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Constitutional Law - First Amendment - New York Statute Proscribing Distribution of Nonobscene Materials Depicting Minors Engaged in Sexual Conduct Does Not Violate the First Amendment because the Materials Are Outside First Amendment Protection and the Statute Is Not Substantially Overboard

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CONSTITUTIONAL LAW—FIRST AMENDMENT—NEW YORK STATUTE PROSCRIBING DISTRIBUTION OF NONOBSCENE MATERIALS DEPICTING MINORS ENGAGED IN SEXUAL CONDUCT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE THE MATERIALS ARE OUTSIDE FIRST AMENDMENT PROTECTION AND THE STATUTE IS NOT SUBSTANTIALLY OVERBROAD

New York v. Ferber (U.S. 1982)

In March 1978, Paul Ferber, the proprietor of a Manhattan bookstore which specialized in sexually oriented products, sold two films[1] depicting young boys engaged in sexual conduct.[2] Ferber was indicted under the New York Penal Laws[3] on two counts of promoting an obscene sexual performance by a child[4] and two counts of promoting a sexual performance by a child[5] in violation of the New York Penal Laws. A jury found him guilty of

1. New York v. Ferber, 102 S. Ct. 3348, 3352 (1982).

2. *Id.* Ferber made two separate sales to an undercover agent, one on March 5, 1978, and the second on March 7, 1978. New York v. Ferber, 96 Misc. 2d 669, 671, 409 N.Y.S.2d 632, 634 (Sup. Ct. 1978), *aff'd*, 74 A.D.2d 558, 424 N.Y.S.2d 967 (N.Y. App. Div. 1980), *rev'd*, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981), *rev'd and remanded*, 102 S. Ct. 3348 (1982). The films were each 10 minutes in duration. One depicted a boy masturbating, the other showed a group of boys engaged in sexual conduct. 96 Misc. 2d at 677, 409 N.Y.S.2d at 637.

3. 102 S. Ct. at 3352. Ferber was indicted under § 263 of the New York Penal Law, enacted in 1977. The legislature had declared its intentions with respect to § 263 as follows:

> 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.

Sexual Performances by Children, ch. 910, § 1, 1977 N.Y. Laws 1901.

4. 102 S. Ct. at 3352. Ferber was charged with two violations of § 263.10 of the New York Penal Laws. This section states, "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 *obscene* performance which includes sexual conduct by a child less than sixteen years of age." N.Y. Penal Law § 263.10 (McKinney 1980).

5. 102 S. Ct. at 3352. Ferber was charged with two violations of § 263.15 of the New York Penal Laws. This section states, "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 (McKinney 1980). Section

the latter two counts.[6] His convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court.[7] The New York Court of Appeals reversed, holding that the New York statute violated the first amendment because it was overbroad in that it prohibited promotion of materials not legally obscene, and thus impermissibly interfered with free speech.[8] On appeal, the United States Supreme Court reversed and remanded,[9] *holding* that the New York statute did not violate the first amendment because the materials involved were outside the scope of first amendment protection and the statute was not substantially overbroad. *New York v. Ferber*, 102 S. Ct. 3348 (1982).

Freedom of speech under the first amendment[10] has been called the most majestic guarantee under the Constitution.[11] This guarantee is appli-

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263 also provides definitions of terms used therein. A "sexual performance" is defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." *Id.* § 263.00(1). "Sexual conduct" is defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." *Id.* § 263.00(3). The statute defines "performance" as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." *Id.* § 263.00(4) (McKinney 1980). To "promote" is defined as "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." *Id.* § 263.00(5) (McKinney 1980).

6. 102 S. Ct. at 3352. Ferber was sentenced to 45 days in prison. *Id.* at 3351 n.3. He was acquitted of the two counts of promoting an obscene sexual performance, under § 263.10. *Id.* at 3352.

7. 74 A.D.2d 558, 424 N.Y.S.2d 967 (1980).

8. 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981). The Court of Appeals reasoned that § 263.15 could not be construed to include an obscenity standard and thus "the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment." *Id.* at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865. It found the statute overbroad because it prohibited the distribution of materials produced outside the state, since the regulation of sexual performances by minors outside of New York did not come within New York's police power. *Id.* at 679-80, 422 N.E.2d at 526, 439 N.Y.S.2d at 866. The court concluded by saying, "We merely hold that those who present plays, films, and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner." *Id.* at 681, 422 N.E.2d at 526, 439 N.Y.S.2d at 867.

The court said the statute was also underinclusive because, although it prohibited distribution of films of children engaged in sexual conduct, it did not prohibit distribution of films in which children had been used in violation of other laws designed to protect minors. *Id.*

9. Justice White, joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, delivered the opinion of the Court. Justice O'Connor filed a concurring opinion. Justice Brennan filed an opinion concurring in the judgment, in which Justice Marshall joined. Justice Stevens also filed an opinion concurring in the judgment. Justice Blackmun concurred in the result.

10. The first amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

11. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 576 (1978). Justice Cardozo

cable against both the state and federal governments.[12] Although not held to be an absolute right,[13] speech is said to be fundamental[14] and any legislative act which restricts the content of first amendment protected speech carries a presumption of unconstitutionality.[15]

Because of the importance of freedom of speech, the Supreme Court allows legislation impacting speech to be challenged both as applied[16] and facially.[17] The Court has devised two means of facially challenging regulations restricting speech: overbreadth and vagueness.[18] It is thought that these doctrines guard against the possible chilling effect of a facially flawed

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has characterized freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937).

12. The first amendment is applied to the states through the fourteenth amendment. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586, 593 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925).

13. For a discussion of the exceptions to first amendment protection, see note 26 and accompanying text *infra*.

14. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). The Court stated that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.*

15. United States v. CIO, 335 U.S. 106, 140 (1948) (Rutledge, J., concurring). Justice Rutledge stated,

> As the Court has declared repeatedly, [a legislative] judgment does not bear the same weight and is not entitled to the same presumption of validity, when the legislation on its face or in specific application restricts the rights of conscience, expression and assembly protected by the Amendment, as are given to other regulations having no such tendency. The presumption rather is against the legislative intrusion into these domains.

