
Susan G. Caughlan
PRIVATE POSSESSION OF CHILD PORNOGRAPHY: THE TENSIONS BETWEEN STANLEY v. GEORGIA AND NEW YORK v. FERBER

Historically, the United States Supreme Court has refused to interpret the first amendment as an unconditional guarantee of free speech. Although absolutists contend that the first amendment protects all speech, the Court has always set limits short of this broad interpretation. The problem of sexually explicit speech has plagued the Court in its efforts to define the scope of the first amendment. Repeated attempts to formulate a standard of first amendment protection regarding sexually explicit speech have divided the Court and resulted in confusing applications of the law. Members of the Court have agreed, however, on one important aspect of this issue: the Constitution protects the private possession of otherwise unprotected speech in the home. For more than fifteen years this principle has been a touchstone of personal liberty in an age of increasing governmental intrusion into daily life.

1. “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. Const. amend. I. The first amendment applies to the states through the fourteenth amendment. For an in-depth discussion of the extent of this application, see Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107, 142-48 (1982).

2. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). "There are certain . . . classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting." Id. at 571-72 (citation omitted).


4. E.g., Chaplinsky, 315 U.S. at 571. “It is well understood that the right of free speech is not absolute at all times and under all circumstances.” Id.

5. See infra text accompanying notes 23-31.

6. For example, in Jenkins v. Georgia, 418 U.S. 153 (1974), the Court invalidated a conviction under Georgia’s obscenity law because the jury had misapplied the standard for offensive speech to ban exhibition of the film Carnal Knowledge.

Consistent with its early holding that the first amendment does not protect obscene speech, the Court has gradually refined and narrowed the scope of first amendment protection afforded to sexually explicit speech. A common thread in the Court’s development and application of each new standard has been its balancing of the harm to the community from the circulation of obscene material against the harm to the community when speech is restricted.

In *New York v. Ferber,* the Court addressed the constitutionality of state statutes restricting child pornography that was not legally obscene. The Court applied its balancing test and held that the statutes were within the state’s power to protect the welfare of its children. In *Ferber,* the Court recognized a new level of harm to the community—the physical and psychological abuse of children—and on that basis permitted states to prohibit the production and distribution of child pornography regardless of whether it was legally obscene.

Armed with the justification of protecting child victims, some states have extended their child pornography statutes to prohibit private possession of child pornography. These statutes are in di-

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9. See infra text accompanying notes 22-32.
10. The Supreme Court has made clear that the important element in this balancing is not the content of the speech but the fact that speech might be restricted because of its content. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957). “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [given speech and press by the first amendment]. . . .” *Id.* at 484. See also Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 *Sup. Ct. Rev.* 285, 286-87 (pointing out that the cases shaping the development of first amendment protection of speech have involved not meaningful political dissent but ideas such as those expressed by Jehovah’s Witnesses, the Ku Klux Klan, and the American Nazi Party).
12. The Court has defined child pornography as “works that visually depict sexual conduct by children below a specified age.” *Id.* at 764 (emphasis in original). The current Supreme Court test for obscenity is set out in note 30 infra.
13. *Id.*
14. *Id.* at 756-58.
15. *Id.* at 756-60.
rect conflict with the principle espoused by the Court in Stanley v. Georgia\textsuperscript{17} that the Constitution protects the private possession of obscene material in the home.\textsuperscript{18} Supporters of state legislation criminalizing private possession have emphasized the state's interest in protecting child victims. They argue that the Court should adopt the rationale that failed in Stanley: that the harm caused by obscene speech is greater than the danger inherent in prohibiting speech.\textsuperscript{19} In State v. Meadows\textsuperscript{20} the Ohio Supreme Court adopted this rationale, holding that the state's interest in protecting children from physical and psychological abuse outweighed the protection of speech under the first amendment.\textsuperscript{21}

The decision in Meadows sets the state interests vindicated in Ferber on a collision course with the constitutional protections established in Stanley. This Note explores the policies behind the Court's decisions in Stanley and Ferber and analyzes the decision in Meadows in light of these policies. The Note concludes that legislation criminalizing the private possession of child pornography is not directly related to the harms intended to be prevented and is therefore an unreasonable restriction of important first and fourth amendment values.

**APPLICATION OF THE FIRST AMENDMENT TO OBSCENE SPEECH**

In Roth v. United States,\textsuperscript{22} the first case to challenge the constitutionality of federal obscenity laws, the Supreme Court refused to extend first amendment protection to obscene speech. Justice Brennan wrote that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."\textsuperscript{23} The Court's first definition of obscenity proved difficult for lower courts to apply.\textsuperscript{24} Nine years later, in Memoirs v.
Massachusetts, the Court, in a plurality opinion, emphasized that this standard required disputed material to be "utterly without redeeming social value."25 This definition reflected an attempt to safeguard first amendment values and sent a message to lower courts that all but the most hard-core material was protected.

Requiring the prosecution to prove a negative—that the disputed material was "utterly without redeeming social value"—made a conviction for obscenity nearly impossible to obtain.26 The practical difficulties of such a standard quickly became obvious, and the following Term, the Court revised its obscenity standard in Redrup v. New York.27 The new test called for a community standard of judgment in determining whether the material was "utterly without redeeming social value."28 The subjective nature of the Redrup test left lower courts little guidance, however, and the Supreme Court found itself the frequent arbiter of whether material was legally obscene.29 In Miller v. California, the Court again reworked its standard for obscenity, this time revising the value test to protect material having serious artistic, scientific, political or literary value.30 Although lower courts have sometimes


26. Reviewing the Memoirs standard seven years later, the Court observed that the burden on the prosecution was "virtually impossible to discharge under our criminal standards of proof." Miller v. California, 413 U.S. 15, 22 (1973).

27. 386 U.S. 767 (1967) (per curiam).

28. The new test required that the material be patently offensive by community standards, that its dominant theme appeal to a prurient interest in sex, and that it be utterly without redeeming social value. Id. at 770-71.

29. Justice Harlan criticized the Court's approach to the obscenity cases, complaining that "anyone who undertakes to examine the Court's decisions since Roth which have held particular material obscene or not obscene would find himself in utter bewilderment." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 707 (1968) (Harlan, J., dissenting).


