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"The prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance."

I. INTRODUCTION

After cautious beginnings in the late 1960's, "kiddie porn" burst upon the pornography market and the front pages in the mid-1970's. As the country became aware of this multimillion dollar, nationwide industry, Congress and state legislatures hurriedly enacted tough penal legislation to combat the problem. Today the federal government and forty-seven states have statutes specifically directed at preventing the production of child pornography while thirty-five states and the United States Congress have passed legislation prohibiting the distribution of such materials.

At least half of the statutes aimed at preventing production do not require that the materials be legally obscene and twenty states prohibit the distribution of child pornography without requiring that the material be legally obscene.

The constitutionality of these various statutes has rarely been challenged in the courts. The laws prohibiting the production and distribution of legally obscene child pornography are unquestionably constitutional so long as they do not suffer from the fatal


Robin Lloyd, the author of For Money or Love: Boy Prostitution in America, has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. . . .

Such magazines depict children, some as young as three to five years of age, in couplings with their peers of the same and opposite sex, or with adult men and women. The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism.

Such magazines, however, are only one of the forms of child pornography that are currently available in the United States. Other forms include ten to twelve minute films known as "loops", still photographs, slides, playing cards, and video cassettes.

Id. at 43.
4. 50 U.S.L.W. at 5078.
5. 50 U.S.L.W. at 5078 & n.2. By this is meant legally obscene as defined by the test in Miller v. California, 413 U.S. 15, 24 (1973). See infra notes 22-25 and accompanying text.
6. The constitutionality of obscene child pornography statutes could be adjudged by the
flaws of vagueness and/or overbreadth. However, the statutes suppressing child pornography without a requirement of legal obscenity have experienced mixed reviews in state and federal courts. When the United States Supreme Court granted certiorari in the case of *New York v. Ferber*, it had to face squarely the issue of the constitutionality of state statutes regulating nonobscene child pornography.

The significance of the *Ferber* decision lies in the Supreme Court's holding that the traditional first amendment test for obscenity would not be applied to child pornography statutes because of the overriding state interest in protecting the welfare of children. This state interest was determined to be compelling enough to overcome the first amendment arguments against the child pornography statutes.

This note will deal with a general background of United States Supreme Court obscenity decisions as well as the Court's traditional concern for the welfare of children in this area. Then it will concentrate on the *Ferber* case, taking it from the trial court, through the state appeal courts and up to the United States Supreme Court. This note will not delve into the history or details of child pornography because the subject has been amply covered elsewhere.

## II. Background

The Supreme Court has held that "[l]iberty of speech, and of the press, is . . . not an absolute right, and the State may punish its abuse." The first amendment prohibition that "Congress shall make no law . . . abridging the freedom of speech" has not been interpreted by the Court to cover all speech. Exceptions have been

*Miller* test without problems. See infra notes 22-25 and accompanying text.


8. 50 U.S.L.W. at 5079.

9. *Id.* at 5080.


recognized for various categories of speech which do not warrant first amendment protections.

There was little litigation regarding the scope and meaning of the first amendment until the early 1900's.\textsuperscript{13} Once the Court began to examine the first amendment, however, it quickly deemed certain categories of speech to be unprotected. In wartime, a claim for first amendment protection is necessarily diminished.\textsuperscript{14} "Fighting words" and libel have also been declared as unprotected speech.\textsuperscript{15} By far obscenity has been the most difficult exception for the court.\textsuperscript{16} The Court established these exceptions to first amendment protection because "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."\textsuperscript{17}

The Court's difficulty with obscenity derives from the attempt to define the term.\textsuperscript{18} Dicta in Chaplinsky v. New Hampshire\textsuperscript{19} suggested that lewdness and obscenity could be prevented and punished without raising constitutional problems. The terms "lewdness" and "obscenity" were not defined in Chaplinsky, however, and it was fifteen years until the case of Roth v. United States\textsuperscript{20} before the Court first established a definition.\textsuperscript{21} Following Roth, the Court could not muster a majority to agree upon the definition of obscenity until the case of Miller v. California.\textsuperscript{22} In the interim,

