

## OSBORNE V. OHIO: DOES IT MEAN THE END OF THE PROTECTION AFFORDED BY STANLEY?

The Supreme Court in *Osborne v. Ohio*<sup>1</sup> held that the first amendment does not prohibit states from outlawing the possession of child pornography in the home.<sup>2</sup> The Court's ruling has commentators<sup>3</sup> scrambling to assess whether the decision will undermine the Court's previous decision, in *Stanley v. Georgia*,<sup>4</sup> recognizing a constitutional right to read and watch what one pleases in one's home.

The Court long has recognized that the first amendment's mandate, "Congress shall make no law . . . abridging the freedom of speech,"<sup>5</sup> is not an unconditional guarantee.<sup>6</sup> Rather, the Court has formulated exceptions for categories of speech that do not warrant first amendment protections.<sup>7</sup> Obscenity falls within this category of Court-made exceptions;<sup>8</sup> defining obscenity, however, has been troublesome.<sup>9</sup>

The Supreme Court defined<sup>10</sup> and redefined<sup>11</sup> "obscenity" in a series

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1. 110 S. Ct. 1691 (1990).

2. *Id.* at 1697. A state statute prohibiting the possession of child pornography, however, must not be overbroad, otherwise, it may be deemed unconstitutional. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (the scope of the statute is unconstitutional only if the overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

3. *See Child Porn Ruling by Court is Studied for Wider Effect*, Wall St. J., April 23, 1990, at B7 Col. 4 ("The logic of the court's opinion . . . has alarmed some legal experts . . . . Of course, legal experts don't all agree on the impact of the ruling").

4. 294 U.S. 557 (1969).

5. U.S. CONST. amend. I.

6. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) ("[it] is well understood that the right to free speech is not absolute at all times and under all circumstances").

7. *Id.* at 571-72. "There are certain . . . classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting . . .". *Id.* (footnotes omitted).

8. *Id.* at 572.

9. *See infra* notes 11-15 and accompanying text. The Court's difficulty with obscenity issues lies in the various definitions of the term. *See Jacobelli v. Ohio*, 378 U.S. 184, 197 (1964) (obscenity may be undefinable, but "I know it when I see it") (Stewart, J., concurring).

10. The Supreme Court first defined "obscenity" in *Roth v. United States*, 354 U.S. 476 (1957). The test was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

11. The Court subsequently clarified *Roth's* obscenity definition in *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam). The new test required a community standard of judgment in assessing whether the material was "utterly without redeeming social value." *Id.* at 771. The *Redrup* test proved to be very subjective and the Court found itself frequently determining whether material was obscene. Justice Harlan, in criticizing the Court's approach, stated that "anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene

of opinions before settling upon the current rule developed in the 1973 case, *Miller v. California*.<sup>12</sup> *Miller* provides the standard for courts to determine whether the first amendment protects sexually explicit speech.<sup>13</sup>

The Court, in *Stanley v. Georgia*,<sup>14</sup> created an important exception to the general rule that the first amendment does not protect obscene speech.<sup>15</sup> In *Stanley* the Court reversed the conviction of a private citizen for the possession of films<sup>16</sup> that the lower court found obscene. The *Stanley* Court unanimously agreed that there exists a constitutional right to read and watch what one pleases in one's home.<sup>17</sup> Nevertheless, the Court has applied *Stanley* narrowly,<sup>18</sup> and has stated that the rule does not protect obscene material viewed outside the home.<sup>19</sup> Subsequent courts have limited *Stanley*'s application faithfully, holding that the first

would find himself in utter bewilderment." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 707 (1968) (Harlan, J., dissenting).

12. 413 U.S. 15 (1973). Chief Justice Burger, writing for the Court, stated:

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 . . . ; (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.

*Id.* at 24 (citations omitted).

13. See *New York v. Ferber*, 458 U.S. 747 (1972). Throughout this Recent Development, the terms "obscenity" or "obscene" refer to material that meets the *Miller* standard and does not involve depictions of children. "Child pornography" is used only in reference to visual sexual depictions involving children. "Non-obscene" material refers to pornography that falls outside the *Miller* obscenity standard.