Id. (footnote omitted). In speech cases then, the Court presumes the restriction to be unconstitutional and "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).

However, Justice Frankfurter has stated, "I deem it a mischievous phrase ['the preferred position of freedom of speech'], if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity." Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring).

16. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 847-52 (1970) [hereinafter cited as Note, *The Overbreadth Doctrine*].

17. *Id. See also* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) [hereinafter cited as Note, *The Void-for-Vagueness Doctrine*].

18. *Id.* The "vagueness" doctrine may apply to a law if "men of common intelligence must necessarily guess at its meaning." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). In addition, its effect must be to chill first amendment speech. *See* Shaman, *The First Amendment Rule Against Overbreadth*, 52 TEMP. L.Q. 259, 263 (1979). The vagueness concept is sometimes considered a subspecies of overbreadth because "[i]t is only when vague laws chill protected speech—that is, only when their vagueness amounts to overbreadth—that they abridge first amendment criteria." *Id.* at 263. *See generally* Note, *The Void-for-Vagueness Doctrine, supra* note 17.

The concepts of overbreadth and vagueness both have been applied to statutes regulating obscenity. For a discussion of such analysis, see F. SCHAUER, THE LAW OF OBSCENITY 154-68 (1976). For a discussion of overbreadth, see notes 20-25 and accompanying text *infra*.

statute on first amendment protected speech.[19] The overbreadth doctrine has been used to invalidate, as facially unconstitutional, statutes that reach both protected as well as unprotected speech.[20] Significantly, an overbreadth challenge may be brought by a challenger, who, on the facts, is engaged in an unprotected activity.[21] The Burger Court, however, has been reluctant to use the overbreadth rule,[22] and, in *Broadrick v. Oklahoma*,[23] limited the use of strict overbreadth analysis by requiring "substantial overbreadth"[24] to invalidate statutes not regulating "pure speech."[25]

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19. *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969); Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting); Smith v. California, 361 U.S. 147, 150-54 (1959).

20. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974) (invalidating ordinance making it unlawful for person to use opprobrius language toward a police official on duty because ordinance not specifically limited to "fighting words"); Butler v. Michigan, 352 U.S. 380 (1957) (invalidating state statute making it unlawful to distribute materials tending to corrupt minors because also applied to sales to adults). *See generally* Shaman, *supra* note 18, at 260. "An overbroad regulation of speech is one that goes too far by encompassing within its proscription speech that is protected from governmental regulation by the first amendment. . . Overbroad regulations of speech are considered to be facially unconstitutional and thus cannot be applied even to regulate unprotected speech." *Id.* at 260-61.

21. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). The Court noted that "we have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* at 486 (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); NAACP v. Button, 371 U.S. 415, 432-33 (1963)). *See generally* Note, *The Overbreadth Doctrine, supra* note 16; Shaman, *supra* note 18.

22. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1186 (10th ed. 1980). While the overbreadth rule was used extensively by the Warren Court, it has been criticized by the Burger Court. *Id.* In *Younger v. Harris*, 401 U.S. 37 (1971), Justice Black, writing for the majority, stated that testing the constitutionality of a statute on its face was to some degree "fundamentally at odds with the function of the federal courts" to resolve concrete cases and controversies. *Id.* at 52. *See also* Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977).

23. 413 U.S. 601 (1973).

24. *Id.* at 615. The statute in *Broadrick* restricted the political activities of the state's classified civil servants. *Id.* at 602. The appellants asserted that the statute prohibited protected political expression such as the wearing of political buttons or the displaying of bumper stickers, and thus was overbroad because both protected and unprotected activities were prohibited. *Id.* at 609-10. The Court stated 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 sweep." *Id.* at 615. The Court found that the overbreadth in this case was not substantial and declined to invalidate the statute on its face. It left any overbreadth in the statute to be cured on a case-by-case basis. *Id.* at 615-16. The *Broadrick* decision has been criticized because the criterion of "substantiality" is vague and produces inconsistent results. *See* Shaman, *supra* note 18, at 270.

25. 413 U.S. at 615. The *Broadrick* Court offered no explanation as to why a different overbreadth standard should be applied to symbolic speech than to pure speech. It stated, "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected be-

Although the Supreme Court has protected freedom of speech staunchly, it also has found that certain classes of expression, because of their content, are excepted from first amendment protection.[26] In 1942, in *Chaplinsky v. New Hampshire*,[27] the Supreme Court addressed the constitutionality of regulating offensive language. In dictum, it categorized obscen-

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havior that it forbids the State to sanction moves from 'pure speech' toward conduct . . . ." *Id.* See Shaman, *supra* note 18, at 270-71.

26. The Court has held that the first amendment right of freedom of speech is not an absolute right. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925). *See generally* Gard, *The Absoluteness of the First Amendment*, 58 NEB. L. REV. 1053 (1979); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

Over the years, the Court has created several exceptions to the first amendment, based on the content of the speech involved. In *Gitlow v. New York*, 268 U.S. 652 (1925), the Court upheld a statute punishing seditious utterances. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that "fighting words" also were excluded from first amendment protection. It defined "fighting words" as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The Court stated, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or 'fighting words'. . . ." *Id.* at 571-72. As indicated by the Court in *Chaplinsky*, libel used to be excluded from the protection of the first amendment. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952). Today, an exception is made when public officials are the target of libelous statements; unless those statements are made with "actual malice." *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Commercial speech also had been excluded from protection, but this exclusion ended in Bigelow v. Virginia, 421 U.S. 809 (1975). However, the protection lessens when the commercial speech is deemed "misleading." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). For a discussion of regulation of obscenity due to its content, see notes 29-43 and accompanying text *infra*. *See generally* Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980).

In recent years, Justice Stevens has advocated a theory of free speech that would result in some types of expression being deemed second-class speech on the basis of their content. He has stated that "the State may legitimately use the content of these [sexually explicit] materials as the basis for placing them in a different classification." Young v. American Mini Theatres, 427 U.S. 50, 70-71 (1976). Justice Stevens reasoned "that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." *Id.* at 70. Justice Stevens reiterated this position in FCC v. Pacific Found., 438 U.S. 726 (1978). His position, however, never has been adopted by the full Court and has been met with much criticism. *See* Comment, *Content-Based Classifications of Protected Speech: A Less Vital Interest?*—Young v. American Mini Theaters, Inc., 1976 UTAH L. REV. 616; Comment, *"Indecent" Language: A New Class of Prohibitable Speech?* FCC v. Pacifica Foundation, 13 U. RICH. L. REV. 297 (1979); Note, *Pacifica's Seven Dirty Words: A Sliding Scale of the First Amendment*, 1979 U. ILL. L.F. 969.

