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First Amendment--Nonobscene Child Pornography and Its Categorical Exclusion from Constitutional Protection

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SUPREME COURT REVIEW

FIRST AMENDMENT — NONOBSCENE CHILD PORNOGRAPHY AND ITS CATEGORICAL EXCLUSION FROM CONSTITUTIONAL PROTECTION

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

I. INTRODUCTION

In *New York v. Ferber*,¹ the Supreme Court upheld a New York criminal statute² which prohibited the distribution of material that visually depicts sexual conduct or the lewd exhibition of genitals by children under sixteen years of age, when such material is not legally obscene.³ Prior to *Ferber*, the first amendment required a finding of legal obscenity before sexually explicit speech could be prohibited on the basis of content.⁴ The Court broke with precedent⁵ in the instant case, however, and classified nonobscene depictions of children's sexuality as a new category of speech which, like obscenity, receives no first amendment protection.⁶ Because the state has a "compelling interest in prosecuting those who promote the sexual exploitation of children,"⁷ and because the Court felt that this interest was not adequately reflected in the legal

¹ 102 S. Ct. 3348 (1982).

² N.Y. PENAL LAW §263.00 (McKinney 1977).

³ The standard for determining whether speech is obscene, and thus outside the protection of the first amendment, was enunciated by the Supreme Court in *Miller v. California*, 413 U.S. 15, 24 (1973): "A state [obscenity] 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."

⁴ See *Pinkus v. United States*, 436 U.S. 293 (1978); *Marks v. United States*, 430 U.S. 188 (1977); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Hamling v. United States*, 418 U.S. 87 (1974); *Miller v. California*, 413 U.S. 15 (1973).

⁵ For a discussion of the Court's misuse of precedent, see *infra* notes 105-124 and accompanying text.

⁶ *Ferber*, 102 S. Ct. at 3357.

⁷ *Id.* at 3356.

definition of obscenity set forth in *Miller v. California*,⁸ the Court held:

The test for child pornography is separate from the obscenity standard. . . . 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.⁹

This Note will examine the precedents and justifications used by the Court in removing nonobscene child pornography from the protection of the first amendment. It will also discuss the significance of the Court's willingness to place a new category of expression beyond the realm of constitutional protection without a requirement that the trier of fact consider the value of the material taken as a whole.

II. HISTORY

In 1977, the United States Congress and the national media exposed the exploitation of children by pornographers as a national problem.¹⁰ The New York legislature responded to the problem by enacting article 263 of its penal law,¹¹ which classifies the use of a child in a sexual performance as a class D felony.¹² "A person is guilty of promoting a sexual performance¹³ by a child when, knowing the character and

⁸ 413 U.S. 15. See *supra* note 3, *infra* notes 72-76 and accompanying text.

⁹ *Ferber*, 102 S. Ct. at 3358.

¹⁰ The widespread use of children in pornography is a relatively new phenomenon: "Child pornography as a big business began with the importation of such material from Europe about 18 months ago. The child magazines and films quickly became big sellers in adult bookshops and American pornographers, alert to a good business opportunity, rushed into the market." Sneed, Bliss and Mosley, *Child Pornography: Sickness for Sale*, Chi. Tribune, May 15, 1977, at 1, col. 1, reprinted in *Protection of Children Against Sexual Exploitation: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 130 (1977) [hereinafter cited as *Senate Hearings*]. The discovery of the problem led to many investigative reports. See, e.g., Anson, *The Last Porno Show*, NEW TIMES, June 24, 1977, at 46, reprinted in *Senate Hearings*, *supra*, at 130; *Child's Garden of Perversity*, TIME, Apr. 4, 1977, at 55, reprinted in *Senate Hearings*, *supra*, at 121; *Child Pornography: Outrage Starts to Stir Some Action*, U.S. NEWS & WORLD REP., June 13, 1977, at 66; Densen-Gerber, *What Pornographers are Doing to Children: A Shocking Report*, REDBOOK, Aug. 1977, at 86; *Kiddie Porn*, CBS 60 Minutes, vol. IX, No. 33 [broadcast May 17, 1977], reprinted in *Senate Hearings*, *supra*, at 123.

