Cracking Down on the Trade in Child Pornography and Pornography for Children

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CRACKING DOWN ON THE TRADE IN CHILD PORNOGRAPHY AND PORNOGRAPHY FOR CHILDREN: MORE PROSECUTIONS, STIFFER SENTENCES AND NOW, AFTER OSBORNE v. OHIO, NO PLACE TO HIDE†

HARVEY L. ZUCKMAN*

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The life of the child pornographer, while never easy, became increasingly difficult in the 1980s when the federal and state governments cast their full attention on these exploiters of children and their pedophiliac customers. This article will review the law in this area, the legislative and judicial process by which the federal and state government have attempted to stamp out the trade in child pornography particularly in the past decade and the first decision of the Supreme Court in this new

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decade making it more difficult than ever to store, handle and move such material, even surrepticiously.

I. A DIFFERENT LEGAL STANDARD FOR MINORS EXPOSED TO OBSCENE AND INDECENT MATERIALS.

The process began with the recognition by the Supreme Court that the Constitution required different treatment for children and adults regarding exposure to obscene and indecent material. In *Butler v. Michigan*, the Supreme Court struck down a section of the Michigan Penal Code which made it a misdemeanor to distribute to the general public or to receive any printed matter, pictures or recordings tending to incite minors to violent, depraved or immoral acts or manifestly tending to the corruption of the morals of minors. The defendant’s conviction for violating the statute was reversed by the Supreme Court in the face of the State’s insistence that by insulating the general reading public from books not too erotic for grown men and women in order to shield juveniles from the world of sex, it was properly exercising its power to promote the general welfare.

Responding to the State’s position, Justice Frankfurter said, “The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.” But Justice Frankfurter did not say that juveniles might not in any way be insulated by government action from adult materials protected by the First Amendment. Indeed, he noted that Michigan had a statute on its books not employed in the *Butler* prosecution designed specifically to prevent minors from coming into contact with such adult materials. The existence of such statutes raise the question whether First Amendment protection for sexually oriented material might vary depending upon the audience for such material and the participants involved in their production.³

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2. Id. at 383-384.
NO PLACE TO HIDE

A. Minors as Audience for Adult Material


The question whether less rigorous constitutional standards of protection for sexually oriented material might be employed when minors constitute the audience was first addressed in Ginsberg v. New York.\(^4\) There, the operator of a lunch counter and magazine stand sold a sixteen-year-old male two "girlie" magazines at two different times. He was convicted on two counts of violating a section of the New York Penal Law\(^5\) which prohibited the knowing sale to minors under the age of seventeen of any picture which depicts nudity and any magazine which contains such pictures and which, taken as a whole, would be "harmful to minors." The term "harmful to minors" was defined as "that quality of ... representation ... of nudity ..., [which] ... (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors" (emphases supplied). The conviction was affirmed by the Appellate Term of the New York Supreme Court without opinion and the Court of Appeals denied leave to appeal.\(^6\)

On appeal to the United States Supreme Court the conviction was affirmed. At the outset of his opinion for the Court, Justice Brennan stated that the "girlie" magazines involved were not obscene for adults under the tripartite standard laid down in Miller v. California,\(^7\) and the

\(^4\) 390 U.S. 629 (1968).
\(^7\) 413 U.S. 15 (1973).

Following a long period of indecision and vacillation as to the general constitutional standard to be applied in determining and suppressing obscene expression (see Doubleday & Co., Inc. v. New York, 335 U.S. 848, 69 S. Ct. 79, 93 L.Ed. 398 (1948) (per curiam), affirming, sub nom. People v. Doubleday & Co., Inc., 297 N.Y. 687, 71 N.Y.S.2d 736, 77 N.E.2d 6 (1947); Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); A Book Named "John Clelan's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts, 383 U.S. 413 (1966), the Court in Miller laid down a three-prong test which had to be met before sexually oriented expression could be condemned. As the first prong of the test the Court adopted the single standard of Roth v. United States, supra, of whether the average person, applying contemporary community standards, would find that the questioned material, taken as a whole, appeals to prurient interest. The Court's second prong requires that the material depict or describe in a patently offensive way, sexual conduct specifically defined by applicable state law. The final prong requires that the material involved again taken as a whole lacks serious literary, artistic, political or scientific value. The Court made clear that under these conjunctive tests only "hard core" expression could constitutionally be suppressed. Examples given by the Court by way of guidance to the legislatures and courts were "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturba-
statute did not bar the appellant from stocking and selling the magazines to persons seventeen years of age or older. Thus, neither the statute nor the conviction thereunder ran afoul of the Court's decision in *Butler v. Michigan*.

Justice Brennan also rejected the appellant's argument that the denial to minors under seventeen of access to material not obscene to those seventeen years of age and older constituted a violation of the First and Fourteenth Amendments. Citing *Prince v. Massachusetts*, which had upheld the right of state to limit the age at which persons could sell religious tracts on the streets of Boston, Justice Brennan said there were two powerful interests that justify the difference in the constitutional treatment of adult materials depending upon the age of the audience.

The first interest is state support of parents' claim of authority to direct the rearing of their children in order that the basic structure of society may be preserved. In addition, the state has an independent interest in the well-being of its youth stemming from the need for them to develop into responsible adult citizens. Recognizing those interests as compelling justification for the subordination of First Amendment rights of minors, the Court said that in upholding the statute and the conviction thereunder it was only necessary that it conclude that the statutory prohibition of access to adult material had a rational relationship to the healthy development of children in society. While conceding that a causal link between adult material and healthy maturation has not been demonstrated, the Court justified the rationality of the legislature's action on the basis that a causal link has not been disproved either.

