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New York v. Ferber: Compelling Extension of First Amendment Infringement

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NOTES

NEW YORK V. FERBER: COMPELLING EXTENSION OF FIRST AMENDMENT INFRINGEMENT.

INTRODUCTION

In *New York v. Ferber,*[1] the United States Supreme Court conducted its first inquiry into the constitutionality of a statute "directed at and limited to depictions of sexual activity involving children."[2] Paul Ferber, owner of a Manhattan bookstore specializing in sexually oriented material, sold two films to an undercover police officer. The films chiefly depicted young boys masturbating. Ferber was indicted under New York statutes regulating child pornography.[3] Ferber was subsequently acquitted of the section 263.10 charge, which required a finding that the material at issue be obscene, and convicted under section 263.15, for which no proof of obscenity was required.[4] The Appellate Division of the New York State Supreme Court affirmed the conviction without opinion.[5]

The New York Court of Appeals reversed, finding section 263.15 violative of the first amendment.[6] The court reasoned that given a different penal code section's explicit inclusion of an obscenity requirement, the statute employed to convict the defendant impliedly regulated only nonobscene child pornogra-

1. New York v. Ferber, 102 S. Ct. 3348 (1982).
2. *Id.* at 3353.
3. The trial judge rejected Ferber's first amendment attack on the two sections in denying a motion to dismiss the indictment. 96 Misc. 2d 669, 409 N.Y.S.2d 632 (1978).
4. *See* notes 24 and 25, *supra.*
5. 72 A.D.2d 558, 424 N.Y.S.2d 967 (1980).
6. 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981).

phy.[7] As the traditional standard for exclusion from first amendment protection is predicated on a finding that the material at issue be obscene, the court concluded that the statute in question targeted a form of expression entitled to first amendment protection.[8]

The United States Supreme Court disagreed with the New York Appellate Court's decision, upholding the constitutionality of the statute on the grounds that the state's interest in protecting the welfare of its youth outweighed any first amendment interests at stake.[9] Given that the defendant was prosecuted under a statute which did not require that the proscribed depiction be obscene, the United States Supreme Court's opinion marked a clear departure from the obscenity standard previously used for determining first amendment applicability.[10] Particularly important in this regard is the Court's lack of reverence for constitutional sanctity when concerning state regulation of child pornography. The state's interest in providing for the health and well-being of its youth may currently, under the appropriate circumstances, be so overwhelming as to deny an individual rights heretofore available under the first amendment. This note seeks both to define the particular forms of expression involving juveniles which, according to the Court, do not warrant constitutional protection, and to question the Court's rationale in setting precedent which narrows the scope of the first amendment.

Obscenity and the First Amendment Prior to *Ferber*

In *Chaplinsky v. New Hampshire*,[11] the United States Supreme Court recognized that particular well-defined areas of expression are not entitled to constitutional protection.[12] For the first time the Court clearly articulated that obscenity is outside the realm of constitutionally protected expression, reasoning that the societal and moral interest in regulating obscene material clearly outweighs any social value possibly derived from the

7. *Id.* at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865.

8. *Id.*

9. 102 S. Ct. at 3357.

10. *Id.*

11. 315 U.S. 568 (1942).

12. "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 problems. These include the lewd and obscene . . . ." *Id.* at 572.

lawful existence and dissemination of such material.[13]

The Supreme Court again refused first amendment protection for obscenity in *Roth v. United States,*[14] stating that speech without socially redeeming value had historically, albeit implicitly, been excluded from constitutional protection.[15] Yet, in a subsequent case the Court was unable to evade "the intractable obscenity problem."[16] Despite the judicially formulated rule that obscenity is utterly without social value and, therefore, beyond the auspices of the first amendment, there remained the question of which materials and activities were "obscene."

In *Miller v. California,*[17] the Supreme Court voiced new guidelines for the purpose of excising obscene material from first amendment protection. Acknowledging "the inherent dangers of undertaking to regulate any form of expression,"[18] the Court modified the per se rule of *Roth,* which exempted all obscene forms of expression from constitutional coverage, and asserted the need for substantive limitations on the permissible scope of regulation. The Court stated that "a state offense must also be limited to 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."[19] While imposing these limitations, the Court also shifted its standard from "utterly" without social value to without "serious" social value. This shift was most significant in that it reflected the Court's increasing willingness to tamper with its social value inquiry and, in so doing, restrict first amendment applicability.

