

KIDDIE PORN IN THE GALLERY: DEFENDING THE ARTIST'S
CORPUS OR INVADING THE CORPORAL
INTEGRITY OF THE SUBJECT

I. INTRODUCTION

The mid-twentieth century American proto-Pop artist Larry Rivers produced a few shocking, controversial works during his career.¹ Rivers offended polite society in 1964 when he crafted his own version of the Jacques Louis David portrait of Napoleon and entitled the work “The Greatest Homosexual.”² An art critic called another portrait by the artist, a nude depiction of his sexagenarian mother-in-law, “a picture of genuine nastiness couple[d] with false charm.”³ Despite the general distaste and caustic reviews of his controversial works, Rivers showed promise early in his career.⁴ He travelled in the same circles as dozens of famous artists, writers, and filmmakers in the New York arts scene.⁵ Some critics would contend that Larry Rivers never achieved his artistic potential—he fell from his high pedestal as a new artist who challenged societal mores—to a tired hack, whose assemblages of collage and caricatures

1. See Ken Johnson, *Portraits Shockingly Intimate a Half-Century Ago Now Assume a Softer Patina*, N.Y. TIMES, Aug. 14, 2008, at E28 available at <http://www.nytimes.com/2008/08/15/arts/design/15rive.html?fta=y> (finding initial reception of Rivers's nude portrait of his sexagenarian mother-in-law “violated a squeamish high culture’s rules of visual and moral decorum”); see also John Perreault, *Larry Rivers: A Cautionary Tale*, ARTOPIA, (Sept. 1, 2008, 6:32 P.M.), http://www.artsjournal.com/artopia/2008/09/larry_rivers_gone_but_still_he.html (recognizing Rivers's parody of Jacques Louis-David's Napoleon entitled “The Greatest Homosexual” as “the best art joke ever”); see *id.* (contrasting Rivers's “History of the Russian Revolution” as “complex and truly magnificent” while simultaneously deriding his later works as marked by false starts and “academic drawing”).

2. Holland Cotter, *Larry Rivers: 1950s/1960s—Refurbished Reputation for a Nervy Painter*, N.Y. TIMES, Sept. 7, 2009, at C1, available at <http://www.nytimes.com/2009/09/07/arts/design/07rivers.html>.

3. Johnson, *supra* note 1 (quoting critic for *Arts Magazine*, Leo Steinberg's reception of “Double Portrait of Berdie”).

4. See *id.* (noting that Rivers' version of *Washington Crossing the Delaware* was purchased by Museum of Modern Art and Tibor de Nagy gallery hosted artist's solo show); see also Johnson, *supra* note 1, at E28 (describing Rivers's early works as “terrifically fertile, energetic, and daring”).

5. See Kate Taylor, *Artist's Daughter Wants Videos Back*, N.Y. TIMES, July 7, 2010, at C1, available at <http://www.nytimes.com/2010/07/08/arts/design/08rivers.html> [hereinafter: Taylor] (providing that Rivers was acquainted with Leonard Bernstein, Jasper Johns, Kenneth Koch, Terry Southern, Allen Ginsberg, Gregory Corso, and Pierre-Dominique Gaisseau).

of famous historical paintings felt “thin,” overwrought, and “formulaic.”⁶

Even after the artist’s death, his works continued to test the bounds of propriety. In July 2010, New York University (“N.Y.U.”) purchased a collection of archives from the Larry Rivers Foundation for an undisclosed price.⁷ The archive contains mostly artifacts from the artist’s life, including letters of historical import that detail Rivers’s relationships with famous twentieth-century artists and writers.⁸ While the collection is lauded for its historical significance, it also includes a widely-criticized forty-five minute compilation of a film series entitled “Growing.”⁹

Rivers began interviewing his prepubescent daughters when they were ages eleven and thirteen.¹⁰ He asked them questions about their developing breasts and continued to expose them to the prying eye of the camera throughout their teenage years.¹¹ The shots portrayed the daughters naked or topless, with close-ups of one daughter’s genitals.¹² Rivers’s daughters have expressed to the media that the film has caused them irreparable harm.¹³ Both daughters are currently in their mid-forties, and one of his daughters, Emma Tamburlini, has demanded that the tapes be removed

6. See Johnson, *supra* note 1, at E28 (“After the ‘60s [Rivers’s] mix of facile draftsmanship, loose brushwork and clever collage and assemblage would look increasingly thin, formulaic, and derivative.”).

7. See Taylor, *supra* note 5, at C1 (indicating that archives, including “Growing” were purchased by N.Y.U. for its special collections from Larry Rivers Foundation).

8. See *id.* (reporting collection contains correspondence between Rivers and famous artists such as William de Kooning and Andy Warhol, and writers John Ashbery and Frank O’Hara).

9. See *id.* (quoting director of N.Y.U.’s Fales Library and Special Collections comment that archive has special import to rare-book world and finding that N.Y.U. purchase was controversial because archive contains footage of artist’s naked daughters in various states of undress).

10. See Tracy Clark-Flory, *Child Porn or Coming-of-Age Film?: Controversial Footage that Artist Larry Rivers Shot of His Naked Adolescent Daughters is headed to NYU*, SALON.COM, July 8, 2010, available at http://www.salon.com/life/broadsheet/2010/07/08/larry_rivers_child_porn (describing contents of “Growing,” which includes “close-up shots of one daughter’s genitals and detailed commentary by Mr. Rivers on the girls’ changing bodies”).

11. See *id.* (finding Rivers captured footage of his topless daughters “every six months for five years”).

12. See *id.* (describing contents of film and speculating that possession of film series may subject holder to criminal child pornography charges).

13. See Taylor, *supra* note 5, at C1 (indicating Rivers’ daughter blames film for her bout with anorexia at age sixteen and later need for psychotherapy). Although consent is irrelevant to statutory elements of child pornography possession, effects of the film seem all the more troublesome because the girls were filmed against their will. See *id.* (citing Tamburlini’s comments that if she ever refused to be filmed, her father would call her “uptight and a bad daughter”).

from the archive and returned to her permanently.¹⁴ N.Y.U. recently responded by refusing to accept the tapes from the Larry Rivers Foundation.¹⁵ The Foundation has denied Tamburlini's previous requests to have the tapes destroyed, so it is not likely to surrender the tapes in the near future.¹⁶

A look into Rivers's past suggests that the film was not an innocent artistic foray, but was instead a manifestation of abuse. His autobiography, *What Did I Do?*, reveals that he was forced to perform a sex act when he was six years old.¹⁷ Rivers also recounts that he had a sexual affair with a fifteen-year-old girl when he was in his forties.¹⁸ Furthermore, Rivers verbally berated his daughters during the filming of "Growing," forcing them to participate in the film.¹⁹ Though these events do not serve to excuse Rivers for creating pornographic content, they may shed some light on his motivations for creating this controversial film.²⁰

Although Rivers's critics may have called the "Double Portrait of Berdie" an affront to polite society for its tasteless depiction of a nude, aged woman, replete with wrinkles and fat, they could not call the portrait criminal.²¹ While some would consider it tasteless to paint a nude portrait of a person's sixty-year old mother-in-law,

14. See *id.* (indicating Emma Tamburlini wants tape removed and returned to her).

15. See Kate Taylor, *University Doesn't Want Film of Artist's Children*, N.Y. TIMES, July 17, 2010, at C3, available at <http://www.nytimes.com/2010/07/17/arts/design/17rivers.html> [hereinafter: Taylor II] (indicating that N.Y.U. has spoken with Larry Rivers Foundation and wants to exclude tapes from archival purchase).

16. See *id.* (recounting that Tamburlini previously asked Larry Rivers Foundation to destroy tapes, but Foundation declined, citing Foundation's preponderant duty to protect collection material). The foundation board has not yet confirmed what they intend to do with the tapes, but will be thoughtfully considering the issues. See *id.* (noting board decision regarding tapes).

17. See Taylor, *supra* note 5 (relating that eleven-year-old neighbor forced Rivers to perform sex act).

18. See *id.* (concerning information in Rivers's autobiography about his adult sexual encounters with fifteen-year-old girl).

19. See *id.* (quoting Emma Tamburlini "if she objected [to being filmed] . . . she was called uptight and a bad daughter").

20. See *infra* notes 64, 77-80 and accompanying text for a discussion advancing that the New York child pornography statute does not require a child's lack of consent since the prosecution can hold defendant strictly liable for offense against a person younger than sixteen years of age, subject to defendant's mistake of age defense.