Thus it is clear that a First Amendment standard more relaxed than that presently laid down for adults in *Miller v. California* prevails in judging sexual materials communicated to minors. Given the powerful interests at stake, this variability in First Amendment protection is not likely to change in the foreseeable future.

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10. 390 U.S. at 639.
11. *Id.* at 640-641.
12. *Id.* at 642-643.
2. Minors in the broadcast audience - *FCC v. Pacifica Foundation*

If reinforcement of the *Ginsberg* approach to children in the audience for adult material is needed it can be found in the rather colorful (blue?) case of *FCC v. Pacifica Foundation*. There, a New York radio station at about two in the afternoon on a school day in October of 1973 played a twelve-minute cut from a George Carlin comedy album entitled "Filthy Words" as part of a program about contemporary society's attitude toward language. Seven of the major swear words were represented in Carlin's monologue and several of them were repeated *ad nauseam*. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter to the Federal Communications Commission complaining of the broadcast. This was, apparently, the only complaint registered about the program. Nevertheless, the Commission issued a declaratory order stating that the licensee, Pacifica Foundation could have been the subject of administrative sanctions. The Commission did state however that its order would be associated with the station's license file and, in the event that subsequent complaints were received, it would then decide whether it should utilize any of the available sanctions authorized by Congress.

In its memorandum opinion adjudicating the complaint, the Commission characterized the language used by Carlin as "patently offensive" though not necessarily obscene and held the language as broadcast to be *indecent* and therefore violative of Section 1464 of Title 18 of the United States Code which forbids the use of "any obscene, indecent or profane language by means of radio communications."

Concerned that indecent language was being broadcast at times of the day when there is a reasonable risk that children would be in the audience, the Commission, rather than place an absolute prohibition on the broadcast of such language, suggested that such broadcasting be channeled to times of the day when children most likely would not be exposed to it. The United States Court of Appeals for the District of Columbia Circuit reversed and the Supreme Court granted certiorari to consider, among other things, whether the order violated First Amendment protection of expression.

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15. *Id.* at 729.

16. *Id.* at 729. Perhaps because it was a matter of first impression the Commission did not impose any formal sanctions.

17. *Id.* at 731-732.

18. *Id.* at 732-733.
The Court held that indecent speech was not accorded absolute constitutional protection under all circumstances and in all contexts because of its minimal expressive value.\textsuperscript{19} Thereafter, it upheld the Commission's order, with its potentially negative effect on the licensee, because of the pervasive nature of broadcasting and because "broadcasting is uniquely accessible to children..."\textsuperscript{20} In justifying regulation of indecent broadcast speech which would otherwise be protected because not obscene under the \textit{Miller} standards, the Court cited \textit{Ginsberg v. New York} \textsuperscript{21} and the government's interests in the well-being of its youth and in supporting parents' claims to authority in raising their children.\textsuperscript{22} "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in \textit{Ginsberg}, amply justify special treatment of indecent broadcasting."\textsuperscript{23}

3. The Practical Problem of Insulating Minors from Protected Adult Material.

Having adopted a variable obscenity approach dependent on the age of the audience and, at the same time, having clearly indicated its unwillingness to reduce the reading and listening level of adults to that of children, the Supreme Court created a difficult practical problem for the Congress, the state legislatures and the lower federal and state courts. In shielding minors from indecent material, regulation must be narrowly drawn so that it does not unduly interfere with First Amendment freedoms of adults.\textsuperscript{24} The means must be carefully tailored if they are to withstand constitutional challenge.\textsuperscript{25} Thus far the Supreme Court has provided little guidance to the legislatures and courts in making the difficult choices as to means. And because of the ad hoc nature of the problem, the Court may not be able to provide much guidance in the future.

\textsuperscript{19} \textit{Id.} at 747.
\textsuperscript{20} \textit{Id.} at 749.
\textsuperscript{21} 390 U.S. 629.
\textsuperscript{22} 438 U.S. at 749.
\textsuperscript{23} \textit{Id.} at 750. Sensitive to the charge that the regulation of indecent adult expression over electronic media would reduce adults to hearing only what is fit for children (cf. \textit{Butler v. Michigan}, 352 U.S. 380, 383 (1957)), the Court noted that adults could still purchase tapes and records or go to theatres and nightclubs to hear such language or perhaps stay up late at night for indecent broadcasting which at the date of the \textit{Pacifica} decision (but not today) the FCC was "channeling" to post-midnight hours. \textit{See} \textit{Action for Children's Television v. FCC}, 852 F.2d 1332, 1340-1341 (D.C. Cir. 1988).
\textsuperscript{24} \textit{See} Sable Communications of California, Inc. v. FCC, — U.S. —, 109 S. Ct. 2829, 2836 (1989).
\textsuperscript{25} \textit{Id.}
a. Print Media

