SB 252

RESEARCH ON PORNOGRAPHY: THE EVIDENCE OF HARM

from the

NATIONAL COALITION
AGAINST PORNOGRAPHY

PORNOGRAPHY'S RELATIONSHIP TO CHILD SEXUAL EXPLOITATION AND ABUSE

S.T.O.P.!®

STAND TOGETHER OPPOSING PORNOGRAPHY®

0904

National Coalition
Against Pornography

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PORNOGRAPHY'S RELATIONSHIP TO CHILD SEXUAL EXPLOITATION AND ABUSE

THE PROBLEM

The National Coalition for Children's Justice (Ken Wooden)

Between 1981 and 1985, child sexual abuse rose by 175%. Child molestation cases in the home in 1986 were 216,216.

In Chattanooga, 60% of 539 children of elementary, junior and senior high school age interviewed had seen X-rated movies, knew names and scenes.

In Reading, PA 70% of 700 elementary students, 65% of junior high students, and nearly 100% of high school students interviewed had seen X-rated movies, and knew names and scenes.

The same pattern was true in Fort McClellan, Alabama; North Adams, Massachusetts; and Cincinnati, Ohio.

Abelson (1970)

1 in 5 boys and 1 in 10 girls had first exposure to pornography be age 12.

National Center of Child Abuse and Neglect, Children's Bureau, U.S. Department of Heath and Human Services: Study of National Incidence and Prevalence of Child Abuse and Neglect (1988) (NIS-2)

"A study to assess the current (1986) national incidence of child abuse and neglect, and to determine how the severity, frequency, and character of child maltreatment changed since the last study in 1980."

The numbers reported reflect cases reported to the Child Protective Services (a state program) accepted for investigation, investigated, and substantiated, based upon consistent operational definitions of maltreatment.

- An estimated 1,678,600 children nationwide experienced abuse or neglect in 1986. These children had experienced demonstrable harm or were endangered and at risk of harm.
- There were 675,000 abused children in 1986.
- There has been a significant increase (74%) in the incidence of abuse between 1980 and 1986.
- Although more professionals (in major community institutions such as schools, hospitals, day care centers, social service agencies and mental health centers, etc.) are recognizing child maltreatment, they are not necessarily reporting it to Child Protective Services.
- A substantial majority (54%) of children who are recognized as abused or neglected by community professionals are not reported to Child Protective Services. Reporting rates are remarkably low. National estimates of the number of cases of abused or neglected children not reported (852,400) far exceeds estimates of the number of cases which are reported (732,300).
- Many suspected cases, reported to Child Protective Services, cannot be substantiated upon investigation.
- Child sexual abuse in 1986 increased progressively, but not significantly by successive age groups, beginning with children aged three. In other words, children of all ages from 3-17 are sexually abused in about equal numbers. When compared to 1980, however, the increased incidence of sexual abuse occured disproportionately among the older children—especially children aged 12-17.
- Child sexual abuse is 5 times more frequent for children from lower income families (i.e., <$15,000).

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- The increased child sexual abuse from 1980 to 1986 occured disproportionately in more urban counties.
- Among the abuse cases there were significant rises in the incidence of physical and sexual abuse:
  - physical abuse increased by 58% over 1980
  - child sexual abuse occurred in 1986 at more than triple the rate of 1980
- There were 138,000 children abused sexually in 1986, and another 17,900 in danger and at risk of being sexually abused.
- Female children were sexually abused almost four times as often as males.
- Male children were emotionally abused more than twice as often as they were sexually abused.
- Female children were equally likely to be sexually abused or emotionally abused.
- Female children experienced more abuse overall than did male children. This reflected primarily their greater susceptibility to being sexually abused.

American Association for Protecting Children (American Humane Association)

They noted a 10-fold increase in the number of children reported to be sexual abuse victims from 1976 to 1983. They summarized numbers of child sexual abuse reported to and investigated by the Child Protective Services. AHA reported that 1,928,000 children had been reported to Child Protective Services in 1985.

National Obscenity Enforcement Unit

"Review of recent law enforcement statistics and studies, as well as scientific research, reveals the devastating effect obscenity and child pornography are having on our nation. Between 1981-1985 reported child sexual abuse rose by 175%. The rape rate has climbed 43% in the last decade alone and, tragically, the highest incidence of rape victims are teenagers between 16-19."

Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia (1986)

"A 1985 report by the New York-based Child Welfare League of America said child sexual abuse reports rose 59 percent from 1983 to 1984. In Delaware and Idaho reports nearly doubled from 1983 to 1984; in Oregon they rose 129 percent; and in Wisconsin, they went up by 132 percent. In Houston, police received 1,600 reports of child sexual assaults in 1985, more than double the total in 1983. There is wide agreement that even these are conservative figures."

Check (1985)

Adolescents aged 12-17 (as a group) report most frequent exposure to pornography (compared to other groups). This was found to be true by the 1970 Commission as well.

Gene Abel (1987)

"It is surprising to note the very high percentage of total child molestations committed by those who target children outside the home." Many sex crimes are not reported, so arrest records are an incomplete picture.

U.S. Department of Justice, Network News, Fall Edition (1985)

"One in three females and one in ten males will be sexually molested before the age of 18. Four million child molesters reside in this country."

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Tony Samstag, "Throwaway Children," THE SPECTATOR (June 25, 1988)

"In some cases, the authorities of several countries have tried to sum up the extent of sexual abuse of children. These numbers have one thing in common. They are very much lower than those which some private organizations have found out on their own. Defence for Children International believes that official estimates as to the number of child prostitutes in any given city seem to bear no relationship to the actual numbers of children involved but rather to the seriousness with which the politicians view the problem. The global traffic in child pornography and prostitution does appear to be vast, probably worth billions in any unit of currency.

"There appears to be a strong connection between commercial child abuse and incest. Sexual abuse at home seems to be one of the most common reasons for very young children to run away—or to be thrown out. Once on the streets, they will seek affection (or cash) in the ways to which they have become habituated, or they will simply become easy meat because they are so helpless."

Silbert & Pines (1984)

They interviewed 200 juvenile and adult street prostitutes. In 193 cases of rape: about 25% reported, without being asked, the assailants' reference (allusion) to pornographic materials. 12% told the rapists that they were prostitutes, only to be assaulted after forced vaginal penetration, in ways the rapists "claimed they had seen prostitutes enjoy in the pornographic literature they cited." In 178 cases of rape: 22% reported, without being asked, "the use of pornographic materials by the adult prior to the sexual act."

THE NATURE AND EXTENT OF THE PROBLEM

Abel (1985)

A study of 411 non-incarcerated sex offenders (sexual deviants or paraphiliacs) showed that sex offenders attempted an average of 581 sex offenses each, completed an average of 533 offenses, and victimized 336 people each over a 12 year period. This includes pedophiles (child molesters).

Abel, et al (1987)

"The frequency of self-reported crimes" (for the non-incarcerated sex offenders they studied) "was vastly greater than the number of crimes for which they had been arrested. The ratio of arrest to commission of the more violent crimes such as rape and child molestation was approximately 1:30.

Faller, 1988 (Presented at the National Association of Social Workers Annual Conference, 11/11/88)

"The number of women who sexually abuse children may be two to three times higher than previously thought. In a clinical study of 308 abuse cases studied over a period of ten years, Faller found that women were the abusers in almost fourteen percent of the cases. 'Our findings also suggest that women are not the initiators (of the abuse), but that they are persuaded, coerced, or otherwise drawn into sexual abuse by men.' About 60 percent of the women in the study had sexually abused more than one child. Almost three out of four women in the study engaged in incestuous family situations, which involved two abusers and at least two victims."

Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia (1986)

"No single characteristic of pedophilia is more pervasive than the obsession with child pornography. The fascination of pedophiles with child pornography and child abuse has been documented in many studies and has been established by hundreds of sexually explicit materials involving children.

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Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986 (continued)

"Detective William Dworin of the Los Angeles Police Department estimates that of the 700 child molesters in whose arrest he has participated during the last ten years, more than half had child pornography in their possession. About 80 percent owned either child or adult pornography.

"Each convicted child molester interviewed by the Subcommittee either collected or produced child pornography, or both. Most said they had used the material to lower the inhibitions of children or to coach them into posing for photographs.

"It is not unusual for pedophiles to possess collections containing several thousand photographs, slides, films, videotapes and magazines depicting nude children and children engaged in a variety of sexual activities.

" 'The maintenance and growth of [the pedophile's] collections [of items related to children] becomes one of the most important things in their life.' (Special Agent Kenneth Lanning, FBI)"

"Messages have appeared on computer bulletin boards offering to buy, sell or trade child pornography, establish correspondence about sexual interests, trade names of 'available' children and even propose sexual liaisons. The bulletin boards actually are an electronic form of the classified ads that appear in sexually-oriented magazines throughout the country. The bulletin board users, who normally use aliases, now have virtually complete anonymity because police are not authorized under current federal law to intercept computer conversations without a warrant based on probable cause. 'We've seen that the (bulletin board) ads tend to be a bit more explicit, because they (the senders) have a sense of anonymity or security. [illegible] a likelihood they'll never be caught' (Sergeant William Brown, Houston Police Department).

"The largest bulletin board accessed by Sergeant Brown was called 'Lambda' and was based in San Francisco. Many of the systems indicate how many calls have come into the network, and Brown reported that he never saw one with fewer than 20,000 calls."

Fortunately, the obscenity provisions of the 1988 drug law have closed many of the loopholes in past legislation that have allowed this type of networking to continue.

"Based on the information obtained during its investigation, the Subcommittee has reached the following general conclusions:

- Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure.
- The vast majority of child pornography in the United States constitutes a small portion of the overall pornography market and is deeply underground. Unlike the adult pornography industry, it is not significantly influenced by organized crime.
- It is extremely difficult, if not impossible in some cities, to purchase true child pornography at adult bookstores. The overwhelming majority of child pornography seized in arrests made in the United States has not been produced or distributed for profit.
- The seizure by the U.S. Customs Service of imported child pornography, especially from Denmark and the Netherlands, has declined dramatically since late 1984 due to increased diplomatic and law enforcement pressure, American news media reports and increased caution shown by American child pornography customers.

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Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia, 1986 (continued)

- The membership of known pedophile-support groups in the United States is probably less than 2,000. While many of the groups' members have been convicted for child sex crimes, the groups themselves are not involved actively in large-scale criminal conspiracies, such as commercial child pornography rings.
- So-called 'child sex rings' do exist, however, and it is these un-organized groups, and the individuals who participate in them, which pose the most serious threat to children.
- The Child Protection Act of 1984, which made illegal all distribution of sexually explicit material involving children, has been highly successful, leading to a substantial increase in federal prosecutions and the placing of higher priorities on such investigations. Since passage of the law, the Department of Justice has won 164 convictions on child pornography violations; in the previous six and one-half years, there were only 64.
- While the awareness of many police agencies about child sexual exploitation has improved greatly, many still do not have the training, staff or inclination to recognize promptly and investigate potential leads to crimes involving child pornography or child sexual abuse.
- Computers are providing pedophiles with a virtually untraceable means of exchanging information, including the names of potential victims. While the Subcommittee is mindful of the Constitutional safeguards against interference with free speech, a need clearly exists for additional legislation in this area." (The obscenity provisions of the 1988 drug law have closed many of the loopholes in past legislation that have allowed this type of networking to continue.)

Eli Coleman, Psychologist at Golden Valley Health Center; University of Minnesota Medical School

There is no question that sexual addiction exists. While not addictive in the chemical or physiological sense, "these behavior patterns are pathological (i.e., caused) and self-defeating. These individuals display hypersexuality in response to feelings of anxiety, depression, or loneliness. Many describe a sexual act as a "fix" to some very negative feeling. But this relief is short-lived and negative feelings recur. Some (therapists) view this as a psychiatric condition and treat it with medications. Others treat it with psychoanalytic or behavioral therapy. Others adopted the methods of treating alcohol addiction."

Abel (1986)

He studied 240 child molesters (pedophiles). They averaged 30 (homosexual or same-sex) to 60 (heterosexual) victims before being caught. The typical child molester will sexually abuse 380 children in a lifetime.

Abel et al (1987)

"Pedophiles (child molesters) involved with children outside the home will occasionally return to the same victim, especially men who molest young boys. As expected, incestuous pedophiles (child molesters who molest their relatives) repeatedly molest the same child, from an average of 36.7 molestations per boy victim to 45.2 molestations per girl victim."

"The number of acts reported by child molesters was from 23 to 282 acts per offender." This is a marked contrast to an earlier study by Gebhard et al (1965) which "reported that, on the average, pedophiles had been found guilty of fewer than 3 paraphilic acts per offender."

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Diagnostic and Statistical Manual of Mental Disorders, III (Revised 1987)

"Because of the highly repetitive nature of paraphilic (sexually deviant) behavior, a large percentage of the population has been victimized by people with paraphilias (sexual deviations)."

"The more deviant the sexual pattern is from the norm, the fewer instances there need to be of the behavior to indicate psychopathology. Being turned on by ladies' underwear (Fetishism) a few times may not mean much, but once with a corpse (Necrophilia) is too much."

David Duncan (1988) Southern Illinois University

He did a content analysis of twenty-five years of homosexual pornographic magazines sold in adult bookstores of two major US cities. Dr. Duncan found "the frequency with which clearly underage models appeared in such legally available magazines has declined to zero, due to the recent legislation prohibiting child pornography. Suggestions of child pornography remained, however, in the frequent use in porno magazine titles of such words as 'boy,' 'young' and 'teen' although the models were no longer adolescents. Youthful appearing models achieved star billing in what the Attorney General's Commission on Pornography has named 'pseudo-child pornography.'"

"Most of the child models appearing in such pornography are likely to be incest victims being exploited by their parents or other adults."

The earlier decline may have been simply market adjustment with the marketers of gay pornography shifting the emphasis in their product as they became more aware of what sold best to their consumers.

"The demand for homosexual child pornography probably proved to be much smaller than marketers expected during the 'porno boom' of the 1960's. But the fact that there is a demand for such material is clearly indicated by the continued presence of the new pseudo-child pornography."

Carter et al (1984)

The Los Angeles Police Department reported that most child molesters were themselves molested as children. They tend to seek out victims of the age they were when first molested. One study reported that 57% of molesters studied had been victims of child molestation themselves.

Diagnostic and Statistical Manual of Mental Disorders III (Revised)

Pedophiles target pre-pubescent children; the age of the females preferred by child molesters is 8-10; boys slightly older.

"The recidivism rate (the likelihood of the crime or offense being repeated) for those sexual deviants (paraphiliacs) who are attracted to the same sex is TWICE that of those attracted to children of the opposite sex."

Pierce (1984)

Sexually exploited children involved in the pornography industry are usually recruited among runaways, although some may use neighborhood children or their own children.

Burgess (1984) (A study in Jefferson County, Kentucky)

"The study was an outgrowth of community interest and was an attempt to examine systematically a group of self-identified juvenile prostitutes compared with a group of other juveniles who were non prostitutes.

"Of the prostitute group, up to 90% had been the victims of child physical abuse by parents, and up to 50% had been the victims of child sexual abuse by parents.

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Burgess (continued)

"Concerning the incidences of intrafamily sex, 23% of the prostitute group related that they had sex with family members, while the non prostitute group answered in a like manner only 3 percent of the time. Intrafamily sex abuse victims often become extrafamily sexual exploitation victims.

"37% of the prostitute group admitted to having been involved in pornography; only 18% of the non prostitute group reported involvement in pornography. 38% of the runaways were involved in prostitution, and 15% of the runaways were involved in pornography.

"The age of first sexual intercourse for these children was 12, with the greatest frequency occurring between 10 and 13 years of age, the lowest age being 3.

"Major overlaps between exploited children and criminal activity have been discovered; therefore there are dramatic intelligence benefits to law enforcement and prosecutorial agencies from working with and for exploited children.

"Research suggests that the vast majority of violent sex offenders (rapists, sex murderers) and child molesters have themselves been the victims, as children, of physical or sexual abuse. Certainly the combined efforts of local task forces can, by focusing on victimized children, help break this pattern.

"Identifying and tracking missing children is vital to curbing the victimization of children. Over 86% of Jefferson County children involved in child prostitution and pornography were, at the time of those activities, runaways or missing.

"Data developed on the first 200 children of the missing child program of Jefferson County, Kentucky indicate that approximately 10% of the missing youth are exploited while missing, with 90% of those exploited falling into the 'unusual circumstances' categories developed.

"The ability of child molesters to avoid exposure and prosecution by maintaining mobility across the county is well documented."

Report for Catholic Bishops (1985) [The Plain Dealer, 11/15/87]

"Effects of child molesting by adults are long-lasting, it said, and if the abuse is by a priest, 'This will no doubt have a profound effect on the faith life of the victims, their families and others in the community.'"

The victim's capacity to develop trusting relationships with adult clergy will be impaired, the report said. "Sexual abuse of a child by a cleric, especially a priest, can have a devastating effect on the child's short and long-term perception of the church and its clergy."

DOES PORNOGRAPHY PROMOTE ABUSE?

June 24, 1986 Surgeon General's Workshop on Pornography

19 nationally and internationally recognized clinicians and researchers achieved consensus on the statement that "children and adolescents who participate in the production of pornography experience adverse enduring effects."

Dr. William Marshall (1983)

87% of girl child molesters and 77% of boy child molesters studied admitted to regular use of hard core adult pornography. The obscene material was used by these sex offenders for three reasons: (1) to stimulate themselves; (2) to destroy the consciences and lower the inhibitions and resistance to sexual activity in their intended child victims; and (3) as teaching tools for the child to imitate or model in their real life sexual encounter with the adult.

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John Rabun, Exploited and Missing Children Unit of Louisville, KY

"The Police/Social work team of the Exploited and Missing Child Unit (EMCU) of Louisville, KY investigated 1,400 cases of children suspected of being victims of sexual exploitation. Over 40 major cases involved the successful prosecution of adults involved with over 12 children each. One case involved 320 children. At the time of the arrest of and/or service of search warrants, all 40 of these adult predators were found with various forms of adult pornography, and in most cases child nudes and/or child pornography were also found.

"Over four years, the EMCU team learned to expect to always find adult pornography since it was used for: 1) the offender's own arousal; 2) self-validation of their own sex deviations; 3) extortion of child victims or other adults; and 4) deliberate and planned lowering of inhibitions of child victims."

The National Obscenity Enforcement Unit

They now teach their investigators at all of their seminars "to look for pornography at the scene of sexual crimes involving children. It is beyond debate that molestation of children is, in part, caused by consumption of pornography."

"The National Obscenity Enforcement Unit has been most successful in its efforts. Prosecutions for child pornography are up by 80% in the last fiscal year (1987) and obscenity prosecutions are up by 800%."

Ann Burgess, Professor at the University of Pennsylvani :
(Federal grant to study child pornography).

Pornography depicting children is used by child molesters to convince children that deviant sex acts (which all child sex abuse is) are normal—thereby breaking down their resistance. Her later study (1987) found that victims of child sexual abuse have symptoms of chronic or delayed posttraumatic stress. It causes multiple psychological problems.

As an example of the cost of treatment, one Southwest Ohio mental health center reported that the cost of treatment for children who are molested (especially if the home is a negative environment) is very high, because problems are more entrenched: Private sessions average $85.00/hour and public sessions are 65.00/hour. Most children need between 40 and 50 hours of treatment to alleviate debilitating symptoms. The more dysfunctional the family, the more treatment is needed. Parent groups are also recommended for families of molested children, and these add to the social cost.

This sample County Mental Health Center treats approximately 70 cases of child molestation per year. There are 4-6 new cases per month.

David A. Scott (In Pornography: A Human Tragedy, 1987)

"*Judith Reisman (1985)* found that from the first issue of *Playboy* in 1954, children in cartoons (or photographs of adults dressed to suggest children) have appeared in sexual contact with adults, and the frequency and intensity of these contacts has increased through the years. The dominant impression was that child/adult sex is glamorous, thereby enhancing the impression that these activities are harmless. Magazines can escape the letter of child pornography laws while still implying that sex with children is desirable and readily available. And these magazines, of course, are sold in the open."

Don Feder, Boston Herald (1988)

"Pornographers protest their innocence while facilitating the victimization of our children."

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The Badgley Report (1984)

The report found that almost 60% of both male and female juvenile prostitutes had been asked to be the subject of sexually explicit films or photographs; 12% of the girls and 20% of the boys had actually been used in making pornography: juvenile prostitutes are a high-risk group in regard to being exploited by pornographers.

Two smaller American studies (Burgess: 755 of youth hustlers had participated in pornography; John Rabun: 37% had participated) emphatically confirm this finding.

The 1982 URSA Study: 27% of the young male prostitutes had been photographed by a "john"; of the 54 young male hustlers for whom information was available, 9 had been photographed for commercial pornographic magazines. In the face of that evidence it seems impossible to deny the existence of a significant link between the exploitation of minors in prostitution and in pornography.

Extant studies of juvenile prostitutes showed less incidence of participation in pornography than is the real case because by its very nature one item of pornography can be viewed contemporaneously by many patrons and for repeated sittings. The demand for pornographic performers will always be a tiny fraction of the demand for prostitutes.

Silbert and Pines (1984)

A detailed content analysis of 193 cases of rape and of 178 cases of juvenile sexual abuse revealed a clear relationship between violent pornography and sexual abuse.

Diagnostic and Statistical Manual of Mental Disorders III-R

Pedophiles who act on their urges with children commonly develop excuses or rationalizations about their illegal sexual activities toward the children:

1) that they have "educational value" for the child

2) that the child derives "sexual pleasure" from them

3) that the child was "sexually provocative" toward them—led them on

These three rationalizations are "themes that are also common in pedophilic pornography." p.284.

In other words, pornography teaches three myths that pedophiles believe, and act on, when they molest children.

