

CHILD PORNOGRAPHY AND CHILD NUDITY: WHY AND HOW STATES MAY CONSTITUTIONALLY REGULATE THE PRODUCTION, POSSESSION, AND DISTRIBUTION OF NUDE VISUAL DEPICTIONS OF CHILDREN

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INTRODUCTION

"Children have become fair game in our sexually saturated society. When we sexualize children and adolescents, we begin a daunting descent that puts us on the path of seeing children in a sexual way."^x

The recent trend of producing and distributing materials that contain nude visual depictions of children, which skirt the fine line between constitutionally protected works of art and unconstitutional child pornography, is alarming.² In several landmark decisions regarding child pornography, the United States Supreme Court has stated that "[i]t is evident beyond the need for elaboration that the State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"³ However, the Supreme Court has also noted that while there is a compelling interest in protecting the physical and psychological well-being of children, "[a]s with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed."⁴ As a consequence, only those statutes that purport to protect the physical and psychological well-being

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1. NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, STATEMENT (1997).

2. See the works of Robert Mapplethorpe, Jock Sturges, David Hamilton, and Sally Mann for examples of this medium.

3. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). See also *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (finding Ohio statute proscribing possession and viewing of child pornography constitutional). It should be noted that the Supreme Court has only held that "visual depictions of children" constitute child pornography, and not written materials. See *Ferber*, 458 U.S. at 764 (stating that "[t]he nature of the harm to be combated requires that the State offense be limited to works that *visually* depict sexual conduct by children below a specified age"). Thus, references to "child pornography" throughout this Article refer only to visual depictions of children—i.e. photographs, videos, or digitized images of children.

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

of children, and are narrowly tailored to accomplish this goal, will satisfy the tests used to determine whether restrictions on First Amendment rights are constitutional.⁵

Applying the rational relationship test, the Supreme Court has held that restrictions on the creation and distribution of child pornography are constitutional.⁶ The Supreme Court has even held that the "at home" possession and viewing of child pornography may be restricted and regulated by state and federal laws.⁷ The Court reached these conclusions notwithstanding the fact that it had previously held that while private possession and viewing of obscene materials may not be regulated or restricted by the State,⁸ States' regulation or restriction of obscenity was valid.⁹

Despite the Supreme Court's rather extensive rulings on child pornography, the Court has not clearly answered a lingering question: May the State constitutionally regulate child nudity? The types of materials encompassing child nudity include nude visual depictions of children on film, videotape, or other electronic media.¹⁰ The Supreme Court has given some indication of how it would rule on the issue of child nudity regulation, but it has not directly answered the question.¹¹ Consequently, in determining the constitutionality of

5. See *id.* (applying rational basis scrutiny to statute prohibiting creation and dissemination of child pornography). See also Josephine R. Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 49-50 (1987-1988) (recognizing Court's application of rational basis scrutiny in *Ferber* and urging strict scrutiny analysis for possession of child pornography). The Court's analysis in *Ferber* and *Osborne* has created considerable confusion as to the appropriate standard of review for child pornography statutes. Although the Court in both cases commented on the "compelling" need to protect children, neither case discussed the second prong of strict scrutiny analysis, whether the means employed by the state were narrowly tailored to achieve the compelling State objective, leading to the possibility that the Court applied rational basis scrutiny. See John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 394-96 (1991) (discussing lack of articulated standards in *Ferber* and *Osborne*).

6. See *Ferber*, 458 U.S. at 753-74 (holding that New York statute proscribing distribution of child pornography material did not violate First Amendment).

7. See *Osborne*, 495 U.S. at 108-15 (upholding Ohio statute prohibiting possessing and viewing child pornography where defendant was convicted of possessing pornographic photographs in his home).

8. See *Stanely v. Georgia*, 394 U.S. 557, 564-65 (1969) (striking down statute proscribing possession of obscene material in one's home, for State cannot control minds, beliefs, or thoughts of its citizens).

9. See *Miller v. California*, 413 U.S. 15, 23-24 (1973) (finding that obscene material is not afforded First Amendment protection).

10. The type of images sought to be regulated throughout this Article include only those works depicting the direct recording of a nude child through some sort of mechanical apparatus, and not paintings, sculptures, or other reliefs which depict nude children. The purpose of regulating such works is to protect the interests of the child depicted, rather than to restrict nudity per se.

11. In *Massachusetts v. Oakes*, 491 U.S. 576 (1989), the Supreme Court had an opportunity to rule on the issue of child nudity, since the defendant in the case was convicted under a Massachusetts law which regulated visual depictions of nude children. However, the Court declined to rule on the issue directly, stating that the issue was moot because the Massachusetts legislature had since amended the original statute to include a "lascivious intent" requirement. See *Oakes*, 491 U.S. at 582-85. Even so, Justice Scalia's dissent in *Oakes* suggests that the Court would allow the restriction of nude visual

regulations governing depictions of child nudity, lower courts have been forced to base their rulings on dicta from the Supreme Court's child pornography cases, and the decisions the Court has issued in obscenity cases.¹² These lower courts have tended to rule on the side of protecting the First Amendment rights of the producer, distributor, and possessor of nude visual depictions of children, rather than on the side of protecting the best interests of the child-victim.¹³ These courts generally rely on two basic arguments to support their rulings. First, courts have maintained that since there is no apparent injury to the child, there is no compelling state interest to support the restriction of child nudity.¹⁴ Second, lower courts have emphasized that any statute purporting to restrict child nudity is unconstitutionally overbroad.¹⁵

Despite the lack of clear guidance from the United States Supreme Court regarding the constitutionality of restrictions on child nudity and the lower court rulings finding depictions of child nudity to be protected speech, there appears to be at least one way to protect children from exploitation that would survive judicial scrutiny in this area. In the interest of protecting the privacy rights of both parents and children, the Court has upheld several statutes even though they directly implicate and infringe upon First Amendment rights.¹⁶ Thus, a well-drafted statute which restricts nude visual depictions of children for the purpose of protecting the privacy rights of both the child and parent would probably be held constitutional.

The objectives of this Article will essentially be three-fold. The first objective will be to offer a brief overview of the constitutionality of restrictions on child pornography, focusing on what types of materials have clearly been

depictions of children because, "[i]t is not unreasonable, therefore, for a State to regard parents using (or permitting the use) of their children as nude models, or other adult's use of consenting minors, as a form of child exploitation." *Id.* at 588-90 & n.2 (Scalia, J., dissenting). *Osborne* was the next opportunity the Supreme Court had to rule on the constitutionality of the regulation of nude visual depictions of children; however, the Court was not required to rule directly on the issue in this case because the Ohio Supreme Court had previously construed an Ohio statute to require more than mere nudity. *See Osborne*, 495 U.S. at 112-13 (finding that nude photographs of minors alone are constitutionally protected expressions). Thus, the Court has never directly addressed whether child nudity could be regulated.

12. *See, e.g.*, *United States v. Cross*, 928 F.2d 1030, 1042-43 & 1042-43 n.34 (11th Cir. 1991) (obscenity not requirement for liability); *People v. Batchelor*, 800 P.2d 599, 601-02 (Colo. 1990) (interpreting *Ferber* and *Osborne* to hold that mere "display" of child nudity in photographs is protected expression).

13. *See Batchelor*, 800 P.2d at 601-02 (acknowledging that range of protected child nudity exists).

14. *State v. Young*, 525 N.E.2d 1363, 1367-68 (Ohio 1989).

15. *See Batchelor*, 800 P.2d at 601 (explaining that statute, which only restricts child nudity, is overbroad).

16. *See, e.g.*, *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (upholding statute prohibiting sale of obscene material to minors); *Prince v. Massachusetts*, 321 U.S. 158, 166-69 (1943) (upholding statute prohibiting children from selling periodicals in public places to protect against child labor). *See generally Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (finding that state law invaded Fourteenth Amendment liberty interests protecting teacher's right, as well as parent's choice, of having child taught foreign language). *Meyer* is a clear indication that parental rights are heavily protected by the Court.

declared by the courts to be unprotected by the Constitution. The second objective will be to explore the debate concerning restrictions on child nudity as compared to restrictions on child pornography. Finally, this Article will offer a model law which would allow States to regulate and restrict the production, possession, and distribution of nude visual depictions of children within the boundaries of the Constitution.