One of the recurrent issues is preventing exposure of minors to non-obscene adult magazines and books displayed for sale on magazine racks or other places of public accommodation. The issue has been addressed by several federal and state appellate courts. Confronting very nearly the same broad regulation making it a crime on the part of magazine and book sellers and others knowingly to display adult periodicals deemed harmful to minors in such manner as to permit access by minors, judges of the federal courts of appeal have divided as to the constitutionality of such legislation. The Eighth Circuit in *Upper Midwest Booksellers v. City of Minneapolis* upheld a Minneapolis ordinance which included provisions that adult material be sealed when displayed in places frequented by minors, and that if the covers or packaging are themselves harmful to minors the sealing device must be opaque. The term “harmful to minors” is defined in terms of the *Miller* tripartite test, except that the prurient appeal is that addressed to minors, and patent offensiveness is that which goes beyond what is suitable material for minors. The merchants sought a declaration of unconstitutionality and an injunction on the basis of overbreadth of the ordinance in denying access of adults to materials protected as to them. The Eighth Circuit, citing Supreme Court doctrine requiring that such overbreadth be real and substantial, held that any overbreadth was incidental and insubstantial because the ordinance was carefully drawn and “adults are still free to request a copy of restricted material to view from a merchant or to peruse the material in “adults only” bookstores or in segregated sections of ordinary retail establishments. More significantly, “adults are still able to view any of the material in a free and unfettered fashion by purchasing it.”

But Judge Lay dissented, believing the Minneapolis ordinance to be overly broad in its sweep and thus unconstitutional on its face. Noting

27. 780 F.2d 1389 (8th Cir. 1985).
29. Id. at § 385.131(3)(e).
31. 780 F.2d at 1395.
32. Id. at 1399.
that the ordinance provided merchants with an alternative to the sealed, opaque covers in the form of a separate area defined by a sign reading "Adults only - you must be 18 to enter," Judge Lay would have held both options unconstitutional.\textsuperscript{33} As to the covers, their sealing prevents assessment of the work as a whole in relation to minors. The cover material might be objectionable but the inside material might not. As to the employment of a segregated area for the display of adult materials, Judge Lay found it constitutionally objectionable as to both minors and adults. "Such a practice effectively prevents minors from purchasing materials they are constitutionally entitled to purchase. Moreover, because of the stigma attached to "adults only" stores, many adults would forgo exercising their first amendment rights to purchase nonobscene literature if such material were only available in adult bookstores."\textsuperscript{34} Turning to the rights of the booksellers, Judge Lay asserted that none of the alternatives made available to them were acceptable.\textsuperscript{35}

"If the bookseller decides to play it safe and establish an "adults only" section, the storeowner would lose the patronage of minors as well as many adults wishing to avoid the stigma attached to such bookstores. If the bookseller chooses instead to sell only nonobscene materials in order to avoid limiting entrance to large numbers of the buying public (all minors and many adults), the bookseller would have to remove from the shelves any book or magazine bearing a cover that might possibly be deemed harmful to minors even though the content of the book or magazine was perfectly proper for all to read."\textsuperscript{36}

In \textit{M.S. News Co. v. Casado},\textsuperscript{37} the Tenth Circuit considered a Wichita, Kansas ordinance similar in nature and language to the Minneapolis ordinance except that it permitted display of adult material "harmful to minors" if the material were kept behind "blinder racks" so that the lower two-thirds of the material was not exposed to view. Again, a magazine vendor had sought to have the statute declared invalid, \textit{inter alia}, on the ground of overbreadth. And again the Court of Appeals held that the overbreadth, if any, was not significant\textsuperscript{38}. The court pointed out that the ordinance permitted the display of material harmful to minors if it is in appropriate blinders racks and adults can purchase it without great difficulty.\textsuperscript{39}

\textsuperscript{33} \textit{Id.} at 1402.
\textsuperscript{34} \textit{Id.} Judge Lay also rejected the majority's holding that the ordinance, given the content of the material aimed at, was a valid time, place or manner restriction on expression. \textit{Id.} at 1402-1404.
\textsuperscript{35} \textit{Id.} at 1408.
\textsuperscript{36} \textit{Id.} at 1402.
\textsuperscript{37} 721 F.2d 1281 (10th Cir. 1983).
\textsuperscript{38} \textit{Id.} at 1286-1287.
\textsuperscript{39} In \textit{Upper Midwest Booksellers}, Judge Lay distinguished \textit{M.S. News Co.} on the basis that the blinder rack option permitted greater access to the material by adults. See 780 F.2d 1389, 1400 n.2.
On the other hand, the Fourth Circuit in *American Booksellers Association, Inc. v. Commonwealth of Virginia* had affirmed a trial court decision striking down a state statute prohibiting, without exception, the knowing display of adult materials for commercial purpose in a manner whereby juveniles might examine and peruse them. The Fourth Circuit first rejected the idea that the statute constituted a reasonable time, place and manner restriction simply because the expression occurred in a private place rather than in a public forum or in a place subject to a general zoning ordinance and because the Virginia amendment imposed restrictions based on the content of publications.

The more serious flaw in the statute, according to the court, was its breadth or, more precisely, its overbreadth. There was a considerable difference of opinion in the trial court as to the number of books and periodicals which might be affected by Virginia’s display regulation. Thus, the Fourth Circuit was uncertain as to the percentage of materials in an average retail outlet which might be affected. The appellate court was certain that booksellers faced a substantial problem attempting to comply with the amendment in ordering, reviewing and displaying publications for sale. And the court rejected the state’s suggestion that placing the materials in blinders racks or sealing them in plastic covers would satisfy the broad mandate of the statute and the requirements of the First Amendment as well. It specifically rejected the *M.S. News* and *Upper Midwest Booksellers* decisions which had upheld the use of these devices.