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\item[13.] P. Kauper & F. Beytagh, CONSTITUTIONAL LAW 1151 (5th ed. 1980).
\item[14.] Schenck v. United States, 249 U.S. 47, 52 (1919).
\item[15.] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). At one time commercial speech was also excluded from first amendment protection, but now it is protected. These exceptions have recently been narrowly construed. See M. Shapiro & R. Tresolini, AMERICAN CONSTITUTIONAL LAW 344-46 (5th ed. 1979); L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-10 at 618 (1978).
\item[16.] See infra notes 18-53 and accompanying text.
\item[17.] 315 U.S. at 572 (footnote omitted).
\item[18.] Justice Stewart, concurring in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), remarked that obscenity may be indefinable but "I know it when I see it."
\item[19.] 315 U.S. at 571-72.
\item[20.] 354 U.S. 476 (1957).
\item[21.] The test adopted was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Id. at 489 (footnote omitted).
\begin{enumerate}
\item[(a)] the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
\item[(b)] the material is patently offensive because it affronts contemporar-
the Court began the practice "of per curiam reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene." 23

In Miller, Chief Justice Burger, writing for the Court, stated that "[t]his much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." 24 Burger, writing for himself and four other members of the Court, held:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 25

The Miller decision is still good law today and, conceivably, should be applied to all prohibitions and punishments of obscene materials. However, the Court has carved out exceptions to the obscenity doctrine, one of which is in the case of juveniles. The Court has held that even where there is an invasion of protected freedoms "[t]he state's authority over children's activities is broader than over like actions of adults." 26

Under the tenth amendment to the United States Constitution, "the general power to enact rules for the health, safety, welfare and morals of the people belongs to the States." 27 The protection of minors is part of this power and is subject to regulation by the states. Two aspects of child welfare which are heavily regulated by the states are school attendance and employment. The Court has declared that it "goes without saying" that states have the power

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rary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

23. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82 (1973) (Brennan, J., dissenting) (footnote omitted). "No fewer than 31 cases have been disposed of in this fashion." Id. at 82 n.8.

24. 413 U.S. at 23.

25. Id. at 24 (citations omitted).

26. Prince v. Massachusetts, 321 U.S. 158, 168 (1944). The stated purpose of this greater power is that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." Id.

to prohibit the employment of workers under a certain age.\textsuperscript{28}

In \textit{Prince v. Massachusetts},\textsuperscript{29} the Court upheld a state child labor law over first amendment objections. A Massachusetts statute forbade boys under twelve and girls under eighteen to sell magazines or newspapers in any street or public place.\textsuperscript{30} The defendant was a member of Jehovah's Witnesses and took her ward with her to sell religious newspapers on the public streets.\textsuperscript{31} She was subsequently arrested for violating the child labor law. At trial, her defense was that the statute was an unconstitutional violation of her niece's freedom of religion under the first amendment, applied to the states through the fourteenth amendment, and a violation of her parental rights under the due process clause of the fourteenth amendment.\textsuperscript{32}

In considering the defense, the Court held that "[a]gainst these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children."\textsuperscript{33} The Court reasoned that the whole community has an interest in keeping children safe from abuses and giving them the opportunity to grow into free and independent well-developed persons and citizens.\textsuperscript{34} Acting to guard the general interest in the well-being of children, "the state as \textit{parens patriae} may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."\textsuperscript{35} The Court held that the state's power over the welfare of children extends to matters of conscience and religious conviction.\textsuperscript{36} The Court concluded that the power of the state to control the public proclaiming of religion by children reaches beyond the scope of its authority over adults, "as is true in the case of other freedoms."\textsuperscript{37}

Thus, the state was able to counterbalance the defendant's first amendment rights by upholding the compelling state interest in protecting the welfare of children. The Court left open the possibility that states could apply this rationale to prevail over first amendment rights in other situations.