Southern California Child Exploitation Task Force (1988)

It is the longest existing task force in the U.S. and has prosecuted all the child pornography and Federal child abuse cases in the Central District of California during the past 10 years.

- "According to the U.S. Customs Service, a conservative estimate of the number of pedophiles in the U.S. is 15,000. It is impossible to determine accurately the number, because pedophiles do everything possible to avoid detection."
- "We have frequently gone into homes with search warrants for child pornography and discovered children living in the home who have been molested by the person who is the target of our child-pornography investigation."
- "We have discovered photographs of the pedophiles molesting children."
- "We have found convicted child molesters as well as individuals who were providing children to molesters."

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Southern California Child Exploitation Task Force (continued)

- "One of the men we prosecuted had 50,000 photographs of noncommercial child pornography in a storage locker. He admitted molesting several hundred children following his release from a state hospital for a child molestation conviction. He even maintained a ledger listing those molestations. He taught swimming and tennis to youngsters, some of whom became his victims."
- "A convicted child molester who was the subject of one of our investigations was found, after he had ordered materials, to have homemade child pornography in his house—including a video tape depicting him molesting a child who was clearly under the influence of drugs or alcohol."
- Some articles written in pornographic magazines call attention to a few cases in which individuals (who claimed neither to be sexually active with children nor to possess child pornography) were the subjects of search warrants after they ordered child pornography from undercover Government agents. While Government operations occasionally identify individuals who are not suitable for prosecution, those cases are the exception, not the rule.

M. Douglas Reed, Ph.D.
Vice President, National Leadership
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CHILD PORNOGRAPHY

THE PROBLEM

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Between 1981 and 1985, child sexual abuse (including having pictures taken pornographically) rose by 175%.

The National Obscenity Enforcement Unit
(Testimony before the Senate Judiciary Committee, June, 1988)

"Review of recent law enforcement statistics and studies, as well as scientific research, reveals the devastating effect obscenity and child pornography are having on our nation.

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THE NATURE AND THE EXTENT OF THE PROBLEM

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"It is not unusual for pedophiles to possess collections containing several thousand photographs, slides, films, videotapes and magazines depicting nude children and children engaged in a variety of sexual activities.

"'The maintenance and growth of [the pedophile's] collections [of items related to children] becomes one of the most important things in their life. Child pornography exists primarily for the consumption of pedophiles—adults whose sexual preference and attraction is to prepubescent children. If there were no pedophiles, there would be little child pornography other than that involving adolescent children.' (Special Agent Kenneth Lanning, FBI)"

National Coalition
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"Based on the information obtained during its investigation, the Subcommittee has reached the following general conclusions:

- Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure.
- The vast majority of child pornography in the United States constitutes a small portion of the overall pornography market and is deeply underground. Unlike the adult pornography industry, it is not significantly influenced by organized crime.
- It is extremely difficult, if not impossible in some cities, to purchase true child pornography at adult bookstores. The overwhelming majority of child pornography seized in arrests made in the U.S. has not been produced or distributed for profit.
- The seizure by the U.S. Customs Service of imported child pornography, especially from Denmark and the Netherlands, has declined dramatically since late 1984 due to increased diplomatic and law enforcement pressure, American news media reports and increased caution shown by American child pornography customers.
- The membership of known pedophile-support groups in the United States is probably less than 2,000. While many of the groups' members have been convicted for child sex crimes, the groups themselves are not involved actively in large-scale criminal conspiracies, such as commercial child pornography rings.
- The Child Protection Act of 1984, which made illegal all distribution of sexually explicit material involving children, has been highly successful, leading to a substantial increase in federal prosecutions and the placing of higher priorities on such investigations. Since passage of the law two years ago, the Department of Justice has won 164 convictions on child pornography violations; in the previous six and one-half years, there were only 64.
- While the awareness of many police agencies about child sexual exploitation has improved greatly, many still do not have the training, staff or inclination to recognize promptly and investigate potential leads to crimes involving child pornography or child sexual abuse."

Southern California Child Exploitation Task Force

It is "dangerously inaccurate" to presume that "because there is not widespread *commercial* distribution of child pornography in the U.S.," that therefore "significant law-enforcement effort in the area of child exploitation is not warranted. The threat imposed on our children has little do do with [that] aspect of the child pornography business."

Burgess (1984) (A study in Jefferson County, Kentucky)

"37% of the prostitute group admitted to having been involved in pornography; only 18% of the non prostitute group reported involvement in pornography. 38% of the runaways were involved in prostitution, and 15% of the runaways were involved in pornography.

"Identifying and tracking missing children is vital to curbing the victimization of children. Over 86% of Jefferson County children involved in child prostitution and pornography were, at the time of those activities, runaways or missing.

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John Rabun, Exploited and Missing Children Unit, Louisville, Kentucky

"The Police/Social work team of the Exploited and Missing Child Unit (EMCU) of Louisville, KY investigated 1,400 cases of children suspected of being victims of sexual exploitation. Over 40 major cases involved the successful prosecution of adults involved with over 12 children each. One case involved 320 children. At the time of the arrest and/or service of search warrants, all 40 of these adult predators were found with various forms of adult pornography, and in most cases child nudes and/or child pornography were also found.

The National Obscenity Enforcement Unit

"It has been most successful in its efforts. Prosecutions for child pornography are up by 80% in the last fiscal year (1987) and obscenity prosecutions are up by 800%."

David Duncan (1988) Southern Illinois University

He did a content analysis of twenty-five years of homosexual pornographic magazines sold in adult bookstores of two major US cities. Dr. Duncan found the frequency with which clearly underage models appeared in such legally available magazines has declined to zero, due to the recent legislation prohibiting child pornography. Suggestions of child pornography remained, however, in the frequent use in porno magazine titles of such words as 'boy,' 'young' and 'teen' although the models were no longer adolescents. Youthful appearing models achieved star billing in what the Attorney General's Commission on Pornography has named 'pseudo-child pornography.'

"The final decline (of child pornography) in the late seventies may have been in response to the pressures building against child pornography which led eventually to that legislation. To a large extent it probably reflects the impact of child abuse programs emerging in the seventies, since most of the child models appearing in such pornography are likely to be incest victims being exploited by their parents or other adults."

BUT THE FACT THAT THERE IS A DEMAND FOR SUCH MATERIAL IS CLEARLY INDICATED BY THE CONTINUED PRESENCE OF THE NEW PSEUDO-CHILD PORNOGRAPHY.

PSEUDO-CHILD PORNOGRAPHY

Judith Reisman (1987)

"A content analysis of Playboy, Penthouse, and Hustler magazines, December 1953 to December 1984, yielded 6,004 child images. Newsstand available child imagery in the context of erotica/pornography increased nearly 2,600% from 1954-1984. 80% of the children were actively involved in all scenes; and each magazine portrayed children as unharmed and/or benefited by adult-child sex."

David A. Scott (In Pornography: A Human Tragedy, 1987)

"*Judith Reisman (1985)* found that from the first issue of *Playboy* in 1954, children in cartoons (or photographs of adults dressed to suggest children) have appeared in sexual contact with adults, and the frequency and intensity of these contacts has increased through the years. The dominant impression was that child/adult sex is glamorous, thereby enhancing the impression that these activities are harmless. Magazines can escape the letter of child pornography laws while still implying that sex with children is desirable and readily available. And these magazines, of course, are sold in the open."

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. Feder (Boston Herald, 10/27/88)

"The October issue of Playboy contains a five-page rebuttal to the so-called Reisman report. Odd that a publication with a circulation of 3.5 million would devote so much space to answering what it assures us is preposterous stuff. Some experts believe [pseudo-child pornography] encourages sexual abuse, both by exci ing perverted pas ions and fostering the belief that the child actually is an eager participant in the act."

"Pornographers protest their innocence, while facilita.ing the victimization of our children."

DOES PORNOGRAPHY PROMOTE ABUSE?

The National Obscenity Enforcement Unit

They now teach their investigators at all of their seminars "to look for pornography at the scene of sexual crimes involving children."

"It is beyond debate that molestation of children is, in part, caused by consumption of pornography."

John Rabun, Exploited and Missing Children Unit

"Over 4 years, the EMCU team learned to expect to always find adult pornography since it was used for

- the offender's own arousal;
- self-validation of their own sex deviations;
- extortion of child victims or other adults; and
- deliberate and planned lowering of inhibitions of child victims."

The Badgley Report (1984)

The report found that almost 60% of both male and female juvenile prostitutes had been asked to be the subject of sexually explicit films or photographs; 12% of the girls and 20% of the boys had actually been used in making pornography: juvenile prostitutes are a high-risk group in regard to being exploited by pornographers.

Two smaller American studies emphatically confirm this finding (Burgess: 75% of youth hustlers had participated in pornography; John Rabun: 37% had participated).

The 1982 URSA Study: concluded that there exists a "slight" relationship between juvenile prostitution and pornography. There, 27% of the young male prostitutes had been photographed by a "John"; of the 54 young male hustlers for whom information was available, 9 had been photographed for commercial pornographic magazines. In the face of that evidence it seems impossible to deny the existence of a significant link between the exploitation of minors in prostitution and in pornography.

Extant studies of juvenile prostitutes showed less incidence of participation in pornography than is the real case because by its very nature one item of pornography can be viewed contemporaneously by many patrons and for repeated sittings. The demand for pornographic performers will always be a tiny fraction of the demand for prostitutes.

Surgeon General's Workshop on Pornography (June 24, 1986)

19 nationally and internationally recognized clinicians and researchers achieved consensus on the statement that "children and adolescents who participate in the production of pornography experience adverse enduring effects."

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Southern California Child Exploitation Task Force (1988)

It is the longest existing task force in the U.S. and has prosecuted all the child pornography and Federal child abuse cases in the Central District of California during the past 10 years.

- "According to the U.S. Customs Service, a conservative estimate of the number of pedophiles in the U.S. is 15,000. It is impossible to determine accurately the number, because pedophiles do everything possible to avoid detection."
- "We have frequently gone into homes with search warrants for child pornography and discovered children living in the home who have been molested by the person who is the target of our child-pornography investigation."
- "We have discovered photographs of the pedophiles molesting children."
- "We have found convicted child molesters as well as individuals who were providing children to molesters."
- "One of the men we prosecuted had 50,000 photographs of noncommercial child pornography in a storage locker. He admitted molesting several hundred children following his release from a state hospital for a child molestation conviction. He even maintained a ledger listing those molestations. He taught swimming and tennis to youngsters, some of whom became his victims."
- "A convicted child molester who was the subject of one of our investigations was found, after he had ordered materials, to have homemade child pornography in his house—including a video tape depicting him molesting a child who was clearly under the influence of drugs or alcohol."
- Some articles written in pornographic magazines call attention to a few cases in which individuals (who claimed neither to be sexually active with children nor to possess child pornography) were the subjects of search warrants after they ordered child pornography from undercover Government agents. While Government operations occasionally identify individuals who are not suitable for prosecution, those cases are the exception, not the rule.

M. Douglas Reed, Ph.D.
Vice President, National Leadership
National Coalition Against Pornography

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"Enough is Enough!"

A monthly newsletter to educate, motivate, and activate women to break pornography's chain of abuse

Together, We *Can* Stomp Out Hard-Core Pornography!

I believe that women united behind a just cause have immeasurable influence and power.

I think of Candi Lightner, a mother whose child was tragically killed one night in a car crash by a drunk driver. Her personal tragedy compelled her to establish Mothers Against Drunk Drivers (MADD).

One woman's passion and justifiable anger united other women, and together they launched a powerful campaign. In only 11 years, they not only strengthened the nation's laws governing drinking and driving, they totally changed the way we view drunk driving.

If women work together, I know the same thing can happen in the campaign against hard-core, illegal pornography.

I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families.

When I speak to women across the country about pornography's harmful effects, I see a groundswell of indignation and outrage rising. Liberal and conservative women, religious and nonreligious women, old and young, businesswomen and homemakers are ready to fight to remove illegal pornography from their neighborhoods. We don't have to agree on a lot of other issues to come together in this common cause.

The shocking images of child pornography, incest, bestiality, rape, and mutilation that pass today as "adult" entertainment are demeaning and harmful to us as women, to our children, and to men as well. As pornography's chief victims, we have the special motivation — we have the urgent obligation — to demand that the degradation and exploitation stop.

That's what *"Enough is Enough!"* is all about. This secular, nonpartisan campaign encourages and equips women in the battle against illegal pornography. It is directed by women, staffed by women, and most of its financial support comes from women. We are not creating a new organization. We are initiating a movement.

I'm convinced that the women of America can make the difference on this issue. We can get the laws against illegal pornography enforced. We can get legislation passed where it is needed. We can change the way America thinks about pornography!

We are working to mobilize hundreds of thousands, eventually millions, of women to stand with us and say, "Enough is Enough!"

I urge you to join us in this important war.

Dee Jepsen

Dee Jepsen
National Campaign Director

"I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families."

May 1993 Vol. 1, No. 1

First Lady Encourages *"Enough is Enough!,"* Condemns Hard-Core Pornography

First Lady Hillary Rodham Clinton recently encouraged the *"Enough is Enough!"* campaign.

In a letter sent to director Dee Jepsen, Mrs. Clinton wrote, "I applaud your group's efforts to eliminate child pornography and illegal pornography and appreciate your willingness to take a stand for the children of the nation.

"I know that you have an enormous and challenging task before you, but this is a pressing issue that must be addressed."

Former First Lady Barbara Bush has also written a letter giving her support to the campaign. ✦

In an interview conducted by Dotson Rader, published in Parade Magazine on April 11th, Mrs. Clinton came down hard on pornography:

Parade: In homes with cable TV, very young children can turn on channels showing R-rated and even X-rated films containing extremely graphic sex and violence — films that it is illegal for them to pay to see in a theater. How can you defend the culture of a country that allows a child access to hard-core pornography and extreme violence?

Mrs. Clinton: I *can't* defend it! I wouldn't defend it! It's wrong, and I wish it would go away, because I think it's so destructive to children and adults to have that kind of material shown. I don't think there's anything wrong with parents' groups or other groups calling for people to boycott certain kinds of entertainment. That's advocacy, education, and choice.

Tell the truth about illegal pornography!

- ✓ Over 80 percent of child molesters admit to regularly using pornography, often imitating actual scenes during molestations.
- ✓ There are more hard-core pornography outlets in this country than McDonald's restaurants.
- ✓ The typical serial child molester has from 360 to 380 victims in his lifetime. Both adult and child pornography is often used as an aid during the crime.
- ✓ 1 in 3 girls and 1 in 7 boys will be molested before the time they are 18 years old.

Hard-core pornography. It's not what you think.

The "Enough is Enough!" campaign is another voice of the National Coalition Against Pornography.

"Enough is Enough!" Campaign • P.O. Box 888 • Fairfax, VA 22030 • 703-278-8343

Cramps Isn't Craziness

I am outraged by the recommendation made by a task force of the American Psychiatric Association that severe PMS (premenstrual syndrome) be categorized as a psychiatric disorder ("Is It Sadness or Madness?" MEDICINE, March 15). If a man has hyperthyroidism and becomes hyperactive, loses weight and becomes irritable, should he go to a psychiatrist for help? Or should he seek help for his hyperactive thyroid? If severe PMS is recategorized, half the population is in danger of being called mentally ill based on changes that occur in every woman's monthly cycle.

MARY R. HOLLIDAY
Aurora, Colo.

Bosnia's Pain

Naida Zecevic should be commended for her MY TURN essay "Will I Ever Go Home Again?" (March 8). Like Naida, members of my husband's immediate family are stranded in Sarajevo. My heart goes out to her. I know how she feels—worrying, wondering if her family will survive, if she will see them again. As an American-born citizen, I'm appalled that the world has allowed this tragedy to occur, mislabeling it an ethnic conflict. Strong steps should have been taken to stop the aggressor and end the fighting in Bosnia, just as strong steps were taken to stop the aggressor in Kuwait. Peace talks have failed; a beautiful country has been destroyed. Innocent victims have suffered. The world should listen to Naida.

MARGARET E. PRLJACA
Newark, Dela.

Zecevic suggests that the U.S. military could end the bloodshed in Bosnia. What makes her think it is America's responsibility to end her country's war? This is what's wrong with our country: everyone says it's our job to fix other countries' problems and we're naive enough to believe it. We can't even take care of ourselves.

C. A. SMITH
New York, N.Y.

Don't Kill This Cow

We were disappointed in "Sparing Those Sacred Cows" (NATIONAL AFFAIRS, March 1), your discussion of the Superconducting Super Collider (SSC), in which you state that the "project epitomizes quark-barrel politics." Moreover, your Conventional Wisdom Watch (PERISCOPE) puts the project on the same footing as "ketchup-measuring bureaucrats." These remarks do a disservice not only to the project but to science in general. The SSC is directed at science of the most fundamental nature: investigating the structure of the smallest building blocks of matter and the nature of the forces that operate between them. Completing the accelerator and particle detectors will also generate important technical advances. More than 100 research universities across the nation are already working on the project. While there is clearly room for serious discussion about the SSC's place in our national priorities, your remarks do nothing to illuminate this question. Unhappily, they ridicule an area of fundamental science at a time when we are trying to educate young people about the importance of science to the nation.

JEROME I. FRIEDMAN
HENRY W. KENDALL
1990 Nobel Laureates in Physics
Cambridge, Mass.

Doctors in the Cross Hairs

After the murder of Dr. David Gunn by a pro-lifer with a history of violence at a demonstration organized by a Rescue America boss with past ties to the Ku Klux Klan, where are the outraged voices of the "moderate" pro-life movement ("The Death of Doctor Gunn," NATIONAL AFFAIRS, March 22)? The president of Feminists for

taped "interview" with Wanda wearing a new blond hairstyle but the same bone-chilling self-assurance.

Yet the film is more than just a clever satire of media overkill. Ritchie assembles a vivid, sharply drawn gallery of small-town characters: Beau Bridges as Wanda's unwilling co-conspirator, a hardhat burdened with a messy past and a loony wife (Swoosie Kurtz); Elizabeth Ruscio as the rival mom, no less competitive but not as imaginative; and Matt Frewer as Wanda's drudge of a lawyer. All that and a bouncy country score by Lucy Simon too. True or not, it's positively terrific. ■

BOOKS

Medicine Woman

TITLE: *CHARMS FOR THE EASY LIFE*
AUTHOR: KAYE GIBBONS
PUBLISHER: PUTNAM; 254 PAGES; $19.95
THE BOTTOM LINE: *Three generations of Carolina women, one better than the next, are told by a fourth, the best yet.*

By AMELIA WEISS

SOME PEOPLE MIGHT GIVE UP their second-born to write as well as Kaye Gibbons, so graceful and spirited are her fictional histories of North Carolina women. In her fourth novel, *Charms for the Easy Life*, Gibbons presents Charlie Kate Birch, a midwife and self-proclaimed doctor who meets her ferryman husband as she crosses the Pasquotank River to deliver babies, nurse the sick and lay out the dead. Her granddaughter Margaret, narrator of the book, imagines, "Between my grandmother, her green eyes . . . and the big-cookie moon low over the Pasquotank, it must have been all my grandfather could do to deposit her on the other side of the river."

That's the first and last romantic view of Charlie Kate, a blunt and righteous woman who eats garlic on toast for breakfast, smells of mothballs and ties her "resolute shoes" with 30-year-old laces soaked every Sunday in linseed oil ("My shoestrings," she says, "have lasted years longer than most people can stand each other"). An eccentric who knows as much about Thomas Hardy's novels as she does about cirrhosis of the liver, Charlie Kate is in fact a healing genius who uses herbal cures like evening primrose and Saint-John's-Wort, as well as all the modern medicine she can get.

Workshops Train Women to Combat Illegal Porn in Their Own Neighborhoods

The "Enough is Enough!" campaign will hold training workshops throughout the country this year to give women and men all the factual, legal, and logistical tools they need to wage successful campaigns against illegal pornography in their neighborhoods.

Workshop attendees learn practical ways to effectively fight illegal pornography at the local level, and they return home fully equipped to take the battle to their own communities.

Designed as basic training courses, the workshops focus on just what constitutes illegal pornography and on the high price society pays for its existence.

Most Americans are confused about what kind of materials are protected by the Constitution. Illegal pornography *is* illegal. The Supreme Court clearly prohibits obscenity, child pornography, material that is harmful to minors, and indecent material. The workshops give attendees a clear understanding of the law as it relates specifically to pornography.

Attendees also learn how illegal pornography threatens public health and safety. Studies conducted around the country unmistakably document the deleterious impact that illegal pornography has on society, particularly on women and children.

The studies have revealed alarming facts —

✓ The majority of child molesters in this country are users of hard-core pornography.

✓ The overwhelming majority of convicted rapists admit that they regularly used hard-core pornography.

✓ Hard-core pornography is addictive for some men who ultimately act out the material.

✓ Hard-core pornography encourages and facilitates the transmission of sexually transmitted diseases.

✓ Because one of the largest consumer groups of pornography is 12 to 17-year-old males, illegal pornography is distorting the values and attitudes of a large portion of our society.

Workshop leaders systematically debunk the myths associated with illegal pornography, particularly the myth that it is a victimless crime.

Each workshop includes time for at least one victim to share her story with attendees, putting a face on the facts and statistics.