27. 315 U.S. 568 (1942). In *Chaplinsky*, the defendant was accused of violating a state statute proscribing, *inter alia*, the addressing of others in a public place in offensive and derisive ways that would annoy them. *Id.* at 569. Chaplinsky distributed religious literature on a public street and attracted a visibly hostile crowd. *Id.* at 569-70. The Court held that punishment for his use of words that were likely to provoke a retaliatory response and lead to a breach of the peace did not impinge upon first amendment rights. *Id.* at 574. For a further discussion of *Chaplinsky*, see note 26 *supra*.

ity as a class of expression outside first amendment protection.[28] However, it was not until *Roth v. United States*,[29] fifteen years later, that the Court encountered a direct challenge to the constitutionality of an obscenity regulation.[30] The Court held that "obscenity is not within the area of constitutionally protected speech or press"[31] and adopted a test for determining what expression is obscene: "whether to the average person, applying contemporary community standards,[32] the dominant theme of the material taken as a whole appeals to prurient interest."[33] Later, in *Jacobellis v. Ohio*,[34] the Court sought to clarify the standard delineated in *Roth*,[35] and stated that obscenity was to be judged by national, not local, community standards[36] and that, if material had *any* social importance, it could not be denied first amendment protection.[37] The remainder of the 1960's produced a plethora

28. 315 U.S. at 571-72.

29. 354 U.S. 476 (1957). In *Roth*, the Court ruled on the constitutionality of a federal criminal obscenity statute. *Id.* at 479. Roth had been convicted under the statute of mailing obscene circulars, which he had used to solicit sales for his New York book, photograph, and magazine business. *Id.* at 480.

30. *Id.* at 479. Although the Court acknowledged that in *Roth* it was for the first time forced to rule on the constitutionality of obscenity regulations, it listed numerous opinions wherein the Court had assumed that obscenity was not protected by the freedoms of speech and press. 354 U.S. at 481 (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); *Ex parte* Jackson, 96 U.S. 727, 736-37 (1877)).

31. 354 U.S. at 485.

32. *Id.* at 489. The Supreme Court approved the trial court's jury instructions which directed the jurors to assess the materials as "exclusive judges of what the common conscience of the community is." *Id.* at 490. After *Roth*, a number of lower federal courts adopted a localized view of community standards. *See, e.g.*, United States v. West Coast News Co., 30 F.R.D. 13 (W.D. Mich. 1962); United States v. Frew, 187 F. Supp. 500, 506 (E.D. Mich. 1960). *Cf.* Alexander v. United States, 271 F.2d 140, 146 (8th Cir. 1959); Eastman Kodak Co. v. Hendricks, 262 F.2d 392, 397 (9th Cir. 1958).

33. 354 U.S. at 489. The Court specifically rejected a test that had been followed by some courts, which was derived from Regina v. Hicklin, 3 L.R.—Q.B. 360 (1868). The *Hicklin* test "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." 354 U.S. at 488-89. The Court stated that the *Hicklin* test "might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." *Id.* at 489.

34. 378 U.S. 184 (1964). In *Jacobellis*, the manager of a motion picture theatre was convicted under a state obscenity law of possessing and exhibiting an allegedly obscene film. *Id.* at 185-86.

35. *Id.* at 191. The Court recognized that the *Roth* test was not perfect, but continued to adhere to it because it believed that any substitute test "would raise equally difficult problems." *Id.*

36. 378 U.S. at 192-93. The Court gleaned its definition of "community" from a passage by Judge Learned Hand in United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913). *See* 378 U.S. at 192-93. The *Jacobellis* Court stated, "We do not see how any 'local' definition of the 'community' could properly be employed in delineating the area of expression that is protected by the Federal Constitution." *Id.* at 193. The Court added, "It is, after all, a national Constitution we are expounding." *Id.* at 195.

37. 378 U.S. at 191. The Court stated the test as follows:

of Supreme Court cases dealing with obscenity,[38] and an admitted confusion in the area.[39]

In 1973, in *Miller v. California*,[40] the Court outlined the obscenity standard that remains in effect today. It held that, in order to pass first amendment muster, state regulation of obscenity must "be limited to works which, taken as a whole, appeal to the prurient interest, 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."[41] The Court also ruled that state regulation of obscenity was permissible only as to works depicting or describing sexual conduct that was specifically defined by the state ob-

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> Material dealing with sex in a manner that advocates ideas, . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. 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.

Id. (footnote omitted). In a later case, the Court reiterated that works had to be "*utterly* without redeeming social value" to be branded obscene and proscribed. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966).

38. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (private possession of obscene material in home protected by constitutional right of privacy); Ginsberg v. New York, 390 U.S. 629 (1968) (materials not obscene when distributed to adults may nonetheless be kept from minors because of state's interest in protecting children); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (motion picture licensing ordinance utilizing vague standard of "not suitable for young persons" held to be unconstitutional); Redrup v. New York, 386 U.S. 767 (1967) (Court acknowledged divergence of views among justices as to the proper test for obscenity and simply reversed the convictions in the case); Ginzburg v. United States, 383 U.S. 463 (1966) (in close cases, evidence of pandering—advertising to appeal to prurient interest—would be relevant in determining whether the work was legally obscene); Memoirs v. Massachusetts, 383 U.S. 413 (1966) (material must be without any redeeming social value to be adjudged obscene); Mishkin v. United States, 383 U.S. 502 (1966) (prurient appeal of materials designed for and disseminated to a deviant sexual group would be measured in terms of that group and not the "average person").