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13. *Id.*

14. 354 U.S. 476 (1957).

15. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.

Id. at 485.

16. Interstate Circuit, Inc. V. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J.).

17. 413 U.S. 15 (1973).

18. *Id.* at 23.

19. *Id.* at 24.

Ferber: THE NEW YORK OPINION

The initial issue before New York Court of Appeals was the appropriateness of the defendant's overbreadth attack. The court noted that where first amendment rights are at issue, a party may generally challenge the constitutionality of a statute "on its face," despite the fact that the party's own rights are not violated under the particular circumstances of the case.[20] The court acknowledged the view stated in *Broadrick v. Oklahoma,*[21] that an overbreadth attack is more stringent in its application to conduct than to "pure speech."[22] Nevertheless, the court chose to view the statute as being aimed at "traditional forms of expression,"[23] thereby allowing the defendant to challenge the statute's constitutionality.

The court of appeals began its substantive inquiry by considering whether section 263.15 regulated expression traditionally entitled to protection under the first amendment.[24] After finding that a companion provision directly prohibited the knowing dissemination of obscene material, the court concluded that section 263.15 specifically targeted nonobscene material.[25] Hence, the court found that the statute prohibited the promotion of materials traditionally afforded constitutional protection.[26]

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20. 52 N.Y.2d at 677, 422 N.E.2d at 524, 439 N.Y.S.2d at 864-65, citing Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973), (first amendment concerns compel the adjudication of overbreadth challenges).

21. 413 U.S. 601 (1973).

22. 52 N.Y.2d at 677, 422 N.E.2d at 524, 439 N.Y.S.2d at 864-65, citing 413 U.S. at 614-15. *See* note 62, *supra.*

23. *Id.* at 677, 422 N.E.2d at 524, 439 N.Y.S.2d at 864-65.

24. "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." N.Y. PENAL LAW § 263.15 (West 1980). "Promote means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, prevent, exhibit or advertise, or to offer or agree to do the same." *Id.* at § 263.5. "Sexual performance means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." *Id.* at § 263.1. "Sexual conduct means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* at § 263.3.

25. 52 N.Y.2d at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865. "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 performance which includes obscene sexual conduct by a child less than sixteen years of age." N.Y. PENAL LAW § 263.10 (West 1980).

26. 52 N.Y.2d at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865.

The court continued by recognizing that "First Amendment rights are not absolute and may on occasion be outweighed by superior government interests."[27] It further asserted that "[t]he State has a legitimate interest in protecting the welfare of minors within its borders, and, at times, that interest may transcend first amendment concerns."[28] As section 263.15 sought to regulate the depiction of juvenile sex without regard for the jurisdiction in which those depictions were recorded, the court found the statute to be overbroad in its application.[29] To the extent that the New York Legislature's purpose in enacting section 263.15 was interpreted by the court as the protection of adolescents from danger to their health and well-being, the court found the statute to be underinclusive on the ground that it didn't uniformly accomplish its purpose.[30] That is, the statute discriminated against sexually oriented types of juvenile abuse.

THE UNITED STATES SUPREME COURT OPINION

Justice White, delivering the unanimous opinion of the Court, began by asserting that the New York Court of Appeals proceeded on the assumption that the guidelines espoused in *Miller* applied when ascertaining the constitutionality of child pornography laws.[31] The Court observed that "[t]he Miller standard, like its predecessors, was an accommodation between the State's interest in protecting the sensibilities of unwilling recipients from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws."[32] Prefacing its departure from the *Miller* standard, the Court expressed its conviction that "states are entitled to greater leeway in the regulation of pornographic depictions of children."[33] The Court subsequently engaged in a five-point analysis in support of its conclusion.

