenses, however, typically require proof of an intent to cause the harm.[153] Burglar tool statutes, for example, include as an element of the offense that one harbors an intent to use the tool in a criminal fashion.[154] Liability is not based on mere possession of the regulated item.[155] With burglar tool statutes, of course, no speech and privacy interests are at stake. With the private possession of child pornography, however, the prohibition directly infringes on an individual's right to speech and privacy, and the prohibition is based on mere possession.[156] Thus, although a state has a lawful right to prohibit harmful activity, a state may not prohibit the possession of every instrumentality that might be used for an illegal purpose, particularly where the instrumentality is communicative material.

Rather than comparing the possession of child pornography to the possession of burglar tools, a more appropriate analogy might be to compare the private possession of child pornography to the private possession of a book that explains how to crack a safe. A state would be unable to prohibit the private possession of such a book because its possession would be protected by the constitutional speech and privacy rights. The book would receive protection even though the possessor might use the book to crack safes, and even though such a book has no other use than to facilitate safe-cracking.[157]

It is possible that many adults who engage in sexual conduct with children possess child pornography. That does not mean, however, that a significant percentage of those adults use the pornographic materials to entice children to engage in sexual conduct with them. An investigative commission on pornography established by the Illinois

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151. *See id.*

152. *See, e.g.*, FLA. STAT. § 810.06 (1989).

153. *See id.*

154. *Id.*; OHIO REV. CODE § 2923.24 (1987); MODEL PENAL CODE § 5.06 (1962).

155. *See, e.g.*, Thomas v. State, 531 So. 2d 708, 709 (Fla. 1988) ("[T]he [burglar tool] statute criminalizes the intent to use an item in an illegal way. Mere possession standing alone will not constitute a crime.").

156. *See Stanley*, 394 U.S. at 568 n.11.

157. However, in one case a federal district court issued a preliminary injunction against publishing an article that described how to manufacture a hydrogen bomb. United States v. Progressive, Inc., 467 F. Supp. 990, *appeal dismissed*, 610 F.2d 819 (1979). But there the Court was concerned about serious harm to national security and the significant physical harm which might ensue from the publication: "A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all." *Id.* at 996.

Legislature concluded "that pornography may be fine for perhaps thousands of individuals. They will do nothing more with it or from it than read it."[158] Until those states that prohibit possession of child pornography establish empirically that possessors of child pornography molest children, no factual basis exists for the states' argument. Empirical evidence is needed to demonstrate the states' compelling interest in banning the possession of child pornography based on the assertion that the pornography is used to entice children to engage in sexual conduct with adults.

In the context of protecting the private possession of obscenity, the Supreme Court reasoned in *Stanley* that consequential harm is not a basis for undermining an individual's privacy right.[159] That reasoning should apply equally to both child pornography and obscenity. The *Osborne* Court, however, used the alleged consequential harm caused by child pornography as a basis to infringe upon the privacy right.[160] In *Stanley*, the Court noted that the government must rely upon education to prevent crime and may resort to punishment only when there has been an actual violation.[161] Criminalizing the possession of child pornography because an individual may use the depictions to commit a crime, however, punishes the possessor before a violation has been committed.

Speech and privacy rights are unduly restricted when possession of child pornography is prohibited on the ground that the possessor may use the material to convince a child to engage in sexual conduct. The grounds are too speculative to overcome the fundamental constitutional right to speech and privacy involved in the possession of communicative material.[162] Even if the states established that many child molesters use child pornography to seduce children, the conduct of child molesting is what should be punished, not the possession of child pornography. Criminalizing the possession of child pornography penalizes many who possess child pornography, but who would never consider molesting a child. Ohio's implication that the possession of

158. SEXUAL EXPLOITATION, *supra* note 118, at 31.

159. *See Stanley*, 394 U.S. at 566-68.

160. *Osborne*, 110 S. Ct. at 1696-97.

161. *Stanley*, 394 U.S. at 566-67.

162. *See* Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 208-10 (1987) (authored by Susan G. Caughlan) (arguing that because criminalization of private possession of child pornography may be ineffective to deter child sex offenders who lure their victims with adult pornography, criminalization of private possession is not directly related to preventing child sexual abuse).

child pornography leads to the actual abuse of children was speculative.[163] Moreover, a person might offer many things to a child such as money or presents to urge compliance with sexual demands. No evidence exists to indicate that pornographic depictions are unique in their ability to entice a child to engage in sexual activity.

VI. SEXUAL ABUSE BY POSSESSORS OF CHILD PORNOGRAPHY

In *Osborne*, Ohio pressed upon the Supreme Court another argument in support of a total prohibition on the private possession of child pornography, namely, that many persons who sexually abuse children possess child pornography.[164] Ohio suggested that a prohibition on the private possession of child pornography provides an alternative means to prosecute child molesters.[165] Proscribing private possession makes available a surrogate crime that can be used to prosecute the possessor who is accused of sexually molesting a child when a prosecution for child molestation cannot proceed because of the difficulty associated with using the testimony of a small child.[166] Ohio also suggested that a person suspected of molesting a child could be prosecuted for possession of child pornography, instead of child molestation, in order to spare the child victim from having to testify.[167]

Such testimony can be traumatic for the child.[168] The problem of using child testimony, however, does not justify banning possession of child pornography when the ban is not a crime justifiable on its merits. In the *Osborne* opinion, the Supreme Court did not allude to this argument, which suggests that the Court did not find it convincing.

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163. Brief for Appellee at 22, *Osborne*, 110 S. Ct. at 1691 (No. 88-5986).

164. Brief for Amici Curiae Concerned Women for America, Focus on the Family, Family Research Council, National Coalition Against Pornography, National Legal Foundation, Athletes for Kids, National Christian Association, and the Berean League, at 28-29, *Osborne* (No. 88-5986).

165. Brief for Appellee at 21, *Osborne* (No. 88-5986). *See also* Potuto, *supra* note 40, at 57-61 (arguing that criminalizing possession would make conviction of child abusers easier, would be less traumatic to child victims, and would result in more convictions).

166. Potuto, *supra* note 40, at 57-61.

167. Brief for Appellee at 24, *Osborne* (No. 88-5986). *See also* Kent & Truesdell, *supra* note 40, at 367 (asserting that criminalizing "mere possession of child pornography would spare child victims the horrors of . . . testifying," and would spare courts the difficulties attendant with a child victim's testimony).

168. Maryland v. Craig, 110 S. Ct. 3157, 3168-69 (1990) (finding that a "growing body of academic literature documenting the psychological trauma suffered by child abuse victims" supports a state's judgment to protect child abuse victims from the emotional trauma of confronting their alleged abusers in court); Coy v. Iowa, 487 U.S. 1012, 1022 (1988) (O'Connor, J.. concurring) (recognizing that "[m]any States have determined that a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom . . . .").

The *Osborne* Court was also silent on a related argument that was asserted to justify a ban on the private possession of child pornography.[169] That argument suggested that the possession of child pornography may encourage the possessor to engage in sexual conduct with children.[170] This argument was similar to the argument made by Georgia in *Stanley* regarding obscenity.[171] In *Stanley*, Georgia had argued that one justification for prohibiting the private possession of obscenity was that possessors may be encouraged to commit unlawful sexual acts after viewing the obscene materials.[172] The Court found, however, that the data presented did not warrant a finding of a cause and effect relationship between possession of obscenity and committing sexual crimes.[173] The Court reasoned that even if such a relationship existed, "in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.'"[174]

The *Osborne* Court did not mention the issue of cause and effect between possession of child pornography and child molestation. Just as there was little evidence indicating the impact obscene material has on the possessor, little evidence exists indicating the impact child pornography has on its possessor.[175]

VII. POSSESSION AS AN ADJUNCT TO DISTRIBUTION

To justify a ban on the private possession of child pornography, Ohio also argued that possessors of child pornography are easier to detect than producers and distributors of child pornography.[176] This reasoning was accepted by the *Osborne* Court[177] even though the *Stanley* Court had rejected the same contention in the context of obscenity.[178] The *Osborne* Court reasoned:

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169. *See* Brief for Amicus Curiae Children's Legal Foundation at 19, *Osborne* (No. 88-5986).

170. *Id.*

171. *Stanley*, 394 U.S. at 566-67.

172. *Id.* at 566.

173. *Id.*

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

175. R. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 119 (1979) (stating that "there are no definitive studies that demonstrate a cause and effect relationship between [child] pornography and sex crimes"); Stanley, *supra* note 119, at 332-34.

176. Brief for Appellee at 19-21, *Osborne* (No. 88-5986).

177. *See Osborne*, 110 S. Ct. at 1696.

178. *Stanley*, 394 U.S. at 567-68.

> Osborne points out that in *Stanley* we rejected Georgia's argument that its prohibition on obscenity possession was a necessary incident to its proscription on obscenity distribution. . . . This holding, however, must be viewed in light of the weak interests asserted by the State in that case. *Stanley* itself emphasized that we did not "mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. . . . In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials."[179]

The *Osborne* Court's reference was to a passage in *Stanley* in which the *Stanley* Court suggested that private possession of espionage material would not be protected.[180] In the federal espionage statute, possession of the printed material is only one element of the crime; the primary element of the crime of espionage, however, is conveying the material to a foreign power.[181] Unlike child pornography, espionage material is not possessed for personal use. Therefore, in citing the espionage statute, the *Stanley* Court was not holding that there were types of communicative material whose possession for personal use could be prohibited.

The *Osborne* Court's decision to uphold a prohibition on the private possession as an adjunct to a prohibition on commercial distribution involved a serious incursion into the privacy right. As indicated, the *Stanley* Court rejected the argument that prohibiting possession was necessary to prohibit distribution.[182] The Supreme Court in *Stanley* held:

> [W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on 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 that they would justify infringement of the individual's right to read or observe what he pleases. Because

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179. *Osborne*, 110 S. Ct. at 1696 (quoting *Stanley*, 394 U.S. at 568 n.11) (citation omitted).

180. *Stanley*, 394 U.S. at 568 n.11 (citing 18 U.S.C. § 793(d) (1989) (criminalizing the possession of classified national security materials)).

181. *See* 18 U.S.C. § 793(d) (1989) (making possession criminal when the possessor has reason to believe that the information could be used to injure the United States).

182. *Stanley*, 394 U.S. at 568 n.11.

> 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.[183]

Despite the state's greater interest in prohibiting child pornography as opposed to obscenity, there is no difference in the logic of prohibiting possession as a way to stop production and distribution. The Court's statement in *Stanley* regarding "the individual's right to read or observe what he pleases"[184] applies equally to both child pornography and obscenity.

In *Osborne*, the Court said that the state's interest in eliminating child pornography is stronger because when dealing with child pornography, the state is protecting a victim.[185] With obscenity, by the Court's analysis, there is no victim.[186] However, the Court's reasoning in *Stanley* that the individual has a right to read what he or she pleases applies with equal force to child pornography. A prohibition against possession takes governmental regulation substantially farther than a mere prohibition against production and distribution and infringes upon an individual's right to view communicative material in the home.

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183. *Id.*

184. *Id.*

185. *Osborne*, 110 S. Ct. at 1696.