I. OVERVIEW OF THE CONSTITUTIONALITY OF CHILD PORNOGRAPHY

Any discussion of the Supreme Court's possible treatment of child nudity first requires an assessment of the Court's treatment of child pornography. Since some of the same constitutional arguments for sustaining restrictions on child pornography may be used to sustain restrictions on child nudity,¹⁷ the value of examining the Court's analysis of restrictions on child pornography is tremendous. The constitutional history of child pornography law can be divided into two main categories—pre-1982 treatment of child pornography and post-1982 treatment of child pornography. In 1982 the Supreme Court addressed the constitutionality of restrictions on child pornography, in deciding the vanguard case of *New York v. Ferber*.¹⁸ Therefore, the cases prior to 1982 upon which the Supreme Court relied in *Ferber* must be examined in order to evaluate the Court's reasoning as well as sharpen the legal issues surrounding child pornography. Similarly, *Ferber* and its progeny must be examined to gain an understanding of how the Court directly addresses the issue of child pornography.

A. *Setting the Stage for New York v. Ferber*

In a line of cases prior to *Ferber*, the Supreme Court held that certain materials deemed to be "obscene" may be constitutionally restricted.¹⁹ The type

17. These arguments will be discussed in greater detail later in the article. Essentially there are two main arguments which support restrictions on child nudity in the same way as child pornography. First, nude visual depictions of children, like child pornography, may be used with great effectiveness by pedophiles to break down the barriers of a child's inhibitions to perform sexual acts. In addition, similar to child pornography, nude visual depictions of children create a permanent record that will follow a child for the rest of his or her life, regardless of the fact that when the child reaches maturity he or she may wish to enjoin the distribution of the visual depictions. See *infra* notes 118-43 and accompanying text for a discussion of the reasons why regulation of child nudity should be constitutional.

18. 458 U.S. 747(1982). See Potuto, *supra* note 5, at 30-32 (explaining that effect of *Ferber* was to make public distribution of child pornography constitutional crime). See also Benjamin J. Vernia, Annotation, *Validity, Construction, and Application of State Statutes or Ordinances Regulating Sexual Performance by Children*, 42 A.L.R. 5th 291, 331 (1994) (explaining that *Ferber* held child pornography is not protected by First Amendment).

19. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208-12 (1975) (explaining that adult nudity without more is protected expression); *Miller v. California*, 413 U.S. 15, 23-24 (1973) (upholding conviction for mailing obscene material because obscenity is not protected by First Amendment); *Stanley v. Georgia*, 394 U.S. 557, 560-68 (1969) (holding that States may not proscribe possession of obscene material in home because constitution protects right of privacy to one's thoughts); *Ginsberg*, 390 U.S. at 637-43 (upholding conviction for sale of obscene magazines to minor);

of materials the Court addressed in these early obscenity cases related to nude visual depictions of adults, usually engaged in some form of sexual activity.²⁰ The Court declared that materials deemed to be obscene were outside of First Amendment protection, and could be fully regulated by the State.²¹ However, materials deemed not to be obscene, such as certain adult pornography, retained First Amendment protection.²²

Despite the conclusive ruling that obscenity was outside First Amendment protection, the Court in *Ferber* struggled to come up with a comprehensive definition of what materials were or were not obscene.²³ Notwithstanding this difficulty, the Supreme Court did clearly recognize that the special status of children gives the State greater latitude in regulating materials that are even suspected of being obscene.²⁴ Thus, the State could, for example, constitutionally restrict the sale of pornographic materials to minors, even though the pornographic materials are not obscene.²⁵

While the Supreme Court did not have occasion to rule on the specific category of materials deemed child pornography in the obscenity cases prior to *Ferber*,²⁶ these cases are important in a discussion of child nudity. At a minimum, these cases introduce the notion that, when the State's aim is to protect children, the State has the ability to restrict certain materials which may otherwise receive constitutional protection.²⁷ Perhaps the seminal case

Roth v. U.S., 354 U.S. 476, 481-85 (1957) (upholding conviction for mailing obscene material because obscenity is not protected speech under the First Amendment).

20. See *Miller*, 413 U.S. at 16 (explaining that Miller was convicted for mass mailing advertising for sale of obscene, "adult" books); *Stanley*, 394 U.S. at 558 (explaining that Stanley was convicted for possessing obscene, adult films in his home); *Ginsberg*, 390 U.S. at 629-32 (explaining that "girlie" magazines were not obscene for adults, only minors); *Roth*, 354 U.S. at 480 (explaining that Roth was convicted for mailing and advertising obscene circulars and obscene book).

21. See *supra* note 19 and accompanying text for a discussion of the holdings in the line of cases before *Ferber*.

22. See *Miller*, 413 U.S. at 23-28 (explaining that only materials found to be "obscene" or "patently offensive 'hard core'" are not afforded First Amendment protection); *Ginsberg*, 390 U.S. at 634-35 (explaining that "girlie" magazines were not obscene for adults and are protected under First Amendment when sold to adults); *Roth*, 354 U.S. at 487 (explaining that "portrayal of sex" by itself is not sufficient to deny First Amendment protection).

23. See *Ferber*, 458 U.S. at 754-55 (discussing difficulty of precisely defining obscenity due to vacillation in prior opinions).

24. "Despite considerable vacillation over the proper definition of obscenity, a majority of the Members of the Court remained firm in the position that 'the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of *exposure to juveniles*.'" *Id.* (emphasis added) (quoting *Miller*, 413 U.S. at 18-19).

25. See *Ginsberg*, 390 U.S. at 634-35 (finding that because "girlie" magazines are not obscene for adults, defendant is allowed to sell these magazines to adults).

26. See *supra* notes 19-22 and accompanying text for a discussion of the rulings in the obscenity cases prior to *Ferber*.

27. In particular, *Ginsberg* emphasizes the importance of States' constitutional power to control material which may adversely affect children. *Ginsberg*, 390 U.S. at 638-39. Almost all of the other important obscenity cases, however, at least mention the special status of children. See *Miller*, 413 U.S. at 36 n.17 (quoting *Ginsberg* for proposition that children have special status with respect to

illustrating this notion is *Ginsberg v. New York*.

1. *Ginsberg v. New York*—The Rights of Parents and Protection of Children

Prior to *Ginsberg v. New York* the United States Supreme Court had already declared that "[o]bscenity [was] not within the area of protected speech or press."²⁸ However, the Court had not clearly addressed the issue of whether the particular sensibilities of children allow the State greater latitude in finding certain materials obscene with respect to children, but not obscene with respect to adults. In *Ginsberg*, the Supreme Court was faced with the issue of whether a State could regulate the distribution or sale of materials deemed to be obscene on the basis of its appeal to minors regardless of whether the material would be considered obscene to adults.²⁹ The Court was forced to address whether it was constitutionally permissible to enforce a statute which restricted the rights of minors under seventeen years of age to read or see sexual material while assuring adults the ability to judge and determine for themselves what sexual material they may read or see.³⁰

The Supreme Court held that with respect to minors it is constitutionally permissible to assess obscene material in terms of the sexual interest of such minors.³¹ Thus, the State need only demonstrate a rational basis for enacting a regulation that limited the access of children to obscene material.³² The Court reasoned that, "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"³³

The *Ginsberg* Court found that a rational basis existed for the State law restricting children's access to obscene material.³⁴ The Court based this finding on two premises:

First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the

obscenity restrictions); *Stanley*, 394 U.S. at 567 (discussing danger of obscenity falling into hands of children).

28. *Ginsberg*, 390 U.S. at 635 (quoting *Roth v. United States*, 354 U.S. 476,485 (1957)).

29. See *Ginsberg*, 390 U.S. at 631-33; *id.* at 645-47 (listing regulations upheld by the Court in "Appendix A to Opinion of the Court").