39. In Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), Justice Harlan noted, "[T]he subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Id.* at 704-05 (Harlan, J., dissenting and concurring) (footnote omitted). Justice Harlan continued, "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." *Id.* at 707 (Harlan, J., dissenting and concurring) (footnote omitted). Justice Harlan pointed out that, in the 13 obscenity cases decided since *Roth*, there had been a total of 55 separate opinions among the Justices. *Id.* at 705 n.1. (Harlan, J., concurring and dissenting). *See* Note, *Obscenity and the Supreme Court: Nine Years of Confusion*, 19 STAN. L. REV. 167 (1966); *The Supreme Court 1965 Term*, 80 HARV. L. REV., 91, 186-94 (1966).

40. 413 U.S. 15 (1973). In *Miller*, the appellant was convicted of mailing unsolicited sexually explicit material in violation of a state statute. *Id.* at 16.

41. *Id.* at 24. The *Miller* Court specifically rejected the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*. *Id.* at 24-25. For a discussion of *Memoirs*, see notes 37 & 38 *supra*.

scenity law.[42] Moreover, the national community standard of *Jacobellis* was rejected in favor of a local community standard.[43]

The Supreme Court has enunciated a particular concern for the protection of minors in the area of obscenity regulation.[44] In *Ginsberg v. New York*,[45] the Court upheld the constitutionality of a state statute prohibiting the knowing sale to a minor of material defined to be obscene as to the minors and which, taken as a whole, was harmful to minors.[46] The Court based its decision on the power of states to adjust the *Roth* definition of obscenity[47] as applied to minors,[48] in order to give parents the support of the

42. 413 U.S. at 24. The Court went on to give some examples of what could be defined for regulation: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated . . . . Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.

43. *Id.* at 31-33. The Court stated that it was not realistic or constitutionally sound to require a national standard. *Id.* at 32. It recognized that people in different states vary in their tastes and attitudes, and did not want to strangle this diversity by imposing the uniformity of a national standard. *Id.* at 33.

44. *See* notes 44-53 and accompanying text *infra*. The Court's concern for minors extends to other areas as well. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court upheld a statute prohibiting the use of a child to distribute literature on the street, recognizing that the state's power to control the conduct of children is greater than the scope of its authority over adults. *Id.* at 170. The Court sought to protect children from possible difficult situations, emotional excitement, and psychological or physical injury. *Id.* at 169-70.

Recently, in *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982), the Court again acknowledged that the state interest in "safeguarding the physical and psychological well-being of a minor is a compelling one." *Id.* at 2621 (footnote omitted). The Supreme Court struck down a state statute providing for exclusion of the press and general public from the courtroom when minor victims of certain sexual offenses were testifying. *Id.* at 2616. The state had advanced two interests to justify mandatory exclusion during the minor victim's testimony: "[t]he protection of minor victims of sex crimes from further trauma and embarassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Id.* at 2620-21 (footnote omitted). The Court recognized that the state's interest in protecting minors was compelling but found that a mandatory exclusion rule was not justified. *Id.* at 2621. It recommended a case-by-case determination of the necessity for exclusion, considering such factors as "the minor victim's age, psychological maturity, and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.*

45. 390 U.S. 629 (1968). In *Ginsberg*, a stationery store owner was convicted of selling "girlie" magazines to a minor in violation of state law. *Id.* at 631.

46. *Id.* at 633.

47. The definition of obscenity at the time of the *Ginsberg* case was the one delineated in *Roth*. For the *Roth* definition of obscenity, see notes 32-33 and accompanying text *supra*.

48. 390 U.S. at 638. The Court found that the state's power to control the conduct of children is clear. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944)). The state had defined obscenity on the basis of its appeal to the sexual interests of minors, here defined as those under 17 years of age. *Id.* Justice Stewart, in a concurring opinion, found the action of the state permissible because "at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.* at 649-50 (Stewart, J., concurring) (footnote omitted).

law to aid them in the rearing of their children and in order to further the state's independent interest in protecting the welfare of children and safeguarding them from abuse.[49] In *FCC v. Pacifica Foundation*,[50] the Court upheld the FCC's punishment of a radio station which broadcast an indecent, but not obscene,[51] comedy monologue, basing its decision in part upon broadcasting's unique accessibility to children.[52]

Against this background, the *Ferber* Court was faced with the novel issue of whether a state statute prohibiting the promotion of works that were not obscene under the *Miller* standard, but which featured sexual performances by minors, could withstand constitutional scrutiny.[53] The Court noted that twenty states, including New York, have statutes prohibiting the distribution of material depicting children engaged in sexual conduct with no requirement that the material be legally obscene.[54] It stated that the New York Court of Appeals had not been unreasonable in concluding that promotion of such nonobscene adolescent sexual materials could not be proscribed under the traditional *Miller* obscenity standard.[55] However, the Court was

49. *Id.* at 639.

50. 438 U.S. 726 (1978). In *Pacifica*, a radio station made an afternoon broadcast of a satiric monologue by comedian George Carlin which repeatedly used "words you could not say on the public airwaves" in a variety of colloquialisms. A father who heard the broadcast while driving with his young son, complained to the Federal Communications Commission. *Id.* at 729-30.

51. The statute in question prohibited the utterance of any obscene, indecent, or profane language by means of radio communication. *Id.* at 731 n.3 (citing 18 U.S.C. § 1464 (1976)). The defendant radio station argued that its broadcast was not indecent because of the absence of prurient appeal. *Id.* at 739. The Court determined that prurient appeal was not an element of indecency, although it was an element of obscenity, and accordingly found the language to be indecent. *Id.* at 741.

52. *Id.* at 749. The Court stated that the broadcast media presented special first amendment problems because of its uniquely pervasive presence in the lives of Americans and its accessibility to children. *Id.* at 748-49. The Court said that broadcast material confronts people in the privacy of their homes, where the individual's right to be left alone outweighs the first amendment rights of the broadcaster. *Id.* at 748. It also said that, in this case, while a "written message might have been incomprehensible to a first grader, . . . [the] broadcast could have enlarged a child's vocabulary in an instant." *Id.* at 749. The Court stated that although other forms of offensive expression could be withheld from children without restricting the source of the material, it was necessary to restrict the source of broadcasting because of its unique accessibility. *Id.* at 749-50.

53. 102 S. Ct. at 3350.