21. See Johnson, *supra* note 1, at E28 (quoting Arts Magazine critic Leo Steinberg's comment on "Double Portrait of Berdie" as "a picture in which genuine nastiness couples with false charm") (describing nude portrait of Rivers's sexagenarian mother-in-law, Berdie Burger) (quoted in original). For a further discussion of obscenity law as it pertains to artistic works, see *infra* note 37-63 and accompanying text.

the First Amendment protects such artistic works from censure.²² A nude portrait of a minor, unlike a nude portrait of an adult, does not receive the same deference; its creator can be prosecuted under state and federal child pornography law.²³

While child pornography is not protected as a legitimate form of artistic expression under the Constitution, the dividing line between art and child pornography is difficult to ascertain.²⁴ For instance, it would be outlandish to characterize Anne Geddes's tender images of naked, cherubic babies surrounded by flowers as child pornography.²⁵ Conversely, some jurisdictions have brought child pornography charges against parents for taking inappropriate nude photos of their young children.²⁶ In a famous opinion, Justice Potter Stewart of the U.S. Supreme Court wrote of pornography, "I know it when I see it."²⁷ Child pornography statutes attempt to limit that subjectivity by defining particular content as child pornography while excluding innocuous images of nude children.²⁸

This comment analyzes the current state of child pornography law to determine whether criminal charges can be brought against trusts and galleries for possessing or distributing works containing child pornography.²⁹ Section II provides an overview of the Constitutional law cases that defined child pornography as an unpro-

22. See U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging the freedom of speech"); see also *supra* note 38 and accompanying text (discussing definition of obscenity and its exclusion of works with artistic value).

23. See *infra* notes 39-49 and accompanying text for proposition that child pornography is not subject to same test as obscenity and states have wide-latitude in prohibiting child pornography based on compelling interest in protecting children from physical and psychological harm.

24. See Sid Smith, *A Developing Controversy: Child Pornography Laws Have Chilling Effect on Photographers*, CHI. TRIB., Feb. 20, 1995, available at http://articles.chicagotribune.com/1995-02-20/features/9502200008_1_sexual-acts-involving-children-child-pornography-laws (discussing how father who took nude photos of his six-year-old daughter for photography class was arrested on child pornography charges and suggests such laws could stifle artists' protected speech).

25. See ANNEGEDDES.COM, http://www.annegeddes.com/modules/anne/galleries/browse.aspx?pi_galleryid= (last visited March 8, 2011) (displaying portraits of nude infants surrounded by a variety of idyllic landscapes, flora, and fauna).

26. See *infra* note 95 and accompanying text (discussing child pornography indictment against parent for taking nude photos of six-year-old child); cf. Anne Geddes, *Two Precious Miracles of Life and How They Can Inspire Us*, THE HUFFINGTON POST (Dec. 21, 2010, 9:01 AM), http://www.huffingtonpost.com/anne-geddes/two-precious-miracles-of-life_b_799291.html (describing artist's subject matter and motivation for photographing infants).

27. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

28. For a discussion of a New York case in which child pornography statute did not penalize child nudity, see *infra* notes 93-101 and accompanying text.

29. See *infra* notes 100-10 (discussing Cincinnati Contemporary Arts Center's criminal charges under child pornography and obscenity statutes).

tected class of speech, distinguishing the elements of child pornography from those of obscenity.³⁰ Section III analyzes the current state of New York child pornography law.³¹ Section IV compares the Rivers situation with prior cases where artistic works became the subject of child pornography charges.³² Section V briefly examines how computer-generated imagery (CGI), which allows producers to create images of children out of thin air, has displaced prior rationales for the criminalization of child pornography.³³ Section VI notes a key difficulty in shifting the proof-of-age burden onto defendants in child pornography cases. Finally, Section VII concludes with an assessment of how the Larry Rivers videotapes should be characterized, and whether possessors and distributors of such controversial works could be charged under the applicable child pornography statutes.³⁴

II. HISTORICAL OVERVIEW OF OBSCENITY LAW AND CHILD PORNOGRAPHY

One of the rationales underlying the First Amendment was to protect the free exchange of ideas in order to bring about political and social change.³⁵ Though the Supreme Court has recognized that the First Amendment exists to protect unorthodox and controversial ideas, some expressions remain outside the ambit of constitutionally-protected expression because they have such little redeeming social importance that their value is outweighed by concerns of order and morality.³⁶

30. For a discussion of the emergence of child pornography from obscenity law, see *infra* notes 35-62 and accompanying text.

31. For a discussion of relevant New York case law, see *infra* notes 64-124.

32. For a further discussion of other prosecutions involving artistic works of child pornography, see *infra* notes 142-163 and accompanying text.

33. For a further discussion of how CGI technologies changed the legal considerations of state and federal lawmakers with respect to child pornography, see *infra* notes 165-184 and accompanying text.

34. For a further discussion of whether an Art Foundation could be charged with possession of child pornography, see *infra* notes 185-96.

35. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (referencing Continental Congress's protection of speech not only to promote truth, science, morality and art but to unite people through "diffusion of liberal sentiments" to curb unjust practices by government officials) (citations omitted).

36. See *id.* at 485.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene It 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.

The Supreme Court defined obscenity in *Miller v. California*.³⁷ The Court held that the guidelines for determining whether a work is obscene are:

[W]hether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁸

The *Miller* obscenity test does not apply to child pornography because the government has a compelling interest in protecting children from victimization and abuse, and statutes banning production and distribution of child pornography are narrowly tailored to further that compelling interest.³⁹

Rather than regulate child pornography as obscenity, the Court held that states have a compelling interest in protecting the physical and psychological well-being of minors.⁴⁰ In contrast to obscenity, the potential literary or scientific value of displaying a child engaged in lewd sexual conduct is “exceedingly modest, if not *de minimis*,” and furthermore, this value does nothing to alleviate the underlying harm to the child during the production and distri-

Id.

37. 413 U.S. 15 (1973).

38. *Id.* at 24. Court defines obscene materials as works “which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Id.* (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

39. *See New York v. Ferber*, 458 U.S. 747, 761 (1982) (holding that *Miller* standard of obscenity “does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children . . . [and] bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work”). The Court in *Ferber* concluded that the state has a compelling interest in safeguarding the physical and psychological well-being of minors. *See id.* at 756-57 (finding compelling interest in safeguarding interests of minors). This may stem in part from the Court’s deference to legislative findings indicating that children used as subjects in child pornography have trouble developing intimate relationships later in life, and the Court concluded that stopping distribution is the most effective action law enforcement can take to stop clandestine production of child pornography, which is “difficult, if not impossible.” *See id.* at 758-60.

40. *See Ferber*, 458 U.S. at 756 (finding “that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling’”) (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)).

bution of child pornography.⁴¹ In addition, the Court relied on legislative findings that child pornography is detrimental to children because images of their abuse will continue to circulate, perpetuating the abuse throughout their adult lives.⁴²

Even if a work of child pornography possesses legitimate literary, scientific, political, or artistic value when considered as a whole, such value does not diminish the State's compelling interest in protecting children from exploitation.⁴³ In *New York v. Ferber*, the Court upheld a New York statute used to convict a bookstore proprietor for selling films that depicted young boys masturbating.⁴⁴ The statute prohibited the knowing promotion of a sexual performance by a child less than sixteen years of age.⁴⁵ The statute defined "sexual performance" as "'any play, motion picture, photograph or dance.'"⁴⁶ Sexual conduct, as defined by the statute, included a host of prohibited acts.⁴⁷ The Court found that stopping the chain of distribution was the most effective means for law enforcement to address the underlying problem of child pornography produc-

41. *Id.* at 762-63. The Court observes that value of any literary or scientific work depicting children engaged in sexual conduct is "exceedingly modest" and proposing use of alternatives that would not involve use of children below statutorily-defined age in those cases. *See id.* (noting children engaging in sexual conduct is of little literary and scientific value). The Court reasoned that a work could have high literary or artistic value, but could be just as harmful to the child forced to engage in explicit sexual or lewd acts for its production, thus it is not reasonable to regulate child pornography under traditional obscenity standards. *See id.* at 761 ("It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political, or social value.") (internal quotations and citation omitted).

42. *See id.* at 759 ("[T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.").

43. *See Ferber*, 458 U.S. at 761 (quoting legislative findings that "a work which, taken on the whole, contains serious literary artistic, political, or scientific value may nevertheless embody the hardest core of child pornography" and otherwise legitimate purposes of nude photograph or video make no difference to abused children portrayed therein).

44. *See id.* at 752 (revealing Manhattan bookstore proprietor Paul Ferber sold two films to undercover officer "devoted almost exclusively to depicting young boys masturbating").

45. *See id.* at 750-51 ("A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes, or induces a child less than sixteen years of age to engage in a sexual performance. . . .") (quoting N.Y. Penal Law § 263.05 (McKinney 1980)).

46. *Id.* at 751 (quoting N.Y. Penal Law § 263.00(4) (McKinney 1980)).