The basic guidelines for the trier of fact must be: . . . whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . whether . . . the work depicts or describes, in a patently offensive way, sexual conduct . . . and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 19 (quoting Kois v. Wisconsin, 408 U.S. 229 (1972)).
misapplied this test, it remains the standard by which courts determine whether sexually explicit speech receives first amendment protection.

*Stanley v. Georgia*

During its reworking of the obscenity standard, the Court established an important exception to the general rule that the first amendment does not protect obscene speech. In *Stanley v. Georgia,* the state prosecuted a private citizen for possession of films that were obscene under the *Miller* test. The Court unanimously reversed the conviction, declaring that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."  

The Court's opinion in *Stanley* established, at least in dictum, the "right to receive information and ideas, regardless of their social worth." Later cases quickly demonstrated, however, that the first and fourth amendment protections articulated in *Stanley* did not extend to the right to deliver or import obscene material. In *Paris Adult Theatre I v. Slaton,* the Court further limited its holding in *Stanley* by refusing to extend first amendment protection to obscene material exhibited in the "privacy" of an adult theater. The Court held that a commercial theater could not be

31. See supra note 6 and accompanying text.
34. *Id.* at 565.
35. *Id.* at 564. In discussing the foundations of this right, the Court cited *Winters v. New York*, 333 U.S. 507 (1948) (the principle of a free press includes distribution as well as publication) and *Martin v. City of Struthers*, 319 U.S. 144 (1943) (first amendment protections encompass the right to distribute and receive literature).
36. In *United States v. Reidel*, 402 U.S. 351 (1971), the Court refused to extend its holding in *Stanley* to protect the delivery of obscene materials. The majority rejected the rationale that "if a person has the right to receive and possess [obscene] material, then someone must have the right to deliver it to him." *Reidel*, 402 U.S. at 355.
37. United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973) (rejecting the argument that *Stanley* protected the right to import obscene material for personal use); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (concluding that *Stanley* did not protect the importation of obscene materials for commercial use).
38. 413 U.S. 49 (1973).
equated with a private home and that the privacy interest protected in *Stanley* did not follow the material outside the home. The rationale offered by the Court to justify this restriction on first amendment freedoms was the public interest “in the quality of life and the total community environment.”

Although the Court decided *Stanley* on first amendment grounds, Justice Marshall’s majority opinion also invoked fourth amendment prohibitions on unreasonable search and seizure. At least two other Supreme Court Justices have indicated that the Court decided *Stanley* on both first and fourth amendment grounds. The Court has applied its holding in *Stanley* narrowly, indicating that it does not intend the case to be a vehicle for the expansion of first amendment protection of obscene material. The view that the protections established in *Stanley* were based on both the first and fourth amendments may serve, however, to maintain *Stanley* as a viable shield to protect private possession of speech despite the Court’s continued narrow construction of the case.

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39. Id. at 65-67.
40. Id. at 58.
41. *Stanley*, 394 U.S. at 568. “We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.” Id. See also *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986) (confirming that the decision in *Stanley* was firmly grounded in the first amendment).
42. The fourth amendment provides, in part: “The right of the people to be secure in their . . . houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. CONST. amend. IV.
43. Justice Marshall referred to the “right to be free . . . from unwanted governmental intrusions into one’s privacy” and “the right to be free from state inquiry into the contents of [one’s] library.” *Stanley*, 394 U.S. 564-65.
44. In his dissenting opinion in *Bowers v. Hardwick*, Justice Blackmun asserted that “*Stanley* rested as much on the Court’s understanding of the Fourth Amendment as it did on the First.” *Bowers*, 106 S. Ct. at 2852-53 (Blackmun, J., dissenting). Justice Stewart’s concurring opinion in *Stanley* also emphasized the fourth amendment issues in the case. *Stanley*, 394 U.S. at 569-72 (Stewart, J., concurring). Justices Brennan and White joined Justice Stewart’s concurring opinion.
47. See infra notes 169-70 and accompanying text.
New York v. Ferber

A new version of obscenity, child pornography, gained widespread circulation in the 1970s.\textsuperscript{48} In 1982 the Supreme Court first addressed state sanctions against child pornography. \textit{New York v. Ferber}\textsuperscript{49} involved the prosecution of a bookstore proprietor for selling two child pornography films to an undercover law enforcement officer.\textsuperscript{50} The New York statute criminalizing the distribution of material depicting a sexual performance by a child did not require the material to meet the legal definition of obscenity.\textsuperscript{51} The New York Court of Appeals reversed the defendant's conviction under this statute, holding that the statute prohibited "the promotion of materials which are traditionally entitled to constitutional protection . . . under the First Amendment."\textsuperscript{52}

In reversing the New York court's decision, the United States Supreme Court held that "the constitutionally permissible regulation of pornography could . . . be more extensive" when that material involved depictions of children.\textsuperscript{53} The Court offered five reasons to support its holding that state laws regulating child pornography were reviewable under a more lenient standard than other legislation affecting first amendment rights.

First, the Court found that a state's interest in safeguarding the physical and psychological well-being of its minors was compelling.\textsuperscript{54} In particular, the Court emphasized that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."\textsuperscript{55} The Court specifically

\textsuperscript{49} 458 U.S. 747 (1982).
\textsuperscript{50} Id. at 751-52.
\textsuperscript{51} N.Y. Penal Law § 263.10 (McKinney 1980) prohibits promotion of an obscene sexual performance by a child. N.Y. Penal Law § 263-15 (McKinney 1980) prohibits promotion of the same conduct, but without the requirement that it be obscene. The defendant was charged under both statutes and convicted by the trial court under § 263-15. Ferber, 458 U.S. at 752.
\textsuperscript{53} New York v. Ferber, 458 U.S. at 753.
\textsuperscript{54} Id. at 756-57.
\textsuperscript{55} Id. at 757.
declined to "second-guess [the] legislative judgment . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."\textsuperscript{56}