30. See *Ginsberg*, 390 U.S. at 636-37 (analyzing statute in light of States' role in safeguarding minors).

31. See *id.* at 638 (quoting *Miskin v. New York*, 383 U.S. 502, 509 (1966)) ("We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [New York's regulation] simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests ...' of such minors.").

32. See *Ginsberg*, 390 U.S. at 641 (stating that Court need only find rational basis for legislature's determination that exposure to pornographic materials harms minors).

33. *Id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158,170 (1944)).

34. See *id.* at 643 ("We therefore cannot say that... [the New York regulation], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm").

rearing of their children is basic in the structure of our society.... The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility... The State also has an independent interest in the well-being of its youth.³⁵

The Supreme Court then went on to hold that the New York statute was constitutional because the Court could not say that the statute, "in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm."³⁶

In terms of the Supreme Court's view on child pornography, *Ginsberg* can be seen as significant in at least two important ways. First, the Supreme Court recognized that parents have significant rights to guide the upbringing of their children.³⁷ Second, the Court recognized that the State's interest in protecting the well-being of children is a compelling interest.³⁸ These two propositions are also critical in an analysis of how the State may restrict the production, possession, and distribution of nude visual depictions of children.³⁹

2. *Miller v. California*—What about Parental Rights and Protecting Children?

In *Miller v. California*,⁴⁰ the Supreme Court crafted a three-part obscenity test to determine what materials should be given First Amendment protection.⁴¹ The *Miller* test, as it has come to be known, requires that:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁴²

Therefore, unless suspect sexually explicit material meets the requirements of the *Miller* test, it will be protected by the First Amendment.⁴³ The *Miller*

35. *Id.* at 639-40. The Court quotes *Meyer* and *Prince* extensively on parental and child rights. Such rights are extremely significant in supporting the proposed privacy statute, *infra*.

36. *Id.* at 643.

37. *Ferber*, 458 U.S. at 756-58; *Ginsberg*, 390 U.S. at 639-40.

38. *See Ferber*, 458 U.S. at 756-58 (finding it "evident" that State has compelling interest in safeguarding children because of need for well-rounded, healthy citizenry for continuation of society) (citing *Prince*, 321 U.S. at 168); *Ginsberg*, 390 U.S. at 638-40 (finding State has independent interest in well-being of youth).

39. *See Ginsberg*, 390 U.S. at 638-39 (establishing special diligence given to restrictions to protect children versus restrictions merely based on a moral objective).

40. 413 U.S. 15 (1973).

41. *Id.* at 24.

42. *Id.*

43. *See id.* at 36-37 (remanding case to lower court for determination of whether material was "obscene" according to *Miller* test).

Court, however, did not mention child pornography in its ruling. The question of whether the *Miller* test for obscenity should be applied to child pornography was the major issue that the Court would later have to address in *New York v. Ferber*.⁴⁴

B. *New York v. Ferber: The Restriction of Child Pornography*

In *New York v. Ferber*, the United States Supreme Court was required, for the first time, to review a criminal statute that prohibited "persons from knowingly promoting sexual performances by children under the age of 16," or distributing materials which visually depicted such performances.⁴⁵ The Court began its inquiry into the constitutionality of the New York child pornography statute by comparing the State's liberty to monitor visual depictions of children which portray sexual acts or lewd exhibitions of genitalia as opposed to adults.⁴⁶ Essentially, the Supreme Court had to decide whether the *Miller* test for adult obscenity was the only constitutional test appropriate for child pornography, or whether the State could place further restrictions on child pornography. Addressing this question, Justice White began his majority opinion by outlining five reasons why the *Miller* test was insufficient to prevent the sexual exploitation and abuse of children, and then examining how the test should be modified for child pornography.⁴⁷

First, the Court held that that the State's interest in protecting the physical and psychological well-being of a minor is a compelling State interest.⁴⁸ The

44. See *Ferber*, 458 U.S. at 753 ("To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?").

45. *Id.* at 749-52. It should be noted here that the term "visual depiction," as used in this Article, refers to any visual reproduction albeit photographs, videotape, digitized photographs, or any other visual medium. It should also be noted here that the Supreme Court's treatment of child pornography in *Ferber* was limited to performances and visual depictions. *Id.* at 764. The Court did not declare that written materials describing child sexual performances should be considered child pornography. *Id.* However, written materials describing child sexual performances may still be scrutinized under *Miller* to determine whether the material is obscene. *Id.*

46. *Id.* at 753.

47. *Id.* at 756-64. See *infra* notes 48-58 and accompanying text for a discussion of each reason. As for altering the *Miller* test, the Court said:

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.

Ferber, 458 U.S. at 764-65 (citations omitted).

48. *Id.* at 756-57.

Court reasoned that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."⁴⁹ Furthermore, the Supreme Court noted that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."⁵⁰

Second, the Court addressed how the distribution of child pornography leads to the sexual abuse of children, and why the *Miller* test is insufficient to curb this abuse.⁵¹ The Court recognized that child pornography creates a "permanent record of the children's participation and the harm to the child is exacerbated by their circulation."⁵² Moreover, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."⁵³

Third, the Court discussed how the economic motive for advertising and selling child pornography leads to the production of even more child pornography. In the Court's view, it was necessary that "enforceable production laws would leave no child pornography to be marketed."⁵⁴

Fourth, the Court discussed the constitutional value of child pornography. The Court stated that:

The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work.... Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.⁵⁵

This discussion of the constitutional value of child pornography is significant because the Court gives child pornography an extremely low value—*de minimis*. Moreover, the Court recognizes that there are suitable substitutes or alternatives to using children in pornographic works, at least when the pornographic works include sexual acts or lewd exhibition of genitals.⁵⁶

49. *Id.* at 757.

50. *Id.* at 758.

51. *Id.* at 759-61.

52. *Id.* at 759.

53. *Id.*

54. *Id.* at 761-62.

55. *Id.* at 762-63.

56. *Id.* Essentially, the Court maintained that the protection of children is so compelling that it is not over-burdensome to require a producer of a literary, scientific or educational work to use a substitute, such as a younger looking adult, rather than a child. *See id.* The Court qualifies this statement by saying the substitute could be used in visual depictions of "sexual acts or lewdly exhibiting their genitals." *Id.* at 762. This same argument can be extended to find that it would not be over-burdensome for a producer of nude visual depictions to use "a person over the statutory age who perhaps looked younger." *Id.* at 763. The authors want to make very clear, however, that we do not

The final reason offered by the *Ferber* Court for holding that child pornography should not receive constitutional protection is that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."⁵⁷ The Court expanded on this fifth element by stating:

[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material... bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.⁵⁸

For all of the foregoing reasons the Court then went on to hold that the New York statute regulating child pornography "sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection."⁵⁹

After concluding that child pornography was not a protected class of material under the Constitution, the Court continued its analysis by discussing the overbreadth arguments in connection with the New York statute.⁶⁰ Largely relying on *Broadrick v. Oklahoma*,⁶¹ the Court addressed whether the New York statute was facially overbroad by stating:

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.⁶²

Recognizing the limited circumstances in which substantial overbreadth will be used to strike down a statute on its face, the Supreme Court held that the New York statute regulating child pornography was not substantially overbroad because its proscription on "'lewd exhibitions] of the genitals'" meant it would

advocate the use of younger looking models to portray children due to the harm which could result. See generally JUDITH A. REISMAN, U.S. DEPT OF JUSTICE, EXECUTIVE SUMMARY, IMAGES OF CHILDREN, CRIME AND VIOLENCE IN PLAYBOY, PENTHOUSE, AND HUSTLER MAGAZINES (1987).

57. *Id.* at 763.

58. *Id.* at 763-64.

59. *Id.* at 765.

60. *id.* at 766.

61. 413 U.S. 601 (1973).

