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Articles

Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession

BY JOSEPHINE R. POTUTO*

Although I am a first amendment absolutist, in the area of children I deviate from my absolutism, which is rather strange. It might seem like a contradiction, but bear with me.

I am in favor of a Nazi saying that a Jew should burn. I am in favor of a member of the Ku Klux Klan arguing that blacks either be lynched or be sent back to Africa, whatever. Whatever point of view that they have.

But in the area of children, they must be protected. For the 16 years I have published *Screw*, even before I published *Screw*, I have always felt children must be protected. So *Screw Magazine* has never championed, has always been appalled by the abuse of children. We have never condoned it, never run photos of child abuse and frankly, I feel that anyone who sells photos of child porn should be put away for a long, long time.¹

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¹ *Effect of Pornography on Women and Children: Hearings Before the Subcomm. on Juvenile Justice of the Senate Judiciary Comm.*, 98th Cong., 2d Sess. 303-04 (1984) (statement of Al Goldstein, publisher, *Screw*) [hereinafter *Effect of Pornography*]. Mr. Goldstein was discussing punishment of sellers and distributors and, by necessary implication, producers of child pornography. He was not discussing the consumption of child pornography in the home and in private, and I do not suggest that his concern for children necessarily would continue paramount in the context of at-home viewing. I include the quote simply as an illustration that the child pornography question makes strange bed-fellows both in terms of the activity depicted and in terms of its troublesome nature for the civil libertarians among us.

INTRODUCTION

In a different time² and in a different world³ a different United States Supreme Court⁴ decided *Stanley v. Georgia*.⁵ The Court held that although obscenity⁶ is unprotected speech under the first amendment,⁷ the government constitutionally may not prosecute an individual for the knowing but private possession of obscene material in the home.

The *Stanley* Court appeared to rest its decision on two grounds: a first amendment right to receive ideas whatever their political or social value⁸ and a privacy right adhering to the home that covers *intellectual*⁹ as well as other activity.¹⁰ While Supreme Court decisions since *Stanley* have narrowed or clarified

² *Stanley's* case was heard by the Georgia Supreme Court on February 13, 1968 and decided by that court on April 9, 1968. *Stanley v. State*, 161 S.E.2d 309 (Ga. 1968). His case was heard by the Supreme Court of the United States on January 14-15, 1969, and decided by that Court on April 7, 1969. *Stanley v. Georgia*, 394 U.S. 557 (1969).

³ For an appreciation of the marked difference in the kind and quantity of pornography available at the time *Stanley* was decided and today, compare The Report of the Commission on Obscenity and Pornography (Sept. 30, 1970) [hereinafter 1970 Pornography Report] with Attorney General's Commission on Pornography, Final Report (July 1986) [hereinafter A.G. Pornography Report]. See generally PORNOGRAPHY AND SEXUAL AGGRESSION (N. Malamuth and E. Donnerstein 1984).

⁴ The members of the *Stanley* Court were Chief Justice Warren and Justices Brennan, Black, Douglas, Fortas, Harlan, Marshall, Stewart, and White. The only justices still sitting are Brennan, Marshall, and White.

⁵ 394 U.S. 557 (1969).

⁶ The current Supreme Court test for obscenity comes from *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test limits obscenity (*i.e.*, unprotected speech) to material that, when considered as a whole, portrays sexual activity in a "patently offensive way," appeals to a "prurient interest in sex," and has no "serious literary, artistic, political, or scientific value." *Id.* at 24.

For purposes of this article "obscenity" refers to material that meets the *Miller* test and is either a visual depiction of adult conduct or words without depictions descriptive of adults or children. "Child pornography," however, always refers ONLY to visual depictions of children. Thus, when only words are concerned, the material is either obscene or it is protected speech; it is never child pornography. See *Ferber v. New York*, 458 U.S. 763, 764 (1982).

⁷ See, *e.g.*, *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁸ *Stanley*, 394 U.S. at 565. The *Stanley* right to receive ideas attaches so long as their receipt causes no harm to others—thus illustrating the distinction between private and public.

⁹ Italics are mine, as is the bias the italics represent.

¹⁰ The line of cases recognizing a constitutional right of privacy includes *Meyer v. Nebraska*, 262 U.S. 390 (1923) (child rearing and education); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (pro-

its constitutional base by rejecting any general first amendment (or privacy) protection for private use outside the home,¹¹ the Court has never questioned, but instead has reaffirmed consistently, that an adult has a privacy entitlement to possess obscenity in his home.¹²

In 1982 the United States Supreme Court decided *Ferber v New York*.¹³ The issue in *Ferber* was child pornography; the precise question was whether the first amendment prohibits criminal prosecution for the knowing sale¹⁴ of movies showing children engaged in sexual¹⁵ but not obscene¹⁶ activity. The Court held that even though not obscene, child pornography is still outside the protection of the first amendment because a state's

creation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception for married persons); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives for unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Carey v. Population Services International*, 431 U.S. 678 (1977) (contraceptive distribution).

¹¹ "The Constitution extends special safeguards to the privacy of the home. " *United States v. Orito*, 413 U.S. 139, 142 (1973). Thus, the Court has found no privacy protection under *Stanley* for the private transportation of obscene materials designed for commercial use. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). The Court also has found no privacy protection for the use of the mail to transport obscenity whether for commercial or private use. *Orito*, 413 U.S. at 139; *United States v. Reidel*, 402 U.S. 351 (1971). In distinguishing between at-home and other uses of pornography the Court explicitly rejected any notion of a constitutional "zone of privacy" that attaches to a pornography consumer outside the home. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65-67 (1973).

The Court has recognized that the home may provide a higher privacy interest than exists elsewhere and this is also true in the context of fourth amendment search and seizure cases. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980). *Compare Coolidge v. New Hampshire*, 403 U.S. 443 (1971) with *Carroll v. United States*, 267 U.S. 132 (1925).

¹² *See, e.g., Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986).

¹³ 458 U.S. 747 (1982). The members of the *Ferber* Court were Chief Justice Burger and Justices Brennan, Blackmun, Marshall, O'Connor, Powell, Rehnquist, Stevens, and White. Only three justices heard both *Stanley* and *Ferber*—Brennan, Marshall, and White.

¹⁴ The movie which *Ferber* was prosecuted for selling showed young boys masturbating. The New York statute under which *Ferber* was prosecuted prohibits among other things, producing, selling, lending, exhibiting, or distributing materials depicting the sexual performance of a child. N.Y. [PENAL] LAW, § 263.00(5) (McKinney 1980). A performance can be a play, movie, photograph, or "any other visual representation exhibited before an audience." *Id.* at § 263.00(4).

¹⁵ *Ferber* 458 U.S. at 752.

¹⁶ *Ferber* was acquitted of selling obscene films but convicted of selling child pornography. *Id.* The only issue before the Court was the constitutionality of a conviction for material that, due to the posture of the case, was in law not obscene. There is

interest in preventing harm to a child resulting from sexual exploitation "overwhelmingly outweighs"¹⁷ any presumptive first amendment interest.

At first glance, the *Ferber* holding, because it deals only with the *public sale* of child pornography, does not affect the at-home privacy interests protected by the *Stanley* Court. *Stanley* would seem to prevent making criminal the mere possession, without more, of child pornography in the home just as it prevents making the mere possession of obscenity criminal. Yet there is another view

Not only do at least eight states presently have statutes that make the knowing possession of child pornography a crime,¹⁸

no indication in *Ferber* that a jury finding that the movies were obscene would have been reversed under the *Miller* test. I believe it would be the rare case in which pictures of children engaged in sexual activity could not meet the *Miller* test.

¹⁷ *Id.* at 763-64. The Court commented that under *Ferber* not all portrayals of child sexuality would be unconstitutional. *Id.* at 764. The Court did not, however, provide guidance for differentiating between speech protected by the first amendment and unprotected child pornography material. For a discussion of how to differentiate, see *infra* text accompanying notes 243-48.

¹⁸ ALA. CODE §§ 13-A-12-192 (1982) (class C felony) (*Miller* obscenity only); ARIZ. REV. STAT. ANN. § 13-3553 (1978) (class 2 felony); FLA. STAT. § 827.071 (1976) (3d degree felony); ILL. REV. STAT. ch. 38, para. 11-20.1 (1979) (class 4 felony); KAN. STAT. ANN. § 21-3516 (Cum. Supp. 1985) (class E felony); MINN. STAT. § 617.247 (1983) (gross misdemeanor); OHIO REV. CODE ANN. § 2907.322 (Anderson Supp. 1984) (1st degree misdemeanor); UTAH CODE ANN. § 76-5a-3 (Cum. Supp. 1986) (2d degree felony); WASH. REV. CODE § 9.68A.07 (1984) (gross misdemeanor).

The recent amendments to the federal Sexual Exploitation of Children Act make the receiving of sexually explicit material transported in interstate commerce a criminal offense. 18 U.S.C. § 2252 (Supp. 1984). The Act no longer requires either *Miller* obscenity or a monetary purpose. *Id.*, see Note, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL 327, 344-48 (1985). If interstate transportation can be shown, possession without more is a crime under federal law punishable by up to \$100,000 or up to 10 years, or both. 18 U.S.C. § 2252(b). Punishment for a repeat offender is up to \$200,000 or up to 15 years or both, with a mandatory two-year minimum sentence. An organization may be fined up to \$250,000.

Three of the states making child pornography possession a crime also make criminal possession with intent (or offer) to distribute when distribution requires no economic motive. FLA. STAT. § 827.071 (2d degree felony); ILL. REV. STAT. ch. 38, para. 11-20.1 (still a class 4 felony); UTAH CODE ANN. § 76-5a-3 (still a 2d degree felony). Several other states make such possession with intent (or offer) a crime. ALASKA STAT. § 11.61.125 (Supp. 1985) (class C felony); IND. CODE § 35-42-4-4 (1985) (class D felony); TEX. PENAL CODE ANN. § 43-25 (Vernon 1974) (3d degree felony).

The underground child pornography market commonly includes the private non-commercial production and exchange of child pornography. See *infra* authorities cited note 125. Frequently, the pedophile who possesses child pornography will also trade, lend, and give it away. Thus, states that make it a crime to possess with intent (or offer)

but the Supreme Court of Ohio just held its statute constitutional under *Stanley* when applied to at-home possession.¹⁹ This reading of *Stanley* is supported by the Attorney General's Commission on Pornography²⁰ which recently recommended making at-home

without economic motive are likely to catch within the statutory net most of the pedophiles caught by states that make mere possession a crime. The major difference between the two crimes is not in the number or kind of persons encompassed by the statutory language but in the comparative ease with which mere possession may be prosecuted.

Obviously, the fact that mere possession is a crime (or arguably even possession with intent) does not mean the legislatures in the above listed states have made criminal *at-home* possession. Regarding each legislature at least three possibilities exist: (1) the legislature was unaware of *Stanley*; (2) the legislature spoke in the context of *Stanley*. Although no specific language exempts at-home possession, the legislature acted expecting the courts to continue engrafting this exemption through caselaw; or (3) the legislature acted thinking (or hoping) that *Stanley* no longer applied (never did apply) to child pornography. Further speculation is fruitless. Legislatures may speak with one voice but surely do not act with one mind. It is sufficient to note that, if the Constitution permits, the statutory language in the above statutes would not preclude prosecution for at-home possession.

¹⁹ *State v. Meadows*, 503 N.E.2d 697 (Ohio 1986), *cert. denied*, 107 S. Ct. 1581 (1987).

²⁰ A.G. Pornography Report, *supra* note 3, at 648-60. The Report contains nine recommendations for state legislation:

- (1) forfeiture of property used in or derived from child pornography;
- (2) making child pornography production a felony;
- (3) making it a felony to conspire to produce, exhibit, or distribute child pornography or to provide children for use in child pornography;
- (4) making it a felony to share information regarding the location of child pornography;
- (5) making it a felony to buy or sell children for use in child pornography;
- (6) making child pornography featuring an adult sufficient evidence to convict the featured adult of child molestation;
- (7) making it possible to prove age of child in ways other than through the child's testimony;
- (8) requiring photo finishing labs to report suspected child pornography;
- (9) permitting lifetime probation for child pornographers and other pedophiles.

Id. at 648-71.

The Report contains seven recommendations for federal legislation:

- (1) requiring producers of "sexually explicit visual depictions" to keep records showing participant consent and age;
- (2) prohibiting pornography participation for anyone under 21;
- (3) prohibiting computer network child pornography information exchange;
- (4) permitting postal service initiated forfeiture actions;
- (5) defining "visual depiction" for child pornography and including undeveloped film in the definition;
- (6) providing financial incentives for state child pornography task forces;
- (7) making it a felony to buy or sell children for use in child pornography.

Id. at 618-47. The Report also contains recommendations for state and federal law

possession of child pornography a crime.²¹

How should at-home possession of child pornography be treated? The policy implications attendant on the answer are enormous, whether one focuses on protection of children or on protection of individual liberties. Balancing these interests was troubling for me.²²

enforcement agencies, for courts and correctional officers, for social service agencies, and for the schools. *Id.* at 631-735.

It is well beyond the scope of this Article to evaluate the efficacy, legality, and need for each of the Commission's recommendations. Some recommendations may be of questionable legality. The call for legislation declaring that a picture of an adult in child pornography is sufficient to convict is one, for example, that troubles me. A court may find that the depiction makes out a *prima facie* case. Under separation of powers principles, I doubt that a legislature could require a court to so find. *Cf.* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Some of the recommended legislation seems unnecessary. I do not believe, for example, that a legislative declaration is necessary for a court to permit a child's age to be proved in some way other than through the child's testimony. Such express statutory declaration is present in some of the current statutes. *See, e.g.,* MO. CRIM. CODE § 568.100 (Supp. 1985). This declaration may represent a legislative response to court decisions. If so, then I can only say that the decisions are misguided. In a statutory rape case it obviously is necessary to prove that, at the time of the sexual activity, the child was below the age of consent. Proof can be achieved through the child's testimony, the parent's testimony, a birth certificate, or, I continue to believe, the jury's conclusion from looking at the child. The same would hold true for child pornography.

²¹ A.G. Pornography Report, *supra* note 3, at 648-60. The Report briefly summarizes the various uses made of child pornography besides sale or exchange. One use is pedophilic sexual arousal. *See, e.g.,* Hartman, Burgess & Lanning, *Typology of Collectors*, in *CHILD PORNOGRAPHY AND SEX RINGS* 86 (A. Burgess ed. 1984). Another use is enticement of children to participate. A.G. Pornography Report, *supra* note 3, at 649. Finally, child pornography may be used to illustrate the activity desired of the child. *Id.* at 649-50.

The Commission repeated the *Ferber* Court conclusions that the child participant suffers harm from child pornography. In a very abbreviated fashion, the Commission concluded that *Ferber* falls outside *Stanley* because while *Stanley* focused on the adult at-home viewer's privacy rights, *Ferber* focused on the harm to children from pornography. *Id.* at 658-60.

While it is comforting to encounter a reading similar to mine of *Ferber* and *Stanley*, it also is troubling because of the ease with which the Commission found child pornography different from the privacy interests of such concern in *Stanley*. More troubling, however, is the failure of the Commission even to consider, much less assess, society's costs in making at-home possession criminal.

²² I owe a debt to several colleagues both for listening to me talk out my concerns and for contributing opinions, ideas, and suggestions. I particularly thank Charles Tremper, psychologist and lawyer, for reviewing my discussion of experts and data; Roger Kirst for checking my evidence discussion to assure I was above an "embarrassment to self and school" standard; and to Richard Harnsberger and John Snowden for worrying about the first amendment implications with me.

Having seen the child victims of sexual abuse as well as the difficulties of successful prosecutions,²³ I found myself easily persuaded that making the possession of child pornography a crime is necessary, right, and constitutional. Yet as a firm believer in the principle that people have the right to think and read as they please, I found myself horrified at the specter of government intrusion and control over what a person is permitted to read in the privacy of his or her own home—even in an area of “speech” in which I find no redeeming social value.²⁴ As a professor of criminal law, I was troubled by both the ready willingness to create a new crime and the potential extension of government power that could ensue.²⁵

How *Stanley* can be read to permit making at-home child pornography possession a crime—and whether, even if a constitutional crime under *Stanley*, a legislature should choose to make it a crime—is the focus of this article. Discussing how is easy; explaining why I think the legislation is warranted is more difficult.

I. STANLEY V GEORGIA

Let me begin by looking closely at what *Stanley v Georgia*²⁶ means today. In deciding that the private possession of obscenity was constitutionally protected, the *Stanley* Court stated, unequivocally and repeatedly, that there is a constitutional right, at least in one's home, to read and watch what one pleases.²⁷ The Court described its objection to a possessory offense as follows:

But we think that mere categorization of these films as “obscene” is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Four-

²³ For a discussion of prosecution difficulties, see *infra* text accompanying notes 175-92.

²⁴ Here I go further than Mr. Justice White in *Ferber*. He admitted the possibility that the social value in child pornography might reach the levels of “exceedingly modest” or “de minimis.” *Ferber*, 458 U.S. at 762.

²⁵ See *infra* text accompanying notes 228-36 for a discussion of *New York v. P.J. Video*, 106 S. Ct. 1610 (1986) (search and seizure of first amendment materials).

²⁶ 394 U.S. 557 (1969).

²⁷ *Id.* at 564.

teenth Amendments. Whatever may be the reach of other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If 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. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity²⁸

Much has been written about the breadth and constitutional underpinnings of *Stanley*, both by the Court in its own later opinions²⁹ and by a host of commentators.³⁰ It is clear today that *Stanley* neither protects all consensual adult conduct engaged in privately at home³¹ nor insulates obscenity or child pornography possessed and shown privately outside the home.³²

While the *Stanley* Court did not rest its decision directly on the assumption that the private consumption of obscenity harms no one, obviously that assumption partially explains its decision to insulate at-home use. The *Stanley* Court noted that a state constitutionally may make criminal at-home possession of stolen goods, or drugs, or firearms (or, by extension, explosives and noxious chemicals)³³ without offending any *Stanley* privacy interests. Although these possessory crimes are distinguishable from obscenity because they implicate no first amendment interests,

²⁸ *Id.* at 565.