Second, the Court addressed the relationship between the distribution of child pornography and the sexual abuse of children. Because the material is a permanent record of the child victim's participation in sexual acts, circulation of the material exacerbates the harm caused by the original production.\textsuperscript{57} The Court reasoned that the state had to abolish the distribution network "if the production of material which requires the sexual exploitation of children is to be effectively controlled."\textsuperscript{58} It authorized direct state action against distributors to achieve this end.\textsuperscript{59} The Court also held that states need not conform their laws regulating child pornography to the obscenity test set out in \textit{Miller v. California}.\textsuperscript{60} Because the \textit{Miller} standard did not reflect "the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children," its criteria did not afford "a satisfactory solution to the child pornography problem."\textsuperscript{61}

Third, the Court noted that the economic motive afforded by the advertisement and sale of child pornography was "an integral part of the production of such materials."\textsuperscript{62} This was perhaps an acknowledgment of the extensive involvement of organized crime in the child pornography industry.\textsuperscript{63} The Court easily found that the distribution of this material provided an economic incentive for its production and thus perpetuated the sexual abuse of children.\textsuperscript{64}

Fourth, the Court found that "[t]he value of permitting live performances and photographic reproductions of children engaged in

\textsuperscript{56} Id. at 758 (footnote omitted).
\textsuperscript{58} Ferber, 458 U.S. at 759.
\textsuperscript{59} Id. at 760. The Court noted that the prosecution of distributors might be "[t]he most expeditious if not the only practical method . . . to dry up the market for this material." Id.
\textsuperscript{60} Id. at 760-61.
\textsuperscript{61} Id. at 761.
\textsuperscript{62} Id.
\textsuperscript{64} Ferber, 458 U.S. at 761.
lewd sexual conduct is exceedingly modest, if not de minimis.”

Invoking the value prong of the Miller test, the Court considered it “unlikely that [such] depictions . . . would often constitute an important and necessary part of a literary performance or scientific or educational work.”

Fifth, the Court noted that a content-based analysis of first amendment protection was not incompatible with its earlier decisions. The creation of a new, content-based restriction on speech was justified, the Court reasoned, when “within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake.” Having thus categorized the interests involved, the Court concluded that “[w]hen a definable class of material, such as [child pornography], bears so heavily and pervasively on the welfare of children engaged in its production, . . . the balance of competing interests is clearly struck and . . . it is permissible to consider these materials as without the protection of the First Amendment.”

Justice O’Connor’s concurring opinion emphasized the importance of this balancing element. Although she recognized that the New York statute might encompass legitimate clinical or sociological depictions of adolescent sexuality, she concluded that the relative value of such depictions and the potential that the statute might prohibit protected speech were not sufficiently significant to justify invalidating the statute.

The Court also addressed the defendant’s claims that the statute was unconstitutionally overbroad because it would reach material that would not “threaten the harms sought to be combatted by the State.” The New York Court of Appeals had recognized this threat and held that the statute was unconstitutionally over-

65. Id. at 762.
66. Id. at 762-63.
68. Ferber, 458 U.S. at 763-64.
69. Id. at 764.
70. Id. at 775 (O’Connor, J., concurring). See also Stone, supra note 67, at 195 (describing the factors considered by the Court in a content-based analysis of “low-value” speech).
71. Ferber, 458 U.S. at 766.
The Supreme Court, however, extended the substantial overbreadth requirement of Broadrick v. Oklahoma to "traditional forms of expression such as books and films" and ruled that the statute's potential overbreadth was insufficient to invalidate it. Referring to the statute's possible chilling effect on protected expression, such as "medical textbooks . . . [or] pictorials in the National Geographic," the Court registered its "serious[] doubt . . . that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach." It further refused to assume that state courts would increase the potentially invalid scope of the statute by giving it an expansive construction. The Court instead determined that a case-by-case analysis would be sufficient to preclude overbread applications of the statute.

The Conflict in State v. Meadows

In 1986, the Supreme Court of Ohio decided State v. Meadows, the first case to juxtapose the first amendment principle affirmed in Stanley v. Georgia and the strong state interest recognized in New York v. Ferber. John Meadows was convicted in Ohio Municipal Court of possessing material depicting a minor engaging in sexual activity. As in Stanley, the defendant did not dispute the state's power to regulate the material in question. As in Stanley, the state did not allege that the defendant possessed the material


73. Ferber, 458 U.S. at 771-74. In Broadrick v. Oklahoma, the Court held that "particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must . . . be substantial . . . judged in relation to the statute's plainly legitimate sweep." 413 U.S. 602, 615 (1973). Ferber marked the Court's first application of the "substantial overbreadth" doctrine to a case involving pure speech. See generally Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970).

74. Ferber, 458 U.S. at 773. The Court stated, "We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." Id.

75. Id.

76. Id.

77. Id. at 773-74.


79. Id. at 44, 503 N.E.2d at 698.

in connection with any other illegal purpose, such as distribution or production.\textsuperscript{61} The Ohio Court of Appeals reversed Meadow's conviction, holding that the state could not prohibit the “mere private possession of . . . pornography in the home.”\textsuperscript{62}

The appeals court rested its decision on the Supreme Court's pronouncement in \textit{Stanley} that the first amendment protected “the mere private possession of obscene matter.”\textsuperscript{63} The court characterized the decision in \textit{Ferber} as establishing the standard of constitutional protection for child pornography, as \textit{Miller v. California} had for adult obscenity.\textsuperscript{64} In considering whether \textit{Stanley} or \textit{Ferber} should control, Judge Shannon, writing for the majority, stated:

I can derive no method, directly or subliminally, from \textit{Ferber} to advance what surely must be society's purpose to eradicate the traffic in [child pornography]. It is of great significance to me that, in \textit{Stanley}, the Court rejected the contention by the State of Georgia that to eliminate the traffic in pornography, it is necessary to bar mere private possession by an individual.\textsuperscript{66}

The Supreme Court of Ohio reversed, holding that the state's interest in “preserving its children's privacy and protecting them from . . . cruel physiological, mental, and emotional abuse” out-weighed first amendment interests in protecting private possession of child pornography.\textsuperscript{68} The court determined that the state interests asserted in \textit{Stanley}, “to protect the individual possessor’s mind . . . and to prevent future deviant sexual behavior linked to exposure to obscene materials,”\textsuperscript{67} were not the same as those raised in \textit{Meadows}. Instead, the state’s interests paralleled those articu-

