

IMAGES OF INNOCENCE OR GUILT?: THE STATUS OF LAWS
REGULATING CHILD PORNOGRAPHY ON THE FEDERAL LEVEL
AND IN ALABAMA AND AN EVALUATION OF THE CASE
AGAINST BARNES & NOBLE

I. A STRUGGLE IN HAZY AREAS OF THE FIRST AMENDMENT

The First Amendment has long been the contentious battleground between censorship and competing public interests. The criminal case against Barnes & Noble, accusing the bookseller of disseminating child pornography, incites opinions on both sides of this battle. The case centers around the photographs in Jock Sturges' *Radiant Identities* and David Hamilton's *The Age of Innocence*. Barnes & Noble claims that the First Amendment prohibits censorship of works of artistic value and that an effort to remove these books from the bookseller's shelves constitutes censorship.¹ Prosecutors allege that protection of children requires reducing both the demand for children to be depicted in such works and the supply of these photographs to potential pedophiles.² While public debate on the issue is often polarized, an understanding of the Supreme Court's jurisprudence in the areas of obscenity and child pornography will show that the Court draws a hazy line between the two in the interest of balancing First Amendment protections. Prosecutors and Barnes & Noble will verbally battle back and forth as if a new line were going to be drawn in this case, portending an outcome which either increases the protection of children or expands the right to freely read and buy artistic works. After the constitutional issues are made clear, working through the technical details of Alabama's child pornography statute will allow an assessment of the outcome of the case against Barnes & Noble. Careful analysis of the Alabama statute and constitutional jurisprudence will

1. See generally Judyth Rigler, *Mustn't Look at Naked Tots?*, SAN ANTONIO EXPRESS-NEWS, Mar. 1, 1998, at BOOKS 4, Part G.

2. John D. Alcorn & Nick Lackeos, *Grand Jury Indicts Book Chain on Child Pornography Charges*, MONTGOMERY ADVERTISER, Feb. 19, 1998, at 1A.

demonstrate that the law in this area is settled and that the haze in this difficult area exists so that a local jury can sort out these difficult but important competing interests.

II. THE ACCUSATIONS AND AFTERMATH OF THE ALABAMA INDICTMENTS

The Alabama case is not the first time that David Hamilton's and Jock Sturges' photographs have been the center of controversy. In 1990, federal agents raided Jock Sturges' studio, seeking evidence to prosecute him under federal child pornography statutes.³ Ultimately, a grand jury found the evidence insufficient and failed to return an indictment against the author.⁴ Then, in April of 1998, authorities raided the home of a man who possessed child pornography and Sturges' *Radiant Identities*.⁵ They were unable to collect sufficient evidence of sexual assault to charge the man as a child molester, but a grand jury in Travis County, Texas, indicted him on charges of possessing child pornography.⁶ Jurors found him guilty on one count involving possession of child pornography, but not guilty on the count dealing with Sturges' book because jurors determined that the book was not child pornography.⁷

By March of 1998, Randall Terry, an anti-abortion activist and leader of Operation Rescue, had brought the attack on *Radiant Identities* and *Age of Innocence* to Barnes & Noble.⁸ Terry and his followers organized a campaign to enter the bookstore and rip up copies of the controversial books.⁹ Terry explained that he and his followers targeted Barnes & Noble because of

3. J.R. Moehringer, *Child Porn Fight Focuses on Two Photographers; Books; Decency: Works of David Hamilton, Jock Sturges Win Praise as Fine Art, but Obscenity Charges Dog Both*, L.A. TIMES, Mar. 8, 1998, at A1.

4. Sarah Boxer, *Critic's Notebook; Arresting Images of Innocence (or Perhaps Guilt?)*, N.Y. TIMES, Mar. 4, 1998, at E2; Moehringer, *supra* note 3, at A1.

5. Dave Harmon, *Coffee-Table Art or Off-The-Shelf Porn?; Key Issue in Child Porn Case*, AUSTIN-AMERICAN STATESMAN, Apr. 30, 1998, at A1.

6. *Id.*

7. Dave Harmon, *Jury: Man Guilty in Child Porn Case; Travis Jurors say Popular Art*, AUSTIN-AMERICAN STATESMAN, May 1, 1998, at A1.

8. Arthur Salm, *If They Can Take It; So Can We*, SAN DIEGO UNION TRIB., Mar. 22, 1998, at BOOKS 2.

9. *Id.*

their size, noting that "[i]f Goliath falls, then the whole earth trembles."¹⁰ Along with protests, demonstrators "urged legal prosecution" of the book chain.¹¹ Tennessee and Alabama responded.¹² A Tennessee grand jury indicted the book chain for the misdemeanor charge of making obscene material accessible to minors.¹³ In response to that charge, the bookseller entered into a plea agreement stipulating that the charge would be dropped if the books were displayed above a certain height, were covered in opaque shrink-wrap, or were kept behind counters.¹⁴ Barnes & Noble faces more serious charges in Alabama and the bookseller has decided to fight Alabama's charges.

On February 18, 1998, a Montgomery, Alabama grand jury made public a thirty-two count felony indictment against Barnes & Noble.¹⁵ The indictment charges the bookseller with dissemination of child pornography because of its sale of the books *Radiant Identities* and *The Age of Innocence*.¹⁶ In a case to be tried by the Attorney General's office, the bookseller faces a \$10,000 fine on each count, with a total fine of \$320,000.¹⁷ The Montgomery indictment was actually returned on February 6, 1998, the same day an indictment was returned in Jefferson County, Alabama by the District Attorney.¹⁸ In the Jefferson County case, Barnes & Noble faces fines totaling \$30,000.¹⁹ In addition to the fines, if convicted, Barnes & Noble faces the prospect of having to register as a sex offender as a corporate person in some jurisdictions.²⁰ With the serious consequences

10. Malcolm Jones, Jr., *Can Art Photography be Kiddie Porn? Barnes & Noble Under Attack by Conservatives*, NEWSWEEK, Mar. 9, 1998, at 58 (quoting Randall Terry, anti-abortion activist).

11. Doreen Carvajal, *Bookseller Under Fire*, N.Y. TIMES, Feb. 22, 1998, at 2.

12. *Id.*

13. *Id.*

14. Jim East, *Obscenity and What One Calls Reasonable*, TENNESSEAN, May 24, 1998, at 2D.

15. *Alabama Grand Jury Indicts Barnes & Noble*, N.Y. TIMES, Feb. 19, 1998, at A10.