186. *Id.* The *Osborne* Court distinguished regulation of child pornography from the regulation of private possession of obscenity which the *Stanley* Court found unconstitutional. *Id.* (citing *Stanley*, 394 U.S. at 565). Unlike the obscenity regulation at issue in *Stanley*, "Ohio has enacted [child pornography regulation] in order to protect the [child] victims." *Id. But see* A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981) (presenting a theory of gender inequality based upon sexuality); MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 16-20 (1985) (arguing that pornography is neither harmless nor merely a product of confused sexuality). MacKinnon describes how all women are victims of pornography:

> [Pornography] eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working. . . . Pornography . . . is a form of forced sex, a practice of sexual politics, an institution of gender inequality.

Id. at 18. *Cf.* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327-31 (1985) (holding that ordinance proscribing trafficking in pornography, where pornography was defined as "the graphic sexually explicit subordination of women," was an unconstitutional restraint on First Amendment rights), *aff'd*, 475 U.S. 1001 (1986). The *Hudnut* court recognized the damages flowing from the depictions of women in pornography. *Id.* at 329. They found that:

> Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery, and rape on the streets. . . . "Pornography is central in creating and maintaining sex as a basis of discrimination."

Id.

Producers and distributors are engaged in the child pornography business. A possessor is not. The possessor stands a step removed from production and distribution. Thus, a prohibition on possession is not justified as an adjunct to a prohibition on commercial production and sale.

In the obscenity arena, the Supreme Court has held that no constitutional right exists to possess obscenity outside the home.[187] Under the Supreme Court's analysis in *Ferber*, child pornography, unlike obscenity, may have serious artistic, literary, political, or scientific value, or may appear in a larger work such as a book that has such value.[188] A prohibition against the private possession of child pornography may therefore curtail legitimate First Amendment interests. When legislatures act in an area where fundamental rights are affected, they must legislate in a fashion narrowly tailored to serve their legitimate goals.[189]

There is no need to prohibit private possession in order to stop the traffic in child pornography. The state's interest in regulating the production and sale of child pornography is to protect children from the harm suffered from being posed in sexual conduct and from having the depictions circulated in commerce. However, an invasion into the privacy of the home is not a narrowly tailored means of effectuating that interest.

In addition to the many stated arguments that were rejected in *Osborne*, the Supreme Court also rejected Osborne's argument that Ohio should prohibit only production and distribution of child pornography in order to protect children from the possible harms that would result from the pornography.[190] The state's interest in eliminating the trade in child pornography should be adequately served by regulating production and distribution. A ban on private possession will not likely prevent the production or distribution of child pornography because private possession rarely comes to the attention of authorities.[191] Consequently, the risk of detection is low. Only on those rare occasions

187. United States v. Orito, 413 U.S. 139, 143 (1973).

188. *See Ferber*, 458 U.S. at 756-57 (finding that the *Miller* obscenity test does not apply in child pornography cases).

189. *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (recognizing that when a state seeks to regulate "fundamental rights," the state must assert a "compelling state interest" and the state's regulations must be "narrowly drawn to express only the legitimate state interests at stake.").

190. *Osborne*, 110 S. Ct. at 1696.

191. AMERICAN CIVIL LIBERTIES UNION, *supra* note 119, at 105 ("Sexual abuse is the ultimate damage to be prevented; criminalizing transfer or possession — besides raising constitutional problems — is a tragic example of law enforcement 'too little, too late.'").

in which authorities have obtained a warrant will they be able to search for and discover privately possessed child pornography. Therefore, a ban on the private possession of child pornography holds little prospect of preventing the production and distribution of child pornography.

The frailty of a prohibition on private possession as a means to eradicate child pornography is relevant in determining whether such a prohibition is constitutional. When fundamental rights are at issue, a state may use only the least restrictive means available to achieve legitimate goals.[192] Further, the means utilized merit particular scrutiny when First and Fourth Amendment rights are being invaded.[193] In that context, the value to the state of prohibiting the private possession of child pornography must be weighed against the privacy right to receive communicative material in the home.

VIII. THE NATURE OF CHILD PORNOGRAPHY

Child pornography, like obscene material, is communicative in nature. This does not mean that a state may not regulate it, but any prohibition must be assessed from the standpoint of the First Amendment. Until *Osborne*, the First Amendment had always prevailed and the Supreme Court had not authorized a prohibition against the private possession of any type of communicative material. The *Osborne* decision cut against the spirit of the First Amendment and retreated from this long-standing history of case law which refused to ban the private possession of communicative materials.

The First Amendment protects all forms of communicative material.[194] In *Ferber*, the Supreme Court stated that child pornography was "without the protection of the First Amendment."[195] That sweep-

192. Shelton v. Tucker, 364 U.S. 479, 488-90 (1960) (holding that a state's policy requiring teachers to divulge all organizational relationships was too broadly drawn to justify the state's otherwise "legitimate inquiry into the fitness and competency of its teachers").

193. *Id.*

194. *See* Texas v. Johnson, 491 U.S. 397, 404-05 (1989). The *Johnson* Court decided whether burning the United States flag was expressive conduct protected by the First Amendment. *Id.* at 403. The Court held that flag-burning, when "sufficiently imbued with elements of communication," implicated the First Amendment. *Id.* at 406 (citation omitted). In reaching its conclusion, the Court discussed other forms of conduct which possessed communicative elements sufficient to "bring the First Amendment into play." *Id.* at 404. These forms of conduct include the wearing of black armbands to protest American military involvement in Vietnam, a sit-in by blacks to protest segregation, the wearing of United States military uniforms to protest the Vietnam conflict, and taping a peace sign to a flag in protest of the Kent State tragedy. *Id.* at 404-05.

195. *Ferber*, 458 U.S. at 764.

ing statement, however, did not necessarily mean that a state may prohibit private possession. Dissenting in *Osborne*, Justice Brennan described the *Ferber* holding as doing nothing more than placing "child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed."[196]

The *Ferber* Court also noted that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy."[197] Although the First Amendment does not protect the *Ferber* commercial production and distribution of child pornography[198] and the *Osborne* private possession of child pornography,[199] a state does not have the power to punish any and all acts associated with child pornography. If, for example, a photograph constituting child pornography is published in an article about child pornography, a state could not prosecute every newscarrier who delivers the newspaper, every purchaser of the newspaper, or every trash hauler who carries the newspaper from the purchaser's home.[200] Clearly, the First Amendment would act to limit the state's actions. Before the state seeks to prohibit communicative material, the state must first prove that prohibiting a particular act is necessary to avert the social harm the state seeks to prevent.[201] In this sense, child pornography is material within the ambit of First Amendment protection.[202]

The First Amendment protects any material that conveys a message. A state could argue that child pornography does not convey any message.[203] In First Amendment analysis, however, the Supreme Court has not distinguished among materials based on the Court's

196. *Osborne*, 110 S. Ct. at 1713 (Brennan, J., dissenting).

197. *Ferber*, 458 U.S. at 756.

198. *Id.* at 765.

199. *Osborne*, 110 S. Ct. at 1697.

200. *Cf. Ferber*, 458 U.S. at 765 (permitting criminal sanctions for obscenity and child pornography only on proof of scienter).

201. *See Osborne*, 110 S. Ct. at 1696-97 (finding that Ohio's proscription of the viewing and possession of child pornography were constitutional because of Ohio's assertions that proscription would protect the victims of child pornography).

202. *See Ferber*, 458 U.S. at 762-63 (suggesting that, although it is unlikely, visual depictions of children engaged in lewd sexual conduct may constitute an "important and necessary part of a literary performance or scientific or educational work"). The *Ferber* Court pointed out, however, that if a depiction of children performing sexual acts or lewdly exhibiting their genitals was necessary for literary or artistic value, "a person over the statutory age who perhaps looked younger could be utilized." *Id.* at 763 (citation omitted).

203. *See id.* at 762 (finding that the message value of child pornography is, at best, nominal).

perception of the value of the message being conveyed. With obscenity, the Court allowed the prohibition on production and distribution, but the material still enjoys First Amendment protection to the extent that obscenity is allowed to be possessed in the home.[204]

Persons receive messages from various kinds of written and visual materials. Although regulation of these various kinds of materials is permitted,[205] the material is still considered communicative. Therefore, a prohibition will only be upheld upon a showing of a compelling state interest.[206]

With child pornography, no compelling state interest exists to justify a complete ban on the private possession of child pornography. In his concurring opinion in *Ferber*, Justice Stevens wrote that child pornography was, for purposes of First Amendment analysis, "marginal speech [of a] lower quality than most other types of communication."[207] Despite that view, Stevens joined Brennan's dissent in *Osborne* and held that the individual's right to private possession of child pornography outweighed the state's interest in its prohibition.[208]

Advocates in favor of broad regulation of child pornography and obscenity have attempted to separate pornographic and obscene materials from other forms of protected "speech."[209] "Though comprised of words and pictures, pornography does not have the special properties that single out speech for special protection; it is more akin to a sexual aid than a communicative expression."[210] However, that analysis of communication is overly simplified. The various forms of communication cannot be readily categorized in terms of the human faculty to which they appeal. Any form of communication may appeal to the rational individual's emotions, be it a political tract, a painting, or a poem.[211]

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204. *See Stanley*, 394 U.S. at 559, 561.

205. *See Ferber*, 458 U.S. at 765 n.18.

206. *See Osborne*, 110 S. Ct. at 1696-97.

207. *Ferber*, 458 U.S. at 781 (Stevens, J., concurring).

208. *See Osborne*, 110 S. Ct. at 1712-13 (Brennan, J., dissenting).

209. *See* Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-08 (contending that because pornography is "more akin to a sexual aid than a communicative expression," it is a low-value form of speech which should not be entitled to protection equal to other forms of speech).

210. *Id.* at 606 (citation omitted).

211. Chevigny, *Pornography and Cognition: A Reply to Cass Sunstein*, 1989 DUKE L.J. 420, 428-31. Chevigny responds to Sunstein's argument that pornography is undeserving of heightened constitutional protection due to its non-cognitive value only as a "sexual aid":

> [W]e do not know how a pornographic film can bypass the visual sense, and through magic arouse a person to an act of sexual degradation. Rather, viewers

An individual's right to receive information is not dependent upon the nature and character of the information.[212] The Supreme Court concluded in *Stanley* that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."[213] Brennan captured this aspect of the First Amendment in his dissent in *Osborne*: "When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees . . . his right to possess them privately . . . ."[214]

Individuals have the right to think their own thoughts, seek their own information, and come to their own truths.[215] This freedom extends to all forms of information, regardless of how others, including governmental authorities, assess the information's value.[216] Ideas may not be suppressed merely because they are unpopular.[217] Even offensive messages, so long as the means of communication are peaceful, are not required to "meet standards of acceptability."[218]

> draw a pattern of sexual relations from their imagination and that pattern arouses. . . . Pornographic film scenes and still photos also can be reassembled to make a rather different piece of propaganda — an appeal against pornography in favor of censorship. . . . Pornographic scenes thus may be arousing, but the action or belief that they arouse depends on each viewer's imagination and beliefs.

Id.

212. *Stanley*, 394 U.S. at 564.

213. *Id.* (citations omitted).

214. *Osborne*, 110 S. Ct. at 1717 (Brennan, J., dissenting).

215. *Stanley*, 394 U.S. at 564-66.