Forcing a bookseller, therefore, to create a separate, monitored “adults only” section or hiding adult materials “under the counter” would only make the impact on adult access even greater because many adults would not enter an “adults only” area or ask out loud for concealed material.

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41. Virginia code Section 18.2-391(a), as amended, provides in relevant part: “It shall be unlawful for any person knowingly to sell or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:

(1) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which when taken as a whole, is harmful to juveniles” (emphasis supplied to show language added by the 1985 amendment.).
42. 802 F.2d at 695.
44. Id. at 696.
While the Fourth Circuit drew the battle line clearly with the Eighth and Tenth Circuits on how, constitutionally minors might be shielded from adult material, its decision was vacated on appeal by the Supreme Court after the Court received answers to certain questions certified by it to the Virginia Supreme Court. The state court in its response significantly narrowed the reach of the statute, reducing the number of materials subject to the display provision and making clear that for a violation to occur the booksellers would have to either knowingly afford juveniles the opportunity to peruse harmful materials or, being reasonably aware of minors' opportunity to peruse the adult material, take no reasonable steps to prevent the perusal. The Supreme Court's vacation of the Fourth Circuit judgment did not therefore reach the original First Amendment issue dividing the Circuits as to how, exactly, minors are to be insulated from the material legally available to adults.

There is also division in the state courts as to the constitutionality of broadly worded magazine shielding statutes, with the majority of state courts that have considered such statutes declaring them unconstitutional. Admittedly, the problem of determining what, constitutionally, legislature may prescribe as the means for denying access to indecent adult print materials by minors is a difficult one because overbreadth will result in denial to adults of constitutionally protected access to the materials. Even though the overbreadth must be real and substantial before legislation may be struck down, the line is not an easy one to draw. But I believe that the Eighth Circuit drew the line improperly in Upper Midwest Booksellers. I agree with dissenting Judge Lay that the majority's upholding of the Minneapolis ordinance permits real and substantial overbreadth. Sealed covers prevent adults from making informed judgments whether to buy a particular publication thus limiting access. This overbreadth is compounded when the sealed covers are required to be opaque so that even the publication's cover cannot be viewed by adults. It is no answer to the overbreadth problem to permit booksellers and other retailers to avoid the sealed cover requirements by setting aside an area of their premises for adult publications with a sign reading

48. Id. at 624-625.
to the effect "Adults Only - you must be 18 to enter." Some adults simply will not enter "adult" bookstores because of the stigma that attaches to the patrons. This alternative makes the denial of access to constitutionally protected material complete as to these adults.51

The Minneapolis city fathers should have been required to return to their legislative drawing board and follow the teaching of the Colorado Supreme Court in Tattered Cover, Inc. v. Tooley.52 "The evolving rule concerning the validity of display regulations is this: A display provision will be upheld if it is so narrowly drawn that it has only an incidental effect on the booksellers' right to sell adult materials and an adult's ability to purchase them."53

b. Motion Pictures and Electronic Media

In Erznoznik v. City of Jacksonville,54 the city had enacted an ordinance making it a crime and a public nuisance for employees of drive-in movie theaters to aid or assist in exhibiting all photographic images of bare human male and female buttocks, and public areas and female breasts if such images were visible from any public street or public place.55 In attempting to uphold the ordinance and the conviction of the manager of a drive-in for violating it, the city claimed that its regulation was an exercise of its police power to protect children. Striking down the ordinance as facially unconstitutional, the Supreme Court held it to be overbroad, including within its reach images clearly not obscene even as to minors such as a baby's buttocks, the nude body of a war victim, scenes from a culture in which nudity is indigenous and paintings of nudes.56 "Clearly all nudity cannot be deemed obscene even as to minors," the Court said.57 Careful discrimination as to the forms of nudity is necessary.

Avoidance of overbreadth in regulation of the electronic media by the federal government is also required. In 1988 the Congress, impatient

51. 780 F.2d at 1402.
52. 696 P.2d 780 (Colo. 1985).
53. Id. at 785.
54. 422 U.S. 205 (1975).
55. Id. at 208. ("330.13 Drive-In Theaters, Films Visible From Public Streets or Public Places. It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this shall be punishable as a Class C offense.")
56. Id. at 212-213.
57. Id. at 213.
with largely ineffective efforts over a five-year period in the 1980s by the Federal Communications Commission to insulate minors from adult telephone messages communicated for a fee, amended the Federal Communications Act of 1934 so as to ban all obscene and indecent interstate commercial telephone communications directed to any person regardless of age. In Sable Communications of California, Inc. v. F.C.C., the Supreme Court upheld the provisions of the legislation prohibiting obscene speech delivered by interstate telephone transmission but struck down the portion of the legislation totally banning indecent expression. More recently, the Commission proposed to allow "dial-a-porn" services to transmit their phone messages to consenting adults if the services required credit card payments, issued access codes, scrambled their messages and asked phone companies to list 900 calls to their service on customer bills, all to the end of preventing access to the messages by minors.