14. 394 U.S. 557 (1969). The members of the *Stanley* Court included Chief Justice Warren and Justices Brennan, Black, Douglas, Fortas, Harlan, Marshall, Stewart, and White, only one of whom currently remains on the Court—White.

15. See *supra* notes 8-15 and accompanying text.

16. While searching Stanley's home for evidence of bookmaking, federal agents discovered three reels of eight-millimeter film. *Stanley*, 394 U.S. at 558.

17. *Id.* at 565. "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.*

18. See Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 71-72 (1974).

19. See *State v. Meadows*, 28 Ohio St. 3d 43, 46-47, 503 N.E.2d 697, 701-02 at n.5 (1986) ("*Stanley* draws a line at the front door of the home"), *cert. denied*, 480 U.S. 937 (1987); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (protection does not extend to material exhibited in the "privacy" of adult theaters); *United States v. Reidel*, 402 U.S. 351 (1971) (*Stanley* does not extend to the delivery of obscene material); *United States v. 12 200-ft. Reels of Super 8MM. Film*, 413 U.S. 123 (1973) (rejecting application of *Stanley* to importation of obscene material for personal use).

and fourth amendment protections upon which the decision was based<sup>20</sup> do not extend to the right to deliver or import obscene material,<sup>21</sup> the right to possess or show obscene material outside the home,<sup>22</sup> or the right to engage privately in any type of consensual adult conduct within the home.<sup>23</sup>

In the 1970's child pornography gained notoriety in the United States.<sup>24</sup> Congress and state legislatures responded by enacting statutes aimed at attacking the problem.<sup>25</sup> Many of the statutes prohibited all pornography involving children, regardless of whether it was obscene under the *Miller* test.<sup>26</sup>

The Supreme Court addressed first the constitutionality of state statutes regulating nonobscene child pornography. In the landmark case, *New York v. Ferber*,<sup>27</sup> a New York trial court convicted the defendant of

20. *Stanley*, 394 U.S. at 568. "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." *Id.* See also *Bowers v. Hardwick*, 478 U.S. 186, 207 (1986) (Blackmun, J., dissenting) ("Stanley rested as much on the court's understanding of the Fourth Amendment as it did on the First").

21. See *United States v. Reidel*, 402 U.S. 351 (1971) (a person's right to possess obscene material does not necessarily encompass the right to receive obscene material); *United States v. 12,200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123 (1973) (rejecting argument that *Stanley* protects importation of obscene material for personal use); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (*Stanley* does not protect the importation of obscene material for commercial use).

22. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (*Stanley* does not protect obscene material shown in the "privacy" of an adult theater).

23. *Bowers*, 478 U.S. at 186 (the state constitutionally may criminalize at-home adult consensual homosexual conduct).

24. See 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 599-601 (1986) [hereinafter ATTORNEY GENERAL'S REPORT]; Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. ILL. L. REV. 711, 713 (noting the difficulty of pinpointing when child pornography first appeared in America, the author nevertheless states that "[t]he use of children in pornography did not become widespread until sometime after 1970 . . ."); Comment, *Preying on Playgrounds: The Exploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 810 (1978) ("By 1976, child pornography had become a featured item among obscenity dealers").

25. For example, see ILL. STAT. ANN. ch. 38, para. 11-20.1 (Smith-Hurd Supp. 1991) ("[a] person commits the offense of child pornography . . . [when] with the knowledge of the nature or content thereof . . . [he] possesses any visual reproductions of any child . . . engaged in any [prohibited sexual] activity"). See also ALA. CODE § 13-A-12-192 (1982); ARIZ. REV. STAT. ANN. § 13-3553 (1978); FLA. STAT. § 827.071 (1976); KAN. STAT. ANN. § 21-3516 (Cum. Supp. 1985); MINN. STAT. § 617.247 (1983); OHIO REV. CODE ANN. § 2907.322 (Anderson Supp. 1984); UTAH CODE ANN. § 76-5a-3 (Cum. Supp. 1986); WASH. REV. CODE § 9.68A.07 (1984). See generally Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981); Note, *Child Pornography Legislation*, 17 J. FAM. L. 505 (1979).