¹¹ The New York legislative declaration reads as follows:

The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performance. 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.

N.Y. PENAL LAW §263.00 (McKinney 1977).

¹² Class D felonies carry a maximum punishment of up to seven years for an individual, and a fine up to \$10,000 for corporations. N.Y. PENAL LAW §§ 70.00, 80.10 (McKinney 1975).

¹³ "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age. N.Y. PENAL LAW § 263.00(1) (McKinney 1977).

content thereof, he produces, directs, or promotes¹⁴ any performance¹⁵ which includes sexual conduct by a child less than sixteen years of age.”¹⁶ 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.”¹⁷ This statute lacks an obscenity requirement, and since another section of the penal law¹⁸ prohibits obscene sexual performances involving children, “[i]f section 263.15 serves any independent purpose, its goal must be to prohibit nonobscene sexual performances¹⁹ involving children.”²⁰

The instant case arose when Paul Ferber, the proprietor of a Manhattan bookstore, sold an undercover police officer two films devoted almost exclusively to depictions of young boys masturbating. Ferber was indicted on two counts of promoting an obscene sexual performance by a child, and two counts of promoting a sexual performance by a child.²¹ A jury acquitted Ferber of the obscenity charge, but found him guilty under section 263.15, which does not require proof of obscenity.²² Ferber's conviction was affirmed without opinion by the Appellate Division of the New York State Supreme Court.²³

The New York Court of Appeals reversed, however, declaring the

¹⁴ “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same. N.Y. PENAL LAW § 263.00(5) (McKinney 1977).

¹⁵ “Performance” means any play, motion picture, photograph, or dance. Performance also means any other visual representation exhibited before an audience. N.Y. PENAL LAW § 263.00(4) (McKinney 1977).

¹⁶ *Id.* § 263.15 (McKinney 1977).

¹⁷ *Id.* § 263.00(3) (McKinney 1977).

¹⁸ *Id.* § 263.10 (McKinney 1977) 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.”

¹⁹ New York is one of twenty states which prohibit the sale of nonobscene child pornography. *See* ARIZ. REV. STAT. ANN. §13-3553 (Supp. 1981); COLO. REV. STAT. §18-6-403 (Supp. 1981); DEL. CODE ANN. tit. 11, §§ 1108, 1109 (1979); FLA. STAT. § 847.014 (1976); HAWAII REV. STAT. §707-751 (Supp. 1981); KY. REV. STAT. §§ 531.320, 531.340-360 (1980); LA. REV. STAT. ANN. § 14:81.1 (A)(3) (West Supp. 1982); MASS. GEN. LAWS ANN. ch. 272, § 29A (West Supp. 1982); MICH. COMP. LAWS § 750.145c(3) (1982); MISS. CODE ANN. § 97-5-33(4) (Supp. 1981); MONT. CODE ANN. § 45-5-625 (1981); N.J. REV. STAT. § 2C:24-4(b)(5) (1981); OKLA. STAT. tit. 21 § 1021.2 (Supp. 1981-1982); PA. CONS. STAT. § 6312(c) (1982); R.I. GEN. LAWS § 11-9-1.1 (1981); TEX. PENAL CODE ANN. tit. 9, § 43.25 (Vernon 1982); UTAH CODE ANN. § 76-10-1206.5(3) (Supp. 1981); W. VA. CODE § 61-8C-3 (Supp. 1981); WIS. STAT. ANN. § 940.203(4) (West Supp. 1981-1982).

²⁰ *People v. Ferber*, 52 N.Y.2d 674, 678, 422 N.E.2d 523, 525, 439 N.Y.S.2d 863, 865 (1981)(*per curiam*).

²¹ *Id.* at 677, 422 N.E.2d at 524, 439 N.Y.S.2d at 864.

²² *People v. Ferber*, 96 Misc.2d 669, 409 N.Y.S.2d 632 (1978).