54. *Id.* at 3351. For the text of the New York statute, see note 5 *supra*. The Court noted that 47 states and the federal government have statutes aimed at the production of child pornography, half of which do not require that the produced materials be legally obscene. 102 S. Ct. at 3350. Also, 35 states and the federal government have laws prohibiting the distribution of child pornography. *Id.* at 3351. The Court noted that 15 states and the federal government prohibit such dissemination only if the material is obscene, and 2 states prohibit dissemination only if the material is obscene as to minors. *Id.* at n.2. In addition, 12 states prohibit only the use of minors in the production of the material. *Id.*

55. 102 S. Ct. at 3352. The Court recognized that the New York Court of Appeals used the *Miller* guidelines to divide protected from unprotected expression. However, it noted that this was the first time the Court had examined a child por-

persuaded that, for five reasons,[56] "the States are entitled to greater leeway in the regulation of pornographic depictions of children" than in the regulation of other forms of pornography.[57]

The Court first recognized the state's interest in safeguarding the well-being of its minors[58] and that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[59] It refused to second-guess the legislative findings that the use of children as subjects of pornographic materials is harmful to their physiological, emotional, and mental health.[60] The Court found that this legislative judgment easily passed muster under the first amendment.[61]

Secondly, the Court determined that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[62] It dismissed Ferber's contention that the state should be allowed to prohibit only the distribution of materials deemed obscene under the *Miller* test.[63] The Court found that, although some states incorporate the *Miller* standard in their child pornography laws, the first amendment does not prohibit states from going further.[64] Moreover, the Court concluded that the *Miller* test was not "a satisfactory solution to the

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nography statute. *Id.* at 3352-53. For a discussion of the position taken by the New York Court of Appeals, see note 8 and accompanying text *supra*. For a statement of the *Miller* standard, see notes 41-43 and accompanying text *supra*.

56. For a discussion of the Court's five reasons, see notes 58-73 and accompanying text *infra*.

57. 102 S. Ct. at 3354. The Court reasoned that although "laws directed at the dissemination of child pornography run the risk of suppressing protected expression," this interest was outweighed by the state's interest in protecting minors. *Id.* For a discussion of the state's interest, see notes 58-59 and accompanying text *infra*.

58. 102 S. Ct. at 3354 (citing Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982); FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusettes, 321 U.S. 158 (1944)). For a discussion of *Globe Newspaper*, see note 44 *supra*. For a discussion of *Pacifica*, see notes 50-52 and accompanying text *supra*. For a discussion of *Ginsberg*, see notes 45-46 and accompanying text *supra*. For a discussion of *Prince*, see note 44 *supra*.

59. 102 S. Ct. at 3355.

60. *Id.* The Court cited numerous professional articles which agreed with the legislative findings that participation in sexual performances is harmful to children. *Id.* at 3355 n.9.

61. *Id.* at 3355.

62. *Id.* The Court found that the materials produced become a permanent record of the child's participation which, when circulated, exacerbates the harm to the child. *Id.* It also determined that the distribution network must be closed in order to stop the abuse of children occurring in the actual production of the materials. *Id.* at 3355-56. The Court accepted the conclusions of 35 state legislatures and Congress that laws which proscribe *production* of child pornography are insufficient to control the nationwide pornography problem because such laws are hard to enforce, and, therefore, that anti-*distribution* laws are needed to dry up the market for pornographic productions. *Id.* at 3356.

63. *Id.* at 3357. For a discussion of *Miller*, see notes 40-43 and accompanying text *supra*.

64. 102 S. Ct. at 3356. The Court said that "the *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the state's particular

child pornography problem."[65]

The Court next observed that advertising and sale of pornographic materials involving children is integrally related to the production of such materials, conduct which is illegal throughout the country.[66] Noting that the constitutionality of laws prohibiting the employment of children in the production of pornographic materials[67] had never been questioned,[68] the Court surmised that if the production laws were more enforceable, no child pornography would be on the market and no ominous first amendment implications would arise.[69] The Court also reasoned that few live or photographic records of sexual performances by children would have any literary, scientific, or educational value.[70] It stated that it was not censoring a particular literary theme or portrayal but merely the use of children in such themes.[71]

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and more compelling interest in prosecuting those who promote the sexual exploitation of children." *Id.*

65. *Id.* at 3357. The Court reasoned that the prurient interest element of the *Miller* test "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work." *Id.* at 3356. It also stated that a work "need not be 'patently offensive' in order to have required the sexual exploitation of a child for its production." *Id.* In reference to the "value" element of the *Miller* test, the Court concluded that even works which, taken as a whole, contain serious literary, artistic, political, or scientific value "may nevertheless embody the hardest core of child pornography." *Id.* at 3357. It cited the Memorandum of Assemblyman Lasher in support of § 236.15 in which it was stated, "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political, or social value." *Id.* Finally, the Court found the "contemporary community standards" element of *Miller* unsuitable in the child pornography context because it was "unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation." *Id.* at n.12.

66. *Id.* at 3357. The Court discussed the relationship between first amendment freedoms and criminal activity. *Id.* It said that speech or writing used as an integral part of conduct which violates a criminal statute has never been protected by first amendment constitutional immunity. *Id.* (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). The Court also cited language in another opinion which said that any first amendment interest involved in the regulation of advertising "is altogether absent when the commercial activity is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at n.14 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 389 (1973)).

67. *Id.* at n.15. The Court observed that a federal statute makes the use of children in the production of pornographic material a federal offense. *Id.* (citing 18 U.S.C. § 2251 (Supp. III 1979)). The Court noted that this statute and many state anti-production statutes do not require the materials produced to be legally obscene in order to impose criminal liability. *Id.*

68. *Id.* at 3357.