In its first point the Court affirmed that states have a "compelling" interest in "safeguarding the physical and psychological

27. *Id.*
28. *Id.* at 679, 422 N.E.2d at 525-26, 439 N.Y.S.2d at 866.
29. *Id.* at 677, 422 N.E.2d at 526, 439 N.Y.S.2d at 864-65.
30. *Id.* at 679-80, 422 N.E.2d at 526, 439 N.Y.S.2d at 866.
31. 102 S. Ct. at 3352.
32. *Id.* at 3353.
33. *Id.*

well-being of a minor."[34] As authority for its determination the Court cited pertinent common law developments,[35] as well as the New York State Legislature's findings on the subject.[36] Moreover, the opinion found that according to both legislative findings and relevant literature, "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[37]

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34. *Id.*, citing Globe Newspapers v. Superior Court, 102 S. Ct. 2613 (1982).

35. The Court began with the premise that "a democratic society rests, for its continuance, upon a healthy well-rounded growth of young people into full maturity as citizens." *Ferber*, 102 S. Ct. 3354, citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944). Further, the Court referred to situations in which the state's interest in protecting the well-being of minors was sustained notwithstanding adverse effects on free speech. *See* FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944).

36. There has been a proliferation 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 on the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.

N.Y. PENAL LAW, ch. 910 § 1 (McKinney 1977). The legislature additionally found:

[T]he 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.

Id.

37. The use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole. S. Rep. No. 95-438, p. 5 (1978). It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. Schoettle, Child Exploitation: A Study of Child Pornography, 19 J. Am. Acad. Child Psych. 239, 296 (1980); . . . Schoettle, Treatment of the Child Pornography Patient, 137 Am. J. Psych. 1109, 1110 (1980); Dansen-Gerner, Child Prostitution and Child Pornography: Medical, Legal and Societal Aspects of the Commercial Exploitation of Children, reprinted in U.S. Dept. of Health and Human Services, Sexual Abuse of Children: Selected Readings at 80 (1980) . . . (sexually exploited children pre-disposed to self-destructive behavior such as drug and alcohol abuse or prostitution). See generally A. Burgess & L. Holmstrom, Accessory-to-Sex: Pressure, Sex and Secrecy, in Burgess, Sexual Assault of Children and Adolescents 85, 94 (1978); V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults, 169 (1969); Ellerstein & Canavan, Sexual Abuse of Boys, 134 Am. J. Diseases of Children 255, 256-257 (1980); Finch, Adult Seduction of the Child:

In its second point, the Court declared that the distribution of recorded sexual performances involving children is inherently associated with the exploitation and abuse of children in at least two ways.[38] First, the dissemination of materials depicting sexual performances of children exacerbates the harmful effects upon those children stemming from the existence of a permanent record of their acts. Second, the opinion stated that channels of circulation must be closed in order to effectively curtail the abuse of children targeted by the statute.[39]

The majority ended its discussion on distribution by explicitly rejecting application of the *Miller* standard in the realm of child pornography.[40] The Court affirmed the state's contention that the *Miller* standard is not dispositive given the state's compelling interest in protecting the welfare of its youth.[41] The Court noted that whether the work as a whole appeals to the prurient interest in sex, whether the specific depictions are patently offensive or whether the work as a whole contains serious social value, bears no significance when ascertaining the harm suffered by juvenile participants.[42]

The third point involved the advertising and selling of child pornography. The Court essentially stated that freedom of speech cannot be at issue where the expression challenged is part of an effort to promote illegal commercial activity.[43] The

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> Effects on the Child, 7 Med. Aspects of Human Sexuality 170, 185 (1973); Groth, Sexual Trauma in the Life Histories of Rapists and Child Molestors, 4 Victimology 10 (1979). Sexual molestation by adults is often involved in the production of child sexual performances. Sexual Exploitation of Children, A Report to Illinois General Assembly by the Illinois Legislative Investigatory Comm'n at 30-31 (1980) . . . When such performances are recorded and distributed, the child's privacy interests are also invaded.

102 S. Ct. at 3355.

38. *Id.*

39. The Court noted that thirty-five states and Congress have concluded that such restraints on distribution are required to effectively combat child pornography. *Id.*

40. The Court referred to the defendant's argument that the prohibition of distributing obscene materials would suffice as a means of combating child pornography. *Id.* at 3357. Yet, why the *Miller* standard should be explicitly rejected within the context of distribution controls is unclear.