16. *Id.*

17. *Id.*

18. James D. Ross, *Jefferson, Montgomery Counties Both Indict Barnes & Noble Booksellers*, MONTGOMERY ADVERTISER, Feb. 21, 1998, at 1B. David Barber, District Attorney of Jefferson County, stated that he was unaware that the Attorney General's office was investigating the same charges. *Id.*

19. *Id.*

20. See Paul Eric Stuhff, *Utah's Children: Better Protected than Most by New*

facing Barnes & Noble, the nation's largest bookseller, the Alabama indictments made news around the world.²¹ Barnes & Noble responded to the accusation:

At Barnes & Noble we take our mission very seriously to be a good corporate citizen in the communities we serve and to be a valuable resource to our customers, bringing books and ideas to the American public. We also follow community standards, as expressed through federal, state and local laws. . . . Although Barnes & Noble may not personally endorse all books that we sell, we respect the right of individuals to make decisions about what they buy and read. In return, we ask that our customers respect our right to bring to the American public the widest selection of titles and ideas.²²

Alabama's Attorney General Bill Pryor responded that his office began its investigation after receiving numerous complaints that Barnes & Noble had been selling child pornography.²³ Pryor explained, "[t]here is nothing artistic about the damage caused by the despicable practice of child pornography."²⁴ Commenting on the content of the books, the Attorney General noted that the books "contain visual reproductions of nude children designed to elicit a sexual response."²⁵ Jock Sturges defiantly responded that "the book 'that so suddenly horrifies the attorney general' has been on sale in Alabama for six years" and "[Pryor] is going to end up embarrassing Alabama because he's going to lose and it's going to cost taxpayers a lot of money."²⁶

Civil Sex Offender Incapacitation Laws?, 24 J. CONTEMP. L. 295, 306-07 & n.63 (1998).

21. See, e.g., Giles Whittell, *Bookshop Accused Over Nude Children Pictures*, TIMES (London), Feb. 20, 1998, at 15; Whit Mason, *Young Nudes Spark Debate*, SOUTH CHINA MORNING POST, Mar. 16, 1998, at 12.

22. Alcorn & Lackeos, *supra* note 2, at 1A (quoting statement from Barnes & Noble, Inc.).

23. *Id.*

24. *Id.* (quoting Pryor).

25. *Id.* (quoting Pryor).

26. *Id.* (quoting Sturges).

III. THE CONTENTS OF *THE AGE OF INNOCENCE* AND *RADIANT IDENTITIES*

While it is difficult to adequately describe Hamilton's and Sturges' photographs in words, the descriptions and opinions of the artistic community and average citizens provide valuable insights into the contents of both works. A reporter for the *Los Angeles Times* stated that Jock Sturges' *Radiant Identities* and David Hamilton's *The Age of Innocence* "focus almost exclusively on naked girls, poised on the precipice of puberty."²⁷ He described the photos as sometimes suggestive or erotic and explained that:

In a typical Sturges photograph, a girl about 10 years old lies back on a futon, her arms outstretched, her exposed genitals drawing the viewer's eye to the center of the frame. In a typical Hamilton photograph, a girl of 13 gazes at her new breasts, touching them tentatively.²⁸

Newsweek magazine described the photos this way:

Sturges, whose work is in the Museum of Modern Art, focuses on nudist families, in black-and-white images that are beautifully composed and printed. Many of the works in "Radiant Identities" were shot on beaches in France (with his subjects' cooperation). Hamilton offers up an endless array of gauzy color shots of girls on the cusp of puberty and just beyond, accompanied by coy text from romantic poetry. Both of them embroil viewers in issues of childhood and early adolescent sexuality, enough to make even the staunchest liberal squirm.²⁹

Alan Sears, who served as head of President Reagan's pornography commission, explained that the contents of the books offended him but added, "I'm as conservative a guy as you'll interview, . . . [b]ut it's not constitutionally forbidden material in these books."³⁰ H.P. Hansell, a Montgomery shopper who had previously viewed *Radiant Identities*, found nothing distasteful about the pictures, stating "[t]he impression I got was of pic-

27. Moehringer, *supra* note 3, at A1.

28. *Id.*

29. Jones, *supra* note 10, at 58.

30. *Id.* (quoting Sears).

tures that mothers keep of children without a stitch of clothing on."³¹

The artistic community has come to the defense of both photographers,³² but Sturges receives the most vigorous defense. Sturges himself claims that his "[a]rtistic credentials are nine miles long," with his photographs being displayed "in every major U.S. museum, including the Metropolitan Museum of Art and in 18 galleries in six nations."³³ Sturges' publisher notes that the photographer's books "have been affirmed by the American Library Association and American Booksellers Association as publications of the highest quality without any prurient intent."³⁴ Art professor Gay Burke, who teaches at the University of Alabama, said of Sturges, "I'll certainly defend the right to do the work he does."³⁵ Although fewer critics appear to defend Hamilton, the photographer has his own Internet web page celebrating the opening of his museum in the South of France and declaring him perhaps "the most popular artist the world has ever seen."³⁶

Even though Hamilton and Sturges appear to have some legitimate artistic credentials, other citizens and critics have been far less charitable. Alabama's Attorney General Bill Pryor declared, "[w]e must protect children from those who would exploit their innocence for financial gain under the guise of so-called 'art.'"³⁷ San Francisco police officer and eighteen-year veteran of the child exploitation division, Thomas Eisenmann, who led a raid of Sturges' apartment in 1990 along with federal agents, echoed the Attorney General's sentiments. Eisenmann said, "I wondered when this would come up again," and "I thought it was child pornography. And I still do."³⁸ In a scathing article in the *New York Times*, art critic Sarah Boxer opined,

31. Alvin Benn & Melissa Montealegre, *Expert Says Porn Trial Hard to Win*, MONTGOMERY ADVERTISER, Feb. 20, 1998, at 1A (quoting Hansell).

32. See, e.g., *id.*

33. Alcorn & Lackeos, *supra* note 2, at 1A (quoting Sturges).

34. *Id.* (quoting Scott Padden, spokesman for Sturges' publisher).

35. Benn & Montealegre, *supra* note 31, at 1A (quoting Burke).

36. Bruce Handy, *Beyond the Pale; Right-Wingers Say Barnes & Noble is Selling Child Porn. They Have a Point*, TIME, Mar. 16, 1998, at 56.

37. Phillip Rawls, *Alabama Porn Charge Follows States Against Bookseller*, CHATTANOOGA FREE PRESS, Feb. 19, 1998, at C2 (quoting Pryor).