62. *Ferber*, 458 U.S. at 769 (citing *Broadrick v. Oklahoma*, 413 U.S. 601,613 (1973)).

not reach medical texts or pictures in the National Geographic.⁶³

C *Supreme Court's Post-Ferber Child Pornography Opinions*

The *Ferber* holding was quite broad in terms of declining First Amendment protection to child pornography, at least in terms of restrictions on visual depictions of sexual acts or lewd exhibitions of genitalia. Nevertheless, the Supreme Court has had to address other child pornography issues in subsequent cases, and there are many issues yet to be addressed by the Court—including whether child nudity may be constitutionally restricted. Perhaps one of the most significant child pornography cases since *Ferber* is *Osborne v. Ohio*.⁶⁴ A review of this case is essential to an analysis of restrictions on child nudity.

1. *Osborne v. Ohio*

In the same way that *Ferber* can be held out as the case that reconciled restrictions on child pornography with *Miller v. California*,⁶⁵ it can be argued that *Osborne v. Ohio*⁶⁶ is the case that reconciled restrictions on the private possession of child pornography with *Stanley v. Georgia*.⁶⁷ In *Ferber* the Court held that the compelling interest of protecting children from the abuse caused by child pornography allows much leeway in drafting statutes restricting the production and distribution of child pornography.⁶⁸ Thus, the *Miller* test for obscenity was not sufficient for child pornography.⁶⁹ Similarly, the Court in *Osborne* held that the compelling interest in protecting children from abuse caused by child pornography is sufficient to allow for much leeway in restricting the private possession and viewing of child pornography.⁷⁰ Therefore, "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*."⁷¹ Furthermore, in *Osborne*, the Court pointed out the difference between a statute which uses a "paternalistic interest" in regulating thought and a statute which seeks to protect the victims of child pornography by destroying the market for these materials.⁷² The First Amendment will not allow the type of paternalistic thought regulation law that the Court reviewed in *Stanley*?⁷³ However, a law which clearly seeks to regulate

63. *Id.* at 773.

64. 495 U.S. 103 (1990).

65. 413 U.S. 15 (1973).

66. 495 U.S. 103 (1990).

67. 394 U.S. 557 (1969). As the *Osborne* Court specifically stated, "[t]he threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as *Osborne* argues, our decision in *Stanley v. Georgia* compels the contrary result." *Osborne*, 495 U.S. at 108 (citation omitted).

68. *Ferber*, 458 U.S. at 756.

69. *Sec id.* at 761 (finding *Miller* test "unsatisfactory" for child pornography).

70. *See Osborne*, 495 U.S. at 110-11.

71. *Id.* at 108.

72. *Id.* at 109.

73. *See id.* (citing *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (stating that State "cannot

not thought, but rather the victimization of children, such as the statute in *Osborne*, would most likely be upheld by the Court.⁷⁴

The overbreadth arguments in *Osborne* were quite similar to the arguments presented in *Ferber*, with the exception that in *Osborne* the Ohio child pornography statute⁷⁵ being reviewed also tried to incorporate a restriction on the "possession of 'nude' photographs of minors."⁷⁶ Prior to the case reaching the United States Supreme Court, however, the Ohio Supreme Court limited the operation of the statute from mere nudity to "where such nudity constitutes a *lewd exhibition* or involves a *graphic focus on the genitals*, and where the person depicted is neither *the child nor the ward of the person charged*"⁷⁷ Thus, the United States Supreme Court was only required to address the constitutionality of the statute as limited by the Ohio Supreme Court.⁷⁸ Recognizing that the Ohio Supreme Court's limitation of the statute was clearly a sufficient limitation on the scope of the material regulated by the statute,⁷⁹ the Court held that the statute "plainly survives overbreadth scrutiny."⁸⁰

2. *United States v. X-Citement Video, Inc.* and *Scienter*

The next major constitutional question that the United States Supreme Court addressed was presented by *United States v. X-Citement Video, Inc.*⁸¹ In *X-Citement Video* the Court was required to review the Federal Protection of Children Against Sexual Exploitation Act of 1977 (hereinafter the Child Protection Act),⁸² which prohibits "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual depiction if such depiction "involves the use of a minor engaging in sexually explicit conduct."⁸³ The major issue in *X-Citement Video* was whether the term "knowingly" modified only the surrounding verbs in the statute, "transports, ships, receives, distributes, or reproduces," or whether "knowingly" also modified "use of a minor."⁸⁴ Relying

constitutionally premise legislation on the desirability of controlling a person's private thoughts").

74. The Court in *Osborne* emphasized that:

Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain—Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.

Id. at 110-11. For a recent example of the Ohio Supreme Court's use of the limited statute see *State v. Jewell*, 1997 WL 476667, at *3-4 (Ohio Q. App. Aug. 22, 1997).

75. OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson 1996).

76. *Osborne*, 495 U.S. at 112. This section will be addressed in greater detail later in this Article during the discussion on the regulation of mere nudity.

77. *Id.* at 113 (emphasis added) (quoting *State v. Young*, 525 N.E.2d 1363, 1368 (Ohio 1988)).

78. *Osborne*, 495 U.S. at 113.

79. *Id.* at 113-14 & n.11.

80. *Id.* at 113.

81. 513 U.S. 64 (1994).

82. 18 U.S.C. § 2252 (1994).

83. 18 U.S.C. §§ 2252(a)(1) and (2) (1994).

84. *X-Citement Video, Inc.*, 513 U.S. at 68.

heavily on statutory construction rules, the Court held that "knowingly" modified not only the surrounding verbs, but "use of a minor" as well.⁸⁵ However, the significance of this case extends beyond just the Court's use of statutory construction rules. *X-Citement Video* also emphasizes the necessity of a clearly defined scienter element for all statutes attempting to restrict child pornography.⁸⁶

D. Child Pornography Cases Addressed by Lower Courts

The United States Supreme Court's failure to address a number of issues related to child pornography has forced several lower federal and state courts to wrestle with various constitutional issues involving child pornography.⁸⁷ A number of these cases have become important judicial guidelines used by several jurisdictions to address constitutional issues related to child pornography. Perhaps one of the more well-cited of these lower court opinions is *United States v. Dost*.⁸⁸

1. *United States v. Dost* and the *Dost* Factors

At issue in *United States v. Dost*,⁸⁹ was whether several pictures taken by the defendant, depicting "minors engaging in sexually explicit conduct," was in violation of the Child Protection Act.⁹⁰ Specifically, the Court was required to address the language in section 2256 of the Act that defined "sexually explicit conduct" as, *inter alia*, a "lascivious exhibition of the genitals or pubic area of any person."⁹¹ To examine the content of the materials that fall under the statute, the court provided six factors that need to be reviewed when addressing whether certain works constitute a "lascivious exhibition of the genitals":

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual

85. *Id.* at 78. "For all of the foregoing reasons [based on canons of statutory construction], we conclude that the term "knowingly" in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers." *Id.*

86. *See id.* The Court mentions in dicta that several cases, including *Osborne*, "suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Id.*

87. This Article will only be discussing the lower federal court decisions that have dealt with various child pornography issues. The state court opinions are widely varied and largely depend on the particular statute of the jurisdiction. As we point out below, however, it is important to note that several state courts have adopted many of the lower federal court decisions.

88. 636 F. Supp. 828 (S.D. Cal. 1986).

89. *Id.*

90. *Id.* at 830 (referencing 18 U.S.C. §§ 2251-2252).

91. *Dost*, 636 F. Supp. at 830 (quoting 18 U.S.C § 2255(2)(E)).

activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Of course, a visual depiction need not involve all of these factors to be a "lascivious exhibition of the genitals or pubic area." The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.⁹²

These factors are perhaps one of the clearest guides for federal courts to consider in determining what types of materials should be considered reachable under the Child Protection Act.⁹³ The *Dost* factors have also been used in several state courts to determine whether certain materials constitute child pornography.⁹⁴

2. *United States v. Knox*

One of the next major issues a lower court had to face under the Child Protection Act was presented in *United States v. Knox*.⁹⁵ The *Knox* court addressed the issue of whether the Act applied to photos of children even though the genitals of the child are covered by clothing.⁹⁶ In *Knox*, the materials suspected of constituting child pornography were video tapes containing "numerous vignettes of teenage and preteen females, between the ages of ten and seventeen, striking provocative poses for the camera."⁹⁷ Utilizing the *Dost* factors, the court held that nudity was not a requirement for a photograph to be considered a violation under the statute.⁹⁸ The court further held that "a 'lascivious exhibition of the genitals or pubic area' of a minor necessarily

92. *Dost*, 636 F. Supp. at 832.

