

*Winter 1985*

### Children and Pornography: An Interest Analysis in System Perspective

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#### Recommended Citation

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# CHILDREN AND PORNOGRAPHY: AN INTEREST ANALYSIS IN SYSTEM PERSPECTIVE

WILLIAM GREEN\*

## TABLE OF CONTENTS

	page
PREFACE .....	441
I. ANALYTICAL FRAMEWORK: PORNOGRAPHY SYSTEM AND PARTICIPANT INTERESTS .....	442
II. CHILDREN AS RECIPIENTS .....	446
<i>Child Obscenity Standard</i> .....	446
<i>Ginsberg v. New York</i> .....	448
<i>Erznoznick v. City of Jacksonville</i> .....	448
<i>Child-Based Indecency Standard</i> .....	449
<i>F.C.C. v. Pacifica Foundation</i> .....	450
<i>Implications of Pacifica</i> .....	452
III. CHILDREN AS ACTORS .....	454
<i>Child Pornography Legislation</i> .....	455
<i>Child Pornography Decisions</i> .....	456
<i>New York v. Ferber</i> .....	460
<i>Impact of Ferber</i> .....	464
IV. CONCLUSIONS .....	469

## ILLUSTRATIONS

	page
FIGURE 1: <i>Children, the Pornography System and the Law</i> ..	443
FIGURE 2: <i>Participants' Legal Interest Model</i> .....	444
FIGURE 3: <i>Use of Obscenity Definitions in Child Pornography Statutes</i> .....	456

## PREFACE

The sexual exploitation of children is an object of public concern. State and federal governments have enacted child obscenity and pornography statutes to protect children from abuse in the production of pornography and from harm in the sale of obscene materials.

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+ I acknowledge the advice of Professor John Batt, College of Law, University of Kentucky, in the preparation of this article.

These enactments have raised free speech, due process, and privacy questions. This article will examine how these issues have been judicially resolved. In general, it will argue that the crucial factor in judicial resolution is the weight courts have given to free speech interests. In this regard, it will argue that courts have more easily resolved child pornography production issues by defining them as conduct unprotected by the first amendment. At the same time, this article will argue that courts have had greater problems in resolving obscenity and child pornography distribution issues, because of the greater importance they have attached to the free speech interests of children, parents, and other adults.

Part I will provide a framework for the analysis of these issues. Part II will examine the legal regulation of children as recipients of pornography: the evolution of a children's obscenity standard in *Ginsberg v. New York*<sup>1</sup> and *Erznoznick v. City of Jacksonville*<sup>2</sup> and the creation of a child-based indecency standard for broadcasting in *Federal Communications Commission v. Pacifica Foundation*.<sup>3</sup> Part III will examine the legal regulation of children as actors in the production of pornography, via the Supreme Court's decision in *New York v. Ferber*,<sup>4</sup> and its impact on appellate and trial courts. Part IV will draw some conclusions about these judicial decisions, their impact on the public and private interests involved, and the issues that remain to be decided.

## I.

## ANALYTICAL FRAMEWORK:

## THE PORNOGRAPHY SYSTEM AND PARTICIPANT INTERESTS

Systems theory is a useful framework for understanding the involvement of children in the pornographic marketplace. A system is a set of structured interactions that converts resources (inputs) into products (outputs) for distribution to consumers.<sup>5</sup> The pornography industry,<sup>6</sup> represented in Figure 1 below, is a system which takes human and financial resources and creates sexually appealing products in the form of pictures, magazines, books, and movies which are

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1. 390 U.S. 629 (1968).

2. 422 U.S. 205 (1975).

3. 438 U.S. 726 (1978).

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

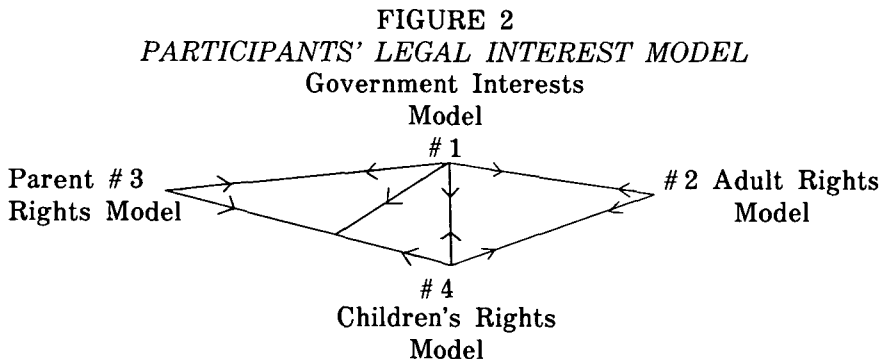
5. Easton, *An Approach to the Analysis of Political Systems*, 9 WORLD POLITICS 383-400 (1957).

6. The President's Commission on Obscenity and Pornography reported that "a monolithic smut industry does not exist; rather there are several distinct markets (films, books, magazines) and submarkets which distribute a variety of erotic materials." Lockhart, *Report of the Commission on Obscenity and Pornography* 7 (1970).



pornography statutes, permit the prosecution of persons involved in the promotion and sale of child pornography in order to eliminate the sexual abuse of children in its creation.

Obscenity prosecutions under federal and state statutes have raised fundamental questions about private and public interests. The participant interests in these cases are expressed in terms of the four models which are represented in Figure 2 below.



The Government Interests Model (#1) recognizes four interests. First, the state has an interest in the health, safety, morals, and general welfare of all its citizens, but it uses this police power primarily on behalf of its adult citizens.<sup>8</sup> Second, “[t]he State also has an independent interest in the well-being of its youth.”<sup>9</sup> Under its *parens patriae* and police powers it has the authority to protect the welfare of children from abuses from anyone. It may also use these powers to override parental decisions in order to protect individual children from neglect or abuse and to promote the general public’s health and safety.<sup>10</sup> Third, there is the state’s interest in supporting “the parent’s claim to authority in their own household to direct the rearing of their children.”<sup>11</sup> Fourth, there is the state’s interest in safeguarding and strengthening the family and the relationships among parents and children.<sup>12</sup>

8. The police power is the basis for state obscenity and child pornography statutes. *Id.* The federal government also has a “police power” under its postal and commerce powers to regulate obscenity and child pornography. See *infra* note 28.

9. *Ginsberg*, 390 U.S. at 640.

10. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state child labor law upheld as applied to a child distributing religious materials) and *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905) (state compulsory vaccination of children upheld in spite of religious objections of parents).

11. *Ginsberg*, 390 U.S. at 639.

12. *H.L. v. Matheson*, 450 U.S. 398 (1981) (states requirement that physician provide notice to parents of a minor’s abortion decision).

The Adult Rights Model (#2) recognizes that the vast array of constitutional rights that people have against the exercise of governmental power are conferred principally upon adults.<sup>13</sup> As a result, this model distinguishes between adult rights and those selected constitutional rights recently extended to minor children under Model #4. The Adult Rights Model also acknowledges that when adults become parents, they gain additional rights under Model #3.

The Parent Rights Model (#3) recognizes the personal interest of parents in the care of their children free from state interference. The Court has acknowledged the primary responsibility of parents to direct the upbringing of their children<sup>14</sup> as an aspect of liberty protected by the due process<sup>15</sup> and free exercise clauses.<sup>16</sup> Moreover, the Parent Rights Model recognizes that parents share an interest with their children in an autonomous family relationship.<sup>17</sup>

The Children's Rights Model (#4) recognizes that minor children have rights against the state. The Court has recently extended to minors an interest in equal protection against racial discrimination in education,<sup>18</sup> in procedural due process in juvenile court adjudication<sup>19</sup> school disciplinary proceedings,<sup>20</sup> in freedom of speech,<sup>21</sup> and, even as

13. Constitutional rights in full force are generally conferred only upon people who have achieved their majority, though the Supreme Court has made recent minor alterations in this view. See *infra* notes 18-23.

14. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (state statute requiring children to attend public school violated parent's right to educational choice for children).

15. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state statute restricting private school teaching to English violated parent's due process right to have children taught German).

16. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state compulsory school attendance law infringing upon the religious convictions of Amish parents).

17. *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*, 431 U.S. 816 (1977) (state procedures for removing children from foster homes intruded upon privacy rights of the foster family) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (city zoning ordinance violated the privacy of the extended family).

18. *Brown v. Board*, 347 U.S. 483 (1954) (state statutes requiring or permitting racial segregation in educational facilities violated equal protection rights of children).

19. Minors' rights in criminal proceedings include protection against coerced confessions, *Gallegos v. Colorado*, 370 U.S. 49 (1962); the right to notice, counsel, confrontation, cross-examination, and not to incriminate oneself, *In re Gault*, 387 U.S. 1 (1967); the prohibition against double jeopardy, *Breed v. Jones*, 421 U.S. 519 (1975), and the requirement of proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970).

20. *Goss v. Lopez*, 419 U.S. 565 (1975) (public school suspension of students without notice and hearing, violates their due process rights).

21. *Tinker v. DesMoines School District*, 393 U.S. 503 (1969) (school regulation forbidding the wearing of armband violated student's free speech right).

against their parents, in personal privacy to make decisions about contraception<sup>22</sup> and abortion.<sup>23</sup> At the same time, the Children's Rights Model also recognizes the minor's due process interest in the family relationship, because of an interest in receiving parental guidance.<sup>24</sup>

The Supreme Court's decisions in cases involving children and pornography have turned upon its evaluation of Model #1 governmental interests and the Model #2, #3, and #4 first amendment, due process, and privacy rights of adults, parents, and children. Parts II and III of this analysis will examine how the Court's decisions in cases involving children as participants in the creation and consumption of pornography have affected these participant interests.

## II

### CHILDREN AS CONSUMERS

Government regulation of the involvement of children with pornography began, not with the creation of the product, but with its distribution. The following analysis will examine the child obscenity standard developed in *Ginsberg v. New York*<sup>25</sup> and *Erznoznick v. Jacksonville*<sup>26</sup> and the child-based broadcast indecency standard created in *Federal Communications Commission v. Pacifica Foundation*.<sup>27</sup>

#### *Child Obscenity Standard*

Federal and state governments regulate the distribution of obscene material. Federal statutes restrict the importation, mailing or communication of obscene materials.<sup>28</sup> States have general obscenity statutes which impose criminal penalties on those who distribute

22. *Carey v. Population Services Internat'l*, 431 U.S. 678 (1977) (state law restricting sale of contraceptives to minors violate their right to privacy).

23. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (state statute requiring written consent by parents or spouse to a woman's abortion decision violates her right to privacy).

24. See *supra* note 17.

25. 390 U.S. 629 (1968).

26. 422 U.S. 205 (1975).

27. 438 U.S. 726 (1978).

28. The Tariff Act is 19 U.S.C. § 1305 (1976). The basic postal statute, 18 U.S.C. § 1461, prohibits the knowing use of the mails for the mailing or delivery of obscene materials. Another postal statute, the Anti-Pandering Act, 39 U.S.C. § 4009 (1976), leaves the matter of erotic arousal at the sole discretion of the individual postal patron. The FBI Statute, 18 U.S.C. § 1462 (1976), prohibits the use of common carriers for the importation or interstate transportation of obscene materials and 18 U.S.C. § 1465 (1976) prohibits the interstate transportation of obscene material for sale or

obscene material.<sup>29</sup> The Supreme Court has generally upheld these statutes, because it has found that obscenity as a class of speech is not entitled to any constitutional protection because it is without redeeming social value.<sup>30</sup>

Whether the material is obscene is determined by an internal test first announced in *Roth v. United States*<sup>31</sup> and later elaborated in *Miller v. California*.<sup>32</sup> It is a test based solely on the anticipated effect of the material on the average adult. It requires the trier of fact to apply contemporary community standards to an examination of the material alleged to be obscene and to determine whether the work taken as a whole describes sex in a patently offensive way; appeals to the prurient interest in sex; and lacks serious literary, artistic, political, or scientific value. If the material passes the test, it is obscene.<sup>33</sup>

Obscenity under the *Roth-Miller* test is also a constant concept, because the intentions of the distributor, the manner of distribution, and the identity of the recipients are unimportant. Commercial distribution of obscene material to adults is unprotected by the first amendment. As the Court said in *Paris Adult Theatre v. Slaton*: "commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct. . . falls within a State's broad power to regulate commerce and protect the public environment."<sup>34</sup>

Whether pornographic materials, non-obscene for adults, would be obscene for children was not considered by the Court until the appearance of an external test for obscenity. In *Ginsburg v. United States*<sup>35</sup> and *Mishkin v. New York*,<sup>36</sup> the Court announced the concept of variable obscenity: the circumstances of distribution could make obscene material which was otherwise protected expression. *Redrup v. New York*<sup>37</sup> extended the concept by holding that the obscenity of material would also depend upon whether it was pandered or sold

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distribution. The FCC Statute, 18 U.S.C. § 1464 (1976), prohibits the use of radio or television to utter "obscene, indecent, or profane language."

29. *Supra* note 7.

30. *Roth v. U.S.*, 354 U.S. 476 (1957) (later elaborated in *Miller v. Cal.*, 413 U.S. 15 (1973)).

31. 354 U.S. 476 (1957).

32. 413 U.S. 15 (1973).

33. *Id.* at 24.

34. 413 U.S. 49, 68-69 (1972).

35. 383 U.S. 463 (1966).

36. 383 U.S. 502 (1966).

37. 386 U.S. 767 (1967).



to juveniles.<sup>38</sup> Whether material was obscene for children, however, involved more than just a conflict between a child's right to free expression and the public interest in morality. The sale of pornography to children raised other questions. Could the government's interest in the protection of children qualify the right of parents to educate their children and the right of adults to protected materials? The Court addressed this question initially in *Ginsberg v. New York*<sup>39</sup> and *Erznoznick v. City of Jacksonville*<sup>40</sup> which will be examined below.

### *Ginsberg v. New York*

Could a state prohibit the sale of printed material to minors defined as obscene on the basis of its appeal to them, though it would not necessarily be obscene to adults? Justice Brennan, speaking for the majority in *Ginsberg*, found that it was reasonable for a state to conclude that a minor's exposure to such material might be harmful and to enact a statute such as New York's which "simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest . . . of minors."<sup>41</sup>

Two state interests justified a limitation on the availability of obscene material to minors. One was the state's "independent interest in the well-being of its youth."<sup>42</sup> The other interest supported "the parents' claim to authority . . . to direct the rearing of their children."<sup>43</sup> It is clear that the statute was more than merely supportive, because it denied parents, if they wished, the right to allow their children to have uninhibited access to books and magazines.<sup>44</sup> Nonetheless, Justice Brennan claimed that the statute did not "bar parents who so desire[d] from purchasing the magazines for their children."<sup>45</sup> Therefore, *Ginsberg* did not explicitly discuss the rights of adults, but one could assume that if the statute did not bar parental purchases, it would not impair an adult's right of access to a bookstore or theatre.

### *Erznoznick v. City of Jacksonville*

Could a city in the exercise of its police power prohibit the exhibition of non-obscene nudity in drive-in movies visible from "any

38. *Id.* at 769.

39. *Ginsberg*, 390 U.S. at 629.

40. *Erznoznick*, 422 U.S. at 205.

41. *Ginsberg*, 390 U.S. at 638.

42. *Id.* at 640.

43. *Id.* at 639.

44. *Id.* at 674 (Fortas, J., dissenting).

45. *Id.* at 639.

public street or public place" in order to protect children?<sup>46</sup> Justice Powell, speaking for the Court in *Erznoznick* agreed that the city could "adopt more stringent controls on communicative materials available to youths."<sup>47</sup> At the same time, the city had to acknowledge that even though the first amendment rights of minors were not co-extensive with those of adults, "minors [were] entitled to a significant measure of First Amendment protection"<sup>48</sup> which included the right to view non-obscene nudity.