Workshops are scheduled during May and June in California, Ohio, and Washington, DC, with others to be announced for later in the year. For information on a seminar near you, call 703-278-8343. ◆

> "The workshop gave me hard facts on just how harmful pornography is and showed me how I can fight it in my community and win."
> *— Gina Zimmerman, Warsaw, Indiana*

"Enough is Enough!" Training Seminars

May 26th and 27th
Countryside inn
Newport Beach, CA
Call Monique at 714-435-9056

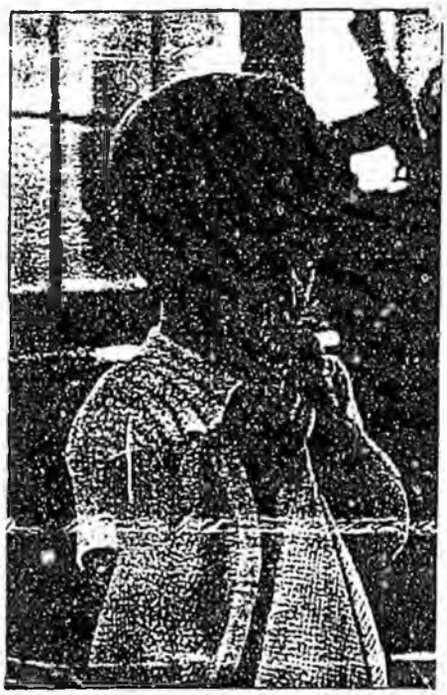
June 12th
Cincinnati Marriott
Cincinnati, OH
Call Barb at 513-521-6227

June 19th
Grand Hyatt, Washington, DC
Call Sonia at 703-278-8343

Registration is $95 per person. Fee includes registration materials, EIE's "Take Action Manual," "Empty Embrace" video, and meals.

Hard-Core Pornography and Sexual Crimes Against Children

This Insidious, Silent Relationship is Too Often Overlooked



The typical child molester will abuse from 30 to 60 children before he is ever caught, according to an Emory University study. Over his lifetime, a molester is likely to abuse more than 360 children.

Ed Savitz, a wealthy Philadelphia pedophile who died of AIDS just weeks ago, used to invite young boys to his upscale apartment to take sexually explicit pictures of them, to have sex with them, and to buy their dirty underwear and even their excrement. Neighbors in the building said that boys ranging in age from 10 to 16 years would come in and out of Savitz's apartment every day at all hours of the day and night. Over a 20-year period, before he was arrested by the Philadelphia police in March 1992, officials estimate that "Uncle Eddy" sexually molested hundreds of teenage and pre-pubescent boys, knowingly infecting many of them with the HIV virus.

On talk shows in Philadelphia, several of the young victims admitted to being the second generation of boys in their family to pose for sexually explicit pornographic sessions with Uncle Eddy. Ed Savitz was called an "insatiable collector of kiddie porn photos" by Lynne Abraham, district attorney of Philadelphia. Estimates of the size of his illegal porn collection ranged from 3,500 to 5,000 photos.

Pornography is a common element — often unmentioned, certainly unheralded — in the majority of sexual crimes committed today. In a study done at Kingston Penitentiary in Canada, 77 percent of those who were convicted of molesting boys and 87 percent of those who were convicted of molesting girls admitted that they regularly used hard-core pornography.

Yet the presence of pornography as a consistent factor in sexual crimes is often overlooked in the media coverage of these cases. Most people are completely unaware of the significant role that pornography plays in sexual crimes, particularly in crimes against children.

Judge Gene Malpas, senior attorney with the National Law Center for Children and Families, first became aware of the link between pornography and child molestation when he served as state prosecutor in Florida. Almost every case of child molestation that he

> "A molester uses it [pornography] in three ways — to stimulate himself, to lower the inhibitions of the child, and to educate the child about what to do."
>
> *— Judge Gene Malpas, senior attorney*
> *National Law Center for Children and Families*

"Enough is Enough!"

A monthly newsletter to educate, motivate, and activate women to break pornography's chain of abuse

Pornography's Victims Rarely Have a Choice

I recently had someone tell me, "Pornography is simply a matter of choice. If you don't like it, if it bothers you so much, well then, don't buy it."

Is hard-core pornography simply a matter of choice?

Tell *that* to the woman who was sexually abused by her older brother when she was too young and small to fight him off and get away. For years, he used her to act out scenes he saw in pornographic magazines.

What choice did she have?

What about the two girls, aged 7 and 12, who were forced to watch X-rated movies before, during, and after they were horribly sexually abused by a neighbor. The doctor who later examined them said they will never have a normal sexual relationship.

What choice did they have?

What about the young children who were sexually abused by their babysitter after he spent the afternoon watching sexually explicit material with his buddies.

What choice did they have?

Hard-core pornography is just like pollution in this respect: often the people who do the polluting are not the people who are hurt by it.

Believe me, the victims rarely have a choice.

Every day, the tragic stories of sexual abuse of women, young boys and girls, and small children reach me by letter, by phone, on radio talk shows, and after speaking engagements.

When do we stop looking the other way? How can we continue to silently tolerate an entire class of material that results in the explicit degradation, abuse, and humiliation of women and children?

Fighting hard-core pornography is a dirty and distasteful job, but it is time for women in America to stand up and face the challenge. The "Enough is Enough!" campaign is a call to courage. It is a call to battle.

America's women have the courage to answer the call to battle. They are working tirelessly across the country to protect the innocent.

I'm glad you are part of this team.

Dee Jepsen

Dee Jepsen
National Campaign Director

"Pornography is just like pollution in this respect: often the people who do the polluting are not the people who are hurt by it."

Best-Selling Author/Therapist Endorses "Enough is Enough!"

Dr. Barbara De Angelis

Best-selling author and counselling therapist Barbara De Angelis, Ph.D., recently endorsed the "Enough is Enough!" campaign and has added her name to the group's diverse National Committee of Support.

"I strongly support the 'Enough is Enough!' campaign in its efforts to speak out against sexual exploitation in all forms," De Angelis said.

De Angelis is author of three best-selling books — *How to Make Love All the Time, Are You the One for Me?*, and *Secrets About Men Every Woman Should Know.*

"As a professional therapist, I have personally witnessed the damaging effects pornography has on society as a whole and on personal relationships more specifically," De Angelis said. "Sexual compulsion and addiction destroy intimacy because, by definition, they introduce a third element into your relationship . . . . I strongly doubt that hard-core pornography creates more intimacy. What it does create is more eroticism, which many couples mistake for intimacy." ◆

Olympic Gold Medalist Joins Campaign

Olympic gold medalist Madeline Manning Mims has joined the "Enough is Enough!" campaign. Mims is the well-known athlete who pioneered the 800-meter run for the United States in 1968. She was (and still is) the only woman to bring back a gold medal in this event, along with the American record. At the time she also set a new Olympic record and the World record.

Madeline Manning Mims is featured (third from left) in the "Enough is Enough!" billboard.

"I grew up in the ghetto in Cleveland, and I've worked closely with young people for the past 17 years. I see what hard-core pornography is doing to destroy young people, families, and relationships," Mims said.

Now an international speaker and an accomplished recording vocalist, Mims has just released a new album whose title song was inspired by the campaign to fight illegal pornography. The lyrics say in part, "We can't let things go on this way. We've got to stand . . . . Enough is enough!" ◆

Watch for our next issue!

We'll update you on "Enough is Enough!" training seminars, feature a story about the educational briefing held in Washington, D.C., for business and professional women, tell you about the fashion show benefit held in Chicago sponsored by Liz Claiborne, Inc., and the Chicago Hilton Hotel, and talk about other "Enough is Enough!" activities.

saw involved pornography, he said.

"Pornography is dangerous to children because it is used to facilitate the crime. A molester uses it in three ways — to stimulate himself, to lower the inhibitions of the child, and to educate the child about what to do," Malpas said.

Perhaps the best known study linking pornography and sex crimes against children is one conducted by the Los Angeles Police Department. The study looked at adult arrests for extrafamilial sex crimes against children over a ten-year period. Of the 320 arrests made by the LAPD Sexually Exploited Child Unit from 1980 to 1989, 199 arrests — over 62 percent — involved pornography. This meant that pornography was either used to facilitate the crime or was produced during the victimization of the child. Crimes included child molestation, oral copulation, sodomy, unlawful sex, rape, insertion of a foreign object, and misdemeanor child annoying.

"Pornography is used quite extensively to lower the inhibitions of the children involved and to get them to do what is wanted," said Detective Gary T. Lyon of the LAPD Sexually Exploited Child Unit.

Lt. Jim Wintergerst of the Crimes Against Children Unit in Louisville, Kentucky, corroborated the link between child sexual abuse and pornography. "When we investigate a case," he said, "we will almost always find pornography. It is used to ease the children into sexual activity."

Police officers, social workers, lawyers, judges, and others who investigate reported instances of child molestation clearly see pornography as an insidious "teaching tool" in the hands of those who sexually prey on children.

"When I am dealing with a victim of abuse and I ask them probing questions, I find that pornography was present in the home many, many times," said Deb Hambright, a social worker in Warsaw, Indiana. "My experience shows that there is a correlation."

Many perpetrators admit that pornography plays a key role in the sexual crimes they commit.

"The explicit material put the thought [of the crime] into my mind. I was around pornography and used it so much that it became an addiction," said a 32-year-old male inmate serving time for molesting an 11-year-old girl. "If I could do it over again, I would never have looked at pornography." ◆

> "When we investigate a case, we will almost always find pornography."
>
> — *Lt. Jim Wintergerst, Louisville Crimes Against Children Unit*

You can help.

Many reporters, and even some law enforcement officials, are unaware of the link between sexual crimes and hard-core pornography. Here's how you can help change that fact:

1. Watch your newspapers for stories about sexual crimes in your area, particularly crimes against women and children.
2. If a story makes no mention of pornography's involvement, call the main number at the paper and ask for the reporter by name.
3. Tell the reporter that you saw the story and that you understand that pornography plays a role in most sex crimes. Ask if the police report indicated that pornography was found in the suspect's possession. You don't need to get into a lengthy discussion, and *please* do not argue with the reporter — you are simply drawing his or her attention to the issue.
4. If the reporter wants to know more about hard-core pornography's link to sexual abuse, tell him or her to call us (703-278-8343) for materials.
5. Send us articles on sexual crimes in your area, regardless of whether or not they mention pornography. We'll make calls to reporters from our office, too. ◆

"Enough is Enough!"

A monthly newsletter to educate, motivate, and activate women to break pornography's chain of abuse

Together, We *Can* Stomp Out Hard-Core Pornography!

I believe that women united behind a just cause have immeasurable influence and power.

I think of Candi Lightner, a mother whose child was tragically killed one night in a car crash by a drunk driver. Her personal tragedy compelled her to establish Mothers Against Drunk Drivers (MADD).

One woman's passion and justifiable anger united other women, and together they launched a powerful campaign. In only 11 years, they not only strengthened the nation's laws governing drinking and driving, they totally changed the way we view drunk driving.

If women work together, I know the same thing can happen in the campaign against hard-core, illegal pornography.

I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families.

When I speak to women across the country about pornography's harmful effects, I see a groundswell of indignation and outrage rising. Liberal and conservative women, religious and nonreligious women, old and young, businesswomen and homemakers are ready to fight to remove illegal pornography from their neighborhoods. We don't have to agree on a lot of other issues to come together in this common cause.

The shocking images of child pornography, incest, bestiality, rape, and mutilation that pass today as "adult" entertainment are demeaning and harmful to us as women, to our children, and to men as well. As pornography's chief victims, we have the special motivation — we have the urgent obligation — to demand that the degradation and exploitation stop.

That's what *"Enough is Enough!"* is all about. This secular, nonpartisan campaign encourages and equips women in the battle against illegal pornography. It is directed by women, staffed by women, and most of its financial support comes from women. We are not creating a new organization. We are initiating a movement.

I'm convinced that the women of America can make the difference on this issue. We can get the laws against illegal pornography enforced. We can get legislation passed where it is needed. We can change the way America thinks about pornography!

We are working to mobilize hundreds of thousands, eventually millions, of women to stand with us and say, "Enough is Enough!"

I urge you to join us in this important war.

Dee Jepsen

Dee Jepsen
National Campaign Director

"I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families."

First Lady Encourages *"Enough is Enough!,"* Condemns Hard-Core Pornography

First Lady Hillary Rodham Clinton recently encouraged the *"Enough is Enough!"* campaign.

In a letter sent to director Dee Jepsen, Mrs. Clinton wrote, "I applaud your group's efforts to eliminate child pornography and illegal pornography and appreciate your willingness to take a stand for the children of the nation.

"I know that you have an enormous and challenging task before you, but this is a pressing issue that must be addressed."

Former First Lady Barbara Bush has also written a letter giving her support to the campaign. ✦

In an interview conducted by Dotson Rader, published in Parade Magazine on April 11th, Mrs. Clinton came down hard on pornography:

Parade: In homes with cable TV, very young children can turn on channels showing R-rated and even X-rated films containing extremely graphic sex and violence — films that it is illegal for them to pay to see in a theater. How can you defend the culture of a country that allows a child access to hard-core pornography and extreme violence?

Mrs. Clinton: I *can't* defend it! I wouldn't defend it! It's wrong, and I wish it would go away, because I think it's so destructive to children and adults to have that kind of material shown. I don't think there's anything wrong with parents' groups or other groups calling for people to boycott certain kinds of entertainment. That's advocacy, education, and choice.

Tell the truth about illegal pornography!

- ✓ Over 80 percent of child molesters admit to regularly using pornography, often imitating actual scenes during molestations.
- ✓ There are more hard-core pornography outlets in this country than McDonald's restaurants.
- ✓ The typical serial child molester has from 360 to 380 victims in his lifetime. Both adult and child pornography is often used as an aid during the crime.
- ✓ 1 in 3 girls and 1 in 7 boys will be molested before the time they are 18 years old.

Hard-core pornography. It's not what you think.

The "Enough is Enough!" campaign is another voice of the National Coalition Against Pornography.

"Enough is Enough!" Campaign • P.O. Box 888 • Fairfax, VA 22030 • 703-278-8343

IMPORTANT MANUAL UPDATE

Child Pornography Laws, State by State

(As of December 1, 1992)

On pages 23-27 of your Take Action Manual, an action item entitled "Strengthen Child Pornography Laws in all 50 States, describes what you need to do to strengthen your state's child pornography law.

Since the initial publication of the Take Action Manual, the "Enough is Enough!" Campaign has received updated information of the status of a number of state child pornography laws. The updated listing of state laws below should be substituted for the listing of states on pages 23-25. State laws in this important area have changed frequently since 1990 and we will continue our attempts to provide the most accurate information available.

The laws regarding the possession of child pornography also vary greatly from state to state. The age in parentheses indicates the age of majority in that state for the purposes of determining what is considered child pornography. For instance, in California it is illegal to possess pornography involving children if they are thirteen years old or younger - however, if the children involved in pornographic scenes are fourteen years or older, the material is not considered child pornography. "F" indicates possession is a felony; "M" indicates possession is a misdemeanor.

States which have no laws dealing with possession of child pornography:

Connecticut	Montana	Wyoming
Hawaii	Rhode Island	
Mississippi	Vermont	

States in which the the possession of child pornography with the intent to distribute and/or for commercial purposes is illegal:

Alaska	F (18)	Massachusetts	F (18)	New Mexico	F (16)
Maine	F (18)	Nebraska	F (18)	New York	F (16)*
Maryland	F (18)	New Hampshire	F (16)	Virginia	F (16)

The mere possession of child pornography is illegal in the following states:

Alabama	F (17)	Kansas	F (16)	Ohio	M (18)
Arizona	F/M (15/18)	Kentucky	M (16)	Oklahoma	F (18)
Arkansas	F (16)	Louisiana	F (17)	Oregon	F (18)
California	M (14)	Maryland	M (16)	Pennsylvania	F (17)
Colorado	M (18)	Michigan	M (18)	S. Carolina	F (18)
Delaware	M (18)	Minnesota	M (18)	S. Dakota	M (18)
Florida	F (16)	Missouri	M (18)	Tennessee	F (18)
Georgia	M (18)	Nevada	M (16)	Texas	F (17)
Idaho	F (18)	New Hampshire	M (16)	Utah	F (18)
Illinois	F (18)	New Jersey	F (16)	Washington	F (16)
Indiana	M (16)	N. Carolina	F (18)	W. Virginia	F (18)
Iowa	M (18)	N. Dakota	M (18)	Wisconsin	F (18)

**Promote or procure" was interpreted under case law as "receipt, acquisition or to obtain."*

New legal efforts on state child pornography statutes are sorely needed for the well-being of this nation's children. Child pornography laws require five essential components to offer adequate protection for children: 1) prohibition of "mere possession," 2) a uniform age of majority of 18 years, 3) felony status for *all* child pornography offenses, 4) mandatory minimum jail sentences with lengthy probationary periods, and 5) strict enforcement and commitment of significant law enforcement resources. If your state does not possess all five of these components, more work is needed and you can make a big difference.

Important Note: DUE TO THE AVALANCHE OF NEW LEGISLATION SINCE 1990, YOU SHOULD CHECK WITH YOUR STATE ATTORNEY GENERAL FOR THE SPECIFICS OF EACH STATE LAW AND WHETHER IT HAS BEEN UP-DATED.

would grant certiorari and vacate the death sentence in this case.

No. 89-7146. Darryl Eugene Freeman, Petitioner v Alabama

496 US 912, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 823, 111 S Ct 8.

June 4, 1990. Petition for writ of certiorari to the Supreme Court of Alabama denied.

Same case below, 555 So 2d 215.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v Georgia, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7423. In Re Kwasi Seitu, Petitioner

496 US 903, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 825, 111 S Ct 10.

June 4, 1990. The petition for writ of habeas corpus is denied.

No. 89-7452. In Re Gareth Wilson, Petitioner

496 US 903, 110 L Ed 2d 284, 110 S Ct 2604.

June 4, 1990. The petition for writ of habeas corpus is denied.

No. 89-7008. In Re Arthur W. Carson, Petitioner

496 US 904, 110 L Ed 2d 284, 110 S Ct 2604.

June 4, 1990. The petition for writ of mandamus is denied.

No. 89-7350. In Re Raymond Swentek, Petitioner

496 US 904, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 833, 111 S Ct 20.

June 4, 1990. The petition for writ of mandamus is denied.

No. 89-6889. In Re Ralph McFadden, Petitioner

496 US 904, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 823, 111 S Ct 7 and reh den (US) 111 L Ed 2d 822, 111 S Ct 7.

June 4, 1990. The petition for writ of mandamus and/or prohibition is denied.

No. 87-6927. Alexis Hamilton, as Natural Mother and Next Friend of James Edward Smith, Petitioner v Texas

496 US 913, 110 L Ed 2d 284, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 495 US 923, 109 L Ed 2d 320, 110 S Ct 1958.

No. 88-1213. Employment Division, Department of Human Resources of Oregon, et al., Petitioners v Alfred L. Smith, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 872, 108 L Ed 2d 876, 110 S Ct 1595.

No. 88-5986. Clyde Osborne, Appellant v Ohio

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 495 US 103, 109 L Ed 2d 98, 110 S Ct 1691.

No. 89-1319. Mark Tarka, Petitioner v G. Charles Franklin, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1080, 108 L Ed 2d 940, 110 S Ct 1809.

No. 89-1334. Jerome B. Rosenthal, Petitioner v J. M. Young, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1080, 108 L Ed 2d 941, 110 S Ct 1811.

No. 89-1341. Maria Graciela Ramirez, Petitioner v Transamerican Natural Gas Corp., et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1081, 108 L Ed 2d 942, 110 S Ct 1811.

No. 89-1382. In Re James Freed, Petitioner

496 US 913, 110 L Ed 2d 285, 110 S Ct 2606.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1077, 108 L Ed 2d 935, 110 S Ct 1839.

No. 89-5737. Charles Troy Coleman, Petitioner v James Saffle, Warden, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2606.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1090, 108 L Ed 2d 964, 110 S Ct 1835.

No. 89-6302. Harold G. Williams, Petitioner v Ralph Kemp, Warden

496 US 913, 110 L Ed 2d 285, 110 S Ct 2606.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1090, 108 L Ed 2d 965, 110 S Ct 1836.

[495 US 103]

CLYDE OSBORNE, Appellant

v

OHIO

495 US 103, 109 L Ed 2d 98, 110 S Ct 1691, reh den (US) 110 L Ed 2d 285, 110 S Ct 2605

[No. 88-5986]

Argued December 5, 1989. Decided April 18, 1990.

Decision: Ohio held permitted, under Federal Constitution's First Amendment, to ban possession and viewing of child pornography; remand held necessary to insure proof of each element of offense.

SUMMARY

An Ohio statute which was designed to combat child pornography made it a crime for a person to possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, except under specified circumstances. A person in Ohio was accused of violating the statute after he was found to possess in his home four photographs, each of which depicted a nude male adolescent posed in a sexually explicit position. The accused's counsel, moving to dismiss the case before trial, alleged that the statute was overbroad, in that it criminalized conduct that was protected under the Federal Constitution. The trial court overruled the motion to dismiss and subsequently gave the jury instructions to which the accused's counsel made no objection. The accused was found guilty as charged, and his conviction was affirmed by an Ohio appellate court. The Supreme Court of Ohio, affirming in turn, held that (1) the Federal Constitution's First Amendment does not prohibit states from proscribing the private possession of child pornography; (2) the statute was not overbroad, because it was to be construed as (a) applying to only a depiction of nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals," and (b) including scienter as an essential element of the offense; (3) the accused, by failing to make a timely objection to the jury instructions as given, waived any claim that the trial court erred in failing to instruct the jury that the term "nudity" referred to a lewd exhibition of the genitals; and (4) the instructions as given were not plainly erroneous (37 Ohio St 3d 249, 525 NE2d 1363). The Ohio Supreme

Briefs of Counsel, p 809, infra.

Court denied a motion for rehearing and granted a stay pending appeal to the United States Supreme Court.