69. *Id.*

70. *Id.* The Court agreed with the trial court that other options were available to producers if the presence of a child was needed for literary or artistic value, e.g., simulation or the use of a young-looking person over the statutory age. *Id.*

71. *Id.* at 3357-58. The Court emphasized that the first amendment interest involved here was limited to the use of children in pornographic materials. *Id.*

Lastly, the Court stated that classifying child pornography as outside first amendment protection was not inconsistent with its other decisions limiting the scope of the first amendment.[72] It said that content-based classifications had been accepted in some instances because, within given classifications, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[73] The Court thus concluded that, on balance, the class of material prohibited by the New York statute so affected the welfare of children that any expressive interests involved had to be considered outside of the protection of the first amendment.[74]

The Court next turned to the limits on this new child pornography exception to the first amendment.[75] The Court warned that the proscribed conduct must be adequately defined by the applicable state law.[76] It compared the test for child pornography to the obscenity standard of *Miller*, and "adjusted" the *Miller* formulation by eliminating its requirements that the whole work be considered, that the work appeal to the prurient interest of the average person, and that the sexual conduct be portrayed in a patently offensive manner.[77] Lastly, the Court cautioned that its ruling applied only to visual reproductions of live sexual performances by children, and that criminal liability could be imposed, as with obscenity, only on the basis of scienter.[78] The Court then analyzed the New York statute and determined that it comported with the above-stated standards.[79]

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72. *Id.* at 3358 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978); Young v. American Mini Theatres, 427 U.S. 50 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)). In each case, a class of speech was removed from first amendment protection due to its content. For a discussion of *Pacifica*, see notes 50-52 and accompanying text *supra*. For a discussion of *Mini Theatres, New York Times*, and *Beauharnais*, see note 26 *supra*. *Chaplinsky* is discussed at notes 26-28 and accompanying text *supra*.

73. 102 S. Ct. at 3358.

74. *Id.* The Court employed a balancing test, weighing the expression proscribed by § 263.15 against the welfare of the children used in the production of the materials. *Id.*

75. *Id.*

76. *Id.* The Court also stated that "the nature of the harm to be combatted requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age." *Id.* (footnote omitted). It recognized that "child" is defined differently by the states. *Id.* at n.17.

77. *Id.* at 3358. For the exact words of the Court, see note 110 *infra*. For a discussion of the *Miller* test, see notes 41-43 and accompanying text *supra*.

78. 102 S. Ct. at 3358.

79. *Id.* at 3359. The Court found that New York adequately defined and listed the sexual conduct proscribed. *Id.* For a discussion of the statutory definitions, see note 5 and accompanying text *supra*. The Court also said that because child pornography is outside of first amendment protection, no statute singling out this class for proscription could be found "underinclusive." *Id.* The Court reasoned that "child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that." *Id.* at n.18. It added that the state also could prohibit the distribu-

Finally, the Court confronted the issue of whether the statute was unconstitutionally overbroad in that it would "forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combatted by the State."[80] It found that the substantial overbreadth doctrine of *Broadrick* was applicable because, in *Broadrick*, the Court had "intimated" that the test "at the very least" applied to cases involving conduct plus speech.[81] The Court determined that the New York statute was not substantially overbroad because the impermissible applications of the statute, such as the production of medical or artistic works, would only amount to a small fraction of the materials within the statute's reach.[82] It further assumed that the state courts would not give an expansive construction to the proscribed activity.[83] The Court, therefore, upheld the statute against the overbreadth challenge, calling it "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications."[84]

Justice O'Connor, in a concurring opinion, stressed that under the majority opinion, New York need not except from its statute material with serious literary, scientific, or educational value, although the statute might not be constitutionally applied to such materials.[85] She noted that such an exception actually would increase opportunities for content-based censorship.[86]

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tion of unprotected materials produced outside the state because, among other reasons, it is often difficult to determine where child pornography is produced. *Id.* at 3359 & n.19.

80. 102 S. Ct. at 3359. The Court pointed out that the New York Court of Appeals did not apply the restrictive test of substantial overbreadth enunciated in *Broadrick* because it considered § 263.15 to be directed at "pure speech." *Id.* The New York court then went on to find the statute fatally overbroad. *Id.* For a discussion of that court's analysis, see note 8 *supra*. The Supreme Court then discussed the prudential reasons for limiting facial attacks on statutes and reviewed its reasoning in *Broadrick*. 102 S. Ct. at 3360-61. For a discussion of *Broadrick*, see notes 23-25 and accompanying text *supra*. For a discussion of the overbreadth doctrine, see notes 18-21 and accompanying text *supra*.

81. 102 S. Ct. at 3362. The Court did not clarify whether it applied *Broadrick* because it considered § 263.15 to deal with conduct plus speech or whether it was extending *Broadrick* to cases involving "pure speech." For a discussion of this point, see notes 111-13 and accompanying text *infra*. For the relevant passage from *Broadrick*, see note 25 *supra*.

82. 102 S. Ct. at 3363.

83. *Id.* The Court said that any overbreadth which existed in § 263.15 could be cured through a case-by-case analysis of particular fact situations. *Id.* (citing Broadrick v. Oklahoma, 413 U.S. at 615-16).

84. *Id.*

85. *Id.* at 3364 (O'Connor, J., concurring). Justice O'Connor explained that the harm to the child is the same no matter what value the community places on the material produced. *Id.*

86. *Id.* Justice O'Connor pointed out that the New York statute did not attempt to suppress communication of any particular idea but merely the use of children to make certain portrayals realistic. *Id.* She added, "[T]he statute attempts to protect minors from abuse without attempting to restrict the expression of ideas by those who might use children as live models." *Id.* She found that a consideration of

Justice Brennan, joined by Justice Marshall, concurred in the judgment only.[87] He believed that application of the New York statute to materials with serious literary, artistic, scientific, or medical value would violate the first amendment.[88] He doubted that the amount of such materials was de minimis, and said that it was "inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed 'material outside the protection of the First Amendment.' "[89]

Justice Stevens, concurring in the judgment, took a more conservative approach, advocating the avoidance of an overbreadth analysis, because of the "marginal" value of the expression at issue.[90]

It is submitted that the *Ferber* decision should be praised because of its strong stand against child pornography. Unfortunately, in attempting to deal with a widespread national problem, the Court once again cut back the scope of the first amendment[91] by creating a content-based class of speech which will not come under its protection.[92]

It is submitted that the particular fact situation presented to the *Ferber* Court forced it to carve out another exception to the scope of the first amendment. Because not all child pornography is necessarily obscene,[93] the Court had to uphold the statute even though it had no obscenity requirement in order to provide a ruling which would adequately protect minors.[94] This action by the Court, it is submitted, is consistent with the Court's hold-

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materials within the statute's reach that did not threaten the harm identified by the Court was unnecessary because any overbreadth in the statute was not substantial enough to warrant facial invalidation. *Id.*

87. *Id.* (Brennan, J., concurring in judgment).