The Jacksonville ordinance, judged by this standard, was fatally overbroad as applied to children, because it was not directed against sexually-explicit nudity, but forbade all nudity in outdoor films. "All nudity," Justice Powell said, "cannot be deemed obscene even as to minors. . . ." under the *Ginsberg* obscenity standard.<sup>49</sup> Non-obscene speech could not be suppressed "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."<sup>50</sup> Thus *Erznoznick* acknowledged the post-*Miller* validity of the *Ginsberg* child obscenity standard, but it did not discuss whether public exhibitions not obscene to adults could be restricted, because they were obscene to children.

#### *The Child-Based Indecency Standard*

The federal government also regulates the distribution of non-obscene material. Federal statutes restrict the mailing and broadcast of indecent material. The Supreme Court first upheld this governmental action in *Rowan v. United States Post Office Department*<sup>51</sup> where it approved of the Anti-Pandering Act, 19 U.S.C. § 4009,<sup>52</sup> which leaves the matter of erotic arousal at the sole discretion of the individual postal patron who has the right to obtain from a post office a prohibitory order against the advertiser even though the material was not obscene by any objective standard.

The Court's decision in *Rowan* is, however, rather limited in its application. It upheld only the right of an adult to make a personal

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46. *Erznoznick*, 422 U.S. at 205.

47. *Id.* at 212.

48. *Id.*

49. *Id.* at 213.

50. *Id.* at 213-14.

51. 397 U.S. 728 (1971).

52. Section 4009 permits a person who has received "a pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" to request the post office to issue an order directing the advertiser to refrain from further mailings. 19 U.S.C. § 4009 (1976).

judgment about a mailed advertisement. Moreover, it did not consider whether the child had a right to refuse offensive material, whether the parents had discretion under section 4009(g) to determine what material a child may receive,<sup>53</sup> nor whether the state's *parens patriae* power could prevail over parental discretion.<sup>54</sup> These issues, along with the free speech-rights of adults, were addressed in the much wider context of radio broadcasting.

*Federal Communications Commission v. Pacifica Foundation*

Could the FCC regulate radio broadcasts non-obscene for children? The issue was raised one afternoon when WBAI, a Pacifica Foundation radio station, broadcast George Carlin's "dirty words" monologue. The FCC, acting on a complaint from a listener, concluded that the monologue "depicted sexual and excretory activities and organs in a manner patently offensive by contemporary standards for the broadcast medium"<sup>55</sup> and was prohibited as indecent under 18 U.S.C. § 1464.<sup>56</sup> The Court of Appeals reversed.<sup>57</sup> On appeal, the Supreme Court upheld the Commission, 5 to 4.<sup>58</sup>

Justice Stevens in his opinion for the Court read the statutory language's prohibition on the use of "any obscene, indecent, or profane language by means of radio communication" in the disjunctive;<sup>59</sup> determined that indecent meant "nonconformance with accepted standards of morality";<sup>60</sup> and then agreed with the Commission's conclusion that indecent language was used in the Pacifica broadcast.<sup>61</sup>

53. Section 4009(g) allows the post office to include in any prohibitive order "the names of any minor children who have not attained their nineteenth birthday and who reside with the addressee." 19 U.S.C. § 4009(g) (1976).

54. The Supreme Court has never ruled on whether there is any limit to a parent's discretion in determining what reading material a child may bring into the home, though *Ginsberg* suggests that the state has an interest to see children are safeguarded from abuse.

55. *In re A Citizen's Complaint Against Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975).

56. 18 U.S.C. § 1464 (1976).

57. 556 F.2d 9 (D.C.Cir. 1977).

58. *Pacifica*, 438 U.S. 726. A majority opinion written by Justice Stevens was joined by four members of the Court: Chief Justice Burger and Justices Blackmun, Powell and Rehnquist. Justice Powell joined by Blackmun concurred in part in the opinion and the judgment. Justice Brennan, joined by Marshall, dissented on constitutional grounds. Justice Stewart, joined by Brennan, White, and Marshall, dissented on statutory grounds.

59. *Id.* at 739-40.

60. *Id.* at 740.

61. *Id.* at 741.

Justice Stevens found no constitutional barrier to the FCC's authority to impose a time regulation on the indecent radio broadcast.<sup>62</sup> Two characteristics of the broadcast media justified this regulation of indecent speech: the impact of the broadcast media on an adult's privacy in the home and the media's easy accessibility to children.<sup>63</sup>

The *Pacifica* decision is noteworthy, because it is the first instance in which the Court has upheld the federal government's power to restrict non-obscene speech. One commentator observed: "the *Pacifica* Court tacitly embraced a general or national standard of decency" for broadcasting.<sup>64</sup> The Court offered two justifications, but the privacy rationale is flawed. "[C]hanneling indecent broadcasts . . . cannot possibly protect that interest . . . [because] it will do nothing to aid the unwilling adult listeners who randomly tune in at night."<sup>65</sup> As a consequence, the protection of young children is the only interest advanced by the Court which can justify the regulation of broadcast indecency. This interest, however, makes major alterations in the rights of children, their parents, and other adults in their access to non-obscene broadcasting.

The Court had recognized the government's interest in the well-being of youth by adopting a children's obscenity standard in *Ginsberg*. In broadcasting, however, the Court assumed that *Ginsberg* was insufficient, because the *Pacifica* decision "allows the government to prevent minors from gaining access to materials that are not obscene."<sup>66</sup> In doing so, *Pacifica* also disregards the admonition in *Erznoznick* that "speech that is [not] . . . obscene as to youths . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks [are] unsuitable for them."<sup>67</sup>

The Court recognized in *Ginsberg* the governmental interest in supporting parental authority. Justice Stevens, citing *Ginsberg*, claimed that the Court's interest in preventing children from hearing offensive broadcasts supported "the parents' claim to authority in their own household."<sup>68</sup> Like *Ginsberg*, *Pacifica* restricts the rights of those parents who may find it desirable to expose their children to the Carlin monologue.<sup>69</sup> However, *Pacifica* goes one step further. The offensive

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62. *Id.* at 750-51.

63. *Id.* at 748-50. See also *id.* at 755-61 (Powell, J., concurring).

64. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 157 (1978).

65. *Id.* at 160.

66. *Pacifica*, 438 U.S. at 767 (Brennan, J., dissenting).

67. *Id.* at 768. (Quoting *Erznoznick*, *supra* note 46).

68. *Id.* at 749. (Quoting *Ginsberg*, *supra* notes 11 & 41).

69. *Id.* at 770 (Brennan, J., dissenting).

material will be available to parents only at times when children are not likely to be in the listening audience.<sup>70</sup>

The Court's decision in *Ginsberg* did not impair the access of adults to books, magazines, records, and movies. This physical separation of the audience is not possible in the broadcast media. As a consequence, *Pacifica* raised the question as to whether the FCC's action violated the principle of *Butler v. Michigan*; government may not regulate the distribution of pornography to children in a manner that prevents adults from gaining access to protected materials and, thereby, "reduces the adult population . . . to reading only what is fit for children."<sup>71</sup> The *Pacifica* majority claimed that the regulation of indecent broadcasting did not violate the principle of *Butler*. The Commission's decision had not closed all broadcasting to indecent speech.<sup>72</sup> Adults, Justice Powell said, may hear the monologue "during late evening hours when fewer children are likely to be in the audience."<sup>73</sup> Moreover, the FCC ruling did not restrict adult use of alternative forums. "Adults who feel the need may purchase tapes and records or go to the theatres and nightclubs to hear these words."<sup>74</sup> Justice Powell in his concurring opinion was more cautious. "Butler. . . is not without force," he said, "but it is not sufficiently strong to leave the Commission powerless to act. . . in this case."<sup>75</sup>

### *Implications of Pacifica*

What *Pacifica* means is unclear. Justice Stevens claimed that the Court's review was limited to the Commission's decision "that the Carlin monologue was indecent as broadcast."<sup>76</sup> Justice Brennan was profoundly disturbed by the implications of the majority's action: it was the product of "acute ethnocentric myopia."<sup>77</sup> His dissent raised three questions about the meaning of *Pacifica*.