On appeal, the United States Supreme Court reversed and remanded. In an opinion by WHITE, J., joined by REHNQUIST, Ch. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., it was held that (1) Ohio's proscription of the possession and viewing of child pornography was permitted under the First Amendment because (a) Ohio did not rely on a paternalistic interest in regulating a person's mind, but rather sought to serve a compelling state interest in protecting the victims of child pornography, and (b) it was reasonable for the state to conclude that such proscriptions were necessary in order to decrease the production of child pornography; (2) the statute, as construed by the Ohio Supreme Court to include the elements of scienter and lewd exhibition, was not unconstitutionally overbroad; (3) the Ohio Supreme Court properly applied its narrowed construction of the statute to the accused's conduct, since the accused had had notice that his conduct was proscribed; (4) the United States Supreme Court was precluded from reaching a due process claim involving the trial court's failure to instruct the jury as to scienter, because the failure of the accused's counsel to comply with a state procedural rule requiring a timely objection to the jury instructions constituted an independent state-law ground adequate to support the result below; (5) the United States Supreme Court was not precluded from reaching a due process claim involving the trial court's failure to instruct the jury as to the lewdness element of the offense, because counsel had pressed the issue of the prosecution's failure of proof on lewdness before the trial court, and, under the circumstances, nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions; and accordingly (6) it was necessary to remand the case for a new trial in order to insure that the conviction stemmed from a finding that the prosecution had proved each of the elements of the offense.

BLACKMUN, J., concurring, joined the court's opinion and expressed the view that the United States Supreme Court's ability to entertain the accused's due process claim which was premised on the trial court's failure to charge the "lewd exhibition" and "graphic focus" elements of the offense did not depend on the accused's objection to this failure at trial.

BRENNAN, J., joined by MARSHALL and STEVENS, JJ., dissenting, expressed the view that (1) the accused's conviction should be reversed, but Ohio should not be free on remand to retry him under the statute; (2) the statute, even as construed by the Ohio Supreme Court, was fatally overbroad because (a) the construction focused on "lewd exhibitions of nudity" rather than "lewd exhibitions of the genitals" in the context of sexual conduct, and (b) the "graphic focus" test was unduly vague; (3) even if the statute was not overbroad, Ohio could not criminalize the accused's possession of the photographs at issue, and (4) the accused's due process challenges arising from the Ohio Supreme Court's addition of the scienter element, as well as his claim stemming from the creation of the "lewd exhibition" and "graphic focus" tests, were properly before the United States Supreme Court, because

such due process claims were separate from the overbreadth challenge and were based upon an alleged error which did not appear until after the Ohio Supreme Court had reinterpreted the statute.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 945 — First Amendment — child pornography — ban on possession and viewing

1. A state may, consistent with the Federal Constitution's First Amendment, proscribe the possession and viewing of child pornography, where

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5 Am Jur 2d, Appeal and Error § 963; 21 Am Jur 2d, Criminal Law § 17; 42 Am Jur 2d, Infants § 16.5; 50 Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 1, 11, 20, 41

10 Am Jur Trials 1, Obscenity Litigation

USCS, Constitution, Amendment 1

US L Ed Digest, Appeal § 1689; Constitutional Law § 945; Statutes § 18.8

Index to Annotations, Children; Lewdness, Indecency, and Obscenity; Overbreadth; Remand

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to overbreadth of legislation in connection with First Amendment rights. 45 L Ed 2d 725.

Supreme Court's development, since Roth v United States, of standards and principles determining concept of obscenity in context of right of free speech and press. 41 L Ed 2d 1257.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 16 L Ed 2d 1231.

Constitutionality of federal and state regulation of obscene literature. 1 L Ed 2d 2211, 4 L Ed 2d 1821.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 ALR4th 239.

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214.

the state does not rely on a paternalistic interest in regulating a person's mind, but rather seeks to protect the victims of child pornography by destroying a market for the exploitative use of children; such prohibitions are valid, even assuming that there is a First Amendment interest in possession and viewing of child pornography, given that (1) a state's interest in safeguarding the physical and psychological well-being of a minor is compelling, (2) the state's legislative judgment, which is found in relevant literature as well and which passes muster under the First Amendment, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of such children, (3) the state asserts that much of the child pornography market has been driven underground, and that, as a result, it is difficult, if not impossible, to solve the child pornography problem by attacking only production and distribution, (4) it is reasonable for the state to conclude that the production of child pornography will decrease if the state decreases the demand for the product by penalizing those who possess and view the product, and (5) the ban on possession and viewing of child pornography materials will encourage the possessors of such materials to destroy them, which result is desirable because (a) the continued existence of such materials causes the child victims continuing harm, and (b) evidence suggests that pedophiles use child pornography to seduce other children into sexual activity. (Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law §§ 930, 945 — First Amendment — child pornography — overbreadth

2a-2d. A state statute is not overbroad, so as to violate the Federal Constitution's First Amendment—regardless of whether the statute as written is substantially overbroad—where (1) the statute, on its face, forbids a person to possess photographs that show a minor who is not the person's child or ward in a state of nudity, but (a) the term "nudity" has been construed by the state's highest court as constituting a lewd exhibition or involving a graphic focus on the genitals, (b) the context of the court's opinion indicates that the court believed that the term refers to a lewd exhibition of the genitals, and (c) the statute, as construed, would thus not penalize persons for viewing or possessing innocuous photographs of naked children; and (2) the statute, on its face, lacks a mens rea requirement, but the state's highest court has concluded—based on the state's default statute specifying that recklessness applies when another statutory provision lacks an intent specification—that the state must establish scienter in order to prove a violation of the possession statute. (Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law § 930; Statutes § 26 — First Amendment — overbreadth challenge

3a-3d. In the context of the Federal Constitution's First Amendment, an individual defendant is permitted to challenge a statute on overbreadth grounds, regardless of whether the individual's conduct is constitutionally protected; the First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom

a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others; however, once such a statute is authoritatively construed as not applicable to the individual, there is no longer any reason to entertain the individual's challenge to the statute on its face, since there is no longer any danger that protected speech will be deterred.

Constitutional Law § 930 — First Amendment — overbreadth

4. Under the overbreadth doctrine of the Federal Constitution's First Amendment, facial invalidation of a statute is inappropriate, even where the statute at its margins infringes on protected expression, where the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.

Constitutional Law §§ 930, 945 — First Amendment — child pornography — vagueness

5a, 5b. A state statute that prohibits the possession or viewing of certain materials or performances that show a minor in a state of nudity is not unconstitutionally vague, for purposes of the Federal Constitution's First Amendment, even though the statute does not define the term "minor," where state law defines a minor as anyone under 18 years of age.

Constitutional Law § 945 — First Amendment — lewd exhibitions

6a, 6b. There is no significant distinction, for purposes of the Federal Constitution's First Amendment, between a statute that proscribes "lewd exhibitions of nudity" and one that proscribes "nude exhibitions of the genitals," because the crucial question in either case is whether the depiction is lewd, not whether the depiction happens to focus on specific body parts. (Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law §§ 930, 945 — First Amendment — child pornography — overbreadth — notice of proscribed conduct

7a-7d. In the case of an accused who was found to be in possession of four sexually explicit photographs of a nude adolescent, and who claims that the state statute under which the accused is prosecuted—which statute prohibits the possession or viewing of certain materials or performances that show a minor in a state of nudity for other than proper purposes—is overbroad so as to violate the Federal Constitution's First Amendment, a narrow construction of the statute, formulated by the state's highest court on appeal of the accused's conviction—under which construction the prohibition pertains to only child pornography—may properly be applied to the accused's conduct, where the accused had notice that his conduct was proscribed, given that (1) it was obvious from the face of the statute that the statute's goal was to eradicate child pornography, (2) the statute, which appeared in the "Sex Offenses" chapter of the state code, was preceded by a provision which proscribed pandering sexually oriented matter involving a minor, and was followed by a provision which proscribed deception to obtain matter harmful to juveniles, and (3) the photographs found in the accused's possession clearly constituted child pornography.

Constitutional Law § 930; Statutes §§ 18, 108 — enforceability — overbreadth — narrowing construction — due process

8a-8c. A court, when reviewing a criminal conviction under a statute which is potentially overbroad under the Federal Constitution's First Amendment, need not either affirm or strike down the statute on its face, but the court may properly narrow the statute, affirm the conviction on the basis of the narrowing construction, and leave the statute in full force; in terms of applying a ruling to pending cases, there is no difference of federal constitutional import between a court's affirming a conviction after construing a statute to avoid facial invalidation on the ground of overbreadth, and affirming a conviction after rejecting a claim that the conduct at issue is not within the terms of the statute, because, in both situations, the Federal Constitution's due process clause would require fair warning to the defendant that the statutory proscription, as construed, covers the defendant's conduct.

Constitutional Law § 840.3 — due process — proof

9a, 9b. The Federal Constitution's due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Appeal § 489 — review of state court decisions — due process — adequate state grounds

10. On appeal to review a decision of a state's highest court which, citing a state procedural rule, held that an accused who asserted a due process challenge to his conviction for possession of child pornography—on the ground that the trial jury had not been instructed as to scienter—waived his right to assert such a challenge because he failed to object when the jury instructions were given, the United States Supreme Court is precluded from reaching the due process challenge, because the failure of the accused's counsel to comply with the procedural rule constitutes an independent state-law ground adequate to support the result below; this conclusion is supported by considerations that (1) the state's law provides that proof of scienter is required in instances, like the present one, where a criminal statute does not specify the applicable mental state, and (2) the state procedural rule serves the state's important interest in insuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions.

Appeal § 489 — review of state court decisions — due process — adequate state grounds

11. On appeal to review a decision of a state's highest court which, citing a state procedural rule, held that an accused who asserted a due process challenge to his conviction for possession of child pornography—on the ground that the trial jury had not been instructed as to scienter—waived his right to assert such a challenge because he failed to object when the jury instructions were given, the United States Supreme Court may properly reach the due process claim, and the decision below is not supported by an independent and adequate state ground, where (1) the trial was brief, (2) right before trial, the accused's coun-

sel moved to dismiss the case on the ground that the state statute under which the accused was being prosecuted was unconstitutionally overbroad, (3) the trial court overruled the motion to dismiss, and (4) immediately thereafter, the accused's counsel proposed various jury instructions; given this sequence of events, the Supreme Court may consider the due process claim because (1) counsel pressed the issue of the prosecution's failure of proof on lewdness before the trial court, and (2) under the circumstances, nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions.

Appeal § 1689 — remand for new trial

12. On appeal to review a decision of a state's highest court which upheld an accused's conviction under a state statute for possession of child pornography, the United States Supreme Court will reverse the conviction and remand the case for a new trial in order to insure that the conviction stemmed from a finding that the prosecution had proved each of the elements of the offense in question, where (1) the case arose out of the accused's possession of four sexually explicit photographs of a nude adolescent, (2) the statute, on its face, prohibited the possession or viewing of certain materials or performances that show a minor in a state of nudity for other than proper purposes, (3) the accused's counsel moved, before trial, to dismiss the case on the ground that the statute was unconstitutionally overbroad, (4) the trial court overruled the motion to dismiss, (5) the state's highest court, affirming the conviction on appeal, (a) construed the statute as applying to only depictions of nudity that involve a lewd exhibition or a graphic focus on the genitals, and (b) held that the accused, by failing to object when the jury instructions were given, had waived his right to assert a due process claim based on the trial judge's failure to insist that the prosecution prove lewd exhibition as an element of the crime, and (6) the Supreme Court, on appeal, holds that it may properly consider the due process claim despite the accused's failure to object to the jury instructions when given.

SYLLABUS BY REPORTER OF DECISIONS

After Ohio police found photographs in petitioner Osborne's home, each of which depicted a nude male adolescent posed in a sexually explicit position, he was convicted of violating a state statute prohibiting any person from possessing or viewing any material or performance showing a minor who is not his child or ward in a state of nudity, unless (a) the material or performance is presented for a bona fide purpose by or to a person having a proper interest therein, or (b) the possessor knows that the minor's parents or guardian has consented in writing to such photographing or use of the minor. An intermediate appellate court and the State Supreme Court affirmed the conviction. The latter court rejected Osborne's contention that the First Amendment prohibits the States from proscribing the private possession of child pornography. The court also found that the statute is not unconstitutionally overbroad, since, in light of its specific exceptions, it must be read as only applying to depictions of nudity involving a lewd exhibition or graphic focus on the minor's genitals, and since scienter is an essential element of the offense. In rejecting Osborne's contention that the trial court erred in not requiring the government to prove lewd exhibition and scienter as elements of his crime, the court emphasized that he had not objected to the jury instructions given at his trial and stated that the failures of proof did not amount to plain error.

Held:

1. Ohio may constitutionally proscribe the possession and viewing of child pornography. Even assuming that Osborne has a valid First Amendment interest in such activities, this case is distinct from Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243, which struck down a Georgia law outlawing the private possession of obscene material on the ground that the State's justifications for the law—primarily, that obscenity would poison the minds of its viewers—were inadequate. In contrast, Ohio does not rely on a paternalistic interest in regulating Osborne's mind, but has enacted its law on the basis of its compelling interests in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials. See New York v Ferber, 458 US 747, 756-758, 761-762, 73 L Ed 2d 1113, 102 S Ct 3348. Moreover, Ohio's ban encourages possessors to destroy such materials, which permanently record the victim's abuse and thus may haunt him for years to come, see id., at 759, 73 L Ed 2d 1113, 102 S Ct 3348, and which, available evidence suggests, may be used by pedophiles to seduce other children.

2. Osborne's First Amendment overbreadth arguments are unpersuasive.

(a) The Ohio statute is not unconstitutionally overbroad. Although, on its face, the statute purports to prohibit constitutionally protected depictions of nudity, it is doubtful that any overbreadth would be "substantial" under this Court's cases, in light of the statutory exemptions and "proper purposes" provisions. In any event, the statute, as construed by the Ohio Supreme Court, plainly survives overbreadth scrutiny. By limiting the statute's operation to nudity that constitutes lewd exhibition or focuses on genitals, that court avoided penalizing persons for viewing or possessing innocuous photographs of naked children and thereby rendered the "nudity" language permissible. See Ferber, supra, at 765, 73 L Ed 2d 1113, 102 S Ct 3348. Moreover, the statute's failure, on its face, to provide a mens rea requirement is cured by the court's conclusion that the State must establish scienter under the Ohio default statute specifying that recklessness applies absent a statutory intent provision.

(b) It was not impermissible for the State Supreme Court to rely on its narrowed construction of the statute when evaluating Osborne's overbreadth claim. A statute as construed may be applied to conduct occurring before the construction, provided such application affords fair warning to the defendant. See, e. g., Dombrowski v Pfister, 380 US 479, 491, n 7, 14 L Ed 2d 22, 85 S Ct 1116. It is obvious from the face of the child pornography statute, and from its placement within the "Sexual Offenses" chapter of the Ohio

Code, that Osborne had notice that his possession of the photographs at issue was proscribed. Bouie v City of Columbia, 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697; Rabe v Washington, 405 US 313, 31 L Ed 2d 258, 92 S Ct 993; and Marks v United States, 430 US 188, 51 L Ed 2d 260, 97 S Ct 990, distinguished. Shuttlesworth v Birmingham, 382 US 87, 15 L Ed 2d 176, 86 S Ct 211—which stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written—does not conflict with the holding in this case. Nor does Massachusetts v Oakes, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633—in which five Justices agreed in a separate opinion that a state legislature could not cure a potential overbreadth problem through a post-conviction statutory amendment—support Osborne's view that an overbroad statute is void as written, such that a court may not narrow it, affirm a conviction on the basis of the narrowing construction, and leave the statute in full force. Since courts routinely adopt the latter course, acceptance of Osborne's proposition would require a radical reworking of American law. Moreover, the Oakes approach is based on the fear that legislators who know they can cure their own mistakes by amendment without significant cost may not be careful to avoid drafting overbroad laws in the first place. A similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the Court, since legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth, and since applying even a narrowed statute to pending cases might be barred by the Due Process Clause. Furthermore, requiring that statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the overbreadth doctrine in a way that would not serve First Amendment interests.

3. Nevertheless, due process requires that Osborne's conviction be reversed and the case remanded for a new trial, since it is unclear whether the conviction was based on a finding that the State had proved each of the elements of the offense. It is true that this Court is precluded from reaching the due process challenge with respect to the scienter element of the crime because counsel's failure to comply with the state procedural rule requiring an objection to faulty jury instructions constitutes an independent state-law ground adequate to support the result below. However, this Court is not so barred with respect to counsel's failure to object to the failure to instruct on lewdness, since, shortly before the brief trial, counsel moved to dismiss on the ground that the statute was overbroad in its failure to allow the viewing of innocent nude photographs. Nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions. The assertion of federal rights, when plainly and reasonably made, may not be defeated under the name of local practice. Cf. Douglas v Alabama, 380 US 415, 421-422, 13 L Ed 2d 934, 85 S Ct 1074.

37 Ohio St 3d 249, 525 NE2d 1363, reversed and remanded.

White, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Blackmun, O'Connor, Scalia, and Kennedy, JJ., joined. Blackmun, J., filed a concurring opinion. Brennan, J., filed a dissenting opinion, in which Marshall and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

S. Adele Shank argued the cause for appellant.

Ronald J. O'Brien argued the cause for appellee.

Briefs of Counsel, p 809, infra.

OPINION OF THE COURT

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Justice **White** delivered the opinion of the Court.

In order to combat child pornography, Ohio enacted Rev Code Ann § 2907.323(A)(3) (Supp 1989), which provides in pertinent part:

"(A) No person shall do any of the following:

. . . . . .

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

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

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing

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or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison, after the Columbus, Ohio, police, pursuant to a valid search, found four photographs in Osborne's home. Each photograph depicts a nude male adolescent posed in a sexually explicit position.[1]

The Ohio Supreme Court affirmed Osborne's conviction, after an intermediate appellate court did the same. State v Young, 37 Ohio St 3d 249, 525 NE2d 1363 (1988). Relying on one of its earlier decisions, the court first rejected Osborne's conten-

1. Osborne contends that the subject in all of the pictures is the same boy; Osborne testified at trial that he was told that the youth was fourteen at the time that the photographs were taken. App 16. The government maintains that three of the pictures are of one boy and one of the pictures is of another. Three photographs depict the same boy in different positions: sitting with his legs over his head and his anus exposed; lying down with an erect penis and with an electrical object in his hand; and lying down with a plastic object which appears to be inserted in his anus. The fourth photograph depicts a nude standing boy; it is unclear whether this subject is the same boy photographed in the other pictures because the photograph only depicts the boy's torso.

tion that the First Amendment prohibits the States from proscribing the private possession of child pornography.

Next, the Court found that § 2907.323(A)(3) is not unconstitutionally overbroad. In so doing, the Court, relying on the statutory exceptions, read § 2907.323(A)(3) as only applying to depictions of nudity involving a lewd exhibition or graphic focus on a minor's genitals. The Court also found that scienter is an essential element of a § 2907.323(A)(3) offense. Osborne objected that the trial judge had not insisted that the government prove lewd exhibition and scienter as elements of his crime. The Ohio Supreme Court rejected these contentions because Osborne had failed to object to the

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jury instructions given at his trial and the court did not believe that the failures of proof amounted to plain error.[2]

The Ohio Supreme Court denied a motion for rehearing, and granted a stay pending appeal to this Court. We noted probable jurisdiction last June. 492 US 904, 106 L Ed 2d 563, 109 S Ct 3212.

I

[1] The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), compels the contrary result. In Stanley, we struck down a Georgia law outlawing the private possession of obscene material. We recognized that the statute impinged upon Stanley's right to receive information in the privacy of his home, and we found Georgia's justifications for its law inadequate. Id., at 564-568, 22 L Ed 2d 542, 89 S Ct 1243.[3]

Stanley should not be read too broadly. We have previously noted that Stanley was a narrow holding, see United States v 12 200—ft. Reels of Film, 413 US 123, 127, 37 L Ed 2d 500, 93 S Ct 2665 (1973), and, since the decision in that case, the value of permitting child pornography has been characterized as "exceedingly modest, if not de minimis." New York v Ferber, 458 US 747, 762, 73 L Ed 2d 1113, 102 S Ct 3348 (1982). But assuming, for the sake of argument, that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from Stanley because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley. Every court to address the issue has so concluded. See, e.g., People v Geever, 122 Ill 2d 313, 327-328, 522 NE2d 1200, 1206-1207 (1988);

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Felton v State, 526 So 2d 635, 637 (Ala Ct Crim App), aff'd sub nom Ex parte Felton, 526 So 2d 638, 641 (Ala 1988); State v Davis, 53 Wash App 502, 505, 768 P2d 499, 501 (1989); Savery v State, 767 SW2d 242, 245 (Tex App 1989); United States v Boffardi, 684 F Supp 1263, 1267 (SDNY 1988).

In Stanley, Georgia primarily

2. Osborne also unsuccessfully raised a number of other challenges that are not at issue before this Court.

3. We have since indicated that our decision in Stanley was "firmly grounded in the First Amendment." Bowers v Hardwick, 478 US 186, 195, 92 L Ed 2d 140, 106 S Ct 2841 (1986).

sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. 394 US, at 565, 22 L Ed 2d 542, 89 S Ct 1243.[4] We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." Id., at 566, 22 L Ed 2d 542, 89 S Ct 1243. The difference here is obvious: '[T]he State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

"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." Ferber, 458 US, at 756-758, 73 L Ed 2d 1113, 102 S Ct 3348 (citations omitted). It is also 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,

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thereby decreasing demand. In Ferber, where we upheld a New York statute outlawing the distribution of child pornography, we found a similar argument persuasive: "'The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' " Id., at 761-762, 73 L Ed 2d 1113, 102 S Ct 3348, quoting Giboney v Empire Storage & Ice Co. 336 US 490, 498, 93 L Ed 834, 69 S Ct 684 (1949).

