

NO. 88-5986

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE, *Appellant*,

v.

STATE OF OHIO, *Appellee*.

**On Writ Of Certiorari To The
Supreme Court of Ohio**

**BRIEF AMICI CURIAE OF NATIONAL COALITION
AGAINST PORNOGRAPHY, CONCERNED WOMEN
FOR AMERICA, FOCUS ON THE FAMILY,
FAMILY RESEARCH COUNCIL,
NATIONAL LEGAL FOUNDATION, ATHLETES
FOR KIDS, NATIONAL CHRISTIAN
ASSOCIATION AND THE BEREAN LEAGUE,
IN SUPPORT OF THE APPELLEE.**

MARK N. TROBNIK*
JORDAN W. LORENCE
CIMRON CAMPBELL
Concerned Women for America
370 L'Enfant Promenade SW
Suite 800
Washington, D.C. 20024
(202) 488-7000

**Counsel of Record*

H. ROBERT SHOWERS*
Gammon & Grange
1925 K St. NW Suite 300
Washington, D.C. 20006
(202) 862-2000
WENDELL R. BIRD
1150 Monarch Plaza
3414 Peachtree Lane
Atlanta, Georgia 30326
(404) 264-9400

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii-v
INTEREST OF AMICIS CURIAE	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	4
I. CHILD PORNOGRAPHY, WHICH IS CHILD SEXUAL EXPLOITATION IN PICTURES, HARMS CHILDREN BY ITS PRODUCTION, DISTRIBUTION AND CON- SUMPTION BECAUSE IT IS A PERMANENT RECORDING OF THEIR SEXUAL ABUSE AND THE SEDUCTION TOOL OF CHOICE FOR THE CHILD MOLESTER	4
A. Evidence Clearly Reveals That Child Por- nography Is Directly Connected With Child Molestation	6
B. Possession And Use Of Child Pornography Involves Substantial Harm To Children	12
C. Children Suffer Severe Psychological And Physical Harm From Production And Distribu- tion Of Child Pornography	17
(i) Psychological Harms To Children From Production	17
(ii) Physical Harms To Children From Pro- duction	19
(iii) Harms To Children From Distribution ..	22
II. NEUROCHEMICAL EVIDENCE SHOWS THAT PEOP- LE REACT DIFFERENTLY TO PICTURES THAN THEY DO TO WORDS RAISING NEW FIRST AMEND- MENT CONSIDERATIONS	23
III. CRIMINAL LAWS AGAINST POSSESSION OF CHILD PORNOGRAPHY DO NOT VIOLATE <i>STANLEY V.</i> <i>GEORGIA</i> AND ARE CRITICAL TO LAW ENFORCE- MENT TO ERADICATE CHILD PORNOGRAPHY AND THE CORRESPONDING CHILD MOLESTATION	15
CONCLUSION.....	30
APPENDIX.....	1a

ceable Legislation, 12 U. Mich. J. Law Reform 295, 301 (1979) (hereafter cited as *Use in Pornography*) (increases the emotional and psychic harm suffered by the child').

Ferber, 458 U.S. at 759 n. 10.

Child pornography has a life of its own. The depictions are timeless and may be distributed and circulated for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again. The harm to children from pornography occurs as a result of the existence of the material itself. According to the Commission on Pornography, "the enactment of criminal penalties for the possession of child pornography is essential if these harms outlined in *Ferber*, 458 U.S. at 749, are to be effectively curtailed." *Commission on Pornography* at 150-151.

II. NEUROCHEMICAL EVIDENCE SHOWS THAT PEOPLE REACT DIFFERENTLY TO PICTURES THAN THEY DO TO WORDS RAISING NEW FIRST AMENDMENT CONSIDERATIONS²⁰

Visual data, whether good or bad, true or false, appears to be processed as "truth" immediately, forcefully and with some degree of permanence, while competing print/speed is processed feebly, or in some cases not at all.²¹ While visual depictions of child exploitation should be treated more harshly than written word because of its harm to the child victim, perhaps the negative and more powerful effect of visual image versus the printed word on the viewer/reader gives additional weight to banning pictorial possession of child pornography.