What will a broadcast indecency standard mean and what will be its effect? Justice Brennan argued that there will be greater problems than those encountered in defining obscenity. Indecency is a less precise term. Moreover, he claimed that its implementation would destroy cultural diversity, because a decency standard would

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70. *Id.* at 768 (Brennan, J., dissenting).

71. 352 U.S. 380, 383 (1957).

72. *Pacifica*, 438 U.S. at 750.

73. *Id.* at 760 (Powell, J., concurring).

74. *Id.* at 750 n. 28. See also *id.* at 760 (Powell, J., concurring).

75. *Id.* at 760 (Powell, J., concurring).

76. *Id.* at 735. See also *id.* at 755-56 (Powell, J., concurring).

77. *Id.* at 775.

be likely to be a reflection of the will "of the dominant culture's . . . thinking, acting, and speaking."<sup>78</sup>

What does "as broadcast" mean? Justice Brennan argued for a narrow view of the Court's holding. Since,

"the FCC insists [in its brief] that it desires only the authority to reprimand a broadcaster on facts analogous to those presented in this case . . . [the opinions of Stevens and Powell] do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment'. . . involved here."<sup>79</sup>

*Pacifica* may, however, have a wider meaning. As one commentator argued, the Stevens and Powell opinions "authorized time zoning . . . when the broadcast: (1) uses language offensive to most people in depicting sexual or excretory activities; (2) uses that language not incidentally, but repetitively; (3) is aired at a time of day when children are likely to be in the audience; and (4) is likely to influence children."<sup>80</sup> That *Pacifica* may have this wider meaning was not foreclosed by Stevens when he said that whether the playing of the monologue in the late evening would be permissible "is an issue neither the commission nor this Court has decided."<sup>81</sup>

What guidance did *Pacifica* provide the FCC? Justice Brennan complained that the privacy and children rationales were "plagued by a common failing: the lack of principled limits on their use . . ."<sup>82</sup> Neither the Stevens nor the Powell opinions, he says, "serve to clarify the extent to which the FCC may assert the rationales as justification for expunging from the airways protected communication the Commission finds offensive."<sup>83</sup> Indeed, Stevens' opinion in which Powell concurred suggested no limitation on future FCC decisions. As Stevens said:

[t]he Commission's decision rested entirely on a nuisance rationale under which context is all important. The Concept requires consideration of a host of variables. The time of day [,] . . . [t]he content of the program in which the language is used will affect the composition of the audience,

78. *Id.* at 777.

79. *Id.* at 771.

80. *Supra* note 64, at 162.

81. *Pacifica*, 438 U.S. at 750 n. 28.

82. *Id.* at 770.

83. *Id.*

and the differences between radio and television, and perhaps closed circuit transmission, may also be relevant.<sup>84</sup>

These questions Justice Brennan raised six years ago have not been answered. No broadcaster has challenged the non-renewal of his license by the Commission because of indecent material in its programming. As a consequence, neither the courts of appeal, nor the Supreme Court have had the opportunity to say what *Pacifica* means besides the Commission's finding "that the Carlin [radio] monologue was indecent as broadcast."<sup>85</sup> What has captured judicial attention in the years since *Pacifica* has been child pornography.

### III. CHILDREN AS ACTORS

Child pornography, the visual or printed depiction of a minor child engaged in explicit sexual conduct, became the subject of government attention after disclosures of a widespread market in 1977 revealed the inadequacy of existing legislation.<sup>86</sup> Federal and state obscenity laws did not reach the producers of child pornography, only its distributors.<sup>87</sup> Moreover, "punishment [of distributors] under obscenity statutes was not severe enough to reflect the aggravating circumstances of child abuse involved in child pornography."<sup>88</sup> Furthermore, state sexual offense and child abuse statutes did not reach the producers of child pornography, because they failed to apply to the abusive acts involved and the penalties they provided were too weak.<sup>89</sup> As a consequence, federal and state legislation was enacted "to protect children directly from physical abuse in pornography and indirectly by suppressing obscene material that might encourage further abuse . . . ."<sup>90</sup> by imposing criminal liability on all the participants in the child pornography system. The following analysis will examine these federal and state child pornography statutes and then turn its attention to the Supreme Court's child pornography decision, *New York*

84. *Id.* at 750.

85. *Pacifica*, 438 U.S. at 735, 755, 756.

86. Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. ILL. L.F. 711, 713-15 (1978).

87. Virtually all child pornography is obscene under current standards. S. Rep. No. 438, 95th Cong. 1st Sess., 12 (1978).

88. Note, *Child Pornography: A New Role for the Obscenity Doctrine*, *supra* note 86, at 715.

89. *Id.* See also Comment, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295, 302 (1979).

90. Moore, *Child Pornography, the First Amendment, and the Media: The Constitutionality of Super-Obscenity Laws*, 4 COMM/ENT 125 (1978-79).

*v. Ferber*,<sup>91</sup> the cases that preceded it and the impact it has had on trial and appellate courts.

### *Child Pornography Legislation*

The federal Protection of Children Against Sexual Exploitation Act of 1977<sup>92</sup> regulates the interstate aspects of child pornography in two ways. First, the statute regulates conduct involved in the solicitation-production of child pornography without regard to its obscenity. Section 2251 forbids parents and other persons from employing children as models for the production of sexually explicit material for interstate shipment.<sup>93</sup> Section 2254, more broadly applicable, makes punishable the "causing of a minor to engage in sexual conduct for commercial exploitation."<sup>94</sup> Second, section 2252 regulates distributors by prohibiting obscene child pornography from being shipped in interstate commerce and received for distribution and sale.<sup>95</sup>

State statutes, like the federal act, usually contain 'production offenses' that directly regulate the conduct of those who solicit or procure children, and 'dissemination offenses' which "attempt to curb sexual abuse [indirectly] by dampening economic supply and demand for sexual depictions of children."<sup>96</sup> This state legislation is not based on any uniform act.<sup>97</sup> Consequently, there are considerable variations in the use of an obscenity standard in state child pornography statutes. Figure 3 presents four types of state statutes with examples of each.

States like Illinois (#1) apply an obscenity definition to both solicitation-production and distribution activities.<sup>98</sup> States like Florida (#2) follow the federal statute and dispense with an obscenity standard for solicitation-production offenses, but impose one on distribution offenses.<sup>99</sup> However, no state reverses this approach (#3). States like New York and Kentucky (#4) dispense with an obscenity requirement for all child pornography offenses.<sup>100</sup> These statutes prohibit all

91. 458 U.S. 747 (1982).

92. P. L. No. 95-225, 92 Stat. 7 (1978).

93. 18 U.S.C. § 2251 (1978).

94. 18 U.S.C. § 2423 (1978). Section 2243 also amended the Mann Act to cover males.

95. 18 U.S.C. § 2252 (1978).

96. Note, *Child Pornography: A New Role for the Obscenity Doctrine*, *supra*, note 86, at 725-26.

97. Note, *Child Pornography Legislation*, 17 J. FAM. L. 505, 531 (1978-79).

98. Ill. Ann. Stat. ch. 38, § 11-20a (Supp. 1978). Now repealed and replaced by § 11-20.1.

99. Fla. Stat. Ann. § 847.014 (Supp. 1978). Now repealed and replaced by § 847.071.

100. Ky. Rev. Stat. §§ 531.300-370 (Supp. 1978) and N.Y. Penal Law §§ 263.00-25



speech that contains explicit sexual depictions of children. However, the statutes which incorporate an obscenity requirement (#1 & 2) often define it in terms of variable obscenity.<sup>101</sup> As one commentator explained: "[U]se of the variable obscenity provision seems the only possible way to arrive at a finding of obscenity for material that depicts children . . . , because [it is the sexually deviant pedophile not] the average adult presumably [who] would . . . find sexual depictions of children appealing to his prurient interest."<sup>102</sup>

FIGURE 3  
USE OF OBSCENITY DEFINITIONS IN CHILD PORNOGRAPHY  
STATUTES

		Application to Solicitation & Production Offenses	
		Yes	No
Application to Distribution Offenses	Yes	1 Illinois	2 Florida
	No	3	4 NY & KY

*Child Pornography Decisions*

Were these child pornography statutes constitutional? In four early cases, state statutes were challenged primarily on first amendment and due process grounds. In two of these cases the defendants claimed that the statutes were vague and that they were also overbroad, because they contained no obscenity requirement for production offenses.