47. *See id.* (defining sexual conduct to include "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals'") (quoting N.Y. Penal Law § 263.00(3) (McKinney 1980)).

tion.⁴⁸ Unlike obscenity laws, child pornography statutes are geared towards protecting the subjects of the works rather than audiences who view the works.⁴⁹

The Court of Appeals reversed Ferber's conviction, holding that the New York statute was overbroad, criminalizing expression traditionally protected by the First Amendment.⁵⁰ The *Ferber* Court rejected this contention of overbreadth, agreeing with the respondent's argument that prohibiting the distribution of obscene child pornography was narrowly tailored enough to satisfy the state's interest in protecting children from the pernicious effects of pornography.⁵¹ In upholding the law, the Court extended the respondent's argument even further, suggesting that child pornography laws encompassing non-obscene content did not violate the First Amendment.⁵²

Additionally, the Court determined that its decision to limit freedom of speech was not inconsistent with its other decisions that applied content-based restrictions to speech when "the evil to be restricted so overwhelmingly outweigh[ed] the expressive interests."⁵³ Unlike the application of obscenity law to adult pornography, the *Ferber* test does not require that child pornography appeal to the prurient interest of the average person, that the sexual conduct portrayed be "patently offensive," or that the work be consid-

48. *See id.* at 756-761 (substantiating state's compelling interest in curbing distribution of child pornography because (1) harm to children is exacerbated by child pornography's continued distribution, and (2) stopping distribution chain is only way to effectively curtail production of child pornography).

49. *See id.* at 758 (stating legislative purpose of child pornography laws is to protect minors' physical and psychological well-being); *see also* Elaine Wang, *Equal Protection in the World of Art and Obscenity: The Art Photographer's Latent Struggle with Obscenity Standards in Contemporary America*, 9 VAND. J. ENT. & TECH. L. 113, 129 (2006) (discussing how child pornography laws are designed to protect subjects whereas obscenity laws are designed to protect audiences).

50. *See id.* at 752-53, 773 (addressing Court of Appeals' holding that statute encroached on medical textbooks and National Geographic by concluding that such legitimate uses constitute such small percentage of child pornography uses that state can cure any potential overbreadth on case-by-case basis).

51. *See id.* at 773 (holding that section 263.15 was not substantially overbroad because its "legitimate reach dwarfs its arguably impermissible applications").

52. *See* *New York v. Ferber*, 458 U.S. 747, 760-61 (1982) ("While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further."); *see also id.* at 773-74 (holding instances where child pornography possesses potential literary, artistic, scientific or social value amount to small fraction of material within statutes and can be cured on case-by-case basis).

53. *Id.* at 763-64.

ered as a whole.⁵⁴ Yet, statutes punishing child pornography are subject to the same rigorous standards as those punishing obscenity and other forms of unprotected expression.⁵⁵ For instance, a state statute seeking to impose criminal punishment for child pornography must be limited to visual media, restricted to depictions of sexual conduct by children below a statutorily-defined age, and contain a narrowly defined description of the prohibited sexual conduct.⁵⁶ Thus, under *Ferber*, child pornography became a new category of constitutionally unprotected speech.⁵⁷

Furthermore, *Broadrick v. Oklahoma*⁵⁸ acknowledged that when the regulated activity involves conduct in addition to speech, the overbreadth of the statute must be substantial for the statute to be declared constitutionally invalid.⁵⁹ This decision paved the way for the Court in *Osborne v. Ohio*⁶⁰ to apply the “substantial overbreadth” test to conduct regulating pure speech.⁶¹ The *Ferber* court applied this rationale, concluding that New York Penal Law Section 263.15 did not suffer from overbreadth sufficient to render it unconstitutional; the instances in which a child may be depicted engaging in sexual conduct for legitimate purposes are so few and far between that they are insubstantial.⁶² Thus, states’ compelling interest in

54. *See id.* at 761 (finding that whether work, taken as whole, appeals to prurient interest of average person has no bearing on whether children have been harmed in its production).

55. *See id.* at 764 (imposing Constitutional limits to statutory prohibition of child pornography).

56. *See Ferber*, 458 U.S. at 764-65.

There are, of course, limits on the category of child pornography. . . . [T]he conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed . . . [and] limited to works that *visually* depict sexual conduct by children below a specified age. The category of “sexual conduct” proscribed must also be suitably limited and described.

Id. (emphasis in original).

57. *See supra* notes 40-45 (discussing how *Ferber* court’s test for child pornography does not include *Miller* third prong for works with social value).

58. 413 U.S. 601 (1973).

59. *See id.* at 615 (providing that regulations of speech should be substantially overbroad “particularly where conduct and not merely speech is involved” to violate First Amendment).

60. 495 U.S. 103 (1990).

61. *See id.* at 112 (holding that scope of statute regulating pure speech “does not render it unconstitutional unless its overbreadth is not only ‘real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep’”) (quoting *Broadrick*, 413 U.S. at 615).

62. *See New York v. Ferber*, 458 U.S. 747, 772-74 (1982) (demonstrating that infringement on protected uses of child pornography would constitute “[no] more than a tiny fraction” of materials implicated by statute and not enough to generate concern of constitutional overbreadth); *see also infra* notes 58-59 and accompany-

protecting children from the harmful effects of pornography formed a juncture that divided child pornography from categorization under the obscenity laws that regulate adult pornography.⁶³

III. CURRENT NEW YORK CHILD PORNOGRAPHY LAW

A. Analysis of New York Penal Law Article 263.00

The determination of whether the Larry Rivers Foundation could be charged with possession of child pornography for the film series, "Growing," requires an examination of the governing New York statutes and case law.⁶⁴ New York Penal Law Section 263.16 criminalizes "promoting a sexual performance by a child," for anyone who, "knowing the character and content thereof. . . knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age."⁶⁵ The Supreme Court reviewed the New York state statute, holding that states can prohibit child pornography that does not meet the legal definition of obscenity without violating the First Amendment.⁶⁶

Subsequently, the New York Court of Appeals defined this section to encompass the acquisition of child pornography for personal use in *People v. Keyes*.⁶⁷ There, the prosecution charged the defendant with violating New York Penal Law section 263.15 for procuring child pornography through the mail and in his home from an undercover officer.⁶⁸ The defense argued, albeit unsuccessfully, that the term "procure" should be construed with refer-

ing text (discussing criteria used to determine whether speech statute is overbroad).

63. See Wang, *supra* note 48, at 129 (concluding obscenity laws encompass wider variety of works than child pornography, and Miller's third prong is irrelevant to latter).

64. See *Contact Info*, LARRY RIVERS FOUND., <http://www.larryriversfoundation.org/contact.html> (last visited Mar. 9, 2011) (listing location of Larry Rivers Foundation as Bridgehampton, New York); Taylor, *supra* note 5, at C3 (indicating that N.Y.U. recently returned "Growing" series to Larry Rivers Foundation, which retains possession of videos).

65. N.Y. Penal Law § 263.16 (McKinney 2008).

66. See *Ferber*, 458 U.S. at 774 (holding New York state statute prohibiting non-obscene child pornography did not violate First Amendment).

67. 75 N.Y.2d 343, 348 (N.Y. 1990). "Understood in this sense, the term 'procure,' as used in Penal Law § 263.00(5) defines 'promote' for the purposes of Penal Law § 263.15 as simply the acquisition of child pornography, whether for personal consumption or for distribution of others" which easily encompassed defendant's conduct. *Id.*

68. See *id.* at 345 (enumerating charges brought against defendant who requested images of underage boys engaged in sexually explicit poses from undercover officer).

ence to other terms in the statute.⁶⁹ The appeals court opted for a plain-meaning construction of the term “procure,” which included acquisition of child pornography for the purpose of distribution to others.⁷⁰ The court also cited the legislative intent to “eradicate child pornography in all its forms” in favor of a broad construction that would penalize passive consumers of child pornography.⁷¹ Although the defendant in *Keyes* presented the alternative argument that he had a constitutional right to possess child pornography in his home, the court did not address this matter since the defendant was charged with *procuring*, and not possession of child pornography.⁷² Under New York state law it is a criminal offense to obtain child pornography for personal use, even if the individual did not play any part in producing or distributing the work of child pornography.⁷³ After *Keyes*, whether spontaneous possession of the material in a person’s own home, without making an acquisition effort, would be enough to convict an individual under the New York statute has yet to be determined.⁷⁴

The Supreme Court’s decision in *Osborne v. Ohio*⁷⁵ resolved the issue of whether the state can lawfully penalize possession of child pornography in the home. There, the United States Supreme Court upheld an Ohio statute that prohibited possession of nude

69. See *id.* at 346 (acknowledging defendant’s argument to apply rule of *nosctitur a sociis* to determine meaning of “procure”).

70. See *id.* at 347-48 (recognizing that while County Court derived definition of “procure” from other words in statute, Court of Appeals properly held that conduct within plain and natural meaning of statute could be penalized, which includes definition meaning “to get possession of: obtain, acquire”).

71. *Id.* at 348 (finding that legislative history “contains no suggestion that the consumers of [child pornography] were to be excluded from the reach of those measures”).