Osborne contends that the State should use other measures, besides penalizing possession, to dry up the child pornography market. 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. 394 US, at 567-568, 22 L Ed 2d 542, 89 S Ct 1243. 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

4. Georgia also argued that its ban on possession was a necessary complement to its ban on distribution (see discussion infra, at 110, 109 L Ed 2d, at 109-110) and that the possession law benefited the public because, according to the State, exposure to obscene material might lead to deviant sexual behavior or crimes of sexual violence. 394 US, at 566, 22 L Ed 2d 542, 89 S Ct 1243. We found a lack of empirical evidence supporting the latter claim and stated that "'[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . .'" Id., at 566-567, 22 L Ed 2d 542, 89 S Ct 1243 (citation omitted).

reasons may exist for overriding the right of the individual to possess those materials." Id., at 568, n 11, 22 L Ed 2d 542, 89 S Ct 1243.[5]

Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, 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. Indeed, 19 States

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have found it necessary to proscribe the possession of this material.[6]

Other interests also support the Ohio law. First, as Ferber recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. 458 US, at 759, 73 L Ed 2d 1113, 102 S Ct 3348. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.[7]

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.

II

[2a, 3a, 4] Osborne next argues that even if the State may constitutionally ban the possession of child pornography, his conviction

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is invalid because § 2907.323(A)(3) is unconstitutionally overbroad in that it criminalizes an intolerable range of constitutionally protected conduct.[8]

5. As the dissent notes, see post, at 141, n 16, 109 L Ed 2d, at 129-130, the Stanley Court cited illicit possession of defense information as an example of the type of offense for which compelling state interests might justify a ban on possession. Stanley, however, did not suggest that this crime exhausted the entire category of proscribable offenses.

6. Ala Code § 13A-12-192 (1988); Ariz Rev Stat Ann § 13-3553 (1989); Colo Rev Stat § 18-6-403 (Supp 1989); Fla Stat § 827.071 (1989); Ga Code Ann § 16-12-100 (1989); Idaho Code § 18-1507 (1987); Ill Rev Stat, ch 38, ¶ 11-20.1 (1987); Kans Stat Ann § 21-3516 (Supp 1989); Minn Stat § 617.247 (1988); Mo Rev Stat § 573.037 (Supp 1989); Neb Rev Stat § 28-809 (1989); Nev Rev Stat § 200.730 (1987); Ohio Rev Code Ann §§ 2907.322 and 2907.323 (Supp 1989); Okla Stat, Tit 21, § 1021.2 (Supp 1989); S. D. Codified Laws Ann §§ 22-22-23, 22-22-23.1 (1988); Tex Penal Code Ann § 43.26 (1989 and Supp 1989-1990); Utah Code Ann § 76-5a-3(1)(a) (Supp 1989); Wash Rev Code § 9.68A.070 (1989); W Va Code § 61-8C-3 (1989).

7. The Attorney General's Commission on Pornography, for example, states that "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." 1 Attorney General's Commission on Pornography, Final Report 649 (1986) (footnotes omitted). See also, D. Campagna and D. Poffenberger, Sexual Trafficking in Children 118 (1988); S. O'Brien, Child Pornography 89 (1983).

8. **[3b]** In the First Amendment context, we permit defendants to challenge statutes on overbreadth grounds, regardless of whether the individual defendant's conduct is constitutionally protected. "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." Massachusetts v Oakes, 491 US 576, 581, 105 L Ed 2d 493, 109 S Ct 2633 (1989).

In our previous decisions discussing the First Amendment overbreadth doctrine, we have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v Oklahoma, 413 US 601, 615, 37 L Ed 2d 830, 93 S Ct 2908 (1973). Even 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. . . .' " New York v Ferber, 458 US, at 770, n 25, 73 L Ed 2d 1113, 102 S Ct 3348.

[2b, 5a, 6a] The Ohio statute, on its face, purports to prohibit the possession of "nude" photographs of minors. We have stated that depictions of nudity, without more, constitute protected expression. See Ferber, supra, at 765, n 18, 73 L Ed 2d 1113, 102 S Ct 3348. Relying on this observation, Osborne argues that the statute as written is substantially overbroad. We are skeptical of this claim because, in light of the statute's exemptions and "proper purposes" provisions, the statute may not be substantially overbroad under our cases.[9] However that may be, Osborne's

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overbreadth challenge, in any event, fails because the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survives overbreadth scrutiny. Under the Ohio Supreme Court reading, the statute prohibits "the possession or viewing of material or

9. The statute applies only where an individual possesses or views the depiction of a minor "who is not the person's child or ward." The State, moreover, does not impose criminal liability if either "[t]he material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance," or "[t]he person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred." It is true that, despite the statutory exceptions, one might imagine circumstances in which the statute, by its terms, criminalizes constitutionally protected conduct. If, for example, a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply. But, given the broad statutory exceptions and the prevalence of child pornography, it is far from clear that the instances where the statute applies to constitutionally protected conduct are significant enough to warrant a finding that the statute is overbroad. Cf. Oakes, supra, at 589-590, 105 L Ed 2d 493, 109 S Ct 2633 (opinion of Scalia, J., joined by Blackmun, J., concurring in judgment in part and dissenting in part).

Nor do we find very persuasive Osborne's contention that the statute is unconstitutionally overbroad because it applies in instances where viewers or possessors lack scienter. Although § 2907.323(A)(3) does not specify a mental state, Ohio law provides that recklessness is the appropriate mens rea where a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability." Ohio Rev Stat Ann § 2901.21(B) (1987).

[5b] We also do not find any merit to Osborne's claim that § 2907.323(A)(3) is unconstitutionally vague because it does not define the term "minor." Under Ohio law, a minor is anyone under eighteen years of age. Ohio Rev Code Ann § 3109.01 (1989).

performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." 37 Ohio St 3d, at 252, 525 NE2d, at 1368.[10] By limiting the statute's operation in

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this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children. We have upheld similar language against overbreadth challenges in the past. In Ferber, we affirmed a conviction under a New York statute that made it a crime to promote the " 'lewd exhibition of [a child's] genitals.' " 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348. We noted that "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in Miller [v California, 413 US 15 [37 L Ed 2d 419, 93 S Ct 2607] (1973),] as an example of a permissible regulation." Id., at 765, 73 L Ed 2d 1113, 102 S Ct 3348."

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[2d] The Ohio Supreme Court also concluded that the State had to establish scienter in order to prove a violation of § 2907.323(A)(3) based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an intent specification. See n 9, supra. The statute on its face lacks a mens rea requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in Ferber that prohibitions on child pornography include some element of scienter. 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348.

[3c, 7a] Osborne contends that it was impermissible for the Ohio Supreme Court to apply its construction of § 2907.323(A)(3) to him—i.e., to rely on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendan[t]." Dombrowski v Pfister, 380 US 479, 491, n 7, 14 L Ed 2d 22, 85 S Ct 1116 (1965) (citations omitted).[12] In Hamling v United States,

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418 US 87, 41 L Ed 2d 590, 94 S Ct 2887 (1974), for example, we reviewed the petitioners' convictions for mailing and conspiring to mail an obscene advertising brochure under 18 USC § 1461 [18 USCS § 1461]. That statute makes it a crime to mail an "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." In Hamling, for the first time, we construed the term "obscenity" as used in § 1461 "to be limited to the sort of 'patently offensive representations or depictions of that specific 'hard core' sexual conduct given as examples in Miller v California.' " In light of this construction, we rejected the petitioners' facial challenge to the statute as written, and we affirmed the petitioners' convictions under the section after finding that the petitioners had fair notice that their conduct was criminal. 418 US, at 114-116, 41 L Ed 2d 590, 94 S Ct 2887.

[7b] Like the Hamling petitioners, Osborne had notice that his conduct was proscribed. It is obvious from the face of § 2907.323(A)(3) that the goal of the statute is to eradicate child pornography. The provision criminalizes the viewing and possessing of material depicting children in a state of nudity for other than "proper purposes." The provision appears in the "Sex Offenses" chapter of the Ohio Code. Section 2907.323 is preceded by § 2907.322, which proscribes "[p]andering sexually oriented matter involving a minor," and followed by § 2907.33, which proscribes "[d]eception to obtain matter harmful to juveniles." That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration. Therefore, although § 2907.323(A)(3) as written may have been imprecise at its fringes, someone in Osborne's position would not be surprised to learn

10. The Ohio Court reached this conclusion because "when the 'proper purposes' exceptions set forth in RC 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions . . . is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." 37 Ohio St 3d, at 251-252, 525 NE2d, at 1367-1368 (emphasis in original).

11. The statute upheld against an overbreadth challenge in Ferber was, moreover, arguably less narrowly tailored than the statute challenged in this case because, unlike § 2907.323(A)(3), the New York law did not provide a broad range of exceptions to the general prohibition on lewd exhibition of the genitals. Despite this lack of exceptions, we upheld the New York law, reasoning that "[h]ow often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." 458 US, at 773, 73 L Ed 2d 1113, 102 S Ct 3348.

[2c, 6b] The dissent distinguishes the Ohio statute, as construed, from the statute upheld in Ferber on the ground that the Ohio statute proscribes " 'lewd exhibitions of *nudity*' rather than 'lewd exhibitions of *the genitals.*' " See post, at 129, 109 L Ed 2d, at 122 (emphasis in original). The dissent notes that Ohio defines nudity to include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state." Post, at 130, 109 L Ed 2d, at 123. We do not agree that this distinction between body areas and specific body parts is constitutionally significant: The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks. In any event, however, Osborne would not be entitled to relief. The context of the opinion indicates that the Ohio Supreme Court believed that "the term 'nudity' as used in RC 2907.323(A)(3) refers to a lewd exhibition of the genitals." State v Young, 37 Ohio St 3d 249, 258, 525 NE2d 1363, 1373 (1988).

We do not concede, as the dissent suggests, see post, at 131, n 5, 109 L Ed 2d, at 123, that the statute as construed might proscribe a family friend's possession of an innocuous picture of an unclothed infant. We acknowledge (see n 9, supra) that the statute as written might reach such conduct, but as construed the statute would surely not apply because the photograph would not involve a "lewd exhibition or graphic focus on the genitals" of the child.

12. **[3d]** This principle, of course, accords with the rationale underlying overbreadth challenges. We normally do not allow a defendant to challenge a law as it is applied to others. In the First Amendment context, however, we have said that "[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." Dombrowski, 380 US, at 486, 14 L Ed 2d 22, 85 S Ct 1116. But once a statute is authoritatively construed, there is no longer any danger that protected speech will be deterred and therefore no longer any reason to entertain the defendant's challenge to the statute on its face.

that his possession of the four photographs at issue in this case constituted a crime.

Because Osborne had notice that his conduct was criminal, his case differs from three cases upon which he relies: Bouie v City of Columbia, 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697 (1964), Rabe v Washington,

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405 US 313, 31 L Ed 2d 258, 92 S Ct 993 (1972), and Marks v United States, 430 US 188, 51 L Ed 2d 260, 97 S Ct 990 (1977). In Bouie, the petitioners had refused to leave a restaurant after being asked to do so by the restaurant's manager. Although the manager had not objected when the petitioners entered the restaurant, the petitioners were convicted of violating a South Carolina trespass statute proscribing "'entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry.'" 378 US, at 349, 12 L Ed 2d 894, 84 S Ct 1697. Affirming the convictions, the South Carolina Supreme Court construed the trespass law as also making it a crime for an individual to remain on another's land after being asked to leave. We reversed the convictions on due process grounds because the South Carolina Supreme Court's expansion of the statute was unforseeable and therefore the petitioners had no reason to suspect that their conduct was criminal. Id., at 350-352, 12 L Ed 2d 894, 84 S Ct 1697.

Likewise, in Rabe v Washington, supra, the petitioner had been convicted of violating a Washington obscenity statute that, by its terms, did not proscribe the defendant's conduct. On petitioner's appeal, the Washington Supreme Court nevertheless affirmed the petitioner's conviction, after construing the Washington obscenity statute to reach the petitioner. We overturned the conviction because the Washington Supreme Court's broadening of the statute was unexpected; therefore the petitioner had no warning that his actions were proscribed. Id., at 315, 31 L Ed 2d 258, 92 S Ct 993.

And, in Marks v United States, supra, we held that the retroactive application of the obscenity standards announced in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973), to the potential detriment of the petitioner violated the Due Process Clause because, at the time that the defendant committed the challenged conduct, our decision in Memoirs v Massachusetts, 383 US 413, 16 L Ed 2d 1, 86 S Ct 975 (1966), provided the governing law. The defendant could not suspect that his actions would later become criminal when we expanded the range of constitutionally proscribable conduct in Miller.

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Osborne suggests that our decision here is inconsistent with Shuttlesworth v Birmingham, 382 US 87, 15 L Ed 2d 176, 86 S Ct 211 (1965). We disagree. In Shuttlesworth, the defendant had been convicted of violating an Alabama statute that, when read literally, provided that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." Id., at 90, 15 L Ed 2d 176, 86 S Ct 211. We stated that "[t]he constitutional vice of so broad a provision needs no demonstration." Ibid. As subsequently construed by the Alabama Supreme Court, however, the statute merely made it criminal for an individual who was blocking free passage along a public street to disobey a police officer's order to move. We noted that "[i]t is our duty, of

course, to accept this state judicial construction of the ordinance. . . . As so construed, we cannot say that the ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied." Id., at 91, 15 L Ed 2d 176, 86 S Ct 211. We nevertheless reversed the defendant's conviction because it was not clear that the State had convicted the defendant under the statute as construed rather than as written. Id., at 91-92, 15 L Ed 2d 176, 86 S Ct 211.[13] Shuttlesworth, then, stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written; this proposition in no way conflicts with our holding in this case.

Finally, despite Osborne's contention to the contrary, we do not believe that Massachusetts v Oakes, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633 (1989), supports his theory of this case. In Oakes, the petitioner challenged a Massachusetts pornography statute as

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overbroad; since the time of the defendant's alleged crime, however, the State had substantially narrowed the statute through a subsequent legislative enactment—an amendment to the statute. In a separate opinion, five Justices agreed that the state legislature could not cure the potential overbreadth problem through the subsequent legislative action; the statute was void as written. Id., at 585-586, 105 L Ed 2d 493, 109 S Ct 2633.

[8a] Osborne contends that Oakes stands for a similar but distinct proposition that, when faced with a potentially overinclusive statute, a court may not construe the statute to avoid overbreadth problems and then apply the statute, as construed, to past conduct. The implication of this argument is that if a statute is overbroad as written, then the statute is void and incurable. As a result, when reviewing a conviction under a potentially overbroad statute, a court must either affirm or strike down the statute on its face, but the court may not, as the Ohio Supreme Court did in this case, narrow the statute, affirm on the basis of the narrowing construction, and leave the statute in full force. We disagree.

First, as indicated by our earlier discussion, if we accepted this proposition, it would require a radical reworking of our law. Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach, apply the statute in that case, and leave the statute in place. In Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), for example, the Court construed the open-ended terms used in 18 USC § 1461 [18 USCS § 1461], which prohibits the mailing of material that is "obscene, lewd, lascivious, indecent, filthy or vile." Justice Harlan characterized Roth in this way:

13. In Shuttlesworth, we also overturned the defendant's conviction for violating another part of the same Alabama statute because that provision had been interpreted as criminalizing an individual's failure to follow a policeman's directions when the policeman was directing traffic, and the crime alleged in Shuttlesworth had nothing to do with motor traffic. 382 US, at 93-95, 15 L Ed 2d 176, 86 S Ct 211.

"The words of § 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the

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statute condemns such material irrespective of the *effect* it may have upon those into whose hands it falls, the early case of United States v Bennet, 24 Fed Cas 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in Roth v United States, supra, at 489 [1 L Ed 2d 1498, 77 S Ct 1304], 'taken as a whole appeals to prurient interest.'" Manuel Enterprises, Inc. v Day, 370 US 478, 482-484, 8 L Ed 2d 639, 82 S Ct 1432 (1962) (footnotes omitted; emphasis in original).

See also, Hamling, 418 US, at 112, 41 L Ed 2d 590, 94 S Ct 2887 (quoting the above). The petitioner's conviction was affirmed in Roth, and federal obscenity law was left in force. 354 US, at 494, 1 L Ed 2d 1498, 77 S Ct 1304.[14] We, moreover, have long respected the State Supreme Courts' ability to narrow state statutes so as to limit the statute's scope to unprotected conduct. See, e.g., Ginsberg v New York, 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274 (1968).

Second, we do not believe that Oakes compels the proposition that Osborne urges us to accept. In Oakes, Justice Scalia, writing for himself and four others, reasoned that

"The overbreadth doctrine serves to protect constitutionally legitimate speech not merely ex post, that is, after the offending statute is enacted, but also ex ante, that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free . . . that is, if *no* conviction of constitutionally proscribable conduct would be

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lost, so long as the offending statute was narrowed before the final appeal . . . then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be 'chilled' . . . ." 491 US, at 586, 105 L Ed 2d 493, 109 S Ct 2633 (emphasis in original).

14. Buckley v Valeo, 424 US 1, 76-80, 46 L Ed 2d 659, 96 S Ct 612 (1976), is another landmark case where a law was construed to avoid potential overbreadth problems and left in place. Section 304(e) of the Federal Election Campaign Act, 2 USC § 434(e) (1976 ed) [2 USCS § 434(e)], imposed certain reporting requirements on "[e]very person . . . who makes contributions or independent expenditures" exceeding $100 "other than by contribution to a political committee or candidate." We stated that "[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." The section was upheld as construed. 424 US, at 80, 46 L Ed 2d 659, 96 S Ct 612 (footnote omitted).

In other words, five of the Oakes Justices feared that if we allowed a legislature to correct its mistakes without paying for them (beyond the inconvenience of passing a new law), we would decrease the legislature's incentive to draft a narrowly tailored law in the first place.

Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be. But a similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the court. This is so primarily because the legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth. In the latter event, there could be no convictions under that law even of those whose own conduct is unprotected by the First Amendment. Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause. Thus, careless drafting cannot be considered to be cost free based on the power of the courts to eliminate overbreadth by statutory construction.

[7c, 8b] There are also other considerations. Osborne contends that when courts construe statutes so as to eliminate overbreadth, convictions of those found guilty of unprotected conduct covered by the statute must be reversed and any further

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convictions for prior reprehensible conduct are barred.[15] Furthermore, because he contends that overbroad laws implicating First Amendment interests are nullities and incapable of valid application from the outset, this would mean that judicial construction could not save the statute even as applied to subsequent conduct unprotected by the First Amendment. The overbreadth doctrine, as we have recognized, is indeed "strong medicine," Broadrick v Oklahoma, 413 US, at 613, 37 L Ed 2d 830, 93 S Ct 2908, and requiring that statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the doctrine in a way that would not serve First Amendment interests.[16]

III

[9a] Having rejected Osborne's Stanley and overbreadth arguments, we now reach Osborne's final objec-

15. Under Osborne's submission, even where the construction eliminating overbreadth occurs in a civil case, the statute could not be applied to conduct occurring prior to the decision; for although plainly within reach of the terms of the statute and plainly not otherwise protected by the First Amendment, until the statute was narrowed to comply with the Amendment, the conduct was not illegal.

16. **[7d, 8c]** In terms of applying a ruling to pending cases, we see no difference of constitutional import between a court affirming a conviction after construing a statute to avoid facial invalidation on the ground of overbreadth, and affirming a conviction after rejecting a claim that the conduct at issue is not within the terms of the statute. In both situations, the Due Process Clause would require fair warning to the defendant that the statutory proscription, as construed, covers his conduct. But even with the due process limitation, courts repeatedly affirm convictions after rejecting nonfrivolous claims that the conduct at issue is not forbidden by the terms of the statute. As argued earlier, there is no doubt whatsoever that Osborne's conduct is proscribed by the terms of the child pornography statute involved here.

tion to his conviction: his contention that he was denied due process because it is unclear that his conviction was based on a finding that each of the elements of § 2907.323(A)(3) was present.[17] According

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to the Ohio Supreme Court, in order to secure a conviction under § 2907.323(A)(3), the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals. The jury in this case was not instructed that it could convict Osborne only for conduct that satisfied these requirements.

[10] The State concedes the omissions in the jury instructions, but argues that Osborne waived his right to assert this due process challenge because he failed to object when the instructions were given at his trial. The Ohio Supreme Court so held, citing Ohio law. The question before us now, therefore, is whether we are precluded from reaching Osborne's due process challenge because counsel's failure to comply with the procedural rule constitutes an independent state-law ground adequate to support the result below. We have no difficulty agreeing with the State that Osborne's counsel's failure to urge that the court instruct the jury on scienter constitutes an independent and adequate state-law ground preventing us from reaching Osborne's due process contention on that point. Ohio law states that proof of scienter is required in instances, like the present one, where a criminal statute does not specify the applicable mental state. See n 9, supra. The state procedural rule, moreover, serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions.

[11] With respect to the trial court's failure to instruct on lewdness, however, we reach a different conclusion: Based upon our review of the record, we believe that counsel's failure to object on this point does not prevent us from considering Osborne's constitutional claim. Osborne's trial was brief: The State called only the two arresting officers to the stand; the defense summoned only Osborne himself. Right before trial, Osborne's counsel moved to dismiss the case, contending

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that § 2907.323(A)(3) is unconstitutionally overbroad. Counsel stated:

> "I'm filing a motion to dismiss based on the fact that [the] statute is void for vagueness, overbroad . . . The statute's overbroad because . . . a person couldn't have pictures of his own grandchildren; probably couldn't even have nude photographs of himself.
>
> "Judge, if you had some nude photos of yourself when you were a child, you would probably be violating the law. . . .
>
> . . . . . .
>
> "So grandparents, neighbors, or other people who happen to view the photograph are criminally liable under the statute. And on that basis I'm going to ask the Court to dismiss the case." Tr 3-4.

The prosecutor informed the trial judge that a number of Ohio state courts had recently rejected identical motions challenging § 2907.323(A)(3). Tr 5-6. The court then overruled the motion. Id., at 7. Immediately thereafter, Osborne's counsel proposed various jury instructions. Ibid.