In a Florida case, *Griffin v. State*,<sup>103</sup> the defendant pled no contest to charges of procuring and using a minor in the production of obscene photographs. On appeal he contended that the Florida Statute

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(McKinney Supp. 1978).

101. Variable obscenity evaluates the sexual depictions of children or other susceptible groups including sexually deviant pedophiles when it appears from the character of the material or the circumstances of its distribution to be directed at such audiences.

102. Note, *Child Pornography: A New Role for the Obscenity Doctrine*, *supra* note 86.

103. 396 So.2d 152 (Fla. 1981).

§ 847.014, which made it unlawful "to procure a minor to perform or participate in any photograph, motion picture, exhibition, show, representation or other production, in whole or in part, which depicts sexual conduct, sexual excitement, or sadomasochistic abuse [and to produce same] involving a minor," was void for vagueness.<sup>104</sup> The Florida Supreme Court held "the statute is impervious to attack on grounds of vagueness, as a person of common intelligence has adequate notice of the conduct proscribed."<sup>105</sup> The court also dismissed the argument that the material could not be found obscene, because the statute failed to incorporate the *Miller* test: "the statute . . . does not proscribe constitutionally protected speech or activities, but . . . specific conduct relating to minors."<sup>106</sup> Since the statute had been constitutionally applied, the court found the defendant did not have standing to challenge the statute for overbreadth.<sup>107</sup>

In a Kentucky case, *Payne v. Commonwealth*,<sup>108</sup> the defendant had been convicted of sodomy, sexual abuse, and using a minor in a sexual performance.<sup>109</sup> On appeal, he contended that the prohibition in Kentucky Revised Statutes 531.310 on "the use of minors in actual or simulated 'acts of . . . homosexuality or lesbianism' [was] unconstitutionally vague,"<sup>110</sup> because it was unclear whether the activity prohibited included "such seemingly innocuous activity as 'two females embracing or two males standing with their arms around each other.'"<sup>111</sup> The Supreme Court of Kentucky replied: "[t]he definitional section [of the statute] read as a whole, coupled with a reference to any standard dictionary should provide the ordinary person of common sense a clear enough indication of the type of acts prohibited."<sup>112</sup> The Court then went on to consider the appellant's argument that the statute was overbroad because it prohibited constitutionally protected conduct. The Court distinguished between statutes in terms of the degree of constitutional scrutiny protecting a minor from actual

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104. Fla. Stat. § 847.014 (1977).

105. *Griffin*, 396 So. 2d at 154.

106. *Id.* at 155.

107. *Id.* at 155-56.

108. 523 S.W.2d 867 (Ky. 1981).

109. In *Payne* the defendant had been convicted in Fayette Circuit Court of sodomy, sexual abuse, and using a minor in a sexual performance. "Seven of the twenty counts of using a minor in a sexual performance [were] predicated upon appellant's act of videotaping a sexual performance by boys under the age of sixteen years. The remaining thirteen counts . . . [were] predicated upon appellant's act of taking photographs of a juvenile less than sixteen years of age engaged in sexual conduct." *Id.* at 869.

110. *Id.* at 871. (Quoting Ky. Rev. Stat. § 531.310 (1978)).

111. *Id.*

112. *Id.*

use in a sexual performance and those dealing with the distribution of materials portraying those sexual performances. Statutes such as K.R.S. 531.310 which "protect children from the conduct of being used in a sexual performance"<sup>113</sup> do not give rise to free speech considerations involved in the sale of child pornography.<sup>114</sup> As a consequence, "[a]ny overbreadth problems must be considered then in light of the less favored position of conduct in the constitutional framework."<sup>115</sup> *Erznoznick* required that the statute's "deterrent effect on legitimate expression [must be] both real and substantial."<sup>116</sup> Applying the *Erznoznick* test, the court concluded that "[a]ny deterrent effect on legitimate expression" of the photographed and videotaped conduct of minors engaged in sexual performances could "not be said to be real and substantial."<sup>117</sup>

These two decisions by the Florida and Kentucky Supreme Courts suggested that the procurement and production offenses of state statutes were not susceptible to vagueness and overbreadth challenges, because the statutes gave adequate notice to a person of common intelligence and the proscribed conduct was not protected speech. At the same time, two other state statutes which made distribution an offense were challenged in federal court on first amendment and due process ground with different results.

In a Texas case, *Graham v. Hill*,<sup>118</sup> a movie theatre and bookstore manager was prosecuted for violating the Texas Penal Code, section 43.25 which made it unlawful for a person to sell, distribute, or possess for sale or distribution "any motion picture or photograph showing a person younger than 17 years of age observing or engaging in sexual conduct."<sup>119</sup> The defendant filed a motion for summary judgment on the grounds of the statute's unconstitutional overbreadth. The federal district court granted the motion. Section 43.25 was overbroad, because it failed to include "the most basic requirement—that . . . the photograph or motion picture be obscene. (citations omitted) As a result. . . its deterrent effect on protected conduct is both real and substantial, especially considering the severe sanctions for violation of the statute."<sup>120</sup>

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113. *Id.*

114. *Id.*

115. *Id.* at 872.

116. *Id.*

117. *Id.*

118. 444 F. Supp. 584 (W. D. Tex. 1978).

119. Tex. Penal Code Ann. § 43.25(a) (Vernon 1977) (statute amended in 1979).

120. *Graham*, 444 F. Supp. at 592, 593.

In a New York case, *St. Martin's Press v. Carey*,<sup>121</sup> the state legislature had passed a child pornography statute which contained both production and dissemination offenses. Section 263.15 made it unlawful "to promote a sexual performance by a child when. . . he produces, directs, or promotes any performance which includes sexual conduct by a child less than sixteen years of age."<sup>122</sup> Shortly before its effective date, St. Martin's requested an injunction against its enforcement. The publisher claimed that section 263.15 would prohibit their publication, distribution, advertisement, and sale of the book *Show Me!*, because it was unconstitutionally broad. St. Martin's claimed that *Show Me!* was not obscene, but that section 263.15 would prohibit its publication. The publisher argued that the statute applied to motion pictures or photographs of children involved in sexual conduct whether or not they were obscene.<sup>123</sup> St. Martin's also claimed that section 263.15 was unconstitutional, because it was a denial of due process. New York, the publisher claimed, may prevent, its children from being exploited, but that purpose had no rational application to *Show Me!*, because the book was produced in Germany between 1969 and 1973.<sup>124</sup>

The district court granted the preliminary injunction, because of the statute's apparent overbreadth<sup>125</sup> and because the book which clearly fell within the statute might be protected first amendment speech,<sup>126</sup> and as a consequence, its removal from the marketplace would cause irreparable harm to the publisher's constitutional rights.<sup>127</sup> The court was, however, more persuaded by the publisher's due process argument. It agreed that New York could not make criminal "the dissemination of photographs of children taken outside the United States some years before the effective date of the statute."<sup>128</sup> On appeal, the decision was reversed, because the Second Circuit found that the suit did not involve a case or controversy where there was a lack of state prosecutorial activity<sup>129</sup> and the book did not come within the statutory language for due process reasons. "We fail to see," the Court of Appeals concluded, "how the New York legislature has any legitimate concern with German children in the years before 1973 . . ." <sup>130</sup>

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121. 605 F.2d 41 (2nd Cir. 1979), 440 F. Supp. 1196 (S.D.N.Y. 1977).

122. N.Y. Penal Law § 263.15 (Consol. 1977).

123. 440 F. Supp. at 1199 (S.D.N.Y. 1977).

124. *Id.*

125. *Id.* at 1206.

126. *Id.* at 1205.

127. *Id.* at 1203.

128. *Id.* at 1205.

129. 605 F.2d 41, 45 (2d Cir. 1979).

130. *Id.* at 44.