²³ *People v. Ferber*, 62 A.D. 558, 424 N.Y.S.2d 967 (1980).

statute to be unconstitutional.²⁴ In holding that the statute violated the first amendment, the court stated:

[O]n its face the statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a non-obscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose. In short, the statute would in many, if not all, cases prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment.²⁵

In essence, the court's primary criticism was that the statute swept protected expression within its ambit, and was therefore unconstitutionally overbroad.²⁶

The court of appeals also criticized the statute for being underinclusive. Although the state's purpose was to protect the welfare of minors, the court questioned the nexus between this purpose and the means chosen since the statute did not prohibit the distribution of all films in which a child was required to engage in any of the other activities which the legislature has determined to be dangerous to children, such as the performance of a dangerous stunt.²⁷ Citing *Erznoznik v. City of Jacksonville*²⁸ for support, the court therefore held that section 263.15 could not be sustained because it discriminated against visual portrayals

²⁴ *People v. Ferber*, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981)(per curiam).

²⁵ *Id.* at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865. Judge Jasen, who dissented, disagreed with the majority's interpretation of the statute and with the majority's assessment that the statute could not be more narrowly construed. He thought the statute need not be read so broadly as to include socially beneficial material, but could instead be construed to reach only "sexually exploitive materials." *Id.* at 687, 422 N.E.2d at 530, 439 N.Y.S.2d at 870. (Jasen, J., dissenting).

²⁶ The court listed the statute's prohibition of materials produced outside of New York as another reason for holding that the statute would punish protected speech. The court noted that some material may contain depictions of sexual activity by children which is considered normal in the children's culture, such as a filmed report of New Guinea fertility rites. *Ferber*, 52 N.Y.2d at 680, 422 N.E.2d at 526, 439 N.Y.S.2d at 866. Because such a report would be banned even though the children's acts are not illegal where the film is produced, and because such a report does not involve exploitation, the statute would, in effect, ban protected material while serving no state interest. Further, the court doubted whether New York possessed the police power to regulate sexual performances of children produced outside the state. *Id.*

²⁷ *Id.*

²⁸ 422 U.S. 205 (1975). In *Erznoznik*, the Supreme Court did not allow the City of Jacksonville to justify its ban of outdoor movies containing nonobscene nudity on the basis of preventing traffic accidents:

By singling out movies containing even the most fleeting and innocent glimpses of nudity the legislative classification is strikingly underinclusive. There is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.

Id. at 214-15.

of nonobscene adolescent sex and "no justification has been shown for the distinction other than special legislative distaste for this type of portrayal."²⁹

The court concluded its opinion by emphasizing that striking down section 263.15 would not leave children unprotected. "Those who employ children in obscene plays, films and books, are still subject to prosecution as are those who sell or promote such materials. . . ." ³⁰ While recognizing the state's compelling interest in protecting children from sexual exploitation,³¹ the court refused to recognize a close connection between this interest and the prohibition of nonobscene depictions of child sexuality.³² The court apparently decided that harmful exploitation could be prevented by regulating obscene material, and that such an approach was required in order to protect first amendment rights.³³

Judge Jasen dissented. According to him, section 263.15 did not restrict the exchange of ideas concerning teenage sexuality; it merely eliminated one mode of expression available to a speaker in exploring the topic by prohibiting the use of children in depictions.³⁴ Therefore, Judge Jasen would have upheld the statute under the test enunciated by the United States Supreme Court in *United States v. O'Brien*.³⁵ Moreover,

²⁹ *Ferber*, 52 N.Y.2d at 681, 422 N.E.2d at 526, 439 N.Y.S.2d at 866.

³⁰ *Id.* at 681, 422 N.E.2d at 526, 439 N.Y.S.2d at 866-67.

³¹ *Id.* at 679, 422 N.E.2d at 525-26, 439 N.Y.S.2d at 866.

³² *Id.* at 681, 422 N.E.2d at 526, 439 N.Y.S.2d at 866-67.