\textsuperscript{61}81. \textit{Meadows}, slip op. at 5 (“[a]ppellant does not argue that the films are not obscene”).
\textsuperscript{62}81. \textit{Meadows}, slip op. at 5 (“[t]here is no indication, directly or by innuendo, that Meadow\textsuperscript{e}s sold, produced, or disseminated the material possessed by him”); State v. Stanley, 224 Ga. 259, 260-61, 161 S.E.2d 309, 311 (1968), rev'd, 394 U.S. 557 (1969).
\textsuperscript{63}82. \textit{Meadows}, slip op. at 8.
\textsuperscript{64}83. \textit{Id.} at 7 (citing \textit{Stanley}, 394 U.S. at 559).
\textsuperscript{65}84. \textit{Meadows}, slip op. at 7-8.
\textsuperscript{66}85. \textit{Id.}
\textsuperscript{68}87. \textit{Id.} at 47, 503 N.E.2d at 700.
lated by the Supreme Court in *Ferber.* The court concluded by deferring to the Ohio legislature's determination that prohibiting the possession of child pornography was necessary "to halt sexual exploitation and abuse of children."\(^8\)

**THE PROBLEM OF CHILD PORNOGRAPHY**

Justice White began his opinion in *New York v. Ferber* by noting that "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem."\(^9\) Experts estimate that an explosive growth in child pornography occurred during the 1970s.\(^9\) Although much of the early material was of foreign origin, pornography has increasingly involved American children.\(^9\) After hearings held in 1977,\(^9\) the Senate Judiciary Committee concluded that "child pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale."\(^9\) One estimate has put the annual revenue of the child pornography industry in the early 1970s at more than $2.4 billion.\(^9\)

The rapid and unexpected growth in the exploitation of children for profit prompted a flurry of protective federal and state legislation.\(^9\) In particular, Congress passed the Protection of Children

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88. Id. at 49-50, 503 N.E.2d at 702.
89. Id. at 51-52, 503 N.E.2d at 704.
91. *1 Attorney General's Report,* supra note 48, at 601; (by 1977, child pornography had become part of the commercial mainstream of pornography); *Note,* supra note 48, at 713.
92. *1 Attorney General's Report,* supra note 48, at 601-02, 601 n.410; *Dudar,* *America Discovers Child Pornography*, Ms., Aug. 1977, at 80 (child pornography operations have been uncovered in Chicago, Los Angeles, Houston, and New York City).
93. Hearings were held from May to September 1977 by the House Subcommittee on the Judiciary, the Subcommittee on Select Education of the House Committee on Education and Labor, and the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary. *1 Attorney General's Report,* supra note 48, at 600 & nn.401, 403.
95. *Shouvlin,* supra note 57, at 544.
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Against Sexual Exploitation Act of 1977\textsuperscript{97} to attack the national traffic in child pornography. The Act prohibited the production of any "sexually explicit" material destined for interstate commerce which employed a child under the age of sixteen.\textsuperscript{98} It also prohibited the transportation, mailing, or receipt of child pornography in interstate commerce for the purpose of sale or distribution for sale.\textsuperscript{99}

Loopholes in the 1977 Act frustrated its enforcement against some violators. Its major flaw, the requirement of a commercial purpose, allowed those who produced child pornography for personal use or barter to escape federal prosecution.\textsuperscript{100} It also failed to prohibit distribution of material that was not obscene.\textsuperscript{101} Although the Act included prohibitions against production, the clandestine nature of the production of child pornography made convictions under the Act virtually nonexistent.\textsuperscript{102} After 1978, traffic in child pornography went underground, and noncommercial distribution flourished in the absence of federal sanctions.\textsuperscript{103}

In 1984, Congress passed the Child Protection Act\textsuperscript{104} to remedy these weaknesses. Reinforced by the Supreme Court's decision in \textit{Ferber}, Congress eliminated the obscenity requirement of the 1977 Act, removed the commercial purpose requirement from the prohibition against interstate trafficking, receipt, or mailing, and raised the protected age to eighteen.\textsuperscript{105} Federal prosecutions increased dramatically as a result of these revisions.\textsuperscript{106} According to the Attorney General's Commission, the 1977 Act "effectively halted the bulk of the commercial child pornography industry," and the 1984

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\textsuperscript{98} Id. § 2251(a).
\textsuperscript{99} Id. § 2252.
\textsuperscript{100} Loken, \textit{The Federal Battle Against Child Sexual Exploitation: Proposals for Reform}, 9 HARV. WOMEN'S LAW J. 105, 112 (1986); 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 604.
\textsuperscript{101} 18 U.S.C. § 2252 (1982). For a discussion of the practical effects of this obscenity requirement, see Note, supra note 63, at 336.
\textsuperscript{102} 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 604 n.421.
\textsuperscript{103} Id. at 604-05.
\textsuperscript{105} Id.
\textsuperscript{106} 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 606.
revisions allowed federal officials to proceed against noncommercial producers and distributors.\textsuperscript{107}

National concern over child pornography focused on the children victimized by the production of this material.\textsuperscript{108} Those who favored strong sanctions against the sale and distribution of child pornography argued that its suppression was necessary to prevent the abuse of children in the production process.\textsuperscript{109} In hearings held pursuant to the enactment of the 1977 Act, Congress assumed that the production of sexually explicit material involving children was child abuse per se and therefore was not entitled to first amendment protection.\textsuperscript{110}

Consistent with the Supreme Court's decision in \textit{Ferber}, the 1984 Act sought primarily to protect children, not to combat pornography.\textsuperscript{111} The unique element of child pornography that distinguishes it from pornography using adult subjects and justifies stricter regulation is that the child victim cannot give his or her consent to perform and be photographed.\textsuperscript{112} The child victim is injured not only by his role in the original production, but also because the materials exist and continue to circulate.\textsuperscript{113}