In reaching this result the Court was forced to distinguish F.C.C. v. Pacifica Foundation. There, George Carlin turned out to be at least partially correct in his legal conclusion that there are certain words one may not utter over the air, because after a complaint was lodged, the Federal Communications Commission granted the complaint and clarified its standards governing indecent speech on the airwaves. It stated that it had "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." The Court in Sable distinguished Pacifica on the bases that no issue of a total ban on indecent broadcasting was before the Court there and that the uniquely pervasive nature of over-the-air free broadcasting permitted intrusion of objectionable material without warning and easy accessibility of children to it. But, of course, even given its intrusive nature, the Court did not

58. The history of the Commission's regulatory efforts is set out in Sable Communications of California v. FCC, — U.S. at —, 109 S. Ct. at 2833-2834.
60. — U.S. —, 109 S. Ct. 2829.
61. Citing Butler v. Michigan, 352 U.S. 380 (1957) for the proposition that the amending statute was not reasonably restricted to preventing only minors from receiving "dial-a-porn" phone messages. Rather, the statute would prevent all access to such messages, which are constitutionally protected for an adult audience. See Carlin Communications, Inc. v. F.C.C., 837 F.2d 546, 549 (2d Cir. 1988); FCC Report and Order, Regulations Concerning Indecent Communications by Telephone, Gen. Doc. No. 90-64 (adopted June 14, 1990).
63. 438 U.S. 726.
64. Id. at 733.
suggest even by way of dictum, that a complete ban of indecent broadcasting was permissible.\footnote{But the Commission has now proposed a 24-hour barring of "adult" programming from the airwaves. See Notice of Inquiry Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464, 4 F.C.C. Rec. 8358 (1984).}

Given the Court's recent decision in \textit{Sable}, it seems safe to conclude that a total ban on indecent electronic communications to shield the children will not pass constitutional muster and that the \textit{Butler} decision stands as a bulwark against the reduction of mass communications to a level of blandness that is \textit{always} suitable for family viewing or listening.

B. \textit{Minors as Participants in the Production of Obscene and Indecent Materials}

While legislators, administrative agencies, prosecutors and courts have long demonstrated a strong interest in protecting the healthy sexual and emotional development of juveniles in our society by preventing their premature exposure to sexual material prepared by others, an even greater threat to normal sexual and emotional development more recently encountered is the exploitation, often under mental or physical duress, of children in the production of obscenity.\footnote{See New York v. Ferber, 458 U.S. 747, 749. 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 599-601 (1986); Kent & Truesdell, \textit{Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography}, 68 OR. L. REV. 363, 363-364 (1989). Note, \textit{Child Pornography: A New Role for the Obscenity Doctrine}, 1978 U. ILL. L. F. 711, 713.} In \textit{New York v. Ferber},\footnote{N.Y. Penal Law §263.15 (McKinney 1980).} the Supreme Court had before it Section 263.15 of the New York Penal Law which declared felonious the promotion by any person of "a sexual performance by a child, when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years old."\footnote{Id. at § 263.10. At the time \textit{Ferber} was decided, 35 states and the United States had enacted legislation prohibiting the distribution of such materials. Twenty states, including New York, prohibited the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene. These statutes are listed in the opinion in \textit{Ferber}. See 458 U.S. at 749-750 n.2. \textit{See also} Schauer, \textit{Codifying the First Amendment: New York v. Ferber} 1982 SUP. CT. REV. 285, 288-289.} It was undisputed that the New York legislation does not require that the sexual material produced with children be legally obscene under the \textit{Miller} standard in order to convict those violating its provisions. A companion provision bans the knowing dissemination of \textit{obscene} material involving children.\footnote{458 U.S. 747.}

In a criminal prosecution brought under the two sections the Supreme Court reversed the New York Court of Appeals judgment that
section 263.15 was unconstitutional on its face because it prohibited the production of materials that were not obscene and therefore protected by the First Amendment. In unanimously upholding the New York statute and the convictions thereunder, the Court began its analysis with the question of whether a state has greater latitude under the Constitution in proscribing works which portray sexual acts or lewd exhibitions by children. In answering the question in the affirmative, the Court gave several reasons. First, echoing its decision in <i>Ginsberg</i>, the Court pointed to the state's interest in safeguarding the physical and psychological well-being of minors so that they might mature into the kind of citizens needed to sustain a democratic society. The Court refused to question the state's legislative judgment that the use of children as subjects of pornographic material is harmful to their physiological, emotional and mental health.

Second, the dissemination of photographs and films depicting sexual activity by juveniles involves their sexual abuse because the child participants would be constantly aware that the materials produced are a permanent record of their activity and because the dissemination of these "records" would exacerbate the emotional and psychological harm to them. If children are to be protected from such abuse, the distribution of indecent as well as obscene materials involving child participants must be disrupted. The most expeditious if not the only practical means to this end would be to disrupt the supply of the materials by imposing severe criminal penalties on those involved in the sale and promotion of the product.

According to the Court, limiting law enforcement in this area only to the distribution of materials meeting the <i>Miller</i> standard would not serve the state's very strong interest in protecting its children from sexual abuse. The <i>Miller</i> standard was held to be inadequate here because (1) the "prurient interest" prong bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work; (2) a sexually explicit depiction involving a child need not meet the "patently offensive" prong in order to involve sexual exploitation; and (3) a work which, taken as a whole, contains "serious literary, artistic, political or scientific value," may nevertheless

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71. Id. at 756-757.
72. Id. at 758. Nor would the Court question the relevant literature on child pornography and mental health that comes to the same judgment. Id. at n.9.
73. Id. at 759-760. It takes two to make a market—a willing seller and a willing buyer. The attack on the willing buyer occurred in <i>Osborne v. Ohio</i>. — U.S. —, 110 S. Ct. 1691, discussed supra at notes 117-130 and accompanying text.
74. Id. at 761.
contain a hard core of child pornography and abuse.\textsuperscript{75}

The Court adjusted the \textit{Miller} formulation. "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."\textsuperscript{76} The Court thus permitted \textit{all} child pornography to be treated as if it were legally obscene in relation to an adult audience.