88. *Id.* at 3365 (Brennan, J., concurring in judgment). Justice Brennan noted that some classes of speech are outside first amendment protection because they have slight social value and involve a compelling state interest. *Id.* He said that if a work represented a serious contribution to some field, it did have social value and the state's interest in suppression would be less compelling because the assumption of harm to the child involved would have less force. *Id.*

89. *Id.*

90. *Id.* at 3367-68 (Stevens, J., concurring in judgment). Justice Stevens disagreed with the majority's ruling that child pornography is totally without first amendment protection but stated that "generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine." *Id.* Justice Stevens admitted that the New York statute reached some protected speech, but advocated a case-by-case adjudication. *Id.* at 3365-67 (Stevens, J., concurring in judgment). For a discussion of Justice Steven's approach to material of "marginal" first amendment value, or so-called "second-class" speech, see note 26 *supra*. In *Ferber*, Justice Stevens was of the belief that the Court had accepted his theory. 102 S. Ct. at 3367 (Stevens, J., concurring in judgment).

91. For a discussion of other cutbacks on the scope of the first amendment, see note 26 *supra*.

92. *See* note 74 and accompanying text *supra*.

93. Judge Jasen of the New York Court of Appeals noted this point. *See* note 104 *infra*.

94. Also, if the Court failed to uphold § 263.15, Ferber would have gone without punishment. For the text of the two statutes, see notes 4-5 *supra*.

ings in *Ginsberg*,[95] *Pacifica*,[96] and other cases in which the Court balanced free speech against the compelling interest in protecting the welfare of children.[97] In these cases, the interest in protecting children prevailed.

Ferber is the first case dealing with children as the subject of visual expression.[98] The state legislature and the Court were not concerned with the pornographic materials themselves, but rather with the minors used to produce them.[99] In essence, the statute attempts to regulate indirectly the conduct involved in the making of child pornography by proscribing the distribution of these materials.[100] It is only because of the unenforceability of production laws that the end product, a form of speech, becomes a necessary subject of regulation.[101] The question then becomes the appropriateness of creating a new class of unprotected speech to deal with this problem. It is submitted that the Court came to the correct conclusion when it created this new unprotected class of speech because, although the right of freedom of speech is fundamental, the state's interest in protecting minors from sexual abuse is compelling and unquestionably outweighs first amendment rights.[102] A statute which contains an obscenity standard, as is evidenced so clearly by the facts of *Ferber*,[103] is not stringent enough to guard against the

95. For a discussion of *Ginsberg*, see notes 45-49 and accompanying text *supra*.

96. For a discussion of *Pacifica*, see notes 50-52 and accompanying text *supra*.

97. *See, e.g.*, Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613 (1982). Although the Court in *Globe* did not uphold the statute in question, it did find that in some cases minors might need protection in situations involving courtroom testimony. For a discussion of *Globe Newspaper*, see note 44 *supra*.

98. *Globe Newspapers* is the closest to *Ferber* in that the statute in *Globe* prohibited the press from being present in a courtroom where a minor was testifying. For a discussion of *Globe*, see note 44 *supra*. One can stretch this conceptually to say that the child in *Globe* was the "subject" of the expression.

99. This type of regulation differs in purpose from obscenity statutes because obscenity statutes are concerned with the effect of sexually exploitive material upon a community, whereas § 263.15 is concerned with the effect which the conduct has on the children involved in the production. For a statement of the legislative intent, see note 3 *supra*.

100. For a discussion of laws regulating the production of child pornography, see note 54 *supra*.

101. These materials are regulated not because they are pornographic, but because the pornography "contains" minors. As the Court noted, if, in place of minors, young-looking non-minors were used to simulate the idea, no first amendment problem would arise. 102 S. Ct. at 3357.

102. The Court willingly accepted the state's interest as compelling. *Id.* at 3354. This seems only logical because in *Ginsberg*, the Court upheld a statute proscribing the distribution of nonobscene literature to minors. The state's interest in preventing exploitation of minors used to make such materials must be at least as compelling as the interest in preventing them from reading it. For a discussion of *Ginsberg*, see notes 45-49 and accompanying text *supra*. For a discussion of the Court's method of analysis in fundamental rights cases, see note 15 *supra*.

103. At this point, it is relevant to point out again that Ferber was acquitted on the two charges under the statute containing an obscenity requirement. Therefore, if the Court failed to uphold § 263.15, Ferber would have gone without punishment. For a discussion of the charges against Ferber and their resolution, see notes 3-6 and accompanying text *supra*.

harm involved.[104] As Justice O'Connor pointed out, simply because particular material does not fall within the technical definition of obscenity in *Miller*, it does not follow that the child involved in the production was not harmed.[105] Also, by not requiring a showing of obscenity, the Court guards against the differences in morality between various communities.[106]

Nevertheless, the decision is not beyond criticism. One flaw is the analytically unsound manner by which the Court arrived at its "test" for child pornography.[107] Instead of directly stating the test, it used the *Miller* stan-

104. As Judge Jasen pointed out in his dissent in the New York Court of Appeals opinion:

> [T]he characterization of such material as "pornographic" does not necessarily imply that it is "legally obscene." While it is fair to say that most obscene material is pornographic, the converse is not necessarily true, for a given performance's "obscenity" in a legal sense depends upon the standards of the community in which it finds itself.