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  \item \textsuperscript{28} \textit{Chesapeake & O. Ry. v. Stapleton}, 279 U.S. 587, 593 (1929).
  \item \textsuperscript{29} 321 U.S. 158 (1944).
  \item \textsuperscript{30} \textit{Id.} at 160-61.
  \item \textsuperscript{31} \textit{Id.} at 159-60.
  \item \textsuperscript{32} \textit{Id.} at 164.
  \item \textsuperscript{33} \textit{Id.} at 165.
  \item \textsuperscript{34} \textit{Id.}.
  \item \textsuperscript{35} \textit{Id.} at 166 (footnotes omitted).
  \item \textsuperscript{36} \textit{Id.} at 167.
  \item \textsuperscript{37} \textit{Id.} at 170.
\end{itemize}
The Court used this rationale in *Roe v. Wade*\(^{38}\) to overcome a woman's constitutional right of privacy in her choice of whether or not to have an abortion after the fetus had reached the stage at which it could be viable on its own. Texas law made it a crime to "procure an abortion," or to attempt one, except on medical advice to save the mother's life.\(^{39}\) In holding this statute unconstitutional, the Court stated that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."\(^{40}\) However, "at some point the state interests as to protection of . . . prenatal life become dominant."\(^{41}\) The point at which the "State's important and legitimate interest in potential life" becomes compelling is at viability.\(^{42}\) Thus, the state "may go so far as to proscribe abortion" after viability is reached.\(^{43}\)

The Court also declared that the state's interest in the welfare of children could outweigh personal freedoms in *Bellotti v. Baird.*\(^{44}\) *Bellotti* concerned a Massachusetts statute that required a pregnant minor seeking an abortion to obtain the consent of her parents or to obtain judicial approval following refusal by one of her parents.\(^{45}\) Even though the Court found the statute too restrictive in that it unconstitutionally burdened the right of the pregnant minor to seek an abortion,\(^{46}\) the Court held that states may limit the freedom of children to make affirmative choices that have potentially serious consequences.\(^{47}\) States are permitted this power because "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."\(^{48}\)

In a decision relying heavily upon *Prince,*\(^{49}\) the Court in *Ginsberg v. New York*\(^{50}\) affirmed a conviction under "a New York criminal obscenity statute which prohibits the sale to minors under 17 years of age, of material defined to be obscene on the basis of its..."
appeal to them, whether or not it would be obscene to adults.”

The Court stated that “even where there is an invasion of protected freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’”

The basis of this power is that “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses.’”

With a definite standard of obscenity and an exception to that standard for the state to further protect children, the stage was set for the rise of child pornography and the legislative attack upon these materials. The ascent of the Ferber case from the trial court to the United States Supreme Court, and the numerous opinions it has left in its wake, is a graphic depiction of the struggle to combat the evils of child pornography and still attempt to maintain the viability of the first amendment guarantees of freedom of speech and press.

III. THE CASE AGAINST PAUL IRA FERBER

In 1977, the New York state legislature amended the state penal code and added a child pornography provision. The new statute

51. Id. at 631.
52. Id. at 638 (quoting Prince, 321 U.S. at 170).
53. Id. at 640 (quoting Prince, 321 U.S. at 165). See also FCC v. Pacifica Foundation, 438 U.S. 726, 749-50 (1978); Miller, 413 U.S. at 18-19; Paris Adult Theatre I, 413 U.S. at 57.
54. N.Y. PENAL LAW § 263 (McKinney 1977):

§ 263.00 Definitions:
As used in this article the following definitions shall apply:

1. “Sexual performance” means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.
2. “Obscene sexual performance” means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.
3. “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.
4. “Performance” means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.
5. “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

§ 263.10 Promoting an obscene sexual performance by a child.
A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any
established tough sanctions against promoting a sexual performance by a child.\textsuperscript{55} Section 263.15 prohibits the promotion of a sexual performance by a child under the age of sixteen even if it was not legally obscene.

Paul Ira Ferber, the owner/operator of a Manhattan bookstore specializing in sexually oriented products, was arrested for selling two films, which Ferber depicted as "Kiddie Films" to an undercover policeman.\textsuperscript{56} He was indicted for two violations each of section 263.10 and section 263.15 of the New York penal law.\textsuperscript{57} At trial Ferber moved to dismiss the indictments on federal constitutional grounds.\textsuperscript{58} In finding both sections of the statute constitutional, New York Court of Appeals Justice Irving Lang stated that "[t]he well-being of children is a subject long recognized as within a state's constitutional power to regulate, particularly in relation to sexual matters," possibly allowing the state to "restrict what otherwise would be constitutionally protected conduct."\textsuperscript{59} Justice Lang

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obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

\textsection{263.15} Promoting a sexual performance by a child.

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

Promoting a sexual performance by a child is a class D felony.