Whereas federal legislation must rest its authority on the movement of child pornography in interstate commerce, the states are free to exercise their police power to prohibit all production and distribution of child pornography.\textsuperscript{114} States' early attempts at legislation, however, often suffered from the same weaknesses as the first federal statute.\textsuperscript{115} Before the Supreme Court decided \textit{Ferber}, fifteen states limited the reach of their child pornography statutes to material that was legally obscene.\textsuperscript{116} In the wake of \textit{Ferber}, some

\begin{thebibliography}{99}
\bibitem{107} Id. at 607.
\bibitem{108} Note, supra note 63, at 327.
\bibitem{111} Note, supra note 63, at 330-31.
\bibitem{112} People v. Spargo, 103 Ill. App. 3d 280, 431 N.E.2d 27 (1982).
\bibitem{113} Shouvlin, \textit{supra} note 57, at 545.
\bibitem{114} "The well-being of its children is of course a subject within the State's constitutional power to regulate. . . ." \textit{Ginsberg v. New York}, 390 U.S. 629, 639 (1968).
\bibitem{116} \textit{Id}.
\end{thebibliography}
states toughened their laws not only as to the content of this material, but also as to the range of prohibited acts.\textsuperscript{117}

In 1985, the Utah state legislature amended its child pornography laws to prohibit the private possession of child pornography.\textsuperscript{118} The legislature read \textit{Ferber} as establishing different standards for child pornography than for adult material. It concluded that the policies underlying \textit{Ferber} allowed states to prohibit even the private possession of child pornography.\textsuperscript{119} In support of this stricter standard, the legislature determined that the elimination of the market for child pornography was necessary to prevent exploitation of children.\textsuperscript{120} The lawmakers also noted that evidence had connected prolonged viewing of pornography to antisocial behavior.\textsuperscript{121}

\textbf{APPLICATION OF THE FIRST AMENDMENT TO PRIVATE POSSESSION OF CHILD PORNOGRAPHY}

\textit{Analysis of Obscenity Law}

The Court's treatment of obscenity cases has involved several levels of analysis. In an early decision, \textit{Roth v. United States}, the Court simply concluded that the first amendment did not protect obscene material because it was "no essential part of any exposition of ideas" and did not contribute to "the social interest in order and morality."\textsuperscript{122} Similarly, the Court in \textit{New York v. Ferber} began its first amendment analysis by citing cases that had classified obscenity as outside the realm of constitutionally protected expression.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{118} \textit{UTAH CODE ANN.} § 76-5a-3 (Supp. 1987).
\item \textsuperscript{119} \textit{Recent Developments in Utah Law}, 1986 \textit{UTAH L. REV.} 95, 172, 177.
\item \textsuperscript{120} \textit{Id.} at 173, 178.
\item \textsuperscript{121} \textit{Id.} at 176 (citing \textit{D. SCOTT, PORNOGRAPHY: ITS EFFECTS ON THE FAMILY, COMMUNITY AND CULTURE (1985)}). Scott presents a distinctly unobjective discussion of the connection between pornography and violent crime.
\item \textsuperscript{122} \textit{Roth v. United States}, 354 U.S. 476, 495 (1957) (quoting \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568, 572 (1942)).
\item \textsuperscript{123} \textit{New York v. Ferber}, 458 U.S. 747, 754 (1982).
\end{itemize}
In later cases, however, the Court emphasized the need to protect "the sensibilities . . . of the general public." This recognition of competing interests indicates that even obscene speech has some value against which to weigh the justifications for restriction. This content-based analysis first distinguishes between "low-value" and "high-value" speech on the basis of subject matter and then applies a balancing test to determine the circumstances under which that speech may be restricted. The post-Roth obscenity cases, including Stanley and Ferber, employed this value-based analysis and balancing test.

The decision in Ferber established child pornography as a separate form of sexually explicit speech whose production and distribution the states may prohibit without resorting to the test for legal obscenity. Regardless of the content-based value that is assigned to child pornography, however, this speech—all speech—takes on a higher value when it is associated with the individual's right to possess it "in the privacy of his own home." If the Court continues to employ a balancing test based on the value of the speech at issue, the private possession of child pornography—like the private possession of any speech—will merit a value commensurate with the constitutional protections it invokes.

State Court Decisions

In 1982, several state courts considered the constitutionality of statutes criminalizing noncommercial conduct involving child pornography. Following Ferber, these courts held that the state's strong interests in protecting children allowed it to proscribe activity that increased the demand for child pornography. In People v.

125. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331 (7th Cir. 1985) (because pornography influences politics and social relations and controls attitudes at home and in the legislature, it has value as speech).
126. See, e.g., Stone, supra note 67, at 195.
127. Schauer, supra note 10, at 306-08. Schauer finds this analysis the most persuasive in describing the basis for the Court's decision in Ferber.
128. The Court in Ferber held that states could prohibit the production and distribution of child pornography regardless of whether it was legally obscene, because the harm occurred despite this classification. New York v. Ferber, 458 U.S. 747 (1982).
Spargo, the Illinois Appellate Court held that the state’s interest in preventing the solicitation of children for the production of child pornography justified a ban on the noncommercial exhibition of child pornography. As in Ferber, the court focused not on a generalized harm to society, but on the state’s “strong and compelling interest . . . in preventing children from becoming involved in the production of child pornography.”

The court in People v. Godek cited Judge Jasen’s dissenting opinion in People v. Ferber in upholding a statute that banned the private display of child pornography to consenting adults even without sufficient proof that the child participants resided in that state. The court focused on the economic incentive argument, emphasizing that the statute’s purpose was the protection of “the minors whose involvement will continue only so long as there is some market, public or private, for the finished product.”