52 N.Y.2d 674, 682 n.1., 422 N.E.2d 523, 527 n.1, 439 N.Y.S.2d 863, 867 n.1 (1981) (Jasen, J., dissenting).

This is in contrast with the majority opinion of the New York Court of Appeals, which said that "it is important to emphasize that the statute considered in this case does not deal with child pornography. Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials." 52 N.Y.2d 674, 681, 422 N.E.2d 523, 526, 439 N.Y.S.2d 863, 866-67 (1981) (citing N.Y. Penal Law §§ 263.05, 263.10). The flaw in the majority's reasoning seems to stem from its misconception that all pornography is necessarily obscene. It is important to note that the New York Court of Appeals was constrained by the fact that there was no existing exception to the first amendment, except obscenity, on which it could base its decision. Because the jury failed to find the materials obscene, the court was faced with the choice of setting the jury's verdict aside as against the weight of the evidence, further restricting the scope of the first amendment without Supreme Court precedent on which to rely, or taking the "safe" route by declaring § 263.15 unconstitutional. It is admitted that an obscenity standard would "catch" almost all of child pornography, as the New York Court of Appeals reasoned, but the fact that not all would be sanctioned makes § 263.15 necessary. The obvious illustration of this point is that Ferber was found by a jury to be not guilty of promoting an obscene performance, although the subjects of the films he sold were masturbation by a young boy and sexual intercourse between a group of boys. Surely, the minors who performed these acts were harmed despite the fact that a jury from the New York City community found the films not to be obscene. But because the New York Court of Appeals limited itself to the traditional obscenity analysis under *Miller*, harm to the children involved had to be considered an irrelevant element. For a discussion of the *Miller* test, see notes 41-43 and accompanying text *supra*.

105. 102 S. Ct. at 3364. A child photographed while masturbating, for example, would seem to suffer the same degree of psychological trauma whether the photograph appeared in a pornographic magazine or a medical textbook—the social value of the work is irrelevant.

106. Under *Miller*, the Court rejected the *Jacobellis* holding that obscenity was to be judged by a national community standard. For a discussion of community standards, see notes 32 & 36 and accompanying text *supra*. The community standard approach is not relevant in child pornography since the emphasis is on the child, not the work. A work which is considered obscene in Ames, Iowa may not be so deemed in New York City, and yet the child involved has suffered through the same harmful experience.

107. For the Court's formulation of the "test," see notes 75-78 and accompanying text *supra*.

dard[108] for comparison and then "adjusted" *Miller* by negating each of its elements to arrive at an unstated standard. In essence, all that remains after these adjustments is a "test" that requires a visual depiction of sexual conduct by children below a specified age with such conduct defined and prohibited by state law.[109]

Another weakness in the Court's opinion is its overbreadth analysis.[110] The Court applied the *Broadrick* "substantial overbreadth" test, but did not make clear whether *Broadrick* was applicable because the Court considered this case to involve conduct plus speech or whether it was extending the use of the "substantial overbreadth" test[111] to situations involving "pure speech."[112] If the latter is true, the Court is breaking new ground and making it even more difficult to mount first amendment facial attacks on regulations affecting speech.

The states that have laws similar to the New York statute now are assured of their constitutionality.[113] Other states may change their laws to con-

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108. For a discussion of the *Miller* standard, see notes 41-43 and accompanying text *supra*.

109. The Court stated that

> [t]he 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 appeal 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.

102 S. Ct. at 3358.

110. *Id.* at 3359-63. For a discussion of the Court's analysis, see notes 80-84 and accompanying text *supra*.

111. For a discussion of overbreadth and the *Broadrick* doctrine, see notes 18-25 and accompanying text *supra*.

112. The Court stated that

> *Broadrick* was a regulation involving restrictions on . . . an area not considered "pure speech," and thus it was necessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.

102 S. Ct. at 3362. The above quote makes it difficult to determine if the Court considered this case as one involving conduct and speech and thus, coming squarely under *Broadrick*, or if this case involved "pure speech," for which the applicability of the overbreadth test was left unanswered by *Broadrick*. The Court could be considering the employment of children to be "conduct." The ambiguity arises because the Court, in the same passage, refers to films as "pure speech." *Id.* It must be noted that the New York Court of Appeals characterized § 263.15 as dealing with "pure speech." It said that § 263.15 is "clearly aimed at books, films and other *traditional forms of expression*." 52 N.Y.2d 674, 677, 422 N.E.2d 523, 524, 439 N.Y.S.2d 863, 865 (1981) (emphasis added).

113. Nineteen states in addition to New York have laws prohibiting the dissemination of material depicting children engaged in sexual conduct whether or not the

form to the New York standard or attempt to be even more stringent. On a practical level, it remains to be seen how this decision will affect the thriving illegal underground[114] that produces and distributes child pornography. Statutes like the one in *Ferber* have been on the books for a number of years,[115] with no reported decline in child pornography. Placing a constitutional imprimatur on these statutes just may force this industry to become more clandestine rather than diminish in volume. It is unclear now if authorities will prosecute distributors of non-pornographic materials, such as medical textbooks, which contain visual sexual depictions of minors and how courts will handle these cases.[116] The Court's concern was the welfare of the children involved, and, although it focused on child pornography, it recognized that any visual sexual depiction of a child may be harmful, whether it has some serious value or is pornographic.[117] The *Ferber* decision already has had direct impact. Fearful of prosecution after the *Ferber* decision, the publisher of a picture book used to educate children about sex has ceased distribution of the publication. The work had been adjudged not to be obscene but contained photographs of minors engaged in sexual conduct.[118] In conclusion, this case once again makes clear that there exists no absolute right to free speech[119] because that right may be weighed against other compelling interests and, perhaps, subordinated to them.

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material is obscene. 102 S. Ct. at 3351 n.2. For a discussion of these and other similar laws, see note 54 *supra*.

114. 102 S. Ct. at 3350 n.1.

115. The New York statute was enacted in 1977. States with similar laws have enactment dates ranging from 1976 to 1982. 102 S. Ct. at 3351, 3351 n.2.

116. The Court assumed that the New York courts would not "widen the possibly invalid reach of the statute" and said that any overbreadth should be cured on a case-by-case basis. *Id.* at 3363.

117. *Id.* at 3357. However, Justice Brennan stated that the Court's assumption of harm to the child loses force when the depiction is a serious contribution to art or science. *Id.* at 3365 (Brennan, J., concurring).

118. Philadelphia Inquirer, Sept. 20, 1982, at 7-A, col. 1. The book is "Show Me!," published by St. Martin's Press, which was issued first in West Germany in 1974 by a Lutheran Church-sponsored publishing company. The English version was introduced in 1975 and St. Martin's had defended the book successfully in obscenity cases in Massachusetts, New Hampshire, and Oklahoma. *Id.*

119. For a discussion of the nature of freedom of speech, see notes 11-15 and accompanying text *supra*.