³³ The court attempted to interpret the statute in a manner which avoided constitutional infirmities, but found that "it is not possible to save section 263.15 by limiting its application to those who promote obscene performances." *Id.* at 678-79, 422 N.E.2d at 525, 439 N.Y.S.2d at 865. Apparently, the court felt that nonobscene depictions could not be prohibited because such depictions fall under the protective reach of the first amendment.

³⁴ *Id.* at 684, 422 N.E.2d at 528, 439 N.Y.S.2d at 868-69 (Jasen, J., dissenting). Judge Jasen was apparently contending that the statute is merely a reasonable time, place, or manner restriction. For a discussion of this viewpoint, see *infra* note 143.

³⁵ 391 U.S. 367, 377 (1967). The *O'Brien* test holds that:

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

This test is used to determine whether a governmental interest is important enough to justify regulation of conduct, when that regulation produces incidental limitations on first amendment rights. *Id.* at 376.

The *O'Brien* test should not be applied to section 263.15. That section fails the third part of the *O'Brien* test because it is content-based and thus not unrelated to the suppression of free expression. As Professor Nimmer explains, statutes which purport to regulate communicative conduct fail the third section of the *O'Brien* test when they regulate conduct in contexts which differ only in their communicative potential from contexts in which the conduct is not regulated. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29, 39-41 (1973). Section 263.15 regulates the sexual exploitation of children, the conduct which the government is interested in preventing, only when that conduct is captured in a depiction with communicative potential. Further, to the extent that section 263.15 serves the

he reasoned that even if the statute was a restriction on content, as the majority contended, and was therefore subject to the strictest standards of scrutiny

the State's interest in protecting children is so compelling that even a direct restraint would be permissible. . . . [T]here is a "clear and present danger" that the promotion of a "sexual performance" by a child will bring about the substantive evil—child abuse—which the Legislature has a right to prevent.³⁶

Judge Jasen proceeded on the assumption that the concept of obscenity has no place in a statute directed at child pornography. He reasoned that obscenity statutes are concerned with the effect which obscene material has upon the community, while child pornography statutes are concerned with preventing the child abuse which is inherent in the production of such materials.³⁷ Because these statutes are concerned with protecting different state interests, Judge Jasen assumed that obscenity statutes would fail to cover all instances of sexual child

government's interest in protecting children from invasions of privacy which occur when non-obscene depictions of child sexuality are distributed, *see infra* notes 79-80 and accompanying text, the government interest in suppressing these depictions is related solely and directly to their use as a means of communication and is unrelated to regulation of conduct. The *O'Brien* test is inapplicable when "the communication allegedly integral to the conduct is itself thought to be harmful." *O'Brien*, 391 U.S. at 382.

³⁶ *Ferber*, 52 N.Y.2d at 686, 422 N.E.2d at 530, 439 N.Y.S.2d at 870 (Jasen, J., dissenting). The clear and present danger test, introduced by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919), has been used to separate constitutionally protected advocacy from unprotected incitement of violent or illegal conduct. *See, e.g.*, *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173-74 (1976); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). *But see Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1976) (applying clear and present danger test to fair trial-free press problem). The clear and present danger test was restated in its present form in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), where the Court held that government may not prohibit advocacy of illegal or dangerous acts "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (footnote omitted). The purpose of the clear and present danger test is not to suppress speech which is regarded as evil in itself. It is to suppress speech which, by its force, is capable of inciting an immediate evil. "Only that evil which is so imminent as to come to fruition before it can be absorbed and considered in open debate may be prohibited." Torke, *Some Notes on the Proper Uses of the Clear and Present Danger Test*, 1978 B.Y.U.L. REV. 1, 35.

Properly formulated, the clear and present danger test does not apply to child pornography. The *Ferber* Court explained that the sale of child pornography encourages child abuse by providing profits to the producers to abuse children, leading these producers to create more child pornography. *Ferber*, 102 S. Ct. at 3357. But this is a slow process, not an immediate one. Further, the sale of child pornography is not directed at inciting child abuse; it is directed at inciting a sexual response in deviants. The clear and present danger test could be properly used to prohibit child pornography if the Court found that child pornography is directed to and has the effect of inciting deviants to molest children; this possibility, however, was never discussed by the Court.