26. See *supra* note 13.

27. 458 U.S. 747 (1982). *Ferber* was the Supreme Court's "[f]irst examination of a statute directed at, and limited to depictions of sexual activity involving children." *Id.* The members of the

selling child pornography<sup>28</sup> in violation of a New York statute.<sup>29</sup> The statute did not require the depiction of a child's sexual performance to meet the legal definition of obscenity.<sup>30</sup> The Supreme Court affirmed the lower court's holding that child pornography, even if not "obscene,"<sup>31</sup> is not protected by the first amendment.<sup>32</sup> The Court determined that the state's interest in protecting children from the harm of sexual exploitation "overwhelmingly outweighs" any first amendment interest.<sup>33</sup> Thus,

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*Ferber* Court were Chief Justice Burger and Justices Marshall, Brennan, Blackmun, O'Connor, Powell, Rehnquist, Stevens, and White. Only Brennan, Marshall, and White participated in both *Stanley* and *Ferber*.

28. The films depicted one boy masturbating and a group of boys engaging in sexual conduct. *Id.* at 752.

29. The state indicted Ferber for violations of New York Penal Law §§ 263.10 and 263.15. *See infra* note 30.

30. The statute provides:

263.00 Definitions:

As used in this article the following definitions shall apply:

1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, send, mail, deliver, transfer, transmute, publish, distribute, present, exhibit or advertise, or to offer or agree to do the same.

263.10 Promoting an obscene sexual performance by a child.

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

263.15 Promoting a sexual performance by a child.

A person is guilty of promoting 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 of age.

N.Y. PENAL LAW §§ 263, 263.10, 263.15 (McKinney 1977).

31. The Court applied the *Miller* standard of obscene. *Ferber*, 458 U.S. at 756-58. *See supra* notes 13, 15 and accompanying text.

32. *Ferber*, 458 U.S. at 763-64 ("When a definable class of material, such as [child pornography], bears so heavily and pervasively on the welfare of children . . . the balance of competing interests is clearly struck and . . . it is permissible to consider these materials as without the protection of the First Amendment").

33. The Court concluded from legislative judgment and applicable literature that child pornography caused physiological, emotional, and mental damage to the child participants. *Id.* at 758. Accordingly, the Court enunciated five reasons justifying greater state regulation when child pornography is targeted: (1) the compelling state interest in safeguarding the physical and psychological well-being of minors; (2) the relationship between the distribution of child pornography and the

*Ferber* gave the states greater latitude in regulating child pornography; they can regulate its production and distribution, regardless of whether the material is legally obscene.<sup>34</sup>

*Ferber* involved the public sale of child pornography, and thus has no effect upon *Stanley's* at-home privacy interest. After *Ferber*, the only distinction between state regulation of adult and child pornography was the nature of materials regulated, not the manner of regulation. In *Osborne v. Ohio*,<sup>35</sup> however, the Supreme Court further distinguished child pornography from the pornographic material protected in *Stanley*.<sup>36</sup>

In *Osborne*, an Ohio trial court found the defendant guilty of violating an Ohio statute<sup>37</sup> prohibiting the possession of child pornography.<sup>38</sup> The

sexual abuse of children; (3) the economic motives that are an integral part of the production of such pornography; (4) "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*;" and (5) a content-based analysis of first amendment protection found not to be incompatible with earlier precedent. *Id.* at 756-64.

For an in-depth discussion of the Court's use of content-based analysis, see generally Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

34. The Court clearly stated that the first amendment does not restrict a state from prohibiting nonobscene child pornography:

[T]he question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography.

*Ferber*, 458 U.S. at 761. However, state regulation of child pornography is subject to limitations set forth by the Court in *Ferber*: (1) the conduct must be defined adequately by the statute's language or the state courts' interpretation of such statute; (2) some element of scienter must be required on the part of the accused; and (3) only live performances or visual reproductions of live performances are not constitutionally protected. *Id.* at 764.