\textsuperscript{55} \textit{Id.} §§ 263.10-.15. The constitutionality of \textsection{263.15} was challenged in \textit{St. Martin's Press, Inc. v. Carey}, 440 F. Supp. 1196 (S.D.N.Y. 1977), when the publisher and distributors of \textit{Show Me!}, a book made and photographed in Germany for parents to use in educating their children about sex and which included photographs of naked children, brought suit for declaratory and injunctive relief against enforcement of the section. \textit{Id.} at 1198-99. The court held \textit{Show Me!} not to be obscene under \textit{Miller} and that there was a serious question as to the facial constitutionality of \textsection{263.15}. \textit{Id.} at 1204-05. The defendants were enjoined \textit{pendente lite} from enforcing the section against \textit{Show Me!} \textit{Id.} at 1208. The order was reversed in \textit{St. Martin's Press, Inc. v. Carey}, 605 F.2d 41, 45 (2d Cir. 1979), because the case did not "involve a case or controversy which justifies intervention by a federal court."

\textsuperscript{56} People v. Ferber, 409 N.Y.S.2d 632, 634 (Sup. Ct. 1978). The films were ten minutes in duration, "one depicting a boy masturbating, the other a group of boys engaging in sexual conduct." \textit{Id.} at 637.

\textsuperscript{57} These offenses are punishable as class D felonies, see \textit{supra} note 54, which carry a maximum imprisonment for up to seven years as to individuals, and as to corporations a fine of up to $10,000. \textit{N.Y. Penal Laws} §§ 70.00, 80.10 (McKinney 1975).

\textsuperscript{58} Ferber implied that "the very fabric of the First, Fifth and Fourteenth Amendments of the United States Constitution . . . would be shredded by upholding" the statute which he claimed was "overly broad, vague, irrational, arbitrary, serves no legitimate state interest, is penally excessive and violates the doctrine of equal protection of the laws." 409 N.Y.S.2d at 635.

\textsuperscript{59} \textit{Id.} The court cited the United States Supreme Court cases of \textit{Ginsberg, Prince, Miller} and \textit{Paris Adult Theatre I}. See \textit{supra} notes 29-53 and accompanying text.
found the legislative purpose of section 263.10 to protect children\textsuperscript{60} to be valid, reasonable and rational.\textsuperscript{61} However, section 263.15 posed greater constitutional difficulties for Lang.

The intent of the legislature in passing section 263.15 was to prohibit a sexual performance by a child even if the performance is within a constitutionally protected context.\textsuperscript{62} Thus, under the statute, even in a work of obvious literary, artistic or scientific merit, a sexual performance by a child would be prohibited.\textsuperscript{63} The court balanced the right of freedom of expression against the right of the legislature to protect children against sexual exploitation and found the scale tipped in favor of the latter. The court noted that "the likelihood that children performing sexual intercourse or lewdly exhibiting their genitals would constitute an important part of a performance is highly remote."\textsuperscript{64} Lang found alternatives available for literary and artistic performances that called for the use of children performing sexual activities. Two alternatives suggested were using a juvenile over sixteen who looked younger, and simulation outside of the prohibitions of the statute.\textsuperscript{65}

\textsuperscript{60} "The purpose is 'To eliminate the sexual exploitation of children by establishing strict criminal sanctions against individuals who induce children to participate in sexual performances and who profit from the distribution of such material.'" 409 N.Y.S.2d at 636 (quoting Memorandum in Support A-3587-B, Assemblyman Lasher).


Section 1. Legislative declaration. The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.

The legislature further finds that the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act.

\textsuperscript{61} 409 N.Y.S.2d at 636.

\textsuperscript{62} "In essence this Article would make material containing children in sexual performances, \textit{no matter what the purpose}, against the public policy of the state." \textit{Id.} at 637 (quoting Memorandum in Support A-3587-B, Assemblyman Lasher) (emphasis in original).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id. But see} S. REP. No. 438, 95th Cong., 1st Sess. 6 (1977), \textit{reprinted in} 1978 U.S. CODE CONG. & AD. NEWS 40, 49-50, in which it was stated that "the film 'The Exorcist' contains a brief scene in which a minor simulates masturbation" and "the film 'Romeo and Juliet' contains a brief scene in which a minor appears in the nude." Under the New York statute both of these films would be prohibited and their producers, distributors and exhibitors open to convictions with a penalty of up to seven years in prison.