38. Moehringer, *supra* note 3, at A1 (quoting Eisenmann).

"[s]omeone should defend Mr. Sturges and Mr. Hamilton legally. Esthetically, they're on their own."³⁹ Boxer explains that most of Sturges' models are "blond-haired, blue-eyed girls with small breasts. He likes to photograph them sprawling on towels with 'sand stuck to their bottoms, or showering together. Some look straight at the photographer, and some shut their eyes. They are ornaments for the beach and the blanket."⁴⁰

David Hamilton has received even more criticism than Sturges, based in part on his pictures, but in large part due to the suggestive text he includes with those pictures. Bruce Handy of *Time* magazine described the text in Hamilton's book:

The Age of Innocence is really something, though: page after page of pubescent girls in poses reminiscent of those in a *Playboy* layout circa 1975. The camera's gaze is solemn, the lens gauzy, the light that of a perpetual late afternoon. Half-formed breasts are bared, fingers are coyly sucked, panties pulled at, genitalia caught artfully winking out of bathing suits. In order to remind us that this is art and not, say, a file on the hard drive of some about-to-be-arrested principal, the photos are captioned with musings on adolescent sexuality from literary folk. . .⁴¹

Sarah Boxer holds Hamilton in as low esteem as she does Sturges, noting that *The Age of Innocence* "is full of photographs of girls in bed, looking dreamy and spent"⁴² and posed to make them all appear willing. Boxer also commented on the most suggestive image contained in either book, a page that will be a nightmare for Barnes & Nobles' defense attorneys and the centerpiece of the prosecutor's case because it is the closest image to an actual sex act in either book:

In the final pages of the book, Mr. Hamilton writes, fantasizing: "In her daydreams she thinks about this man who will one day come to her in answer to her questions. Perhaps he is a prince, a knight on a white stallion, a man in military uniform. . . . She is lovely, our nymph, and her potential is infinite. Heaven grant her the man who is worthy of her, and who comes to her bringing sex with tenderness. She has her virginity and her innocence; she

39. Boxer, *supra* note 3, at E2.

40. *Id.*

41. Handy, *supra* note 36, at 56.

42. Boxer, *supra* note 4, at E2.

will, if she is fortunate, trade them in due course for experience and love." The words are accompanied by pictures of a teen-age girl being carried around by a teen-age boy, who, on the final page, is bending over her.⁴³

Based on the divergent opinions of various critics, one can only imagine the difficulty a jury will have in sorting through the questions of whether these books are truly art or just obscene child pornography.

IV. BACKGROUND AND SELF-EVALUATIONS OF JOCK STURGES AND DAVID HAMILTON

The personal backgrounds and self-evaluations of David Hamilton and Jock Sturges are essential to a complete understanding of *Radiant Identities* and *The Age of Innocence*, and they may also have legal significance. The photographers have not been charged personally with any crime, but evidence of their backgrounds and intentions in creating these books could still legally figure into the Barnes & Noble case. The authors' backgrounds could be relevant in deciding an element of the case because both books contain visual depictions that require the state to demonstrate that those depictions appeal to the prurient interest.⁴⁴ Generally, whether the material appeals to the prurient interest is determined by looking solely at the material's effect on the reader, but such evidence might be admissible to demonstrate that the photographers' intentions and backgrounds make the books more likely to evoke the prurient interests of readers.⁴⁵

Both Hamilton and Sturges admit to at least one recorded indiscretion with the underage models in their pictures. Sturges, now fifty, admitted that at age twenty-eight he engaged in a sexual relationship with Jennifer Montgomery, a fourteen-year-

43. *Id.*

44. The majority of depictions prohibited by section 13A-12-191 of the Alabama Code do not require that the materials appeal to the prurient interest, but depiction of breast nudity is an exception. *Poole v. State*, 596 So. 2d 632, 638 (Ala. Crim. App. 1992); *Perry v. State*, 568 So. 2d 339, 341 (Ala. Crim. App. 1990); ALA. CODE § 13A-12-190(13), -191 (1994).

45. See *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987).

old model.⁴⁶ Sturges met Montgomery at a New England boarding school where he served as her dorm counselor.⁴⁷ Their sexual relationship began and continued for several years after Sturges convinced the young woman to model for his photographs.⁴⁸ Hamilton met his now thirty-year-old wife under similar circumstances, when she was one of his models at age thirteen.⁴⁹ Neither faced criminal prosecution for these acts, acts that critics of the photographers claim demonstrate that both are, at worst, pedophiles and, at best, dirty old men.⁵⁰

The photographers counter that no similar indiscretions have occurred since. Hamilton notes that he has been married for the past eighteen years to his former model who began her career at thirteen-years-old.⁵¹ Sturges claims that his indiscretion was a one-time mistake, made during a time of weakness.⁵² Sturges reflects on the affair, explaining that he is not a philanderer because he has had only four relationships in his life and that this second relationship is "obviously embarrassing now."⁵³ The photographer believes vulnerability, which resulted from his recent divorce from his first wife, led to the bad decisions that ultimately brought about the affair.⁵⁴ He still remembers fondly, though, his respect for Montgomery's intellect.⁵⁵ Montgomery, on the other hand, harbors mixed feelings regarding Sturges.⁵⁶ She notes that her experience with Sturges left her damaged, explaining that his actions toward her were wrong and that his photographs of children are clearly sexual.⁵⁷ At the same time, she also heaps high praise on the quality of his photographs.⁵⁸ Summing up her mixed emotions,

46. Moehringer, *supra* note 3, at A1.

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.*

51. Moehringer, *supra* note 3, at A1.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Montgomery is now a film maker, and she chronicled her relationship with Sturges in a cathartic quasi-documentary, *Art for Teachers of Children*. The 1995 film earned Montgomery a Guggenheim fellowship. Moehringer, *supra* note 3, at A1.

57. *Id.*

58. *Id.*

Montgomery stated, “[i]t’s confusing, [b]ut that’s life. It’s not black and white.”⁵⁹

While the photographers’ pasts have some similarities, the self-evaluations of their work vary considerably. Sturges vigorously maintains that his photographs are not obscene.⁶⁰ Sturges defiantly maintains, “[t]here’s nothing criminal in my work. The thing absent from these pictures that drives people nuts is *shame*.”⁶¹ The photographer also notes that he meets his models at nudist beaches and colonies, photographing children with the families’ written permission.⁶² He also gives the families continuing control over the photographs.⁶³ Through this process, Sturges maintains that his photographs are intended “to be beautiful, . . . I find *Homo sapiens* to be an extraordinarily beautiful species.”⁶⁴

David Hamilton speaks in tones quite different than Sturges when describing his photographs. Hamilton believes that sex is a big part of what he is photographing, candidly stating that little girls are “erotic.”⁶⁵ The photographer makes these brash assertions based on a belief that his “erotic” photography of children is not child pornography.⁶⁶ Hamilton claims to be a misunderstood artist, comparing himself to literary giant Vladimir Nabakov, author of the controversial novel *Lolita*, and to Lewis Carroll, author of *Alice’s Adventures in Wonderland*.⁶⁷ Carroll was a known pedophile who also photographed young children,⁶⁸ and Hamilton asserted that, “[i]f Lewis Carroll were alive today he would be in jail! . . . ‘He was a wonderful man!’”⁶⁹

59. *Id.*

60. Doreen Carvajal, *Barnes & Noble Vows to Stock Art Books Despite Indictments*, N.Y. TIMES, Feb. 20, 1998, at A15; Jesse Hamlin, *N.Y. Publisher Indicted for Child Porn S.F. Photographer Says His Work is the Target*, SAN FRANCISCO CHRON., Feb. 20, 1998, at A2.