41. *Id.* at 3357.

42. *Id.* at 3357-58.

43. "It has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in

opinion additionally noted that, as with the distribution, the regulation of advertising and selling was necessitated by the lack of enforceable production laws.[44]

In its fourth point, the Court stated, "The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis."[45] In dismissing any question as to whether the statute proscribed a particular literary theme, the Court observed that various alternatives to using children in sexual portrayals would not result in the censorship of socially valuable expression on the subject of children and sexuality.[46] The Court concluded that "[t]he First Amendment interest is limited to that of rendering the portrayal somewhat more realistic by utilizing or photographing children."[47]

In its fifth and final point, the Court found, "Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."[48] The opinion added that it was not rare to accept the constitutionality of content-based proscription, where within the confines of the classification the evil to be restricted overwhelmingly outweighed any expressive interest at stake.[49] In concluding, it found that "[w]hen a definable class of material, such as that covered by section 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these

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violation of a valid criminal statute." Gibony v. Empire Storage & Ice. Co., 336 U.S. 490, 498 (1949).

44. 102 S. Ct. at 3357.

45. *Id.*

46. > We consider it 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. As the trial court in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside the prohibition of the statute could provide another alternative.

Id.

47. *Id.* at 3357-58.

48. *Id.* at 3358.

49. *Id.*

materials as without the protection of the First Amendment."[50]

The Court enunciated limitations on state regulation of child pornography by means of amending the *Miller* standard:

> The *Miller* formulation is adjusted in the following respects: a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; the material at issue need not be considered as a whole.[51]

The Court noted that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[52] The Court also imposed a requirement of scienter on the part of the defendant for the imposition of criminal responsibility.

Concerning the statute's alleged underinclusiveness, the majority recognized early in the opinion that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[53] After holding that section 263.15 sufficiently defines the constitutionally unprotected material subject to regulation, the Court concluded that "there is nothing unconstitutionally underinclusive about a statute that singles out this category of material for proscription."[54]

The Court began its examination of the defendant's overbreadth challenge by reciting the traditional rule that a person to whom the statute may be applied cannot challenge the statute on the grounds that it may unconstitutionally apply to others.[55] The Court pointed to its recognition in *Broadrick* of "two cardinal principles of constitutional order,"[56] namely, the personal

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 3355.
54. *Id.* at 3359.
55. *Id.* at 3360, citing United States v. Raines, 362 U.S. 17, 21 (1960); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937); Yazoo & M.N.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912).
56. 102 S. Ct. at 3360.

nature of constitutional rights,[57] and the "prudential limitations" with respect to constitutional adjudication.[58] The Court added that the prudential limitations both allow the Court to focus on individual factual settings and give the state courts the opportunity to construe statutes in order to avoid constitutional conflicts.[59]

As an exception to the traditional rule, the opinion found that the first amendment overbreadth doctrine is justified only by "weighty countervailing policies."[60] One such weighty countervailing policy is the fear of self-censorship.[61] The Court voiced its concern for the far reaching implications of striking a statute on its face, and noted that the overbreadth doctrine had previously been employed with hesitation, and then "only as a last resort."[62]

The Court accordingly found that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate

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57. *Id.* citing McGowan v. Maryland, 336 U.S. 420, 429 (1961).

58. In addition to prudential restraints, the traditional rule is grounded in Article III limits on the jurisdiction of federal courts to actual cases and controversies. This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied."

102 S. Ct. at 3360, citing United States v. Raines, 362 U.S. 17, 21 (1960); Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885).

59. 102 S. Ct. at 3360.

60. *Id.* at 3361, citing United States v. Raines, 362 U.S. 17, 22-23 (1960) (an act of Congress shall not be declared unconstitutional with reference to hypothetical cases).

61. 102 S. Ct. at 3361, citing Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980) (in first amendment contexts the courts are inclined to entertain overbreadth challenges in order to protect against inhibition chilling free speech); Gooding v. Wilson, 405 U.S. 518, 521 (1972) (overbreadth challenge deemed necessary to prevent chilling of rights for fear of criminal sanctions).