*New York v. Ferber*

When the United States Supreme Court considered the child pornography issue for the first time, the major constitutional issue was whether a state "consistent with the First Amendment [could] prohibit the dissemination of material which shows children engaged in sexual conduct regardless of whether the material is obscene."<sup>131</sup> The case, *New York v. Ferber*, involved a bookstore owner who had been convicted of promoting the sexual performance of a child under the same statute that had been at issue in *St. Martin's Press*: section 263.15.<sup>132</sup> Ferber had argued that the statute was unconstitutionally overbroad, because it did not contain a requirement that the child's performance be obscene.<sup>133</sup> This time, however, the overbreadth challenge came before the state supreme court with a different result. The New York Court of Appeals reversed the conviction because the statute would "in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment."<sup>134</sup> On appeal, the United States Supreme Court reversed the judgment unanimously.<sup>135</sup>

Justice White, writing for the Court, first identified the state's interest in regulating child pornography. "The state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"<sup>136</sup> Prevention of sexual exploitation and abuse of children, he said, "constitutes a governmental objective of surpassing importance."<sup>137</sup> The New York statute's regulation of distribution was an appropriate means to promote the state's interest. "The advertising and selling of child pornography provides an economic motive for . . . [its] production. . . ."<sup>138</sup> Moreover, its distribution "is intrinsically related to the sexual abuse of children [, because]. . . the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."<sup>139</sup> At the

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131. *Ferber*, 458 U.S. at 754.

132. *People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632, 634 (N.Y. Sup.Ct. 1978).

133. 52 N.Y.2d 674, 677, 422 N.E.2d 523, 524, 525 (N.Y. 1981).

134. 422 N.E.2d at 525.

135. *Ferber*, 458 U.S. 747 (1982). A majority opinion written by Justice White was joined by four members of the Court: Chief Justice Berger and Justices O'Connor, Powell, and Rehnquist. Separate concurrences were written by Justice Brennan joined by Marshall, Justice Stevens, and Justice O'Connor. Justice Blackmun concurred in the result.

136. *Id.* at 756, 757.

137. *Id.* at 757.

138. *Id.* at 761.

139. *Id.* at 759.

same time, the value of permitting children to appear in pornographic films and photographs was "exceedingly modest, if not deminimus."<sup>140</sup> In these circumstances, where the evil to be restricted "so overwhelmingly outweighs the expressive interests, if any at stake," a content-based classification was permissible.<sup>141</sup> Justice White concluded:

When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.<sup>142</sup>

How could child pornography be regulated? Justice White found that the *Miller* obscenity standard could not be used, because it was an output-oriented standard which focused on the harm the material posed to society and not an input-oriented standard which applied to the psychological harm inflicted on the child. As he stated concisely:

[T]he question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest [or is patently offensive to] the average person bears no connection to the issue of whether the child has been physically or psychologically harmed in the production of the work . . . . It is [also] irrelevant to the [abused] child . . . whether or not the material. . . has a literary, artistic, political, or social value.<sup>143</sup>

Miller's community standard test was also inapplicable to the evaluation of child pornography. "It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation."<sup>144</sup>

Child pornography would be judged by a separate four-part test: (1) adequate definition of the offensive sexual conduct, (2) visual depiction, (3) the minority of the subject, and (4) the knowledge of the defendant. According to Justice White, "the conduct to be prohibited must be adequately defined by the state law [,] . . . limited to works that visually depict sexual conduct by children below a specified age [, and with] . . . some element of scienter on the part of the defendant."<sup>145</sup>

140. *Id.* at 762.

141. *Id.* at 763, 764.

142. *Id.* at 764.

143. *Id.* at 761.

144. *Id.* at 761 n.12.

145. *Id.* at 764, 765.

The New York child pornography statute met this test. The conduct and context were sufficiently limited. Section 263.15 forbade the performance by a minor of "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. . . [in] any play, motion picture, photograph or dance, or any other visual performance exhibited before an audience."<sup>146</sup> The statute also forbade the knowing promotion of "sexual performances by a child under the age of sixteen by distributing material which depicts such performances."<sup>147</sup>

What remained to be addressed was the claim that the statute was unconstitutionally overbroad, because it prohibited the distribution of medical and educational materials that portrayed adolescent sex in a non-obscene manner. In response, Justice White said that where conduct and not merely speech is involved, *Broadrick v. Oklahoma*<sup>148</sup> had held that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."<sup>149</sup> Applying *Broadrick*, he said that *Ferber* was "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications."<sup>150</sup> Section 263.15 might forbid the distribution of material with serious literary, scientific, or educational value, but "these arguably impermissible applications [would] amount to [no] more than a tiny fraction of the material within the statute's reach."<sup>151</sup> As a consequence, section 263.15 was not substantially overbroad.<sup>152</sup>

In sum, *Ferber* upheld a New York and Kentucky-type child pornography statute<sup>153</sup> which dispenses with the obscenity requirement for the promotion and distribution of visual child pornography. What then of the *Miller* standard of obscenity? *Miller v. California* remains applicable to all obscene sexual representations of children in books, magazines, pamphlets, and oral recordings, but not visual materials.<sup>154</sup> However, the concurring opinions in *Ferber* suggest that the Court

146. *Id.* at 751.

147. *Id.* at 749.

148. 413 U.S. 601 (1973).

149. *Ferber*, 458 U.S. at 770 (Quoting *Broadrick*, 413 U.S. at 613).

150. *Id.* at 773.

151. *Id.*

152. *Id.*

153. See Figure 3 in text, at 456.

154. Note, *Child Pornography: A New Exception to the First Amendment—New York v. Ferber*, 10 FLA. ST. U.L. REV. 684, 696-97 (1983).

did not necessarily dispose of the *Miller* LAPS test when it decided that overbreadth challenges to child pornography statutes must meet *Broadrick's* demanding real and substantial test. Justice O'Connor stated: "the Court does not hold that New York must accept material with serious literary, scientific, or educational value."<sup>155</sup> Justice Brennan, joined by Marshall, went even further when he said: "depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would not violate the First Amendment."<sup>156</sup> Justice Stevens, however, saw no reason for the Court to discuss the matter, because there had been no claim that the material at issue in *Ferber* had any socially redeeming value.<sup>157</sup> In spite of these reservations, the *Ferber* child pornography test would be likely to dispose of almost all first amendment overbreadth and vagueness challenges. The decision did not, however, directly address two issues raised in pre-*Ferber* cases: the privacy rights of parents and adults and the due process right implicated by the exercise of the state's police power on behalf of children in foreign jurisdictions.<sup>158</sup>

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155. *Ferber*, 458 U.S. at 774 (O'Connor concurring).

156. *Id.* at 776 (Brennan with Marshall concurring).

157. *Id.* at 777 (Stevens concurring).

158. Two prosecutions under the federal Protection of Children Against Sexual Abuse Act of 1978, 18 U.S.C. 2423, 2251-53, will not be examined in the text but briefly mentioned here.

*U.S. v. Langford*, 688 F.2d 1088 (7th Cir. 1982) involved the issue of whether a prosecution under section 2252 was properly venued in the sending state and the jury was properly instructed to apply that state's community standard. The Seventh Circuit rejected the appellant's argument that the community standards of the receiving jurisdiction should apply, because it interpreted the appellants argument as an attack on the validity of the venue statute for federal obscenity cases, 18 U.S.C. § 3237(a) which "authorizes federal obscenity cases to be venued in either the sending jurisdiction, the receiving jurisdiction, or in any jurisdiction through which the mailed obscenity moves." *Id.* at 1094. The court found that this expansive view of section 3237(a) reflected a congressional interest "in protecting minors in . . . each and every aspect of the illicit pornographic scheme" to which the Supreme Court had given its support in *Ferber* (458 U.S. at 1095).

*U.S. v. Nemuras*, 567 F. Supp. 87 (D.Md. 1983) involved the issue of whether sexually explicit photographs, here defined as lewd exhibition of the genitals in section 2253, were taken with the knowledge that they would be distributed in interstate commerce in violation of section 2251. The court found that the evidence was clear that the photographs were distributed in interstate commerce. Therefore, the "sole issue" was whether the photographs were lewd. "In the court's view . . . lewd photographs of children [were] those in which the child is depicted as half or partially clothed, posed in such a way as to depict or suggest a willingness to engage in sexual activity or a sexually coy attitude." *Id.* at 89. The court then found that the photographs fit within its definition and upheld the defendant's conviction. *Id.* at 90.