Given this sequence of events, we believe that we may reach Osborne's due process claim because we are convinced that Osborne's attorney pressed the issue of the State's failure of proof on lewdness before the trial court and, under the circumstances, nothing would be gained by requiring Osborne's lawyer to object a second time, specifically to the jury instructions. The trial judge, in no uncertain terms, rejected counsel's argument that the statute as written was overbroad. The State contends that counsel should then have insisted that the court instruct the jury on lewdness because, absent a finding that this element existed, a conviction would be unconstitutional. Were we to accept this position, we would " 'force resort to an arid ritual of meaningless form,' . . . and would further no perceivable state interest." James v Kentucky, 466 US 341, 349, 80 L Ed 2d 346, 104 S Ct 1830 (1984), quoting Staub v City of Baxley, 355 US 313, 320, 2 L Ed 2d 302, 78 S Ct 277 (1958), and citing Henry

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v Mississippi, 379 US 443, 448-449, 13 L Ed 2d 408, 85 S Ct 564 (1965). As Justice Holmes warned us years ago, "[w]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v Wechsler, 263 US 22, 24, 68 L Ed 143, 44 S Ct 13 (1923).

Our decision here is analogous to our decision in Douglas v Alabama, 380 US 415, 13 L Ed 2d 934, 85 S Ct 1074 (1965). In that case, the Alabama Supreme Court had held that a defendant had waived his confrontation clause objection to the reading into evidence of a confession that he had given. Although not following the precise procedure required by Alabama law,[18] the defendant had unsuccessfully objected to the prosecution's use of the confession. We followed "our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question" and stated that "[i]n determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interest, and therefore sufficient to preserve the claim for review here." Id., at 422, 13 L Ed 2d 934, 85 S Ct 1074. Concluding that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection," we held that the Alabama procedural ruling did not preclude our consideration of the defendant's constitutional claim. Id., at 421-422, 13 L Ed 2d 934, 85 S Ct 1074. We reach a similar conclusion in this case.

IV

[12] To conclude, although we find

17. [9b] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 US 358, 364, 25 L Ed 2d 368, 90 S Ct 1068 (1970).

18. The Alabama court had stated: " 'There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the questions embracing the alleged confession.' " 380 US, at 421, 13 L Ed 2d 934, 85 S Ct 1074 (citation omitted).

Osborne's First Amendment arguments unpersuasive, we reverse his conviction and remand

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for a new trial in order to ensure that Osborne's conviction stemmed from a finding that the State had proved each of the elements of § 2907.323(A)(3).

So ordered.

SEPARATE OPINIONS

Justice **Blackmun**, concurring.

I join the Court's opinion. I write separately only to express my agreement with Justice Brennan, see post, at 146, n 20, 109 L Ed 2d, at 132-133, that this Court's ability to entertain Osborne's due process claim premised on the failure of the trial court to charge the "lewd exhibition" and "graphic focus" elements does not depend upon his objection to this failure at trial.

Justice **Brennan**, with whom Justice **Marshall** and Justice **Stevens** join, dissenting.

I agree with the Court that appellant's conviction must be reversed. I do not agree, however, that Ohio is free on remand to retry him under Ohio Rev Code Ann § 2907.323(A)(3) (Supp 1989) as it currently exists. In my view, the state law, even as construed authoritatively by the Ohio Supreme Court, is still fatally overbroad, and our decision in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), prevents the State from criminalizing appellant's possession of the photographs at issue in this case. I therefore respectfully dissent.

I

A

As written, the Ohio statute is plainly overbroad. Section 2907.323(A)(3) makes it a crime to "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity." Another section defines "nudity" as

> "the showing, representation, or 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
>
> [495 US 127]
>
> below the top of the nipple, or of covered male genitals in a discernibly turgid state." § 2907.01(H).

In short, §§ 2907.323 and 2907.01(H) use simple nudity, without more, as a way of defining child pornography.[1] But as our prior decisions have made clear, " 'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." Schad v Mount Ephraim, 452 US 61, 66, 68 L Ed 2d 671, 101 S Ct 2176 (1981) (quoting Jenkins v Georgia, 418 US 153, 161, 41 L Ed 2d 642, 94 S Ct 2750 (1974)); see also FW/PBS, Inc. v Dallas, 493 US 215, 224, 102 L Ed 2d 56, 109 S Ct 80 (1990) (plurality opinion); id., at 238, n 1, 102 L Ed 2d 56, 109 S Ct 80 (Brennan, J., concurring in judgment); Doran v Salem Inn, Inc., 422 US 922, 932-933, 45 L Ed 2d 648, 95 S Ct 2561 (1975); Southeastern Promotions, Ltd. v Conrad, 420 US 546, 557-558, 43 L Ed 2d 448, 95 S Ct 1239 (1975); California v LaRue, 409 US 109, 118, 34 L Ed 2d 342, 93 S Ct 390 (1972). In Erznoznik v City of Jacksonville, 422 US 205, 213, 45 L Ed 2d 125, 95 S Ct 2268 (1975), for example, we invalidated a statute that "would [have] bar[red] a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might [have] prohibit[ed] newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." The Ohio law as written has the same broad coverage and is similarly unconstitutional.[2]

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B

Wary of the statute's use of the "nudity" standard, the Ohio Supreme Court construed § 2907.323(A)(3) to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." State v Young, 37 Ohio St 3d 249, 252, 525 NE2d 1363, 1368 (1988). The "lewd exhibition" and "graphic focus" tests not only fail to cure the overbreadth of the statute, but they also create a new problem of vagueness.

1

The Court dismisses appellant's overbreadth contention in a single cursory paragraph. Relying exclusively on our previous decision in New York v Ferber, 458 US 747, 73 L Ed 2d 1113, 102 S Ct 3348 (1982),[3]

1. Other provisions of Ohio law relating to child pornography are not phrased in terms of "nudity." For example, Ohio Rev Code Ann § 2907.321 (Supp 1989) prohibits the knowing creation, sale, distribution, or possession of "obscenity involving a minor." Section 2907.322 prohibits the knowing creation, sale, distribution, or possession of materials depicting a minor engaging in "sexual activity" (defined as "sexual conduct or sexual contact," see §§ 2907.01(A), (B), (C)), masturbation, or bestiality. The documented harm from child pornography arises chiefly from the type of *obscene* materials that would be punished under these provisions, rather than from the depictions of mere "nudity" that are criminalized in § 2907.323. See New York v Ferber, 458 US 747, 779, n 4, 73 L Ed 2d 1113, 102 S Ct 3348 (1982) (Stevens, J., concurring in judgment).

2. The Court hints that § 2907.323's exemptions and "proper purposes" provisions might save it from being overbroad. See ante, at 112, 109 L Ed 2d, at 111. I disagree. The enumerated "proper purposes" (e.g., a "bona fide artistic, medical, scientific, educational . . . or other proper purpose") are simultaneously too vague and too narrow. What is an acceptable "artistic" purpose? Would erotic art along the lines of Robert Mapplethorpe's qualify? What is a valid "scientific" or "educational" purpose? What about sex manuals? See, e.g., Faloona v Hustler Magazine, Inc. 607 F Supp 1341 (ND Tex 1985), aff'd, 799 F2d 1000 (CA5 1986). What is a permissible "other proper purpose"? What about photos taken for one purpose and recirculated for other, more prurient purposes? The "proper purposes" standard appears to create problems analogous to those this Court has encountered in describing the "redeeming social importance" of obscenity. See Pope v Illinois, 481 US 497, 500-501, 95 L Ed 2d 439, 107 S Ct 1918 (1987); id., at 513-519, 95 L Ed 2d 439, 107 S Ct 1918 (Stevens, J., dissenting); Smith v United States, 431 US 291, 319-321, 52 L Ed 2d 324, 97 S Ct 1756 (1977) (Stevens, J., dissenting); Paris Adult Theatre I v Slaton, 413 US 49, 84-85, 37 L Ed 2d 446, 93 S Ct 2628 (1973) (Brennan, J., dissenting); Miller v California, 413 US 15, 24, 37 L Ed 2d 419, 93 S Ct 2607 (1973); Memoirs v Attorney General of Massachusetts, 383 US 413, 418, 16 L Ed 2d 1, 86 S Ct 975 (1966) (plurality opinion); Roth v United States, 354 US 476, 484-485, 1 L Ed 2d 1498, 77 S Ct 1304 (1957).

At the same time, however, Ohio's list of "proper purposes" is too limited; it excludes such obviously permissible uses as the commercial distribution of fashion photographs or the simple exchange of pictures among family and friends. Thus, a neighbor or grandparent who receives a photograph of an unclothed toddler might be subject to criminal sanctions.

3. Although the phrase "lewd exhibition of the genitals" was offered as an example of a permissible regulation in Miller v California, 413 US, at 25, 37 L Ed 2d 419, 93 S Ct 2607, it was mentioned in the Court's treatment of a *vagueness* question. Even then the phrase was prefaced with the words "[p]atently offensive representations or descriptions," ibid., and included in a list with other types of sexual conduct that served to limit its scope.

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the majority reasons that the "lewd exhibition" standard adequately narrows the statute's ambit because "[w]e have upheld similar language against overbreadth challenges in the past." Ante, at 114, 109 L Ed 2d, at 112. The Court's terse explanation is unsatisfactory, since Ferber involved a law that differs in crucial respects from the one here.

The New York law at issue in Ferber criminalized the use of a child in a "'*[s]exual performance,*" defined as "'any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.'" 458 US, at 751, 73 L Ed 2d 1113, 10[illegible] S Ct 3348 (quoting N Y Penal Law § [illegible].00(1) (McKinney 1980)). "'"*Sexual conduct*"'" was in turn defined as "'actual or simulated sexual intercourse [illegible]te sexual intercourse, sexual be[illegible]ty, masturbation, sado-masochis[illegible] abuse, or lewd exhibition of the ge[illegible]itals.'" 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348 (quoting § 263.00(3)). Although we acknowledged that "nudity, without more[,] is protected expression," id., at 765, n 18, 73 L Ed 2d 1113, 102 S Ct 3348, we found that the statute was not overbroad because only "a tiny fraction of materials within the statute's reach" was constitutionally protected. Id., at 773, 73 L Ed 2d 1113, 102 S Ct 3348; see also id., at 776, 73 L Ed 2d 1113, 102 S Ct 3348 (Brennan, J., concurring in judgment). We therefore upheld the conviction of a bookstore proprietor who sold films depicting young boys masturbating.

The Ohio law is distinguishable for several reasons. First, the New York statute did not criminalize materials with a *"graphic focus"* on the genitals, and, as discussed further below, Ohio's "graphic focus" test is impermissibly capacious. Even setting aside the "graphic focus" element, the Ohio Supreme Court's narrowing construction is still overbroad because it focuses on "lewd exhibitions of *nudity*" rather than "lewd exhibitions of *the genitals*" in the context of *sexual conduct*, as in the New York statute at issue in Ferber.[4]

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Ohio law defines "nudity" to include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state," *as well as* depictions of the genitals. On its face, then, the Ohio law is much broader than New York's.

In addition, whereas the Ohio Supreme Court's interpretation uses the "lewd exhibition of nudity" test standing alone, the New York law employed the phrase "'lewd exhibition of

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the genitals'" in the context of a longer list of examples of sexual conduct: "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, [and] sado-masochistic abuse.'" 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348. This syntax was important to our decision in Ferber. We recognized the potential for impermissible applications of the New York statute, see id., at 773, 73 L Ed 2d 1113, 102 S Ct 3348, but in view of the examples of "sexual conduct" provided by the statute, we were willing to assume that the New York courts would not "widen the *possibly invalid* reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'" Ibid. (emphasis added). In the Ohio statute, of course, there is no analog to the elaborate definition of "sexual conduct" to serve as a similar limit. Hence, while the New York law could be saved at least in part by the notion of ejusdem generis, see 2A C. Sands, Sutherland on Statutory Construction § 47.17, p 166 (4th ed 1984), the Ohio Supreme Court's construction of its law cannot.

Indeed, 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. Pictures of topless bathers at a Mediterranean beach, of teenagers in revealing dresses, and even of toddlers romping unclothed, all might be prohibited.[5]

4. The Court maintains that "[t]he context of the opinion indicates that the Ohio Supreme Court believed that 'the term "nudity" as used in R C 2907.323(A)(3) refers to a lewd exhibition of the genitals.' State v Young, 37 Ohio St 3d 249, 268, 525 NE2d 1363, 1373 (1988)." Ante, at 115, n 11, 109 L Ed 2d, at 112. The passage cited (and quoted in part) by the Court, however, is a description of appellant's objections at trial and his argument on appeal, not a precise formulation by the Ohio Supreme Court of the "lewd exhibition" test. Indeed, only two sentences after the quotation cited by the majority, the Ohio court referred to "lewdness [a]s a necessary element of *nudity* under R C 2907.323(A)(3)." 37 Ohio St 3d, at 268, 525 NE2d, at 1373 (emphasis added). Earlier in its opinion, the Ohio Supreme Court more carefully articulated its construction of the statute and stated that § 2907.323(A)(3) criminalizes depictions of nudity "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." Id., at 252, 525 NE2d, at 1368. It is on this portion of the opinion that I rely.

The Ohio Supreme Court did not say, "[W]here such nudity constitutes a lewd exhibition of or involves a graphic focus on the genitals." The noun "exhibition" does not take as a modifier the preposition "on," and the court's repeated reference to the "prohibited state of nudity" as "a lewd exhibition or a graphic focus on the genitals," id., at 251, 525 NE2d, at 1367, leaves no doubt that its choice of words was deliberate. The Ohio court clearly meant the "lewd exhibition" standard to pertain only to nudity and not to displays of the genitals. See also ibid. (referring to "morally innocent states of nudity as well as lewd exhibitions").

But were the Court today correct that the Ohio Supreme Court intended to create a "'lewd exhibition' of the genitals" test, I would hardly be reassured. Indeed, such a confused approach by the Ohio Supreme Court, referring in one part of its opinion to "lewd exhibi-

5. The majority concedes that "[i]f, for example, a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply." Ante, at 113, n 9, 109 L Ed 2d, at 111. To provide another disturbing illustration: A well-known commercial advertisement for a suntan lotion shows a dog pulling down the bottom half of a young girl's bikini, revealing a stark contrast between her suntanned back and pale buttocks. That this advertisement might be illegal in Ohio is an absurd, yet altogether too conceivable, conclusion under the language of the statute. "Many of the world's great artists—Degas, Renoir, Donatello, to name a few—have worked from models under 18 years of age, and many acclaimed photographs and films have included nude or partially clad minors." Massachusetts v Oakes, 491 US 576, 593, 105 L Ed 2d 493, 109 S Ct 2633 (1989) (Brennan, J., dissenting) (footnote omitted). In addition, there is an "abundance of baby and child photographs taken every day without full frontal covering, not to mention the work of artists and filmmakers and nudist family snapshots." Id., at 598, 105 L Ed 2d 493, 109 S Ct 2633 (Brennan, J., dissenting); see also State v Schmakel, No. L-88-300, (Ohio Ct App, Oct. 13, 1989), pp 10-11 ("[A] parent photographing his naked toddler on a bear rug would be threatened with a prison term . . . even though parents ostensibly have the same interests in taking those pictures as they do in keeping a journal or gloating about their children's accomplishments"). None of these examples involves "sexual conduct," Ferber, 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348, yet all might be unlawful under the Ohio statute.

Furthermore,

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the Ohio law forbids not only depictions of nudity *per se*, but also depictions of the buttocks, breast, or pubic area with less than a "full, opaque covering." Thus, pictures of fashion models wearing semi-transparent clothing might be illegal,[6] as might a photograph depicting a fully clad male that nevertheless captured his genitals "in a discernibly turgid state." The Ohio statute thus sweeps in many types of materials that are not "child pornography," as we used that term in Ferber, but rather that enjoy full First Amendment protection.

It might be objected that many of these depictions of nudity do not amount to "lewd exhibitions." But in the absence of *any* authoritative definition of that phrase by the Ohio Supreme Court, we cannot predict which ones. Many would characterize a photograph of a seductive fashion model or alluringly posed adolescent on a topless European beach as "lewd," although such pictures indisputably enjoy constitutional protection. Indeed, some might think that *any* nudity, especially that involving a minor, is by definition "lewd," yet this Court has clearly established that nudity is not excluded

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automatically from the scope of the First Amendment. The Court today is unable even to hazard a guess as to what a "lewd exhibition" might mean; it is forced to rely entirely on an inapposite case—Ferber—that simply did not discuss, let alone decide, the central issue here.

The Ohio Supreme Court provided few clues as to the meaning of the phrase "lewd exhibition of nudity." The court distinguished "child pornography" from "obscenity," see 37 Ohio St 3d, at 257, 525 NE2d, at 1372, thereby implying that it did not believe that an exhibition was required to be "obscene" in order to qualify as "lewd."[7] But it supplied no

6. Cf. Steffens v State, 343 So 2d 90, 91 (Fla App 1977) (invalidating as impermissibly vague ordinance that prohibited "female waitresses, entertainers or other employees of a public business" from appearing with their breasts "thinly covered by mesh, transparent net or lawn skin tight materials which are flesh colored and worn skin tight, so as to appear uncovered," on the ground that "[i]n view of the scanty female apparel which is now socially acceptable in public particularly on beaches, the description of the type of clothing forbidden by this ordinance is extremely unclear").

7. Other courts have found it necessary to equate "lewd" with "obscene" in order to avoid overbreadth and vagueness problems. See, e.g., United States v 12 200—ft. Reels of Film, 413 US 123, 130, n 7, 37 L Ed 2d 500, 93 S Ct 2665 (1973); Donnenberg v State, 1 Md App 691, 697, 232 A2d 264, 267 (1967) ("lewd" and "indecent" equivalent to "obscene"; "[o]therwise the words would be too vague to constitute a permissible standard in a criminal statute"); State ex rel. Cahalan v Diversified Theatrical Corp. 59 Mich App 223, 232-233, 229 NW2d 389, 393 (1975); Seattle v Marshall, 83 Wash 2d 665, 672, 521 P2d 693, 697 (1974); State v Voshart, 39 Wis 2d 419, 429-431, 159 NW2d 1, 6-7 (1968). But the Ohio Supreme Court specifically rejected this path.

In my judgment, even equating "lewd" with "obscene" would not adequately clarify matters because "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." Paris Adult Theatre I v Slaton, 413 US, at 103, 37 L Ed 2d 446, 93 S Ct 2628 (Brennan, J., dissenting); see also Sable Communications of California, Inc. v FCC, 492 US 115, 133-134, 106 L Ed 2d 93, 109 S Ct 2829 (1989) (Brennan, J., concurring in part and dissenting in part); Pope v Illinois, 481 US 497, 507, 95 L Ed 2d 439, 107 S Ct 1918 (1987) (Brennan, J., dissenting); id., at 513-518, 95 L Ed 2d 439, 107 S Ct 1918 (Stevens, J., dissenting.)

authoritative definition—a disturbing omission in light of the absence of the phrase "lewd exhibition" from the statutory definition section of the Sex Offenses chapter of the Ohio Revised Code. See § 2907.01.[8] In fact, the word

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"lewd" does *not* appear in the statutory definition of *any* crime involving obscenity or other sexually oriented materials in the Ohio Revised Code. See §§ 2907.31-2907.35.

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Thus, when the Ohio Supreme Court grafted the "lewd exhibition" test onto the definition of nudity, it was venturing into uncharted territory.[9]

tions of *nudity*" and in another to "lewd exhibitions of *the genitals*," would create a great deal of uncertainty regarding the scope of § 2907.323(A)(3) and likely would render that

8. Revised Code § 2905.26(B), which was repealed in 1974, defined "lewdness" somewhat unhelpfully as "any indecent or obscene act." As it now reads, the Sex Offenses chapter of the Ohio Revised Code is remarkably *devoid* of any use of the term "lewd." The crime of "importuning," for example, is defined as the solicitation to engage in "sexual activity" or "sexual conduct." Ohio Rev Code Ann § 2907.07 (1976). "Public indecency" comprises "expos[ing one's] private parts," "engag[ing] in masturbation," "engag[ing] in sexual conduct," or "engag[ing] in conduct which to an ordinary observer would appear to be sexual conduct or masturbation." § 2907.09. "Prostitution" is described as engaging in "sexual activity for hire." Ohio Rev Code Ann §§ 2907.21-2907.26 (1975 and Supp 1989).

Currently, several sections of the Ohio Revised Code outside the Sex Offenses chapter contain the term "lewd." See Ohio Rev Code Ann § 715.52 (1976) ("Any municipal corporation may . . . [p]rovide for the punishment of all lewd and lascivious behavior in the streets and other public places"); Ohio Rev Code Ann § 3767.01(C) (1988) (defining public "nuisance" as "that which is defined and declared by statutes to be such and . . . any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives [and so on, are exhibited]"); Ohio Rev Code Ann § 4715.30(A) (Supp 1989) (providing that "[t]he holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for . . . [e]ngaging in lewd or immoral conduct in connection with the provision of dental services"); Ohio Rev Code Ann § 4931.31 (1977) ("No person shall, while communicating with any other person over a telephone, . . . use or address to such other person any words or language of a lewd, lascivious, or indecent character, nature, or connotation for the sole purpose of annoying such other person").

The Ohio Supreme Court did not refer to any of these provisions in articulating its "lewd exhibition" standard, and they provide little guidance in deciphering the "lewd exhibition of nudity" test. Indeed, although the Ohio public nuisance statute, § 3767.01(C), contains the phrase "lewdness, assignation, or prostitution," it has been interpreted to refer only to conduct or behavior and not to photographs and other printed materials. See Ohio v Pizza, No. L-88-045, 18 (Ohio Ct App, Mar. 10, 1989), p 18. Thus, Ohio has followed those States that have determined that "the term 'lewdness' does *not* apply to persons who sell pornography." Chicago v Geraci, 30 Ill App 3d 699, 704, 332 NE2d 487, 492 (1975) (emphasis added); see also Chicago v Festival Theatre Corp. 91 Ill 2d 295, 302, 438 NE2d 159, 161-162 (1982) (noting that various courts have held that "'lewdness, assignation, or prostitution'" abatement statutes are not applicable to obscene films or books).