³⁷ *Ferber*, 52 N.Y.2d at 682-83, 422 N.E.2d at 527, 439 N.Y.S.2d at 867 (Jasen, J., dissenting).

abuse, and that therefore, a separate child pornography statute was needed.³⁸ The majority, on the other hand, proceeded on the assumption that the guidelines of *Miller* constituted the appropriate border separating protected from unprotected material in the context of a child pornography statute.³⁹ The Supreme Court, while admitting that "the Court of Appeals' assumption was not unreasonable in light of our decisions,"⁴⁰ reversed the decision and held that the statute is constitutional.⁴¹

III. THE SUPREME COURT

Justice White's majority opinion⁴² removed all works which contain a sexual performance by a child, as defined by New York Penal Law section 263.15, from first amendment protection. The Court employed a balancing test in reaching this result; the state's "compelling interest" in protecting children from sexual exploitation was weighed against the "*de minimis*" first amendment interest in allowing the distribution of depictions of children's sexual activity.⁴³

After noting that the dangers to the physical and emotional well-being of child pornography participants are well documented,⁴⁴ the

³⁸ *Id.* (Jasen, J., dissenting). Judge Jasen implied that child pornography receives less protection than obscenity because the state's interest in eradicating child pornography is, perhaps, more compelling than its interest in eradicating obscenity. *See id.* at 685-686, 422 N.E.2d at 529, 439 N.Y.S.2d at 869 (Jasen, J., dissenting).

³⁹ *Id.* at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 863.

⁴⁰ *Ferber*, 102 S. Ct. at 3352. Several commentators had predicted that when child pornography laws which lacked an obscenity requirement were brought before the Court, they would be found unconstitutional. *See, e.g.,* Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809, 824-36 (1978) (child pornography statutes regulate a form of free speech, and without an obscenity requirement "[s]uch sweeping legislative prohibitions fall desperately short of the *Miller* standards and are clearly overbroad." *Id.* at 828); Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. ILL. L.F. 711, 740-42 ("New York's rejection of the obscenity doctrine appears patently unconstitutional." *Id.* at 743-44). *Contra* Comment, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295, 306-33 (1978) ("failure to provide an obscenity requirement does not violate the first amendment, provided that explicit sexual conduct is defined only to include conduct certain to harm the child victim." *Id.* at 334).

⁴¹ In reaching this result, the Court failed to make use of either the clear and present danger test or the *O'Brien* standard used by Judge Jasen.

⁴² Justice White's majority opinion was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice O'Connor filed a concurring opinion. Justice Brennan also filed an opinion, which Justice Marshall joined, concurring in the judgment. Similarly, Justice Stevens filed an opinion concurring in the judgment, and Justice Blackmun concurred without opinion.

⁴³ *Ferber*, 102 S. Ct. at 3358.

⁴⁴ *Id.* at 3355 n.9. After extensive hearings, the Senate Committee on the Judiciary concluded that child pornography participants are often unable to develop healthy personal relationships in adulthood, and that they tend to become sexual abusers themselves. S. REP. NO.

Court concurred in the legislative judgment that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."⁴⁵ Justice White stressed that the state's compelling interest in protecting children has justified limitations on first amendment freedoms in the past,⁴⁶ citing *Prince v. Massachusetts*,⁴⁷ *Ginsberg v. New York*,⁴⁸ and *FCC v. Pacifica Foundation*⁴⁹ as examples. The Court's reasoning merely reaffirmed its long-held belief that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."⁵⁰

After evaluating the state's interest in banning nonobscene depictions of adolescent sexuality and finding that interest compelling, the Court turned to an examination of the first amendment interests at stake. The Court decided that these interests were insignificant. First, the Court held that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct

438, 95th Cong., 1st Sess. 9 (1977). Children are also physically harmed in the production of sado-masochistic materials, and sometimes even murdered. See Anson, *supra* note 10, quoted in *Senate Hearings*, *supra* note 10, at 154. In addition, children may suffer other forms of physical harm because their bodies are not mature enough for sexual activity:

The prepubescent child having sexual intercourse does not have a vaginal pH which protects against infection. Work in Australia by Dr. Malcom Doppileson, a gynecologist and Odyssey Board Member, has shown that children who have prepubescent intercourse have the highest incidence of cervical carcinoma of all women at early ages in their twenties and thirties.