These state cases echo Ferber in supporting legislative attempts to broaden the attack on child pornography. Following Judge Jasen’s lead, courts have abandoned the public morality argument that failed in Stanley v. Georgia in favor of asserting the state’s compelling interest in safeguarding the physical and psychological well-being of minors. The harm to the child victim stems not only from the potential for physical abuse during production but also from the knowledge that “the recording is circulating within the mass distribution system for child pornography.” States are therefore free to attack both commercial and noncommercial distribution in order to reach this exploitation ef-

131. Id. at 286, 431 N.E.2d at 31.
134. Godek, 113 Misc. 2d at 610, 449 N.Y.S.2d at 435.
139. Shouvlin, supra note 57, at 545.
Finally, the need to remove economic incentives for participation in the industry also justifies a rejection of overbreadth claims.141

The Protection of Private Possession

In State v. Meadows, the state of Ohio argued that the Supreme Court in Ferber had enunciated a different standard for child pornography than for other types of obscene material, and that this standard would permit states to prohibit the private possession of child pornography.142 This argument, however, confuses the standard of protection with the permissible remedy. By establishing a different test for child pornography than for adult pornography, the Supreme Court simply recognized that the production itself was more harmful when it involved children. This recognition of greater harm from production does not necessarily indicate greater harm from private possession, nor does it give to states the same freedom to regulate private possession that Ferber conferred regarding production.

Analysis of Harm

The argument that states should be permitted to regulate child pornography more severely than adult pornography begins with the proposition that child pornography harms the actors because they are too young to give their consent to participate and be photographed.143 Child pornography, the argument continues, is therefore inherently more harmful than adult pornography, and this greater harm justifies allowing the states a greater reach in regulating production.144 The states' strong interest in protecting the wel-

143. Ferber, 458 U.S. at 761; Spargo, 103 Ill. App. 3d at 285-87, 431 N.E.2d at 30-31.
144. Meadows, 28 Ohio St. 3d at 50, 503 N.E.2d at 703. For arguments that the production of adult pornography can be as harmful to adult actors as the production of child pornography is to child actors, see Blakely, Is One Woman's Sexuality Another Woman's Pornography?, Ms., Apr. 1985, at 37; Jacobs, Patterns of Violence: A Feminist Perspective on the Regulation of Pornography, 7 Harv. Women's L.J. 5, 20-23 (1984). But see 1 Attorney General's Report, supra note 48, at 412. The Attorney General's Commission stated that
fear of its children justifies extending the scope of its regulation beyond that permitted in regulating the general welfare. The Supreme Court extended the scope of permissible regulation in *Ferber* by allowing states to regulate child pornography without regard to the obscenity requirement established in *Miller v. California*.

*Ferber* therefore established that because the production of child pornography is itself harmful, the states can regulate some aspects of child pornography without regard to whether the material is obscene. In approving a lower threshold for the regulation of child pornography than for adult pornography, the Court acknowledged that child pornography is not a victimless crime. If sexually explicit material depicts children, it probably does not fall within the protection of the first amendment, but if the material depicts adults, it may be protected, subject to the obscenity test in *Miller v. California*. The *Ferber* decision placed all child pornography on the same footing as obscene adult pornography and thus enabled states to prosecute child pornography on a broader scale than adult pornography. The distinction between child and adult pornography, therefore, concerns what materials may be regulated rather than how they may be regulated.

"harm to performers involved would not otherwise be taken to be a sufficient condition for restriction of the photographs rather than the underlying conduct." *Id.*


146. The potential for harm to the child victims is the same regardless of whether the material is legally obscene. *Id.* at 761.

147. *Id.* at 758 & n.9.


149. The Court in *Ferber* stated:

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

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

Application of Constitutional Protections

The Supreme Court established in Stanley that the permissible reach of a state's power to regulate in furtherance of its citizens' welfare was circumscribed by the protections of the Bill of Rights.151 The particular rights involved in the private possession of otherwise unlawful material—the guarantees of the first and fourth amendments—work synergistically to protect the possession of material that otherwise would not merit protection.152 Previous cases established that private noncommercial possession of unprotected material outside the home is not entitled to constitutional protection.153 Material that is completely outside the first amendment likewise receives no special protection simply because it is in the home.154 In Stanley, however, the Court established that the combination of first and fourth amendment protections prohibited a state from reaching into a person's home to seize unprotected material when that material involved speech.155

152. See id. at 563-64.
154. The Court in Stanley stated: "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. . . . No First Amendment rights are involved in most statutes making mere possession criminal." Stanley, 394 U.S. at 568 n.11. In holding that Ohio could criminalize the private possession of child pornography, the Supreme Court of Ohio interpreted this footnote to allow states to reach otherwise-protected speech if it found "compelling reasons . . . for overriding the right of the individual to possess those materials." Meadows, 28 Ohio St. 3d at 47, 503 N.E.2d at 700 (quoting Stanley, 394 U.S. at 568 n.11). In footnote 11, however, Justice Marshall's example of such a compelling reason deals with the possession of material that "could be used to the injury of the United States or to the advantage of any foreign nation." Stanley, 394 U.S. at 568 n.11 (quoting 18 U.S.C. § 793(d) (1982)). Private possession of child pornography hardly rises to the level of possession of state secrets. The Supreme Court of Ohio's misapplication of footnote 11 thus does not support its holding adequately. See Meadows, 28 Ohio St. 3d at 357, 503 N.E.2d at 716 (Brown, J., concurring).
155. See Stanley, 394 U.S. at 565. Although the Court premised its holding in Stanley solely on first amendment grounds, both the language of Justice Marshall's opinion and
In criminalizing the possession of child pornography, the Utah legislature cited the need to protect children from exploitation.\textsuperscript{156} It reasoned that child pornography was used as part of the act of child abuse, to induce the child’s participation in pornographic productions.\textsuperscript{157} Notwithstanding such a relationship, the legislature’s solution, prohibiting private possession, ignores the fundamental principles of the Supreme Court’s first amendment jurisprudence.\textsuperscript{158}

In evaluating whether sexually explicit speech should be protected under the first amendment, the Court has used a content-based analysis that incorporates a balancing test to determine the circumstances under which the speech may be restricted.\textsuperscript{159} Although the holding in \textit{Stanley} established that the right to possess material in one’s home was of sufficient value to survive the state’s interest in regulating that material,\textsuperscript{160} the Court did not preclude the possibility that a state interest could rise to a level sufficient to outweigh the first amendment interests at stake in \textit{Stanley}.\textsuperscript{161} In \textit{Paris Adult Theatre I v. Slayton}, Chief Justice Burger cited a minority report of the Commission on Obscenity and Pornography indicating “at least an arguable correlation between obscene material and crime.”\textsuperscript{162} This issue of possible harm to third parties is significant because under the Court’s current content-based analy-
sis, even speech that receives maximum first amendment protection can be restricted for a sufficiently compelling reason.\textsuperscript{163}