216. *See* Winters v. New York, 333 U.S. 507, 510 (1948) ("We do not accede to appellees' suggestion that the constitutional protection for a free press applies only to the exposition of ideas."). The *Winters* Court considered whether New York could punish a bookseller for selling a magazine entitled "Headquarters Detective, True Cases from the Police Blotter." *Id.* at 508. The bookseller had been convicted for violating a New York statute which penalized distributors of any printed material "principally made up of . . . accounts of criminal deeds, or pictures . . . of deeds of bloodshed, lust, or crime." *Id.* The New York Court of Appeals upheld the bookseller's conviction by reading the statute to prohibit only those materials which would "[incite] violence or depraved crimes." *Id.* at 518. However, the Supreme Court held the statute was unconstitutionally vague. *Id.* at 519.

217. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 688-89 (1959) (stating that the Constitution protects ideas although they are unconventional and shared only by a minority); *see* Cohen v. California, 403 U.S. 15, 23-26 (1971) (protecting open communication of all ideas, no matter how offensive, is necessary to enable the development of diverse and novel ideas).

218. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (holding that organization's distributing leaflets to protest real estate agent's actions which resulted in racial integration of previously "white" neighborhoods was protected expression under the First Amendment, even though the views expressed in the leaflets may be "offensive to others").

Additionally, even if a depiction of unclothed minors conveys a message of sexual attraction, the state has no interest in suppressing that message as long as it is conveyed in the privacy of an individual's home with no threat to others. While controlling "the moral content of a person's thought . . . may be a noble purpose . . . it is wholly inconsistent with the philosophy of the First Amendment."[219] Indeed, in *Ferber*, the Court decided on the need for a category broader than obscenity for depictions of children because the Court saw a justification for regulating depictions of children engaged in sexual conduct.[220] The state's interest overshadowed the possibility that the depictions might appear in a work that, taken as a whole, contained serious literary, artistic, political, or scientific value.[221] By recognizing that child pornography may appear in a work of value, the Court thus acknowledged that child pornography could be material of First Amendment significance.[222]

The possession of a photograph or book is a communication held in abeyance until the possessor views the material. The ideas conveyed may be good or bad, noble or base, but simply receiving the material is not a crime. The state has no right to control the content of a person's mind.[223] One student of the First Amendment writes that "external forces — Congress, state legislatures, or the Court itself . . . [cannot] determine what communications or forms of expression are of value to the individual; how the individual is to develop his faculties is a choice for the individual to make."[224]

Although the Supreme Court in *Osborne* said that it was not creating new law,[225] allowing a ban on the private possession of child pornography is hard to reconcile with the Court's broad *dictum* in *Stanley*:

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219. *Stanley*, 394 U.S. at 565-66.

220. *See Ferber*, 458 U.S. at 761.

221. *Id.* The Court articulated a standard to define obscenity in *Miller v. California*. *See supra* note 15 and accompanying text.

222. *See* Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 304 ("[T]he category that results from *Ferber* is not defined by the absence of First Amendment value."). The Court's conclusion that the category of child pornography should be more broadly defined than obscenity left two situations unaddressed. *Id.* at 297. "In one case a depiction of children engaged in sexual conduct might itself have serious value, a situation to be distinguished from the case in which a valueless depiction is part of a larger work containing value elsewhere." *Id.* at 297-98 (citations omitted).

223. *See Stanley*, 394 U.S. at 566.

224. Redish, *supra* note 21, at 637.

225. *Osborne*, 110 S. Ct. at 1695-96 (distinguishing the holding of *Stanley*, in which the Court struck down a Georgia statute criminalizing the private possession of obscene material, from the *Osborne* facts, where private possession of child pornography was involved).

"If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch."[226] When the state dictates what writings or depictions a person may or may not possess, the state begins a dangerous process of censorship.

The First Amendment protects an individual's right to receive information.[227] The Fourth Amendment right to privacy reinforces this First Amendment right by assuring that individuals will receive information free from government interference.[228] Justice Brandeis captured this notion best when discussing the Fourth Amendment in a wiretap case.[229] Brandeis said that the drafters of the Constitution

> recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.[230]

Child pornography is not necessarily obscene.[231] Standing alone, child pornography may have serious literary, artistic, political, or scientific value.[232] Child pornography may also be contained in a larger work that has such value.[233] The purpose of regulating child pornog-

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226. *Stanley*, 394 U.S. at 565.

227. Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (stating that right to receive information is "an inherent corollary of the rights of free speech and press"); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (finding "a First Amendment right to receive information and ideas"); Martin v. Struthers, 319 U.S. 141, 143 (1943) ("[The] right of freedom of speech and press . . . necessarily protects the right to receive it."); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2 (stating that "[t]he right to know fits readily into the first amendment"); Note, *Content Regulation and the Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1863 (1983) (stating that the right of "expression includes the interest in receiving ideas and images").

228. Note, *supra* note 227, at 1864 ("The interest in privacy, too, intersects with expression. Privacy may be viewed as the interest of an individual or group in forming an inner life. It involves the channelling of thought, belief, and sensation as the expression of autonomous personality.").

229. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

230. *Id.*

231. *Ferber*, 458 U.S. at 764.

232. *Id.*

233. *Id.*

raphy is not to purge the marketplace of the ideas that the information is communicating. Rather, the purpose of regulating child pornography is to protect the young persons used in the production of the depictions.[234] Because child pornography may contain serious literary merit, a prohibition against the private possession of child pornography would seem to be more intrusive on the First Amendment right to receive information than a prohibition against the private possession of obscene materials.

IX. THE HAZARDS OF PROHIBITING POSSESSION

Offenses which limit what one may possess are problematic because of the difficulty in determining whether the person was aware of the character or existence of the item. State statutes often define "possess" in ways that do not ensure whether the possessor was aware of these factors. For example, the New York Penal Law defines "possess" as having "physical possession or otherwise to exercise dominion or control over tangible property."[235] Thus, an item may be "possessed" if the item is in a pocket or handbag even if the person is unaware the item is there. The person may have placed the item there without realizing what it was, or the item may have been placed there by another person. Even a person who is aware of the existence of the item may not be aware that the item is, for example, a narcotic drug, obscene material, or child pornography.

When dealing with items found in a person's premises, the possession issue is usually resolved by proving the person had control over the premises.[236] Thus, an item found in a person's apartment or house will usually be sufficient to support a conviction for possession. Courts also have convicted individuals for possession of illegal items even where the person was not the sole occupant of the dwelling.[237] It would be easy not to know about the existence of a particular photograph in an apartment an individual shares with another person. Also, a person may move into an apartment in which a previous tenant has

234. *See Osborne*, 110 S. Ct. at 1696.

235. N.Y. PENAL LAW § 10.00 (Consol. 1991).

236. *E.g.*, State v. Harvey, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972) (finding that prosecutor sufficiently established defendant's possession of marijuana where defendant was "within three to four feet of the marijuana . . . and no one else was in the room," or in defendant's house).

237. *E.g.*, People v. Casanova, 117 A.D.2d 742, 744, 498 N.Y.S.2d 471, 472 (N.Y. App. Div.) (finding constructive possession justified despite lack of exclusive possession when other incriminating circumstances were present), *appeal denied*, 67 N.Y.2d 940, 494 N.E.2d 117, 502 N.Y.S.2d 1032 (1986).

left certain items or a visitor might inadvertently leave a prohibited item in another person's home. With photographs, the problem is particularly acute because photographs are typically small. Furthermore, many people keep such a large number of photographs that they might not notice that a particular photograph was inadvertently left behind by another person.

In a number of cases, individuals have been charged with possession of child pornography after giving film to a drug store for developing.[238] When the film turned out to contain child pornography, the individuals were arrested and charged.[239] In one such case, an individual's children had taken the photographs without the person's knowledge.[240] The person was arrested despite the fact that there was no evidence that the person knew that questionable photographs were on the film taken to the drug store.[241]

In *Osborne*, the Supreme Court did not allude to these difficulties. However, these problematic issues are relevant when determining whether a state has a compelling interest in prohibiting the private possession of child pornography. If prohibiting possession applies to those situations in which the existence or nature of the item is in doubt, then the state's interest in protecting the children depicted in the material is not being served. A ban on possession of child pornography can be effective only against those who are aware that they possess such material.

A strict *mens rea* requirement regarding the possession of child pornography can partially ameliorate the problem. For example, the Minnesota child pornography statute requires that the person possess the material "knowing or with reason to know its content and character."[242] Knowledge of the possessed item also may be inferred from the circumstances. A New York court deciding a drug possession case inferred knowledge of the substance's possession by the attendant circumstances.[243] The court reasoned "that the possessor knows what

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238. *See, e.g.*, People v. Lerch, 108 Ill. 2d 580, 483 N.E.2d 888 (1985) (reviewing conviction of Lerch for photographing his six-year-old child in the nude while the child played with her mother on the Lerch's living room floor before a bath), *noted in* Stanley, *supra* note 119, at 339. *See also* Stanley, *supra* note 119, at 343-44 (discussing arrest of William Kelly after having film developed which contained, unknown to him, pictures of his children in "lascivious poses," which his children had taken of each other).

239. *See* Stanley, *supra* note 119, at 339, 343-44.

240. *Id.* at 343-44.

241. *Id.*

242. MINN. STAT. ANN. § 617.247 (West 1987).

243. People v. Reisman, 29 N.Y.2d 278, 285, 277 N.E.2d 396, 400, 327 N.Y.S.2d 342, 348 (1971), *cert. denied*, 405 U.S. 1041 (1972). The *Reisman* court decided whether knowledge of

he possesses, especially, but not exclusively, if it is in his hands, on his person, in his vehicle, or on his premises."[244]

In *Osborne*, the trial judge instructed the jury that possession meant "to have, hold, control, or to exercise dominion or custody over a thing or object."[245] This instruction did not require a finding that Osborne was aware that the depictions existed. The Ohio Supreme Court, on the other hand, required proof that Osborne recklessly possessed child pornography.[246] According to the Ohio Supreme Court, a possessor of child pornography possesses it recklessly if, "with heedless indifference to the consequences, he perversely disregards a known risk" that it is child pornography.[247] Thus, a possessor who does not know of the item's existence or character, would be guilty if the possessor was simply aware of a risk that the item might be child pornography.

Even with a strict *mens rea* requirement in a possession offense, non-aware possessors remain at risk. A possessor's guilt or innocence depends upon whether the trier of fact decides that the possessor was aware of the existence and content of the item. The possessor's credibility while testifying may be decisive. When dealing with child pornography, the issue of knowledge or recklessness is particularly delicate because inferring knowledge or recklessness often depends upon many factors. These factors include the age of the person depicted and the pornographic character of the depiction. In cases such as these, an underage person may appear older. Also, the pornographic character of the depiction depends upon many factors[248] including the *Osborne* Court's less than precise definition of pornography.[249]

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possession could be attributed to a person who consigned, and later accepted delivery of a carton filled with marijuana. *Id.* at 281-82, 277 N.E.2d at 397-98, 327 N.Y.S.2d at 345-46. The court reasoned that an inference of possession was justified or "probabilities based on experience" supported the inference. *Id.* at 286, 277 N.E.2d at 400, 327 N.Y.S.2d at 349. Finding the "probabilities justifying the inference of knowledge" to be "unusually impressive," the court held that the inference was permissible. *Id.* at 282, 277 N.E.2d at 401, 327 N.Y.S.2d at 350.