72. See *id.* at 349 (dismissing defendant’s argument that right of privacy gives him constitutional right to possess child pornography in his home because defendant was charged with *procurement* of child pornography and not possession). The defendant cited *Stanley v. Georgia* for the proposition that even though defendant’s obscene materials were prohibited under the constitution, defendant could not be convicted of criminal possession because of his constitutional right of privacy to possess the material in his own home. See *Keyes*, 75 N.Y.2d at 349 (citing *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (noting obscenity prohibited under Constitution)).

73. See *id.* at 347-48 (reversing trial court’s holding that New York legislature did not intend to penalize passive consumers of child pornography based on legislature’s intent to ban child pornography in all its forms and addition of term “procure” to statute, which is defined as “to obtain, acquire” in order to direct statute at consumers, and not merely manufacturers and distributors).

74. See *supra* note 72 and accompanying text (explaining that defendant’s procurement of child pornography was deciding factor in *Keyes* decision).

75. 495 U.S. 103 (1990).

photographs of a minor.⁷⁶ The Ohio statute differed from the New York statute at issue in *Keyes*, penalizing lewd exhibitions of child nudity rather than lewd exhibitions of the genitals.⁷⁷ The Court concluded that the Ohio statute was not unconstitutionally overbroad because the Ohio Supreme Court had further narrowed the definition of nudity to encompass a lewd exhibition or graphic focus on the genitals, where the person depicted is not the child or ward of the person charged under the statute.⁷⁸ The *Osborne* Court revealed that the state had a compelling interest in banning the possession of child pornography because pedophiles can use those materials to induce other children to engage in sexual activity, and a ban would encourage possessors of child pornography to destroy the material.⁷⁹ Thus, the Court upheld the Ohio child pornography statute penalizing individuals for possessing child pornography in the home.⁸⁰

76. *See id.* at 109-13 (holding that Ohio statute prohibiting possession of nude photographs of minors is not unconstitutionally overbroad). The court rejected the defendant's reliance on *Stanley v. Georgia* because the state's reason for regulating possession of obscenity—to prevent it from poisoning the minds of viewers—because that was an impermissible, paternalistic interest, whereas the state of Ohio had a compelling interest in regulating child pornography. *See id.* at 109 (citing *Ferber*, 458 U.S. 747, 756-58 (1982)). In contrast, the court acknowledges compelling reasons for prohibiting possession of child pornography. *See id.* at 109-10 (noting rationale for prohibiting possession of child pornography). To the defendants argument that the statute is unconstitutionally overbroad because it criminalizes constitutionally-protected conduct, the Court counters that overbreadth is not substantial enough to warrant facial invalidation because the other areas of Ohio law define the terms “nudity” and “minor” with specificity, and require an element of scienter as set forth in *Ferber*. *See id.* at 112-14 (analyzing overbreadth analysis).

77. *See id.* at 112-13 (indicating that although depictions of nudity without more are constitutionally protected speech, here Ohio statute is not facially overbroad because Ohio Supreme Court restricted definition of nudity to lewd exhibition of nude child who is not person's child or ward). The Ohio court's interpretation thus excluded possession or viewing of innocuous photos of naked children from the statutory prohibition. *See id.* at 114 (excluding possession or viewing naked photos).

78. *See id.* at 113 (concluding Ohio statute is not overbroad because Ohio Supreme Court sufficiently narrowed definition of nudity by interpretation (citing *State v. Young*, 37 Ohio St. 3d 249, 252 (Ohio 1988)); *cf.* *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that depictions of nudity, without more, are constitutionally protected forms of expression)).

79. *Osborne*, 495 U.S. at 111 (introducing rationale that ban on possession encourages destruction of child porn which is related to compelling interest in protecting child victim from permanent record of abuse); *see also supra* note 7 and accompanying text (citing Attorney General's Commission on Pornography for evidence that children are coerced to engage in sexual activity with adult by images of other children engaging in same types of activity).

80. *See supra* notes 48-54, 74 and accompanying text for discussion of states' compelling interest in protecting children from pernicious effects of pornography, and how circulation perpetuates the abuse.

As one element of a child pornography prosecution, a child's age poses an evidentiary challenge to the prosecution, and a good faith, mistake-of-age defense can absolve a defendant in certain situations.⁸¹ To hold an individual strictly liable under New York Penal Law § 263.16 of the possession statute, the prosecution must prove beyond a reasonable doubt that the child performer was under sixteen years of age.⁸² Obtaining proof of the performer's age poses a hefty burden to the prosecution, where the child is "likely to be anonymous and incapable of identification."⁸³ The defendant can then assert an affirmative defense by showing a good faith, reasonable belief that the performer was over the age of sixteen.⁸⁴ In addition to establishing the age of the performer, the prosecution must also establish that the defendant had knowledge of the character and content of the material possessed.⁸⁵

The content of the film "Growing" determines how persons who view, possess or distribute the film will be treated under New York law. The New York child pornography statute prohibits "promotion of a sexual performance of a child . . . which includes sexual conduct by a child less than sixteen years of age."⁸⁶ The statute also defines sexual conduct to include "lewd exhibition of the genitals."⁸⁷ The definition of "lewd exhibition of the genitals" under New York law depends upon a lower court's decision interpreting this term.⁸⁸ The term can be ambiguous, but the lower threshold

81. See *infra* notes 82-84 and accompanying text (explaining challenges to prosecution under possession statute and describing affirmative defense to such charges).

82. See *New York v. Gilmour*, 678 N.Y.S.2d 436, 439 (N.Y. Sup. Ct. 1998) (recognizing New York state legislature meant to hold persons who know content and character of sexual performance strictly liable for possessing child pornography, inferred from legislature's inclusion of mistake of age as defense under N.Y. Penal Law § 263.20).

83. See *id.* (highlighting prosecution's obstacles to prove performer's age beyond reasonable doubt as required to support conviction).

84. See *id.* (acknowledging mistake of age defense under N.Y. Penal Law § 263.20 can absolve defendant of charges if shown by preponderance of evidence standard).

85. See *id.* at 439 (recognizing plain language of statute applies scienter requirement to character and content of visual or performance art); cf. *United States v. X-citement Video*, 513 U.S. 64 (1994) (holding that where federal statute listed no element of scienter, scienter element applied to sexually explicit nature of material and age of performer as well).

86. N.Y. Penal Law § 263.16 (McKinney 2008).

87. See N.Y. Penal Law § 263.00 (McKinney 2008) (defining "sexual conduct" as "actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals").

88. See *People v. Pinkoski*, 300 A.D.2d 834, 837-38 (N.Y. App. Div. 2001) (considering child's pose as relevant to lewdness definition).

of the definition excludes depictions of nude children without some additional context or expression to imply lewdness.⁸⁹ Various news articles confirm that the “Growing” series produced by Larry Rivers contains video footage of the exposed breasts of Rivers’ two daughters, Gwynne and Emma, beginning when they were ages thirteen and eleven, and also includes up-close shots of one daughter’s genitals.⁹⁰ Rivers’s daughters were both under the age of sixteen when he began filming them, thus both daughters meet the statutory definition of “child.”⁹¹

The New York Supreme Court held in *People v. Pinkoski*⁹² that exposure of a minor child’s bare chest and buttocks did not constitute a “lewd exhibition of the genitals” within the statutory definition of sexual conduct.⁹³ The photos that formed the basis of the indictment in *Pinkoski* were of a six-year-old girl with her bare chest and buttocks exposed.⁹⁴ On appeal, the court decided to reinstate counts of child pornography charges based on a photo of the same girl with her pants down to her ankles and her right hand on or near her groin area in close proximity to the genitalia.⁹⁵ There, the judge did not properly instruct the jury on the proper definition of the term “lewd.”⁹⁶ The Appellate Division reinstated the counts because a grand jury could conclude that an image of the child touch-

89. See, e.g., John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347, 385 (1991) (“[I]t is unclear how a ‘lewd exhibition of the genitals’ differs from any other depiction of the genitals” but prohibition can not constitute “any depiction of nude children” without encroaching upon constitutionally-protected speech.).

90. See Taylor, *supra* note 5, at C1 (elaborating on contents of film, “Growing”). The article also compares Rivers’ film to other photographic works of nude children and concludes that “[i]n Rivers’s case the material seems more overtly sexual, including close-up shots of one daughter’s genitals . . .” *Id.*

91. See Clark-Flory, *supra* note 11 (noting that Rivers’s daughters were ages eleven and thirteen when he began filming them).

92. 300 A.D.2d 834 (N.Y. App. Div. 2001).

93. See *id.* at 836-37 (upholding dismissal of grand jury indictment and refusing to imply statutory provision where legislature defined sexual conduct in four different ways, none of which included exposure of bare chest and buttocks unaccompanied by lewd exhibition).

94. See *id.* at 834 (indicating grounds for indictment).

95. See *id.* at 837-38 (concluding that photo of child’s genitalia was sexually suggestive and far different from an innocuous “family photograph of a nude child either lying on a blanket or bathing, and assuredly could not be considered an artistic rendering of a nude”).