Whether pornography in general and child pornography in particular actually cause a viewer to commit sexual or violent crimes has been the subject of recent study and much heated debate.\textsuperscript{164} The respondents in \textit{American Booksellers} advanced this argument to justify proposed restrictions on adult pornography.\textsuperscript{165} The argument has also been used to justify the state's power to criminalize private possession of child pornography.\textsuperscript{166} The court in \textit{American Booksellers} held, however, that even if the premise that viewing pornography causes harmful behavior were accurate, the restriction on speech was too great to justify an antipornography ordinance.\textsuperscript{167}

\textit{Balancing the Interests}

Discussing the conflict between first amendment protections and the state's interest in safeguarding the welfare of its children, the Court in \textit{Ferber} held that the "balance of competing interests" would not preclude the state from exercising its regulatory power to criminalize the production and distribution of child pornography.\textsuperscript{168} Extending a state's regulatory power to the criminalization of private possession, however, does not necessarily follow from the analysis in \textit{Ferber}, because different interests are involved. The state's interest in the welfare of its children must be balanced against the strong first and fourth amendment protections established in \textit{Stanley}.\textsuperscript{169} First amendment case law has established that even speech at the core of the first amendment can be re-

\textsuperscript{163} Schauer, \textit{supra} note 10, at 304-06.
\textsuperscript{164} \textit{E.g.}, \textit{American Booksellers Ass'n v. Hudnut}, 771 F.2d 323 (7th Cir. 1985); \textit{ATTORNEY GENERAL'S REPORT}, \textit{supra} note 48; Blakeley, \textit{supra} note 144; Comment, \textit{The Indianapolis Pornography Ordinance: Does the Right to Free Speech Outweigh Pornography's Harm to Women?}, 54 \textit{UNIV. OF CINN. L. REV.} 249 (1985).
\textsuperscript{165} \textit{See American Booksellers Ass'n}, 771 F.2d at 325, 329 & n.2.
\textsuperscript{167} 771 F.2d at 329-31. \textit{Accord T. EMERSON}, \textit{supra} note 10, at 497-98 (arguing that this link is far too tenuous to be useful and that the possible advantage of preventing some crime would not outweigh the damage done to freedom of expression).
\textsuperscript{169} \textit{See supra} text accompanying notes 33-47.
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restricted if the competing interest is strong enough. Proponents of a state's authority to regulate the private possession of child pornography should therefore have to demonstrate a state interest sufficiently compelling to outweigh the first and fourth amendment protection of the private possession of otherwise unprotected speech.

Because some evidence may link private possession of child pornography and child sexual abuse, supporters of criminalization contend that this danger justifies a state's power to regulate private possession. A careful analysis of this argument demonstrates, however, that the proposed remedy—criminalization of private possession of child pornography—is not directly related to the harms intended to be prevented.

Once the material has been produced, states cannot prevent the initial harm, which occurs in the production itself. States can, however, prevent the subsequent injury to the child victim that occurs when such material is exhibited, traded between collectors, or sold. Publication of this material "arguably imposes a harm on the child victim analogous to the emotional harm redressed in the invasion of privacy tort." The remedy for such an injury is limited to civil damages, and does not include criminal sanctions against the speech itself. The state's interest in regulating child pornography therefore "is better characterized as protection of the child from emotional and psychological harm. . . ." This is the interest against which the importance of the first and fourth amendment protections of private possession must be weighed.

171. 1 Attorney General's Report, supra note 48, at 649-50.
172. "A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography. . . . [H]e must carry with him the distressful feeling that his act has been recorded for all to see." Shouvlin, supra note 57, at 545. See also People v. Spargo, 103 Ill. App. 3d 280, 286, 431 N.E.2d 27, 31-32 (1982) (noting that the continuing fear of exposure from distribution is as damaging as the initial sexual exploitation); 1 Attorney General's Report, supra note 48, at 650. "Each time the pornography is exchanged the children involved are victimized again." Id. at 651.
175. Note, supra note 173, at 316 n.123.
Although the child is harmed simply by the continued existence of the pornographic material,\textsuperscript{176} practical considerations make this an insufficient basis on which to justify a statute that so strongly impacts first amendment rights. Each time the photographs change hands, the child victim is harmed again.\textsuperscript{177} The states, however, already have the authority to prohibit these transactions.\textsuperscript{178} Although the child will never be sure that all photographs have been destroyed, this harm cannot be redressed by criminal sanctions. Because photographs "are timeless and may be distributed and circulated throughout the world for years after they are initially created,"\textsuperscript{179} a ban on private possession is necessarily less effective in protecting the child victim's privacy rights than strong sanctions against production and distribution.

Proponents of a state's right to prohibit private possession of child pornography also argue that pedophiles use such materials to solicit the participation of other children in sexual activity.\textsuperscript{180} Although states have a strong interest in preventing this solicitation, criminalization of private possession will not necessarily deter such activity. Pedophiles\textsuperscript{181} often have extensive collections of erotica, including both child and adult pornography,\textsuperscript{182} and research indicates that they are just as likely to use adult pornography as child pornography to lower the inhibitions of a child victim.\textsuperscript{183} Criminalizing the private possession of child pornography therefore may not have the desired effect of decreasing opportunities for child abuse.

\textsuperscript{176} 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 651.
\textsuperscript{177} Id.
\textsuperscript{179} 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 651.
\textsuperscript{180} Shouvlin, supra note 57, at 610, 649-50.
\textsuperscript{181} The Attorney General's Commission on Pornography defines a pedophile as a person having a clear sexual preference for children. 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 609.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 686.
Administrative Convenience

A second argument in support of allowing states to prohibit private possession is that this prohibition is a necessary incident to controlling production and distribution of child pornography. This argument rests on the alleged difficulty of proving other offenses, such as production, distribution, and exhibition. In response to the same argument, the Court in Stanley stated that even if such difficulties existed, "we do not think that they would justify infringement of the individual's right to read or observe what he pleases." The Court found that right "so fundamental to our scheme of individual liberty [that] its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws."