9. Indeed, in other contexts the Ohio Supreme Court has recognized the difficulty of defining the term "lewd." See, e.g., Columbus v Rogers, 41 Ohio St 2d 161, 163-165, 324 NE2d 563, 565-566 (1975) (holding void for vagueness city ordinance providing that "'[n]o person shall appear on any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress'"); Columbus v Schwarzwalder, 39 Ohio St 2d 61, 62-63, 313 NE2d 798, 800 (1974) (per curiam) (reversing, on grounds of overbreadth, convictions under disorderly conduct ordinance that prohibited "'disturb[ing] the good order and quiet of the city'" and "'otherwise violat[ing] the public peace by indecent and disorderly conduct or by lewd or lascivious behavior'"); see also South Euclid v Richardson, Nos. 54247, 54248, (Ohio Ct App, Aug. 18, 1988), pp 1-2 (invalidating as vague and overbroad municipal ordinance stating that "'no person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct,'" and that defined "'lewdness'" as "'sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals'").

Moreover, there is no longstanding, commonly understood definition of "lewd" upon which the Ohio Supreme Court's construction might be said to draw that can save the "lewd exhibition" standard from impermissible vagueness.[10] At

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common law, the term "lewd" included "any gross indecency so notorious as to tend to corrupt community morals," Collins v State, 160 Ga App 680, 682, 288 SE2d 43, 45 (1981), an approach that was "subjective" and dependent entirely on a speaker's "social, moral, and cultural bias." Morgan v Detroit, 389 F Supp 922, 930 (ED Mich 1975).[11] Not surprisingly, States with long experience in applying indecency laws have learned that the word "lewd" is "too indefinite and uncertain to be enforceable." Courtemanche v State, 507 SW2d 545, 546 (Tex Cr App 1974). See also Attwood v Purcell, 402 F Supp 231, 235 (Ariz 1975); District of Columbia v Walters, 319 A2d 332, 335-336 (DC 1974). The term is often defined by reference to such pejorative synonyms as " 'lustful, lascivious, unchaste, wanton, or loose in morals and conduct.' " People v Williams, 59 Cal App 3d 225, 229, 130 Cal Rptr 460, 462 (1976). But "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify." State v Kueny, 215 NW2d 215, 217 (Iowa 1974). "To instruct the jury that a 'lewd or dissolute' act is one which is morally 'loose,' or 'lawless,' or 'foul' piles additional uncertainty

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upon the already vague words of the statute. In short, vague statutory language is not rendered

10. Historically, prohibitions on "lewd" acts grew out of "the archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion." Pryor v Municipal Court for Los Angeles, 25 Cal 3d 238, 248, 599 P2d 636, 641 (1979). We held such vagrancy laws unconstitutionally vague in Papachristou v City of Jacksonville, 405 US 156, 31 L Ed 2d 110, 92 S Ct 839 (1972). Cf. Ohio Rev Code § 715.55 (1976) ("Any municipal corporation may provide for: (A) The punishment of persons disturbing the good order and quiet of the municipal corporation by clamors and noises in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by *lewd* or lascivious behavior. (B) The punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself") (emphasis added).

11. Virtually any act running afoul of "conventional" morality can be and has been sanctioned under "lewdness" laws. See, e.g., Jelly v Dabney, 581 P2d 622, 626 (Wyo 1978) (describing, as punishable under "lewdness" prohibition, crime of "illicit cohabitation," i.e., a "dwelling or living together by a man and woman, not legally married to each other, in the manner of husband and wife, and indulgence in acts of sexual intercourse") (quotation omitted); Egal v State, 469 So 2d 196, 198 (Fla App 1985) (" '[I]f forty years ago either a man or a woman had donned the apparel popular on our beaches today . . . such person would probably have been . . . branded as a lewd, lascivious, and indecent person' ") (quoting State ex rel. Swanboro v Mayo, 155 Fla 330, 332, 19 So 2d 883, 884 (1944)).

more precise by defining it in terms of synonyms of equal or greater uncertainty." Pryor v Municipal Court for Los Angeles, 25 Cal 3d 238, 249, 599 P2d 636, 642 (1979).

The Ohio Supreme Court, moreover, did not specify the perspective from which "lewdness" is to be determined. A "reasonable" person's view of "lewdness"? A reasonable pedophile's? An "average" person applying contemporary local community standards? Statewide standards? Nationwide standards? Cf. Sable Communications of California, Inc. v FCC, 492 US 115, 133-134, 106 L Ed 2d 93, 109 S Ct 2829 (1989); Pope v Illinois, 481 US 497, 500-501, 95 L Ed 2d 439, 107 S Ct 1918 (1987); Pinkus v United States, 436 US 293, 302-303, 56 L Ed 2d 293, 98 S Ct 1808 (1978); Smith v United States, 431 US 291, 300, n 6, 52 L Ed 2d 324, 97 S Ct 1756 (1977); Miller v California, 413 US 15, 24, 37 L Ed 2d 419, 93 S Ct 2607 (1973); Mishkin v New York, 383 US 502, 508, 16 L Ed 2d 56, 86 S Ct 958 (1966). In sum, the addition of a "lewd exhibition" standard does not narrow adequately the statute's reach. If anything, it creates a new problem of vagueness, affording the public little notice of the statute's ambit and providing an avenue for " 'policemen, prosecutors, and juries to pursue their personal predilections.' " Kolender v Lawson, 461 US 352, 358, 75 L Ed 2d 903, 103 S Ct 1855 (1983) (quoting Smith v Goguen, 415 US 566, 575, 39 L Ed 2d 605, 94 S Ct 1242 (1974)); see also Houston v Hill, 482 US 451, 465, and n 15, 96 L Ed 2d 398, 107 S Ct 2502 (1987).[12] Given the important First Amendment interests

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at issue, the vague, broad sweep of the "lewd exhibition" language means that it cannot cure § 2907.323(A)(3)'s overbreadth.

2

The Ohio Supreme Court also added a "graphic focus" element to the nudity definition. This phrase, a stranger to obscenity regulation, suffers from the same vagueness difficulty as "lewd exhibition." Although the Ohio Supreme Court failed to elaborate what a "graphic focus" might be, the test appears to involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture or other representation. Not only is this factor dependent on the perspective and idiosyncrasies of the observer, it also is unconnected to whether the material at issue merits constitutional protection. Simple nu-

12. The danger of discriminatory enforcement assumes particular importance of the context of the instant case, which involves child pornography with male homosexual overtones. Sadly, evidence indicates that the overwhelming majority of arrests for violations of "lewdness" laws involve male homosexuals. See Pryor, supra, at 252, n 599 P2d, at 644, n 8. Cf. Houston v Hill, 482 US 451, 96 L Ed 2d 398, 107 S Ct 2502 (1987) (prosecution of male homosexual for interfering with a police officer in the performance of his duties); Developments in the Law—Sexual Orientation and the Law, 102 Harv L Rev 1509, 1537-1538, 1542 (1989). "Such uneven application of the law is the natural consequence of a statute which as judicially construed measure[s] the criminality of conduct by community or even individual notions of what is distasteful behavior." Pryor, supra, at 252, 599 P2d, at 644. The "lewd exhibition" standard " 'furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." ' " Kolender v Lawson, 461 US, at 360, 75 L Ed 2d 903, 103 S Ct 1855 (quoting Papachristou, 405 US, at 170, 31 L Ed 2d 110, 92 S Ct 839, in turn quoting Thornhill v Alabama, 310 US 88, 97-98, 84 L Ed 1093, 60 S Ct 736 (1940))

dity, no matter how prominent or "graphic," is within the bounds of the First Amendment. 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. Similarly, a painting of a partially clad girl could be said to involve a "graphic focus," depending on the picture's lighting and emphasis,[13] as could the depictions of nude children on the friezes that adorn our courtroom. 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.

In sum, the "lewd exhibition" and "graphic focus" tests are too vague to serve as any workable limit. Because the statute,

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even as construed authoritatively by the Ohio Supreme Court, is impermissibly overbroad, I would hold that appellant cannot be retried under it.[14]

II

Even if the statute was not overbroad, our decision in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), forbids the criminalization of appellant's private possession in his home of the materials at issue. "If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." Id., at 565, 22 L Ed 2d 542, 89 S Ct 1243. Appellant was convicted for possessing four photographs of nude minors, seized from a desk drawer in the bedroom of his house during a search executed pursuant to a warrant. Appellant testified that he had been given the pictures in his home by a friend. There was no evidence that the photographs had been produced commercially or distributed. All were kept in an album that appellant had assembled for his personal use and had possessed privately for several years.

In these circumstances, the Court's focus on Ferber rather than Stanley is misplaced. Ferber held only that child pornography is "a category of material the *production* and *distribution* of which is not entitled to First Amendment protection," 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348 (emphasis added); our decision did not extend to private *possession*. The authority of a State to regulate the production and distribution of such materials is

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not dispositive of its power to penalize possession.[15] Indeed, in Stanley

13. Since § 2907.323(A)(3) makes it to crime to "view" as well as to possess depictions of nudity, visitors to an art gallery might find themselves in violation of the law.

14. The scope of § 2907.323(A)(3) is restricted to depictions of "a minor who is not the person's child or ward." This does not cure the overbreadth problem, because many constitutionally protected photographs outlawed by the statute, such as commercial advertisements and works of art, circulate outside of the subject's immediate family. See also ante, at 124, 109 L Ed 2d, at 118 (" 'Judge, if you had some nude photos of yourself when you were a child, you would probably be violating the law. . . . So grandparents, neighbors, or other people who happen to view the photograph are criminally liable under the statute' ") (quoting Tr 3-4).

15. The distinction drawn in Stanley is not an anomaly in the law; to the contrary, we have often protected expression valued by listeners, whether or not the *source* of the communication was fully entitled to the safeguards of the First Amendment. See, e.g., Pacific Gas & Electric Co. v Public Utilities Comm'n of California, 475 US 1, 8, 89 L Ed 2d 1, 106 S Ct 903 (1986) (plural opinion); Consolidated Edison Co. of New York v Public Service Comm'n of New York, 447 US 530, 533-534, and n 1, 65 L Ed 2d 319, 100 S Ct 2326 (1980); First National Bank of Boston v Bellotti, 435 US 765, 777, and n 13, 55 L Ed 2d 707, 98 S Ct 1407 (1978); Lamont v Postmaster General, 381 US 301, 307-308, 14 L Ed 2d 398, 85 S Ct 1493 (1965) (Brennan, J., concurring). Just as the right of a listener to receive information does not rest on the right of the producer to disseminate it, so the power to ban the production and distribution of child pornography does not imply a concomitant authority to proscribe mere possession.

16. Although we held in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," id., at 568, 22 L Ed 2d 542, 89 S Ct 1243, we acknowledged that "compelling reasons may exist for overriding the right of the individual to possess" other types of "printed, filmed, or recorded materials." Id., at 568, n 11, 22 L Ed 2d 542, 89 S Ct 1243. The majority's reference to this language as support for its decision today, see ante, at 110, 109 L Ed 2d, at 109-110, ignores the fact that footnote 11 in Stanley cited only to 18 USC § 793(d) [18 USCS § 793(d)], which criminalizes possession of defense information harmful to US national security. To equate child pornography with state secrets is to read the narrow exception carved in footnote 11 of Stanley as swallowing the general rule that the case established. See State v Meadows, No. C-850091 (Ohio Ct App, Dec. 18, 1985) (Doan, J., concurring) ("The reservation [in footnote 11 of Stanley] applies to traitorous or seditious materials, and not to child pornography"), rev'd, 28 Ohio St 3d 43, 503 NE2d 697 (1986), cert denied, 480 US 936, 94 L Ed 2d 771, 107 S Ct 1581 (1987); see also Meadows, 28 Ohio St 3d, at 356-357, 503 NE2d, at 716 (Brown, J., concurring). Although our decisions even in the First Amendment area have taken special note of the paramount importance of national security interests, see, e.g., Near v Minnesota ex rel. Olson, 283 US 697, 716, 75 L Ed 1357, 51 S Ct 625 (1931), we nonetheless have required a strong showing of imminent danger before permitting First Amendment freedoms to be sacrificed. See, e.g., New York Times Co. v United States, 403 US 713, 726-727, 29 L Ed 2d 822, 91 S Ct 2140 (1971) (Brennan, J., concurring).

we assumed that the films at issue were obscene and that their production, sale, and distribution thus could have been prohibited under our decisions. See 394 US, at 565, n 2, 22 L Ed 2d 542, 89 S Ct 1243. Nevertheless, we reasoned that although the States "retain broad power to regulate obscenity"—and child pornography as well—"that power simply does not extend to mere possession by the individual in the privacy of his own home." Id., at 568, 22 L Ed 2d 542, 89 S Ct 1243. Ferber did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed. The distinction established in Stanley between *what* materials may be regulated and *how* they may be regulated still stands. See United States v Miller, 776 F2d 978, 980, n 4 (CA11 1985) (per curiam); People v Keyes, 135 Misc 2d 993, 995, 517 NYS2d 696, 698 (1987). As Justice White remarked in a different context, "[t]he personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by

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the Constitution." United States v Reidel, 402 US 351, 356, 28 L Ed 2d 813, 91 S Ct 1410 (1971).

The Court today finds Stanley inapposite on the ground that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley." Ante, at 108, 109 L Ed 2d, at 108. The majority's analysis does not withstand scrutiny.[16]

While the sexual exploitation of children is undoubtedly a serious problem, Ohio may employ other weapons to combat it. Indeed, the State already has enacted a panoply of laws prohibiting the creation, sale, and distribution of child pornography and obscenity involving minors. See n 1, supra. Ohio has not demonstrated why these laws are inadequate and why the State must forbid mere possession as well.

The Court today speculates that Ohio "will decrease the production of child pornography if it penalizes those who

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possess and view the product, thereby decreasing demand." Ante, at 109-110, 109 L Ed 2d, at 109. Criminalizing possession is thought necessary because "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." Ante, at 110-111, 109 L Ed 2d, at 110. As support, the Court notes that 19 States have "found it necessary" to prohibit simple possession. Ibid. Even were I to accept the Court's empirical assumptions,[17] I would find the Court's

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approach foreclosed by Stanley, which rejected precisely the same contention Ohio makes today:

> "[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 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." 394 US, at 567-568, 22 L Ed 2d 542, 89 S Ct 1243.

At bottom, the Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.[18]

17. That 19 States have prohibited possession of child pornography hardly proves that such an approach is integral to effective enforcement of production and distribution laws. A restriction on speech cannot be justified by such self-referential reasoning. In fact, the difficulty of enforcing possession laws—for example, the requirements of probable cause and a warrant before a search may be undertaken—means that penalties for possession are dubious complements to curbs on production, sale, and distribution. See Note, Private Possession of Child Pornography: The Tensions Between Stanley v Georgia and New York v Ferber, 29 Wm. & Mary L Rev 187, 212 (1987) ("Statutory prohibition of the private possession of child pornography is an inefficient and ineffective means of preventing the serious problem of child sexual abuse").

The federal experience illustrates that possession laws are not an essential element of a successful enforcement strategy. In the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L 95-225, 92 Stat 7, Congress prohibited the production, distribution, and sale of material depicting sexually explicit conduct by minors. See 18 USC §§ 2251-2253 (1982 ed) [18 USCS §§ 2251-2253]. Congress also criminalized the mailing, receipt, or trafficking in interstate or foreign commerce of such material for the purpose of sale or distribution for sale. See 18 USC § 2252(a) (1982 ed) [18 USCS § 2252(a)]. But Congress did *not* criminalize mere possession. In the Child Protection Act of 1984, Pub. L 98-292, 98 Stat 204, Congress enacted a broad revision of the 1977 law, removing the requirement that trafficking, receipt, and mailing be for the purposes of sale or distribution for sale. See 18 USC § 2252(a) [18 USCS § 2252(a)]. Further, the 1984 Act eliminated a requirement that material be "obscene" before its production, distribution, sale, mailing, trafficking, and receipt could be found criminal, see § 2252(a); raised the age limit of protection from 16 to 18 years of age, see § 2256(1); and added stiffer penalties, see § 2252(b), criminal and civil forfeiture provisions, see §§ 2253, 2254, and a civil remedy for personal injuries. See § 2255. Even in the 1984 amendments, Congress did not find it necessary to ban simple possession. Nevertheless, the Attorney General's Commission on Pornography determined that "the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry." 1 US Dept of Justice, Attorney General's Commission on Pornography, Final Report 607 (1986).

18. The Court briefly identifies two other interests that it contends justify Ohio's law. First, the majority describes a state interest in destroying the "permanen[t] record" of the victim's abuse. Ante, at 111, 109 L Ed 2d, at 110. I do not believe that the law is narrowly tailored to this end, for there is no requirement that the State show that the child was abused in the production of the material or even that the child knew that a photograph was taken. Even if the State could recover all copies of the offensive picture, which seems highly unlikely, 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, ibid., when there is no indication that the child is even aware of its existence. And if the law's purpose is preventing sexual abuse of children, it is underinclusive to the extent that it does not prevent *parents* from photographing their children in a state of nudity, see, e.g., Massachusetts v Oakes, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633 (1989), or giving others written permission to do so. See, e.g., Faloona v Hustler Magazine, Inc. 607 F Supp 1341 (ND Tex 1985). The only restriction on parents is the nebulous "proper purposes" provision, which is really no restriction at all. See n 2, supra. More fundamentally, even if the State could presume that minors are legally incompetent to consent to sexually explicit photographs, and therefore that all such photographs could be outlawed, it does not follow that the State can prohibit *possession* of such pictures in addition to their *production*. In Ferber, the Court was careful to limit its discussion to the "distribution" and "circulation" of photographs taken without a minor's consent. See 458 US, at 759 and n 10, 73 L Ed 2d 1113, 102 S Ct 3348; cf. Butterworth v Smith, 494 US 624, 635-636, 108 L Ed 2d 572, 110 S Ct 1376 (1990); The Florida Star v B. J. F. 491 US 524, 532-533, 105 L Ed 2d 443, 109 S Ct 2603 (1989); Smith v Daily Mail Publishing Co. 443 US 97, 103, 61 L Ed 2d 399, 99 S Ct 2667 (1979); Cox Broadcasting Corp. v Cohn, 420 US 469, 491, 43 L Ed 2d 328, 95 S Ct 1029 (1975). By analogy, Stanley assuredly protects the private possession of obscene adult pornography, even though an argument could be made that "production of adult pornography can be as harmful to adult actors as the production of child pornography is to child actors." Note, 29 Wm. & Mary L Rev, supra, at 204, n 144; see also Attorney General's Report, supra n 17, at 839-900; Pollard, Regulating Violent Pornography, 43 Vand L Rev 125, 133-134 (1990).

Second, the Court maintains that possession of child pornography may be prohibited "because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." Ante, at 111, 109 L Ed 2d, at 110 (citing, in a footnote, the Attorney General's Commission on Pornography). The Attorney General's Commission, however, determined that pedophiles are likely to use *adult* as well as *child* pornography to lower the inhibitions of a child victim. See Attorney General's Report, supra n 17, at 686; see also Brief for Covenant House et al. as Amici Curiae 8, n 9 (characterizing the Court's argument on this point as "factual speculation"). Finally, Ohio's solution—prohibiting private possession—ignores fundamental principles of our First Amendment jurisprudence. "Assuming obscene material could be proved to create a . . . danger of illegal behavior, it would not follow that the expression should be suppressed. Rather, the basic principles of a system of freedom of expression would require that society deal directly with the . . . action and leave the expression alone." T. Emerson, The System of Freedom of Expression 494 (1970). See also Paris Adult Theatre I v Slaton, 413 US, at 108-110, 37 L Ed 2d 446, 93 S Ct 2628 (Brennan, J., dissenting). Thus, while acts of sexual abuse themselves may be outlawed, the private possession of photographs, magazines, and other materials may not.

While I share the majority's

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concerns, I do not believe that it has struck the proper balance between the First Amendment and the State's interests, especially in light of the other means available to Ohio to

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protect children from exploitation and the State's failure to demonstrate a causal link between a ban on possession of child pornography and a decrease in its production.[19] "The existence of the State's power to prevent the distribution of obscene matter"—and of child pornography—"does not mean that there can be no constitutional barrier to any form of practical exercise of that power." Smith v California, 361 US 147, 155, 4 L Ed 2d 205, 80 S Ct 215 (1959).

III

Although I agree with the Court's conclusion that appellant's conviction must be reversed because of a violation of due process, I do not subscribe to the Court's reasoning regarding the adequacy of appellant's objections at trial. See ante, at 122-125, 109 L Ed 2d, at 117-119. The majority determines that appellant's due process rights were violated because the jury was not instructed according to the interpretation of § 2907.323(A)(3) adopted by the Ohio Supreme Court on appeal. That is to say, the jury was not told that "the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals." Ante, at 123, 109 L Ed 2d, at 118. The Court finds that appellant's challenge to the trial court's failure to charge the "lewd exhibition" and "graphic focus" elements is properly before us, because appellant objected at trial to the overbreadth of § 2907.323(A)(3). See

[495 US 146]

ante, at 123-124, 109 L Ed 2d, at 118. I agree with the Court's conclusion that we may reach the merits of appellant's claim on this point.[20]

19. The notion that possession of pornography may be penalized in order to facilitate a prohibition on its production, whatever the rights of possessors, is not unlike a proposal that newspaper subscribers be held criminally liable for receiving the newspaper if they are aware of the publisher's violations of child labor laws. Cf. L Tribe, American Constitutional Law 915 (2d ed 1988). In both cases, sanctions against possession might increase the effectiveness of concededly permissible regulations on the production process. But although the need to protect children from exploitation may be acute, it cannot override the right to receive the newspaper or to possess sexually explicit materials in the privacy of the home, especially when less restrictive alternatives exist to further the state interests asserted.