244. *Id.*

245. Partial Transcript of Proceedings at 120, State v. Osborne, No. 14333 (Franklin County Mun. Court Sept. 24, 1985).

246. State v. Young, 37 Ohio St. 3d 249, 253, 525 N.E.2d 1363, 1368-69 (1988), *rev'd sub nom.* Ohio v. Osborne, 110 S. Ct. 1691 (1990).

247. *Id.* at 253, 525 N.E.2d at 1368-69 (quoting OHIO REV. CODE ANN. § 2901.22(C) (Anderson 1987)).

248. *See infra* text accompanying notes 284-88.

249. *See Osborne*, 110 S. Ct. at 1699 n.11.

In *Ferber*, the Supreme Court held that "some element of scienter on the part of the defendant" must be proved.[250] However, what level of *mens rea* the Supreme Court intended to be proved is unclear. In a federal prosecution for filming a minor in sexually explicit conduct, the court permitted the accused to assert a defense of reasonable mistake of age if the accused believed the minor was an adult.[251] To be convicted, the possessor was required to be aware of both the existence and character of the child pornography.[252] In *Osborne*, the Supreme Court merely alluded to the scienter requirement in ruling on a procedural issue, but provided no new insight as to how the issue should be resolved in future cases.[253]

The "recklessness" level of *mens rea* approved by the *Osborne* Court does not adequately limit the range of persons who might be found guilty of possession of child pornography. Before a state has a compelling interest in prohibiting child pornography possession, it would seem that the state first must prove that the possessor was aware of both the existence of the pornography and of its pornographic character. This would mandate that the state prove that the possessor had knowledge of both the type of depiction and the age of the person depicted. If the accused does not know that the person depicted is a minor, the rationale for overriding First and Fourth Amendment rights crumbles. The accused cannot be suspected of using the photographs to seduce minors if the accused does not know that the person depicted in the photograph is a minor.

The danger of convicting persons without establishing their knowledge of the existence or character of the material militates against

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250. *Ferber*, 458 U.S. at 765. *See also* Smith v. California, 361 U.S. 147, 152-55 (1959) (requiring scienter before a bookseller can be prosecuted for selling obscene material).

251. United States v. Kantor, 677 F. Supp. 1421, 1435 (C.D. Cal. 1987), *vacated, mand. granted*, United States v. United States Dist. Court, 858 F.2d 534 (9th Cir. 1988) (holding that defendant may assert a reasonable mistake defense because abolition of pornography is limited by the First Amendment; punishment for unintentional violations may unduly burden producers of nonpornographic expressions, and it is unfair to punish pornography employers for a "factual error, which might have been the product of trickery and deception"). *Kantor* is noted in Christiansen, *The Child Protection Act: A Blanket Prohibition Smothering Constitutionally Protected Expression*, 9 LOY. ENT. L.J. 301 (1989); Peetzer, United States v. United States District Court (Kantor): *Protecting Children from Sexual Exploitation or Protecting the Pornography Producer?*, 20 PAC. L.J. 1343 (1989).

252. *Kantor*, 677 F. Supp. at 1429. The Supreme Court in *Osborne* decided not to rule on Osborne's challenge to a similar jury instruction because his counsel at trial had not objected. *Osborne*, 110 S. Ct. at 1703.

253. *Osborne*, 110 S. Ct. at 1703. However, the Court decided that scienter was required under Ohio law. *Id.*

permitting a ban on the private possession of child pornography. When the possession of the material is in the home, a prohibition against possession is even more dangerous. The harm to Fourth Amendment interests is significant because the enforcement techniques necessary to discover child pornography in the home are highly intrusive. This was exemplified in *Osborne* where police searched dresser drawers until finding photograph albums and then perused large numbers of photographs until finding four which formed the basis of the charge against Osborne.[254]

X. PROHIBITING THE VIEWING OF CHILD PORNOGRAPHY

Osborne was convicted for possession of child nudity material under Ohio Revised Code section 2907.323(A)(3).[255] The Ohio statute also forbids viewing child pornography.[256] In fact, this statute alone among the post-*Ferber* statutes includes the additional prohibition against the act of viewing child nudity material.[257] Obscenity statutes also typically forbid possession, but not viewing. This Ohio provision is apparently the first statute to outlaw the viewing of communicative material.

The result of Ohio's far-reaching statute is that a non-possessor of child pornography who inadvertently views child pornography may be prosecuted under the statute. Thus, a person who passes by a drive-in movie theater where pornographic material is being shown could be convicted under the statute. Similarly, a visitor to a museum exhibit at which a single work on display constituted child pornography could be convicted under Ohio's statute.[258] This prohibition takes the scope of illegality even farther beyond the commercial production and distribution that was at issue in *Ferber*. One who simply views child pornography is even farther removed from the commercial child pornography industry than one who possesses.

Further, Ohio's statute does not even require that the accused "intend" to have the material come within his or her line of vision.[259]

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254. *Id.* at 1692, 1712.

255. OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson Supp. 1990).

256. *Id.* The statute provides, in pertinent part, that "no person shall . . . *view* any material or performance that shows a minor who is not the person's child or ward in a state of nudity. . . ." *Id.* (emphasis added).

257. *See id. Compare* OHIO REV. CODE ANN. § 907.323(A)(3) *with* the other post-*Ferber* statutes cited *supra* at note 41.

258. *See Osborne*, 110 S. Ct. at 1706 n.2 (Brennan, J., dissenting) (referring to a 1990 museum exhibition of the work of Robert Mapplethorpe).

259. *See* OHIO REV. CODE ANN. § 2907.323(A)(3) (requiring only that a person "view" the proscribed material to violate the statute). However, Ohio Revised Code § 2901.21(B) provides,

A conviction will lie if the person was aware of a risk that the material would contain child pornography and would come within view.[260]

Even though Osborne was not charged with "viewing" child pornography, Osborne challenged the "viewing" element of the Ohio statute as evidence of overbreadth in the statute.[261] Under the overbreadth doctrine, the Supreme Court had to determine the "viewing" element was constitutionally valid before a conviction under the statute could be upheld.[262] The Court determined that the viewing element was not overbroad but did not explain the reason for its decision.[263] The Court mentioned "viewing" in the concluding sentence of its analysis of Osborne's privacy challenge: "Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography."[264] Previously, the Court had mentioned viewing only obliquely in a discussion which had been directed mainly at possession rather than viewing.[265] The Court held that the "State's ban on possession *and viewing* encourages the possessors of these materials to destroy them."[266]

While a ban on possession may encourage a possessor to destroy the child pornography, a ban on viewing will not. A viewer and a possessor are distinct individuals under the statute.[267] Thus, the Court's assertion that a ban on viewing encourages destruction of child pornography makes no sense. The only way in which the Court's assertion could make sense would be if a viewer were to destroy child pornography that belonged to another. Presumably, however, the viewer would have no right to destroy another person's child pornography.

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in pertinent part, that "when the section defining an offense . . . neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." OHIO REV. CODE ANN. § 2901.21(B). Thus, "recklessness is the culpable mental state required to constitute a violation of [Ohio Revised Code] § 2907.323(A)(3)." *Young*, 525 N.E.2d at 1369; *see supra* text accompanying notes 246-49.

260. *See supra* text accompanying notes 246-49.

261. Brief for Appellant at 41, *Osborne* (No. 88-5986).

262. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (holding that a statute may be facially invalid when it is "substantially overbroad," or when the statute may deter protected speech to an extent which justifies invalidating the statute). Thus, the *Osborne* Court had to overturn Osborne's conviction if it found any element of the Ohio statute to be "substantially overbroad." *Id.*; *see also* Quigley & Shank, *supra* note 89, at ___ (discussing the *Osborne* Court's overbreadth analysis).

263. *See Osborne*, 110 S. Ct. at 1698.

264. *Id.*

265. *See id.* at 1695-97.

266. *Id.* at 1697 (emphasis added).

267. *See* OHIO REV. CODE ANN. § 2907.323(A)(3) (stating that "[n]o person shall . . . possess *or* view" child pornography) (emphasis added).

The Court's conclusion that a ban on viewing is constitutionally valid is curious when compared to the Court's reasons for upholding a ban on possession. As indicated in the *Osborne* opinion, the reasons for upholding a ban on the private possession of child pornography were three-fold: bans on production and distribution were insufficient to stop the dissemination of child pornography, child pornography permanently records the abuse of the child victim, and child molesters use child pornography as a tool for the seduction of minors.[268] These rationales, however, do not justify proscribing the "viewing" of child pornography. A non-possessing viewer of child pornography has nothing to do with the dissemination or preservation of child pornography. A non-possessing viewer cannot use it to seduce other children. A non-possessing viewer can only view the materials.

Ohio's ban on the viewing of child pornography is the kind of legislation that courts sometimes hold violates substantive due process rights by forbidding an act that the state simply has no business prohibiting.[269] The prohibition is particularly dangerous because a First Amendment interest is involved. To enact a valid regulation affecting speech, a state must have a compelling interest in the harm it seeks to avert and may use only the least restrictive means necessary to avert that harm.[270] A complete ban on the viewing of child pornography is hardly a necessary means to stop the production of child pornography. The non-possessory viewer's relationship to the child pornography industry is far too marginal, and a state cannot effectively enforce a ban on viewing.

XI. SEXUAL CONDUCT AS AN ELEMENT OF CHILD PORNOGRAPHY

Most of the post-*Ferber* statutes dealing with child pornography enumerated certain kinds of sexual acts that were prohibited and added the broader category of "lewd exhibition of the genitals."[271]

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268. *See supra* text accompanying notes 100-04.

269. *See* Alegata v. Commonwealth, 353 Mass. 287, 297, 231 N.E.2d 201, 207 (1967) (holding that vagrancy statute was invalid "as repugnant to the due process clause of the Fourteenth Amendment" for seeking "to [criminalize] conduct which cannot fairly be classed as such" and thus constituted "an invalid exercise of the police power"); Fenster v. Leary, 20 N.Y.2d 309, 312, 229 N.E.2d 426, 428, 282 N.Y.S.2d 739, 742 (1967) (holding that vagrancy statute was invalid "on the ground that it violates due process and constitutes an overreaching of the proper limitations of the police power" and concluding that the statute "unreasonably [criminalizes] conduct . . . which in no way impinges on the rights or interests of others and which has in no way been demonstrated to have anything more than the most tenuous connection with prevention of crime.").

270. *See infra* text accompanying notes 354-67.

271. The post-*Ferber* statutes are cited *supra* at note 41.

Four of these statutes omitted this formulation requiring instead that the depiction be of one person sexually touching another.[272] In addition to prohibiting the possession of depictions of minors involved in sexual conduct,[273] Ohio enacted a statute titled "Illegal use of minor in nudity-oriented material or performance."[274] This statute, by regulating depictions of nudity, is broader than any other post-*Ferber* statute. The Ohio statute, under which the *Osborne* charge was filed, defined the material as anything showing "a minor who is not the person's child or ward in a state of nudity."[275] Ohio statutorily defined nudity as a

> depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.[276]

In *Ferber*, the Supreme Court held that material must depict sexual conduct in order to come within the classification of child pornography.[277] The New York statute at issue in *Ferber* covered "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."[278] In the *Ferber* case, the acts depicted were those of masturbation.[279]

The *Ferber* Court made special note of the section in the statute covering "lewd exhibition of the genitals," because this was the only category in the definition that did not involve sexual activity related to sexual touching of oneself or another person.[280] The Court noted

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272. *See* MO. ANN. STAT. § 573.037 (Vernon Supp. 1991) (requiring that the material show "a minor participating or engaging in sexual conduct"); NEV. REV. STAT. ANN. § 200.730 (Michie Supp. 1989) (requiring that material "[depict] a person under the age of 16 years engaging in or simulating, or assisting others to engage in or simulate, sexual conduct"); OHIO REV. CODE ANN. § 2907.322 (Anderson Supp. 1990) (requiring that material "shows a minor participating or engaging in sexual activity"); S.D. CODIFIED LAWS ANN. § 22-22-23.1 (Supp. 1991) (requiring depiction of a minor "engaging in a prohibited sexual act or in the simulation of such an act").