\textsuperscript{65} 409 N.Y.S.2d at 637. \textit{But see infra} note 95.
Justice Lang logically reasoned that "it would seed [sic] anomalous for the state to be able to prohibit the employment of a child under sixteen from working as a stagehand but be prevented from prohibiting the use of that child to engage in sexual intercourse on stage."66 A jury subsequently acquitted Ferber of the obscenity charges under section 263.10, but found him guilty of both counts of promoting a sexual performance by a child under section 263.15.67

The conviction of Ferber by the Supreme Court of New York County, was unanimously affirmed without a written opinion by the Appellate Division of the New York Supreme Court.68 On appeal to the New York Court of Appeals, however, Ferber's conviction was reversed in a per curiam opinion.69 The court declared that the statute is "clearly aimed at books, films and other traditional forms of free expression" entitled to first amendment protection and thus suffers from overbreadth.70 The court recognized the state's legitimate interest in protecting the welfare of juveniles within its borders but "[t]o the extent the statute would purport to regulate the sexual performances of children throughout the world there is some question as to whether that goal ... necessarily comes within the police powers of the State of New York."71

The court also found the statute "strikingly underinclusive"72 in that the severe penalties imposed by the statute are reserved for producers and distributors of nonobscene materials featuring adolescent sex and do not apply to the producers and distributors of materials "in which a child has performed a dangerous stunt" or activity "dangerous to the health or well-being" of a child em-

66. 409 N.Y.S.2d at 637.
67. People v. Ferber, 439 N.Y.S.2d 863, 864 (1981). Ferber was sentenced to 45 days in jail. 50 U.S.L.W. at 5079 n.3.
68. People v. Ferber, 74 A.D.2d 558 (N.Y. 1980).
69. The contentions by Ferber on appeal were: (a) § 263.15 is unconstitutional because it omits the constitutional requirement that a child's sexual performance be obscene; (b) prejudicial comments made by the prosecution during the summation denied the defendant his right to a fair trial guaranteed by the sixth and fourteenth amendments; and (c) the trial court committed reversible error in shifting the burden of proof when it refused to charge the jury that the prosecution had to prove, beyond a reasonable doubt, that the players in the films were under the age of sixteen. 52 N.Y.2d 674, 675 (1981). The Court of Appeals dealt with only the first contention.
70. 439 N.Y.S.2d at 865, 866. The court's interpretation of the statute to reach books flies in the face of the language of the statute, since under § 263.00(4) performance is limited to visual materials, and is contrary to the intent of the legislature. See supra notes 54, 60.
71. 439 N.Y.S.2d at 866.
72. Id. (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 214).
ployee. This is discrimination on the basis of content, according to the court, "and since no justification has been shown for the distinction other than special legislative distaste for this type" of material, the statute is unconstitutional.

The granting of certiorari to Ferber's case provided the basis for the United States Supreme Court's "first examination of a statute directed at, and limited to depictions of sexual activity involving children." Justice White authored the opinion of the Court which reversed the New York Court of Appeals. White took judicial notice of the nationwide child pornography problem and the federal and state legislation enacted to combat it. The Court was persuaded that the states are entitled to greater leeway in the regulation of child pornography for five reasons: (a) "a state's interest in 'safeguarding the physical and psychological well being of a minor' is 'compelling;'' the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children;" (c) the distribution of "child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation;" (d) the value of allowing live or visual performances of "children engaged in lewd sexual conduct is exceedingly modest, if not de minimis;" and (e) excluding child pornography from first amendment protection is not incompatible with the Court's precedents.

73. Id. However, underinclusive classifications, i.e. those which do not include all who are similarly situated with respect to a law, are constitutionally invalid only when "the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Mathews v. De Castro, 429 U.S. 181, 185 (1976) (quoting Helvering v. Davis, 301 U.S. 619, 640 (1937)). "The state [is] not bound to deal alike with all . . . classes, or to strike at all evils at the same time or in the same way." Semler v. Dental Examiners, 294 U.S. 608, 610 (1935). See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Fullilove v. Klutznick, 448 U.S. 448 (1980); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).