²⁹ *See, e.g.,* *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States v. Reidel*, 402 U.S. 351 (1971).

³⁰ *See, e.g.,* Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203; Ratner, *Social Importance of Prurient Interest—Obscenity Regulation v. Thought-Privacy*, 42 So. CAL. L. REV. 587 (1969); Note, *Stanley v. Georgia: A First Amendment Approach to Obscenity Control*, 31 OHIO ST. L.J. 364 (1970).

³¹ *Stanley*, 394 U.S. at 568 n.11. Any lingering doubts that *Stanley* protected all consensual at-home private conduct were laid to rest in *Bowers*, 106 S. Ct. 2841 (State constitutionally may make criminal at-home adult consensual homosexual conduct.).

³² *See* cases cited *supra* note 11. *See Bowers*, 106 S. Ct. 2841, 2846 (“*Stanley* did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment.”).

³³ *Stanley*, 394 U.S. at 568 and n.11.

other crimes, such as the government's power to make criminal the possession of written material involving national security interests, another crime the *Stanley* Court mentioned expressly,³⁴ surely do implicate first amendment interests.

Thus the notion that obscenity consumption by itself causes no real harm necessarily rests somewhere close to the surface of the opinion in *Stanley*. The case for distinguishing child pornography is made on this basis.

II. WHAT IS NOT DISTINGUISHABLE ABOUT CHILD PORNOGRAPHY

Before making the case for distinguishing child pornography, let me begin at the other end and discuss the ways in which child pornography may not be distinguished—at least without directly overruling what remains of *Stanley*, that proscription of obscenity requires a semblance of commercial or public or out-of-home use.³⁵

A. *Unprotected Speech*

The simple fact, for example, that child pornography is unprotected speech most assuredly would not put it outside the reach of *Stanley*. Although one might quarrel with the conclusion that obscenity is outside the ambit of the first amendment,³⁶

³⁴ *Id.*

³⁵ It is not my purpose in this article to argue for or against the retention of the *Stanley* rule. If *Stanley* goes, then obviously at-home child pornography possession constitutionally may be made criminal. My purpose is to evaluate whether the Court may uphold *Stanley* regarding at-home possession of obscenity and yet find it inapplicable to child pornography.

³⁶ I believe that the Court is wrong in excluding obscenity for two reasons. First, excluding some speech may chill other speech which, although protected, sits definitionally close to the boundary between protected and unprotected speech. Second, the distinction between protected and unprotected speech is an unpersuasive rationale and not specific as to its limitations.

Obscenity conveys ideas and emotions. The rationale for its exclusion from the protected ambit sounds to me simply like a state conclusion that obscenity conveys a bad message. Yet protection of the unpopular message is the foundation of first amendment protections.

I do not quarrel with the societal judgment that some viewpoints are repugnant or even detrimental to the societal fabric. I quarrel with vesting in government the right to

the Supreme Court of the United States consistently has held that obscenity is excluded.³⁷ Yet the fact that obscenity is unprotected speech did not prevent the *Stanley* Court from holding that its possession at home was insulated from criminal prosecution.³⁸ It follows that even the most creative sophist could not succeed with an attempt to move child pornography out from under *Stanley* merely by stating that child pornography is unprotected speech.

B. *Direct Harm*

In *Stanley* the State argued that viewing obscenity is criminal because viewing causes harm to the viewer that society should attempt to avoid.³⁹ The *Stanley* Court rejected this attempt to protect the viewer's mind from what the State argued is the pernicious influence of obscenity.⁴⁰ To the extent that obscenity conveys ideas⁴¹ (whether the joy of sex or the subjugation of women) and that ideas by definition cause impact, shielding a consenting adult viewer from the impact of an idea runs directly against traditional first amendment values.⁴² The expectation that speech can influence and persuade is, after all, a major premise underlying the societal protection afforded speech.

In rejecting a possession crime justified on the theory of preventing the impact of the obscenity, the *Stanley* Court essentially employed a first amendment analysis to speech unprotected under the first amendment.⁴³ Whether one applauds or criticizes

silence those viewpoints. Today's right-thinking government might be yesterday's Germany under Hitler. In any event it should be the speech—not societal conclusions as to its worth—that determines its staying power.

The most that can be said about obscenity as unprotected speech is that, although the underlying rationale easily could encompass all unpopular speech, obscenity can usually be contained by focusing on the sexual (and speech plus) message conveyed.

³⁷ See cases cited *supra* note 7

³⁸ *Stanley v. Georgia*, 394 U.S. 557, 558 (1969).

³⁹ *Id.* at 566-67.

⁴⁰ *Id.* at 565-66.

⁴¹ Ideas may stimulate emotions as well as the intellect. *E.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971).

⁴² See generally, T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424 (1962); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 *COLUM. L. REV.* 391 (1963).

⁴³ As a consequence, some argued that *Stanley* presaged first amendment protection for obscenity. See, *e.g.*, Ratner, *supra* note 30, at 593.

this approach, no good reason exists for the Court to abandon it when child pornography is concerned. Protection of the adult viewer from himself constitutes no more a sufficient state interest when the at-home adult privately views child pornography than when he views obscenity depicting adults.

C. Consequential Harm

The next argument for distinguishing *Stanley* obscenity from child pornography is based on the difference in societal harm which results if a viewer is induced by his or her viewing to commit harmful, even criminal acts.⁴⁴ This argument focuses on the harm the viewer might cause to others as a result of the viewing rather than on the direct harm to the viewer caused by the viewing.

The State argued in *Stanley* that obscenity viewing often is a condition precedent to a greater harm, the commission of serious crimes.⁴⁵ The State asserted the power to anticipate and to avoid the greater harm by prosecuting obscenity viewing just as it avoids the greater harm, *i.e.*, the completed crime,⁴⁶ by prosecuting an attempt. The *Stanley* Court refused to countenance possession prosecutions based on a theory of consequential harm.⁴⁷ The Court rejected this approach again by essentially using a first amendment analysis.⁴⁸

In part, the Court based its refusal on the absence of evidence showing a causal connection between obscenity and crime⁴⁹ (translated into first amendment language this means that no argument could be maintained that obscenity creates a "clear and present danger" of societal harm).⁵⁰ Even if causation could

⁴⁴ See A.G. Pornography Report, *supra* note 3, at 304-06.

⁴⁵ *Stanley*, 394 U.S. at 566.

⁴⁶ Questions in attempt law include how far past preparation the person must act so as not to punish solely for the bad mens rea. MODEL PENAL CODE, § 5.05 comment (Tent. Draft No. 10 1960). A related question is whether to punish the attempt as seriously as the completed crime. Compare MODEL PENAL CODE § 5.05 (1962) and comment (Tent. Draft No. 10 1960) with J. WAITE, THE PREVENTION OF REPEATED CRIME 8-9 (1943).

⁴⁷ *Stanley*, 394 U.S. at 566.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, *e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Yates v. United States*, 354 U.S. 298 (1957), *overruled in part*, 437 U.S. 1 (1978).

be shown, however, the Court indicated it still would have rejected an at-home possession crime because the government should punish the harm arguably caused—in other words the crime—not the receipt or the transmission of the thought leading to the harm.⁵¹

1. *The Case for Saying Child Pornography Is Different*

The *Stanley* conclusion that no empirical evidence exists to support a viewing-doing connection⁵² probably is distinguishable from what is known today about child pornography.⁵³ Apparently virtually all child sexual abusers possess child pornography.⁵⁴ While not all consumers of child pornography abuse children, the congruence of abusers and pornography is troubling and supports some connection, although not necessarily causal, between the person who looks at child sex and the person who has sex with children.⁵⁵

Not only is there a viewing-doing connection where child pornography is concerned, but a child victim is qualitatively different from an adult victim. Thus the *Stanley* Court deter-

⁵¹ *Stanley*, 394 U.S. at 566.

⁵² *Stanley*, 394 U.S. at 566. Indeed, at least for cases in which violent obscenity is concerned, current research seems to support a viewing/doing associational connection even for adults. See A.G. Pornography Report, *supra* note 3, at 309-34. I do not find this particularly surprising. We assume, after all, that good literature uplifts and ennobles. Why should not the converse also be true? Cf. H. EYSENCK, *PSYCHOLOGY IS ABOUT PEOPLE* 256 (1972).

⁵³ See, e.g., Belanger, Conner, Copenhafer & D'Agostino, *Scope of the Problem: Investigation and Prosecution in CHILD PORNOGRAPHY AND SEX RINGS* 25-50 (A. Burgess ed. 1984); Hartman, Burgess, & Lanning, *supra* note 21, at 93-109.

⁵⁴ See, e.g., *Effect of Pornography*, *supra* note 1, at 143 ("[W]ithout exception, every pedophile we interviewed admitted to owning an extensive collection of adult and child porn.") (statement of Daniel Campagna); Hartman, Burgess, & Lanning, *supra* note 21, at 93 (1984); FINKELHOR, *CHILD SEXUAL ABUSE* 42-43 (1981); Davidson, *Sexual Exploitation of Children: An Overview of its Scope, Impact, and Legal Ramifications*, F.B.I. LAW ENFORCEMENT BULL. 26, 27 (Feb. 1984); Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 814-17 (1978).

⁵⁵ The evidence is not sufficient to prove causation. See generally A.G. Pornography Report, *supra* note 3, at 901-1035; *PORNOGRAPHY AND SEXUAL AGGRESSION* (N. Malamuth and E. Donnerstein 1984); Hartman, Burgess, & Lanning, *supra* note 21, at 83-92.

mination—that a state's interest in crime prevention is sufficiently satisfied by punishing the doing even if viewing and doing are connected,⁵⁶ is inapplicable to the child victim. Although harm exists to both children and adult victims of nonconsensual or violent crime, at any level (except possibly death) the harm to a child will be perceived as more serious than the equivalent harm to an adult.

If viewing stimulates the adult possessor to engage in non-violent, consensual activity with another adult, this activity either is not criminal or, if criminal, is not a crime a state would prosecute.⁵⁷ This is not the case when child pornography stimulates the possessor to have nonviolent sexual activity with a child: this activity is always a serious crime. With respect to consequential harm, then, if sexual activity relates to viewing, sexual activity always harms a child and always more seriously than sexual activity harms an adult.

2. *The Case Against*

Thus the question of consequential harm as a way to distinguish obscenity and child pornography under *Stanley* is a closer question than that of direct harm because with consequential harm the danger is both greater (since its impact falls on a child) and closer (since for child pornography an associational connection exists between viewing and doing that was absent from the state's showing in *Stanley* regarding obscenity). Yet this distinguishing ground ultimately must fail because it intrudes too closely on what is right about *Stanley*—that citizens should be able to think and to read what they want without governmental sanction, at least until a direct causative link is shown. A focus on potentially causative harmful impact is simply insufficient justification to override the *Stanley* first amendment concerns. In addition, this focus opens the door to other problems.

⁵⁶ The task of distinguishing on this basis admittedly is difficult because the *Stanley* Court's conclusion that punishing the act itself is sufficient clearly formed the more telling basis for rejecting the State's legal position.

⁵⁷ The argument frequently is made that viewing obscenity enhances adults' sex lives. A.G. Pornography Report, *supra* note 3, at 343.

Some pedophiles,⁵⁸ for example, use adult obscenity to engage in sexual acts with children.⁵⁹ If the projected harm to the child is sufficient to stop child pornography viewing, then this rationale might mean the end of *Stanley* even for at-home viewing of adult obscenity

D *The Aid and Abet Theory*

An attempt to distinguish child pornography from obscenity on the basis of aid and abet theory also should fail if *Stanley* still lives. Because *Stanley* was tried for possession⁶⁰ (as a principal) and not for distribution or production (on an aid and abet theory of culpability), no aid and abet argument was relevant and none was made. Thus nothing in the *Stanley* opinion directly addresses this theory of state power to prosecute on possession facts alone.⁶¹

The Model Penal Code makes a person responsible for the criminal activity of another when, "with the purpose of promoting or facilitating the commission of an offense, he aids or agrees or attempts to aid such other person in planning or committing it, or having a legal duty to prevent the commission of the offense, fails to make proper effort so to do."⁶² Of course, a variety of views exists of how direct one's conduct must be to make one an aider in the criminal law

Consider the plight of Herbert Wilcox,⁶³ the newspaper publisher convicted of aiding an alien to work illegally in England. Wilcox attended and reviewed an illegal jazz concert. A literal reading of the court's opinion leads to the conclusion that Wilcox's willing (and paid for) attendance at a concert he knew to be illegal was an encouragement sufficient to constitute aiding

⁵⁸ For purposes of this article "pedophile" is defined as an adult whose sexual preferences run to children and not other adults. A pedophile need not act out his sexual preferences but if he does, he acquires his child victims through some form of "entice-ment" rather than through physical force.

⁵⁹ A.G. Pornography Report, *supra* note 3, at 411 n.74.

⁶⁰ *Stanley*, 394 U.S. at 558.

⁶¹ No one in *Stanley* argued accomplice liability on a theory of aiding the distribution by the purchase.

⁶² MODEL PENAL CODE § 2.06 (Final Tent. Draft 1962).

⁶³ *Wilcox v. Jeffery*, 1 All E.R. 464 (K.B. 1951).

without regard to the additional assistance provided by the favorable review he gave the concert.⁶⁴

It is a traditional law school exercise to inquire into the culpability of each of the patrons who also paid to attend the concert. The consensus conclusion most frequently reached is that under the court's reasoning each patron is guilty of aiding but that no prosecutor would prosecute because of time constraints and fear of public outcry. The important point for my purposes is that *Wilcox* illustrates a broad but by no means unique version of aid and abet theory that supports a production or a distribution guilty verdict of a purchaser in the production chain who acts with knowledge of the initial illegal activity.

In *Wilcox* the concert was performed in public⁶⁵ while in *Stanley* the obscenity was viewed at home. Nevertheless, the distinction is irrelevant for aid and abet theory in which the focus is on the quality of the assistance and the intent of the assistant.⁶⁶ Privacy as its own interest is relevant to liability only if the thing done in private and not communicated logically cannot be said to "aid."

In *Stanley's* case, assuming a public or commercial transaction, a patron aids not only by purchasing obscene material but also by belonging to a class of consumers but for whose existence the distributor and the producer would not act. Since no com-

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ For that matter, aiding and abetting need not necessarily require the principal's awareness that he is being assisted. See, e.g., *State v. Tally*, 15 So. 722, 739 (Ala. 1894).

Although under *Stanley*, an aid and abet theory based on positive acts of encouragement and assistance does not distinguish obscenity from child pornography, there is a possible difference based on the legal duty in many states to report child abuse. Because no equivalent duty to act arises when adult sexual activity is depicted, an argument might be made that the purchaser/viewer of child pornography aids production and distribution in a way the purchaser/viewer of adult sex materials could not. The former aids by his failure to act rather than in any encouragement or assistance represented by the purchase. For a discussion of child reporting statutes and how they may be used to distinguish *Stanley*, see *infra* text accompanying notes 137-42.

The more direct and cleaner approach, however, is to permit prosecution for the possession. Accomplice liability theory, after all, focuses on the aid and comfort given the principal by the aider and the nature and degree of the aider's activity. As to that, there is no difference between the consumer of adult obscenity and the consumer of child pornography. The difference is in the harm caused by the consumer in his or her own right.

mercial production of obscenity exists without a market,⁶⁷ the at-home possessor aids in the production and the distribution.

This aid and abet argument works just fine as a theoretical exercise but fails upon re-examination of the *Stanley* opinion.⁶⁸ In upholding freedom of thought and of privacy in the context of a possessory offense, the *Stanley* decision must be read to reject holding Stanley liable on the theory of aiding and abetting obscenity distribution.⁶⁹ Otherwise, without requiring any additional activity or without pointing to a change, however slight, from the *Stanley* facts, privacy and freedom of thought may be infringed merely by redefining the crime committed.

E. Ferber v New York

As discussed earlier,⁷⁰ the factual setting in *Ferber* concerned the public dissemination of child pornography and no *Stanley* privacy question even arguably was at issue. In discussing why the obscenity standard is inapplicable to child pornography, the Court made some very broad and emphatic statements about both the harm to children that child pornography causes and the state's interest in protecting children.⁷¹ From these statements comes the argument that *Ferber* qualifies *Stanley*

⁶⁷ A large amount of child pornography production and distribution is both home-produced and non-commercial. See authorities cited *infra* note 125. Obviously an aiding and abetting argument would not work for this part of the market unless non-commercial production and distribution are made criminal. The federal government and many states have now done just that. *E.g.*, 18 U.S.C. § 2252 (1984 Supp.). Even so, the pedophile who produces his own child pornography is unlikely to be deterred by the absence of others with whom to share.

An additional question regarding aiding and abetting is whether it is an available theory for culpability when the child pornography is produced outside the state or outside the United States. For a discussion of the power and appropriateness of a state sanctioning conduct that takes place in another jurisdiction, see *infra* text accompanying notes 154-63.

⁶⁸ I say this although with child pornography it may be possible to make a successful aider and abettor argument that was not persuasive to the Court in *Stanley*. See *supra* note 66. In *Stanley* it was quite clear that the Court, in sub silentio seeing no harm in adult pornography, would not have been receptive to the idea of accomplice liability.

⁶⁹ Or on a theory of conspiracy to distribute it.

⁷⁰ See *supra* text accompanying notes 13-17.

⁷¹ *Ferber v. New York*, 458 U.S. 747, 758 (1982).