In making this departure from \textit{Miller}, the Court believed that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct was at best minimal. But because the Court's central rationale in \textit{Ferber} is the imperative of protecting actual children from harm, the Court limited the departure from prevailing First Amendment law to material that visually depicts children below the age specified by the relevant statute. Distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or visual reproduction of live performances retains normal First Amendment protections.\textsuperscript{77}

By almost any First Amendment measure, \textit{New York v. Ferber} is an extraordinary case. It identifies a new category of expression, non-obscene visual depiction of sexual activity by children, that is to be denied First Amendment protection. But this casting out from First Amendment protection is not based, as other denials of such protection have been, on the effect on the potential \textit{audience} for the expression, but rather on the effect on the participants (children) involved in the creation of the expression.\textsuperscript{78} Perhaps without fully realizing it, the Court created a new category of expression excluded from First Amendment protection and did so without spelling out the parameters of that category.\textsuperscript{79} At this point it cannot be determined whether the category includes other varieties of expression harmful to the participants themselves.

\textsuperscript{75} Id. at 761.
\textsuperscript{76} Id. at 764.
\textsuperscript{77} Id. at 764-75.
\textsuperscript{79} See Schauer, note 53 at 294.

Recognizing that child pornography was becoming a serious national problem, the Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977. The act imposed criminal penalties of up to $10,000 fines or ten years imprisonment or both on anyone who "employed, used, persuaded, induced, enticed or coerced any minor to engage in any sexually explicit conduct for the purpose of producing any visual or print depiction of such conduct knowing or having reason to know that such visual or print depiction would be transported in interstate or foreign commerce or will be mailed". Parents, legal guardians or persons having custody or control of minors who knowingly permitted minors to engage in such conduct for the purpose of producing visual or print depictions were subject to the same criminal penalties if they knew or had reason to know that such depictions would be transported in interstate commerce or mailed.

At the other end of the child pornography traffic even stiffer criminal penalties might be imposed upon those who knowingly transported or shipped in interstate or foreign commerce or the mail for the purpose of sale or distribution for sale any obscene visual or print depiction using a minor engaged in "sexually explicit conduct" for its production. In defining sexually explicit conduct, Congress chose to list "hardcore" activities meeting the Miller test for patent offensiveness.

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80. The problem may in part be of the federal government's own making. Confiscated child pornographic materials are being circulated in sting operations to trap pedophiles interested in buying these materials. See United States v. Musslyn, 865 F.2d 945 (8th Cir. 1989); State v. Steadman, 152 Wis.2d 293, 448 N.W. 2d 267 (Wis. App. 1989). The recent increase in federal criminal indictments may be due to "the mass marketing of child pronography by the United States Custom and the United States Postal Inspection Services." Stanley, The child Porn Myth, 7 CARDOZO ARTS & ENT. L. REV. 295, 321-322 text at nn. 134-136 (1989). Risking the escape of previously purchased or confiscated child pornography in the course of "sting," operations seems at the very least hypocritical (if not immoral and illegal) on the part of agencies supposedly dedicated to removing such material from circulation.


82. 18 U.S.C.A. § 2251(a), (c) (West 1982).

83. Id. § 2251(b).

84. Id. § 2252(a). "Any person who violated this section shall be fined not more than $10,000, or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this section, such person shall be fined not more than $15,000, or imprisoned not less than two years nor more than 15 years, or both." Id. § 2252(b).

85. Id. § 2253(2).
Effectiveness of the act was severely limited by the requirements that child pornography in interstate foreign commerce or in the mails be legally obscene as then apparently mandated by *Miller v. California* and that those transporting such material in interstate or foreign commerce or through the mails do so for the purpose of sale or distribution for sale. If the motivation for the legislation was the protection of children, these requirements stood in the way of achieving that goal because children could be sexually exploited or abused even if the depictions were legally obscene or were not produced for commercial gain.

Following the Supreme Court's determination in *Ferber* that those involved in the production and distribution of child pornography could be constitutionally prosecuted when the material involved was not legally obscene, the Congress went back to its drawing board. In 1984, Congress enacted the Child Protection Act amending the 1977 legislation to eliminate the need to establish the obscenity of child pornography and the commercial purpose for its transport or shipment in interstate or foreign commerce or the mail. Criminal fines were increased substantially for individuals and imposed for the first time on organizations. Upon conviction for violations of the act there would also be imposed automatic criminal forfeitures of property derived from gross profits or other proceeds obtained from violations of the act as well as property used or intended to be used to commit such violations. Civil forfeitures of other property could also be sought by the Government. The upper age limit of minority was raised from under sixteen in the 1977 act to under eighteen in the amended act.