93. This notion can be seen by the number of cases which have followed the *Dost* holding. *See, e.g.*, *United States v. Wolf*, 890 R2d 241, 244-46 (10th Cir. 1989) (affirming trial court's use of *Dost* factors in measuring "lasciviousness" of photo of partially nude girl); *United States v. Villard*, 885 F.2d 117, 122 (3d Cir. 1989) (adopting *Dost* factors to determine whether photos of nude boy are "lascivious" genital exhibition); *United States v. Mr. A*, 756 F. Supp. 326, 328-29 (E.D. Mich. 1991) (using *Dost* factors to find that genitalia of children were not lasciviously exhibited in photos taken by parents).

94. *See, e.g.*, *People v. Kongs*, 37 Cal. Rptr. 2d 327,334 (Cal. Ct. App. 1994) (finding *Dost* factors useful in applying California statute to photographs of minor in awkward or compromising positions); *People v. Hebel*, 527 RE.2d 1367, 1379 (III. App. Ct. 1988) (finding *Dosi* factors relevant in determining sufficient evidence of child pornography for probable cause); *State v. Saulsbury*, 498 N.W.2d 338, 344 (Neb. 1993) (finding *Dost* relevant in application of Nebraska statute involving "sexually explicit conduct" in photos); *Alexander v. Texas*, 906 S.W.2d 107,110 (Tex. Ct. App. 1995) (applying *Dost* factors to Texas statute involving "lewd exhibition of the genitals" where defendant suggested child undress for photograph). *But see* *State v. Gates*, 897 P.2d 1345, 1348-50 (Ariz. 1995) (discussing *Dost* factors but ultimately finding them inapplicable where children were filmed engaging in normal, nonsexual conduct).

95. 32 F.3d 733 (3d Cir. 1994).

96. *Id.* at 736-37.

97. *Id.* at 737.

98. "We hold that the federal child pornography statute, on its face, contains no nudity or discernibility requirement, that non-nude visual depiction, such as the ones contained in this record, can qualify as lascivious exhibitions, and that this construction does not render the statute unconstitutionally overbroad." *Id.*

requires only that the material depict some 'sexually explicit conduct' by the minor subject which appeals to the lascivious interest of the intended audience."⁹⁹

The holding in *Knox* is, therefore, extremely significant because it suggests that the full context of photographs may be examined to determine the lascivious intent of the intended audience.¹⁰⁰ This notion seems to modify the *Dost* factors somewhat by suggesting that the *Dost* factors apply merely to the content of the visual depiction. In contrast, *Knox* appears to suggest that the *context* of the visual depiction is just as important as the *content* of the visual depiction.¹⁰¹

II. NUDITY V. CHILD PORNOGRAPHY

Recently, there has been a disturbing trend in the use of nude and semi-nude children by commercial photographers for photo essays.¹⁰² In response, there has been a dramatic outcry by the public directly proportional to the proliferation of nude photographs of children.¹⁰³ As a direct result of the recent increase in the sale of nude photographs of children, the courts have been forced to address more than just the First Amendment rights of the producer.¹⁰⁴ The courts have been forced to weigh the compelling societal concerns regarding the potential victimization of children and the subrogation of parental rights resulting from the production and distribution of visual depictions of nude children.¹⁰⁵ It would seem commonsensical that one sure way to curb any potential harm to children is to restrict the production, distribution, and possession of any nude photographs of children in any form. However, this begs the constitutional question of whether the category of "any nude photograph of a child" is invalid as overbroad.¹⁰⁶ It should be clearly noted here that the type of nude photos which have become the target of recent litigation, and which are the focus of this paper, are not the commonplace "baby in the tub" type of

99. *Id.* at 747.

100. *See id.* (clarifying that "lasciviousness" inquiry involves use of *Dost* factors and particularities of case but not intent of child).

101. The Nebraska legislature recently opened debate on legislation aimed at furthering the examination of the context of visual depictions suspected of including child pornography by taking into consideration "compilations of existing materials." *See* L.B. 1349, 95th Leg., 2d Sess. (Neb. 1998).

102. *See* the works of Robert Mapplethorpe, Jock Sturges, David Hamilton, and Sally Mann for examples of this medium.

103. *See* literature published by the organization, Loyal Opposition, Inc., stating that "Barnes and Noble sells child pornography" (referencing works by Jock Sturges, David Hamilton, and Sally Mann as works of child pornography). *See also* Malcom Jones Jr., *Can Art Photography be Kiddie Porn?*, NEWSWEEK, Mar. 9, 1998, at 58.

104. *See Phillip* Rawls, *Nation's Largest Bookseller Charged with Child Pornography*, AP, Feb. 19, 1998, available in 1998 WL 6642096 (highlighting: "Alabama grand jury decision to indict Barnes & Noble "on child pornography charges involving the sale of books by noted photographers whose work includes pictures of nude children"). The State of Alabama is primarily prosecuting Barnes & Noble for books such as photographic works by Jock Sturges, David Hamilton, and others. *Id.*

105. *See id.*

106. *See Ferber*, 458 U.S. at 764 (noting that conduct to be proscribed must be "suitably limited" and properly described).

photographs.¹⁰⁷ Rather, the nude photographs discussed herein include nude photographs which the Ohio legislature attempted to regulate in *Osborne*.¹⁰⁸ As the *Osborne* Court indicated in dicta, the Ohio statute would not be substantially overbroad and this type of regulation of nudity should be constitutionally permissible.¹⁰⁹

A. *What are the Current Classifications?*

To better understand the constitutionality of legislative restrictions on visual depictions of child nudity, it is instructive to identify and define the spectrum of materials that have somewhat consistently been identified as clearly pornographic or clearly non-pornographic. First, the visual depictions of children that are consistently viewed by most courts as clearly pornographic, and thus not given constitutional protection, are materials which include, but are not limited to, visual depictions involving children who are sexually aroused, masturbating, or engaged in sexual acts involving sexual penetration of some sort.¹¹⁰ On the other end of the spectrum are the clearly non-pornographic visual depictions of either fully or partially nude children taken by parents, friends, or other family members while the child was engaged in some type of normal childhood activity, such as a baby taking a bath. There is virtually no dispute among the lower courts as to these classifications of child pornography and non-child pornography. However, a dispute does arise when nude visual depictions of children fall in between the two classifications.

B. *Treatment of Child Nudity by the Supreme Court*

The United States Supreme Court has not been presented the opportunity to settle the issue of whether child nudity, without any other qualification, may constitutionally be regulated. In *Ferber*, the Supreme Court did engage in a brief consideration of the difference between the regulation of adult nudity and child pornography.¹¹¹ Despite this discussion, however, the *Ferber* Court was not required to review a statute restricting child nudity and thus the decision in *Ferber* provides little guidance on whether child nudity may be regulated.¹¹²

107. See *id.* at 765 (prohibiting depictions of children masturbating); see also *X-Citement Video*, 513 U.S. at 66 (discussing pornographic videos featuring minor); *Osborne*, 495 U.S. at 107 (prohibiting photographs of youth in explicit poses).

108. See OHIO REV. CODE ANN. § 2907.323(A)(3) (Anderson 1989) (prohibiting nude photographs of children which interpreted by Ohio Supreme Court as prohibiting graphic or explicit photographs).

109. See *Osborne*, 495 U.S. at 112 & 112-13 n.9 (stating that statute, as construed to prohibit graphic or explicit depictions, is not overbroad).

110. See *X-Citement Video, Inc.*, 513 U.S. at 66 (pornographic video containing footage of female under eighteen years of age); *Osborne*, 495 U.S. at 107 (photographs of nude male adolescent posing in sexually explicit position); *Ferber*, 458 U.S. at 752 (films depicting young boys masturbating).