273. OHIO REV. CODE ANN. § 2907.322(A)(5) (Anderson Supp. 1990).

274. *Id.* § 2907.323.

275. *Id.* § 2907.323(A)(3). Certain statutory exceptions are provided: possession for "artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose"; and possession by written consent of the parent. *Id.* § 2907.33(A)(1)(a), (b).

276. *Id.* § 2907.01(H).

277. *Ferber*, 458 U.S. at 765.

278. N.Y. PENAL LAW § 263.00(3) (Consol. 1989).

279. *Ferber*, 458 U.S. at 752.

280. *Id.* at 765.

that the phrase "lewd exhibition of the genitals" had been used in the case of *Miller v. California*[281] as an example of one kind of depiction states might regulate as obscenity.[282] But the Court did not attempt to define the phrase in either *Miller* or *Ferber*.

The *Ferber* Court recognized that the term "lewd" was difficult to define and limit.[283] In deciding that the New York statute was not overbroad, the Court recognized that some applications of the statute might infringe upon protected speech.[284] In that regard, the Court stated: "Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.' Under these circumstances, [section] 263.15 is 'not substantially overbroad . . . .'"[285]

The term "lewd exhibition of the genitals" was part of most post-*Ferber* statutes.[286] However, the term is problematic. It is unclear how a "lewd exhibition of the genitals" differs from any other depiction of the genitals. A photograph showing a nude frontal view of a child walking towards the camera would probably not constitute lewdness. By contrast, if the child had a coy facial expression, one could argue that this constitutes a "lewd exhibition of the genitals." The term might also require that something specific to the genitals be lewd, for example, that the genitals be shown in a state of sexual excitement.[287] If read broadly, however, the term "lewd exhibition of the genitals" may encompass any depiction of nude children, which the *Ferber* Court had defined as protected speech.[288]

The United States Supreme Court in *Osborne* decided that the Ohio Supreme Court had construed the Ohio statute to include the

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281. 413 U.S. 15, 25 (1973).

282. *Ferber*, 458 U.S. at 765.

283. *See id.* at 773.

284. *Id.*; *see also id.* at 764 ("there are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment").

285. *Id.* at 773-74 (citation omitted).

286. For citation of the post-*Ferber* statutes, see *supra* note 41.

287. Frederick Schauer suggested that the term "lewd exhibition of the genitals" might be read more broadly when applied to depictions of children than when applied, in defining obscenity, to depictions of adults. Schauer, *supra* note 222, at 294-95. Schauer argues by analogy to Ginsberg v. New York, 390 U.S. 629 (1968), which permitted states to set a lower standard for obscenity sold to minors, as opposed to adults. That analogy would not seem to hold. The fact that states can be more protective of minors than of adults as regards the type of material they may read or view should not control the definition of the material in question.

288. *See Ferber*, 458 U.S. at 765 n.18 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) and indicating that nudity, without more, is protected expression).

lewd exhibition of the genitals.[289] However, in Brennan's dissent, he challenged this reading of the Ohio Supreme Court's ruling.[290] Brennan pointed out that the Ohio Supreme Court had not limited "lewd exhibition" to involve exhibition of the genitals.[291] The intermediate appellate court had used the phrase "lewd exhibition of the genitals,"[292] but the Ohio Supreme Court dropped the "of the genitals" language in its own formulation.[293] The Ohio Supreme Court wrote: "[i]t is true that R.C. 2907.323(A)(3) does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals."[294] The United States Supreme Court, however, did not say how the Ohio Supreme Court's formulation was construed, but Brennan pointed out that the Ohio Supreme Court did not link the term "lewd exhibition" to the word "genitals."[295] In Brennan's opinion, lewd exhibitions of "nudity" were also within the statute's purview.[296]

In fact, the Ohio Supreme Court would have found it difficult to confine the Ohio statute to depictions of the genitals only because Ohio's statutory definition of "nudity" also included display of the buttocks, the pubic area, and the female breast, in addition to the genitals.[297] Brennan noted, "the broad definition of nudity in the Ohio statutory scheme means that 'child pornography' could include any photograph depicting a 'lewd exhibition' of even a small portion of a minor's buttocks or any part of the female breast below the nipple."[298] Thus, in Brennan's opinion, the Ohio Supreme Court could not have limited the coverage of the Ohio statute to cover "lewd exhibition of the genitals" without ignoring the statutory definition of "nudity."

The United States Supreme Court reasoned, however, that whether or not the Ohio Supreme Court had limited "lewd exhibition" to "genitals" only was irrelevant.[299] "[The] distinction between body areas and specific body parts is constitutionally [in]significant: the

289. *Osborne*, 110 S. Ct. at 1699 n.11.

290. *Id.* at 1707 n.4 (Brennan, J., dissenting).

291. *Id.*

292. State v. Osborne, No. 85AP-945 (Ohio Ct. App. June 10, 1986) (WESTLAW, 1986 WL 6681), *aff'd sub nom.* State v. Young, 37 Ohio St. 3d 249, 525 N.E.2d 788 (1988), *rev'd sub nom.* Ohio v. Osborne, 110 S. Ct. 1691 (1990).

293. *Osborne*, 110 S. Ct. at 1707 n.4 (Brennan, J., dissenting).

294. State v. Young, 37 Ohio St. 3d 249, 251, 525 N.E.2d 1363, 1367 (1988), *rev'd sub nom.* Ohio v. Osborne, 110 S. Ct. 1691 (1990).

295. *Osborne*, 110 S. Ct. at 1707 (Brennan, J., dissenting).

296. *Id.*

297. OHIO REV. CODE ANN. § 2907.01(H) (Anderson Supp. 1990).

298. *Osborne*, 110 S. Ct. at 1708 (Brennan, J., dissenting).

299. *Id.* at 1699 n.11.

crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks."[300]

The *Osborne* Court thus expanded *Ferber*-defined child pornography beyond lewd exhibition of the genitals only.[301] This expansion creates the possibility that "lewd exhibition" may be found where genitals are not shown, but where the pose is deemed to be seductive. Thus, the line between child pornography and nudity becomes extremely difficult to discern. The apparent meaning of *Ferber* and *Osborne* is that depictions of nudity are protected unless the nudity is "lewd." Because the Court is not concerned with which body parts are shown, the Court did not exclude the possibility that a depiction of a face might be construed as being "lewd."

The Supreme Court's ready acceptance of "lewd exhibition" in *Osborne* is at odds with the Court's concern over similar phrasing in *Ferber*. The *Ferber* Court expressed concern over the broad construction of the New York statutory formulation of the term "lewd exhibition of the genitals."[302] Because the term appeared at the end of a listing of several sexual acts, the Court said that the term must be read narrowly.[303] The Court said that it would not assume "that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'"[304] The Ohio Supreme Court in *Osborne*, however, expanded the scope of that formulation. This was the exact result that the United States Supreme Court in *Ferber* had warned against. In contrast, the *Osborne* Court was unconcerned that the statute's reach had been greatly expanded.

Beyond "lewd exhibition," the Ohio Supreme Court determined that depictions might also fall within the ambit of the Ohio statute if they involved a "graphic focus on the genitals."[305] The formulation of "graphic focus on the genitals" did not require lewdness and was absent from the New York statute at issue in *Ferber*.[306] The Ohio

300. *Id.* While the Supreme Court thus did not require the depiction of any particular body parts, the Ohio statute did. OHIO REV. CODE ANN. § 2907.01(H). Thus, the Court's statement here that depiction of certain body parts is not required may be taken as *dictum*.

301. *See Ferber*, 458 U.S. at 767-74.

302. *See id.*

303. *Id.* This is an application of the principle of statutory construction *ejusdem generis*. *Osborne*, 110 S. Ct. at 1708 (Brennan, J., dissenting).

304. *Ferber*, 458 U.S. at 773.

305. *Young*, 37 Ohio St. 3d at 252, 525 N.E.2d at 1368.

306. *See supra* text accompanying note 280.

Supreme Court's formulation thus introduced a term that had not appeared in other statutes that had come before the United States Supreme Court.

The formulation "graphic focus on the genitals," even more clearly than "lewd exhibition," covered depictions that involved no sexual conduct. The United States Supreme Court, however, accepted this formulation without discussion, mentioning it in a footnote only.[307] Brennan, however, called the Ohio Supreme Court's "graphic focus on the genitals" formulation "a stranger to obscenity regulation."[308] Brennan concluded that the formulation "appears to involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture."[309] According to Brennan, this definition was "dependent on the perspective and idiosyncrasies of the observer" and was "unconnected to whether the material at issue merits constitutional protection.[310] [For example,] Michelangelo's 'David,' might be said to have a 'graphic focus' on the genitals, for it plainly portrays them in a manner unavoidable to even a casual observer."[311] Brennan expressed concern that the Supreme Court had permitted Ohio to regulate depictions of nudity: "[T]he depictions of nude children on the friezes that adorn our Courtroom" could come within this formulation.[312] "Even a photograph of a child running naked on the beach or playing in the bathtub might run afoul of the law, depending on the focus and camera angle."[313]

A photograph showing a child posed in a sexually suggestive manner carries some of the harm to which the Supreme Court alluded to

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307. *Osborne*, 110 S. Ct. at 1699 n.11.

308. *Id.* at 1711 (Brennan, J., dissenting).

309. *Id.*

310. *Id.*

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

312. *Id.*

313. *Id.* The Third Circuit took a stricter view in construing the Child Protection Act of 1984, which regulates depictions of "sexually explicit conduct," defined to include "lascivious exhibition of the genitals or pubic area." 18 U.S.C. § 2256(2), (2)(E). In United States v. Villard, 885 F.2d 117 (3d Cir. 1989), the photographs at issue showed a boy "from the head down to the knees," and the boy's penis was in a state of "three quarters erection." *Id.* at 123. The Court had to determine whether this was a "lascivious exhibition of the genitals or pubic area." It said:

> If the photographs showed the boy's body from head to knees, they may have constituted closeup photographs of the boy's body, but would seem not to constitute closeup photographs of the boy's genitals. Moreover, simply because the boy had a partial erection does not necessarily mean that the erection was the focus of the photograph.