61. Moehringer, *supra* note 3, at A1 (emphasis added).

62. *Id.*

63. Debra Baker, *Beyond Bookstore Protests: Conservatives Fight to Expand Definition of Child Porn*, 84 A.B.A. J. 22, 23 (1998).

64. Moehringer, *supra* note 3, at A1.

65. *Id.* See also Handy, *supra* note 36, at 56.

66. Jones, *supra* note 10, at 58; Moehringer, *supra* note 3, at A1.

67. Moehringer, *supra* note 3, at A1.

68. Boxer, *supra* note 4, at E2.

69. Moehringer, *supra* note 3, at A1.

V. HISTORIC NARROWING OF FIRST AMENDMENT PROTECTIONS
LEADING TO *MILLER V. CALIFORNIA*

Analysis of child pornography cases must proceed on two levels, beginning with the constitutional requirements set forth by the United States Supreme Court and then continuing with analyses of the operations of particular state statutes. Public debate tends to center on broad constitutional issues, rather than focusing on the immense detail of the many different state statutes.⁷⁰ In this fractious and heated debate, three basic points of view arise. The first category includes the views of those individuals who believe that the protection of the First Amendment is absolute.⁷¹ The second group consists of the views of those individuals who believe that the First Amendment provides no protection for nude depictions of children.⁷² Finally, there is a group of people who believe that the test established by the Supreme Court in *Miller v. California*⁷³ protects the photographs as artistic expression.⁷⁴ The first two positions fail to recognize the middle ground that the Supreme Court has taken in squaring First Amendment rights with protection of the public.⁷⁵ The final assertion is nearly correct because *Miller* does weigh heavily in the regulation of obscenity, but on the issue of child pornography, *Miller* is not controlling.⁷⁶ Even though *Miller* is not controlling in cases of child pornography, the Supreme Court's *Ferber* test for such material cannot be understood without reference to *Miller*.⁷⁷

Before *Miller v. California*, the Supreme Court had struggled to find a middle ground between the important protections afforded to free speech under the First Amendment and a state's interest in protecting the sensibilities of those who did not want

70. See *A Dixie Book Burning*, N.Y. TIMES, Feb. 23, 1998, at A18.

71. See *Book Burning: Did Politics Prompt Indictments?*, MONTGOMERY ADVERTISER, Mar. 1, 1998, at 10A.

72. See James Eldon Wilson, *Child Pornography Real Issue, Not Our Freedom of Expression*, MONTGOMERY ADVERTISER, Mar. 22, 1998, at 15A.

73. 413 U.S. 15 (1973).

74. See *A Dixie Book Burning*, *supra* note 70, at A18.

75. See *Miller v. California*, 413 U.S. 15, 36-37 (1973).

76. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

77. *Ferber*, 458 U.S. at 764-65.

to be exposed to sexually explicit materials.⁷⁸ In *Chaplinsky v. New Hampshire*,⁷⁹ one of the earliest First Amendment cases in this area, the Court clarified that free speech has limits.⁸⁰

In *Chaplinsky*, the Court determined that "certain well-defined and narrowly limited classes of speech" could be constitutionally prevented and punished.⁸¹ The Supreme Court reasoned that lewd and obscene speech constitutes a class of speech without First Amendment protection, explaining that, "[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁸²

While *Chaplinsky* did not involve any obscene material, in *Roth v. United States*,⁸³ the Court ruled that obscene materials were not protected by the First Amendment.⁸⁴ *Roth* involved a federal statute making it a crime to mail obscene, lewd, lascivious or filthy materials.⁸⁵ Upholding the statute, *Roth* held that "[a]ll ideas having even the slightest redeeming social importance . . . have the full protection of the [First Amendment] guaranties [sic], unless excludable because they encroach upon the limited area of more important interests."⁸⁶ With this reasoning in mind, the Supreme Court defined "obscenity" as "utterly without redeeming social importance."⁸⁷

Although the Supreme Court clearly determined that the First Amendment did not protect obscenity, explaining exactly what is "obscene" was a more difficult matter. The initial test for obscenity was articulated in *Memoirs v. Massachusetts*,⁸⁸ and it incorporated the *Roth* holding in a three-part test.⁸⁹ The three

78. *Miller*, 413 U.S. at 18-20.

79. 315 U.S. 568 (1942).

80. *Chaplinsky*, 315 U.S. at 571-72.

81. *Id.*

82. *Id.*

83. 354 U.S. 476 (1957).

84. *Roth*, 354 U.S. at 484-85.

85. *Id.* at 479.

86. *Id.* at 484-85.

87. *Id.*

88. 383 U.S. 413 (1966).

89. *Memoirs*, 383 U.S. at 418.

elements of the *Memoirs* test required that (1) the dominant theme of the material, taken as a whole, appeals to a prurient interest in sex; (2) the material is patently offensive because it affronts contemporary community standards relating to descriptions or depictions of sexual matters; and (3) the material is utterly without redeeming social value.⁹⁰ The third element of the *Memoirs* test created the most difficulty.⁹¹ As a practical matter, almost no speech would be declared obscene and outside First Amendment protection due to the difficulty in our criminal justice system of affirmatively proving the double negative—that the material be “utterly without redeeming social value.”⁹² A state’s ability to regulate obscenity was a hollow power in light of the *Memoirs*’ test, but the facts of *Miller* provided the Court with an opportunity to modify the *Memoirs*’ test to provide states with a workable framework for regulating obscenity.

The facts of *Miller* involve the dissemination of pornographic material depicting sexual acts.⁹³ The defendant in *Miller* conducted a mass mailing in an attempt to sell books which he called “adult” material.⁹⁴ The advertisements contained descriptive writings along with pictures and drawings of “men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.”⁹⁵ Those materials were received in the mail, unsolicited, by two individuals, and they reported receiving them to authorities.⁹⁶

The Court reaffirmed its settled holding that obscene material is not protected by the First Amendment and clarified its position with regard to what standards states may use in making determinations of what is obscene.⁹⁷ The Court began by explaining that regulation involving any form of expression requires carefully defined limits.⁹⁸ State statutes could proscribe only those materials which described sexual conduct, and

90. *Id.*

91. *See Miller*, 413 U.S. at 22.

92. *See id.* (emphasis added).

93. *Id.* at 18.

94. *Id.* at 16.

95. *Id.* at 18.

96. *Miller*, 413 U.S. at 18.

97. *Id.* at 23-24.