35. 110 S. Ct. 1691 (1990). An earlier decision by the Ohio Supreme Court used similar analysis in upholding the right of the state to prohibit the possession of child pornography. See *State v. Meadows*, 28 Ohio St. 3d 43, 503 N.E.2d 697 (1986), *cert. denied*, 480 U.S. 937 (1987).

36. *Stanley* protects home viewing and possession of pornography depicting adults in sexual portrayals.

37. OHIO REV. CODE ANN. § 2907.323(A)(3) (Baldwin 1989) provides:

(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.

intermediate appellate court and the Ohio Supreme Court affirmed, finding no merit in Osborne's assertion that the first amendment protects the private possession of child pornography.<sup>39</sup>

The Supreme Court, after determining that its previous decision in *Stanley* did not compel a contrary result, held that a state may constitutionally proscribe the possession of child pornography.<sup>40</sup> The Court distinguished *Stanley* on the basis of the asserted state interest. In *Stanley*, the state sought to proscribe private possession of pornographic material because of the poisonous effect on the minds of viewers.<sup>41</sup> Conversely, in *Osborne*, the state had no paternalistic interest in regulating Osborne's mind; rather the state sought to protect the victims of child pornography.<sup>42</sup> The Court concluded that "[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.'"<sup>43</sup> Because of the state's compelling interest in *Osborne*, the Court supported the state's attempt to stamp out the vice of child pornography at all levels.<sup>44</sup> The Court found a reasonable connection between penalizing the possession of child pornography and encouraging decreased production by virtue of decreased demand.<sup>45</sup> No similar connection existed in *Stanley*.<sup>46</sup>

Finally, the Court examined the negative impact of child pornography upon children.<sup>47</sup> After weighing all considerations, the Court found that

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- (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.

38. *Osborne*, 110 S. Ct. at 1695. The police found in the defendant's home photographs of nude male adolescents posed in sexually explicit positions.

39. *Id.*

40. *Id.* Other issues the Court addressed included whether the Ohio statute was overbroad and whether the failure to instruct the jury on an element of child pornography violated due process. The Court found the Ohio statute not violative of the first amendment, but remanded because failure to instruct on an element of child pornography under the Ohio statute violated due process. *Id.* at 1697-1705.

41. See *supra* notes 14, 16-25 and accompanying text.

42. *Osborne*, 110 S. Ct. at 1696.

43. *Id.*

44. *Id.* at 1697. The Court's decision in *Ferber* effectively limited the states' regulatory efforts to the production and distribution of child pornography, thus driving much of the child pornography market underground.

45. *Id.*

46. In *Stanley*, the Court rejected Georgia's argument that its prohibition on obscenity possession was a necessary element incident to its proscription on the distribution of obscenity. *Stanley*, 394 U.S. at 567-68.

47. The court referred to the resulting permanent effects of the child's abuse and the frequent

the state's interest in protecting children from the harm resulting from the possession of child pornography far outweighed the protection of first amendment interests.<sup>48</sup>

The consequences of the *Osborne* decision on freedom of speech remain to be seen; it has aroused a great deal of debate from two camps.<sup>49</sup> Critics of *Osborne* fear that the decision unwisely erodes *Stanley's* protections and ultimately will lead to broader restrictions on freedom of speech.<sup>50</sup> At a minimum, many fear that the decision will lead to permissible bans upon the possession of adult pornography in the home.<sup>51</sup>

The other camp argues that the Court's decision in *Osborne* does not represent a dramatic shift in freedom of speech protection.<sup>52</sup> Because of the unique circumstances involved with child pornography, proponents argue it is unlikely that the decision will lead to further freedom of speech restrictions.<sup>53</sup>

Justice Brennan's dissent in *Osborne* reflects the views of those who fear that the Court struck an improper balance, which ultimately will create inroads into constitutional barriers against unwarranted state intrusion.<sup>54</sup> In Brennan's view, the majority's reliance upon *Ferber* is misplaced; *Ferber* merely puts child pornography on the same footing as obscenity in establishing what materials the state may regulate, not in determining the manner of regulation.<sup>55</sup> Justice Brennan strongly stated his broad view of freedom of speech:

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use of existing child pornography by pedophiles to seduce other children to engage in sexual activity. *Osborne*, 110 S. Ct. at 1697.