The *Ferber* Court focused on a state's interest in protecting child welfare,⁷² a "government objective of surpassing importance."⁷³ This state interest comes mainly from two sources: a state's legitimate interest in assisting parents to protect and to nurture children;⁷⁴ and its independent obligation to protect children from physical or from moral injury that would impede their growth into responsible, well-rounded, caring, and capable adults.⁷⁵

The precedent-making nature of the *Ferber* holding was that the obscenity standard need not be reached to make public dealing in child pornography a constitutional crime.⁷⁶ The *Ferber* Court rejected the use of the obscenity standard to differentiate between legal and illegal child pornography for the commonsense reason that if the activity depicted causes harm to a child, then that harm is no less real because the work, taken as a whole, is not obscene.⁷⁷ The Court held that although not obscene, child pornography of the kind involved in *Ferber* is outside the protection of the first amendment because a state's interest in preventing the harm to children resulting from sexual exploitation "overwhelmingly outweighs the expressive interests, if any, at stake."⁷⁸

In deciding that child pornography causes harm to a child, the *Ferber* Court examined the harm that may result solely from the existence of the visual depiction as well as the harm caused

⁷² *Id.* at 755. The Court cited to several of its opinions in which it afforded greater scrutiny and protection to rights and interests of children than those of adults. See, e.g., *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978) (under statutory authority prohibiting broadcast of indecent language, F.C.C. may sanction broadcaster of indecent but nonobscene speech due in part to interest in protecting children); *Ginsberg v. New York*, 390 U.S. 629 (1968) (state may protect children from exposure to material not obscene for adults on theory that it is obscene for children); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (under state child labor law, states may prohibit use of children to distribute religious material despite first amendment impact).

This past term the Court added yet another decision to this list. *Bethel School District No. 403 v. Fraser*, 106 S. Ct. 3159 (1986) (state may protect child listeners by disciplining child speaker for giving lewd speech at school assembly).

⁷³ *Ferber*, 458 U.S. at 757.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 763-64.

to the child by participation in the sexual activity depicted.⁷⁹ Whether the *Ferber* holding rests on a finding that child pornography by itself harms a child participant or on a finding that child pornography—plus the sexual activity and entire atmosphere of the pornography enterprise—harms a child is not entirely clear. What is clear is that every member of the Court found that child pornography constitutes child abuse.⁸⁰

The case for distinguishing child pornography from the *Stanley* setting rests ultimately on the *Ferber* Court finding that child pornography causes harm to children.⁸¹ The stronger the showing of harm caused by the pornography, the easier is the policy decision to make at-home possession criminal since even incremental law enforcement gains protect children. The converse also is true: the less clear the showing that harm is caused, the less clear that incremental law enforcement gains protect children at all.

III. JUST WHAT IS THE HARM AND JUST WHAT CAUSES IT?

The notion that a child can be harmed simply by knowing that pornography depicting him or her exists and may be seen seems intuitively correct. Because pornography remains a present fact, the harm it causes has the capacity to recur in a way that actual sexual abuse—however injurious—does not.

A sexually abused child may remember unrecorded sexual activity. The child may even worry that someone might disclose his or her sexual past. The child knows, however, that the

⁷⁹ *Id.* at 759.

⁸⁰ Five members of the Court—Chief Justice Burger and Justices O'Connor, Powell, Rehnquist, and White—form the majority opinion. Of the concurrences filed, Justice O'Connor wrote to emphasize the harm to a child caused by child pornography. *Id.* at 775. Justices Brennan, Marshall, and Stevens all agreed that there is serious harm caused. *Id.* at 775-77. Justice Blackman concurred in the result without opinion. It is difficult to explain his concurrence without assuming he agreed that child pornography harms children.

⁸¹ It is possible to distinguish between child pornography and the *Stanley* case on the basis of the burglar tool analogy (and the harm to children from sexual activity) or on the affirmative reporting obligation arguably applicable to child pornography viewing. But I believe the case for a child pornography exception stands or falls on a showing of harm. Certainly for Justices Brennan and Marshall this issue of harm is determinative. *Id.* at 777 (Brennan, J., concurring); see *supra* text accompanying notes 128-29 (discussion of burglar tool analogy).

number of people who saw what he or she did is small: the sex occurred in private, not in an amphitheater. This child probably believes, with reason, that each day decreases the likelihood that his or her sexual past will be disclosed.

The child pornography victim, however, must live with the possibility that his or her activity may be *seen* years after his or her participation and by an ever-increasing number of people.⁸² As compared to the child whose activity was not photographed, the pornography victim faces a greater possibility that his or her sexual activity will not remain secret, a continuing possibility of disclosure, and certainly a decreased likelihood that, if disclosed, he or she successfully can protect his or her privacy and reputation by denying participation.⁸³

Assume, for example, that Ida Innocent, a seven-year-old child, and Peter Predator, a 35-year-old pedophile, live in a small town. Assume Ida had sex with Peter, and Peter photographed these encounters. Although Ida no longer sees or associates with Peter, he retains these pictures and continues to enjoy looking at them. Worse, as is the pedophile's penchant, he has shared the pictures with others having a similar pedophilic interest.⁸⁴ Thus Peter's continuing intrusion of Ida's privacy is compounded by the intrusion of additional viewers.⁸⁵

The pictures depict Ida engaging in various sex acts with Peter; they probably represent a shameful episode to her. Al-

⁸² *Ferber v. New York*, 458 U.S. 747, 759-60 (1982). See authorities cited *infra* note 94.

⁸³ Children understand the permanence of a picture. K. Lanning, *supra* note 21, at 83-84. They have attempted burglaries to obtain the pictures. *Id.* One commentator even insinuates that the permanence of a picture is more harmful than the sexual activity depicted. Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981).

⁸⁴ See generally authorities cited *infra* note 125.

⁸⁵ *Ferber* 458 U.S. at 760 n.10. And this is not all. These additional pedophiles also may prey on Ida themselves. The threat of public dissemination of the pictures may be enough to coerce Ida into cooperation. A.G. Pornography Report, *supra* note 3, at 650. Consider in this light the decision by the Miss America Pageant to divest Vanessa Williams of her crown once nude and suggestive pictures of her were published. Consider the argument made by the child plaintiffs in *Faloon v. Hustler Magazine* that publication of their nude pictures in *Hustler* damaged their reputations and placed them in a false light. 799 F.2d 1000, 1004-07 (5th Cir. 1986). Consider also the child who became suicidal after news of her child porn participation hit the papers. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 292 (1980).

though Ida may try to, and may succeed in, disassociating herself from Peter and her sexual activity with him, she knows the pictures still exist and that Peter still looks at them. She either knows or suspects that he has shown them to others. Ida has the additional worry that those outside the pedophilic underworld may see the pictures and recognize her. This could happen in a variety of ways.

Peter (or one of the pedophiles with whom he has shared) might sell the pictures to a magazine sold under the table in a local bookstore.⁸⁶ A salesperson could flip through the pages, recognize Ida, and tell others. Peter's home (or the home of one of the pedophiles with whom he has shared) might be burglarized and the pictures taken. His housecleaner (or the housecleaner of one of the pedophiles with whom he has shared) could come across them inadvertently.

As yet another possibility, Peter (or one of the pedophiles with whom he has shared) could be arrested and the photographs found during a legal search. The police, the prosecutor, the defense counsel, the office staff of each of these, and, if the case goes to trial, the judge, the judge's clerk, the judge's secretary, the bailiff, the jury, the witnesses, and perhaps even the trial spectators may see the pictures. Any of these people, whether ethically or not, might talk to others.

Suppose Ida is twelve or fourteen when her pornography participation becomes public information (or worse, suppose Ida was twelve or fourteen rather than seven when the pictures were taken). Although the law may treat her participation as nonconsensual, the pictures show a participant who appears willing. Those with knowledge of these pictures could include Ida's neighbor, a potential employer, a spouse, a friend, or a relative of a potential employer or a spouse. Many of those with knowledge will define Ida's character and her morality based on these pictures.⁸⁷ Even those who do not hold her morally culpable

⁸⁶ Obviously we would not expect Peter to sell the pictures if he could be identified through them. But the pictures could be of Ida by herself, or of Ida with another child, or even of Ida with Peter when Peter's back is to the camera.

⁸⁷ See generally Burgess, Hartman, McCausland, & Powers, *Impact of Child Pornography and Sex Rings on Child Victims and Their Families*, in *CHILD PORNOGRAPHY AND SEX RINGS* 111-26 (A. Burgess ed. 1984).

may keep distant through worry about the effect of the sexual abuse on her adult mental stability or on her ability to be a caring and responsible parent.⁸⁸

The likelihood of disclosure of Ida's early sexual initiation or child pornography participation may not be great but the impact of any disclosure certainly will be. In any event, Ida cannot calculate the risk of disclosure and she probably will spend a lifetime worrying.

I have just outlined the intuitive case for saying that child pornography in and of itself harms children. This intuition is shared by at least some of the psychiatric or medical experts who have worked with child pornography victims.⁸⁹ Based on their work with child pornography and sex abuse victims, these experts seem to agree that a child depicted in pornography suffers injury not only from participation in the sexual activity but also by having to deal with the existence of an always available permanent record. At best, however, their conclusions are based on limited clinical sampling and are not identified clearly as deriving solely from child pornography as distinct from the sexual activity depicted or another pornography-related consequence.⁹⁰

In apparent recognition of the equivocal nature of the foundation for these expert conclusions, the Attorney General's Commission on Pornography recommends additional research directed specifically at separating the harm caused by the depiction alone from all the other harm caused by pornography-related activi-

⁸⁸ There is data showing sexually abused children becoming child sex abusers when they are adults. See, e.g., *Ferber* 458 U.S. at 757 n.9; A.G. Pornography Report, *supra* note 3, at 613. The impact of child sex abuse on adult emotional stability also has been well documented. See, e.g., Berliner, Blick, & Buckley, *Expert Testimony on the Dynamics of Intra-Family Child Sexual Abuse and Principles of Child Development* in ABA NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, CHILD SEXUAL ABUSE AND THE LAW (5th ed. 1984); Knuckman, *The Role of Community Mental Health Centers*, in CHILD PORNOGRAPHY AND SEX RINGS 149 (A. Burgess ed. 1984); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV 977 (1969); Shouvlín, *supra* note 83, at 535, 539; Burgess, Hartman, McCausland, & Powers, *supra* note 87, at 119-20; Stack, *Preventing the Sexual Exploitation of Children: The New York Experience*, 56 N.Y.S. BAR J. 11, 12 (Feb. 1984).

⁸⁹ See *infra* notes 93-94.

⁹⁰ See authority cited *infra* note 94.

ties.⁹¹ If the argument for child pornography harm rests solely on the limited research presently available, without regard either to the intuition that harm is caused⁹² or to the associated harm unarguably caused by child pornography participation, the *Ferber* result would be troubling,⁹³ both because the experts so far

⁹¹ A.G. Pornography Report, *supra* note 3, at 731.

⁹² I am hardly an expert on the use of social science data by courts and legislators. My intuitive sense, however, is that when limited expert findings do not match an intuitive judgment about the way things work, judges—and the rest of us—would be strongly inclined to reject the expert findings as insubstantial or inconclusive. I think this response is warranted.

⁹³ *Ferber* 458 U.S. at 758-59 n.10. The *Ferber* Court was able to point to three sources that child pornography by itself harms children. Together, they hardly make a strong case.

One source, a psychiatrist who works with abused children, described his experience with one 12-year-old child. Schoettle, *supra* note 85, at 289, 292; Schoettle, *Treatment of the Child Pornography Patient*, 137 AM. J. PSYCHIATRY 1109, 1110 (1980). He notes that "[t]here is no literature available concerning the psychiatric consequences of children having been involved in photographed sexual encounters" Schoettle, *supra* note 85, at 291 (emphasis added). His conclusion that the pictures by themselves cause harm apparently is based on his clinical experiences (a 12-year-old threatened suicide once her pornography participation became public) as well as some general literature suggesting that non-violent sexual episodes in themselves do not harm children: it is the fear of disclosure (as well as family reaction and lack of professional intervention) that does the damage. See, e.g., Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex, and Secrecy*, 10 NURSING CLIN. N. AMER. 551, 556-58 (1975) (disclosure of the sexual activity is a key factor, and the victim's emotional reaction is influenced by how and why the secret is disclosed).

The second source relied on by the *Ferber* Court was a lawyer who worked with abused children and who described his intuitive conclusion. Shouvlín, *supra* note 83, at 545.

The third source was a student note that includes an interview with a child psychiatrist who says that "the victim's knowledge of publication" of the pornography "increases the emotional and psychic harm." Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295, 301 (1979).

The case for showing harm from child pornography alone, moreover, is not universally accepted. First, it can be argued that the harm suffered by fear of disclosure results from society's refusal to see a child's seemingly willing participation as victimization and that the harm would disappear if only societal attitudes were changed so that a child pornography victim could feel no more ashamed than a child robbery victim does. *Cf.* *Stephenson v. State*, 179 N.E. 633 (Ind. 1932).

In *Stephenson*, the defendant kidnapped and raped a woman. While the defendant still held the woman, she took poison. She then refused his offer of hospitalization. After being returned to her parents she lingered ten days and then died. The *Stephenson* Court held that the defendant caused the victim's death even though (1) the only physical injuries he inflicted were bite wounds and (2) the victim's subsequent irresponsibility

have little evidence upon which to base their conclusions and because of the difficulties associated with research in this area.⁹⁴

Fortunately, the harm need not be evaluated on this basis. Since not all things are susceptible of proof, reliance on shared intuition is neither unacceptable to the Court⁹⁵ nor invalid as

(taking the poison) probably was caused by the humiliation of the rape not by her physical wounds. See Comment, *Criminal Law and Procedure—Homocide—Causal Relation Between Defendant's Unlawful Act and the Death*, 31 MICH. L. REV. 659, 668-74 (1933). In a real sense, the victim's shame, plus her feeling of societal disapprobation, caused her death, not Stephenson's acts.

Second, not only is it clinically difficult to separate the harm caused by child pornography from that caused by the sex act and other pornography related activity, but clinical work is a methodology considered inferior to controlled empirical experiments using the scientific method. See generally D. CAMPBELL, *QUASI-EXPERIMENTATION* (1969); R. NISBETT & L. ROSS, *HUMAN INFERENCE* (1980); Eysenck, *Sex, Violence, and the Media: Where Do We Stand Now?*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 305 (N. Malamuth & E. Donnerstein ed. 1984). It ethically is not possible to set up actual experiments with children testing the effects of abuse or child pornography participation or disclosure by abusing one group of children and then comparing their reactions against those of an unabused control group. Clinical work takes place in the real world with real human emotions, not in a laboratory where all but one variable, the harm caused by the pornography itself, can be held constant. At best there is inevitable imprecision in these circumstances when gauging causation and degree of harm. Cervonnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 DICK. L. REV. 691-719 (1985); Meehl, *Theoretical Risks and Tabular Asterisks: Sir Karl, Sir Ronald, and the Slow Progress of Soft Psychology*, 46 J. CONSULTING AND CLIN. PSYCH. 806 (1978). See Wilson, *Violence, Pornography and Social Science*, in *THE PORNOGRAPHY CONTROVERSY* 238-43 (1975) (R. Rist ed. 1975).

To the extent clinicians develop the data relied on, additional difficulties arise. A clinician can be naive. Clinicians are trained to believe patients, not to evaluate with suspicion. Cf. D. O'BRIEN, *TWO OF A KIND: THE HILLSIDE STRANGLERS* (1985). I know of a psychiatrist who testifies fairly regularly at criminal trials. He feels that clinicians may be the least equipped to distinguish truth from lies because to a large degree this distinction is irrelevant to their work: if a patient relays a story that is false, his inaccurate perception or untruthfulness is part of his sickness.

The clinician's interest, moreover, properly is in the patient, not in a world view of how to deal with a problem. If a possibility exists, however slight, of harm resulting from pornography, then the clinician's inclination will be to urge action to eliminate it.

⁹⁴ Among the problems associated with experts is knowing when you have a reliable one. They are no more infallible or more uniformly wise and ethical than the rest of us. They sometimes disagree with each other (Every insanity prosecution, after all, has an expert on each side, looking at the same individual and the same event and coming to contradictory conclusions.). Experts also may offer opinions beyond a responsible point suggested by the state of their research. See, e.g., Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 457-58 (1983-84).

⁹⁵ The Court repeatedly has said that legislative findings need not reach scientific certainty before a legislature may act. See *Bowers v. Hardwick*, 106 S. Ct. 2841, 2846 (1986); see, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-65 (1973); *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968).

forming at least a partial basis upon which decisions may be made. In evaluating policy choices, ignoring our perceptions of the way things work and the way people act is both absurd and impractical. To ignore this intuition when we think that the result will bring serious harm to children is unacceptable.

The question, then, is not whether to rely on intuitive judgments but just how much to rely in the absence of other proof. This is a very difficult question to answer when the corollary interests—privacy and free speech—are also significant, and when reliance on intuition risks infringement with arguably little showing that children will be benefitted.

This question need not be answered here, however, because indisputable evidence exists that child pornography harms children. As the *Ferber* Court recognized, the harm to a child pornography participant like Ida is not only her loss of privacy and her fear of disclosure but encompasses as well the intertwined and inseparable harms caused by child pornography participation.⁹⁶

A direct, probably causal, relationship exists between the child pornography market and child sex abuse depicted in pornography. The prime purpose of commercially produced child pornography, after all, is neither to satisfy the child's adult partner sexually nor to provide vicarious pleasure to the pornography producer; its purpose is to produce the child pornography to be sold. Since the market for depiction of child sexual abuse encourages and adds to instances of this abuse,⁹⁷ the *Ferber* Court readily concluded that harm to the child from child pornography properly includes harm caused by participation in the sexual activity depicted.⁹⁸

This conclusion is substantiated by the inability of many experts even to separate out the harms caused. Some experts

⁹⁶ See *Ferber* 458 U.S. at 758. "It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id.* at n.9 (citing Schoettle, *supra* note 85 at 296; Schoettle, *supra* note 93 at 1110; Densen-Gerner, *infra* note 152 at 80).

⁹⁷ *Id.* at 759-60.

⁹⁸ *Id.* at 758 n.9, 759-60. The Court also noted a pressing need to go after distributors because the underground child pornography market made it difficult to get the producers. *Id.*

relied on by the Court,⁹⁹ and a few who have come forward since *Ferber*,¹⁰⁰ seem unable to unravel the harm caused by the child pornography alone from the harm derived from the collective abuse—the enticement or desensitizing, the participation in the sexual activity, the selling and the trading of children on an underground pornography market, *and* the harm caused by the permanence of the record.