96. See *id.* at 837 (“While it may have been preferable for the People to have instructed the grand jury as to the generally accepted definitions of the term ‘lewd,’ the word is not so arcane as to escape the understanding of the average juror.”).

ing herself could arouse the prurient interests of a pedophile viewer, sufficient to constitute a lewd exhibition of the genitals.⁹⁷

B. Application of Child Pornography Statutes to the “Growing” Series

The “Growing” video contains shots of Rivers’s daughters naked or topless, with their bare breasts exposed to the camera, as well as a detail view of one daughter’s genitals.⁹⁸ Any exhibition of the genitals could be prurient depending on its context, but the statute specifically prohibits “lewd exhibition of the genitals.”⁹⁹ In *Pinkoski*, the connection between “lewdness” and “genitals” was more readily apparent because the child had her hand near her groin in what could be considered a sexually suggestive pose.¹⁰⁰ The Court dismissed charges predicated on photographs of the six-year-old victim’s bare chest and buttocks because these did not constitute lewd exhibitions of the genitals.¹⁰¹ Unlike the child in *Pinkoski*, Rivers’s daughters were older; throughout the course of the film the daughters ranged in age from eleven to eighteen.¹⁰² The exposure of *their* developing teenage breasts is quite unlike the depiction of the prepubescent six-year-old’s chest in *Pinkoski* because River’s depiction could arouse the prurient interest, satisfying the *Pinkoski* court’s definition of “lewd exhibition of the genitals.”¹⁰³

Under *Ferber*, the performance’s appeal to the prurient interest would not matter because child pornography statutes are meant to protect the child victim and not to censure the viewer.¹⁰⁴ The

97. See *id.* (asserting that photo offended “accepted standards of decency” and “appeal[ed] to the prurient interests”).

98. See Clark-Flory, *supra* note 10 (indicating type of nudity depicted by video).

99. See N.Y. Penal Law § 263.00 (McKinney 2008) (including lewd exhibition of genitals within statute’s definitions of prohibited conduct).

100. See *supra* notes 93-97 and accompanying text (providing explanation of *Pinkoski* decision).

101. See *Pinkoski*, 300 A.D.2d at 836 (finding bare buttocks and chest are not lewd exhibitions of genitals under definition set forth in N.Y. Penal Law § 263.00).

102. See Clark-Flory, *supra* notes 10 (noting that Rivers began filming daughters at ages eleven and thirteen over timeframe of five years).

103. See *id.* at 837-38 (holding conduct that appealed to prurient interest was lewd within statute’s definition); *cf. supra* note 82 (referencing *Ferber* holding that child performance need not appeal to prurient interest or be patently offensive to constitute child pornography).

104. See *id.* (convicting mother for portraying child in photographs that could arouse prurient interest of pedophile); see also *Ferber*, 458 U.S. 747, 760-61 (1982) (holding that work need not appeal to prurient interest to constitute child pornography).

Pinkoski opinion cites Penal Law Article 245 for a definition of sexual conduct that includes physical contact with a female's breast.¹⁰⁵ The Supreme Court in *Osborne* relied on the state court's statutory interpretation of "lewd exhibition of the genitals" when applying the statute.¹⁰⁶ *Ferber* merely required that states provide enough detail of the prohibited conduct but did not define what constitutes sexual conduct by a minor.¹⁰⁷ The *Ferber* court did mention, however, that depictions of nudity alone are not prohibited by the constitution.¹⁰⁸ If the Rivers video contained images of the daughters touching their breasts, this could fall within the statutory definition of sexual conduct.¹⁰⁹

The Rivers video is described as containing "up close shots of one of the daughter's genitals."¹¹⁰ *Pinkoski's* reversal of the grand jury's decision appears to depend on the definition of obscenity set out in *Miller*, because the photo is being judged by "accepted [community] standards of decency" and whether the photo appeals to the prurient interest.¹¹¹ Nevertheless, the Supreme Court in *Ferber* clarified that New York State can punish individuals for promoting child pornography that does not rise to the level of obscenity without violating the Constitution.¹¹²

The *Pinkoski* court appears to achieve some middle ground, not seeking to penalize parents for taking innocent, albeit nude, photographs of their young children while still imposing penalties for photographs that society would, on average, consider "prurient" or sexually suggestive.¹¹³ If the "Growing" video is to come within

105. See *Pinkoski*, 300 A.D.2d at 837 n.3 (quoting Penal Law § 245.10 that defines sexual conduct as "an act of masturbation, homosexuality, sexual intercourse, or physical contact with the person's clothed or unclothed genitals, pubic area, buttocks, or if such person be a female, breast").

106. See *Osborne*, 495 U.S. at 78 (finding that Ohio statute was not overbroad because sexual conduct had been defined by Ohio Supreme Court).

107. See, e.g., *Ferber*, 458 U.S. at 764 (describing constitutional requirements for child pornography statute).

108. See *New York v. Ferber*, 458 U.S. 747 at 765 (holding that depictions of nudity, without more, are constitutionally protected forms of expression).

109. See *supra* notes 77-78 and accompanying text (noting New York courts typically define "sexual conduct" to include "lewd exhibitions of the genitals").

110. Taylor, *supra* note 5, at C1.

111. *Ferber*, 468 U.S. at 755. The *Ferber* Court acknowledged "adher[ing] to the guidelines expressed in *Miller*" since its decision. *Id.*

112. See *id.* at 764-65 ("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.").

113. See *People v. Pinkoski*, 300 A.D.2d 834, 836 (implying that additional context is needed for images to constitute child pornography by excluding images of bare buttocks and chest because they did not constitute lewd exhibitions of genitals).

the statutory definition of pornography, the images of the child's genitalia must be accompanied by something more—a suggestive context that appeals to the prurient interest.¹¹⁴ The Rivers footage is also accompanied by an interview, with Rivers asking the girls whether boys have started to notice their breasts.¹¹⁵ The daughters' commentary might be sufficient; news accounts of the videos suggest that the context of the conversation that accompanies the videos is sexual in nature.¹¹⁶ The daughter's bashful admissions of a potential crush or the awkward stares of their peers could create a titillating element that would propel the videos from categorization as an innocent, artistic rendering of the female body into the realm of child pornography, punishable by statute.¹¹⁷

While the film's contents determine whether the work is child pornography, to prosecute someone for the film would require the state to produce evidence that the person charged "kn[ew] the character and content" of the work, and "knowingly ha[d] in [his or her] possession or control any performance which includes sexual conduct by a child less than sixteen years of age."¹¹⁸ The New York statute defines "promote" to include "procure," encompassing both obtaining the work without intention to distribute and mere possession.¹¹⁹ The *Ferber* court set the constitutional bounds for child pornography statutes by requiring an element of scienter.¹²⁰ The New York statute prohibits anyone who, "knowing the character and content thereof," from possessing or promoting child pornography.¹²¹

114. See *Pinkoski* 300 A.D.2d 834 (N.Y. App. Div. 2001). (citing *Ferber* court for suggesting statute that prohibits all child nudity regardless of context could be overbroad).

115. See Clark-Flory, *supra* note 11 (relating that "Growing" video contains interviews by Rivers in which he asks his daughters "about their breasts and whether boys have started noticing them").

116. See *id.* (noting one frame contained close-ups of one daughter's genitals in graphic focus).

117. See *id.* (discussing shift in public perception of taking and distributing any photographs involving any nudity, including "bath-time photos," as acceptable to unlawful).

118. N.Y. Penal Law § 263.16 (McKinney 2008).

119. See *supra* notes 71-74, 76 and accompanying text (citing cases which upheld constitutional prohibition of procuring or acquiring child pornography without intent to distribute and prohibition against mere possession of child pornography).

120. See *New York v. Ferber*, 458 U.S. 747, 765 ("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant") (citations omitted).

121. New York Penal Law § 263.16. "A person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he

The Larry Rivers Foundation sold the “Growing” footage along with the rest of the archive to New York University.¹²² The Larry Rivers Foundation transferred the contents of the archive to N.Y.U. only after N.Y.U. refused to purchase the “Growing” series, implying that the films remained property of the Foundation throughout the negotiation process.¹²³ Thus, a prosecutor might be able to charge the foundation with possession of child pornography if there was also enough evidence to convince a jury that the Foundation knew what the videos contained.¹²⁴ Although difficult to impute knowledge on a Foundation, the prosecutor could look at emails or formal negotiations between N.Y.U. and the Larry Rivers Foundation, examining the Foundation’s process of appraising works, to determine if there was evidence of knowledge.