98. *Id.*

the statutes were required to specifically define such conduct.⁹⁹ Further, statutes could prohibit only those works that, when taken as a whole, appealed to a prurient interest in sex, portrayed sexual conduct in a patently offensive way, and lacked serious literary, artistic, political or scientific value.¹⁰⁰ The Court reasoned that if a trier of fact used these guidelines for determining what was obscene, even though the First Amendment provided obscenity no protection, appellate courts could conduct independent review where necessary.¹⁰¹ This independent review would ensure that regulation in varying fact situations did not spill over into various areas of protected speech, thus sustaining the vitality of the First Amendment.¹⁰²

State statutes regulating child pornography adhered to the standard set forth in *Miller* until 1982, when the Supreme Court further narrowed the protections of the First Amendment in *New York v. Ferber*,¹⁰³ a case which dealt exclusively with child pornography.¹⁰⁴ Although *Miller* provided ill-defined guidance to courts interpreting statutes regulating child pornography under the First Amendment, precedent established in *Ginsberg v. New York*¹⁰⁵ would guide the Court to its landmark *Ferber* decision.¹⁰⁶

In 1966, prior to hearing *Miller*, the Court heard the *Ginsberg* case, which involved a statute aimed at limiting children's access to any obscene material.¹⁰⁷ The Court noted that where protected freedoms are invaded, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."¹⁰⁸ Based on this rationale, the Court held that states need only show a rational basis for legislation limiting children's access to obscene material.¹⁰⁹

99. *Id.* at 24.

100. *Id.*

101. *Miller*, 413 U.S. at 25.

102. *See id.* at 26.

103. 58 U.S. 747 (1982).

104. *See Ferber*, 458 U.S. at 747.

105. 390 U.S. 629 (1966).

106. *See Ginsberg*, 390 U.S. at 629.

107. *Id.* at 638.

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

109. *Id.* at 641.

VI. THE LANDMARK CASE *NEW YORK V. FERBER* AND THE SUPREME COURT'S JURISPRUDENCE INVOLVING CONSTITUTIONAL RESTRICTIONS ON CHILD PORNOGRAPHY

Miller remains the most influential First Amendment case in this area because the Supreme Court has modified the *Miller* standard to provide states with greater leeway in regulating child pornography.¹¹⁰ Thus, *Miller* is essential to understanding the Supreme Court's jurisprudence in the area of child pornography. *Ferber* is, however, the controlling case when regulation of child pornography clashes with the First Amendment.¹¹¹

The facts and procedural history of *Ferber* demonstrate how unsettled constitutional questions involving child pornography were ten years after the *Miller* decision. In *Ferber*, the owner of a bookstore selling sexually-oriented products sold two films to undercover police officers which depicted young boys masturbating.¹¹² The shop owner was indicted for violation of New York's laws prohibiting dissemination of child pornography.¹¹³ The shop owner was acquitted on counts involving promotion of obscene sexual performances, but he was found guilty on related counts that did not require a showing that the material was obscene.¹¹⁴ On appeal, the convictions were affirmed, but New York's highest court reversed the convictions on the grounds that a statute prohibiting these materials without a showing that they were obscene violated the First Amendment under the *Miller* test.¹¹⁵

The Supreme Court granted certiorari in the case and noted that in light of its recent decisions, specifically *Miller*, the New York Court of Appeals had reasonably interpreted the statute under the *Miller* standard.¹¹⁶ The Court then explained that the *Miller* standard represented an accommodation between a state's interest in protecting the sensibilities of unwilling recipients from exposure to pornographic material and the danger of

110. See *Ferber*, 458 U.S. at 756.

111. See *id.*

112. *Id.* at 751-52.

113. *Id.*

114. *Id.*

115. *Ferber*, 458 U.S. at 751-52.

116. *Id.* at 753.

ensorship from content-based obscenity statutes.¹¹⁷ The Court first determined that statutes governing dissemination of child pornography were in a separate category from statutes governing obscenity.¹¹⁸ The Court then explained that the similarity of the statutes required an accommodation very similar to the *Miller* formulation but that based on five important policy reasons, states should be given greater leeway in regulating the category of child pornography.¹¹⁹

The first justification for allowing states greater leeway in regulating pornographic depictions of children is that states have a compelling interest in "safeguarding the physical and psychological well-being of a minor."¹²⁰ The Court provided several examples and explained that regulations aimed at protecting the physical and emotional well-being of children have been allowed even though they operate in the area of constitutionally protected rights.¹²¹ The Court concluded that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,"¹²² and the legislative judgment that the use of children in pornographic materials is harmful to the physiological, emotional and mental health of children will not be second-guessed.¹²³ For this reason, the statute was held not to violate the First Amendment.¹²⁴

The second rationale is that films depicting children engaged in sexual activity are closely related to sexual abuse of children in two ways. First, any materials produced create a permanent record of the child's actions, and circulation of these

117. *Id.* at 756.

118. *See id.*

119. *See id.*

120. *Ferber*, 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court of Norfolk County*, 457 U.S. 596, 607 (1982)).

121. *Id.* at 757 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (allowing special treatment of indecent broadcasting received by adults and children based on government's interest in the "well being of its youth"); *Ginsberg*, 390 U.S. at 637-43 (sustaining statute protecting children from exposure to nonobscene literature); *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944) (sustaining a statute prohibiting children from distributing literature on the street even though it operated in the area of First Amendment rights).

122. *Ferber*, 458 U.S. at 757.

123. *Id.* at 758.

124. *Id.*

materials only increases the harm to those children.¹²⁵ In addition, preventing exploitation of children requires more than going after producers who are often clandestine in their activities. It is logical that states should be allowed to pursue the visible market for child pornography in an effort to dry up the demand for those materials. In essence, the supply of child pornography can only be controlled if the distribution network is closed, and closure is most easily effected by attacking the demand for child pornography.¹²⁶

The third rationale for a separate First Amendment standard regulating child pornography rests on the economic incentives involved in advertising and selling child pornography. The Supreme Court found that the continued selling and advertising of child pornography was an integral part in creating an expanding market for child pornography.¹²⁷ It also held that the constitutional freedom of speech extends no protection to speech or writings used as an integral part of conduct prohibited by criminal statutes.¹²⁸

The fourth rationale is important, in part because it contextualizes *Ferber* within *Miller*. The Court explained in *Ferber* that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."¹²⁹ The Court determined that it was not likely that visual depictions of children performing sexual acts or lewdly displaying their genitals would play an important or necessary part of any literary, scientific or educational work.¹³⁰

Finally, the Court noted that classifying child pornography as material outside the protection of the First Amendment was not contrary to the Court's earlier decisions under the First Amendment.¹³¹ Citing extensive precedent, the Court noted that the question of whether speech is protected under the First

125. *Id.* at 759.

126. *Id.* at 759-60.

127. *Ferber*, 458 U.S. at 761.

128. *Id.* at 761-62.

129. *Id.* at 762.