Sexual Exploitation of Children: Hearings before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess., 44 (1977) (statement of Judianne Densen-Gerber, President, Odyssey Institute) [hereinafter cited as *House Crime Hearings*]. See also Densen-Gerber, *Child Prostitution and Child Pornography: Medical, Legal and Societal Aspects of the Commercial Exploitation of Children*, in U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *SEXUAL ABUSE OF CHILDREN: SELECTED READINGS* 77, 80 (1980); Ellerstein & Canavan, *Sexual Abuse of Boys*, 134 AM. J. DISEASES OF CHILDREN 255, 256-57 (1980); Finch, *Adult Seduction of the Child: Effects on the Child*, 7 MED. ASPECTS OF HUM. SEXUALITY 170, 185 (1973); Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCH. 289, 296 (1980); Schoettle, *Treatment of the Child Pornography Patient*, 137 AM. J. PSYCH. 1109, 1110 (1980).

⁴⁵ *Ferber*, 102 S. Ct. at 3355.

⁴⁶ See *infra* notes 117-24 and accompanying text.

⁴⁷ 321 U.S. 158 (1944). In *Prince*, the Court upheld a child labor law which prohibited children from selling periodicals in any street or public place. The statute was challenged on the basis that it prevented a young child who was a Jehovah's Witness from distributing religious pamphlets. Despite the statute's effect on the freedom of religion, the Court upheld the law in the interest of protecting children.

⁴⁸ 390 U.S. 629 (1968). In *Ginsberg*, the Court upheld a statute which prohibited the sale of sexually explicit literature to minors. While conceding that the material in question was not obscene as to adults, the Court held the legislature could rationally find that exposure to such material is harmful to minors.

⁴⁹ 438 U.S. 726 (1978). In *Pacifica*, the Court found that a radio monologue which dealt explicitly with four-letter words was not obscene, but was regulable because the government's interest in protecting children justified limiting indecent but nonobscene broadcasts to hours when children were not likely to be in the audience.

⁵⁰ *Prince*, 321 U.S. at 168.

is exceedingly modest, if not *de minimis*.”⁵¹ In so holding, the majority embraced for the first time the notion that the social value of speech is a consideration in determining what degree of protection should be awarded that speech.⁵² Second, the Court denied that a ban on the dissemination of nonobscene depictions of adolescent sexuality was equivalent to “censoring a particular literary theme or portrayal of sexual activity;”⁵³ such depictions still retain first amendment protection as long as they do not contain a live performance by a minor.⁵⁴ Third, the Court dismissed the claim that section 263.15 is unconstitutionally overbroad.⁵⁵ While admitting that under the New York Court of Appeals’ construction⁵⁶ the statute could apply to “medical textbooks [and] pictorials in National Geographic” and that such applications were “arguably impermissible,”⁵⁷ Justice White denied that the statute was unconstitutionally overbroad because any resultant overbreadth would not be “substantial.”⁵⁸ The Court reached this holding by applying the rule of *Broadrick v. Oklahoma*,⁵⁹ which held 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,”⁶⁰ before a statute may be declared unconstitutionally overbroad. The Court thereby extended the scope of *Broadrick*, which had previously applied only in cases “where conduct and not merely speech is involved,”⁶¹ to cases like *Ferber*, which deal

⁵¹ *Ferber*, 102 S. Ct. at 3357.