Id. (citation omitted).

in *Ferber*.[314] The child may feel embarrassed over having posed for the picture. Absent some sexual touching, however, the line between child pornography and nudity is impossible to draw.[315] Lewdness is too subjective a criterion to provide a line between depictions whose possession the Constitution protects and those which the Constitution does not protect. Some jurors might find any photograph of a nude child to be "lewd." The Ohio Supreme Court's formulation, with the United States Supreme Court's approval, leaves no clear line between child pornography and nudity.[316]

XII. ILLEGAL SEXUAL CONDUCT AS AN ELEMENT OF CHILD PORNOGRAPHY

In *Osborne*, the United States Supreme Court overlooked a key element of previously defined child pornography, namely, the illegal nature of the conduct being depicted. A requisite of a child pornography prohibition is that the depicted sexual conduct be unlawful.[317] In fact, in a pre-*Osborne* decision, the Ohio Supreme Court found that child pornography involves "physical, mental and sexual abuse," and that "[t]he depictions sought to be banned . . . are but memorializations of cruel mistreatment and unlawful conduct."[318] In *Ferber*, the United

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314. *See Ferber*, 458 U.S. at 758.

315. Ohio argued that even if no sexual conduct occurs in a photograph depicting a nude child, such conduct may have taken place before or after the photograph was taken. Brief for Appellee at 35 n.16, *Osborne* (No. 88-5986) (citing Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295, 300 (1979) (authored by T. Christopher Donnelly)). This rationale was not mentioned by the Court, and it would seem insufficient to warrant a prohibition against possession. The fact that unlawful conduct may have taken place does not justify an assumption that it did take place.

316. Indicative of the chilling effect of the Court's failure to draw a sharp line between child pornography and nudity is a report in an Alaskan newspaper that authorities at East High School in Anchorage, citing the *Osborne* ruling, forbade students to publish in their 1990 yearbook naked pictures of the students as babies. *Alaska Ear*, Anchorage Daily News, Apr. 22, 1990, at B3, col. 1. In 1991, the U.S. attorney in San Francisco sought indictment of a photographer based, at least in part, on photographs he took of young girls at nude beaches. According to prosecuting officials, the photographs focused on the genitals, and thereby fit the *Osborne* definition of child pornography. *Panel Rejects Pornography Case*, N.Y. Times, Sept. 15, 1991, at A29, col. 1. The grand jury, however, declined to indict. *Id.*

317. *Cf.* Schauer, *supra* note 222, at 300 (stating that although *Ferber* mentioned the proposition that speech may be regulated when it is an important part of an unlawful act, the correct approach analyzes the value of the speech's content rather than its connection with illegal activity).

318. State v. Meadows, 28 Ohio St. 3d 43, 50, 503 N.E.2d 697, 703-04 (1986) (holding that statute criminalizing private possession of materials depicting minors engaging in sexual activity,

States Supreme Court exempted child pornography from First Amendment protection on the theory that the state has a right to prevent "sexual exploitation and abuse of children."[319] The Court said that "[s]exual molestation by adults is often involved in the production of child sexual performances."[320]

The rationale for allowing a child pornography prohibition is that a child is unable to consent to the sexual conduct involved in the pornography.[321] If the child is over the age of consent for sexual conduct, the sexual conduct is deemed to be lawful. Thus, a valid prohibition against the use of children in child pornography would have to incorporate an age requirement no lower than the age for lawful consent to sexual conduct.

States typically define the term "minor" for their child pornography statutes as "one under the age of eighteen."[322] The age of consent for sexual conduct, however, is typically fifteen or sixteen.[323] Thus, where the child is sixteen or seventeen, the sexual activity may be considered lawful. At this age, the child is deemed capable of consenting to the sexual conduct depicted in the child pornography.

In the New York statute at issue in *Ferber*, the sexual conduct depicted was unlawful because the statute regulated depictions of sexual conduct by children under the age of sixteen.[324] The age of consent for sexual conduct in New York was seventeen.[325] Under the Ohio

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masturbation, or bestiality did not violate the First Amendment since the statute advanced "compelling" state interests of preserving minors' privacy and protecting them from many forms of abuse attendant with child pornography), *cert. denied*, 480 U.S. 936 (1987).

319. *Ferber*, 458 U.S. at 757.

320. *Id.* at 758 n.9 (citation omitted).

321. People v. Spargo, 103 Ill. App. 3d 280, 286, 431 N.E.2d 27, 31 (Ill. App. Ct. 1982) (reviewing defendant's conviction for exhibiting to an undercover police investigator a photo album containing seventy color photographs of young, nude boys masturbating or exhibiting their genitals); COMMISSION ON PORNOGRAPHY, *supra* note 46, at 412.

322. *E.g.*, ILL. ANN. STAT. ch. 110 1/2, para. 11-1 (Smith-Hurd Supp. 1991) ("A minor is a person who has not attained the age of 18 years. A person who has attained the age of 18 years is of legal age for all purposes. . . .").

323. *E.g.*, KAN. STAT. ANN. § 21-3503 (Supp. 1990) (making sexual intercourse, lewd fondling, and solicitation to engage in lewd fondling a crime when "any of the . . . acts [are engaged in] with a child who is under 16 years of age. . . .").

324. *See* N.Y. PENAL LAW § 263.15 (Consol. 1989) ("A person is guilty of promoting a sexual performance by a child when . . . he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."); Petition for Writ of Certiorari at 5, New York v. Ferber, 458 U.S. 747 (1982) (No. 81-55) (stating that one depiction was a film containing scenes of naked boys, "some no older than seven or eight years of age, . . . engaged in solo and mutual masturbation").

325. N.Y. PENAL LAW § 130.25.

statute at issue in *Osborne*, no age was specified, but the Ohio Supreme Court stated that the relevant age was eighteen.[326] However, in Ohio, the age of consent for sexual conduct was fifteen.[327] Thus, with a child that was fifteen, sixteen, or seventeen years of age, the sexual conduct was considered lawful, but production, distribution, or possession of a depiction of that conduct was considered unlawful.

This age discrepancy undercuts the rationale in favor of regulating child pornography. The rationale for prohibiting the possession of child pornography is that it facilitates an injury to the child depicted.[328] But if the child is engaging in conduct that she or he is deemed capable of undertaking consensually, then the child has incurred no injury.

XIII. PROOF OF AGE OF THE CHILD DEPICTED

Osborne also had challenged the method which Ohio used to establish the age of the persons depicted in the four photographs at issue.[329] The United States Supreme Court, however, did not accept this issue for review.[330] At Osborne's trial, the prosecution introduced the four photographs into evidence and asked the jury to decide that the person depicted in the pictures was younger than eighteen years of age.[331] One of the photographs had an inscription on the reverse side: "Tommy — 13."[332] The prosecution suggested that the inscription indicated that the person depicted in the photograph was thirteen years of age.[333] The prosecution, however, had no evidence establishing who had written the inscription, or whether the number referred to the age of the child or to something else.[334]

In the typical child pornography case, the prosecution has a photograph that depicts a person. The prosecution asserts that the person is below the statutory age. The photograph is then introduced into evidence and the trier of fact is asked to conclude that the person depicted in the photograph is below the relevant statutory age. On occasion, pediatricians have testified as expert witnesses to estimate the age of the child in the photograph. Courts have never required

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326. *Young*, 37 Ohio St. 3d at 252, 525 N.E.2d at 1368.

327. OHIO REV. CODE ANN. § 2907.04 (Anderson Supp. 1990).

328. *See Ferber*, 458 U.S. at 753.

329. Jurisdictional Statement of Appellant at 16-18, *Osborne* (No. 88-5986).

330. Docket Sheet, *Osborne* (No. 88-5986).

331. Partial Transcript of Proceedings at 52-55, State v. Osborne, No. 14333 (Franklin County Mun. Court, Sept. 24, 1985).

332. *Id.* at 53.

333. *Id.*

334. *Id.*

that the photographer testify to authenticate the photograph. Bowing to the difficulty of prosecution if strict proof requirements were imposed, the courts have allowed the trier of fact to determine the age of the person depicted by simply viewing the photograph.

This method of establishing the age of the person depicted in a photograph is questionable. Typically, when photographs are used as evidence in criminal cases, the prosecution must authenticate the photograph to prove that the photograph is a true representation of what the photograph appears to depict.[335] If the prosecution alleges that the person depicted is below a given age, the prosecution should be required to either present proof of the identity and age of the person depicted or, at least, present expert testimony on the depicted person's age.

Beyond the question of age, there are other problems of authentication. Photographs may be produced by splicing material together. A photograph that appears to be of a person may in fact be of a dummy, or a wax figure. If the photograph is of poor quality, it may not be obvious that the photograph depicts a live person.

One consequence to the rationale that children are harmed by posing in pornographic photographs is that the depiction in the photograph must be of a real child.[336] Thus, if the depiction is of a dummy or is an artist's representation, there would be no child pornography.[337] When the state introduces a photograph that appears to be of a person,

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335. *See, e.g.*, United States v. Stratton, 392 F. Supp. 552, 554 (E.D. Pa.) (A photograph that is admitted into evidence must be authenticated.), *aff'd*, 523 F.2d 1052 (5th Cir. 1975), *cert. denied*, 424 U.S. 945 (1976).

336. COMMISSION ON PORNOGRAPHY, *supra* note 46, at 597. *See also* Kent & Truesdell, *supra* note 40, at 370 n.29 (noting that 18 U.S.C. § 2252, the federal child pornography statute, includes as child pornography only the depiction of real children and would therefore not cover an artist's sketch that was not of an actual child). Because child pornography regulation is aimed at protecting children within the state, it is not obvious that a state may regulate depictions of even a real child if the depiction is produced outside the state. The Supreme Court in *Ferber* said that a state may prohibit the distribution of materials produced outside the state. *Ferber*, 458 U.S. at 766-67. The Court noted that it is "often impossible to determine where such material is produced," and that it is often produced abroad. *Id.* at 767 n.19. In oral argument in *Osborne*, Justice Marshall asked whether the material in question had been produced in Ohio. Transcript of Oral Argument at 45, *Osborne* (No. 88-5986). But the Court's opinion in *Osborne* did not address the issue, even though the evidence was that the photographs were mailed from Florida. *Id.*

337. State statutes would seem to be limited to depictions of real children by their use of the term "minor," which means a real person below a specified age. See statutes cited *supra* note 41. Material conveyed by computer would not be child pornography for this reason.

that is not sufficient proof that the photograph is, in fact, of a real person. Again, expert testimony should be required to establish that fact.[338]

XIV. THE POSING OF A CHILD AS AN ELEMENT OF CHILD PORNOGRAPHY

The New York statute at issue in *Ferber* prohibited "performances."[339] This implied that the photographing had to be staged or posed.[340] To justify the New York statute, the Supreme Court determined that a substantial portion of the harm to a child is the psychological and possibly physical harm from being staged in sexual conduct.[341] The post-*Ferber* statutes, however, were not limited to posed depictions.[342] These statutes simply referred to depictions of a child engaged in sexual conduct.[343] The Ohio statute, as construed by the Ohio Supreme Court, did not require the prohibited depictions to have been posed[344] or, indeed, to show sexual conduct.[345]

Although the United States Supreme Court in *Osborne* did not mention this aspect of the Ohio statute, Justice Brennan, in his dissent, noted that under the statute

> there is no requirement that the State show . . . that the child . . . knew that a photograph was taken. I do not see how a candid shot taken without the minor's knowledge can 'haun[t]' him or her in the years to come . . . when there is no indication that the child is even aware of its existence.[346]

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338. There also should be a temporal limitation on child pornography. If the depiction is of a child that lived centuries ago, the harm to that child would not be sufficient to warrant regulation.

339. N.Y. PENAL LAW § 263.15 (Consol. 1989). A "sexual performance" is defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." *Id.* § 263.00(1).