In a hearing before the Senate Judiciary Committee, for example, one expert was asked: “How harmful is it for a child to be photographed in a sexually explicit position? What is the long range impact on the psyche or life of that child?” Her response was: “It is not just that photograph but it is what happens before, what happens afterward, where all of the photos go. And there [sic] always are sexually molested, abused, raped, whatever, that is all part of the whole scene.”¹⁰¹

Now consider the differences between child pornography and adult obscenity both in the degree of harm the participant suffers from the participation and in the level of societal interest in preventing that harm. When children are concerned, virtual un-animity exists that serious harm results from participation in sexual activity.¹⁰² Virtually no one removed from the pedophile and the child pornography underground argues that this harm to children is imaginary. At the very least, production of child

⁹⁹ *Id.* at 758 n.9.

¹⁰⁰ See, e.g., CHILD PORNOGRAPHY AND SEX RINGS (A Burgess ed. 1984); Statement of John Rabun, Dpty. Dir., Nat'l Ctr. for Missing and Exploited Children, *Effect of Pornography*, *supra* note 1 at 133, 145.

¹⁰¹ Question by Arlen Specter, Sen., Pa., Answer by Ann Burgess, Prof. Psychiatric Nursing, Univ. Pa., *Effect of Pornography*, *supra* note 1 at 148.

¹⁰² In western society there is almost unanimous agreement that early sexual activity, particularly in an exploitive relationship, causes harm to a child. See, e.g., U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CHILD SEXUAL ABUSE: INCEST, ASSAULT, SEXUAL EXPLOITATION 7 (1981); Committee on the Judiciary, U.S. Senate, Sen. Hearing No. 98-1267 (Sept. 12, 1984); R. HOLMES, THE SEX OFFENDER AND THE CRIMINAL JUSTICE SYSTEM 91-103 (1983); Green, *Children and Pornography: An Interest Analysis in System Perspective*, 19 VAL. LAW REV 441 (1985); Lanning & Burgess, *Child Pornography and Sex Rings*, FBI LAW ENFORCEMENT BULL. 10 (January 1984); Shouplin, *supra* note 83; at 535; Stack, *supra* note 88, at 11; Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 J. OF LAW REFORM 295 (1979); Note, *supra* note 18, at 327; Comment, *supra* note 54, at 809; authorities cited *supra* note 88. *But see* G. Wilson and D. Cox, THE CHILD LOVERS [A STUDY OF PAEDOPHILES IN SOCIETY] 129 (1983).

pornography involves posing a child in a suggestive fashion and in circumstances likely to cause nervousness, shame, and anxiety¹⁰³ In most cases, moreover, the production of child pornography necessarily involves sexual abuse of children. Sexual abuse means committing a crime—a clear statement that society considers the harm substantial.

The data from physicians, psychologists, psychiatrists, empirical studies, and others—not to mention the intuitive judgment of the general public¹⁰⁴—all affirm an even stronger consensus as to the harm caused by pornography participation than was the situation when the Court decided *Ferber* States without child pornography statutes have enacted them; states with relatively narrow descriptions of the child pornography offense have expanded their definitions of the crime.¹⁰⁵ More child victims are being found; more experts are devoting time to evaluating the effects of child sex abuse.

Although some people argue that adults also suffer harm from pornography participation,¹⁰⁶ there is at best no consensus

¹⁰³ This is not to suggest that everyone agrees that *Ferber* was correctly decided or that any step taken in defense of children is appropriate. *Ferber* himself made, for example, a quite common argument: that only obscene speech should be prohibited from distribution (with the apparent underlying premise that the actual abuse involved in the depiction should be handled directly by prosecuting the child sex producer for child sex abuse). An A.C.L.U. response to a law enforcement claim that the child abusers use an underground computer network to locate and trade victims provides another example of the absence of unanimity as to the solution to the child pornography problem. Said the A.C.L.U. representative, "A bill to regulate sexually oriented computer services is an unwise and unconstitutional effort to terminate services which now permit consenting adults to communicate privately via home computers about their sexual thoughts and fantasies." *Lawmen Say Child Molesters Use Computer Network*, Lincoln (Neb.) Journal, Oct. 2, 1985, at 32, col. 3.

¹⁰⁴ See, e.g., Allen, *The War on Children*, BIBLE ADVOCATE 4 (December 1985); *Child Porn Curb*, 72 A.B.A. J. 32 (February 1982); *Lawmen Say Child Molesters Use Computer Network*, *supra* note 103, at 32, col. 3.

¹⁰⁵ To demonstrate this reaction, one need only compare the statutes in effect when *Ferber* was decided with the statutes listed in this article. See *Ferber* 458 U.S. at 749 n.2; statutes cited *supra* note 18. See also, Note, *Child Pornography Legislation*, 17 J. FAM. LAW 505 (1979); Note, *supra* note 18, at 327

¹⁰⁶ See, e.g., A.G. Pornography Report, *supra* note 3, at 299-347. The Report distinguishes between primary harm, that which is harmful in itself, and secondary harm, that which leads to harmful consequences. *Id.* at 304. Generally, pornography is not a primary harm. *Id.* at 304-06.

that consenting adults suffer harm.¹⁰⁷ Even if the potential harm to the adult or the child participant were equivalent, moreover, no equivalent compelling state interest is triggered to protect adults from such harm. Adults are assumed to take care of themselves in interpersonal relationships and to make voluntary and knowing choices to participate in pornography production.

Certainly these assumptions do not apply to children. Whatever the controversy about the nature of the consent of an adult participant in pornography,¹⁰⁸ far less controversy—if, indeed, any at all—can exist regarding the inability of a young child to give a truly knowing and voluntary consent.¹⁰⁹ For child pornography, moreover, issues about a child's capacity to consent are compounded by the exploitative relationship out of which the pornography develops.¹¹⁰

IV STANLEY V FERBER: WHAT ELSE IS DIFFERENT ABOUT CHILD PORNOGRAPHY?

By itself, the *Ferber* conclusion that child pornography causes substantial harm to a child participant is more than sufficient to distinguish *Stanley* and to permit making at-home child por-

¹⁰⁷ At least this is true when the pornography, or obscenity, is neither violent nor degrading and is shared and viewed in private. See, e.g., *id.* at 335-37. There are those who argue that even public dissemination of such material should not be sanctioned. The Supreme Court of the United States does not share this view. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

¹⁰⁸ See, e.g., L. LOVELACE & M. MCGRADY, *ORDEAL, AN AUTOBIOGRAPHY* (1980).

¹⁰⁹ See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."). The capacity to consent knowingly is related to the child's age. The younger the child, the less the ability to make a knowing consent—and the greater the likelihood that a state will not recognize any evidence that the consent was knowing. Below a certain age a conclusive presumption of non-consent operates. In modern statutory rape statutes the age of conclusive non-consent frequently is around 12. See, e.g., N.J. STAT. ANN. § 2C:14-2 (West 1982). For the most serious of the sex offenses, rape, the Model Penal Code put the age of non-consent at under 10. MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962). The Model Penal Code describes a third degree felony as sexual intercourse with a child less than 16. *Id.* § 213.3. Here the conclusive presumption is that a child under 16 cannot voluntarily consent—or, put another way, the law will not hear argument that the child voluntarily consented.

¹¹⁰ See Guio, Burgess, & Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. CRIME AND JUST. 65 (1980).

nography possession criminal. Combined with other differences between child pornography and the *Stanley* Court's concerns in evaluating obscenity, the case for distinguishing *Ferber* becomes virtually unassailable.

Directly related to the harm to children from sexual activity and to the compelling state interest in protecting them from that harm is the fact that most of the activity depicted in child pornography itself is a crime—a crime that *is* enforced and that public and law enforcement officers alike believe *should* be enforced.¹¹¹ If a film depicts actual intercourse with a twelve-year-old, for example, then actual intercourse must have taken place¹¹² and obviously a substantial state interest exists in prosecuting this crime, whether or not depicted on film.

The legal situation regarding the adult sexual activity depicted in *Stanley* obscenity is substantially different from the situation regarding child sexual activity. Following the lead of the Model Penal Code,¹¹³ most states no longer make adultery or fornication criminal and, although slightly less than half the states still make sodomy a crime,¹¹⁴ prosecutions are rare outside

¹¹¹ See, e.g., Note, *The Porno Plague*, THE BIBLE ADVOCATE 2 (January 1985); Davidson, *supra* note 54, at 26.

¹¹² Child pornography need not involve actual sexual activity. Most motion pictures produced by the major motion picture companies are not "hardcore." They portray sexual intercourse through suggestion rather than on screen commission of the sex act. In addition, actual sex or even nude scenes may be handled by a double. This, evidently, is how the nude scenes of the then child actress Brooke Shields were handled in *Blue Lagoon*. The nature of the producer and audience of child pornography, particularly when coupled with the limited production budgets generally available, suggest that the use of body doubles is unlikely and certainly that simulated sex is not all there is to child pornography.

¹¹³ MODEL PENAL CODE § 213 (official Draft & Revised Comments 1962). For an explanation of the Model Penal Code decision to eliminate adultery and fornication as crimes, see MODEL PENAL CODE AND COMMENTARIES pt. II, 430 (1980). See also Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963). For examples of state statutes eliminating these offenses, see ARK. STAT. ANN. § 34-1209 (1977); N.J. STAT. ANN. ch. 14, 24 (1983).

Even states that retain one or the other of these offenses classify them as minor crimes. See, e.g., NEB. REV. STAT. § 28-704 (1985) (adultery a class I misdemeanor).

Admittedly I have not canvassed the world, but I know of no modern prosecutions for adultery or fornication. I suspect if there were any, the media would have trumpeted them far and wide.

¹¹⁴ Twenty-four states still make sodomy a crime. See *Bowers v. Hardwick*, 106 S. Ct. 2841, 2847-48 n.1 (1986) (Powell, J., concurring).

the context of homosexual activity¹¹⁵ Indeed, the recent holding in *Bowers v Hardwick*¹¹⁶ regarding a state's power to proscribe sexual conduct in private and at home was limited to homosexual sodomy;¹¹⁷ the State assumed that its sodomy statute would be unconstitutional if applied to marital relations.¹¹⁸

Nor did the *Hardwick* Court conclude that prosecution of homosexual activity was wise state policy. It confined its task to the question of whether homosexuality was a fundamental right.¹¹⁹ The four dissenters¹²⁰ subscribed to a ringing endorsement of at-home privacy rights governing "the most intimate aspects of [citizens'] lives." ¹²¹ Justice Powell, who made the fifth vote in the majority opinion, wrote separately to suggest that a prison sentence for the crime of sodomy¹²² would constitute cruel and

¹¹⁵ There is no evidence to suggest that prosecutions under these statutes are pursued. The State in *Hardwick* admitted that no such prosecution had occurred in Georgia since "the 1930's or 40's" *Id.* at 2859 n.11 (Stevens, J., dissenting). The State also chose not to prosecute *Hardwick* when his act of sodomy was uncovered. *Id.* at 2848 n.2 (Powell, J., concurring). *Hardwick's* case went to court at his instigation as a declaratory judgment action, an unwise choice.

¹¹⁶ See generally *id.*

¹¹⁷ It is true that in the posture of the case the only litigant before the court was asserting his right as a homosexual to at-home privacy. *Id.* at 2842-44. Arguably, then, the Court properly limited itself to the only issue before it. It is naive to believe that the Court necessarily would have treated the question of sodomy between heterosexuals and especially married heterosexuals the same way it treated homosexual sodomy.

¹¹⁸ *Id.* at 2858 n.10. The Court left this question unanswered. *Id.* at 2842 n.2.

¹¹⁹

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.

Id. at 2843.

¹²⁰ Justices Blackmun, Brennan, Marshall, and Stevens.

¹²¹ *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

¹²² I believe Justice Powell's concurrence should be read to say any prison sentence would fall under the eighth amendment. His language, however, does contain some ambiguity: "In my view, a prison sentence for such conduct—*certainly a sentence of long duration*—would create a serious Eighth Amendment problem." *Id.* at 2847 (emphasis added).

unusual punishment under the eighth amendment.¹²³ Doubtless he would not find an eighth amendment violation if a prison sentence were imposed for at-home sodomy of a child.

At the very least, then, the public, prosecutors, and courts perceive adult private consensual sexual activity, even if defined as crime, in a different light from adult/child or adult-inspired child sexual activity. This difference in perspective easily could contribute to the Court holding that no privacy entitlement to view child pornography exists.

More than that, the possession of child pornography by the child sex abuser evidently demonstrates more than the obvious conclusion that one who engages in sex with children has a sex interest focused on children rather than adults. Abusers produce child pornography in conjunction with their own sexual activities—much child pornography is home grown¹²⁴—and they also use it to entice or to condition a child to participate in sexual activity.¹²⁵

Conditioning occurs by demonstrating that other children have participated (with the implicit message, that nothing is wrong with sexual activity if other children do it and have fun, corroborating the adult's explicit urgings).¹²⁶ Using pornography to entice or to "persuade" is apparently a common tactic: pedophiles almost never use force to get their way.¹²⁷ For child pornography possessors, at-home possession serves a purpose

¹²³ Clearly, then, the *Hardwick* concurrence and dissent demonstrate that the present Court will not uphold a prison sentence for at-home sodomy. Four dissenters find it unconstitutional to call at-home sodomy a crime in 1986; Powell thinks it unconstitutional to send anyone to prison for committing the crime.

¹²⁴ The underground child pornography market commonly includes the private non-commercial production and exchange of child pornography. H.R. Rep. No. 536, 98th Cong., 1st Sess. 2, 11 (1983), reprinted in 1984 U.S. Code Cong. and Ad. News 492, 493, 502 (1985); Davidson, *supra* note 54, at 27; Lanning & Burgess, *supra* note 102, at 11; Stack, *supra* note 88, at 13.

¹²⁵ Use of pornography to entice or desensitize children is "significant." A.G. Porn Report, *supra* note 3, at 411. See also Hartman, Burgess & Lanning, *supra* note 21, at 86.

¹²⁶ U.S. DEP'T. JUSTICE, F.B.I., CHILD MOLESTING: A BEHAVIORAL ANALYSIS FOR LAW ENFORCEMENT 61 (1986).

¹²⁷ See generally G. WILSON AND D. COX, *supra* note 102, at 51; Belanger & Belcher, *Typology of Sex Rings Exploiting Children*, in CHILD PORNOGRAPHY AND SEX RINGS 51 (A. Burgess ed. 1984).

additional to the mere at-home consumption; it is a tool to ease commission of the abuse.

When characterized as a tool in the commission of the child abuse crime, the nature of child pornography, as well as the question whether possession may be made criminal, immediately takes on a different look. Consideration of the crime of burglary illustrates this difference. A burglar frequently uses tools to ease commission of a burglary. As a result, in many jurisdictions, possession of burglar's tools is criminal.¹²⁸ Possessing burglar's tools is a crime, not because these tools are inherently evil, but because they are used and useful in committing a burglary.

Child sexual abuse is also a crime. If the child pornography product, like the burglar's screwdriver, can be shown to be useful and perhaps necessary in a pedophile's enticement of a child to participate in criminal sexual activity, then possession of child pornography seems to present a case for prosecution equivalent to the case for prosecution of screwdriver possession.¹²⁹ If anything, the pornography case is stronger since the harm produced through use of child pornography is more serious than the harm produced through use of the screwdriver.

What does *Stanley* have to say on the subject of making obscenity possession criminal by analogizing it to the possession of a burglar's tools? While the *Stanley* Court did not consider this use of obscenity directly it is reasonable to assume that the Court would have continued to limit punishment to only the doing in the face of a claim that at-home possession of adult obscenity should be made criminal because it is used to entice adults into sexual activity. It is even more reasonable to assume, however, that the *Stanley* Court would not have treated with similar equanimity a showing that child pornography is used to entice children into sexual activity.¹³⁰ The enticed child, after all, is a qualitatively different victim from the enticed adult.

¹²⁸ See, e.g., IND. CODE § 35-13-8-1 (1976); MICH. COMP. LAWS ANN. § 750.116 (West 1966).

¹²⁹ Remember that the content of the child pornography does not receive first amendment protection. Thus, the pornography and the screwdriver alike are not protected speech. Whatever protection is to be afforded to child pornography, then, must come from the *Stanley*-recognized special privacy interests associated with the home.

¹³⁰ Using child pornography to entice a person into sexual activity or to desensitize

In light of these differences between children and adults, both in the harm caused to the sex act participant and in societal interest to protect against the harm, next consider the *Stanley* Court's rejection of law enforcement concerns as a sufficient justification for a possession offense. The argument relating to prosecution difficulties rests on a state's police power to outlaw obscenity or child pornography. In *Stanley*, the State argued that prosecuting possession of obscene materials was necessary because prosecuting for distribution or intent to distribute was so difficult that a state could not protect its interest in outlawing obscenity efficiently or effectively.¹³¹

This argument prompted the Court to respond that it did not believe that prosecution difficulties existed, and even assuming such difficulties, the right to read or to observe as one wishes is so fundamental as to override any state entitlement to ease in administering its criminal laws.¹³² In the *Stanley* Court's view, privacy and independence of thought were values too important to be sacrificed on the altar of criminal justice efficiency.

It equally is true of child pornography that a state can prosecute a child pornography producer¹³³ or distributor;¹³⁴ either of these may cause more harm to the child than a mere at-home consumer. In fact, when sexual activity is depicted, the person who produces the pornography and orchestrates the child's sexual activity probably causes the major harm.¹³⁵ That person may be prosecuted not only for child pornography production but

a person to a particular sexual activity is not unique. Some claim today that, like child pornography with children, adult pornography is used to get adults to reject their inhibitions or to pressure them to engage in activity that they otherwise would refuse. See A.G. Pornography Report, *supra* note 3, at 342. Others argue that when the pornography is neither violent nor degrading, its use to entice may actually have a beneficial function in stimulating, enhancing, and perhaps promoting variation of adult sexual activity.

The difference between the use of child pornography to entice children and the use of adult obscenity to entice adults, then, is not necessarily in the potential to entice but in (1) the child's lack of capacity to consent and (2) the fact of (or, depending on the point of view, the greater) harm caused to the child by the ensuing sexual activity.

¹³¹ *Stanley v. Georgia*, 394 U.S. 557, 561-64 (1969).

¹³² *Id.*

¹³³ *Id.* at 567.