After substantially strengthening the anti-child pornography law in 1984, Congress came back again in 1986 to close a loophole regarding the interstate transportation of children for purposes of producing child por-

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86. 413 U.S. 15.
89. 458 U.S. 747.
92. *See Id.* §§ 2251(c), 2252(b).
93. *See Id.* § 2253(a).
94. *See Id.* § 2254(a).
95. *See Id.* § 2255(1).
The 1986 amendments known as the Child Sexual Abuse and Pornography Act made criminal the transportation of minors in interstate or foreign commerce, or in any United States territory or possession with the intent that the minors engage in any sexually explicit conduct for the purpose of producing visual depictions of such conduct and broadened the term visual depiction in the legislation to include undeveloped film and videotape. The 1986 legislation also amended the Mann Act to make it gender neutral regarding the transportation in interstate or foreign commerce of minors for illegal sexual purposes.

Further amendment of the anti-child pornography law was made in 1988 in Title VII, subtitle N, sections 7511-7513 of the Anti-Drug Abuse Act. The changes effected include the criminalization of the use of computers in interstate child pornography trafficking and the buying and selling of or the offering to buy or sell minors knowing that the minors will be employed in the production of visual depictions of sexually explicit conduct. Very heavy fines and imprisonment for not less than 20 years are prescribed for violation of the child buying and selling prohibitions.

The 1984 amendments appear to have to some extent broken the logjam on law enforcement. During the more than six years from enactment of the "Protection of Children Against Sexual Exploitation Act" in 1977 to passage of the 1984 amendments, there were a total of 69 individuals indicted and 65 individuals convicted of violating the original act. From the effective date of the 1984 amendments through the time of the House of Representatives' consideration of the 1986 amendments, 274 individuals had been indicted and 214 individuals had been convicted of violating the amended act.

In large part, the increased effectiveness of law enforcement is the result of the attitude of the judiciary. The federal courts have consistently upheld the constitutionality of this legislative scheme in the face of

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98. Id.
102. Id. § 2251A.
claims of vagueness, lack of notice of the applicable community whose standards would apply, imposition of strict felony liability, imposition of cruel or unusual punishment and denial of equal protection of the law. Those actually convicted under this legislative scheme have fared no better with their claims of lack of sufficiency of evidence of violations, errors in the admissibility of evidence or the affirmative defense of entrapment. And complaints about harsh sentences also meet with little judicial sympathy.

II. NO LEGAL PLACE TO HIDE CHILD PORNOGRAHY

At the same time, however, the combination of strengthened legislation, tough law enforcement, sympathetic judges and a high conviction rate with stiff sentences has had the unintended consequence of driving the child pornographers even deeper underground, taking with them their underage victims. This, of course, makes the goal of eradication of the traffic much more difficult. Reaching supply operations whether in nondescript garets, abandoned warehouses or even in apparently respectable homes at the time of production distribution or sale is a chancy and sometime thing. Another approach complementing the increasingly difficult operation of disrupting supply would be to destroy demand by criminalizing the use and possession, of child pornography. A number of states have

104. See United States v. O'Malley 854 F.2d 1085, 1086 (8th Cir. 1988); United States v. Fogarty, 663 F.2d 928, 930 (9th Cir. 1981); United States v. Reedy, 845 F.2d 239, 241 (10th Cir. 1988); United States v. Nemuras, 567 F. Supp. 87, 90 (D. Md. 1983) ("[T]he statute is sufficiently clear that anyone with a modicum of common sense and a knowledge of the English language and of human nature can understand what is prohibited by it.").


110. See United States v. Garot, 801 F.2d 1241, 1246-1247 (10th Cir. 1986).


112. See United States v. Ames, 743 F.2d 46 (1st Cir. 1984), cert. denied 469 U.S. 1165 (1985) (sentence of five years sustained); United States v. Freeman, 663 F. Supp. 73 (E.D. Ark. 1987) (sentence of six years sustained when average sentence for the same offense was allegedly 3.1).

taken this approach but until recently serious doubt existed as to the constitutionality of such legislation because of the prior Supreme Court decision of Stanley v. Georgia. There the Court had ruled that the First Amendment prohibits government from making mere private possession of obscene material a crime. According to the Court as then constituted, the "right to receive information and ideas, regardless of their social worth ... is fundamental to our free society. ... [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted intrusions into one's privacy."

Because of the strongly perceived need of society to eliminate the exploitation of children which the child pornography trade necessitates, the United States Supreme Court in Osborne v. Ohio rose above these fundamental principles to strike a major blow against the market for child pornography. There, local police found photographs in the appellant Osborne's home each of which depicted a nude male adolescent posed in a sexually explicit position. Osborne was convicted of violating an Ohio statute which criminalized the mere possession or viewing of material or performance that depicts a minor not the person's child or ward in the nude, except under certain narrow exceptions not applicable to him. He was sentenced to six months in prison and his convictions and sentence was affirmed by the intermediate appeals court and the Ohio Supreme Court, which rejected his contention that the First and Fourteenth Amendments prohibit the states from enforcing legislation punishing the private possession of child pornography.

On appeal the Supreme Court, in upholding the constitutionality of the Ohio statute though reversing the conviction for instructional error

114. See Kent & Truesdell, note 50 at 372 n.35, 378-381 for a review of state legislation and judicial decisions.
115. 394 U.S. 577.
116. Id. at 564.
118. See Ohio Rev. Code Ann. § 2907.323(A)(3) (Supp. 1989) which provides inter alia:
   
   (A) No person shall do any of the following:
   
   "(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:
   
   "(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.
   