*Impact of Ferber*

State child pornography prosecutions have continued since *Ferber*. Defendants in these cases have continued to raise overbreadth, vagueness, substantive due process, and right to privacy arguments. What impact *Ferber* has had will be examined at two levels: first at the trial court level in Kentucky in the distribution case of *Commonwealth v. Mikesell*<sup>159</sup> and at the state appellate court level in one distribution case, *People v. Enea*,<sup>160</sup> and two production cases: *State v. Shuck*<sup>161</sup> and *State v. Jordan*.<sup>162</sup>

## a. In Trial Court

What is the impact of *Ferber* at the trial court level in a jurisdiction with a child pornography statute analogous to New York's? A Kentucky prosecution for the distribution of child pornography, *Commonwealth v. Mikesell*,<sup>163</sup> will serve as an illustration. In *Mikesell*, the Lexington-Fayette Urban County police had established a fictitious organization, the Kentucky Adolescent Center (KyAC) to identify persons involved in child pornography.<sup>164</sup> In its letters to suspects, KyAC was presented as a non-profit clearing house for putting members in touch with each other for the purpose of producing, trading, and selling child pornography.<sup>165</sup> The defendant, Donald Mikesell, responded to the solicitation and in a meeting in a local hotel room agreed to loan an undercover police detective his collection of magazines, photographs, and films.<sup>166</sup> A month later, Mikesell wrote the detective complaining that he had received no material from him in exchange for the loan, asking for the return of his material, and an end to their relationship.<sup>167</sup> Instead, a prosecution was initiated under the Kentucky child pornography statute which prohibits the "distribution of matter portraying a sexual performance of a minor."<sup>168</sup> Mikesell

159. *Comm. v. Mikesell*, No. 83-CR-208 Fayette Cir. Ct., Ky. June 8, 1983 (Angellucci, J.) (order overruling defendant motion to dismiss the indictment on constitutional grounds).

160. 665 P.2d 1026 (Colo. 1983).

161. 661 P.2d 1020 (Wash. App. 1983).

162. 665 P.2d 1280 (Utah 1983).

163. *Mikesell* (court's order), No. 83-CR-208.

164. *Id.* at 2.

165. *Id.*

166. *Id.* at 3.

167. *Id.*

168. Ky. Rev. Stat. § 531.340(1) (1978). The Kentucky child pornography statute which prohibits "distribution of matter portraying a sexual performance of a minor" provides in relevant part:

did not dispute that the material portrayed "a sexual performance by a minor" as the phrase was used in the statute,<sup>169</sup> but in his attempt to dismiss the charges challenged the statute on constitutional grounds: its overbreadth and its intrusion on his right to privacy.

The Fayette Circuit Court first turned its attention to the defendant's two overbreadth arguments. Mikesell argued that under K.R.S. 531.300(1), distribution required the "transfer of possession" of the materials.<sup>170</sup> However, the statute was inapplicable here, because his "loan" of material was not commercial distribution, but merely a transfer of custody, "a non-commercial delivery for temporary examination."<sup>171</sup> Mikesell also argued that K.R.S. 531.300(1) could only protect Kentucky minors from involvement in the production of pornography. Here, however, the statute was overbroad, because "the pictures were taken of persons outside Kentucky and at a time prior to the enactment (in 1978) of K.R.S. 531.300."<sup>172</sup> His "loan" of a picture "long since produced, duplicated, sold, and circulated about the country . . ." he concluded, "did not make it a more or less permanent record."<sup>173</sup>

The Court dismissed the defendant's overbreadth arguments. The loan of the material was a transfer of possession as defined by K.R.S. 500.080(14), because it involved a transfer of "actual physical possession . . . or control over a tangible object."<sup>174</sup> No transfer of interest in property was required. Therefore, when the defendant transferred possession, it was an act in violation of the statute.<sup>175</sup> The Court also found unpersuasive, in light of *Ferber*, the defendant's argument that he loaned material produced outside Kentucky. In *Ferber*, the Supreme Court had concluded: "it is often impossible to determine where such

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A person is guilty of distribution of matter portraying a sexual performance of a minor when, having knowledge of its content and character, he:

- (a) sends or causes to be sent into this state for sale or distribution; or
- (b) brings or causes to be brought into this state for sale or distribution; or
- (c) in this state, he: (1) exhibits for profit or gain; or (2) distributes; or (3) offers to distribute; or (4) has in his possession with the intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor.

169. Ky. Rev. Stat. § 531.300(4), (6) (1978).

170. *Mikesell*, No. 83-CR-208 at 5 (Memorandum for Defendant on Constitutional Issues).

171. *Id.*

172. *Id.* at 8.

173. *Id.* at 23.

174. *Mikesell* (court order), 83-CR-208 at 4.

175. *Id.*

material is produced' . . . ."<sup>176</sup> *Ferber* also held that since child pornography is not protected by the first amendment, "a state is not barred from prohibiting the distribution of unprotected material produced outside the state."<sup>177</sup> Moreover, the circuit court dismissed as irrelevant the defendant's contention that the films and photographs were several years old. A principal concern of the Court in *Ferber* had been to uphold a state statute similar to Kentucky's in order to prohibit the continued circulation of the "permanent record" of the child's act in the mass distribution system of child pornography for years after the photographs were taken.<sup>178</sup>

The Fayette Circuit Court then turned its attention to Mikesell's two privacy claims. The defendant argued that his loan of materials was protected by his federal right to privacy. *Stanley v. Georgia's* right to possess obscene materials applied to him, because 'a hotel is for these purposes the same as a house.'<sup>179</sup> Moreover, his loan of the material was not affected by the limitation of the right to receive after *Stanley*.

In every case limiting the application of *Stanley*, there was a public element present. . . .None of these elements are present here. None of the post-*Stanley* cases have so limited its holding to permit states to constitutionally outlaw a private not-for-consideration loan of any form of communicative materials from one individual to another, conducted at a location in which the lender had a reasonable expectation of privacy.<sup>180</sup>

Mikesell also argued that he was protected by the state's right to privacy announced in *Commonweath v. Campbell*<sup>181</sup> which went beyond the First Amendment rights under the Federal Constitution.<sup>182</sup> This right, he argued, extended to his circumstances, because *Commonwealth v. Smith*<sup>183</sup> made it clear that friends sharing their vices together are entitled to the same protection as an individual acting privately in his home."<sup>184</sup>

176. *Id.* at 5 (Quoting *Ferber*, 458 U.S. at 766 n. 19 (1982)).

177. *Id.*

178. *Id.* at 5, 8.

179. *Mikesell* (defendant's memorandum), 83-CR-208 at 16 (citing *Stanley*, 394 U.S. 557, 565 (1969)).

180. *Id.* at 26.

181. 133 KY. 50, 117 S.W. 383 (Ky.App. 1909).

182. *Mikesell* (defendant's memorandum), 83-CR-208 at 17.

183. 163 KY. 227, 173 S.W. 340, (Ky.App. 1915).

184. *Mikesell* (defendant's memorandum), 83-CR-208 at 17.