The Court has rejected this administrative convenience argument in many other contexts as a rationale for restricting fundamental rights. In People v. Spargo, the state advanced the administrative convenience rationale to justify its regulation of the private, noncommercial exhibition of child pornography outside the home. The court applied Stanley to the possession of child pornography and held that "[w]hatever constitutional protections Stanley confers were relinquished by the defendant when he removed the child pornography from the confines of his own home and exhibited it to another." The court also reasoned that a ban

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184. See, e.g., 1 ATTORNEY GENERAL'S REPORT, supra note 48, at 413 ("virtually all child pornography is produced surreptitiously, and thus . . . enforcement will be difficult"); Loken, Child Pornography—A Turning Point, 16 THE PROSECUTOR 15, 16 (Summer 1982) (noting the clandestine nature of the child pornography industry and the difficulties inherent in monitoring the same of pornographic material); Note, supra note 63, at 346 (organized crime is now deeply involved in child pornography).


186. Id.

187. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (administrative convenience cannot stand as the sole rationale for a statute that distinguished on the basis of sex); Smith v. California, 361 U.S. 147 (1959) (administrative convenience cannot justify criminal conviction for possession of an obscene book when the defendant had no knowledge of the book's content).

188. 103 Ill. App. 3d 280, 431 N.E.2d 27 (1982).

189. Id. at 285, 431 N.E.2d at 30.

190. Id.
on private, noncommercial exhibition of child pornography would
discourage production by decreasing demand for this material.\textsuperscript{191}

No evidence presently supports the contention that prohibiting
the private possession of child pornography would significantly ad-
vance the state’s interest in deterring child abuse.\textsuperscript{192} Most recom-
mendations have focused on production and distribution as the
causes of harm to the child victim.\textsuperscript{193} The states’ adoption of uni-
form laws directed against production and distribution of child
pornography would be more effective.\textsuperscript{194} For example, the rate of
federal prosecutions increased dramatically following the 1984 re-
visions that strengthened the federal Child Protection Act.\textsuperscript{195}

Because states are not limited to regulating child pornography
that moves in interstate commerce, they may prohibit all produc-
tion and trafficking in such material.\textsuperscript{196} The report of the Attorney
General’s Commission on Pornography notes that some states do
not yet ban trafficking, an activity that harms the child victim
more than private possession does, and which would carry a
harsher penalty.\textsuperscript{197}

Statutory prohibition of the private possession of child pornog-
raphy is an inefficient and ineffective means of preventing the seri-
ous problem of child sexual abuse. Although most pedophiles col-
lect child pornography,\textsuperscript{198} all collectors are not necessarily child
molesters.\textsuperscript{199} States may, however, prosecute collectors who also
distribute or produce pornographic material for these more serious
offenses, which will carry heavier penalties than mere possession.
The efficacy of any sentence, of course, depends on its actual im-

\textsuperscript{191} Id.
\textsuperscript{192} Studies indicate that the enforcement of existing child pornography and child abuse
laws is itself problematical. Abusers can be “average” citizens as well as depraved individu-
als on the edge of society. The former often are not prosecuted or are released with only a
fine. D. Scott, supra note 121, at 13.
\textsuperscript{193} See, e.g., Shouvlin, supra note 57, at 544-45; Note, supra note 173, at 299-301.
\textsuperscript{194} 1 Attorney General’s Report, supra note 48, at 660-64, 670-71.
\textsuperscript{195} Id. at 606-07.
\textsuperscript{196} Id. at 607.
\textsuperscript{197} Id. at 608.
\textsuperscript{198} Id. at 609, 681.
\textsuperscript{199} For example, the court in Meadows found no indication that the defendant had par-
ticipated in any unlawful activity except the possession of magazines depicting children en-
gaging in sexual activities. State v. Meadows, No. C-850091 (Ohio App. Dec. 18, 1985), rev’d,
Practicality demands that limited law enforcement resources are best spent in prosecuting those who are involved in the more harmful offenses of producing and distributing child pornography.

**CONCLUSION**

A close reading of the Supreme Court's decision in *New York v. Ferber* suggests that the Court did not intend its ruling to do more than alter the standard for child pornography so the states could regulate the production and distribution of this material regardless of any obscenity requirement. The purpose of expanding the states' power to regulate was to prevent the abuse of children used to produce the material. Although advocates of the states' power to criminalize the private possession of child pornography contend that their purpose is likewise to prevent child abuse, they face two obstacles, one practical and one constitutional. First, criminalizing private possession may not have the desired effect of reducing the incidence of child abuse. Second, the constitutional protections against which this purpose is weighed are much stronger for the case of private possession than for production or distribution.

*Stanley v. Georgia* and its progeny established that a state could regulate unprotected speech everywhere except when it was privately possessed in the home. The *Ferber* holding placed all child pornography on the same footing as material that is obscene under the *Miller v. California* test. The inescapable conclusion

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200. One case report states that an offender caught in the act of sexually molesting a child received a sentence of five years imprisonment, all but six months of which were suspended. 1 Attorney General's Report, supra note 48, at 685-86.

201. See id. at 660-71 (recommending that states toughen their child pornography laws to make many offenses a felony).

202. See New York v. Ferber, 458 U.S. 747, 764-65 (1982) (explaining that the decision removed the requirements of the *Miller* test and effectively equated all child pornography with obscenity as defined in *Miller*).

203. See supra text accompanying notes 58-61. Any doubt as to the Court's intention to do more than address the problem of child abuse in production is dispelled by its suggestion, in dictum, that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." *Ferber*, 458 U.S. at 763.

204. See supra text accompanying notes 176-83, 192.

205. See supra text accompanying notes 128-29.

206. See supra text accompanying notes 33-39.

is that the state is free to regulate material depicting child pornography except when an individual possesses it "in the privacy of his own home."\textsuperscript{208}

\textit{Susan G. Caughlan}