340. *See Ferber*, 458 U.S. at 750-51.

341. *Id.* at 758.

342. The post-*Ferber* statutes are cited *supra* note 41.

343. *See, e.g.*, MINN. STAT. ANN. § 617.247 (West 1987) ("A person who has in possession a photographic representation of *sexual conduct which involves a minor*, knowing or with reason to know its content and character and that an actual minor is an actor or photographic subject in it, is guilty of a gross misdemeanor.") (emphasis added).

344. *Young*, 37 Ohio St. 3d at 252, 525 N.E.2d at 1368 (citing to OHIO REV. CODE ANN. § 2907.323(A)(3)).

345. *See supra* text accompanying notes 271-76, 289-300.

346. *Osborne*, 110 S. Ct. at 1714 n.18 (Brennan, J., dissenting).

By not acknowledging this problem, the United States Supreme Court in *Osborne* upheld a statute that covered candid photographs. If a person takes a candid photograph of a child emerging from a lake after skinny-dipping, that photograph might be illegal if the trier of fact decides that the genitals are in "graphic focus."[347] The fact that the child might have been unaware that the photograph was taken is of no relevance. Although a candid photograph may, depending on the context, invade the child's privacy, the candid photograph does not involve the psychological trauma that the *Ferber* Court found as a compelling justification for a state to warrant a criminal prohibition.

XV. STANDARDS FOR ASSESSING THE STATE'S ASSERTED INTEREST

The Supreme Court in *Ferber* and *Osborne* did not articulate whether the means by which a state regulates child pornography must be "compelling" or need only bear a rational relationship to preventing child pornography. In *Ferber*, the Court found the state's interest in protecting children from the sexual exploitation associated with being posed for nude photographs to be compelling.[348] The *Ferber* Court gave two reasons for the conclusion that prohibiting the commercial distribution of child pornography is an appropriate means to eliminate production of child pornography:

> First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.[349]

In discussing the state's interest in regulating child pornography, however, the Court did not delineate the standard which the state's interest must meet. One commentator concluded that the Court was

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347. *See supra* text accompanying notes 305-13.

348. *Ferber*, 458 U.S. at 756-57. "[A] State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling' . . . [and t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. *Cf.* Schauer, *supra* note 222, at 304-06 (asserting that because the *Ferber* Court considered child pornography to be on the fringe of First Amendment speech, the courts' "references to 'compelling' and 'surpassing' interests seem more rhetorical than doctrinal").

349. *Ferber*, 458 U.S. at 759 (citations omitted).

requiring only a rational relationship between the ban on commercial distribution and the elimination of child pornography production.[350]

In *Osborne*, the Court cited language from *Ferber* which supported the assertion that Ohio's interest in protecting the wellbeing of children was "compelling."[351] But, as in *Ferber*, the Court did not use that term in discussing the appropriateness of the means chosen to regulate child pornography.[352] The *Osborne* Court stated that it was "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[353] The Court's use of "reasonable" suggested that the Court was requiring only a rational relationship between the interest Ohio sought to protect and the means Ohio employed to protect that interest.

In other cases involving speech and privacy interests, the Court has held that the state must establish a "compelling" interest with respect to both the harm the state seeks to prevent, and the means used to prevent that harm.[354] In *Roe v. Wade*,[355] for example, because the privacy right was involved the Court found: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'"[356]

Even where a state has a "compelling" interest to prevent a given harm, the state must protect that interest through means that do not unnecessarily infringe upon basic fundamental rights. In *Shelton v. Tucker*,[357] Arkansas required all public school teachers to file annual

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350. *See* Potuto, *supra* note 40, at 49.

351. *Osborne*, 110 S. Ct. at 1696. The language cited, in part, was:

> It is evident beyond the need for elaboration that a state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Id. (quoting *Ferber*, 458 U.S. at 756-58).

352. *See supra* text accompanying notes 348-50.

353. *Osborne*, 110 S. Ct. at 1696.

354. *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973). *See* Potuto, *supra* note 40, at 50.

355. 410 U.S. 113 (1973).

356. *Id.* at 155.

357. 364 U.S. 479 (1960). In *Shelton*, Arkansas sought to compel every public school teacher, as a condition of employment, to annually file an affidavit listing every organization to which they have belonged or contributed within the preceding five years. *Id.* at 480. The Supreme Court recognized Arkansas' legitimate interest in using such information to inquire into teachers'

affidavits listing every organization to which they belonged.[358] The Supreme Court acknowledged that Arkansas had a valid interest in checking the fitness of state teachers.[359] However, the Court determined that the teachers had a First Amendment right to association,[360] and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[361] The Court thus found the means used by the state to assure teachers' fitness was invalid because it was not narrowly tailored to serve the state's interest.[362]

Similarly in *Schaumberg v. Citizens for a Better Environment*,[363] the Court found that the means used to achieve an admittedly legitimate interest were far too sweeping to pass muster under the First Amendment.[364] In *Schaumberg*, an Illinois village concerned about groups fraudulently soliciting funds for charitable purposes prohibited charities from soliciting on a door-to-door basis if the groups did not use at least seventy-five percent of their receipts for charitable purposes.[365] "The Village's legitimate interest in preventing fraud can be

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fitness to teach. *Id.* at 485. However, due to the "unlimited" scope of the information request, the Court held that the requirement was an unconstitutional interference with the teachers' right of free association. *Id.* at 489-90.

358. *Id.* at 480. The Arkansas statute provided, in pertinent part, that

> No person shall be employed . . . as a . . . teacher in any public school . . . until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions. . . .

Id. at 480-81.

359. *Id.* at 485.

360. *Id.* at 490.

361. *Id.* at 488. The *Shelton* Court explained why the Arkansas requirement was too broad:

> The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes. . . . Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy.

Id.

362. *Id.* at 490.

363. 444 U.S. 620 (1980).

364. *Id.* at 636-37.

365. *Id.* at 624. The Village of Schaumburg adopted an ordinance requiring charitable organizations to apply for a permit as a prerequisite to solicitations door-to-door or on the public streets. *Id.* at 623. An organization which solicited without a permit was subject to a fine for each offense in an amount up to $500. *Id.* at 624. The ordinance required that permit applications, among other information, contain "[s]atisfactory proof that at least seventy-five per cent

better served by measures less intrusive than a direct prohibition on solicitation."[366] The Court thus held that "the ordinance cannot survive scrutiny under the First Amendment."[367]

In *Texas v. Johnson*,[368] a case in which Texas prosecuted a man for burning an American flag, the Court conceded that Texas had "an interest in encouraging proper treatment of the flag."[369] Nevertheless, the Court held that Texas may not "criminally punish a person for burning a flag as a means of political protest."[370] The state's legitimate interest did not justify the state's means, which infringed upon First Amendment rights.[371] In *Johnson*, the Court determined that means used to achieve the state's interest must be subject to "the most exacting scrutiny" when they infringe upon First Amendment rights.[372]

In *Osborne*, Ohio had a compelling interest to protect children from the harms associated with being posed for photographs while engaging in sexual conduct.[373] Such an interest, however, did not permit Ohio to override other persons' constitutional protections without compel-

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of the proceeds of such solicitations will be used directly for the charitable purpose of the organization." *Id.* (quoting SCHAUMBURG, ILL. CODE § 22-20(g) (1975)). An organization seeking a charitable solicitation permit could comply with the ordinance's "satisfactory proof" requirement only by submitting "a certified audit of the [organization's] last full year of operations." *Id.* at 624 n.4 (quoting SCHAUMBERG, ILL. CODE § 22-20). The ordinance mandated the audit indicate the organization's distribution of funds or other comparable information. *Id.*

366. *Id.* at 637.

367. *Id.* at 636. The *Schaumburg* Court also found the ordinance's "seventy-five per cent" presumption inconsistent with the First Amendment. *Id.* at 637. The ordinance presumed that "any organization using more than twenty-five percent of its receipts on fundraising, salaries, and overhead is not a charitable . . . enterprise and that to permit it to represent itself as a charity is fraudulent." *Id.* at 636. The Court recognized, however, that this could not be "true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions. . . ." *Id.* Because the *Schaumberg* ordinance lumped these types of legitimate charitable organizations together with those organizations which used "the charitable label as a cloak," the ordinance unnecessarily interfered with legitimate organizations' First Amendment rights. *Id.* at 637.

368. 491 U.S. 397 (1989).

369. *Id.* at 418. The Court gave an example of a valid regulation pertaining to treatment of the flag: "Congress has, for example, enacted precatory regulations describing the proper treatment of the flag." *Id.* (citing 36 U.S.C. §§ 173-177 (1988)). The *Johnson* Court, however, contrasted the propriety of regulating proper treatment of the flag and criminalizing its destruction: "To say that the Government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest." *Id.*

370. *Id.*

371. *See id.*

372. *Id.* at 411 (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

373. *Osborne*, 110 S. Ct. at 1696.

ling reasons.[374] Ohio's reasons were not compelling enough to justify a complete prohibition on the private possession of child pornography.[375]

XVI. SUBSTANTIALITY OF THE OVERBREADTH

The *Osborne* Court concluded that the Ohio statute would be constitutionally valid even if overbroad so long as the statute was not "substantially overbroad."[376] This meant that the statute could stand even if the Ohio Supreme Court's formulations of "lewd exhibition" and "graphic focus on the genitals," and the statute's prohibition against "viewing," invaded the realm of constitutionally protected speech activity.[377] In determining that the statute would be constitutional even if overbroad,[378] the Supreme Court referred to the "substantial overbreadth" test formulated in *Broadrick v. Oklahoma*.[379] In *Broadrick*, the Court held that where the regulated activity involves conduct in addition to speech, the overbreadth of the statute must be "substantial" before the statute is invalid.[380] The statute at issue in

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374. *See* Coy v. Iowa, 487 U.S. 1012 (1988) (stating that the state's interest in preventing child sexual abuse did not override the defendant's right to confront witnesses).

375. The Court's lack of concern about establishing facts was similar to that of the Attorney General's Commission, on which the Court relied. *See supra* note 116. The Commission conducted no independent factual research yet made sweeping factual conclusions about the harmful impact of child pornography. *See id.* One analyst characterized the Commission's approach by saying that

> [it] so weakens the burden of justification required for the abridgement of pornographic material that no serious level of scrutiny is accorded the arguments offered to justify such censorship. Indeed, the very kinds of arguments offered by the Commission as adequate justification for censorship are, on examination, the kinds of arguments that classical principles of free speech condemn as an inadequate basis for law.

Richards, *supra* note 116, at 277.

376. *Osborne*, 110 S. Ct. at 1697.

377. *Id.* The *Osborne* Court recalled its previous finding in *Ferber* that "[e]ven where a statute at its margins infringes on protected expression, 'facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'" *Id.* (quoting *Ferber*, 458 U.S. at 770 n.25).

378. *Id.*

379. 413 U.S. 601 (1973).