48. *Id.* Pointing to dicta in *Stanley*, the court determined that its ruling did not conflict because *Stanley* recognized that compelling reasons may overcome the privacy right of individuals to possess materials. *Osborne*, 110 S. Ct. at 1696 (Court did not "mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. . . . In such cases, compelling state interests may exist for overriding the right of the individual to possess those materials") (quoting *Stanley*, 394 U.S. at 568 n.11).

49. See *Child-Porn Ruling by Court Is Studied For Wider Effect*, Wall St. J., April 23, 1990, at B7.

50. For example, the *Osborne* decision may lead to intrusion into the home whenever the government believes a private activity perpetuates a market that exploits others. Justice Brennan provided another example in his *Osborne* dissent by hypothesizing that under the majority's reasoning a state may legalize the possession of newspapers that were produced in violation of child labor laws. *Osborne*, 110 S. Ct. at 1715 n.19 (Brennan, J., dissenting).

51. *Osborne*, 110 S. Ct. at 1705.

52. Wall St. J., *supra* note 49, at B7.

53. *Id.*

54. *Osborne*, 110 S. Ct. at 1715 (Brennan, J., dissenting).

55. *Id.* at 1712-13 ("*Ferber* held only that child pornography is a category of material the production and distribution of which is not entitled to First Amendment protection; our decision did

When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an over-broad law.<sup>56</sup>

Persuasive arguments exist that *Osborne* represents a natural extension of previous freedom of speech decisions as well as child protection laws. The *Ferber* finding that child pornography causes harm to children supports the distinction made between possession of child pornography and possession of obscenity.

Arguably, generally pornographic material harms those who participate.<sup>57</sup> The harm to a child, however, is qualitatively different: the long-term loss of privacy and fear of disclosure; the use of child pornography as an inducement in child molestation; and the illegality of the act portrayed.<sup>58</sup> Therefore, the differences between child pornography and adult pornography lie both in the degree of harm suffered by the participant and in the degree to which society considers the harm substantial.

Furthermore, the *Osborne* exception may be consistent with numerous other exceptions for children.<sup>59</sup> The Court has held that when an invasion of protected freedoms occurs, "[t]he state's authority over children's activities is broader than over like actions of adults."<sup>60</sup> Thus, the state may overcome a defendant's first amendment rights when the protection of a child is at stake.

At this juncture it is unclear whether *Osborne's* child pornography exception will mean the re-evaluation or end of *Stanley*: whether courts will construe *Osborne* narrowly, limiting its holding to children, or will

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not extend to private *possession* . . . the distinction established in *Stanley* between *what* materials may be regulated and *how* they may be regulated still stands) (citation omitted) (emphasis added).

56. *Id.* at 1717.

57. Current research seems to lend support to a "viewing-doing" connection when adults view violent pornography. See, e.g., ATTORNEY GENERAL'S REPORT, *supra* note 25.

58. *Osborne*, 110 S. Ct. at 1697.

59. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("states may limit the freedom of children to make affirmative choices that have potentially serious consequences"); *Roe v. Wade*, 410 U.S. 113 (1973) (at viability, the state's interest in protecting the life of the fetus is compelling and overcomes the woman's privacy interest); *Ginsberg v. New York*, 390 U.S. 629 (1968) (statute prohibiting the sale of pornography to minors upheld); *In re Gault*, 387 U.S. 1 (1967) (difference in procedural rights of adults and juveniles); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state child labor law upheld over first amendment objections).

60. *Prince*, 321 U.S. at 168.

make *Osborne* the first step in allowing interference in what people do in the privacy of their own homes.

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