62. 102 S. Ct. at 3361, citing 413 U.S. at 613 (enforcement of statutes difficult due to a wide range of constitutional challenges).

sweep."[63] The opinion further found, as intimated in *Broadrick*, that the requirement of substantial overbreadth extended "at the very least" to situations involving conduct plus speech.[64] That the overbreadth must be substantial applies to both civil and criminal prohibitions, as well as in actions seeking declaratory relief.[65] One additional limitation noted by the Court requires that, in potentially severable, impermissibly overbroad statutes, only that portion found unconstitutional is to be invalidated.[66]

In applying these standards for overbreadth, the majority held that section 263.15 was not substantially overbroad.[67] With regard to the New York Court of Appeal's holding that the regulation of child pornography outside state borders is not within the police powers of the state, the United States Supreme Court concluded simply that the state may prohibit the distribution of unprotected materials produced outside the state consistent with the first amendment.[68]

In finding that section 263.15 didn't unduly encroach upon first amendment rights, the Court viewed the statute as one whose "legitimate reach dwarfs its arguably impermissible applications."[69] The Court acknowledged that while the statute was directed at the "hard core of child pornography," a legitimate concern was raised with respect to medical tests and other educational materials. Nevertheless, the Court questioned how often it would be necessary to employ children to accommodate educational purposes, and further suggested that the statute's impermissible applications amount to only a "tiny fraction" of the materials covered under the statute.[70] Finally, the opinion found

63. 102 S. Ct. at 3362, citing 413 U.S. at 615.

64. 102 S. Ct. at 3362. The Supreme Court's analysis thus differed from that of the Court of Appeals, in that the latter chose to view the statute as directed at "pure speech," and in so doing facially invalidated the statute without a finding that the overbreadth involved was substantial.

65. 102 S. Ct. at 3363, citing Parker v. Levy, 417 U.S. 733, 760 (1974) (extension of standing in first amendment cases should be less lenient in the military context).

66. 102 S. Ct. at 3361, citing United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (upholding constitutionality of various statutory provisions banning obscene materials, despite existence of unconstitutional provisions under same act).

67. 102 S. Ct. at 3363.

68. *Id.* at 3359.

69. *Id.* at 3363.

70. *Id.*

that any existing overbreadth of section 263.15 "should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[71]

Concurring Opinions

Justice O'Connor, concurring in the opinion, stressed that the Court's holding did not require New York to exempt material with serious social value, and suggested that the compelling interests may permit the state to constitutionally regulate forms of expression without regard for their social value.[72] She further noted that the audience's appreciation of the expression is quite irrelevant to the state's interest in protecting minors from sexual exploitation.[73] An exception for depictions with serious social value would, according to Justice O'Connor, actually increase the probability of content-based censorship disfavored by the first amendment. She added that the statute did not seek to censor all expression of child pornography, but only censored that expression in which children were engaged for the proscribed illicit purposes.[74]

In discussing the overbreadth challenge, Justice O'Connor suggested that the New York statute may be overbroad on the grounds that it bars depictions which don't threaten the harms identified by the Court.[75] Nonetheless, she also deferred any further inquiry, stating that the potential overbreadth was insufficiently substantial to warrant facial invalidation of the statute.[76]

Justices Brennan and Marshall, concurring in the judgment, agreed with the majority in finding that the state is afforded greater leeway in regulating pornography, the promotion of which harms children.[77] They added that the state does not have such leeway when protecting consenting adults from such material.[78] The two Justices also voiced the opinion that regulation of

71. *Id.*, citing 413 U.S. at 615-16 (Court deferred on overbreadth inquiry where political activists challenged constitutionality of state merit system act).