111. See *Ferber*, 458 U.S. at 765-66 n.18 (discussing *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)).

112. The *Ferber* Court reviewed a statute proscribing "the use of a child in a sexual performance." *Ferber*, 458 U.S. at 750 (citing N.Y. PENALLAW § 263.05 (McKinney 1980)).

Furthermore, in *Massachusetts v. Oakes*,¹¹³ the Court declined to rule on the issue of child nudity because the Massachusetts legislature amended the statute purporting to regulate nudity prior to the case reaching the Supreme Court.¹¹⁴

Due to the Ohio Supreme Court's limited construction of the statute at issue, the Supreme Court in *Osborne* was not required to address the constitutionality of a State statute which on its face purported to regulate child nudity.¹¹⁵ As previously mentioned, however, the United States Supreme Court did suggest that since the statute had sufficient exemptions and "proper purposes" provisions, the Ohio statute might not be substantially overbroad, and may thus be considered constitutional.¹¹⁶ This acknowledgment by the *Osborne* Court seems to suggest that a state statute which on its face purported to regulate child nudity would be constitutional even if it is not limited in scope by the state's high court.¹¹⁷

C. The Argument in Support of Restrictions on Nude Visual Depictions of Children

The primary argument for sustaining restrictions on child nudity as constitutional is that the type of photos sought to be restricted are either abusive in themselves, or they are potentially tools to abuse children.¹¹⁸ The harm caused by nude depictions of children is clearly noted in Dr. Judith Reisman's study, *Images of Children, Crime and Violence in Playboy, Penthouse and Hustler Magazines*.¹¹⁹ In her study, Dr. Reisman suggests that nude images of children tend to reduce taboos and inhibitions restraining abusive, neglectful or exploitative behavior toward children.¹²⁰ Dr. Reisman also maintains that nude photographs of children tend to make children more acceptable as objects of abuse, neglect, and mistreatment, especially sexual abuse and exploitation.¹²¹ Therefore, restricting dissemination limits the harm caused by these types of nude visual depictions.¹²²

113. 491 U.S. 576 (1989).

114. *Id.* at 582-83 & n.2. However, Justice Scalia suggests in his dissent that if the Court would have ruled on the issue of the regulation of nude visual depictions of children, that States should be able to constitutionally regulate nude visual depictions of children. *Id.* at 589-90 & n.2 (Scalia, J., dissenting).

115. *Osborne*, 495 U.S. at 112-14.

116. *Id.* at 112.

117. *Id.*

118. See REISMAN, *supra* note 56, at 9-10. See also JUDITH A. REISMAN, *KINDSEY, CRIMES & CONSEQUENCES* (1st ed. 1998).

119. JUDITH A. REISMAN, U.S. DEPT' OF JUSTICE, EXECUTIVE SUMMARY, IMAGES OF CHILDREN, CRIME AND VIOLENCE IN PLAYBOY, PENTHOUSE, AND HUSTLER MAGAZINES (1987).

120. See *id.* at 3 (analyzing effects of presenting children in sexual or violent setting).

121. See *id.* at 14 (stating that, "[t]he use of voluntarily nude young 'actresses' further undermines the sensitivity of readers regarding the capability of young persons . . . to give consent to their irreversible appearance in public sex displays.").

122. See *id.* at 10 (calling for moratorium of child depictions due to potential harm caused to children).

Essentially, the same arguments used to protect children in *Ferber* and *Osborne* from the harm caused by child pornography could be made, although to a lesser degree, to protect children from the harm caused by nude depictions of children.¹²³ Furthermore, the Supreme Court's arguments from *Ginsberg* could be used to establish that parents have significant rights in protecting children from harm, and that the State has greater latitude in protecting children as opposed to adults from the harm caused by nude visual depictions.¹²⁴ Again, not all nude photos of children are sought to be criminalized, but rather only those without a statutorily defined legitimate or "proper purpose."¹²⁵

1. How *Ferber* and *Osborne* Apply to Child Nudity

The Supreme Court should uphold restrictions on nude visual depictions of children for the same reasons the Court upheld restrictions on child pornography in *Ferber* and *Osborne*—the protection of children demands it. Although the case for restrictions on child pornography is obviously stronger, the case for restrictions on nude visual depictions of children is nonetheless valid. In fact, the same five reasons that persuaded the Court that States are entitled to greater leeway in the regulation of pornographic depictions of children are applicable to the regulation of child nudity.¹²⁶

First, the protection of children from emotional and mental harm is a compelling State interest.¹²⁷ Restricting nude visual depictions of children would protect children from emotional and mental harm.¹²⁸ Therefore, restricting nude visual depictions of children should also effectuate the compelling State interest in protecting children.

Second, the distribution of nude visual depictions of children exacerbates the harm caused to the child in the same way, although again to a lesser degree, as visual depictions of child pornography. The permanent record created by nude visual depictions never allows the child to escape the harm caused by the

123. See *Osborne*, 495 U.S. at 110-11 (citing need to protect child pornography participants, and discussing link between child pornography and sexual abuse of children); *Ferber*, 458 U.S. at 758 (citing ability of States to protect physiological, emotional, and mental health of children).

124. See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (arguing that parents are entitled to State assistance in protecting children from sex-related material).

125. The term of art, "proper purpose," comes from *Osborne* where the Supreme Court discusses the proper purposes provisions contained in the Ohio child pornography statute. See *Osborne*, 495 U.S. at 112-14.

126. See *supra* notes 48-58 and accompanying text for a discussion of the five reasons the Supreme Court used to support the States' right to place restrictions on child pornography.

127. See *Osborne*, 495 U.S. at 109 (stating that State has compelling interest in safeguarding physical and psychological well-being of minors); *Ferber*, 458 U.S. at 756-57 (same); *Ginsberg*, 390 U.S. at 640 (noting that State has interest in well-being of its youth); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1943) (noting that State has interest in protecting welfare of children); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (noting that State has interest in improving physical, mental, and moral quality of its citizens).

128. See REISMAN, *supra* note 56, at 10 (recommending an immediate moratorium on production of nude visual depictions of children at least until sufficient studies have been made on subject).

nude photographs.¹²⁹ Furthermore, in the same way visual depictions of child pornography can be used to entice children into performing sexual acts by pedophiles, nude visual depictions of children can also be used by pedophiles to entice children into performing sexual acts.¹³⁰

Third, the advertising and selling of nude visual depictions of children provide a significant economic motive for, and are thus, an integral part of the production of such materials, and will only continue to grow without sufficient legal restraint.¹³¹ This notion can be seen in the increasing number of producers of visual depictions of nude children, and the willingness of large national booksellers to distribute these materials.¹³²

Fourth, where "necessary" for artistic or other bona fide purposes the availability of simulations of child nudity (which do not otherwise constitute child pornography) provides an alternative to using nude children.¹³³ Although using younger looking models may not be as "realistic" as using nude children, the protection of children demands that a substitute be used.¹³⁴

Fifth, the regulation and restriction of nude visual depictions of children is not incompatible with prior Supreme Court rulings.¹³⁵ As mentioned previously, the Supreme Court has not addressed the constitutionality of restricting nude visual depictions of children. Moreover, the Court has been exceedingly willing to protect children despite First Amendment concerns.¹³⁶

2. Why *Ginsberg* Indicates that Nude Depictions of Children Can be Restricted

The Supreme Court's ruling in *Ginsberg* indicates that the distribution of nude visual depictions of children could be restricted in at least two ways. First, the Court in *Ginsberg* made it abundantly clear that the protection of children allows for a great disparity between what may be restricted to protect children in

129. See *Ferber*, 458 U.S. at 759 (noting that materials produced from child's participation in photographs and films depicting sexual activity create permanent record that exacerbates harm to child).

130. See REISMAN, *supra* note 56, at 8 (finding erotica and pornography as tools used to lure and indoctrinate children into sexually abusive situations).

131. See *Ferber*, 458 U.S. at 761 (stating that advertising and selling child pornography provide economic motives for production of pornographic materials).