¹³⁴ This is true only if the child pornography harm that circulation of the depiction causes is separated from the harm production causes.

¹³⁵ Or at least the clearer harm.

also for the child abuse or the child sexual abuse that was photographed.

Because the option of prosecuting producers and distributors is available, the difficulty of successful prosecution seems to be no different an argument in the child pornography context than in the obscenity context and should have as little success. This conclusion ignores not only the different context in which society places protection of children but also the increased difficulty of successful production and distribution (and child abuse) prosecutions when child witnesses are involved.¹³⁶ The more substantial prosecution problems involved with child witnesses or victims increase the law enforcement costs over those asserted in *Stanley*. At the same time, the compelling state interest to protect children and the more severe harm suffered by child pornography participants increase the asserted need for greater law enforcement involvement. The question thus becomes whether law enforcement gains from employing the most pervasive program to prevent harm to children are worth more than the privacy loss. The *Stanley* Court never answered this question.

I still have not exhausted the catalogue of real and at least arguably pertinent differences between child pornography and the *Stanley* facts. Consider, as a final example, child abuse reporting statutes. Generally in the criminal law no legal duty exists to act to prevent a crime. The lack of legal duty is as true for an obscenity crime as for any other. By contrast, many jurisdictions today make it a criminal offense to fail to report a suspected instance of child abuse¹³⁷ or child sex

¹³⁶ For a discussion of child-victim/child-witness prosecution difficulties, see *infra* text accompanying notes 174-92.

¹³⁷ Many of these statutes restrict the mandatory reporting obligation to doctors, teachers, police officers, and others in a special care relationship. See, e.g., ALA. CODE §§ 26-14-1 to -14 (Supp. 1986); ARIZ. REV. STAT. ANN. § 13-3620 (1986). In others the definition of child abuse or neglect requires that the acts be caused by a parent or guardian. See, e.g., N.J. STAT. ANN. §§ 9:6-8.8 to -8.21 (1976 & Supp. 1986). Some impose no penalty for failure to report. See, e.g., N.C. GEN. STAT. §§ 7A-516 to 517, 543 (1981); WYO. STAT. § 14-3-205 (1977). An at-home child pornography viewer in most situations would have no duty to report under these statutes. Nor would he be likely to have a duty under a statute that requires reporting only physical injury. See, e.g., OKLA. STAT. tit. 21, §§ 845-846.1 (1985). Other states, however, have reporting statutes that seem squarely to cover the at-home child pornography viewer. See, e.g.,

abuse.¹³⁸ Several jurisdictions expressly cover child sexual exploitation (defined to include visual depictions) in the list of crimes for which observers have an affirmative duty to report.¹³⁹

The primary purpose of a reporting statute is to facilitate investigation of and elimination of child abuse. The factual circumstances contemplated are those in which the reporter is a concerned citizen who knows either the adult or the child involved¹⁴⁰ and shares the societal interest in protecting children from sexual abuse. The statute is directed at catching the pedophile, not at getting the pedophile to report.

Nonetheless, when a pornography viewer knows the adult or the child depicted or when the viewer has reason to believe that the child pornography was produced recently in the jurisdiction,¹⁴¹ the typical child pornography viewing situation is different from the typical situation contemplated under a reporting statute only because the pedophile is a bad rather than a concerned citizen. Unless and until child pornography possession is made criminal, this difference hardly seems a justification for exclusion from the reporting responsibility.¹⁴² Under some reporting statutes, then, the viewer arguably commits a crime at

IDAHO CODE §§ 16-1601 to -1602, -1619 (Supp. 1986); IND. CODE §§ 31-6-11-1 to 3, 6-4-3, 35-42-4-1 to -4, 35-45-4-1 (1985).

¹³⁸ Most jurisdictions include sexual abuse within the ambit of the child reporting requirement. *See, e.g.*, N.J. STAT. ANN. § 9:6-8.21 (Supp. 1986); WYO. STAT. § 14-3-205 (1977).

¹³⁹ *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 8-546, 13-3552 to 3553 (Supp. 1986); IDAHO CODE §§ 16-1602 (Supp. 1986); IND. CODE §§ 31-6-11-2, -6-4-3, 39-49-2-1 to -2 (Supp. 1986); UTAH CODE ANN. § 78-3b-2 (Supp. 1986).

¹⁴⁰ In any case, many pedophiles do know personally the adult and/or child depicted on film.

¹⁴¹ Much child pornography is produced outside the United States and transported in. *See infra* authorities cited at note 152. A viewer of child pornography might not have reason to know whether the child pornography was foreign-produced or produced in another state. Similarly, the child pornography may have been produced several years earlier and its participants no longer children. Again, the child pornography viewer might have no reason to know whether the child abuse depicted is recent enough to oblige the viewer to report. In any case, a state may have less interest, if any at all, in protecting children not within the state or in protecting participants no longer children. *Ferber v. New York*, 458 U.S. 747, 779 (1982) (Stevens, J., concurring).

¹⁴² If possession is made criminal, then the child pornography possessor has a fifth amendment privilege against the reporting obligation. *See, e.g.*, *Fisher v. United States*, 425 U.S. 391 (1976); *Garrity v. New Jersey*, 385 U.S. 493 (1967). Similarly, the possessor has a privilege if he or she is one of the actors depicted.

home and in private merely by viewing and then not reporting what he or she sees in the child pornography

Thus endeth the litany of differences between child pornography and obscenity that supports an exemption from *Stanley* under the *Stanley* rationale. The case for distinguishing is made easy once harm to children is shown. Its constitutionality follows no matter what the standard of review

V STANDARD OF REVIEW: WHAT PRICE PRIVACY? WHAT PRICE CHILDREN?

The Court has stated that when unprotected speech such as child pornography is concerned, a state need only show a rational relationship between the defined harm (here, injury to children) and the legislative response to deal with that harm.¹⁴³ In *Ginsberg v New York*, for example, a state legislative finding that material not obscene for adults nonetheless impaired “the ethical and moral development of our youth”¹⁴⁴ triggered a state interest sufficient to prohibit sale of the material to children. On that basis, once harm to children is shown, a statutory solution will be upheld if it does not offend a first amendment (or other constitutionally) protected interest, and it embodies a solution rationally related to a state’s interest in preventing the harm.

In *Ferber*, when the question was public distribution and not *Stanley* privacy, a rational relationship test was employed to conclude that child pornography causes harm.¹⁴⁵ Unquestionably a legislative judgment that possession of child pornography causes harm passes muster under this test. The at-home possession crime is rationally related to the protection of children even without reliance on the intermingled harm caused by the pornography enterprise. Examining the combined harm merely reinforces the legislative judgment.

Since all nine members of the *Ferber* Court agree that child pornography is not protected speech,¹⁴⁶ technically a child por-

¹⁴³ *Ginsberg v. New York*, 390 U.S. 629, 640-43 (1968).

¹⁴⁴ *Id.* at 641.

¹⁴⁵ See *Ferber*, 458 U.S. at 756-58.

¹⁴⁶ *Id.*

nography possession crime does not offend first amendment interests. The only other constitutional derivation for protection stricter than that provided by a rational relationship test is the high societal value placed on privacy. Except for *Stanley*, however, the privacy interest the Court has recognized to date exclusively relates to family, sexual, or marital privacy.¹⁴⁷ The home by itself and unattached to another substantial interest does not insulate from criminal prosecution harmful activity that occurs within.

The substantial interest recognized in *Stanley* was the right to view obscenity (translated by the *Stanley* Court into the right to read and think without government interference). Because child pornography is distinguishable from *Stanley* obscenity, arguably *Stanley* no more dictates stricter scrutiny of legislative action regarding at-home child pornography possession than it operates to preclude the constitutionality of the child pornography possession crime.

Although the Court might follow this approach, it is flawed by its circularity. The reason child pornography differs from obscenity is because child pornography causes harm. If harm is the necessary precondition for distinguishing *Stanley*, then the Court must focus its scrutiny on the issue that harm is caused. To accomplish this, I believe the fundamental *Stanley* right of privacy should apply until the Court after strict scrutiny affirmatively decides that harm is caused.

Classifying at-home child pornography possession as a crime implicates a first amendment privacy interest. Legislation infringing this interest is constitutional only if the legislation is both justified by a compelling state interest and narrowly tailored to effect that interest.¹⁴⁸ The protection of children unquestionably is a compelling state interest. The remaining question is whether a child pornography possession crime statute is narrowly tailored to protect children. To determine whether it is narrowly tailored

¹⁴⁷ See cases cited *supra* note 10.

¹⁴⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973); *U.S. v. Carolene Products Co.*, 304 U.S. 144 n.4 (1938) (holding that where legislation infringes a protected interest within a "specific prohibition" of the Constitution, strict scrutiny may be required in considering the constitutionality of the legislation); see also L. LUSKY, *BY WHAT RIGHT?*, 108-10 (1975).

requires a two-part analysis. First, child pornography possession must cause harm to children. Second, the possession crime must not pull within its scope persons that the state legitimately can have no interest in protecting.

In *Ferber*, a prosecution of a commercial distributor, the Court looked at data that concluded harm to children was caused directly and exclusively by child pornography as well as at data focusing on the harm caused by the child pornography enterprise.¹⁴⁹ If anything, this approach makes even more sense with a possession crime because an at-home possessor seems more likely than a commercial distributor to use the pornography in ways, such as enticing children to sexual activity, that involve the intertwined child pornography enterprise. In any event, such an approach is appropriate: societal ability to prevent risk to a child from child pornography should not have to wait on social science data that may never arrive regarding the harm that the child pornography depiction exclusively caused.

When all the activities associated with the child pornography enterprise are considered in evaluating the question of harm to the child, then the case for demonstrating the causation of the harm is "evident beyond the need for elaboration."¹⁵⁰ The only remaining question is whether the child pornography crime includes within its ambit those for whom a state may not legislate. Although much child pornography production is local and non-commercial, a good portion of child pornography is produced in another state or outside the United States.¹⁵¹ That is particularly true of child pornography produced commercially.¹⁵²

None of the child pornography possession statutes presently enacted contain express exceptions from culpability for a pos-

¹⁴⁹ *Ferber* 458 U.S. at 757-59.

¹⁵⁰ *Id.* at 756. Even those who suggest that the harm suffered from child sexual activity is overrated agree that there is harm. *But see* G. WILSON & D. COX, *supra* note 102, at 129. These authors argue, however, that the harm to a child becomes substantial and longlasting only if family and friends react badly to disclosure or if there is no prompt therapeutic intervention.

¹⁵¹ A.G. Pornography Report, *supra* note 3, at 408-09.

¹⁵² Densen-Gerner, *Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children*, reprinted in NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* (U.S. Dep't of Health and Human Services publication no. (OHDS) 78-30161 1980); R. LLOYD, *FOR MONEY OR LOVE: BOY PROSTITUTION IN AMERICA* 89-90 (1976).

essor whose child pornography involves an out-of-state¹⁵³ child actor. Because a state's interest in protecting child participants who have no connection to the state arguably may be described as "far less compelling"¹⁵⁴ than its interest in protecting its own children, do all these statutes fail as overinclusive?

Traditional standing doctrine prohibits a defendant from making an on-its-face challenge to a statute when a statute more narrowly drawn could have proscribed the defendant's conduct.¹⁵⁵ The only exception to traditional standing arguably relevant to child pornography is one created to provide breathing space under the first amendment.¹⁵⁶ Even if a defendant can make such a first amendment challenge where unprotected speech is involved,¹⁵⁷ overbreadth must be substantial "judged in relation to the statute's plainly legitimate sweep."¹⁵⁸

Ferber himself argued that he should be permitted to challenge the New York statute under which he was convicted as being substantially overbroad even if validly applied to him.¹⁵⁹ The Court answered that New York's statute was a "statute whose legitimate reach dwarfs its arguably impermissible applications."¹⁶⁰ The same is true of a child pornography possession statute.

Because child sex abusers frequently produce their own pornography and every state has child sex abusers, a substantial portion of child pornography in every state involves that state's own children as participants. Even commercial child pornography, most of which is produced outside the United States, in-

¹⁵³ By "out-of-state" child actor, I mean one whose depicted sexual activity took place outside the state and who has no connection with the state either at the time of the child pornography production or at the time of its discovery or prosecution.

¹⁵⁴ *Ferber*, 458 U.S. at 779 (Stevens, J., concurring); cf. *Edgar v. Mite Corp.*, 457 U.S. 624 (1982) (state has no interest in protecting non-resident shareholders).

¹⁵⁵ *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹⁵⁶ *Id.* at 611.

¹⁵⁷ *But see Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

¹⁵⁸ *Broadrick*, 413 U.S. at 615; accord *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-04 (1985) ("If the overbreadth is 'substantial, the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation.'").

¹⁵⁹ *Ferber*, 458 U.S. at 772.

¹⁶⁰ *Id.* at 773.

cludes a great many pictures of American children contributed by American pedophiles.¹⁶¹ Thus any perceived overbreadth in statutory scope is insubstantial.

In fact, no overbreadth problem exists at all because a state's interest properly may encompass protection of out-of-state children. To say that a state may protect only its own children from what it legitimately describes as a clear and severe harm—and to hell with the rest of the world—seems indescribably parochial and indifferent to shared national and, for most countries, international concerns. In protecting children wherever located, moreover, a state indirectly protects those children unarguably entitled to its protection.

First, unlike a child's sex or coloring, a child's connection to a state is not discernible by looking at the child. In many cases, certainly most cases involving commercially produced child pornography, a child's identity will be unknown and undiscoverable and so too his or her connection with a particular state. That being true, a state's clear interest in protecting its own children may be undermined seriously if successful prosecutions depend on proving¹⁶² that the child in the child pornography has a connection with the state (or even on proving that an adult depicted in the pornography has such a connection).

Second, successful possession prosecutions may work to dry up the child pornography commercial market. Since the smaller the market, the fewer the children who will be used to make child pornography, successful possession prosecutions involving out-of-state children indirectly achieve protection of those in-state.

Third, a child pornography possessor does not choose pornography based on geographical nexus between a state and the child portrayed in the pornography. The longer it takes to prosecute the possessor, and the harder the proof problems of the

¹⁶¹ See A.G. Pornography Report, *supra* note 3, at 408; S. REP. NO. 438, 95th Cong., 1st Sess. 6 (1977).

¹⁶² This is the case even if the proof standard on the jurisdictional predicate is simply a preponderance rather than proof beyond a reasonable doubt. See MODEL PENAL CODE § 1.13(10) (“‘[M]aterial element of an offense’ means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense”).

prosecution, then the longer he or she remains a potential predator of in-state children.

Finally, it is impossible to imagine that a state would resent as intrusive a sister-state's help in protecting its children. Were the assertion of jurisdictional nexus outside a state's power even with sister state consent, moreover, there *IS* protection achieved for in-state children in such a broadly defined state power. In reciprocally protecting the children of other states, each state thereby indirectly protects its own.

Making child pornography possession a crime thus is a narrowly tailored effectuation of the state's compelling interest to protect its children. Whether a rational relationship test or strict scrutiny test is applied to test the constitutionality of the child pornography possession crime, the result is the same: the crime is constitutional.

VI. AN EVALUATION OF POTENTIAL BENEFITS FROM PROSECUTING AT-HOME POSSESSION

The next consideration is whether making child pornography possession a crime is worth doing. As the economists say, what are the costs? And what are the benefits? A cost-benefit analysis¹⁶³ is needed because a child pornography possession crime may mean a loss of privacy and perhaps a weakening of the paramount principle that a person's private thoughts are his or her own. A showing that at-home child pornography possession constitutionally may be made criminal, in other words, is not necessarily a showing that making it a crime is wise policy

A. *Possession as Increasing the Catch*

The first task to consider is what activity presently may be made criminal under *Stanley*. Then evaluating what activity remains that may be reached only by a child pornography possession offense will be possible.

Obviously production of child pornography is a crime and remains a crime whether produced in a commercial studio or in

¹⁶³ For a discussion of the cost-benefit analysis as a slippery slope and its likelihood here, see *infra* text accompanying notes 238-47.

the home. Distribution is a crime even in the absence of a commercial purpose. Any exchange, no matter how private, may be made criminal and punished.¹⁶⁴ Similarly, any transport outside the home, no matter how private or how discreet,¹⁶⁵ may be prosecuted consistent with the *Stanley* holding.

Using pornography to entice a child to engage in sexual activity may be made criminal and prosecuted whether or not the use took place in the home. Regardless of purpose, any sharing of child pornography (or obscenity or indecent material) with a child unquestionably may be prosecuted.¹⁶⁶ Sharing child pornography with another adult, even at home, also may be prosecuted.¹⁶⁷ In fact, if eight pedophiles get together in one of their homes and each brings pictures, then each may be prosecuted for sharing child pornography with the other seven.

Under *Stanley*, then, the only person who is protected from criminal treatment is the lone viewer who manages to get the material to his or her house without being caught. Even when the material is obscenity and not child pornography, the viewer is protected only at home and only when he or she does nothing more than possess and view the material alone and in private.

How many child pornography possessors fit this description and therefore commit no crime unless child pornography possession is made criminal? I have no precise way of quantifying, nor have I seen any empirical studies that attempt the analysis. From all the data demonstrating the congruence between child pornography and child sex abuse, as well as the data demonstrating that much child pornography is home produced by the child sex abuser in conjunction with sexual activity, I cannot imagine that we are talking about a large number of people.¹⁶⁸

¹⁶⁴ See, e.g., ALA. CODE § 13A-12-192 (Supp. 1986); ARIZ. REV. STAT. ANN. § 13-3553 (Supp. 1986); MD. [CRIM. LAW] CODE ANN. § 419A (Supp. 1986).

¹⁶⁵ See cases cited *supra* note 11.

¹⁶⁶ *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968).

¹⁶⁷ The one exception would be a spouse or perhaps a "significant other." Sharing may be made criminal because it involves more than private thought. The possessor is now a distributor. *Cf. Beach v. State*, 411 N.E.2d 363 (Ind. App. 1980) (defendant "exhibited child porn to another" in defendant's hotel room).