130. *Id.* at 762-63.

131. *Id.* at 763.

Amendment often turns on the content of that speech.¹³² Building on this assertion, the Court summed up its decision:

Thus, it 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, such as that covered by [the statute], 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.¹³³

The Court's holding provided three constitutional requirements for statutes governing child pornography. While child pornography is unprotected by the First Amendment, the Supreme Court's holding acknowledged that all legislation in the area of First Amendment rights has limits.¹³⁴ Statutes prohibiting child pornography must (1) adequately define the conduct to be prohibited, (2) be limited to works that visually depict sexual conduct of children below a specific age, and (3) suitably limit and describe the proscribed conduct.¹³⁵

After explaining the constitutional requirements for statutes regulating child pornography, the Court then modified its *Miller* test for obscenity, specifying the constitutional limits imposed by First Amendment free speech.¹³⁶ Even though the test for child pornography is separate from the *Miller* test for obscenity, the former cannot be understood without the latter.¹³⁷ The *Miller* test is modified so that in child pornography cases, the trier of fact does not have to find "that the material appeals to the prurient interest of the average person," nor does the sexual conduct have to be portrayed "in a patently offensive manner." Finally, "the material at issue need not be considered as a

132. *Ferber*, 458 U.S. at 763.

133. *Id.* at 763-64.

134. *Id.* at 764.

135. *Id.*

136. *Id.*

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

whole.¹³⁸ The Court also established clear that criminal responsibility in the area of child pornography, as with obscenity laws, cannot be imposed unless the defendant demonstrates a clearly defined element of scienter.¹³⁹

The Supreme Court's most recent decision in the area of child pornography is *Osborne v. Ohio*,¹⁴⁰ a case dealing with private possession of child pornography. In *Osborne*, police officers discovered pictures of nude adolescent boys posed in sexually explicit positions in the petitioner's home.¹⁴¹ The Ohio statute outlawing possession of child pornography included depictions of children in a "state of nudity."¹⁴² The defendant objected to the statute as overbroad and argued that the Supreme Court's holding in *Stanley v. Georgia*¹⁴³ protected his right to private possession of the pictures in his home.¹⁴⁴ The Ohio Supreme Court interpreted exceptions in the statute as limiting the regulation of nudity to depictions involving a lewd exhibition or graphic focus on genitalia.¹⁴⁵

The Supreme Court affirmed the Ohio Supreme Court, reasserting its commitment to *Ferber* and squaring *Stanley v. Georgia* with the Ohio statute at issue.¹⁴⁶ The Court reasoned that the Ohio regulation was constitutionally permissible because it sought to protect victims of child pornography by drying up the market for those materials.¹⁴⁷ This overriding state interest in protecting the psychological and physical well-being of children distinguished the Ohio statute from the statute in *Stanley* because the latter was based on a paternalistic interest in regulating thoughts out of fear that obscenity would "poison the minds

138. *Id.*

139. *Id.* at 765; see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69, 78 (1994).

140. 495 U.S. 103 (1990).

141. *Osborne*, 495 U.S. at 107.

142. *Id.* at 106.

143. 394 U.S. 557 (1969). In *Stanley*, the Court "struck down a Georgia law outlawing the private possession of obscene material" to prevent "poison[ing] the minds of its viewers." *Osborne*, 495 U.S. at 108-09 (discussing *Stanley*, 394 U.S. at 557, 561).

144. See *Osborne*, 495 U.S. at 107-09.

145. *Id.* at 107.

146. *Id.* at 108-10.

147. *Id.* at 109.

of its viewers" and hurt public morality.¹⁴⁸ Thus, the Court reaffirmed its position that the public interest in protecting the well-being of children and drying up the demand for child pornography provided a similar but separate standard for regulation of child pornography.

The *Ferber* and *Osborne* holdings both considered whether the relevant statutes may be constitutionally overbroad. The defendants in both cases asserted that statutes without exceptions for materials with artistic, scientific or educational value could sweep into areas of potentially protected speech, and this assessment was shared by several Justices.¹⁴⁹ For example, under such a statute, baby pictures or copies of *National Geographic* could serve as evidence upon which an individual could be convicted. Relying on its holding in *Broadrick v. Oklahoma*,¹⁵⁰ the Court explained that the doctrine of overbreadth is "strong medicine" that it has employed "with hesitation, and then 'only as a last resort.'"¹⁵¹ Because neither case presented facts where the respective statutes regulating child pornography swept into areas of protected speech and because the Ohio statute required that the depictions of genitals be "lewd," the Court held that any potential overbreadth was not substantial enough to invalidate the Ohio statute.¹⁵² In sum, because such a small number of depictions of artistic, scientific or educational value would involve the "lewd" exhibition of genitalia, the whole statute should not fail and frustrate the broad range of constitutional prohibitions in the statute.

VII. OPERATION OF SECTION 13A-12-191: ALABAMA'S PROHIBITION ON DISSEMINATION OF CHILD PORNOGRAPHY

The history of Alabama's statute regulating child pornography closely tracks the Supreme Court's holdings in *Miller v.*

148. *Id.*

149. See *Ferber*, 458 U.S. at 774-75 (O'Connor, J., concurring); see also *Osborne*, 495 U.S. at 126-32 n.5 (Brennan, J., dissenting) (arguing that the Ohio statute at issue was overly broad because it included materials protected by the First Amendment).

150. 413 U.S. 601 (1973).

151. *Ferber*, 458 U.S. at 769 (citing *Broadrick*, 413 U.S. at 613).

152. *Id.* at 773; *Osborne*, 495 U.S. at 112-14.

*California*¹⁵³ and *New York v. Ferber*.¹⁵⁴ In 1978, five years after *Miller* and four years before *Ferber*, the Alabama legislature passed its first child pornography statute.¹⁵⁵ The act made it illegal to "knowingly produce by any means 'obscene matter displaying or depicting in any way a person under the age of 17 years engaged in or involved in any way in any obscene act'" involving one of six forms of specified sexual conduct.¹⁵⁶ The specified forms of conduct were (1) sado-masochistic abuse, (2) sexual intercourse, (3) sexual excitement, (4) masturbation, (5) nudity or (6) other sexual conduct.¹⁵⁷ Both the sexual conduct in which a child was engaged and the depiction of that act had to meet the definition of "obscene." The definitional provision of the act used the *Miller* standard in stating that obscene material was that which, "[a]pplying contemporary local community standards, on the whole, appeals to the prurient interest; [i]s patently offensive; and on the whole, lacks serious literary, artistic, political or scientific value."¹⁵⁸

In 1984, two years after the *Ferber* decision, the Legislature passed Alabama's current child pornography act.¹⁵⁹ The present act retains the prohibition on depictions of persons under the age of seventeen¹⁶⁰ and incorporates two changes to the

153. 413 U.S. 15 (1973).