132. See Jones Jr., *supra* note 103, at 58.

133. See *Ferber*, 458 U.S. at 762-63 (stating that it is unlikely that "visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work").

134. See *id.* at 763 (discussing availability of older models as alternate way of expressing same ideas). See also *supra* note 56.

135. See *id.* (noting that regulating child pornography as material not protected by First Amendment is not incompatible with Supreme Court precedent). See also *supra* note 56.

136. See *Osborne*, 495 U.S. at 109-11 (restricting child pornography); *Ferber*, 458 U.S. at 773 (same); *Ginsberg*, 390 U.S. at 633 (restricting distribution of explicit material to minors); *Prince*, 321 U.S. at 164-65 (restricting child labor in face of First Amendment free exercise argument).

comparison to what may be restricted to protect adults.¹³⁷ Second, the Court upheld the statutory scheme in *Ginsberg* despite the fact that the scheme purported to restrict the distribution of nudity to children.¹³⁸

The first proposition is significant to the regulation of nude visual depictions of children because the Court's overbreadth rulings (that mere nudity as applied to the overbreadth of adult pornography and obscenity jurisprudence) are inapplicable to nude visual depictions of children. Although the Court has found that adult nudity, without more, is not subject to constitutional regulation,¹³⁹ this conclusion does not necessarily apply to children.¹⁴⁰ Given the Court's tendency to protect children, it is unlikely that the Court would apply the same standard of review to both children and adults.¹⁴¹ This outcome is especially likely given the particularized harm (mentioned previously with respect to the study by Dr. Reisman) that child nudity poses as compared to adult nudity.¹⁴²

As to the second proposition, although the Court's holding with regard to the statute ruled on in *Ginsberg* has been modified somewhat by subsequent rulings, the Court has not completely overruled its position that materials containing mere nudity may be restricted from the viewing of children.¹⁴³ Therefore, it would not be difficult for the Court to rule that a State may protect children from becoming subjects of the materials the Court has already held may be kept from them.

III. WHAT ELSE CAN BE DONE?

It appears there is sufficient legal authority to support the direct statutory regulation of nude visual depictions of children.¹⁴⁴ However, a remaining question is whether there is an easier alternative available for protecting children from the aforementioned harm? One possible answer could be in the form of a statute that recognizes the fact that children do not have the capacity to decide whether or not they should be in a nude photo.

137. See *Ginsberg*, 390 U.S. at 636 (stating that "material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children" and that State can bar distribution to children of material suitable for adults) (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668,671 (N.Y. 1966)).

138. *Id.* at 643.

139. See *Miller v. California* 413 U.S. 15, 23-24 (1973) (limiting permissible scope of State regulation to works that depict or describe sexual conduct).

140. See *supra* note 139 and accompanying text for a discussion of how a regulatory standard for minors differs from adult standard.

141. See *supra* note 139 and accompanying text

142. See *Reisman, supra* note 56, at 9-10 (concluding that harm to children as targets of sexual imagery is compelling public concern).

143. See *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975) (stating that all nudity is not obscene with respect to minors).

144. Based on the foregoing argument, the authors strongly believe that States may adopt statutes which directly regulate the production and distribution of nude visual depictions of children. However, we recognize the political difficulty in passing such statutes, and, therefore, we offer this proposed statute as a less intrusive means of regulating nude visual depictions of children.

A. Legislation to Protect Privacy Interests

The following proposed model statute is one such attempt to recognize parental rights and rights of children in relation to controlling when nude photos of children may be taken, and when they may be distributed.¹⁴⁵

Model Child Privacy Protection Act*Purpose Statement*

The prevention of the sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance. To further this compelling governmental objective, this statute is designed to regulate the creation and distribution of nude visual depictions of children which have a detrimental impact on children.

Restrictions on the Creation of Nude Visual Depictions of Children

A.) No person shall:

1.) Photograph or otherwise capture the image of any minor, other than the person's child or ward, in a state of nudity, or create, produce, or direct the production of any visual depiction of such minor in a state of nudity, unless:

a.) The person has obtained prior written consent from all legally recognized parents, legal guardians, or legal custodians of the minor prior to such photographing of the minor, and prior to the use of the nude depiction of the minor in any material or performance, and prior to the transfer of such nude depictions or material; and

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

2.) Photograph any minor who is the person's child or ward in a state of nudity, or create, produce, or direct the production of any visual depictions of such minor in a state of nudity, unless:

a.) The person has obtained oral or written consent from all other legally recognized parents, legal guardians, or legal custodians of the minor to the photographing of the minor, and to the use of such depictions of the minor in material or performance, and to the transfer of such material as well as the specific manner in which such material or performance is to be used;¹⁴⁶ and

b.) The depiction, material, or performance is sold, disseminated,

145. This model statute has been created solely for the purpose of this article, but it has been closely modeled after the OHIO REV. STAT. § 2907.323 (1997) which was upheld as constitutional by the United States Supreme Court in *Osborne v. Ohio*, 495 U.S. 103 (1990).

146. Note here that the consent does not have to be prior consent. Thus, if a parent or guardian takes a photo without consulting the other parent, it is sufficient if the other parent consents at some later time.

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

Restrictions on the Possession of Nude Visual Depictions of Children

3.) Possess any visual depiction of a minor, other than the person's child or ward, in a state of nudity, unless:

a.) The person knows that all of the legally recognized parents, legal guardians, or legal custodians of the minor have given prior written consent to the photographing or use of the visual depiction of the minor in a state of nudity and to the manner in which the depiction, material, or performance is used or transferred as required in sections 1 and 2 listed above; and

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

4.) Possess any visual depiction of a minor who is the person's child or ward in a state of nudity, unless:

a.) The person knows that all of the other legally recognized parents, legal guardians, or legal custodians of the minor have given oral or written consent to the photographing or use of the depiction of the minor in a state of nudity and to the manner in which the depiction, material, or performance is used or transferred; and

b.) 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 medical, scientific, educational, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, prosecutor, judge, or other person having a proper interest in the material or performance.

Restrictions on the Publication and Sale of Nude Visual Depictions of Children

5.) Publish or sell any visual depiction of a minor in a state of nudity, unless:

a.) The minor reaches the legal age of majority and consents in writing to the publication of the visual depiction; or

b.) The depiction, material, or performance is published or sold for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, prosecutor, judge, or other person having a proper interest in

the material or performance.

Severability

6.) If any portion, clause, or phrase of this statute is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

B.) Definitions:

1.) "Nudity" is defined as bare, naked, unclothed, uncovered, or less than opaquely covered post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or the nipple or areola only are covered. In the case of pre-pubertal persons, nudity shall mean uncovered or less than opaquely covered pre-pubertal human genitals or pubic area;¹⁴⁷

2.) "Proper purpose" is defined as conduct which is morally innocent, i.e., the possession or viewing of the material for a non-prurient purpose.¹⁴⁸ Such purpose includes, but is not limited to, the transfer of a visual depiction of a nude child from a parent of the child to another family member or to a family friend;¹⁴⁹

3.) "Proper interest" is defined as an interest which is morally innocent, i.e. a non-prurient interest.

4.) "Minor" means any person under the age of twenty-one;¹⁵⁰

5.) "Visual depiction" means photographs, videotape, digital photographs, digital reproductions of photographs or video tape, undeveloped film or videotape;

6.) "Publish" means to issue for public distribution or sale in any form including but not limited to electronic media such as the Internet;

7.) "Material" means any compilation, document, film, or other media containing a visual depiction or any part of a visual depiction;

8.) "Consent" is defined in its common meaning and for purposes of this statute includes consent as to the specific manner in which the visual depiction, material, or performance is to be used;

9.) "Photograph" includes still photography, video, digital photography, or creation or capturing of any visual depiction or any

147. This definition is primarily derived from the Massachusetts statute discussed in *Massachusetts v. Oa*ej*, 491 U.S. 576, 578-80 (1989).

148. See *Osborne*, 495 U.S. at 113 n.10 {defining conduct that is morally innocent as possession or viewing of material for non-prurient purpose}.