74. Id.

75. 50 U.S.L.W. at 5079.


77. 50 U.S.L.W. at 5078.

78. Id. at 5080 (quoting Globe Newspapers v. Superior Court, 50 U.S.L.W. 4759 (U.S. June 23, 1982)). See supra note 26 and accompanying text.

79. 50 U.S.L.W. at 5081.

80. Id. at 5081-82.

81. Id. at 5082.

82. Id.
In explaining the first reason for upholding the constitutionality of the New York statute, White declined to second-guess the legislative judgment of New York that "there has been a proliferation of exploitation of children as subjects in sexual performances." White concluded, from legislative judgment and relevant literature, that children used in pornography are physiologically, emotionally and mentally harmed by the participation.

Turning to the second justification for upholding the statute, White declared that there was a link between the distribution of child pornography and the sexual abuse of children in two ways. One way is that once a child's sexual performance is reduced to a permanent visual record, the harm to the child is exacerbated by the circulation of that record. The second way is that, since production of these materials is a low profile, clandestine business, it is extremely difficult to apprehend the producers, but by closing the producers' distribution network the economic incentive to produce these materials will dry up, resulting in a decrease in production.

The Court acknowledged that the states could set their own standards for prohibiting obscene child pornography. Nevertheless, the Court also found that the first amendment does not restrict a state from prohibiting nonobscene child pornography. The Court compared the test for child pornography to the Miller standard:

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

83. Id. at 5080; 1977 N.Y. Laws 910 See also supra note 60.
84. 50 U.S.L.W. at 5080-81 & n.9.
85. Id. at 5081.
86. Id. at 5081. See id. at 5078 n.2 for those statutes that require material to be found obscene and those that do not before it can be prohibited.
87. Id. at 5081. The Court rejected the Miller test as follows: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." Id. at 5082.
The *Miller* test was rejected because the Court decided that it was not related to the issue of whether a child was abused, mentally or physically, in the production of pornographic material. Applying the *Miller* test to child pornography would not stop child abuse in this area. A child could be abused and harmed through the production of pornographic materials that would be protected speech under *Miller*. Thus, the Court reasoned that to prevent the type of child abuse addressed by the statute in question, the *Miller* test would have to be set aside when analyzing a child pornography statute.\(^8\)

The dismissal of the *Miller* standards left the states free to suppress child pornography as they saw fit.\(^9\) But White quickly put limits on the regulation of unprotected child pornography. First, the conduct prohibited must be adequately defined by the language of the applicable statute or by the interpretation put on the statute by the state courts.\(^10\) The Court found the New York statute's prohibitions to be adequately defined as to the work prohibited (visual), the age of the performers (under sixteen), and the type of sexual conduct (actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse and lewd exhibition of the genitals). Second, some element of scienter must be required on the part of the accused.\(^11\) The New York statute required the scienter of "knowing" or awareness.\(^12\) Third, only live performances or visual reproductions of live performances are not constitutionally protected.\(^13\) Thus, written descriptions of the statutorily proscribed activities banned by a statute are constitutionally protected if they are not obscene.

The *Miller* test remains applicable to sexual child performances that are not live or are not visual reproductions of live performances. This would seem to include books, magazines, pamphlets,

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88. *Id.*
89. State statutes are restricted in their reach by the federal constitution and by the applicable state constitution. This note will only deal with the restrictions placed upon child pornography statutes by the federal constitution.
90. *Id.* at 5082.
91. *Id.*
92. "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." N.Y. PENAL LAW § 15.05(2) (McKinney 1975).
93. 50 U.S.L.W. at 5082. *But see supra* note 70 and accompanying text. It is indeed perplexing how White could ignore the statutory interpretation put on the statute by the highest court in the state of New York. Hypothetically, if the statute was used against a book, as it could under the statutory interpretation of the New York Court of Appeals, then White's opinion could be used to strike down that use as unconstitutional.
advertisements and oral recordings. The limiting of these statutes prohibiting nonobscene child pornography to visual materials is logical since the purpose of these statutes is to protect the welfare of children. No child is abused when an author describes the activities prohibited by the New York statute. Thus, if the purpose of the statute is to protect children, there would be no reason to prohibit nonobscene, nonvisual material describing the activities listed in the statute.