154. 458 U.S. 747 (1982).

155. *Poole v. State*, 596 So. 2d 632, 637 (Ala. Crim. App. 1992) (citing ALA. CODE §§ 13A-12-190 to -198 (1982) (amended 1984)).

156. *Poole*, 596 So. 2d at 637-38 & n.3 (quoting ALA. CODE § 13A-12-197) (alteration in original).

157. *Id.* at 638 & n.3 (citing ALA. CODE § 13A-12-197).

158. *Id.* at 638 (quoting ALA. CODE § 13A-12-190(12)).

159. *Id.* (citing ALA. CODE §§ 13A-12-190 to -198 (1994)). The Barnes & Noble case is specifically governed by section 13A-12-191, entitled "Dissemination or public display of obscene matter containing visual reproduction of persons under 17 years of age involved in obscene acts." The text of the act reads as follows:

Any person who shall knowingly disseminate or display publicly any obscene matter containing a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony.

ALA. CODE § 13A-12-191.

160. To demonstrate that the person depicted

is under the age of 17 years, the state is not required to introduce into evidence a birth certificate, produce testimony as to the date of birth of such person, or produce testimony of any person who knows or is acquainted with the person alleged to be under the age of 17 years.

original legislation.¹⁶¹ The first change is that the act engaged in by the child need not be obscene.¹⁶² The second change is that nudity is now divided into two separate categories, "breast nudity" and "genital nudity," thereby creating seven classifications of sexual conduct, rather than six.¹⁶³ The more important change is the bifurcation of the definition of the term "obscene" in section 13A-12-190(13).¹⁶⁴ The definition of obscenity with regard to breast nudity retains the three-pronged *Miller* standard from the former statute.¹⁶⁵ The genital nudity category retains the six original proscribed sexual activities, but "obscenity" under those categories only has to meet the prong of the *Miller* standard which requires that the visual depiction lack any "serious literary, artistic, political, or scientific value."¹⁶⁶ Thus, the Alabama legislature chose to accept the *Ferber* holding that the state need not demonstrate that material containing genital nudity "appeal[s] to the prurient interest" or that it is "patently offensive."¹⁶⁷ Yet under the new category of breast nudity, which was not discussed in *Ferber*, the Legislature decided not to take any chances and retained the *Miller* obscenity standard wholesale.¹⁶⁸ Further, it is important to note that in determin-

ALA. CODE § 13A-12-193. The jury may infer that individuals are under 17, whether they are or not, based on the following factors:

- (1) The general body growth and bone structure of the person; (2) The development of pubic hair or body hair on the person; (3) The development of the person's sexual organs; (4) The context in which the person is placed by any accompanying printed or text material; (5) Any expert testimony as to the degree of maturity of the person.

Id.

161. *Poole*, 596 So. 2d at 638.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Cole v. State*, 721 So. 2d 255, 258-59 (Ala. Crim. App. 1998) (citing ALA. CODE § 13A-12-190(13)); *Poole*, 596 So. 2d at 638 (citing ALA. CODE § 13A-12-190(13)a (Supp. 1990)).

166. *Poole*, 596 So. 2d at 638-39 (discussing ALA. CODE § 13A-12-190(13)b).

167. *Id.* at 639; *Ferber*, 458 U.S. at 764.

168. *Ferber*, 458 U.S. at 764; *Miller*, 413 U.S. at 24; *Cole*, 721 So. 2d at 258-59; *Poole*, 596 So. 2d at 638 (citing ALA. CODE § 13A-12-190(13)). Section 13A-12-190(13) of the Alabama Code defines "obscene" as follows:

a. When used to describe any matter that contains a visual reproduction of breast nudity, such term means matter that:

1. Applying contemporary local community standards, on the whole, appeals to the prurient interest; and

ing whether depictions of breast nudity are obscene, the work is considered as a whole, while depictions of genital nudity are considered standing alone.¹⁶⁹ In effect, this means that depictions of breast nudity can be "saved" from obscenity by the context of the work, while depictions of genital nudity are not considered in context. As with most child pornography statutes, the essential question centers on whether the material meets the definition of obscene.

A second important definition under Alabama's child pornography statute is that accorded the term "lewd," which modifies both breast nudity and genital nudity.¹⁷⁰ Both federal and state courts have struggled with the definition of the term "lewd," and attempts to define the term raise two important issues. The trier of fact must first determine what to look at in determining whether a depiction is "lewd," and then a workable definition of the term must be applied to the conduct depicted. Alabama has adopted the position of a majority of federal courts on the first issue, but not on the second.¹⁷¹ In Alabama, the child does not have to assume a sexually inviting manner because "lewdness" is, "*not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles . . .*"¹⁷² The test or definition for "lewd" depictions is that the sex organs be "represented by the photographer as to arouse or satisfy the sexual cravings of a voyeur."¹⁷³

2. Is patently offensive; and

3. On the whole, lacks serious literary, artistic, political or scientific value.

b. When used to describe matter that contains a visual reproduction of an act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct, such term means matter containing such a visual reproduction that itself lacks serious literary, artistic, political or scientific value.

ALA. CODE § 13A-12-190(13) (1994).

169. See *Poole*, 596 So. 2d at 638 (citing ALA. CODE § 13A-12-190(13) (Supp.1990)).

170. ALA. CODE § 13A-12-190(10) (1994) (stating that breast nudity is "[t]he lewd showing of the post-pubertal human female breasts below a point immediately above the top of the areola"); *id.* § 13A-12-190(11) (stating that genital nudity is "[t]he lewd showing of the genitals or pubic area").

171. See, e.g., *Poole*, 596 So. 2d at 640 & n.5 (citing *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)).

172. *Poole*, 596 So. 2d at 640 (quoting *Wiegand*, 812 F.2d at 1244).

173. *Id.* Many federal courts have adopted all or part of a test consisting of six

A final element of great importance is the scienter requirement for child pornography statutes.¹⁷⁴ The scienter requirement for section 13A-12-191 is that the defendant disseminate the materials "knowingly."¹⁷⁵ Under the definitional section 13A-12-190(4), a person acts "knowingly" when he or she knows "the nature of the matter [and] when either of the following circumstances exist: a. The person is aware of the character and content of the matter; or b. The person recklessly disregards circumstances suggesting the character and content of the matter."¹⁷⁶

VIII. WILL BARNES & NOBLE PREVAIL IN THE ALABAMA CASE?

Child pornography statutes, like obscenity statutes, are most often won or lost based on the definitions in the statute.¹⁷⁷ The Barnes & Noble case is no exception. From the prosecutor's standpoint, meeting these definitions while bearing

factors. These factors, called the *Dost* factors, are as follows:

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

United States v. *Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

Alabama courts have never explicitly adopted use of the *Dost* factors. In fact, the *Wiegand* case, cited by the Alabama Court of Criminal Appeals in *Poole*, appears to say that the *Dost* factors are too generous to defendants. See *Wiegand*, 812 F.2d at 1244. Yet use of the *Dost* factors may be an open question because in the same paragraph that it cites *Wiegand*, the Alabama Court of Criminal Appeals also cites the *Wolf* case. *Poole*, 596 So. 2d at 640. The trial court in *Wolf* adopted five of the six *Dost* factors. The Tenth Circuit affirmed, holding that not all of the factors "need be present in order for a sexually exploitative photograph of a child to come within the constitutional reach of the statute." United States v. *Wolf*, 890 F.2d 241, 245-47 (10th Cir. 1989).