¹⁶⁸ I am deliberately leaving out of the equation the prosecutorial discretion in choosing the crimes entitled to office resources in investigation and preparation. Variables such as budget and court calendar constraints as well as prosecutorial evaluation as to comparative seriousness of various crimes obviously impact on whether a new crime in the statute books means more prosecutions.

Yet, since viewing child pornography causes demonstrable injury to a child, then preventing even one instance of such child victimization is worth the cost. Thus the first and clearest potential benefit ascribed to prosecuting at-home possession is that prosecution of possessors expands the net so as to catch other perpetrators, however few they are, who may be caught in no other way

The decrease in child victimization, however, is neither solely nor primarily dependent on defining possession as criminal. The key criterion is how many of these new criminals will be caught. Whatever the supposed gains a possession crime should produce in conviction rates of possessors, the actual effect will be minimal unless the police somehow are able to develop ways to learn who is committing the new offense.

Consider the child abuse or the child sex abuse crime. Child abuse frequently produces evidence physically visible on the child. Child abuse and child sex abuse both frequently result in identifiable behavioral changes caused by emotional distress.¹⁶⁹ A child sex abuser acting with children other than his or her own may create suspicion by the frequency of child visits to the abuser's home. Yet, even though child physical and sexual abuse often provide fairly observable indicia of the abuse, perhaps fewer than six percent of these cases are reported.¹⁷⁰

Many explanations are given for the low reporting figures. Perhaps we all lead such insulated and independent lives that we never see instances of child abuse.¹⁷¹ Then again, we may not

¹⁶⁹ See J. MACDONALD, *RAPE OFFENDERS AND THEIR VICTIMS*, 120-45 (1971); Comment, *supra* note 54, at 817-20. This is particularly true of coerced sexual activity. See, e.g., Halleck, *Emotional Effects of Victimization*, in *SEXUAL BEHAVIOR AND THE LAW* 684 (R. Slovenko ed. 1965); Landis, *Experience of 500 Children with Adult Sexual Deviation*, 30 *PSYCHIATRIC Q.* 100-03 (1956).

¹⁷⁰ See Prager, *Sexual Psychopathy and Child Molesters: The Experiment Fails*, 6 *J. JUV. L.* 49, 62 (1982); Schoettle, *supra* note 69, at 290; Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications*, 89 *DICK. L. REV.* 691-719 (1985); see also, De Francics, *Protecting the Child Victim of Sex Crimes Committed by Adults*, 35 *FED. PROB.* 15, 17 (Sept. 1971).

¹⁷¹ This allegedly is part of the reason why no one who knew the Kallinger family noticed the child abuse suffered by the child Joseph Kallinger. F. SCHREIBER, *THE SHOEMAKER* 21-61, 388-95 (1984) (Joseph Kallinger and his 12-year-old son were charged with break-ins, rapes, and murders committed during a seven-week period in 1974. They also may have been responsible for two additional murders. One of the victims was a

recognize what we see as abuse, either because of a refusal to believe our neighbors act in this way or because of an inability to see the evidence of child abuse for what it is.¹⁷² Finally, we may fail to report what we see because of a general reluctance to get involved.

Whatever the explanations for low abuse reporting statistics, there is no reason to believe that the reporting rate dramatically will improve for a possession crime. Given the nature of child pornography possession, neither as directly harmful as actual abuse nor as productive of observable evidence, I would expect the reporting statistics to be much worse.

As a result, the possession crime probably will not identify any new child victimizers.¹⁷³ No matter how big the net, after all, it still must be thrown in water where fish are likely to be found. The presence of the fish in combination with the size of the net produces an increase in the catch. The police problem, even with the expanded net of a child pornography possession crime, is that the police continue to be unable to locate the fish.

B. Possession as Increasing Convictions

If the possession crime adds little in its own right to the law enforcement arsenal, it nonetheless may increase the overall conviction rate for those already identified as possible child sex abusers. Because the possession crime involves fewer elements than, for example, the present crimes of distribution or possession with intent to distribute or using child pornography to entice a child, a prosecution for possession may result in a conviction when the jury would acquit the defendant of the related crime.¹⁷⁴

child of nine or ten and the other victim was Joseph's older son.). *Id.* at 15-18, 196-202, 221-32.

¹⁷² This also seems to be true of the Kallinger family history. *See id.* It clearly was true of Sybil's childhood (Sybil was the multiple personality whose story was made into a television movie starring Sally Field and Joanne Woodward.). For Sybil's story, see F. SCHREIBER, *SYBIL* (1973).

¹⁷³ The one exception is when the police investigate the defendant for another reason and unexpectedly find the child pornography during the course of that investigation. In *Stanley* the investigation that turned up the obscenity was initially conducted to find evidence of illegal bookmaking activities. *Stanley v. Georgia*, 394 U.S. 557-58 (1969).

¹⁷⁴ Ease of conviction was considered insufficient justification in *Stanley* to warrant an at-home possession prosecution. *See supra* notes 129-31. The decision was in the context of adult obscenity. *Id.* at 567-68.

The same could hold true in a prosecution for child sex abuse. As noted earlier, virtually all child sex abusers possess child pornography. Thus a child pornography possession crime potentially sits in every child sex abuse case. Prosecution for sex abuse may be difficult not only because of more and more difficult elements to prove, but also because such a prosecution invariably involves the additional problems associated with child witness testimony.¹⁷⁵

In the typical possession case the prosecutor will have the child pornography to introduce into evidence.¹⁷⁶ Connecting the pornography to the defendant will be accomplished through the testimony of the police officer who seized it.¹⁷⁷ By contrast, the typical child sex abuse prosecution requires the testimony of a child witness.

One problem with child witness testimony is the difficulty of getting it: often there is family or child reluctance or outright refusal to cooperate with law enforcement. Many people even today see the child more as culprit than as victim. Some parents would rather protect family reputation or the welfare of the adult abuser¹⁷⁸ than see a successful prosecution take place.

For these and other reasons, many families would prefer to keep the child sex abuse quiet and avoid a public trial in which the shameful happenings in their private lives would be displayed.¹⁷⁹ A perfectly natural inclination exists not to want one's

¹⁷⁵ Child witness testimony involves several problems that decrease the chances of a successful prosecution. See generally, *The Child Witness*, 40 J. Soc. ISSUES 1 (Goodman ed. 1984); Melton, *Sexually Abused Children and the Legal System: Some Policy Recommendations*, 13 AM. J. FAM. THERAPY 61 (1985); Libai, *supra* note 88, at 977; Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?* 17 NEW ENG. L. REV. 643 (1982); ABA Nat'l Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases* (Oct. 1982); ABA Nat'l Legal Resource Center for Child Advocacy and Protection, *Innovations in the Prosecution of Child Sexual Abuse Cases* (Nov. 1981).

¹⁷⁶ I am oversimplifying here. In the typical case in which the State has the pornography one would expect a plea to result—at least once the judge at the suppression hearing decided that the pornography was constitutionally seized and therefore admissible into evidence.

¹⁷⁷ For a discussion of fourth amendment law regarding presumptive first amendment materials, see *infra* text accompanying notes 228-35.

¹⁷⁸ A.G. Pornography Report, *supra* note 3, at 416-17 n.79.

¹⁷⁹ See Schoettle, *supra* note 85, at 293 (12-year-old child pornography participant contemplated suicide after newspaper stories about her participation were published).

private problems substituting for the entertainment generally provided by television soap operas. The natural urge for privacy is compounded by the activities of distributors, producers, and child sex abusers. They not only operate in private, frequently by resorting to an underground network, but their common tactic is to frighten children into not reporting or not cooperating if the crime is uncovered.¹⁸⁰

Even with a reported case and a cooperative child and parents, all problems do not disappear. The child involved may be so young as not to qualify as a witness¹⁸¹ or may be unable to communicate intelligibly or may freeze in the defendant's presence¹⁸² or may be unwilling to respond to questions put by the defense counsel or the prosecutor.¹⁸³ Even with an intelligible child witness, jurors still may doubt the child's credibility.¹⁸⁴

Many of these difficulties have led to making accommodations for child testimony.¹⁸⁵ Yet however helpful a particular accommodation might be to a child witness, that accommodation cannot be made if it infringes upon a defendant's sixth amendment confrontation rights.¹⁸⁶ When special child witness procedures are employed, moreover, they cannot assure that all problems with child witnesses magically will disappear

¹⁸⁰ See generally, CHILD PORNOGRAPHY AND SEX RINGS (A Burgess ed. 1984).

¹⁸¹ See, e.g., Prager, *supra* note 170, at 49.

¹⁸² See, e.g., State v. Warford, 389 N.W.2d 575 (Neb. 1986) (ruling that closed-circuit television could not be used without "compelling need"). See also Note, *The Constitutionality of Admitting the Videotape Testimony at Trial of Sexually Abused Children*, 7 WHITTIER L. REV. 639, 639 n.1 (1985).

¹⁸³ See, e.g., Warford, 389 N.W.2d at 575.

¹⁸⁴ Goodman, Golding, & Haith, *Jurors' Reactions to Child Witnesses*, 40 J. Soc. ISSUES 139 (1984).

¹⁸⁵ Accommodation for children has included an abused child hearsay exception. See, e.g., COLO. REV. STAT. § 13-25-129 (Supp. 1986); UTAH CODE ANN. § 76-5-411 (Supp. 1986); WASH. REV. CODE ANN. § 9A.44.120 (1985). Some states provide for videotaped child witness testimony. See, e.g., ARK. STAT. ANN. §§ 43-2035 to -2036 (Supp. 1983); COLO. REV. STAT. § 18-3-413 (Supp. 1986); KY. REV. STAT. ANN. § 421.350 (Supp. 1984); WIS. STAT. ANN. § 967.04 (Supp. 1986). Another accommodation is taking child witness testimony in camera (watched on video by the jury). See, e.g., ABA Nat'l Legal Resource Center for Child Advocacy and Protection, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases*, Rec. 3.3 (1982). Some states have eliminated corroboration requirements for child witness testimony. See *id.*, Rec. 4.2. Finally, a child courtroom has been proposed. Libai, *supra* note 88, at 977.

¹⁸⁶ See, e.g., Dutton v. Evans, 400 U.S. 74 (1970) (hearsay exception did not deny confrontation right).

At the very least, preparation of an abuse case involving a child witness takes longer than the average case. Several interviews frequently are necessary before the child feels comfortable talking with the prosecutor.¹⁸⁷ Attempts are made to demystify the trial process (and thus stimulate testimony) by introducing the child to the courtroom, judge, and court officers, sitting the child in the witness chair, and letting the child observe court proceedings. All this takes time.

In addition to the practical difficulties with young child witnesses, some question whether the testimony should be attempted at all. There are experts who say that in all sex or physical abuse cases, the trial process, with potential appearances at grand jury and preliminary hearing stages and the likelihood of repeated interviews to prepare the case for trial, is harmful to a child since it keeps the abusive episode current in the child's memory.¹⁸⁸ Others argue that while harm can occur, it typically comes in an incest case in which testimony places the child in a difficult emotional position.¹⁸⁹

Although experts may differ as to whether and when such harm from testimony can be predicted and whether and when it

¹⁸⁷ Frequently particular prosecutors are designated to work with children as not all adults are equally facile at establishing a relationship with a child in which the child will feel at ease to talk, much less talk about private or embarrassing subjects.

Prosecuting child molesters has been called "one of the toughest and most stressful [jobs] in law enforcement." *Grueling Child-Abuse Cases Push Many Prosecutors to Their Limits*, Wall St. J., Nov. 9, 1986, at 31, col. 4.

¹⁸⁸ Some believe the damage is so great that children should not testify. Others believe, however, that no empirical case has been made that children need any special trial accommodation at all. See, e.g., T. GIBBENS & J. PRINCE, *CHILD VICTIMS OF SEX OFFENSES* (1963). Some even argue that the testimony serves as a purgative and a catharsis. See, e.g., Melton, *supra* note 175, at 64-65.

Yet another harm also arguably ensues from child testimony. This is the risk of a jury acquittal and its effect on a child. The proof burden in a criminal case means, obviously, that a jury could believe a defendant likely guilty and yet still acquit because of a remaining reasonable doubt. Acquittal necessarily means neither juror belief in the defendant's innocence nor juror belief that the child lied. Disinterested adults have enough trouble understanding this distinction: a complaining witness, whether child or adult, is much less able to appreciate the distinction.

¹⁸⁹ See, e.g., Parker, *supra* note 175, at 643. The child may have mixed feelings about the adult and may feel guilt at the perceived responsibility for possibly breaking up the home. The guilt may be accentuated by family unhappiness at the trial and at the family breakdown. See, e.g., Burgess, Hartman, McCausland, & Powers, *Impact of Child Pornography and Sex Rings on Child Victims and Their Families*, in *CHILD PORNOGRAPHY AND SEX RINGS* (A. Burgess ed. 1984).

can be avoided by special trial accommodation,¹⁹⁰ one thing is clear: if the trial judge concludes that testifying will be harmful to the child, then the child will not testify. Punishment of the adult will be a consideration secondary to prevention of additional harm to the child.¹⁹¹

When a child sex abuse prosecution is lost because of child witness problems, a prosecution for the imbedded possession crime might succeed. How many more child abusers will be caught through conviction in such a surrogate prosecution depends on how many presently get away.¹⁹²

Unlike the specious argument that a child pornography possession crime results in more convictions simply because there now are more criminals, *THIS* number of convictions, whatever it turns out to be, is a societal benefit directly attributable to the possession crime. The number is a net gain because it is not dependent on locating new abusers. Rather, the surrogate prosecution enhances the likelihood of convicting a child abuser who already has been located and identified. -

C. *Effect of Possession Conviction on Next Prosecution*

Next consider the possible effect of a successful surrogate

¹⁹⁰ Research methodology is imprecise for assessing degree and duration of harm. See, e.g., *The Child Witness*, 40 J. Soc. ISSUES 1 (Goodman ed. 1984); Libai, *supra* note 88, at 977; Melton, *supra* note 154, at 61. There are several sources for the harm—the abusive episode itself, the delay in therapeutic intervention, inappropriate family and official response, and the trial process. Obviously, then, it is difficult if not impossible to isolate how much harm is caused by any one of the factors. This difficulty is exacerbated by different combinations of factors leading to different conclusions regarding contribution to total harm caused by each separately.

¹⁹¹ I do not mean to suggest that a consensus exists as to the harm to the child from courtroom testimony—or to what is sufficient to eliminate, or at least alleviate, the harm. I merely suggest that if a judge is convinced by expert testimony that the injury to the child will be great, the judge will not permit the testimony. Similarly, if a prosecutor is convinced that testimony will be damaging to the child, he or she may elect not to go forward with the case—or look to bring the case without the child's testimony. And, for that matter, if a parent is convinced that his child will be harmed by testifying the parent may make it very difficult, if not impossible, to obtain the child's testimony.

¹⁹² It also depends on how many times child witness problems lead a prosecutor either not to prosecute or to take a plea on a minor related offense and how many times these cases, if tried, result in acquittal.

prosecution¹⁹³ in a later child sex abuse case¹⁹⁴ involving the same defendant.¹⁹⁵ Many criminals recidivate. Prime among recidivists are child sex abusers.¹⁹⁶ The surrogate possession conviction of the abuser who otherwise might have gotten away should mean an easier conviction and a heavier sentence for the abuser if he or she subsequently is convicted for the "right" crime.

1. *Repeat or Habitual Offenders*

No matter whether the sentencing system is indeterminant, determinant, or presumptive, a repeat offender is treated more severely than a first-time offender committing the same offense. Most states now have habitual offender statutes that permit both enhanced sentencing for a repeat offender and specify just what that enhanced sentence must be.¹⁹⁷

¹⁹³ The discussion regarding the NEXT crime is also applicable to a two-count prosecution joining both child pornography possession and child sex abuse charges. To the extent both charges are before the jury, the child pornography possession charge may enhance the child's credibility in the abuse case. Similarly, if the evidence of child pornography possession is to go before the jury anyway, then the second charge is less helpful to bolster the child's testimony. The charge still may be useful in making evidence relevant at the trial that otherwise might be inadmissible. Although admissible only on the child pornography charge, it nonetheless may influence jury consideration of the child abuse charge. I do not say that this should happen, only that it may.

¹⁹⁴ This may also apply to a later child pornography production or distribution case.

¹⁹⁵ To keep things simple, I focus here on the child sex abuser (and not on other child victimizers such as the child pornography distributor or possessor) who would have gotten away absent a possession crime. The discussion may apply to these prosecutions as well.

¹⁹⁶ Among the mentally disturbed, the recidivist rate for child sex abusers is exceeded only by the recidivist rate for exhibitionists. American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 271 (3d ed. 1980).

¹⁹⁷ See, e.g., NEB. REV. STAT. § 29-2221 (1985); W. VA. CODE § 61-11-18 (Supp. 1986). Some commentators argue that judges impose sentences too lenient for crimes against children. See, e.g., A.G. Pornography Report, *supra* note 3, at 416-17 n.79. In more than 20 of the states, however, the legislature in the habitual offender statute mandates a stiffer sentence for the convicted habitual offender. See, e.g., ALA. CODE § 13A-5-9 (1975); IND. CODE ANN. § 35.50-2-8 (Burns Supp. 1986); N.Y. PENAL LAW § 70.06 (McKinney 1975). Thus, in these states the pedophile convicted as an habitual offender may not have his sentence lessened by a sentencing judge unconvinced of the seriousness of the crime or influenced by the respectable look of the offender.

Approximately five states provide habitual offender treatment for misdemeanants. E.g., NEV. REV. STAT. § 207.010 (1985); WASH. REV. CODE § 9.92.090 (1984). The rest require that the prior and current crimes be felonies to trigger enhanced sentencing. E.g., ALA. CODE § 13A-5-9 (1975); COLO. REV. STAT. § 16-13-101 (Supp. 1985); IND. CODE ANN. § 35-50-2-8 (Burns Supp. 1986). This is likely to be no impediment: juris-

The risk of enhanced sentences for repeat offenses—and the deterrence that facing this risk might provide¹⁹⁸—does not make the child pornography possession offense unique. The difference, if there is one, is that without the possession offense used as a surrogate for the child sex abuse crime there may never have been a repeat offender.¹⁹⁹

When the offender is a child sex abuser as well as a child pornography possessor, moreover, the impact of the prior possession conviction might not stop with enhanced sentencing. Among other things,²⁰⁰ there may be evidentiary consequences of benefit to a prosecutor.

