



Chapter 9

Child Pornography

Child pornography is an extremely serious problem in this country and abroad. Several organizations which advocate "consensual" adult sexual relations with children have been established in Western Europe and the United States over the last twenty years. Many of these organizations are directly involved in child sex rings, molestation, and the dissemination of child pornography. On the positive side, law enforcement officials have been provided valuable tools to combat this problem. A 1982 Supreme Court decision is one such tool. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court concluded that since society has such a governmental interest of surpassing importance in safeguarding the well being of its youth, states are entitled to a greater leeway in the regulation of pornographic depictions of children. The *Miller* standard of obscenity, therefore, does not need to be applied to child pornography cases:

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for 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.

458 U.S. at 764. The Court also held that the prosecution does not need to prove that the material lacks serious value: "a work which, taken on the whole, contains serious literary, artistic, political or scientific value may nevertheless embody the hardest core of child pornography. 'It is irrelevant to the child [who has been abused] whether or not the material has a literary, artistic, political, or social value.'" 458 U.S. at 761. Justice O'Connor strongly reiterated this position in her concurring opinion: "I write separately to stress that the Court *does not hold* that New York must except 'material with serious literary, scientific, or educational value,' from its statute." 458 U.S. at 774 (emphasis added). The Court stated that the harm to the abused child simply outweighs any arguable value the material may have to society.

If you find child pornography, you can prosecute such a case without dealing with the more troublesome elements of obscenity law. However, under the obscenity test, magazines depicting at least the "lewd exhibition of the genitals" of minors *without* sexual conduct, such as the well-known pedophile magazine "Lollitots," may be found obscene. *Raymond Heartless, Inc. v. State*, 401 A.2d 921 (Del. 1979). See: *People v. Walcher*, 515 N.E.2d 319,323 (Ill.Ct.App.4 Dist. 1987); *U.S. v. Nolan*, 818 F.2d. 1015 (1st Cir. 1987).

However, the Massachusetts Supreme Court found the state child pornography statute overbroad in its inclusion of “non-obscene photographs” of a 15-year-old stepdaughter who was nude above the waist. *Commonwealth v. Oakes*, 518 N.E.2d 836 (Mass. 1988), cert. granted, _____ U.S. _____, 100 L.Ed.2d 226 (1988).

After the *Ferber* decision, many states strengthened their child pornography laws. All states prohibit the dissemination of child pornography, and many states have made mere possession unlawful.’

For instance, the Ohio statute criminalizes the pandering or possession of obscene or sexually oriented matter involving a minor. The statute also forbids anyone to “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,...’ (a number of exceptions follow). The Ohio Supreme Court upheld the constitutionality of this statute. See: *State v. Meadows*, 503 N.E.2d 697 (1986), cert. denied, 480 U.S. _____, 94 L.Ed.2d 771 (1987). The Ohio court closely followed the reasoning and rationale of the *Ferber* decision. The Ohio court found that child pornography is obscene *per se*, and that the prosecution did not need to utilize the *Miller* standard. The court, again relying on *Ferber*, held that the “state’s interest of preserving its children’s privacy and protecting them from the cruel physiological, mental, and emotional abuse caused by sexual seduction, exploitation, and mistreatment occasioned by child pornography outweigh appellee’s interest in possessing such visual depictions.” 28 Ohio St.3d at 52. The defense relied on *Stanley v. Georgia*, 394 U.S. 557 (1969), and maintained that an individual has a constitutional right to possess obscene material in the privacy of his own home. The court, however, argued that *Stanley* provided exceptions to this rule: “there could be cases involving other subjects where...compelling reason may exist for overriding the right of the individual to possess those [obscene] materials.” 394 U.S. at 568. In *Ferber* and *Meadows*, the courts held that child pornography is one of these exceptions and the preservation of a child’s well-being is certainly a “compelling reason” to recognize the exception.

The federal child pornography statute has also been revised and stiffened. The “Child Protection Act of 1984” eliminated the require-

* Minnesota (1983), Arizona (1983), Nevada (1983), Alabama (1984), Ohio (1984), Oklahoma (1984), Washington (1984), Texas (1985), Florida (1989), Utah (1985), Illinois (1985), Kansas (1986), Georgia (1987), Missouri (1987), Idaho (1983), South Dakota (1987), Nebraska (1988), Colorado (1988), and West Virginia (1988). The constitutionality of child porn possession statutes has been upheld by the following cases: *State v. Meadows*, 503 N.E.2d 697 (Ohio 1986), cert. denied, 480 U.S. _____, 94 L.Ed.2d 771 (1987); *Felton v. State*, 526 So.2d 635 (Ala. Crim. App. 1986), aff’d, 526 So.2d 638 (Ala. Sup. Ct. 4-8-88), reh’g denied, 5-20-88; and *People v. Geever*, 522 N.E.2d 1200 (Ill. 1988).

ment that the material be "obscene" and that it be *commercially* distributed. It also increased the maximum fines for first time violators from \$10,000 to \$100,000 and for repeat offenders from \$15,000 to \$200,000. Amendments currently before Congress would give prosecutors even more tools in their efforts against child pornography.

Note: In *U.S. v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987), the District Court held that the challenged portions of the Child Protection Act were fully constitutional except as to its definition of "sexually explicit conduct." One important finding was that the burden of confining one's conduct within lawful bounds can properly fall on those who undertake the activity; thus the use of underage children imposes strict liability even when the government cannot prove the defendant knew the children were underage. However, the court ruled that the defendants may offer a "good faith" defense in the case of the films where "Traci Lords" was thought to be an adult. This ruling was upheld by the Court of Appeals. ____ F.2d ____ (9th Cir. 1988).

Prosecutions have increased, and should continue to increase. There were more convictions in 1985 based on 18USCS §§ 2251-2256 than the previous eight years combined (the statute was enacted in 1978). Under this same statute there were more convictions in May 1986 than any one year from 1978-1983. These statistics should encourage prosecutors to vigorously enforce both obscenity and child pornography laws.

Many prosecutors believe that a proper investigation, search, and seizure will almost always result in a guilty plea.* It is important that investigators and prosecutors understand the types of collectors and producers of child pornography and their typical *modus operandi*.

If you need assistance in this area, contact CDL for the names of experts, sources of material and the latest legal decisions. You may also contact the National Obscenity Enforcement Unit of the Department of Justice in Washington at (202) 633-5780, and the National Center for Missing Children in Washington at (202) 634-9821.

²For a discussion of search and seizure of child pornography, see Chapter 2.