The Court dismissed Mikesell's federal right to privacy claim on two grounds. First, *Stanley* held that mere possession of obscene materials in one's own home could not be made a crime. The defendant's behavior involved more than mere possession. "[T]he defendant expected to be able to 'borrow' another's collection of child pornography in return for the loan. This could arguably constitute 'consideration' for the loan which would further remove it from the category of 'mere possession'."<sup>185</sup> The Court then concluded that *Ferber* had approved state regulation of the defendant's activity, because "[l]oans made to individuals for the purpose of copying child pornography give the 'permanent record' of the child's act wider circulation for years after the original photograph was taken."<sup>186</sup> Second, the Court found that *Stanley* had not dealt with child pornography. *Ferber* had, however, "ruled that child pornography is not protected by the First Amendment if it involves scienter and the category is suitably limited and described to include only visual depictions of sexual conduct by children."<sup>187</sup> Thus the court concluded that *Ferber* would not allow a defendant's right to privacy to frustrate the government's compelling interest in preventing the sexual exploitation of children.<sup>188</sup> Then the court turned to the defendant's state privacy claim. It was "not unmindful" that Kentucky had a broader right to privacy than under the federal constitution, but it found that the defendant's argument was "grounded primarily on cases which the Court finds inapplicable . . . [because] the Kentucky legislature has recently shown its concern about the protection of children by the passage of the statute in question."<sup>189</sup>

#### b. In Appellate Courts

The *Mikesell* case never went to trial; the defendant accepted a plea bargain. In the aftermath of *Ferber*, many other child pornography cases have probably been disposed of in a similar manner. Appeals in cases where the defendant was tried and convicted have raised overbreadth and privacy issues similar to those examined in *Mikesell*. They have been rejected in all three reported state cases which will be discussed below.

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185. *Mikesell* (court's order), 83-CR-208 at 8.

186. *Id.*

187. *Id.* (Quoting *Ferber*, 458 U.S. at 758 (1982)).

188. *Id.* at 7-8.

189. *Id.* at 9.

In the only distribution case, *People v. Enea*,<sup>190</sup> the defendant claimed on appeal that Colorado statute, section 18-6-403<sup>191</sup> denied him due process, because it was vague. The Colorado Supreme Court dismissed the challenge, because Enea's "bald assertion of vagueness" was insufficient "to overcome the presumption of constitutionality to which the statute is entitled."<sup>192</sup> The Court then turned to the defendant's principal argument: the statute was overbroad, because it prohibited his participation in the sale of non-obscene photographic materials. *Ferber*, the Court said, was dispositive: these materials were unprotected by the first amendment.<sup>193</sup> Since the defendant had made no claim that the materials had artistic, educational, medical, or scientific value, the Court also found it unnecessary to reach the overbreadth issue.<sup>194</sup>

In *State v. Shuck*,<sup>195</sup> the first of two production cases decided since *Ferber*, the defendant argued on appeal that the Washington child pornography statute, chapter 9.68A<sup>196</sup> was unconstitutionally overbroad on its face, because "the preparation of educational materials depicting non-obscene adolescent sex falls within the ambit of the statute."<sup>197</sup> The Washington Court of Appeals answered: *Ferber* made it clear that "given the overriding governmental concern for the physiological, emotional, and mental health of the children involved,"<sup>198</sup> the child pornography statute did not violate the first amendment under the substantial overbreadth rule of *Broaderick*,<sup>199</sup> because it proscribed works of serious educational value.<sup>200</sup>

The other production case, *State v. Jordan*,<sup>201</sup> involved a challenge to the constitutionality of Utah statute, section 76-10-1206.5.<sup>202</sup> The Supreme Court of Utah dismissed the defendant's three constitutional challenges. First, the Court rejected the argument that the state had no right to prohibit acts which were not obscene under the *Miller* test.<sup>203</sup> *Ferber* had rejected the *Miller* standard and then created its own four-part test for child pornography. Judged by the *Ferber* stan-

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190. 665 P.2d 1026.

191. Colo. Rev. Stat. § 18-6-403 (Supp. 1980).

192. *Enea*, 665 P.2d at 1027.

193. *Id.* at 1028.

194. *Id.*

195. *Shuck*, 661 P.2d at 1020 (Wash.App. 1983).

196. Wash. Rev. Code Ann. § 9.68A (1981).

197. *Shuck*, 661 P.2d at 1022.

198. *Id.*

199. 413 U.S. 601 (1973).

200. *Shuck*, 661 P.2d at 1022.

201. *Jordan*, 665 P.2d 1280.

202. Utah Code Ann. § 76-10-12065 (Supp. 1981).

203. *Jordan*, 665 P.2d at 1283.

dard, the Utah statute was not substantially overbroad.<sup>204</sup> Second, the Court rejected the claim that the statute invaded the right of privacy of consenting people in their homes. This broad reading of *Stanley v. Georgia*,<sup>205</sup> the Court said, was a "sophistic argument [that] ignores the fact that we are not dealing with two consenting adults in the privacy of their own home."<sup>206</sup> Here the right to privacy could not frustrate the state's compelling interest in protecting minors against sexual exploitation. Third, the Court rejected the claim that the statutory phrase "simulated sexual conduct" was so vague as to deny the defendants due process, because the phrase was sufficiently defined by the statute to warn of the proscribed conduct.<sup>207</sup>

### c. Conclusions

This brief survey of post-*Ferber* cases suggests the following tentative conclusions about state child pornography statutes. Courts are unlikely to be receptive to vagueness challenges to either production or distribution offenses. Overbreadth challenges will meet with a similar reception. Courts are unlikely to accept a narrow construction of the distribution offense which would exclude a "loan" of child pornography. Loans are part of the network of commercial distribution. State power to control child pornography produced in other jurisdictions, challenged before *Ferber* on due process grounds, will now be rejected on overbreadth grounds. States are not prohibited from suppressing the distribution of unprotected material. Overbreadth challenges to both production and distribution offenses based on the claim that the child pornography at issue is non-obscene under *Miller* will be rejected, unless the defendant makes a claim that the material has educational, medical, or scientific value. Privacy claims by producers and distributors will not shelter the sexual exploitation of minors. *Stanley* continues to be narrowly construed. Post-*Ferber* courts have said that *Stanley* protects the use of obscene material by consenting adults, not the production of child pornography. *Stanley* also protects merely possession in one's home, it does not extend to the right to receive borrowed or loaned materials, because they are part of the scheme of commercial distribution.

### CONCLUSIONS

What is the current status of laws regulating the sexual exploitation of children in the pornographic marketplace? Participation of

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204. *Jordan*, 665 P.2d at 1284.

205. 393 U.S. 557 (1969).

206. *Jordan*, 665 P.2d at 1285.

207. *Jordan*, 665 P.2d at 1285-86.

children in the creation of visual child pornography will be judged by the *Ferber* four-part test. Distribution will be judged differently depending upon the subject and form of the material. If it is visual child pornography, irrespective of the identity of its intended audience, it will also be judged by the *Ferber* test. If it is distributed to children in the form of books, magazines, or movies then *Ginsberg* and *Erznoznick* hold that it must be obscene for children. If, however, the material is broadcast by radio and children are likely to be in the audience, then *Pacifica* holds it need be merely indecent to be prohibited, but not necessarily indecent to children.

How has the Supreme Court's response to the sexual exploitation of children affected the legal interests of the participants? There is no adult, parental, or child right (as defined by Models 2, 3, and 4) to produce or distribute child pornography. Adults have no right to exploit those persons incapable of consent, nor do parents have any authority to abuse minor children entrusted to their care. Only the Model 1 governmental interest based on the *parens patriae* and police powers to insure the well-being of children has been recognized by the Court. With obscenity legislation, the Court has recognized that an adult's right to distribute and receive protected materials under Model 2 differs from a child's right under Model 4. A parent has the discretion under Model 3 to purchase obscene material for their children, but none in the receipt of indecent broadcast material. Model 1 governmental interests in the protection of the child and parental assistance have justified a different standard for the sale of obscene material to minors under Model 4 and a restriction on parental discretion under Model 3 in the receipt of indecent broadcast material. However, as *Erznoznick* and *Pacifica* make clear, the Court has yet to confront the implications of that choice for Model 4 adult rights on the public streets and in the broadcast media.

In conclusion, the Burger Court has created two-child based exceptions to the obscenity doctrine since *Miller*, but with entirely different results. Two years after *Ferber*, there are few unanswered questions about the constitutional status of child pornography statutes. Only the issue of whether child pornography may have scientific, medical, or educational value remains to be examined. Six years after the *Pacifica* decision, the opposite circumstance prevails. Justice Brennan's questions remain to be answered by the Commission and the Court. Consequently, no one knows the meaning of a broadcast indecency standard, nor what action the FCC may take to protect the interests of children in the audience.