In explaining the third justification for upholding the New York statute, i.e., that distribution of child pornography provides an economic motive for the illegal activity of production, the Court declared that the constitutional freedoms of speech and press do not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute." Here the Court is allowing the states to attempt to hinder the producers of child pornography by disrupting, and hopefully shutting down, their distribution network. If the state cannot punish the elusive producers by criminal penalties, then the state can economically punish them by drying up their outlets to the purchasing public.

Justice White's fourth reason for sustaining the New York statute is that the first amendment value of permitting child pornography is modest, if not non-existent. White, echoing the trial court, observed that "if it were necessary for literary or artistic value" for a juvenile to engage in sexual conduct "a person over the statutory age who perhaps looked younger could be utilized." Another alternative could be "[s]imulation outside of the prohibition of the statute." The Court's allowance of these alternatives demonstrates that the purpose of these prohibitions on nonobscene, visual child pornography is to protect the welfare of children and not merely an attempt to suppress the nonobscene sexual media in

94. 50 U.S.L.W. at 5082 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). Writing cannot be an integral part of a violation of the New York child pornography statute in question, since nonobscene writing cannot be constitutionally prohibited under the statute. See supra note 93 and accompanying text.

95. Id. The Court does not give its opinion on the constitutionality of state child pornography statutes that define a child as a person under age sixteen or who appears as a prepubescent. Illinois, Nebraska and Indiana have such provisions. See ILL. REV. STAT. ch. 38, § 11-20a (1978); NEB. REV. STAT. § 28-1463 (1979); IND. CODE §§ 35-30-10.1-2 to -3 (1979).

If the statutes are intended to protect minors from the ill effects of engaging in child pornography, that purpose would not appear to be served by the extended provisions of these statutes since no minors would be involved. It therefore would seem possible that the Court would strike down these provisions as overbroad.

96. Id.
The final justification for upholding the New York law was that in doing so, the Court followed precedent. The Court regarded the statute in question as a content-based classification of speech and thus utilized a balancing test to determine its constitutionality. The Court found that within the confines of the given classification of child pornography, the restricted evil of the sexual abuse and exploitation of children so overwhelmingly outweighs the expressive interests at stake, that no process of case-by-case adjudication is required to prove that child abuse occurred in the production of the material involved in the prosecution.

Turning to the question of the alleged underinclusiveness of the statute in question, White held that, since section 263.15 deals with material not entitled to first amendment protection, there is nothing unconstitutionally underinclusive about singling out this category of material for proscription. Since child pornography “as defined in § 263.15 is unprotected speech subject to content-based regulation,” it cannot be underinclusive or unconstitutional for a state statute to single out child pornography while failing to regulate other protected speech which creates the same alleged risk. This was a direct reference to the language of the New York Court of Appeals, as was the Court’s statement that the first amendment does not bar the state from prohibiting the distribution of unprotected materials produced outside the state.

Justice White next focused his attention on the issue of the alleged facial overbreadth of the statute. Ferber alleged that because the statute would forbid the distribution of material with serious literary, scientific or educational value, or material which does not threaten the harm sought to be combatted by the state, the statute is unconstitutionally overbroad on its face. He won with this challenge in the New York Court of Appeals, as was the Court’s statement that the first amendment does not bar the state from prohibiting the distribution of unprotected materials produced outside the state.

Even though Ferber’s activity could be constitutionally regulated, he could attack the statute as invalid on its face. A comprehensive review of the overbreadth doctrine is beyond the scope of this note. For cases discussing facial overbreadth see Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), Broadrick v. Oklahoma, 413 U.S.
The Court has insisted that the facial overbreadth of a statute must be not only real but also substantial before it is declared unconstitutional on this basis, especially where conduct and not merely speech is involved.\textsuperscript{105} With the statute in question, White considered it to be "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications."\textsuperscript{106} The prohibition of protected expression which concerned the New York Court of Appeals, "ranging from medical textbooks to pictorials in National Geographic,"\textsuperscript{107} amount to no more than a tiny fraction of the materials within the state's reach, reasoned White.\textsuperscript{108} Whatever overbreadth does exist in section 263.15 should be cured through case-by-case analysis of the fact situation.\textsuperscript{109}