380. *Id.* at 615. The Court did not limit applicability of the "substantial" overbreadth analysis to speech associated with conduct only. The *Broadrick* Court, however, did determine that speech regulations must be substantially overbroad "*particularly* where conduct and not merely speech is involved." *Id.* As a result of the *Broadrick* Court's injection of "substantiality" into overbreadth analysis, the Court moved to a case-by-case determination of overbreadth, rather than applying a facial overbreadth determination. *See id.* at 615-16. For a comparison of the case-by-case approach effected by *Broadrick*'s "substantial overbreadth" holding and the Court's previous overbreadth doctrine, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

Broadrick regulated government employees' political campaigning.[381] The "conduct" at issue was political activity of state employees.[382] The Court's rationale for requiring "substantial" overbreadth was that the "conduct" aspect gave the state greater latitude in regulating.[383] The *Broadrick* Court noted that the facial overbreadth adjudication

> attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct — even if expressive — falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.[384]

In *Ferber*, the Supreme Court used the *Broadrick* "substantial overbreadth" test.[385] The *Ferber* Court acknowledged that the *Broadrick* Court had not considered whether the substantiality requirement applied to "pure speech" situations.[386] Nevertheless, the Court applied the substantiality requirement to the *Ferber* case because the facts involved "the harmful employment of children to make sexually explicit materials for distribution."[387] The "conduct" at issue in the *Ferber* case was the distributor using children for the production of child pornography. The *Osborne* Court, however, ruled that *Ferber* had "specifically held" that the substantiality requirement was applicable to "pure speech."[388] That characterization seems at odds with the language in *Ferber*.

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381. *Id.* at 604-06.

382. *Id.*

383. *Id.* at 615.

384. *Id.*

385. *Ferber*, 458 U.S. at 773. The *Ferber* Court held that the New York statute at issue was not "substantially overbroad." *Id.* Instead, the Court found the statute to be "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Id.*

386. *Id.* at 771.

387. *Id.*

388. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 n.12 (1985); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1026 (1988) (stating that the *Ferber* Court found "pure speech" but nonetheless required substantial overbreadth).

With an offense involving possession only, as in *Osborne*, pure speech is involved. The only arguable conduct is the possession itself. Nevertheless, the *Osborne* Court applied the "substantial" overbreadth test.[389] Citing *Broadrick*, the Court in *Osborne* stated that

> in our previous decisions discussing the First Amendment overbreadth doctrine, we have repeatedly emphasized that where a statute regulated 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 statute's plainly legitimate sweep."[390]

The *Osborne* Court, however, omitted the rest of that sentence from *Broadrick* which included "particularly where conduct and not merely speech is involved."[391]

Therefore, *Osborne* marks the first time the Supreme Court applied the "substantiality" requirement where the speech activity was "pure speech" rather than "mixed speech-conduct." This is an unfortunate innovation in overbreadth analysis because the "substantiality" criterion provides a ready rationale for refusing to strike statutes that invade the freedom of speech.

In *Ferber*, the Court held that a "substantiality" requirement was implicit in the overbreadth doctrine.[392] "The requirement of substantial overbreadth," the Court reasoned

> is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.[393]

On the contrary, a substantiality requirement seems to be inconsistent with the overbreadth doctrine. In *Broadrick*, the Supreme Court explained the rationale behind the overbreadth doctrine: "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of

389. *Osborne*, 110 S. Ct. at 1697.
390. *Id.* (quoting *Broadrick*, 413 U.S. at 615).
391. *Broadrick*, 413 U.S. at 615.
392. *See Ferber*, 458 U.S. at 772.
393. *Id.*

others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."[394]

If a statute regulates both unprotected and protected speech, an overbreadth analysis should not depend upon whether the scope of the protected speech covered by the statute is limited. As the Court noted in *Ferber*, the "extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation."[395] However, even where the scope of the protected speech is slight, a statute would nonetheless remain enforceable despite the fact that the statute outlaws protected speech. The purpose of the overbreadth doctrine is to preclude the continued existence of such statutes.[396] The substantiality requirement is dangerous to the protection of speech even where "conduct," in addition to speech, is involved as in *Broadrick* and *Ferber*.[397] However, the substantiality requirement is all the more dangerous when applied to pure speech as was the case in *Osborne*.[398]

XVII. THE IMPACT OF THE *OSBORNE* DECISION

The United States Supreme Court's decision in *Osborne* places the United States well below the level of privacy protection accepted at the international level.[399] European countries typically prohibit the commercial distribution of obscene publications without distinguishing whether the materials contain obscenity or child pornography as the United States Supreme Court has.[400] The European Commission of

394. *Broadrick*, 413 U.S. at 612.

395. *Ferber*, 458 U.S. at 772.

396. *See Broadrick*, 413 U.S. at 612; *supra* text accompanying note 394.

397. *See Ferber*, 458 U.S. at 771; *Broadrick*, 413 U.S. at 604-06.

398. *See Osborne*, 110 S. Ct. at 1697.

399. *See generally* Beytagh, *Privacy in Perspective: The Experience Under Foreign Constitutions*, 15 U. TOL. L. REV. 449 (1984) (exploring other countries' privacy rights by review of foreign constitutional provisions expressly protecting the right of privacy, foreign case law applying a privacy right in various contexts, and foreign legislation seeking to protect privacy).

400. CRIMINAL CODE art. 228 (U.S.S.R.) (prohibiting possession for sale or distribution, of pornographic materials); PENAL CODE art. 528, Royal Decree No. 1398 (It.) (prohibiting possession for purposes of commerce or distribution of obscene publications); PENAL CODE art. 283 (Fr.) (prohibiting possession for commerce, distribution, or display of publications contrary to good morals); PENAL CODE art. 288 (Hung.) (prohibiting acquisition of obscene object for purpose of circulating or exhibiting in public); PENAL CODE art. 184 (Ger.) (prohibiting dissemination of "obscene writings, depictions, or pictures"); Belgium, Penal Code (1867), art. 383 (prohibiting sale or distribution of publications contrary to good morals); Obscene Publications Act, 1964, ch. 74, § 1 (Eng.) (prohibiting possession of obscene articles for publication with gain); Protection of Children Act, 1978, ch. 37, § 1 (Eng.) (prohibiting possession "with a view to their being distributed or shown by himself or others" of indecent photographs of a child under the age of sixteen).

Human Rights has upheld such prohibitions against challenges brought under the freedom of expression provision in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[401] While some European penal codes do prohibit possession of child pornography for distribution, they do not prohibit the possession of such materials for personal use in the home or elsewhere.[402]

As stated, the European countries distinguish between possession for distribution and possession for personal use.[403] This represents a policy judgment that possession for personal use need not be prohibited as part of the effort to curb such publications. The policy decision also represents placement of a higher value on personal freedom.[404]

In *Ferber*, the Supreme Court authorized the regulation of the child pornography industry. States then were permitted to outlaw the commercial production and distribution of a new category of material, beyond obscenity, which was referred to as child pornography.[405] In *Osborne*, the Supreme Court went a step farther and authorized the regulation of the private possession of child pornography.[406] Additionally, the *Osborne* Court significantly expanded the definition of child pornography by overlooking criteria the *Ferber* Court found essential as a predicate to regulation. Specifically, the Court: (1) diluted the *Ferber* requirement that sexual conduct be depicted[407] thus blurring the line between child pornography and depictions of nudity;[408] (2)

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401. *E.g.*, X., Y. & Z. v. Belgium, 9 Euro. Comm'n H.R. 13 (1978) (upholding article 383 of the Belgian Penal Code and construing article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10).

402. See statutes cited *supra* note 400.

403. *Id.*

404. The stricter protection of personal privacy in Europe is reflected in the general absence of sodomy statutes in Europe and in the holding of the European Court of Human Rights that sodomy statutes violate the right of privacy under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Norris Case, 142 Eur. Ct. H.R. (ser. A) at 21 (1988) (finding sodomy statute of Republic of Ireland violative of right of privacy under European Convention); Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) at 25 (1981) (finding sodomy statute of Northern Ireland violative of right of privacy under European Convention). *See also* Michael, *Homosexuals and Privacy*, 138 NEW L.J. 831 (1988) (comparing European Court of Human Rights' decision in *Case of Norris*, which held that statutes criminalizing sodomy violated the right to privacy, with the United States Supreme Court's decision, *Bowers v. Hardwick*, which came to an opposite conclusion). In comparison, half the states in the United States prohibit sodomy, and the Supreme Court has upheld these prohibitions against a privacy challenge. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

405. *Ferber*, 458 U.S. at 757.

406. *Osborne*, 110 S. Ct. at 1697.

407. *See supra* text accompanying notes 277-307.

408. *See supra* text accompanying notes 308-16.

dropped the *Ferber* requirement that the sexual conduct depicted be illegal;[409] (3) ignored the *Ferber* requirement that the depiction be posed, upholding the Ohio statute even though it covered candid photographs;[410] and (4) upheld the Ohio statute although it outlawed "viewing."[411]

In effecting these significant inroads on speech and privacy protection, the Court did not explain the standards used to assess the Ohio regulations. However, the Court apparently ignored the requirement used in other privacy cases which required the state to establish a compelling interest in both the harm and the means used to avert that harm.[412]

The Court accepted without discussion Ohio's sweeping factual claims about the harm that allegedly flows from the private possession of child pornography. The Court provided little reasoning to substantiate these conclusions about the harmful consequences of the private possession of child pornography. The Court left itself open to the biting critique of the three dissenters, who pointed out the absence of any basis in the Court's opinion for a finding that a ban on the possession of child pornography was warranted.[413]

The scope of the Court's exception from First and Fourth Amendment protection may be difficult to confine. Although states have an interest in protecting children from sexual exploitation, that does not give the states the right to undermine First and Fourth Amendment values. This is particularly true with the prohibition against the private possession of child pornography, where the infringement is not likely to serve the state's interest to any appreciable extent. Hopefully the Court in future speech and privacy cases will limit the exception to child pornography. However, one can imagine claims that the private possession of other types of publications should be outlawed on a similar rationale of the social harm associated with the possession.

For example, it is arguable that a state can decide to prohibit the private possession of a book on the use of firearms on the theory that the reader might use the book to learn about guns and commit a crime. One could argue, citing *Osborne*, that such a prohibition is a necessary component of a state's efforts to prohibit the use of guns in the commission of crime. However, the infringement on speech and privacy rights would be substantial.

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409. *See supra* text accompanying notes 317-28.
410. *See supra* text accompanying notes 340-47.
411. *See supra* text accompanying notes 255-64.
412. *See supra* text accompanying notes 354-72.
413. *Osborne*, 110 S. Ct. at 1714-15 (Brennan, J., dissenting).

The *Stanley* principle that the government may not dictate what printed or visual materials persons may possess in the home[414] is logically applicable to all material that is possessed for its communicative value. The right to possess any kind of communicative material is a basic right of the individual. This is true regardless of the material's content. If the government can dictate what communicative material people may or may not possess, the danger to liberty is substantial. The right to receive information should not be curtailed because the government finds the information to be of little social value.[415]

The teaching of the United States Supreme Court cases on the First Amendment is that speech material is in need of special protection. This rationale applies not only to vindicate a given person who might be prosecuted for speech activity, but also, and more importantly, so that others will not censor themselves for fear of prosecution. The power of government to peruse books or photograph albums in an individual's home, as Ohio police did in Osborne's home, is an ominous power. In *Osborne*, the Supreme Court declared for the first time that a person's library is not sacrosanct, but is subject to police inspection. This power is inconsistent with a spirit of free inquiry.

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414. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969); *supra* text accompanying notes 61-64.
415. Winters v. New York, 333 U.S. 507, 510 (1948).