2. *Child Pornography—but No Child Pornography Conviction*

Before considering the possible evidentiary consequences of a child pornography possession conviction, I want first to consider what could happen at a child sex abuse trial of a defendant with no prior convictions. Let me return to seven-year-old Ida Innocent.

Suppose Ida accuses Peter Predator of rape (here defined as sexual penetration of a child under 13). Ida describes Peter as having spent several weeks getting to know her, buying her candy, and generally being friendly. She recounts three afternoons that she spent with Peter in his apartment. On all three occasions, she tells the prosecutor, Peter showed her pictures of a young girl having intercourse with him. On Ida's second and third visits, Peter suggested that they do what the girl and he

dictions with the child pornography possession offense generally classify it as a felony. See statutes cited *supra* note 18. Jurisdictions adding the child pornography possession offense likely also will classify it as a felony.

¹⁹⁸ Enhanced sentencing also applies to the recidivist child pornography possessor who is not a child sex abuser. Realization of the heavy sentence risk might deter him or her from continued consumption and, if enough possessors are convicted, might even have an effect on child pornography sales, thereby reducing the total amount of child pornography produced.

¹⁹⁹ Any offense containing lesser related or included crimes easier to prove should result in conviction of an offender who otherwise may never have been convicted the first time.

²⁰⁰ There also are law enforcement investigative consequences. See *infra* text accompanying notes 225-40.

were doing in the pictures. On her third and last visit, Ida agreed. Assume the prosecutor obtains these pictures legally. Under present operation of the rules of evidence, can the prosecutor introduce the pictures into evidence in Peter's rape prosecution?

The general rule, of course, is that prior bad acts, whether or not resulting in a criminal conviction, are inadmissible to show that the defendant committed the act currently being prosecuted.²⁰¹ Clearly the pictures of Peter with a child other than Ida may not be introduced to prove that Peter had intercourse with Ida.

In the above hypothetical, however, introduction of the pictures is relevant to the description of how Peter committed the sexual abuse of Ida.²⁰² They tend to show how THIS crime was committed, not that a person who did it before would do it again. Unquestionably, then, the jury should have both Ida's testimony AND the pictures in deciding whether Peter sexually abused her.

Now consider a second version of the hypothetical. The history of Ida and Peter remains basically as described above. The only difference is that the pictures shown to Ida by Peter are of a girl and an adult male—not Peter. Any change in result? I think not.

Introducing these pictures would be less prejudicial to Peter because they do not constitute evidence of Peter's prior bad act. The pictures are just as relevant, however, to showing how Peter achieved the sexual abuse of Ida. The trial judge who permits introduction of the pictures of Peter in the first version of the hypothetical logically must permit introduction of these pictures, too.

Move on to a third version of the hypothetical. Once again, Peter seduces Ida, and the rape prosecution ensues. Pictures are found, and again I assume they were found legally. As in the first version of the hypothetical, the pictures are of a young girl

²⁰¹ See, e.g., FED. R. EVID. 404.

²⁰² On these facts there is no question that the possession of the child pornography is relevant since it has at least a "tendency" to prove the matter in issue. See FED. R. EVID. 401 advisory committee's note. The general rule is that all relevant evidence is admissible. See, e.g., FED. R. EVID. 402. It may be kept out only if "its probative value is substantially outweighed by the danger of unfair prejudice." See FED. R. EVID. 403.

and Peter having sexual intercourse. But unlike that first version, there was no use of the pictures in Ida's seduction. Introduction of the pictures this time is not relevant to show how the crime was committed because the pictures were not involved in the crime. May this evidence of prior bad acts nonetheless have substantive use to show Peter's intent to molest Ida? The clear answer this time is that the pictures may not be introduced because they are relevant to prove intent only if used to show Peter's predisposition to molest little girls. That use is an impermissible back door attempt to show that a person who abused a child once is likely to have done it this time.

The same result should hold true if, in yet another version of my hypothetical, the pictures not only were not used in Ida's seduction but the adult male in the pictures was not Peter. Again, this is a clear case in which no evidentiary theory could lead to the proper substantive admission of the pictures.²⁰³

Assume that the pictures are ruled inadmissible substantively in these last two versions. The trial begins. Ida tells her story

Peter then takes the stand and denies knowing Ida or raping her. So far he creates no problem for himself with his testimony,²⁰⁴ but he does not stop here. He also denies any interest in child sex, saying he finds the very idea of such a thing an abomination. Now what about the pictures? The likely answer is that Peter has "opened the door" to introduction of the

²⁰³ I suggest here, however, not that trial judges never will decide this way but that the evidence rules clearly do not permit it. The ultimate determination of admissibility rests in the reasoned exercise of discretion by the trial judge. *E.g.*, *State v. Ellis*, 303 N.W.2d 741 (1981) (in murder prosecution evidence of other assaults on women relevant to identity and plan). To the chagrin of many evidence professors, I am sure that at least some judges would decide that these pictures were admissible to show intent and not be reversed on appeal either because the reviewing court adheres to the same mistaken view of the admissibility of the pictures or because their admission is considered harmless error.

²⁰⁴ *But see, e.g.*, *People v. Rassmussen*, 492 N.E.2d 612, 618-19 (Ill. App. Ct. 1986). In *Rassmussen* the court upheld the use of a photograph to impeach the defendant on his claims that he neither sexually assaulted nor even met the victim until after the day on which the assault allegedly occurred. The photograph used to impeach showed the victim and a defendant witness—but not the defendant. It was connected to the defendant (sufficient at least for admissibility) by an equivocal defendant statement acknowledging awareness of the circumstances of the picture. Other photographs depicted the defendant in the nude.

pictures.²⁰⁵ Once again, then, the evidence is before the jury, although this time not substantively but to impeach Peter's testimony

Let me return to Peter on the stand. Suppose that Peter is silent on the subject of his sexual proclivities. Nor does he pronounce moral indignation from the witness chair. Instead, Peter says that he is a responsible, upstanding adult who never before has been in trouble with the law.²⁰⁶ Would this statement be enough to trigger introduction of the photographs?

Can defense character witnesses who testify to Peter's reputation as a worthy, moral, and upright citizen open the door to admission of the photographs? Can other defense witnesses who claim personal knowledge in denying either the defendant's presence or his charged activity with the victim open the door?²⁰⁷ Can the door be opened by the prosecutor setting Peter up by the questions he asks on cross-examination?²⁰⁸ What are the answers? Under a pure version of the evidence rules, the answer is probably no. For some judges, some of the time, the answer is perhaps yes.²⁰⁹

What, then, may be concluded from this brief review of general evidence concepts? In child sex abuse cases in which child pornography was used to entice, the child pornography, if found, will be introduced in evidence. If the experts are correct that most child sex abusers use child pornography to entice, then

²⁰⁵ See, e.g., *id.* at 617-19.

²⁰⁶ Assume here that, before the Ida incident, he had never been arrested.

²⁰⁷ See, e.g., *Rasmussen*, 492 N.E.2d at 618-19.

²⁰⁸ In evidence law it is sometimes important whether the testimony that opened the door was elicited on direct or cross. A further refinement of the textual discussion thus is needed if Peter's pertinent statements came in answer to questions from the prosecutor. The prosecutor may not begin by asking Peter if he owns child pornography since this is what we assumed the judge already ruled on. Can the prosecutor ask Peter about his feelings regarding child sex abuse? Can the prosecutor ask Peter if he has a sexual interest in little girls? (And then, once Peter testifies that he has no interest in little girls and that the crime is an abomination, can the prosecutor then introduce the pictures?) The answers depend on the jurisdiction, on the trial judge, on the particular wording of the question, and on how many similar questions are asked. The more it looks as though the prosecutor merely is circumventing the judge's ruling on picture inadmissibility, the less likely it is that the questions (or the pictures to impeach) will be allowed in evidence.

²⁰⁹ For one of the more famous examples of a broad view of the prosecutor's power to impeach see *People v. Sorge*, 93 N.E.2d 637 (N.Y. 1950).

the pornography will be introduced in virtually every one of these cases.²¹⁰ In most other sex abuse cases, the closer the trial judge attempts to follow the theoretical underpinnings of the evidence rules, the narrower the scope for introducing the pictures, whether for substantive or impeachment purposes.

3. *Child Pornography Conviction: Use to Impeach*

A child pornography possession conviction would allow evidence of a defendant's contact with child pornography to be put before the jury in a subsequent sexual abuse case (if the defendant testifies) in which child pornography either was not used to entice the child victim or was used but not found. A child sex abuser is a consumer of child pornography. One would expect that often the pornography will be found.²¹¹ Merely because the child sex abuser likes and owns child pornography, however, does not mean the police always will find it. Nor does it necessarily mean that the police may search for it in investigating a child sex abuse case.²¹² While child sex abuse and child pornography seem to form an unholy alliance, that does not mean the alliance will be present for proof purposes in a particular trial.

In all but nine states²¹³ and in federal trials, a cross examiner may impeach a witness's testimony through use of a prior felony conviction although, as with a child pornography conviction, the prior crime involves neither dishonesty nor false statements.²¹⁴ In

²¹⁰ It therefore seems possible to test empirically the expert conclusions that child pornography is used to entice by examining the number of sex abuse prosecutions in which child pornography was introduced into evidence as relevant to the way the crime is committed. I do not know how successful such a study would prove: if the pornography is clearly admissible substantively the defendant very well might plead. In any event, I have not undertaken such a study.

²¹¹ See *Photos Seized in Sex Abuse Case*, DES MOINES REG., Nov. 8, 1986, at col. 2.

²¹² See *infra* text accompanying notes 225-37.

²¹³ See, e.g., FLA. STAT. ANN. EVID. CODE § 90.610 (West Supp. 1976); HAW. R. EVID. 609 (1980); ID. R. EVID. 609 (1985).

²¹⁴ For a brief description of the historical context out of which the rule permitting impeachment by prior convictions developed, see J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE, 609-54 to 55.

Perjury is the best example of a prior conviction with relevance to dishonesty or false statement. In many jurisdictions theft offenses as a group are treated as relevant to dishonesty. *Id.* at 609-72 to -73.

nearly twenty of these states impeachment use is allowed regardless of the conviction's probative value or prejudicial effect.²¹⁵ Thus in these latter states a defendant's prior child pornography association probably will be put before the jury should he or she testify

For federal trials and for states following the federal approach, impeachment use of a child pornography conviction requires a showing that probative value outweighs prejudicial effect to the defendant.²¹⁶ Under such a required showing, the child pornography conviction should be inadmissible to impeach because it has at best little probative bearing on the truthfulness of the defendant's testimony while its similarity to the present crime undoubtedly will be quite prejudicial.²¹⁷

Admitting the child pornography conviction to impeach a testifying defendant's credibility would put before the jury the fact that he or she has an interest in child sex. This is powerful evidence in a sex abuse case and would buttress any doubts as to the child's testimony or any concern that a conviction is based only on the word of a child.²¹⁸

²¹⁵ Nearly 20 states do not require a showing that probative value outweighs prejudiciality. *See, e.g.*, ARK. STAT. ANN. § 28-100 (Supp. 1976); CONN. GEN. STAT. ANN. § 52-145 (West 1986); NEB. REV. STAT. § 27-609 (1978); NEV. REV. STAT. § 50.095 (1981). Approximately five of these statutes do not require a felony to impeach. *See, e.g.*, MO. REV. STAT. § 491.050 (1971); OR. REV. STAT., § 40.355 (1985); WIS. STAT. ANN. § 906.09 (West Supp. 1979).

²¹⁶ FED. R. EVID. 609; *see, e.g.*, ARIZ. R. EVID. 609; ME. R. EVID. 609; OKLA. STAT. ANN. tit. 12, § 2609 (West 1978).

²¹⁷ In determining whether probative value outweighs prejudice, a court probably will look at the nature of the offense (and this one bears not the slightest relationship to honesty), remoteness of the conviction (all other factors being equal, the closer the time proximity, the more likely its admissibility) as well as the similarity of the prior offense to the charged offense and the importance of credibility issues in the current trial. 3 D. LOUISELL AND C. MUELLER, FEDERAL EVIDENCE §§ 315-18, 324-32.

While I know how this balancing test should be answered, I offer no guarantees that it will be answered this way. In New Jersey, for example, the rule on admissibility of prior offenses requires a showing that probative value outweighs prejudice. N.J. STAT. ANN. § 2A:81-12 (West 1976); *State v. Sands*, 386 A.2d 378 (1978). But even so, I know of many trial judges who routinely would permit introduction in evidence of a child pornography possession conviction in a child sex abuse case on the theory that one who committed a crime is less believable than one who has not.

²¹⁸ Yes, I understand that impeachment use is *NOT* use as substantive evidence. Like many others I believe, however, that a jury would consider substantively the evidence of a prior child pornography conviction. *See Note, To Take the Stand or Not*

Return once again to Ida and Peter. Assume that Peter is a physician and a member of the Chamber of Commerce.²¹⁹ He makes a very good and believable witness. Ida, by contrast, is nervous and fidgety and easily confused as to the sequence of events. At trial all twelve jurors may be convinced on the sole basis of Ida's testimony that Peter raped her.²²⁰ In this event, the introduction of Peter's prior child pornography conviction to impeach his testimony will not move the jury from acquittal to conviction because the jury was prepared to convict anyway. But suppose one or more of the jurors was not quite convinced on the basis of Ida's testimony. In such a case knowledge of Peter's prior conviction for child pornography possession might remove any lingering doubt and turn this hung or acquitting jury into a convicting jury.

Knowing this, Peter might not testify.²²¹ While the jury will be admonished that the defendant's failure to testify may not be used to infer guilt—and while a jury actually may follow this instruction—in at least some cases the defense will be undermined by the defendant's failure to explain the circumstances of his encounter with the child. If, for example, we suppose the most common situation, that the defendant is a family friend or relative or someone else who cannot deny knowing the child,

to Take the Stand: The Dilemma of the Defendant With a Criminal Record, 4 COLUM. J.L. & SOC. PROB. 215, 218 (1968) (response to survey showed more than 40 percent of judges and almost all attorneys believed jury cannot follow instruction to use prior conviction only to evaluate credibility).

The general view that juries treat this information substantively is one reason why the drafters of the federal rules elected to restrict the list of impeaching felonies. J. WEINSTEIN & M. BERGER, *supra* note 214, at 609-56 to 58. The low probative value of convictions for crimes unrelated to dishonesty is the other major reason why the federal rules restrict the list of impeaching felonies. *Id.* at 609-56.

²¹⁹ Pedophiles come from all walks of life. Frequently they are professionals. They frequently salivate or otherwise announce their perversion to the community. *See, e.g.,* CHILD PORNOGRAPHY AND SEX RINGS (A. Burgess ed. 1984); G. WILSON AND D. COX, *supra* note 102, at 15-17; Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (1978).

²²⁰ I know I am oversimplifying here. A juror votes to convict if no reasonable doubt remains on the basis of *all* the evidence. The question is whether the quantum is sufficient, not whether each piece of evidence independently meets this standard. For purposes of streamlined discussion, and also because it likely will be Ida's testimony that convinces the jury, I am oversimplifying in the text.

²²¹ 3 D. LOUISELL AND C. MUELLER, *supra* note 217, § 315, 317-18. *See generally*, Note, *supra* note 218, at 218.

then his failure to offer his explanation or denial may well doom his defense.

My point here is modest. Given the circumstances of Ida and Peter, many jurisdictions will permit the prosecutor to use Peter's prior possession conviction to impeach. In these jurisdictions, such use of the prior conviction may make at least some child sex abuse cases easier to prove.

D Limited Prosecution Benefits

The "real" difficulty impeding an effective criminal law solution to the problem of child pornography and child sexual abuse is that relatively few of these crimes ever get reported. Solutions to the problem that involve creating new crimes are therefore of limited utility. The problem is finding the child abuser, not simply describing the abuser's conduct as criminal.

Even were this not so, the only at-home conduct presently protected under *Stanley* is that of the lone viewer who does nothing more than privately possess and view. Because everything else involving sex or pornography with children already is or may be made a crime, only a small number of child pornography possessors cannot be prosecuted for one or more of these other crimes.

Creation of a possession offense, however, will permit successful prosecution of some child abusers who otherwise would walk simply because of prosecution proof difficulties. As an alternative offering increased chance of conviction, the possession offense will aid the all-out societal effort to punish at least all known child abusers.

An additional benefit may be derived from the subsequent use of the conviction obtained in a child pornography surrogate prosecution. The benefit depends on whether in a particular case the child pornography possession evidence otherwise is admissible and whether, in any event, the jurisdiction permits use of this type of conviction to impeach.

Prosecutors will derive some benefit, but not much, from a child pornography possession crime.²²² The great majority of

²²² Some of the benefit derives from the jury's impermissible substantive use of the child pornography conviction.

cases still will not be prosecuted because the great majority of cases still will go unreported.

VII. AN EVALUATION OF POTENTIAL COSTS FROM PROSECUTING AT-HOME POSSESSION

The two prime costs attributed to making at-home child pornography possession a crime both relate to the high value deservedly placed on privacy interests, particularly in one's home. The first cost is the risk to privacy through new and increased law enforcement activity attendant on classifying possession as a crime. The second is the fear that a child pornography exception will engulf the remainder of the *Stanley* rule.

A. *Privacy Loss Through Vigorous (Or Excessive) Law Enforcement*

I do not know the likelihood that bad arrests or searches will occur or occur frequently if possession of child pornography is made a crime. My instinct is that the police will be too busy with other matters to spend much time looking under beds (literally) to ferret out suspected possessors of child pornography. Certainly the police are not presently engaged in such activity regarding the more serious child sex abuse or child pornography production crimes.²²³ If the police sit merely as receivers, and then verifiers, of reports or suspicions that others provide, then any extra enforcement power will make little difference in present police activity or citizen/police involvement.