72. *Id.* at 3364.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 3365, citing *Ginsberg*, 390 U.S. at 637, 638 n.6, 642-43 n.10; Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (Brennan, J.).

expression with serious redeeming social value would violate the first amendment, asserting that the state's interest in regulating depictions of sexually involved children is likely to be far less compelling where the depictions are serious contributions to art or science.[79] With respect to the overbreadth attack, the Justices agreed with the Court in that the tiny fraction of material with serious social value conceivably within the realm of the statute is insufficient to justify striking the statute by means of the overbreadth doctrine.[80]

Justice Stevens, concurring in the judgment, focused his opinion on the Court's mode of analysis with respect to the overbreadth challenge. After accepting as "clear" both the constitutionality of criminal prosecution for the defendant's conduct and the statute's reach into constitutionally protected areas of expression, Justice Stevens addressed the "critical" issue of the appropriateness of the overbreadth doctrine in a first amendment context. The Justice stated that an inquiry into first amendment protection demands consideration of both content and context,[81] and noted that the Court made an "empirical" judgment in concluding that impermissible application of the statute amounted to only a tiny fraction of material within the statute's reach.[82]

Justice Stevens labeled both the Appellate Court's and the Supreme Court's mode of analysis as extreme, explaining that while the Court's approach would deprive an entire film of constitutional protection based only on the existence of one lewd

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79. 102 S. Ct. at 3365.

80. *Id.*

81. *Id.*

82. The Court's analysis is directed entirely at the permissibility of the statute's coverage of non-obscene material. Its empirical evidence, however, is drawn substantially from congressional committee reports that ultimately reached the conclusion that a prohibition against obscene child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem. The Senate Committee on the Judiciary concluded that "virtually all of the materials that are normally considered child pornography are obscene under current standards," and that "in comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential."

Id. at 3365 n.4.

scene, the Appellate Court's approach in the same instance would require striking the entire statute on the ground of overbreadth.[83] In support of his refusal to entertain the overbreadth challenge, Justice Stevens asserted that adjudications involving concrete factual situations tend to be crafted with greater wisdom.[84] Alternatively, Justice Steven's own intermediate approach would refuse to apply the overbreadth doctrine, opting rather for case-by-case analysis.[85]

CRITIQUE

The Court enunciated the new test for child pornography only insofar as it may be compared to the *Miller* standard.

> The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.[86]

Referring directly to the *Miller* opinion, the Court stated that "[a] state offense must also be limited to 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."[87] Focusing on the third element of both the *Miller* and *Ferber* tests, i.e., whether the work is to be considered as a whole, one can only conclude from the specific language of the opinions that the *Ferber* Court's statement "and the material at issue need not be considered as a whole" refers to the social value inquiry. Hence, the new formula articulated in *Ferber* apparently would remove child pornography from first amendment protection, provided that the content to be regulated is adequately defined by state law, that sexual conduct in-

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83. *Id.* at 3367.
84. *Id.*
85. *Id.*
86. *Id.* at 3358.
87. 413 U.S. at 24.

volving children is portrayed, and that those depictions at issue lack serious literary, political, artistic, or scientific value.[88]

Notwithstanding the explicit articulation of the *Ferber* formula, intimations by the Court suggest an actual narrowing of the social value inquiry to the point of insignificance, thereby allowing for an even greater degree of first amendment infringement. The Court specifically restricted the first amendment interest to that of making the portrayals more "realistic" by utilizing children.[89] The Court added that the necessity of using children for the above-stated purpose probably would not arise often.[90] In conjunction, the Court found that "[w]hen a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[91] This statement suggests that the state's interest in protecting children from sexual exploitation will always be so overwhelming as to outweigh any expressive interest at stake, presuming the applicability of a narrowly defined statute. Hence, the *Ferber* formula essentially would remove all works containing actual sexual portrayals of children from the realm of first amendment protection.

The *Ferber* formula, including the aforementioned implications for its application, indicates an increasing willingness of the Court to sustain the constitutionality of statutes embodying compelling state interests, even where doing so would result in sacrificing the sanctity of the first amendment. The perimeters of this shift away from the approach of prior decisions may be perceived in the concurring opinions of Justice O'Connor and Justices Brennan and Marshall. In stressing that the Court did not hold that New York must excise material with serious social value from its statute, Justice O'Connor went so far as to suggest that compelling interests may allow the state to regulate expression without regard for its social value.[92] Conversely, Justice

88. 102 S. Ct. at 3358.
89. *Id.* at 3357-58.
90. *Id.* at 3357.
91. *Id.* at 3358.
92. *Id.* at 3359.