174. United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994); *Ferber*, 458 U.S. at 765.

175. ALA. CODE § 13A-12-191.

176. *Id.* § 13A-12-190(4); *Perry v. State*, 568 So. 2d 339, 341-42 (Ala. Crim. App. 1990).

177. See, e.g., *Poole*, 596 So. 2d at 632.

the burden of proof beyond a reasonable doubt will be a difficult challenge because defense attorneys need only raise a reasonable doubt in one contentious element of the statute to win their case. The three elements that will be most problematic are whether Barnes & Noble acted "knowingly," whether the nude depictions in the photographs are "lewd" according to Alabama case law, and finally, whether the photographs meet the definition of "obscene" in the statute. Because of the difficulty in demonstrating that Barnes & Noble satisfies all of these elements beyond a reasonable doubt, it is likely that the bookseller will prevail.

Whether Barnes & Noble acted "knowingly" is difficult to determine because the facts in the case are so contradictory. The prosecution will argue that Sturges and Hamilton have been accused of child pornography on many different occasions, indicating the possibility that their books are child pornography. It may then argue that these accusations, combined with Barnes & Noble's careful examination of the books, should have and in fact did confirm the bookseller's suspicions that the disputed texts constitute child pornography. At the very least, there is certainly an indication that Barnes & Noble recklessly disregarded the issues. The defense will counter that none of the accusations led to convictions and that circumstances suggest that the artistic community embraces the works of Sturges and Hamilton. Therefore, Barnes & Noble's assessment of the works cannot be reckless because of these contradictory conclusions regarding the nature of the books. Assessing the weight that a jury may give to any notice that Barnes & Noble may have had as to potential problems with the photographs and how that notice may be weighed against the artistic credentials of both works is difficult to ascertain.

Of the three most contentious issues, the issue of whether the nude depictions are "lewd" is the prosecution's best chance for success. It also provides the prosecution with the opportunity to admit very damaging evidence against Barnes & Noble. While the test centers on the relationship between the viewer and the materials, or the "exhibition which the photographer sets up for an audience that consists of himself or like-minded pedophiles," the prosecution will seek to use this opportunity to demonstrate that the creators of the works intended the works to arouse the

“sexual cravings of a voyeur.”¹⁷⁸ If the prosecution is able to get in evidence of Sturges’ or Hamilton’s history involving pedophilia or self-assessments of Hamilton’s work and Sturges’ photographs, a strong case could be made that both authors sympathize with pedophiles and have set up their displays to arouse “like-minded” individuals.¹⁷⁹ Defense attorneys will vigorously fight such evidence because it is highly prejudicial and bears little relationship to the actual defendant in the case, Barnes & Noble. If such evidence is admitted, it will be difficult for the defense to demonstrate that the depictions are not “lewd,” which may result in prejudice to the rest of their case.

The most difficult element for the prosecution to show is easily the most important—whether the depictions of breast nudity and genital nudity are in fact “obscene.” The definition of breast nudity provides for the work to be viewed as a whole, following the *Miller* standard.¹⁸⁰ The first two elements will be difficult to meet, considering that *Miller* is grounded on the regulation of obscene sexual conduct.¹⁸¹ Indeed, in *Radiant Identities* and *The Age of Innocence*, no sexual conduct is depicted; the images are simply of nudity. Showing that an image of simple nudity “appeals to the prurient interest” and is “patently offensive” is a nearly impossible burden for the prosecution to meet.¹⁸² Additionally, the Alabama statute provides that both breast nudity, with the work taken as a whole, and genital nudity, standing alone, must lack “serious literary, artistic, political or scientific value.”¹⁸³ While the *Miller* court rejected the *Memoirs*’ “utterly without redeeming social value” test because of the difficulty in proving the double negative,¹⁸⁴ the new *Miller* standard is still very difficult to prove in the criminal context. After Sturges and Hamilton present their artistic creden-

178. *Poole*, 596 So. 2d at 640 (quoting *Wiegand*, 812 F.2d at 1244).

179. *Id.* (quoting *Wiegand*, 812 F.2d at 1244).

180. *Cole v. State*, 721 So. 2d 255, 258-59 (Ala. Crim. App. 1998) (citing ALA. CODE § 13A-12-190(13)); *Poole*, 596 So. 2d at 638 (citing ALA. CODE § 13A-12-190(13)a (Supp. 1990)).

181. *Miller*, 413 U.S. at 23-26.

182. See ALA. CODE § 13A-12-190(13) (1994).

183. *Cole*, 721 So. 2d at 258-59; *Poole*, 596 So. 2d at 638; ALA. CODE § 13A-12-190(13).

184. *Miller*, 413 U.S. at 21-25 (quoting *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)).

tials, and with the defense putting on the expert testimony of art critics, the Alabama jury will find it difficult to declare that the work of Sturges and Hamilton lacks any serious artistic merit.

IX. THE FINAL QUESTION IS FOR THE JURY

While the final decision of a jury in the Barnes & Noble case is clouded by hazy speculation, this speculation does not indicate uncertainty in the relevant area of the First Amendment. The Supreme Court has set a standard that relies on the jury system to reflect the standards of the local community. In leaving juries the legal room to make these decisions, the competing interests in protecting children and preventing censorship are balanced appropriately. Striking this balance is a democratic and fair way to avoid the dire consequences envisioned by the polar opposites in this First Amendment debate. After analyzing the Supreme Court's jurisprudence and the Alabama statute, the Barnes & Noble case is less of a battle in the area of the First Amendment law than it is a frontier. The Supreme Court has decided that this frontier may be expanded by the decision of an Alabama jury.¹⁸⁵ Ultimately, whether or not the definition of obscenity will be expanded to include *Radiant Identities* or *Age of Innocence*, and in turn impose criminal liability on the world's largest bookstore chain, rests in the hands of an Alabama jury. Out of this haze, the jury's verdict will not create new law. Instead, it will represent the balancing of competing First Amendment interests.

Brian Verbon Cash

185. The Jefferson County case against Barnes & Noble has been dismissed with prejudice. The Montgomery county case is still ongoing, therefore the attorneys involved were not able to fully discuss either case as of the time this Article went to press.