C. Collection Need Not Be Considered in Its Entirety for Child Pornography Classification to Apply

The Larry Rivers Foundation is not the only art institution that has come under fire for possessing works that allegedly contained child pornography. In 1990, Cincinnati’s Contemporary Arts Center and its director were indicted on obscenity charges for displaying a retrospective of the photographer, Robert Mapplethorpe.¹²⁵ An Ohio grand jury indicted the gallery director under charges of pandering obscenity for five photographs depicting sadomasochistic acts.¹²⁶ Two of the seven original photographs in controversy were of children with their genitals exposed.¹²⁷ The

knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age.” *Id.*

122. See Taylor, *supra* note 5 (indicating daughter, Emma Tamburini demanded that video series be returned to her); Taylor II, *supra* note 15 (indicating N.Y.U.’s subsequent return of “Growing” series to Larry Rivers Foundation after artist’s daughter complained to University).

123. See Taylor, *supra* note 14 (noting N.Y.U. rejected offer to purchase “Growing” series after discovering film’s contents).

124. See *supra* note 85 and accompanying text for discussion of scienter required by New York child pornography statute.

125. See Jenni Sorkin, *Robert Mapplethorpe: Pictures*, 83 FRIEZE MAG., May 2004, available at http://www.frieze.com/issue/review/robert_mapplethorpe_pictures_pictures (providing that police arrested gallery director, Dennis Barrie, on obscenity charges for hosting Mapplethorpe’s exhibition entitled “The Perfect Moment,” which contained photographs of nude people in sexually explicit poses).

126. See *Cincinnati v. Contemporary Arts Center*, 57 Ohio Misc. 2d 15, 19-20 (Ohio Misc. 1990) (noting that grand jury based indictment of Dennis Barrie, curator, and Contemporary Arts Center on five sadomasochistic photographs after viewing entire exhibit).

127. See Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, available at <http://www.nytimes.com/1990/10/06/us/cincinnati-jury-acquits-museum-in-mapplethorpe-obscenity-case.html?>

grand jury excluded these latter two photographs from the obscenity indictment based on the precedent announced in *Ferber*, that nude photos of minors are to be treated differently.¹²⁸ The Ohio court did not consider whether Mapplethorpe's photographs were child pornography; instead, the court applied the *Miller* test for obscenity, which requires that the work "as a whole" lack serious artistic merit.¹²⁹

The trial court considered whether the seven photos were obscene when "taken as a whole."¹³⁰ The court found that each photograph must be taken as a whole under the obscenity definition, and not considered within the entire context of the exhibition, which included 168 photographs that were not the subjects of an obscenity prosecution.¹³¹ The trial court excluded the two nude pictures of minors because child pornography is subject to a more stringent constitutional standard and does not "need [to] be considered as a whole."¹³² Even though the Rivers archive contains other works that have historic and artistic significance, the artistic importance of those works does not redeem "Growing" if a fact finder determines that the film alone contains images of child pornography.¹³³ Thus, a foundation or gallery seeking to avoid child pornography charges must examine and vet the entire contents of any prospective collection, because a single video or photograph that fits within the definition of child pornography could expose that institution to criminal charges.¹³⁴

The Cincinnati jury acquitted the Contemporary Arts Center and its director of obscenity charges.¹³⁵ The acquittal proved to be

("Two of the photographs showed children with their genitals exposed and were the basis of charges the defendants had illegally displayed the images of nude children.")

128. See *Cincinnati*, 57 Ohio Misc. 2d at 20 (finding obscenity test for exhibition of photographs did not include two works depicting child pornography when considering work as a whole).

129. See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining test for obscenity to include "[w]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

130. See *Cincinnati*, 57 Ohio Misc. 2d at 19-20 (declaring trial court considered photographs within context of entire exhibition).

131. See *id.* (noting that each photograph is to be considered separately under definition of obscenity).

132. *Id.* at 20 (quoting *Ferber*).

133. See *Pinkoski*, 300 A.D.2d, at 837 (holding that works need not be considered in context of exhibition).

134. See *supra* note 126 and accompanying text (describing obscenity charges against gallery and its director for Robert Mapplethorpe exhibition).

135. See *Wilkerson*, *supra* note 127, at 2 (announcing Museum and director's acquittal in obscenity case as major victory for art and creativity).

a pyrrhic victory for the arts world because the sensationalism of the Mapplethorpe scandal encouraged Congress to pass a law that prohibited the National Endowment for the Arts (“NEA”) from subsidizing obscene or indecent materials.¹³⁶ Senator Helms blamed the government grant for helping to create the Mapplethorpe exhibit, and for squandering taxpayer dollars “to subsidize filthy and offensive art.”¹³⁷ This signaled the start of the “culture wars” of the 1990s that created a tension between free expression and censorship of the arts.¹³⁸ Artists have continued to topple societal conventions by transgressing moral boundaries and subjecting audiences to images that are intended to shock and disgust.¹³⁹ These artists have gotten more media attention since the debate centered on NEA funding for the arts.¹⁴⁰ As a result of the culture war, more artists have been charged with crimes for their works, either for obscenity or child pornography.¹⁴¹

IV. COMPARISONS TO PREVIOUS CHILD PORNOGRAPHY CHALLENGES TO ARTISTIC WORKS

The Larry Rivers situation bears similarities to an Alabama case against Barnes & Noble for selling books containing images of child pornography.¹⁴² In 1998, an Alabama grand jury indicted Barnes & Noble on charges of disseminating child pornography for selling *Radiant Identities* and *The Age of Innocence*.¹⁴³ Alabama sought to prosecute the bookseller because the books contained images of

136. See Sorkin, *supra* note 125, at 2 (revealing Helms amendment that curtailed NEA funding of artistic works in wake of Cincinnati Contemporary Arts Center indictment).

137. Wilkerson, *supra* note 127, at 1 (quoting Senator Jesse Helms’s reaction to Mapplethorpe exhibit).

138. See Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205, 206 (noting culture wars began in 1989 with attack on Robert Mapplethorpe’s homoerotic nudes and Andres Serrano, known for his “Piss Christ,” photo of plastic crucifix submerged in artist’s urine).

139. See, e.g., *id.* (citing Brooklyn Museum of Art’s exhibition of dung-splattered Virgin Mary and HIV-positive artist Ron Athey’s performance art where he cut incisions into another man and draped towels bloodied by incisions over audience).

140. See *id.* at 207 (finding that “scandalous artist[s]” have been “dug up” for purpose of political mudslinging over national funding for arts).

141. See *id.* at 207-08 (highlighting Alabama and Tennessee cases against Barnes & Noble for two books by artists Jock Sturges and David Hamilton containing child pornography, Oklahoma prosecution of video store under child pornography statute for renting Academy Award-Winning film *The Tin Drum*, and arrest of artist Spencer Tunick for depicting nude people in public, among others).

142. See *infra* notes 143-144 (explaining details of Barnes & Noble case).

143. See *Alabama Grand Jury Indicts Barnes & Noble*, N.Y. TIMES, Feb. 19, 1998 at A10, available at <http://www.nytimes.com/1998/02/19/us/alabama-grand-jury-in->

nude children lying supine with their genitals exposed.¹⁴⁴ The author of *Radiant Identities*, Jock Sturges, had narrowly avoided indictment for child pornography prior to the Barnes & Noble case.¹⁴⁵ Supporters of Randall Terry, a talk radio host who led an anti-abortion campaign called Operation Rescue, were at the forefront of the effort to indict Barnes & Noble on charges of pandering obscenity.¹⁴⁶ His supporters raided bookstores, and one supporter even purchased a copy of each book, bringing them to a local police station, where officers forwarded the complaint to the attorney general's office.¹⁴⁷ A similar prosecution against Barnes & Noble in Tennessee resulted in the national bookseller's entry of a plea bargain in which the prosecution agreed to drop charges if the seller agreed to display the books above a certain height, cover them in shrink wrap, and place them behind the counter.¹⁴⁸

The artists embroiled in the Barnes & Noble prosecution bear many similarities to Larry Rivers. Sturges exhibited his work in prominent art museums including the Metropolitan Museum of Art, the Museum of Modern Art [MoMA], and in eighteen different galleries worldwide.¹⁴⁹ Similarly, Rivers has had his work displayed in the MoMA and his own show at a prominent New York gallery.¹⁵⁰ Like the "Growing" series, Sturges's work also depicted preteen girls with exposed breasts and genitalia.¹⁵¹ Both Hamilton and Sturges engaged in sexual encounters with the underage models

dicts-barnes-noble.html (reporting Alabama grand jury's indictment of Barnes & Noble).

144. See Brian Cash, Comment, *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*, 51 ALA. L. REV. 793, 797-98 (2000) (describing images in *The Age of Innocence* and *Radiant Identities*).

145. See Philip Hager, *U.S. Grand Jury Refuses to Indict Photographer*, L.A. TIMES, Sept. 17, 1991, at A3, available at http://articles.latimes.com/print/1991-09-17/news/mn-2724_1_grand-jury (reporting on Federal grand jury's refusal to return indictment against Jock Sturges on child pornography charges).