Brennan, with whom Justice Marshall joined, asserted that regulation of expression with serious social value would violate the first amendment.[93] Yet, even Justices Brennan and Marshall, traditionally first amendment enthusiasts, joined the majority in restricting the social value inquiry from the whole work to the specific portrayals prohibited by statute.[94]

The underlying reasons behind the Court's formulation of a new standard in the realm of child pornography may be viewed as twofold. Primarily, all members of the Court concurred that a state has a compelling interest in protecting its youth from sexual abuse and exploitation.[95] This interest may be distinguished from those arising in other first amendment challenges, in that the state seeks to protect a particularly vulnerable group of actors involved in the expression itself, rather than the viewers of the particular expression. Additionally, the expression herein concerned is overtly sexual, and while members of the Court previously have expressed reluctance to allow state regulation of purely sexual materials, the description of materials subject to censorship under section 263.15 indisputably verges on the ambit of obscenity, an area of expression transgressing any first amendment concerns.[96]

Despite rendering a judgment premised on sound underlying considerations, and one which is largely consistent with previous opinions in the area of first amendment litigation, the Court's analysis with respect to the social value inquiry revealed a disturbing departure from precedent. In *Roth v. United States*,[97] the Court resolved the social value inquiry by declaring obscenity to be that which is "utterly without redeeming social importance," stating further that "the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[98] In *Jacobellis v. Ohio*,[99] Justice Brennan

93. *Id.* at 3365.

94. *Id.*

95. The Court stated that it would not second-guess the legislative judgment. *Id.* at 3355.

96. Respondent's counsel conceded that a finding that the films are obscene would have been consistent with the *Miller* standard. *Id.* at 3365 n.1.

97. 354 U.S. 476 (1957).

98. *Id.* at 484, 487.

99. 378 U.S. 184 (1964).

wrote, "Nor may the constitutional status of the material be made to turn on a weighing of its social importance against its prurient appeal, for a work cannot be proscribed unless it is utterly without social importance."[100] Justice Brennan adhered to this position in *Memoirs v. Massachusetts*,[101] by stating that "a book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so though the book is found to possess the requisite prurient appeal to be patently offensive."[102] In *Miller v. California*,[103] the Court directed its inquiry to "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[104] Thus, the *Ferber* Court's narrowing of the social value inquiry to the specific sexual portrayals at issue represents a clear departure from the whole-work analysis of prior decisions.

This departure from the approach of prior decisions is unsettling because the Court is, in essence, denying first amendment guarantees to socially valuable expressions within a work also containing child pornography. As Justice Brennan observed in *Ferber*, "the limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly 'slight social value,' and the State has a compelling interest in their regulation."[105] By having traditionally focused its inquiry on the entire work, the Court had recognized that socially valuable expressions were to be afforded at least some weight when ascertaining whether constitutional protection extended to the work at issue. Presumably, the *Ferber* Court narrowed the social value inquiry to the individual portrayals in order to underscore the superiority of New York's compelling interest over any existing first amendment concerns. However, this was unnecessary in light of the Court's explicit use of a purported balancing test when it conclusively found the materials in *Ferber* to be without the protection of the first amendment. The Court's balancing test, and the implications for its use in the realm of child pornography, alone would have constituted sufficient grounds for upholding New

100. *Id.* at 191.
101. 383 U.S. 413 (1966).
102. *Id.* at 419.
103. 413 U.S. 15 (1973).
104. *Id.* at 25.
105. 102 S. Ct. at 3365.

York's statute against the first amendment challenge.[106] Thus, the *Ferber* Court's approach unnecessarily would have denied recognition of any constitutional protection to expressions with serious social value, had they existed.

Concerning the defendant's overbreadth challenge, the Court essentially concluded that the New York statute was not to be facially invalidated except on a determination of substantial overbreadth in its conceivable applications. In this respect, the Court expressed doubt as to whether the impermissible applications amounted to more than a tiny fraction of all applications under the statute. While having found the New York statute not substantially overbroad, the Court nevertheless failed to provide any guidelines for determining when a statute is substantially overbroad for the purposes of the overbreadth doctrine.