Justice Brennan, writing for himself and Justice Marshall, concurred in the judgment. However, Brennan stressed that the "application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific or medical value, would violate the First Amendment."\textsuperscript{110} Brennan stated that the value of these depictions of children, vis-a-vis the first amendment, that are themselves serious contributions to art, literature, or science, is simply not \textit{de minimus} by definition and "[a]t the same time, the State's interest in suppression of such materials is likely to be far less compelling."\textsuperscript{111} In the absence of particular harm to juveniles, Brennan believed the state lacked the power to suppress nonobscene sexually oriented materials.\textsuperscript{112}

Justice Stevens concurred in the judgment of the Court but believed that a more conservative statute would adequately protect the state's interest in protecting the welfare of its children and cause less harm to the constitutional guarantee of free expres-

\textsuperscript{105} 50 U.S.L.W. at 5084.
\textsuperscript{106} Id. at 5085.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id. (quoting Broadrick v. Oklahoma, 413 U.S. 601 (1973)). Since there was no argument that the films sold by Ferber do not fall squarely within the category of activity defined as unprotected, there was no need for the Court to make an independent examination of the films to assure itself that its decision did not constitute a prohibited intrusion on the field of free expression. Id. at 5085 n.28.

Justice O'Connor's concurring opinion will not be discussed because she merely reemphasized portions of White's opinion.

\textsuperscript{110} Id. at 5086 (Brennan, J., concurring).
\textsuperscript{111} Id.
\textsuperscript{112} Id.
Stevens constructed a hypothetical in which a foreign film as a whole constituted a serious artistic work, but contained an individual scene of a child that was plainly lewd if shown in isolation. Under White's opinion, Stevens argued, the New York statute could constitutionally prohibit the distribution and exhibition of this film because of that one scene. Stevens did not declare that the New York statute was unconstitutionally overbroad but said he would wait for a concrete factual situation, similar to his hypothetical, before ruling the statute invalid due to overbreadth.

IV. CONCLUSION

Ferber can be seen as a case dealing with the definition of obscenity, the power of the states, or a combination of both. The case was argued on the obscenity issue in the New York courts. But when the Supreme Court dealt with the case, it decided that the case was outside of the obscenity field and analyzed it in light of the competing individual's interest in personal freedoms and the state's interest in protecting the welfare of children.

The Supreme Court has freed the hands of the states from the binds of Miller to better combat child pornography and protect the welfare of children. Could this be the beginning of the end for nonobscene, sexually explicit materials generally receiving first amendment protection? A state is still limited in some ways in its fight to protect its children from sexual exploitation. Balancing on the one hand the Court's recent concern for protecting freedom of expression, even if it involves sexually explicit material, and on the other hand its long standing concern for the welfare of children and the states' role in protecting that welfare, the Ferber decision does not seem to be a springboard for further inroads into first amendment freedoms. The Court balanced the two interests and found the states' interests to be the more compelling.

As a result of the emphasis placed on child welfare balanced against the first amendment concerns, Ferber should toll the de-

113. Id.
114. Id. See supra note 64.
115. One commentator has stated that there is a possibility that "obscenity guidelines will follow the road of the search warrant requirement — an idealist restriction on government power rendered lame by the myriad exceptions." Note, Child Pornography Legislation, 17 J. Fam. L. 505, 543 (1979).
116. See supra notes 89-93 and accompanying text.
117. See supra notes 11-25 and accompanying text.
118. See supra notes 26-53 and accompanying text.
mise of any state child-pornography statute which prohibits the use of persons who appear as prepubescents in nonobscene mate-
rial but who have reached majority. If the statutes are intended to protect minors from the ill effects of engaging in child pornography, that purpose would not be served by the extended provisions of these statutes since no minors would be involved. It therefore would seem probable that the Court would strike down these pro-
visions as overbroad.

The most important constitutional issue about the enforcement of child pornography statutes is in regards to material of literary, artistic, scientific and medical importance which incorporates within it at least one photograph of a child in violation of the applicable statute. Will the suppression of that work, merely because of a single photograph of a child engaging in sexual conduct as defined by the statute, be a serious blow to first amendment free-
doms? In the words of Justice White, it is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."

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119. See supra note 95 and accompanying text.
120. See supra note 64 and accompanying text.
121. 50 U.S.L.W. at 5082.