146. See Doreen Carvajal, *Barnes & Noble Vows to Stock Art Books Despite Indictments*, N.Y. TIMES, Feb. 20, 1998, available at <http://www.nytimes.com/1998/02/20/us/barnes-noble-vows-to-stock-art-books-despite-indictments.html> (noting charges against Barnes & Noble in Alabama and Tennessee were brought after protestors ransacked bookstores and tore up copies of offensive materials).

147. See *id.* (recounting tale of protestor who brought books to authorities' attention).

148. See Cash, *supra* note 144, at 794-95 (providing details of Barnes & Noble's plea agreement).

149. See *id.* at 798 (citing John D. Alcorn & Nick Lackeos, *Grand Jury Indicts Book Chain on Child Pornography Charges*, MONTGOMERY ADVERTISER, Feb. 19, 1998, at 1A (quoting Sturges)).

150. See Johnson, *supra* note 1 (discussing highlights of Rivers's career).

151. See Cash, *supra* note 144, at 797 (noting that "a typical Sturges photograph" contains images of ten-year-old girl lying supine with "her arms out-

they photographed.¹⁵² Similarly, Rivers admitted to having had an affair with a fifteen-year-old when he was in his early forties.¹⁵³

The Alabama state law at issue in the Barnes & Noble prosecution differed from the New York statute in an important way.¹⁵⁴ While the Sturges photographs bear striking similarities to the “Growing” video, Alabama’s child pornography statute defines child pornography differently.¹⁵⁵ In Alabama, “lewdness” does not depend on the child achieving some sexually inviting pose.¹⁵⁶ Similar to New York, the Alabama statute follows the decision in *Ferber*, that the content depicted need not appeal to the prurient interest or be “patently offensive” to constitute child pornography.¹⁵⁷ Unlike New York, however, Alabama adopted a special test for breast nudity as opposed to general nudity, which requires a showing that the breast nudity is “obscene” under the three-prong *Miller* test before it is considered child pornography.¹⁵⁸ For both genital nudity and breast nudity to constitute child pornography, the depiction must be “lewd.”¹⁵⁹ Alabama’s statute determines “lewdness” based on the subjective intent of the photographer and the viewer’s

stretched, her exposed genitals drawing the viewer’s eye into the center of the frame”) (citations omitted).

152. See Cash, *supra* note 144, at 800-801 (describing Hamilton and Sturges sexual relationships with minor girls); see also Taylor, *supra* note 5, and accompanying text (recounting Rivers’s affair with fifteen year old girl).

153. See *supra* note 13 and accompanying text (revealing Rivers’s autobiography contains admission that artist had sexual encounters with underage girls while in his early forties).

154. See *infra* notes 155-63 and accompanying text (contrasting Alabama child pornography statutory construction with New York statute).

155. See *infra* note 148 (defining lewdness under Alabama state penal code as characteristic pertaining to voyeur); cf. *supra* note 89 (explaining that New York statute defines lewdness based on image of voyeur and not subjective lewdness of voyeur).

156. See Cash, *supra* note 139, at 815 (“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 and like-minded pedophiles.’”) (citations omitted).

157. See Cash, *supra* note 144, at 813-14 (finding Alabama legislature adopted part of *Ferber* holding child pornography need not rise to level of obscenity to be constitutionally prohibited).

158. See *id.* (finding Alabama requires breast nudity to be obscene when “the work is considered as a whole”); see also ALA. CODE § 13A-12-190 (10) (1975) (defining breast nudity as “[t]he lewd showing of the post-pubertal human female breasts below a point immediately above the top of the areola.”).

159. See Cash, *supra* note 144, at 815 (citing *Poole v. State*, 596 So. 2d 632, 637 (Ala. Crim. App. 1992)) (noting Alabama does not consider lewdness a characteristic of child depicted, but of photographer’s exhibition of photograph for audience of like minded pedophiles).

subjective interpretations of that content.¹⁶⁰ In *Osborne v. Ohio*, the Court declared the statute in *Stanley v. Georgia*¹⁶¹ overbroad because the legislative intent was to prevent lewd images from poisoning the mind of the viewer, which the Court viewed as an impermissible objective to justify encroachment on the First Amendment.¹⁶²

The Alabama legislature's emphasis on the mind of the viewer suggests that there are some images whose production involves the same emotional and psychological harm to the child as child pornography, but which fall outside the ambit of the statute.¹⁶³ By subjecting the lewdness test to the mind of the viewer, the Alabama child pornography statute does not seem narrowly tailored to the compelling interest of protecting children from abuse, since nude depictions of children for purely artistic and non-lewd purposes could nevertheless subject a child to emotional scarring.¹⁶⁴

V. NO CHILDREN WERE HARMED IN THE MAKING OF THIS
PRODUCTION: FIRST AMENDMENT PROTECTIONS EXTEND
TO WORKS DEPICTING IMAGES OF VIRTUAL CHILDREN

The Child Pornography Prevention Act of 1996 ("CPPA") added a clause to the federal child pornography law, criminalizing the depiction of virtual, computer-generated children engaging in sexual activity.¹⁶⁵ In a lawsuit challenging the validity of the Act, Respondents, members of an adult entertainment trade association, argued that such a prohibition was overbroad, infringing upon constitutionally protected speech.¹⁶⁶ The Court held that the CPPA

160. *See id.* ("The test . . . for 'lewd' depictions is that the sex organs be 'represented by the photographer as to arouse or satisfy the sexual cravings of a voyeur'" (citations omitted); *see also* ALA. CODE § 13A-12-190 (adopting plain-meaning definition of lewdness set forth in Alabama case law: "[o]bscene, lustful, indecent, lascivious, lecherous"); *Perry v. State*, 568 So. 2d 339, 342 (Ala. Civ. App. 1990) (defining "lewd" as imputing "lascivious intent" upon viewer).

161. 394 U.S. 557, 564-65 (1969).

162. 495 U.S. 103 (1990). For a review of permissible, compelling interests for penalizing child pornography, *see supra* note 76 and accompanying text.

163. *See* ALA. CODE § 13A-12-190 (13) (defining terms of statute).

164. *See supra* note 62 (holding work need not appeal to prurient interest to constitute child pornography); *but see Osborne*, 495 U.S. at 112-14 (finding overbreadth is not substantial enough to warrant facial invalidation of statute).

165. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239-40 (2002) (evaluating statute that penalized virtual child pornography under First Amendment). The statute at issue in *Ashcroft* banned "any visual depiction, including any photograph, film, video picture, or computer, or computer-generated image or picture . . . [that] is, or *appears to be*, of a minor engaged in sexually explicit conduct." 18 U.S.C. § 2256(8)(A), *invalidated by Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (emphasis added).

166. *See Ashcroft*, 535 U.S. at 243 (articulating respondent's argument that "appears to be" and "conveys the impression" language of statute suffer from vague-

disregarded the *Miller* test for obscenity by including works of redeeming social value among prohibited works, even though not all books and movies surrounding the theme of adolescent sex appeal to the prurient interest and the work, as a whole, must lack serious literary value.¹⁶⁷ The Court also recognized the state's compelling interest in preventing the sexual abuse of children.¹⁶⁸ The Court rejected the government's argument that the state had a compelling interest in banning *virtual* child pornography for causing *actual* harm to children because the causality was too attenuated.¹⁶⁹

Additionally, the government argued that because it is difficult to distinguish between images of real and virtual children, both should be banned.¹⁷⁰ The Court reasoned that the government cannot enact a law to ban unprotected speech when that law has a chilling effect on a substantial amount of constitutionally protected speech.¹⁷¹ The CPPA is not narrowly tailored to a compelling government interest because the compelling interest in *Ferber* depends upon how the image was made, not its message.¹⁷² The Court interpreted the *Ferber* decision to include virtual pornography as a constitutionally permissible, alternative means of expressing child pornography, holding that not all child pornography is without value.¹⁷³ The Court also criticized the statute's vague wording, which penalized videos that "convey[ed] the impression" of containing sexually explicit content, because a film containing zero sexual content, but which nevertheless suggested the possibility of sexual content in its trailers or previews, would be subject to the statutory prohibition.¹⁷⁴

ness and overbreadth, and will have effect of chilling works protected by First Amendment).

167. *See id.* at 246 (noting theme of teenagers engaging in sexually explicit activity "is a fact of modern society and has been a theme of art and literature for centuries").

168. *See id.* at 249 (illustrating state's compelling interest in that child pornography constitutes permanent record of abuse, whose circulation harms child, and state's interest in closing distribution network to forestall economic motive of creating child pornography).

169. *See id.* at 250 (arguing causal link between virtual child porn and child abuse is contingent and indirect).

170. *See id.* at 257-58 (discussing government's position that tendency of confusion is compelling interest for banning virtual child porn).

171. *See id.* at 244 (citing *Broadrick v. Oklahoma*, 43 U.S. 601, 612 (1973)).

172. *See id.* at 251 ("[S]peech that is neither obscene nor the product of sexual abuse . . . does not fall outside the First Amendment's protection.") (citation omitted).