Justice Stevens would have refused to entertain an overbreadth challenge premised on first amendment concerns, opting rather to review only the facts of each case.[107] While thereby avoiding the problem of defining standards for substantial overbreadth, the implications of Justice Steven's approach admittedly are that a potentially overbroad statute would tend to result in a chilling of free speech because of self-censorship.[108] In support of his position, Justice Stevens minimized the adverse effects of self-censorship as compared to the broad, unambigious state-imposed censorship advocated by the majority.[109] Yet, self-censorship potentially could result in a significantly more serious chilling of free speech, primarily in situations involving highly overbroad statutes. Thus, whereas Justice Stevens disagreed with the majority and sought to afford "marginal speech," such as the portrayals in *Ferber*, some first amendment protection,[110] his refusal to apply the overbreadth doctrine in situations involving highly overbroad statutes would likely undermine his express intentions.

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106. *See* discussion and accompanying text, notes 88-96, *supra*, as to the *Ferber* formula and the implications of its application.

107. *See supra* note 82.

108. 102 S. Ct. at 3367.

109. *Id.*

110. *Id.* at 3367-68.

Justice O'Connor's overbreadth analysis, while consistent with the majority in requiring substantial overbreadth for facial invalidation, nevertheless focused on different factors when inquiring into the New York statute's conceivably impermissible applications. Justice O'Connor asserted that "it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court."[111] This is distinguished from the Court's statement that "[h]ow often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the section 263.15 in order to produce educational, medical or artistic works cannot be known with certainty."[112] The Court's reference to the necessity of employing children signified that it was looking to expressions with serious social value as providing instances of potential overbreadth. In limiting her overbreadth inquiry to ascertaining whether there would be a substantial number of occasions in which the state's compelling interest would be lacking, Justice O'Connor more aptly tailored application of the overbreadth doctrine to the underlying rationale of the holding in *Ferber*. That is, as it was the compelling interest of the state which, according to the *Ferber* formula, would remove all expressions containing child pornography from the scope of first amendment guarantees, only situations where such a compelling state interest would be substantially lacking would justify facial invalidation of the statute. Moreover, the type of situation contemplated by Justice Stevens as a reason for refusing to entertain the overbreadth challenge would be equally well incorporated into Justice O'Connor's analysis, albeit without sacrificing the overbreadth doctrine altogether.[113]

CONCLUSION

The United States Supreme Court's removal of child pornography from first amendment protection in *Ferber* was premised explicitly on the state's compelling interest in preventing

111. *Id.* at 3364.

112. *Id.* at 3363.

113. As a hypothetical of a potentially overbroad application, Justice Stevens offered the example of a foreign film containing child pornography, where the juvenile participant resided abroad. Justice Stevens noted that in such a case the state interest would be far less compelling than in the present case. *Id.* at 3366-67. Similarly, Justice O'Connor addressed a similar scenario as being an instance in which the compelling interests identified by the Court would not be triggered. *Id.* at 3364.

sexual abuse and exploitation of its youth. The analysis employed in *Ferber* may be distinguished from that in other cases raising first amendment issues, in that the majority of exceptions to first amendment applicability have been founded not on the strength of the state's interest in suppression, but rather upon a finding that the expression at issue lacked the socially valuable aspects promoted by the first amendment. The unanimous decision in *Ferber* suggests the Court's willingness to part from established modes of first amendment analysis in order to sustain the constitutionality of laws embodying compelling state interests.

While having found the prevention of child pornography a compelling state interest, and one which by definition was so overwhelming as to outweigh any expressive interests at stake, the Court nevertheless failed to provide any guidelines for determining when other state interests might also be so compelling. Thus, although the Court restricted the *Ferber* formula to application in the narrow realm of child pornography, the underlying rationale of the Court could be applied to other areas traditionally protected by the first amendment. The inherent risks of creating exceptions to fundamental legal principles, such as child pornography with respect to the first amendment, are that small encroachments may lead to significant erosions. Such a prospect is particularly alarming where the first amendment is concerned, an amendment which embodies principles central to both our system of law and government. Nevertheless, provided the state's interest is in fact as compelling as that of New York in *Ferber*, then first amendment infringement is not only compelling, but commendable.

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