Whether or not arrests and convictions abound, the specter of too much police/citizen involvement exists and perhaps may by itself override incremental law enforcement benefits derived from a child pornography possession crime. The specter gains more substance when one remembers that the Supreme Court of the United States has had limited success defining obscenity²²⁴ and refused even to try to define child pornography

²²³ See, e.g., *Effect of Pornography on Women and Children: Hearings on S. 1267 Before the Subcomm. on Juvenile Justice of the Senate Judiciary Comm.*, *supra* note 1, at 139-40 (statement of Daniel S. Campagna); Shouvlín, *supra* note 83, at 543 n.59.

²²⁴ Compare *Roth v. United States*, 354 U.S. 476 (1957) with *Miller v. California*,

Definitional fuzziness lends itself to police mistakes or overreaching since the conclusion that the material is child pornography is crucial to deciding that possession of the material is criminal. A citizen lawfully may possess photographs, films, and books and need not justify to the government particular taste in reading or viewing material. A crime with definitional fuzziness, however, expands the opportunities of the police to investigate in legal good faith.

Return to my earlier example of the burglar's tools. If the police conduct a home search for burglar's tools, they can define with fair precision what objects they expect to find. Not only can they be concrete in specifying the objects of their search, but their search for those objects will not involve a rummaging through private papers, photographs, or film.²²⁵

A picture of a nude child, however, is only that until a content judgment declares it child pornography.²²⁶ If it is not child pornography, it is protected speech. Thus the intrusion to seize the picture might be an intrusion not only on a fourth amendment privacy interest but also on a protected first amendment interest as well.

This extra level of analysis necessary to decide whether possession of a picture is criminal likely had great influence on the *Stanley* result. Protection of at-home privacy is not only or merely to protect an adult's right to view obscenity but to protect the right to be free from intrusion when the material is not obscene. Limiting a state's ability to declare conduct a crime concomitantly limits its investigative opportunities.

The at-home privacy interest in first amendment material should have led to a difference in the standard of cause required

413 U.S. 15 (1973). Mr. Justice Stewart finds articulation of a standard difficult, but he knows obscenity when he sees it. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Mr. Justice Brennan finally gave up trying to articulate one workable standard. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 73-114 (1972) (Brennan, J., dissenting).

²²⁵ Even unexposed film is seizable when unexposed pictures are within the definition of child pornography. Several states so define the crime. *E.g.*, CRIM. CODE § 1021.2 (Supp. 1985).

²²⁶ See *Faloon v. Hustler Magazine*, 799 F.2d 1000, 1004 n.1 (5th Cir. 1986) (nude photographs of children, including one with frontal nudity of boy and nude girl facing him, not child pornography under *Ferber*).

before a search warrant issues for such material. Unfortunately, the Supreme Court of the United States concluded otherwise.²²⁷ With one exception only, the protection against searching for presumptive first amendment material is no different from the protection afforded a burglar's tool.

In fourth amendment law the police sometimes may conduct a warrantless search on probable cause even if they had time first to obtain a warrant.²²⁸ To search a private dwelling for evidence²²⁹ of a criminal offense,²³⁰ however, they normally must have obtained either a search or an arrest warrant.²³¹

Presumptive first amendment interests, in and out of the home, always²³² are protected by the requirement that a search

²²⁷ *New York v. P.J. Video, Inc.*, 106 S. Ct. 1610 (1986).

²²⁸ In several situations, a warrant is not required to conduct a search. *See, e.g., United States v. Watson*, 423 U.S. 411 (1976) (public arrest); *Carroll v. United States*, 267 U.S. 132 (1925) (search of car). For searches of material presumptively covered by the first amendment, exceptions to the warrant requirement, if available at all, will be scrutinized closely. *Roaden v. Kentucky*, 413 U.S. 496 (1973).

²²⁹ The mere evidence rule no longer limits a fourth amendment search. *Warden v. Hayden*, 387 U.S. 294 (1967). The rule permitted searches for contraband or instrumentalities or fruits of a crime—but not mere evidence. *Id.* But even if it still operated to limit searches, a search for child pornography is a search for an instrumentality of the crime of possession and not merely a search for evidence of its commission.

If the crime charged is child sexual abuse, then a search for child pornography would be permitted so long as the pornography was used to entice the child. In this case, the pornography would be an instrumentality of the crime. I think it unlikely that a search for child pornography could be conducted on the theory that it is evidence of the crime of child sexual abuse simply on the premise that child abusers keep child pornography. I think the constitutionality of a search on this basis is doubtful even if the child pornography, if found, could be introduced into evidence.

²³⁰ By its terms the fourth amendment is not restricted to felonies. State statutes governing the issuance of search warrants similarly permit warrants to issue whether the offense is a felony or misdemeanor. *See, e.g., NEB. REV. STAT. §§ 29-104, -108, and 813* (1985). Nonetheless, most if not all searches today are conducted in conjunction with felony investigations. It would take a highly unusual case to intrude on at-home privacy in investigating an offense which, by misdemeanor classification, is not considered very serious.

²³¹ Alternatively, they must be able to show an exigent circumstance obviating the need for prior judicial authorization. *Payton v. New York*, 445 U.S. 573, 590 (1980). The exigent circumstance justifies the warrantless search if the court in evaluating the constitutionality of the search is persuaded of the exigency. The need to justify the warrantless search occurs only when a warrant otherwise is required under the fourth amendment. In a situation in which a warrant is not required, no exigent circumstance is needed.

²³² At least this is the case in the absence of a "now or never" emergency. *Roaden*

be on a warrant.²³³ But what the first amendment does *NOT* require is a higher or different showing of probable cause before a warrant issues. Material afforded presumptive first amendment protection is evaluated by the same standard that governs search warrants generally²³⁴ the magistrate simply must have a substantial basis for concluding that a fair probability exists that evidence of the crime will be found in the place specified.²³⁵

If the police decide to go all out to stop child pornography possession, the potential for harassment certainly exists. Gay bars in a community tend to be known by the police. If the police suspect that pedophiles generally are gay,²³⁶ then they could follow gays home and set up other kinds of surveillance to find out whether they harbor an unhealthy interest in children. Similarly, the police might investigate video shops suspected of behind-the-counter transactions in child pornography²³⁷ and begin investigations of all customers or of those customers known or suspected to have rented child pornography

In fact, however, the police already may undertake this sort of activity to investigate child sex abuse or child pornography distribution or to develop a charge that an individual uses child pornography to entice child victims. I am fairly convinced that the incremental authority to investigate a possession crime will have negligible impact.

v. Kentucky, 413 U.S. 496 (1973). Compare *Heller v. New York*, 413 U.S. 483 (1973) (magistrate could issue warrant upon his opinion that the material is obscene) with *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (police officer could not search for "obscene" material without granting defendants a hearing).

²³³ *Roaden*, 423 U.S. at 496; see *Heller* 413 U.S. at 483 (magistrate could issue warrant but post-seizure hearing still necessary); *Marcus*, 367 U.S. at 717; see also *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (seizure by customs agents pursuant to civil process must be followed by prompt post-seizure hearing).

²³⁴ *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

²³⁵ *Id.*

²³⁶ There are both heterosexual and homosexual pedophiles. See G. WILSON AND D. COX, *supra* note 102, at 123. There are various estimates of pedophilic sexual preferences. One survey concluded that approximately 70 percent of pedophiles preferred boys. Another estimate, however, was that child pornography preferences are evenly split between boys and girls. Comment, *Preying on Playgrounds: The Exploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 813 and n.24 (1978).

²³⁷ The video operator also would be guilty of a child pornography offense—distributing.

B. *Limited Privacy Loss*

If police discretion is handled fairly and wisely, then presumably any extra enforcement power incident to the possession crime will not act to intrude on legitimate privacy expectations. If they instead choose to investigate more thoroughly than a healthy respect for privacy would dictate I still do not think that the intrusion on privacy will be any different because they investigate a possession as compared to, for example, a use-to-entice crime. If the police go too far under the fourth amendment, the courts always are available as a check. As with law enforcement benefits so too is the conclusion regarding privacy intrusion. In each instance the relatively few cases investigated and prosecuted combined with the number of crimes already available to convict the possessor lead to a conclusion that the child pornography possession crime will have a negligible impact.

C. *The Stanley Slippery Slope*

What then of the fear that a child pornography exception ultimately means the end of *Stanley*? Are children *sui generis*, or does a crime of child pornography possession augur a new trend of examining what people read and think in the privacy of their own homes?

The available research relied on by the *Stanley* Court to conclude that obscenity is not likely to injure either participant or viewer today is both seriously questioned in terms of methodology and contradicted by later studies.²³⁸ Several experts now report a connection between viewing violent obscenity and committing violence on women.²³⁹ Although no equivalent data exists that harm is caused to an adult pornography participant merely from knowledge of the existence of the obscenity, I would not be surprised to see that data develop.

I do not know how farfetched the progression from child pornography back to a re-evaluation of *Stanley* would strike the

²³⁸ See, e.g., Wilson, *Violence, Pornography, and Social Science*, 233-38 in *THE PORNOGRAPHY CONTROVERSY* (1975) (R. Rist, ed.).

²³⁹ A.G. Pornography Report, *supra* note 3, at 323-29. See generally *PORNOGRAPHY AND SEXUAL AGGRESSION* (N. Malamuth & E. Donnerstein eds. 1984).

Court. So long as the distinction for child pornography primarily or completely rests on the harm caused to a child participant as compared to a consenting adult obscenity participant, child pornography is sufficiently distinguishable to fall well outside *Stanley*. In fact, I believe child pornography is distinguishable on the basis of harm even if the Court were to declare obscenity protected speech tomorrow. Exceptions specific to children abound in the caselaw in the first amendment area²⁴⁰ and elsewhere.²⁴¹ This simply would be one more.

More troublesome in terms of the *Ferber* holding is how one distinguishes the harm to a child from possessing child pornography as compared, for example, to the harm caused from possessing a nude picture of a child.²⁴² If under *Ferber* a state legitimately may protect children from harm, then arguably the Court must define as child abuse any depiction that causes harm to a child.

It is not particularly difficult to make a reasonable guess at what the *Ferber* Court has in mind when it noted that not all child nudity would be child pornography. If the child pornography is not obscene under *Miller*, a determination of criminality likely depends on the interrelationship of four somewhat overlapping factors.

The first factor is the nature of the activity depicted. A picture of a nude child, absent seductive pose, is different from the same nude child posed seductively and certainly different from a depiction of that nude child engaged in sexual activity.

The second factor is the projected impact of the activity on the child pornography participant. The child may suffer embarrassment or shame in posing nude, particularly if in a seductive pose. He or she may be unhappy and nervous during the photo or film session. Not only is that embarrassment surely magnified if the child is photographed while engaged in performing a sexual act with another, but the sexual activity is an additional harm.

²⁴⁰ See cases cited *supra* note 13-17.

²⁴¹ *E.g.*, *In Re Gault*, 387 U.S. 1 (1967) (difference in procedural rights between adults and juveniles).

²⁴² The *Ferber* Court noted that not all portrayals of child sexuality would be unprotected speech. *Id.* at 764. *Cf.* *Shields v. Gross*, 461 N.Y.S.2d 254, 448 N.E.2d 108 (1982) (photos taken with parental consent could not later be challenged by child).

The third factor is the societal evaluation of the legitimacy of the purpose for the picture. A nude picture of Ida Innocent in a medical text might pass muster under *Ferber* when that same photograph might be child pornography if published in a sex magazine.²⁴³ Presumably Ida's embarrassment about posing nude would be present no matter what the purpose for the depiction (although perhaps not to the same degree). Presumably that embarrassment will continue through her knowledge that others have and will see her nude picture. Nonetheless, since society will consider the context of the publication in deciding whether Ida's character is impugned, the definitional decision as to whether it is child pornography partly will ride on the same criterion.

The need for the depiction is the fourth factor. As with purpose, need makes a difference. Suppose the medical text contained a picture of Ida engaged in sexual intercourse. Here not only is the harm to Ida significantly greater but it is far more difficult to justify the need for the depiction. The medical text could always depict adults or, if size is important, small adults or line drawings.

Need, purpose, nature of the activity depicted, and impact of the activity on a child will add up to a judgment whether or not harm exists. Although perhaps ultimately circular, need, purpose, nature of the activity depicted, and impact of the activity on a child also may add up to a judgment whether or not the depiction is child pornography

Now apply this standard for identifying child pornography. Suppose that the picture at issue in *Ferber*²⁴⁴—boys masturbat-

²⁴³ Cf. *Redrup v. New York*, 386 U.S. 767 (1967); *Ginzberg v. United States*, 383 U.S. 463 (1966) (in close cases defendant's treatment of material in emphasizing "provocative aspects" will control court's obscenity characterization). Perhaps a general circulation "family" newspaper by definition can never publish child pornography. I feel that perhaps a major motion picture company can also never be said to produce obscenity. See *Jenkins v. Georgia*, 418 U.S. 153 (1974) (motion picture which did not "depict sexual conduct in patently offensive way" was not obscene).

²⁴⁴ I am dealing here with whether the newspaper may be prosecuted for dissemination of the picture (or even sued in tort for invasion of privacy). I do not address the additional, and much harder, question whether the newspaper may be prevented from publishing the picture initially. *E.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469

ing—was run by a daily newspaper or popular news magazine as a graphic illustration of the evils of child pornography²⁴⁵ Ferber's own distribution of the picture is a crime. What difference should/does apply when the disseminator is a general circulation newspaper?

Under a *Miller* obscenity test the newspaper publication is not obscene because a legitimate societal purpose in the publication existed, and, taken as a whole, it does not appeal to a prurient interest.²⁴⁶ And by contrast to Ferber's activities, the newspaper's purpose in publishing is to eliminate child pornography by graphic illustration of the need for vigorous law enforcement. Thus, unlike *Ferber*, publication is not an encouragement to the commercial production of child pornography

The harm to the boys derived from the participation in the sexual activity, however, is at least a constant and probably substantially more severe because the general public, not just the pedophilic underworld, sees the picture.²⁴⁷ At the same time,

(1975) (allowed publication of rape victim's name based on court records).

Further, even if the newspaper publication would be child pornography, the newspaper could still harm the child—and yet be protected under *Ferber* simply by naming the child and explicitly describing the sex act in which the child participated. Thus a focus on harm to the child is a somewhat unsatisfying solution.

²⁴⁵ Or the picture might have appeared in a medical journal. Or the picture may have appeared to be the two boys but actually was a simulation using adult performers. Or an identical picture of native boys might have been published in *National Geographic* as evidence of a tribal ritual. This latter example raises the potential overbreadth argument that arises when foreign children are considered within the scope of a state possession offense. In their cultures some of this activity may be condoned if not proscribed. I still believe that the statutes are constitutional without regard to proof of nexus between the child depicted and the state prosecuting. See *supra* text accompanying notes 151-63.

²⁴⁶ See *supra* note 6 for the complete *Miller* test.

²⁴⁷ See *People v. Spargo*, 431 N.E.2d 27 (Ill. App. Ct. 1982):

We believe that children who have already been the subject of graphic sexual depiction in some form of child pornography have an interest in having such material shielded from the view of others. As damaging as the initial sexual exploitation involved when the photographs were taken is the continuing fear of exposure from distribution and the possible tension of keeping the act secret. Exhibition of the photographs in the case at bar, for example, could very well lead to further contact and exploitation of the child since the children's names and sexual traits were contained in [the trial record].

Id. at 31.

showing need for the depiction is difficult. The newspaper, after all, could run the picture and cover the child's face to prevent identification.

Is the newspaper publication child pornography under *Ferber*? The possible answer to this question is troubling since, if harm to the child controls, I suspect that under the *Ferber* reasoning constitutional prosecution is possible. Even more troubling than what happens to the newspaper publisher is what theoretically *SHOULD* happen to the at-home possessor of the newspaper. If the newspaper is child pornography, then the at-home reader is in possession of child pornography. Although I have no doubt that the at-home reader would not be prosecuted, I have some difficulty describing a principled distinction that exempts him.²⁴⁸

Of some comfort, however, is the belief that the Court never will face these questions because no responsible newspaper publisher would choose to publish such a picture, at least where a child could be identified. It is a sufficient answer therefore to say, as the *Ferber* Court clearly did, that the hard questions such as the one posed by this example will be faced only if and when they arise (with the implicit assumption that they never will arise). I do not know. As I am not sure that I know what the answers should be.

VIII. SHOULD WE? OR SHOULDN'T WE? HESITANT FINAL THOUGHTS

I believe that a pedophile uses child pornography to entice victims. I believe that prosecution for possession of child pornography will sometimes catch a pedophile against whom an abuse case would fail. I believe that child pornography in its own right, and without regard to the harm caused by the activity depicted, injures children (but I do not have any notion as to how much nor do I know whether less injury would be caused if societal attitudes changed tomorrow). I believe that child

²⁴⁸ One possible distinction is that the at-home newspaper reader—at least if the newspaper is delivered to the subscriber's door—is not in knowing possession. Cf. *Lamber v. California*, 355 U.S. 225 (1957) (no notice); *Martin v. State*, 17 So. 2d 427 (Ala. Ct. App. 1944) (no actus reus).

pornography is related to child sex abuse, and I certainly believe a child is harmed from early initiation to sex—particularly in the circumstances that frequently prevail when production of child pornography is concerned.

When resolution of the issue comes down to balancing what looks like a child pornography possessor's minimal loss of privacy against what looks like a minimal increase in law enforcement ability to protect children from harm caused by predator adults, the answer I come to is to make at-home possession a crime.²⁴⁹ The privacy interest by itself, even if substantial, simply does not override a finding of real harm to children whose incidence and impact could be lessened even a little by a child pornography possession crime.

I am not attempting to denigrate privacy concerns. I simply think that, since "to take child pornography more seriously is to take sexual abuse of children more seriously, and vice versa,"²⁵⁰ prevention of harm to children is a more compelling interest here. I expect most legislatures to decide similarly. Regarding the crime of at-home possession of child pornography, I suspect that what is obvious to laypeople is a problem only for lawyers.

²⁴⁹ A lot of us seemingly are in the same boat. The American Civil Liberties Union, for example, argues that when harm to children is shown, society should act to prevent that harm. Interestingly, it finesses the question of just what shows harm.

²⁵⁰ A.G. Pornography Report, *supra* note 3, at 417.