149. See *id.* at 112 n.9 (stating that example of transfer of photo from parent to family friend as morally innocent).

150. Since a "minor" is not fully established nationwide, it should be noted that the United States Attorney General's Commission on Pornography recommended in 1986 that age twenty-one be established as the boundary line for males and females permitted to legally pose nude for various media. See REISMAN, *supra* note 56, at 10.

part of a visual depiction.

In several other instances legislatures have passed laws requiring parental consent for various activities, including those activities involving fundamental rights, and courts have upheld the parents' right to direct the upbringing of their children.¹⁵¹ The United States Supreme Court has also clearly declared in several cases that parents possess the fundamental liberty to direct the upbringing of their children.¹⁵² Therefore, parents should also be able to determine whether it is in their child's best interest to be photographed nude.¹⁵³ Also, given that in certain abusive situations both parents may not agree that nude photographs should be taken of the child, it follows that legislation should require both parents' consent.

Furthermore, children should also contribute to the decisionmaking process which determines whether nude photos should be taken of them. As previously mentioned, however, children do not normally have the capacity to make a decision of this magnitude. Thus, it would not be too proscriptive to regulate the taking of any nude photos of children until they reach a suitable age when they can make the decision. It follows that children should at least be able to decide, when they reach the age of majority, whether the nude photos that their parents consented to should be publicly distributed. Since children are often myopic in their decision making and their attitudes are often tempered with age and maturity, what may have seemed like a good idea to a pubescent teen may be shameful or embarrassing when he or she is older. This appears especially true given the fact that most children, and in particular younger children, are ready and willing to please their parents. Since, under the proposed statute, the parent must consent to the nude photos, the child may be influenced heavily by a parent's consent. However, once the child matures and begins to think for him or herself, the child may regret having a permanent record of nude photos distributed throughout the public.¹⁵⁴

B. Response to Anticipated Arguments Against the Proposed Model Statute

Since the proposed model statute does implicate First Amendment liberties, there will no doubt be opposition to its adoption. The foreseeable arguments against the proposed statute will likely be the same arguments that have been

151. See, e.g., statutes pertaining to abortion requiring parental consent.

151 See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (invalidating statute that prevented teaching any modern language other than English to student who failed eight grade as unconstitutional).

153. For examples of cases where a parent's right to control nude photographs of a child was not protected due to an inadequate or non-existent statute, see *City of St. Paul v. Campbell*, 177 N.W.2d 304, 306 (Minn. 1970) (taking nude photographs of thirteen-year-old child without mother's consent did not violate disorderly conduct ordinance). See also *Faloon v. Hustler*, 799 F.2d 1000, 1005 (5th Cir. 1986) (finding unnecessary judicial approval of releases to publish photographs of minor).

154. For an example of this type of later regret by a child, see *Shields v. Gross*, 448 N.E.2d 108 (N.Y. 1983) (holding actress Brooke Shields was not allowed to halt distribution of nude photos taken of her when she was ten-years-old because mother had consented to photos). See also *Faloon*, 799 F.2d at 1003 (recognizing minors' regret in allowing nude photographs to be taken of them).

addressed in many of the other cases mentioned previously such as *Ferber* and *Osborne*. Opponents to the proposed model statute will likely argue that the statute lacks a compelling state interest and that it is overbroad. For the reasons outlined below, both of these contentions lack merit.

1. What is the Compelling State Interest?

The allegation that the statute restricts First Amendment rights without a compelling interest can be addressed by keeping in mind that the statute purports not to regulate thought, as in *Stanley*, but rather to protect parents' individual liberties and more importantly to protect the well-being of children. As declared in *Meyer v. Nebraska*, a parent has the liberty guaranteed by the Fourteenth Amendment to "establish a home and bring up children."¹⁵⁵ Furthermore, as forcefully declared in *Prince v. Massachusetts*, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."¹⁵⁶ Given that parents have the fundamental liberty interest to oversee the proper upbringing of their children, and given that the proposed statute purports to further that interest, the proposed statute clearly manifests a compelling interest which outweighs the First Amendment rights of any producer of nude photos of children.

The state must not only be able to demonstrate a compelling interest with respect to parental rights, but since the statute also potentially implicates First Amendment rights as a result of the child majority-age distribution provision, the State must also show a compelling interest for this provision. Just as the Supreme Court stated in *Prince*: "Parents may be free to become martyrs themselves. But it does not follow [that] they are free ... to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."¹⁵⁷ Parents should also not be free to permanently damage a child through the distribution of nude photos of the child until the child reaches the age of majority and makes that decision for him or herself. The logic of this argument can best be summarized by saying that the state demonstrates a compelling interest in the statute because a parent's liberty interest over a child is superior to the rights of a producer or possessor of nude pictures of the child, and the child's liberty interest is superior to a parent's rights and the rights of others in terms of the distribution of the pictures due to the harm that could come to the child.

2. Is the Statute Facially Overbroad?

The potential overbreadth arguments presented by the proposed statute are likely to be more strenuously argued, but are by no means insurmountable. Just as in *Ferber* and *Osborne*, any alleged overbreadth argument must be proven to

155. *Meyer*, 262 U.S. at 399 (citations omitted).

156. *Prince v. Massachusetts*, 321 U.S. 158,168 (1943).

157. 74 at 170.

be "not only 'real, but substantial'" in order to succeed.¹⁵⁸ That does not appear to be the case with this statute. There are two primary reasons why the proposed model statute is not overbroad. First, as mentioned in *Ferber*, this statute regulates a very minimal amount of material.¹⁵⁹ Second, the statute does not prohibit the production, possession, or distribution of nude photos of children. Rather, the proposed model statute merely regulates the method by which these activities are carried out.¹⁶⁰

It is unquestionable that there are people who would allow their children to be photographed nude, and this group will unquestionably include some children who will consent to the distribution of the photos when they reach the age of majority. The statute, however, does not completely restrict the production, distribution, or possession of nude visual depictions of children.¹⁶¹ Furthermore, the statute is no more restrictive than necessary to protect both parental and child privacy interests; therefore, the statute is not substantially overbroad.¹⁶²

CONCLUSION

The recent trend of producing and distributing materials that contain nude visual depictions of children which skirt the fine line between constitutionally protected works of art and unconstitutional child pornography is alarming. Although the Supreme Court has clearly held that the State may completely restrict child pornography, the question remains whether certain nude visual depictions of children constitute child pornography. Nonetheless, it appears, at least relatively clear, that nude visual depictions of children can and do have the same harmful effects on children as child pornography, although to a lesser degree.

To fully protect children from psychological and emotional harm, States should enact legislation which restricts the production, distribution, and possession of nude visual depictions of children. The compelling interest of protecting the psychological and mental well-being of children is sufficient to satisfy the strict scrutiny test the Supreme Court places on restrictions to First Amendment rights—provided also that the legislation is narrowly tailored at only preventing harm to children.¹⁶³ Similarly, if the State wants to further protect the psychological and mental health of children, the State should enact

158. See *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

159. See *New York v. Ferber*, 458 U.S. 747, 762 (1982) (stating that it is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part" of piece of work).

160. See *supra* notes 145-54 and accompanying text for a discussion of the authors' proposed statute.

161. See *supra* notes 145-54 and accompanying text for a discussion of the authors' proposed statute.

162. See *supra* notes 158-61 and accompanying text for a discussion of potential overbreadth arguments that may be raised in response to the authors' proposed statute.

163. See *supra* notes 127-30 and accompanying text for a discussion of the protection of the psychological and mental well-being of children as a compelling state interest.

legislation which ensures parents are involved in the decision to create nude visual depictions of children and that children are given the ability to make an informed and mature decision whether to distribute the nude visual depictions. Again, the compelling interest of protecting the psychological and mental well-being of children is sufficient to satisfy the strict scrutiny test the Supreme Court places on restrictions to First Amendment rights. Provided that the legislation is narrowly tailored to only protect children from harm and secure parental sovereignty, the protection of parental rights to guide the upbringing of their children is a compelling interest which satisfies the strict scrutiny test.