173. *See id.* (finding that *Ferber* recognized virtual porn as permissible alternative to actual child pornography).

174. *Id.* at 237.

There are two live witnesses to attest that the Rivers video did not contain images of virtual children.¹⁷⁵ In other cases, there may be more complex tasks to determine whether the child portrayed in the pornographic film is real or virtual.¹⁷⁶ Whether the person portrayed in the footage is a minor or an adult with diminutive features is difficult to determine.¹⁷⁷ The high court contends that such prosecutorial difficulties should not shift the burden onto the defendant to prove that the image did not use real children.¹⁷⁸ An outright ban on all images of naked children, including virtually-rendered ones, poses constitutional overbreadth problems, encompassing a substantial amount of speech not tied to a compelling government interest.¹⁷⁹

VI. REJECTION OF FEDERAL RECORD KEEPING REQUIREMENTS
CLOSES AN OUTLET FOR PROSECUTORS TO SHIFT
THE PROOF-OF-AGE BURDEN TO THE
PORNOGRAPHY INDUSTRY

In 1988, Congress passed the Child Protection and Obscenity Enforcement Act which required studios to keep detailed records of each performer's age, date of birth and a list of all the aliases that performer ever used.¹⁸⁰ The record-keeping requirements were so stringent that pornography producers complained of hav-

175. *See supra* note 12 (indicating Rivers's two daughters are now adults and could conceivably attest to fact they were used in films).

176. *See Ashcroft*, 535 U.S. at 237 (discussing government's argument that virtual images of nude children should be banned because of difficulty distinguishing between images of real and virtual children).

177. *See Onki Kwan, From the Protection of Children Against Sexual Exploitation Act of 1977 to The Adam Walsh Child Protection and Safety Act of 2006: How Congress Went From Censoring Child Pornography to Censoring Protected Sexual Speech*, 36 HASTINGS CONST. L. Q. 483, 490 ("[P]roducers of sexually explicit content tend[] to use very young performers to give viewers the impression that the performers were minors.").

178. *See id.* (finding that government's prohibition of child pornography does not satisfy government's compelling interest of eliminating market for child pornography because "few pornographers would risk prosecution for abusing real children if fictional, computerized images," and moreover, there is no underlying crime state seeks to prohibit when no actual children were involved in production).

179. *See id.* at 237 ("[T]he defense leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced by real children from virtual ones.").

180. *See id.* (noting stringent record-keeping requirements of Child Protection law).

ing to hire full-time staff just to deal with the record keeping requirements, and they subsequently filed suit.¹⁸¹

Predictably, the Supreme Court ruled that the statute was unconstitutionally overbroad for imposing documentation requirements on everyone along the chain of commerce.¹⁸² The *American Library Ass'n v. Thornburgh*¹⁸³ decision sheds light on one of the fundamental difficulties of prosecuting a child pornography case: finding convincing evidence that the performers were minors at the time they were depicted.¹⁸⁴

VII. CONCLUSION

Child pornography statutes have the design of protecting adolescents like Larry Rivers's daughters from a lifetime of shame brought on by their exhibition in a pornographic context.¹⁸⁵ As of this writing, the Larry Rivers Foundation possesses the "Growing" series, and could be indicted by a grand jury if a prosecutor were to establish that the Foundation knew the character and content of the "Growing" series, possessed the films, and provided that the films contain "sexual conduct by a child less than sixteen years of age."¹⁸⁶

Proving that the Foundation knew the character and content of the films might not be difficult because the timeline of the archival purchase suggests that the Foundation either knew beforehand or was informed of the film's contents when engaging in negotiations with N.Y.U. over the purchase of the film.¹⁸⁷ The prosecutor would also have to present evidence to convince the factfinder, beyond a reasonable doubt, that the girls were under the age of six-

181. *See id.* at 492 (reporting that pornography industry plaintiffs sought injunction against 1988 law).

182. *See id.* at 493 (invalidating statute based on overbreadth). By way of example, the court noted that:

[A] film distributor who makes copies of films for distribution would be faced with the often insurmountable task of having to track down personally any performer in a 'lascivious scene,' even if the original producer of the film provided the distributor with his own documentation of the age of every performer.

Id. at 492 (emphasis in original) (quoting *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 477 (D.D.C. 1989)).

183. 713 F. Supp. 469 (1989).

184. *See New York v. Ferber*, 458 U.S. 747, 764-65 (1983) (noting statutory prohibitions of child pornography are restricted to depictions of sexual conduct by children below statutorily-defined age).

185. *See supra* notes 39-49 (explaining legislative purpose in proscribing child pornography).

186. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

187. *See supra* notes 122-124 (suggesting how prosecution may be able to impute knowledge of film's contents on Foundation).

teen when they were portrayed in the film.¹⁸⁸ This is usually difficult in most child pornography prosecutions but may be simplified by the fact that Rivers's daughters have identified themselves as being the underage when the footage was taken.¹⁸⁹

The prosecutor would also have to show that Rivers's portrayal of his daughters constitutes a "lewd exhibition of the genitals," a showing that does not require the content to appeal to the prurient interest, but cannot consist of the mere exposition of the daughters' nude breasts without some context for the fact-finder to infer a lewd portrayal.¹⁹⁰ The "Growing" series need not be considered as a whole for the court to classify it as child pornography—if even one frame of the film constitutes a lewd exhibition of the genitals and the rest is innocuous, the work can still fall outside First Amendment protection.¹⁹¹

The tension between art that is protected under the First Amendment and expression that can be prosecuted as obscenity or child pornography is not new.¹⁹² The Robert Mapplethorpe exhibition in Cincinnati showed that a museum and its director could be indicted on obscenity charges for displaying a collection with serious artistic value, with the arguable exception of a handful of portraits.¹⁹³ Similarly, a national chain of bookstores was indicted in two states for promoting works that are considered by some people as legitimate artistic works and denounced by others as egregious examples of child pornography.¹⁹⁴ Since prosecutions of child pornography are no longer relegated to seedy computer pornography enthusiasts or the back rooms of adult bookstores, institutions like the Larry Rivers Foundation are not protected from child pornography prosecution because of their affiliation with high-flown forms

188. *See supra* notes 83-84 and accompanying text (setting out standard of proof and elements of New York child pornography statute).

189. *See supra* notes 86-85 (asserting New York's statutory age requirements for child porn prosecution).

190. *See supra* notes 93-112 (comparing present case with *Pinkoski* and other cases where court defined "lewd exhibition of the genitals").

191. *See supra* notes 125-132 (finding work need not be considered as whole to be punishable as child pornography).

192. *See supra* notes 110-15 (describing indictment of museum director, Dennis Barrie, for obscenity-related charges).

193. *See supra* note 125-135 (detailing art museum director and museum charged with pandering obscenity for displaying sadomasochistic photographs by renowned artist Robert Mapplethorpe).

194. *See supra* notes 142-164 (describing prosecution of Barnes & Noble for selling books containing images of nude adolescent girls).

of artistic expression.¹⁹⁵ Indeed, the arts as a whole are in jeopardy and funding for the arts has been slashed because there is a large contingency in Congress and the public that vehemently opposes subsidizing potentially obscene works.¹⁹⁶

The dissemination of new, high-powered graphics technologies is now blurring the lines between real pornographic images of children and virtual likenesses.¹⁹⁷ The Supreme Court rejected a federal statute regulating virtual images as child pornography because the statute encroached upon areas of permissible speech and did not address the government's compelling interest in protecting children from abuse.¹⁹⁸ While the Court continues to defend areas of constitutionally protected speech, the advent of virtual pornography only complicates prosecutions of real child pornography by requiring the state to prove that the child is real, along with the child's age.

Attempts to ease that burden on the state have so far been met with opposition. The task of verification a performer's age is a difficult one; the legislature cannot impose requirements on producers and distributors of pornography to keep track of every performer.¹⁹⁹ In light of these critical developments in First Amendment law, arts organizations must be cautious in acquiring new photographs or visual media that may subject them to prosecution, and states must look for new ways to dismantle the (often underground) child pornography market without encroaching upon protected speech.

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195. *See supra* notes 46, 54 (indicating that artistic merit will not salvage work that otherwise contains images of child pornography because of state's compelling interest in protecting children from abuse); *cf. Miller v. California*, 413 U.S. 15, 24 (1973) (enumerating social value as one test to protect works that would otherwise be obscene from state sanction).

196. *See supra* notes 136-138 (giving historical account of culture-wars and senator Helms effort to divest obscene or pornographic works of NEA funding).

197. *See supra* notes 170-172 and accompanying text for a discussion of the Child Pornography Prevention Act of 1996.

198. *See supra* notes 165-174 (explaining high court's holdings in *Ashcroft v. Free Speech Coalition*).

199. *See supra* notes 180-184 (noting Supreme Court case that invalidated record-keeping requirements on pornography industry for over-breadth).

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