   "(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."
119. 110 S. Ct. 169.
negating Osborne procedural due process, \textsuperscript{120} emphasized that \textit{Stanley} was a narrow holding and that since that decision the value of permitting child pornography has been deemed "exceedingly modest, if not \textit{de minimis}." \textsuperscript{121} The Court, per Justice White, went on to assume for purpose of argument that Osborne had a First Amendment interest in viewing and possessing child pornography but it nevertheless upheld the Ohio statute. It distinguished \textit{Stanley} on the basis that the state's interests underlying child pornography prohibitions far exceeded the interests justifying the Georgia law prohibiting adult obscenity at issue in \textit{Stanley}. \textsuperscript{122} There, the state was exercising paternalistic control to protect the minds of its citizens from being poisoned by obscenity. Georgia's interest was viewed as insufficient to overcome the constitutional protection of a person's private thoughts. \textsuperscript{123} In \textit{Osborne} the state was not attempting paternalistic control of the defendant's mind but rather protection of the victims of child pornography by attempting to destroy the market for the exploitation of children. \textsuperscript{124} Repeating language in \textit{Ferber} \textsuperscript{125} the Court said:

\begin{quote}
[it] is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . The legislative judgment as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.
\end{quote}

The Court then added that "[i]t is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." \textsuperscript{126}

To bolster its decision subordinating individual interests of exposure to pornographic communicative materials and protection from government intrusion into personal privacy, the Court recognized two other interests supporting the Ohio statute. First, as noted in \textit{Ferber}, the materials produced by child pornographers permanently record the victim's abuse and do continuing damage to the children for years to come.

\begin{itemize}
\item \textsuperscript{120} The jury was not instructed that it could convict for violation of Ohio Rev. Code. Ann. § 2907.323(A)(3) only if the State proved scienter and that the defendant possessed material depicting a lewd exhibition, or a graphic focus on a child's genitals. — U.S. at —, 110 S. Ct. at 1703-1705, 109 L.Ed.2d at 117-119.
\item \textsuperscript{121} See 458 U.S. at 762.
\item \textsuperscript{122} \textit{Id.} at 1692-1693.
\item \textsuperscript{123} \textit{Id.} at 1696.
\item \textsuperscript{124} — U.S. at —, 110 S. Ct. at 1695-1697.
\item \textsuperscript{125} 458 U.S. at 756-758.
\item \textsuperscript{126} \textit{Id.} at 757-760.
\end{itemize}
Criminalizing possession and viewing encourages destruction of such material. Second, encouragement of destruction is also desirable because it deprives pedophiles of a tool to seduce other children into sexual activity.127

One effect of Osborne v. Ohio should be to make child pornographers more vulnerable to successful prosecution because once the pornographer finishes producing his material he must still handle and store it. Probable cause is all that is required for law enforcement authorities to obtain a warrant to search for such contraband.128 The Fourth Amendment standards for searching out and seizing child pornography are not greater than those imposed for obscene materials and other things.129 The fact that pornographers may sometimes use adults who have the appearance of children under the age of eighteen does not affect probable cause warrants. As the Ninth Circuit said in United States v. Wiegand,

[T]he predicate of many statutory rape laws is to tell the difference in the age of the victim. If such laws are not unconstitutional because a mistake as to age might be made, it is difficult to hold a warrant unconstitutional because error [as to the age of the participants] could occur under its direction.130

Possessing child pornography either physically or constructively is now very risky and if one is caught with the goods it will likely result in prosecution, conviction and lengthy incarceration.

The other effect of the Osborne decision, as suggested by the Court, might be to reduce the market for child pornography. Though the abstract theory makes sense the actual effect on demand is questionable since the compulsion of pedophiles to collect child pornography may often exceed the fear of punishment for being caught in possession of it. It may be noted that criminal child molestation statutes have not, unfortunately, eliminated child molestation. Whatever the actual effect of Osborne, the Court has sent a strong message to the child pornographers and their customers that society need not tolerate any of their activities, including the passive one of possessing this exploitive material whether in a storage room, a warehouse or even in the privacy of one's own home. Osborne marks the culmination of a long legislative and judicial process by the states and federal government to distinguish child pornography from ordinary obscenity and to eliminate it from our society.

127. Id. at 759.
128. See United States v. Wiegand, 812 F.2d 1239, 1242 (9th Cir. 1987), cert. denied 484 US. 856 (1987).
129. Id.
130. Id. at 1243
III. Conclusion

Setting aside the arguments of the moralists and those who believe but cannot prove a causal link between the exposure of juveniles to pornography and later criminal sexual behavior, a strong case can be made for tough federal and state legislation protecting children from exposure to and participation in the production of pornography if we grant the premise that children are different from adults and need to be nurtured differently.131 Again, while there is an absence of empirical data, some psychiatrists (particularly child psychiatrists) believe from their professional observation of patients with emotional and sexual dysfunction that permissive exposure of children to obscene and indecent materials may distort the normal maturation process.

[Psychiatrists] . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval - another potent influence on the developing ego.132

Given the concern expressed by some of the closest observers of the maturation process, I believe the Supreme Court is correct in upholding legislation that criminalizes the knowing exposure of minors to sexual materials that may not be legally obscene but are of an "adult" indecent nature. Since the harmful exposure is magnified as to those children imposed upon to participate in the production of pornography, legislation outlawing the involvement of minors in production of both obscene and indecent visual materials and the mere possession of these materials is also amply justified. The First Amendment should not be viewed as so inflexible as to permit the placing of society's youth at risk of sexual abuse and distorted emotional development.