20. The Court's opinion should not be taken to mean that appellant's due process claim with respect to the "lewd exhibition" and "graphic focus" elements would be procedurally barred now had he failed to object at trial. If appellant's due process contention were nothing more than a complaint concerning the statute's overbreadth, the suggestion that he would be barred from raising it now if he failed to object at trial might be plausible. But that is not appellant's argument. Rather, he maintains that his due process rights were violated because the Ohio Supreme Court affirmed his conviction after adding the elements of "lewd exhibition" and "graphic focus" on appeal, despite the fact that appellant had had no reason to design a defense strategy or introduce evidence with these tests in mind. The jury, moreover, might have convicted appellant purely on the basis of the "nudity" definition, without deciding whether the materials depicted a "lewd exhibition of nudity" or involved a "graphic focus" on the genitals. Thus, appellant's due process claim is separate from his overbreadth challenge, see Shuttlesworth v Birmingham, 382 US 87, 92, 15 L Ed 2d 176, 86 S Ct 211 (1965), as even the Court appears to recognize at some places in its opinion. See ante, at 121, 109 L Ed 2d, at 117 ("Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause"). The due process violation in this case was not complete until the Ohio Supreme Court affirmed appellant's conviction after reinterpreting the statute. Requiring defendants to object *at trial* to an error that does not appear until the appellate stage would advance no legitimate state interest regarding finality or compliance with state procedures.

But the Court does not rest there. Instead, in what is apparently dictum given its decision to reverse appellant's conviction on the basis of the first due process claim, the Court maintains that a separate due process challenge by appellant arising from the Ohio Supreme Court's addition of a scienter element is procedurally barred because appellant failed to object at trial to the absence of a scienter instruction. The Court maintains that § 2907.323(A)(3) must be interpreted in light of § 2901.21(B) of the Ohio Revised Code, which provides that recklessness is the appropriate mens rea where a statute "'neither specifies culpability nor plainly indicates a purpose to impose strict liability.'" Ante, at 113, n 9, and

[495 US 147]

122-123, 109 L Ed 2d, at 111, 117-118. I cannot agree with this gratuitous aspect of the Court's reasoning.

First, the overbreadth contention voiced by appellant must be read as fairly encompassing an objection both to the lack of an intent requirement and to the definition of "nudity." Appellant objected to, inter alia, the criminalization of the "mere possession or viewing of a photograph," without the need for the State to show additional elements. Tr 4. A natural inference from this language is that intent is one of the additional elements that the State should have been required to prove. There is no need to demand any greater precision from a criminal defendant, and in my judgment the overbreadth challenge was sufficient, as a matter of federal law, to preserve the due process claim arising from the addition of a scienter element. As the majority acknowledges, our decision in Ferber mandated that "prohibitions on child pornography include some element of scienter." Ante, at 115, 109 L Ed 2d, at 113 (citing Ferber, 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348). In Ferber we recognized that adding an intent requirement was part of the process of narrowing an otherwise overbroad statute, and appellant's contention that the statute was overbroad should be interpreted in that light. I find the Ohio Supreme Court's logic internally contradictory: In one breath it adopted a scienter requirement of recklessness to narrow the statute in response to appellant's overbreadth challenge, and then, in the next breath, it insisted that appellant had failed to object to the lack of a scienter element.

Second, even if appellant had failed to object at trial to the failure of the jury instructions to include a scienter element, I cannot agree with the reasoning of the Ohio Supreme Court, unquestioned by the majority today, that "the omission of the element of recklessness [did] not constitute plain error." 37 Ohio St 3d, at 254, 525 NE2d, at 1370. To the contrary, a judge's failure to instruct the jury on every element of an offense violates a "'bedrock, "axiomatic and elementary" [constitutional] principle,'" Francis v Franklin, 471 US

[495 US 148]

307, 313, 85 L Ed 2d 344, 105 S Ct 1965 (1985) (quoting In re

Winship, 397 US 358, 363, 25 L Ed 2d 368, 90 S Ct 1068 (1970)), and is cognizable on appeal as plain error. Cf. Carella v California, 491 US 263, 268-269, 105 L Ed 2d 218, 109 S Ct 2419 (1989) (Scalia, J., concurring in judgment); Rose v Clark, 478 US 570, 580, n 8, 92 L Ed 2d 460, 106 S Ct 3101 (1986); Connecticut v Johnson, 460 US 73, 85-86, 74 L Ed 2d 823, 103 S Ct 969 (1983) (plurality opinion); Jackson v Virginia, 443 US 307, 320, n 14, 61 L Ed 2d 560, 99 S Ct 2781 (1979). "[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, . . . it is necessary to take note of it on our own motion." Screws v United States, 325 US 91, 107, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330 (1945) (plurality opinion).

Thus, I would find properly before us appellant's due process challenge arising from the addition of the scienter element, as well as his claim stemming from the creation of the "lewd exhibition" and "graphic focus" tests.

IV

When speech is eloquent and the ideas expressed lofty, it is easy to find retrictions 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 both his right to possess them privately and his right to avoid punishment under an overbroad law. I respectfully dissent.

[495 US 149]

JONAS H. WHITMORE, individually and as next friend of RONALD GENE SIMMONS, Petitioner

v

ARKANSAS et al.

495 US 149, 109 L Ed 2d 135, 110 S Ct 1717

[No. 88-7146]

Argued January 10, 1990. Decided April 24, 1990.

Decision: Death row inmate held not to have standing, either individually or as "next friend," to challenge validity of death sentence imposed on another death row inmate, who had waived right of appeal.

SUMMARY

An individual who had allegedly murdered 14 members of his family, and later killed or wounded 5 other people, was tried separately in an Arkansas Circuit Court on each of the 2 sets of crimes, and in each case was convicted of capital murder and sentenced to death. After each sentence, (1) the individual stated under oath his desire that no action be taken to appeal or in any way change his sentence, and (2) the Circuit Court, after conducting a hearing as to the individual's competence to make such a waiver, concluded that his decision was knowing and intelligent. In denying a priest's petition to appeal one of the sentences on the individual's behalf, the Supreme Court of Arkansas held that (1) the priest did not have standing to proceed (a) as "next friend," because it had not been alleged that he was the individual's spiritual adviser or confidant or, indeed, that the two had ever met, (b) as an aggrieved taxpayer under the state constitution, or (c) as a concerned citizen seeking to prevent an important legal issue from going unresolved at the appellate level; (2) under Arkansas law, a mandatory appeal is not required in all death penalty cases, but capital defendants may forgo direct appeal only if they have been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive all rights to appeal; and (3) the Circuit Court, on the basis of the record, correctly upheld the individual's waiver (754 SW2d 839). The Arkansas Supreme Court, while noting that seven possible grounds for reversal had been discussed with the individual by his counsel, subsequently upheld the individual's waiver

Briefs of Counsel, p 810, infra.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 1, 1994

SUBJECT: Possession of Child Pornography - SB 252 (Work Order No. 8-LS1513\A)

TO: Senator Mike Miller
Attn: Sharon

FROM: Jerry Luckhaupt
Legislative Counsel

You have asked various questions about child pornography.

1. What is the definition of child pornography? Child pornography is defined in SB 252 to be "any material that visually or aurally depicts conduct described in AS 11.41.455(a)" and "the production of that material involved the use of a child under 18 years of age who engaged in the conduct."

2. What is the history of attempts to criminalize the possession of child pornography? In Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) the United States Supreme Court struck down a Georgia law that outlawed the private possession of obscene material, finding that the law impinged on Stanley's right to receive information in his own home. Whether this decision protected the personal possession of child pornography was not considered in that case and was the subject of much discussion. In Ferber v. New York, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982) hints were provided that possession of child pornography would not be permitted under Stanley. In Ferber, the Court upheld a New York law that outlawed the distribution of child pornography and stated that "the value of permitting child pornography has been characterized as 'exceedingly modest, if not de minimis.'" Finally, in Osborne v. Ohio, 495 U.S. 103, 109 L.Ed.2d 98, 110 S.Ct. 1691 (1990) the Court finally upheld a New York statute that banned the possession or viewing of child pornography. The Court found that such a statute protects the victims of child pornography and encourages the destruction of existing child pornography.

3. What federal laws are there on this subject? 18 U.S.C. § 2251 et. seq. (copy attached) prohibits the inducement or employment of a minor for the purpose of producing any visual depiction of sexually explicit conduct (similar to AS 11.41.455),

the buying or selling of minors, and the distribution, mailing, and receipt of sexually explicit material that depicts minors engaged in that conduct. I have also attached copies of some other states' laws on possession of child pornography.

4. Is there anything in our state constitution that could conflict with SB 252? The right to privacy clause, Article I, § 19, of the Alaska Constitution could conceivably be found to protect personal possession of child pornography, although I do not believe that such a finding is likely. The personal possession of child pornography could be analogized to the possession of controlled substances. In this regard, although the Alaska Supreme Court held that the personal possession of small amounts of marijuana in the home is protected under our right to privacy provision (the court found that state's needs to ban its possession, e.g., its dangerousness, did not outweigh the privacy interests) the court did not extend this protection to other drugs, e.g., cocaine, whose dangerousness is proven and not subject to debate to the extent marijuana's was. In this regard I believe the Alaska Supreme Court would find that child pornography is akin to cocaine in that its dangerousness and the harm that it can cause seems to be fairly well accepted and would hold that its possession is not protected under the Alaska Constitution.

5. What difficulties are there with SB 252? Successful prosecutions could be difficult as the bill requires that a person possess the visual or aural matter knowing that the production of the matter involved the use of a child under the age of 18 and that the child engaged in the conduct that is depicted. The knowing requirement could be difficult to prove in certain situations. You may want to discuss this with the Department of Law to determine their feelings on the provision and the need for, and what type of mental state, should be employed. I am also concerned with how this knowing requirement could be applied to aural depictions and am wondering if it could ever be met if the defendant did not witness the recording being made.

GPL:gc:pl
94-075.glc

Enclosure

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 25, 1994

SUBJECT: Sectional Summary of SB 252 (Work Order No. 8-LS1513\A)

TO: Senator Mike Miller
Attn: Sharon

FROM: Jerry Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.61 by providing a new section, AS 11.61.127, that makes it a class B misdemeanor[1] to possess any material that visually or aurally depicts conduct that is described in AS 11.41.455(a), unlawful exploitation of a minor,[2] knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

GPL:lmb
94-024.lmb

---

[1] Class B misdemeanors are subject to a term of imprisonment of not more than 90 days, AS 12.55.135(b), and to a fine of not more than $1,000., AS 12.55.035(b).

[2] AS 11.41.455(a) provides:

> A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:
>
> (1) sexual penetration;
> (2) the lewd touching of another person's genitals, anus, or breast;
> (3) the lewd touching by another person of the child's genitals, anus, or breast;
> (4) masturbation;
> (5) bestiality;
> (6) the lewd exhibition of the child's genitals; or
> (7) sexual masochism or sadism.

Alaska State Legislature

SENATOR
MIKE MILLER
P O Box 55094
North Pole, Alaska 99705
(907) 488-0862

Senate District Q

While in Juneau
State Capitol
Juneau, Alaska
99801-1182
(907) 465-4976

Senate

SPONSOR STATEMENT
SENATE BILL 252
POSSESSION OF CHILD PORNOGRAPHY

AS 11.41.455 and AS 11.61.125, prohibits the production and distribution of child pornography; current law however does not address the issue of possession.

SB 252 addresses a compelling need to "close the loop" by prohibiting possession of child pornography as well as production and distribution. It is crucial that state statutes address this vital issue. For as long as the supply and demand exist, producers will continue to victimize the children involved.

In Osborne v.Ohio, 495 U.S.103, 109 L.Ed.2d 98, 110 S.Ct. 1691 (1990) the Court finally upheld a New York statute that banned the possession or viewing of child pornography. The Court found that such a statute protects the victims of child pornography and encourages the destruction of existing child pornography.

The physical and psychological trauma inflicted on victims of this sexual exploitation is so devastating some children never heal.

If we regulate when people are old enough to drink, drive and vote in order to protect them, then why would we not also regulate and ban the possession of child pornography to stop this cycle of abuse in which the child is always the victim.

I urge your support of SB 252 .

Sec. 11.41.455. **Unlawful exploitation of a minor.** (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality; or

(6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is

intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

NOTES TO DECISIONS

Conviction and sentence upheld. — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Applied in Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Cited in Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.61.125. Distribution of child pornography. (a) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for distribution, or in the state distributes, or in the state possesses, prepares, publishes, or prints with intent to distribute, any material that visually depicts conduct described in AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) Distribution of child pornography is a class C felony.

(d) In this section, "distribution" includes delivering, selling, renting, leasing, lending, giving, circulating, exhibiting, presenting, providing, and exchanging, whether or not for monetary or other consideration. (§ 2 ch 57 SLA 1983; am §§ 1, 2 ch 39 SLA 1985)

Cross references. — For crime of unlawful exploitation of a minor, see AS 11.41.455.

Effect of amendments. — The 1985 amendment in subsection (a) deleted "sale or" preceding "distribution" and "sell, or exhibit to others for commercial consideration" preceding "any material," inserted "in the state distributes, or," and substituted "in" for "under" following "conduct described", and added subsection (d).

Collateral references. — Validity and construction of statutes and ordinances regulating sexual performance by child, 21 ALR4th 239.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date: January 21, 1994
Title: "An Act prohibiting the possession of child pornography."
Sponsor: Senator Miller
Requestor: Senator Miller

Department Affected: Department of Law
BRU: Prosecution
Component: All

COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						
FUNDING:						
1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-
POSITIONS:						
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services Division
Date: January 21, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: January 21, 1994

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Rev 11/93

FISCAL NOTE DEPT. OF LAW

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

ANALYSIS CONTINUATION:

This bill amends AS 11.61 to establish the crime of possession of child pornography punishable as a class B misdemeanor. The department does not anticipate a fiscal impact because, in most cases, evidence to support a prosecution would probably only come to light in conjunction with the investigation of more serious offenses, such as child sexual abuse or drug possession.

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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DEPARTMENT OF LAW

CRIMINAL DIVISION

January 24, 1994

RECEIVED JAN 26 1994

The Honorable Mike Miller
Alaska State Senate
State Capitol
Juneau, Alaska 998001-1182

Re: SB 252 ("An Act prohibiting the possession of child pornography")

Dear Senator Miller:

You have asked for our opinion as to the constitutionality of SB 252, "An Act prohibiting the possession of child pornography." In *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), the United States Supreme Court held that a similar provision did not violate the United States Constitution.

It is possible, but unlikely, that the Alaska Supreme Court would conclude that this type of provision violates the right of privacy protected by the article I, section 22, of the state constitution. *See Ravin v. State*, 537 P.2d 494 (Alaska 1975). Other states that have considered the matter have concluded that the state has a compelling interest in protecting children from exploitation and that destroying the market for child pornography is reasonably related to that purpose. *See, e.g., Washington v. Davis*, 768 P.2d 499 (Wash. App. 1988). We have a partial listing of other jurisdictions that have criminalized the possession of child pornography and would be glad to share that list with you at your request.

I note for your general information that we anticipate prosecutions for this offense arising from the discovery of child pornography by law enforcement officers who are lawfully searching a residence in the course of investigating other crimes, such as drug or sexual abuse offenses.

CONSTITUTIONALITY - DEPT. OF LAW

03-C31LH

If you have any other questions or comments, please do not hesitate to contact us.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Margot O Knuth
Margot O. Knuth
Assistant Attorney General

MOK\jf

cc: Deborah Behr
Assistant Attorney General

Raga Elim
Legislative Liaison

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO: SB 252

Revision Date: _____ Dept. Affected: Public Safety

Title: " An act prohibiting the possession of child pornography " BRU: Alaska State Troopers

Component: Detachments

Sponsor: Senator Miller

Requestor: Senate Judiciary COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY 94) impact: $ _____

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Francis C. Allan Phone: (907) 269-5691

Division: Alaska State Troopers Date: 01/20/93

Approved by Commissioner: [signature] Date: 01/24/94

Agency: Richard T. Burton, Dept. of Public Safety

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Rev 11/92

FISCAL NOTE PUBLIC SAFETY

POSITION PAPER - Department of Public Safety

BILL NO: SB 252

DATE: January 25, 1994

TITLE: "An Act prohibiting possession of child pornography"

CONTACT: C.E. Swackhammer
Deputy Commissioner
465-4322

SB 252 addresses the societal problem of possession of child pornography. Alaska does not have a statute currently that prohibits the possession of child pornography. Alaska does have child exploitation laws that include the sales and/or production of child pornography. Production, sales, or delivery of child pornography are felony offenses. The statute would allow the charging of individuals found in possession of child pornography with a B misdemeanor.

Section one of the bill creates the crime of possession of child pornography making it a B misdemeanor. This is the type of crime that is typically secondary to an ongoing and existing investigation for a more serious crime of child exploitation. This would allow items that are normally found usually during the service of a search warrant in a different case. This would allow investigators to charge individual with possession of this material.

It is widely believed that persons involved in the viewing of child pornography will continue to do so unless sanctions, sometimes severe, are imposed. At the very least this creates a market for the exploitation of children.

This statute should have little or no impact on enforcement activities as this is the type of violation that is typically encountered during the investigation of numerous other crimes.

The Department of Public Safety supports this legislation.

Richard L. Burton
Commissioner

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date:
Dept. Affected: Corrections
Title: An act prohibiting possession of child pornography
BRU: None
Component: None
Sponsor: Senator Miller
Requestor: Senate Judiciary
COMPONENT SERIAL NO. N/A

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MH TIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY94) cost: $ 0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

According to the Department of Law, it is unlikely that prosecutions for this offense would occur except in conjunction with other more serious offenses.

Prepared by: Diane Schenker, Special Assistant
Phone: 465-4643/586-2147
Division: Office of the Commissioner
Date: 1/24/94
Approved by Commissioner: J. Frank Prewitt, Jr.
Date: 1/24/94
Agency:

FISCAL NOTE CORRECTIONS

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date:
Dept. Affected: Administration
Title: "An Act prohibiting possession of child pornography...."
BRU: Public Defender Agency
Component: Public Defender Agency
Sponsor: Miller
Requestor: (S) Jud
COMPONENT SERIAL NO. 1631

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: none

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: John Salemi, Director
Phone: 264-4400
Division: Public Defender Agency
Date:

Approved by Commissioner: Nancy Bear Usera
Date: 1/24/94
Agency: Administration

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(Rev. 1993) N 1/24/94

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date:
Title: "An Act prohibiting the possession of child pornography."
Sponsor: Senator Miller
Requestor: Senate Judiciary

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0

FUNDING SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY 94) cost: $ 0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Brant McGee
Division: Office of Public Advocacy
Phone: 274-1684
Date:

Approved by Commissioner: Nancy Bear Useral
Agency: Department of Administration
Date: 1/24/94

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[INTRO]

Child pornography is vivid, heart-breaking proof of one or more children being sexually violated and exploited and, as evidence, is beyond challenge.

Equally unchallengable is the certainty that an adult who sexually violates a child is, by definition, a child molester. Professional study of this activity establishes collection of child porn as a "given" in the life of virtually every identified child molester.

Studies summarized in the final report of the Attorney General's Commission on Pornography indicate those who sexually exploit children do so for a wide range of reasons, and come from a wide array of backgrounds, and occupations, but it seems helpful to group them into two categories: "situational" and "preferential" molesters. The former are people who act out of some serious sexual or psychological need but choose children as victims only when they are readily and safely accessible. "Preferential" molesters, on the other hand, are those with a clear sexual preference for children ("pedophiles" in common usage) who can only satisfy the demands of that preference through child victims. "Preferential" abusers collect child pornography and/or erotica almost as a matter of course. It is unclear how large each of these respective categories is, but it does seem apparent that "preferential" child molesters over the long term victimize far more children than do "situational" abusers. (pg 134-35)

Also shown in one of the studies summarized is the 6 step "life cycle" of child pornography. Typically, step one is the display of existing child pornorgraphy to a potential victim, obstensibly for "sex education". Step 2 attempt to convince child explicit sex is acceptable, even desirable. Step 3 Child porn used to convince children are sexually active-it's ok. Step 4 Child pornography desensitizes-lowers child's inhibitions. Step 5 Some of these sessions progress to sexual activity. Step 6 Photographs or movies are taken of the sexual activity (subsequently used as Step 1 with the next victim, thus perpetuating the cycle).

The pain suffered by children used in pornography is often devastating, and always significant. In the short term the effects of such involvment include depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety. Victims in the longer term may successfully "integrate" the event, particularly with psychiatric help, but many will likely suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion, a fragmented sense of self, and possible entry into delinquency or prostitution. All, of course, will suffer the agony of knowing the record of their sexual abuse is in circulation, its effects on their future lives unknowable and beyond their control. That may well be their most unhealable wound. (pg. 136)

BACK UP TESTIMONY

Bob Wood

The commission also notes some states have made possession (of kiddie porn) illegal, and considers this action an "extremely effective" weapon against child molesters. (pg 134)

Considering the life-shattering effect on our youth, I would ask in the strongest of terms, that you enact this legislation prohibiting the possession of child pornography in the state of Alaska. I would also ask that you put some REAL TEETH in it!

May I suggest the first conviction to require registration on an inter-state law enforcement network, and link that registration requirement to life-time probation.

NOTE: Would also like to bring TWO MINUTE "SOUND BITE" FROM ONE OF THE MEMBERS OF THE A.G.'s COMMISSION ON PORN —

Bob H

Rob Wood - Re: SB 252 - DRAFT