As was explored above, it is the use of pictures which manipulate and exploit children into participating with an adult in a sexual act. There is a growing body of scientific neurochemical research which shows that pictures are processed and retained by the brain in a different manner than the written word. At least in the context of pictorial child pornography, therefore,

²⁰ Amici acknowledge and thank Dr. Judith Reisman for her valuable assistance in the development of this concept.

²¹ See D. Galin, *Educating Both Halves of the Brain*, 53 *Childhood Education* 17 (1976).

the Court should examine written First Amendment activity in a different light from pictorial activity.

Neurological research has shown that the brain is divided into two halves or hemispheres, the left and right, and each half of the brain performs functions. One half of the brain primarily processes purely cognitive (written) information while the other half primarily processes visual information. As one neurologist explains,

The two cerebral hemispheres are differently specialized, each performing a variety of tasks of which the other is either incapable or able to accomplish with only marginal facility. The left hemisphere is specialized for language comprehension and execution, verbal memory, and the numerical aspects of calculation, whereas the right hemisphere is specialized for visual-spatial and visual perceptual function, nonverbal memory and comprehension, and execution of speech prosody.

J. Cummings, "Hemispheric Asymmetries in Visual-Perceptual and Visual-Spatial Function," in *Dual Brain: Hemisphere Specialization in Humans* 233 (D. Frank ed. 1985). In general, the left hemisphere is more important for language and motor skills, while the right hemisphere does better with visual and spatial functions. R. Restak, *The Brain* 248 (1984).

Research in the education field also demonstrates that there is substantively different responses by the brain to pictures than to printed words.²² In much the same manner, advertisers are researching what stimulates the two hemispheres of the brain so that a product will be noticed and remembered. At least one study quite logically suggests that an advertising campaign consisting of both written words and pictures may have the most success. Appel, Weinstein, and Weinstein, *Brain Activity and Recall of TV Advertising*, 19 *Journal of Advertising Research* 8 (1979).

A mass communication specialist noted: "The printed word no longer has the power it once did. . . the addictive, distortive

²² L. Harris, "Right-Brain Training: Some Reflections on the Application of Research on Cerebral Hemispheric Specialization to Education," in *Brain Lateralization in Children* 211 (1988).

nature of images are vitally important realities within which to address the issue of freedom of speech." J. Reisman, *Freedom Of Speech as My Theology in Electronic Environment*, 3 New York Review of Law and Social Change, 275-278 (1979). At the very least, it is time to seriously reconsider the 19th century position that words and pictures are to be equated on the same First Amendment plane because they effect people in the same manner. The common-sense reality of the situation (and now a growing body of scientific research) is that they do not, and therefore, different First Amendment protections should be afforded to each. It is no accident that pedophiles revere the picture more than the word. The pictures of molestation stimulate them on a deeper and stronger level, be it neuro-chemical or psychological. The exploitation of a child in a photograph, movie, or video is clear, devastating, and it retains its depraved potency for those that possess and view it.

It is time to stem the tide of this terrible holocaust which claims thousands of innocent children as its victims. Possession of pictorial child pornography cannot be given the same First Amendment protection as written depiction. Intuition follows the old adage that "a picture is worth a thousand words." Unfortunately, a single photograph of a molested child speaks volumes about the tragedy that has befallen that child.

III. CRIMINAL LAWS AGAINST POSSESSION OF CHILD PORNOGRAPHY DO NOT VIOLATE *STANLEY V. GEORGIA* AND ARE CRITICAL TO LAW ENFORCEMENT TO ERADICATE CHILD PORNOGRAPHY AND THE CORRESPONDING CHILD MOLESTATION

Stanley v. Georgia, 394 US 557 (1969) has been repeatedly raised by criminal defendants as the Supreme Court case which constitutionally prevents passage of laws against possession of child pornography. The Ohio Supreme Court in *Meadows*, 28 Ohio St.3d answered this question persuasively by stating:

Thus, *Stanley*, has always stood for—and still stands for—the proposition that the state may not, consistent with the First Amendment, regulate the mere private possession of material in one's own home merely because it is obscene. However, it is also significant to our inquiry that Justice