⁵² Justice Steven’s opinion in *Young v. American Mini Theatre*, 427 U.S. 50, 70 (1975) held that sexually explicit speech does not receive full first amendment protection because “few of us would march our sons and daughters off to war to preserve [it].” That section of his opinion, however, was joined only by Chief Justice Burger and Justices White and Rehnquist. Likewise, the section of Justice Steven’s opinion in *Pacifica* which suggested that sexually explicit speech deserves less than full first amendment protection was joined only by Chief Justice Burger and Justice Rehnquist. In *Ferber*, the Court takes Justice Steven’s argument further than he intended: he believes that speech with lesser value, while regulable, is still protected from total suppression. *Id.* For a discussion of Justice Steven’s concurrence in *Ferber*, see notes 92-97 and accompanying text.

⁵³ *Ferber*, 102 S. Ct. at 3357.

⁵⁴ *Id.* at 3357-58.

⁵⁵ A regulation is overbroad when it punishes speech which it did not have to reach in order to accomplish the legislature’s valid goal. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 710 (1978); Comment, *First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

⁵⁶ The Court was bound to accept the construction given the statute by the New York Court of Appeals. See *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). For the New York court’s construction, see *supra* note 25 and accompanying text.

⁵⁷ *Ferber*, 102 S. Ct. at 3363.

⁵⁸ *Id.*

⁵⁹ 413 U.S. 601 (1973). In *Broadrick*, the Court limited the reach and strength of the overbreadth doctrine. See Shaman, *The First Amendment Rule Against Overbreadth*, 52 TEMP. L.Q. 259, 269 (1979); Yarbrough, *The Burger Court and Freedom of Expression*, 33 WASH. & LEE L. REV. 37, 39 (1976).

⁶⁰ *Broadrick*, 413 U.S. at 615.

⁶¹ *Id.* Justice White extended the doctrine by stating:

with pure speech.⁶²

Consideration of these three factors convinced the Court that the infringement on first amendment interests was slight and easily outweighed by the state's interest in protecting children. Therefore, the Court determined that the state was entitled to "greater leeway in the regulation of pornographic depictions of children"⁶³ than it is usually allowed in cases involving infringements on first amendment freedoms. Because the Constitution allowed greater leeway in the area of child pornography, the Court decided to scrutinize the statute less stringently⁶⁴ than would be necessary if first amendment interests were involved.⁶⁵

While he admitted that this balancing test had been used to create a new, unprotected, and content-based⁶⁶ classification of speech, Justice White argued that such a move was not unprecedented:

[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, 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. When 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

Broadrick was a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary 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. . . .

Ferber, 102 S. Ct. at 3362.

⁶² Motion pictures, photographs, illustrations, and plays are all protected by the first amendment and are considered forms of pure speech. See *Schad v. Borough of Mount Ephriam*, 452 U.S. 61, 65 (1981); *Erznoznik*, 422 U.S. at 208; *Jenkins v. Georgia*, 418 U.S. 153, 155 (1974); *Schacht v. United States*, 398 U.S. 58, 62 (1970); *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

⁶³ *Ferber*, 102 S. Ct. at 3354.

⁶⁴ For a discussion of the standards of scrutiny that are appropriate for analyzing statutes when first amendment interests are involved, see *infra* notes 127-31 and accompanying text.

⁶⁵ Removing child pornography from the first amendment also allowed the Court to sidestep the underinclusiveness problem discussed by the New York Court of Appeals. Since the Court held that § 263.15 adequately defined an area of unprotected speech subject to content-based regulation, *Ferber*, 102 S. Ct. at 3359, n.18, "it cannot be underinclusive or unconstitutional for a state to do precisely that." *Id.*

⁶⁶ A content-based regulation is one which applies only to speech which deals with a certain subject matter or advocates a particular viewpoint. An example of a content-based regulation can be found in *Street v. New York*, 394 U.S. 576 (1969). In *Street*, the Court struck down a statute making it a crime to cast contempt upon an American flag. This statute was content-based because it only applied when the speaker expressed a viewpoint contemptuous of the American flag. See also *L. TRIBE*, *supra* note 55 at 584-99.

materials as without the protection of the First Amendment.⁶⁷

Justice White cited libel,⁶⁸ obscenity,⁶⁹ and fighting words⁷⁰ as examples of content-based classes of speech which have been removed from first amendment protection by the same process that resulted in the removal of child pornography.

As a result of the categorical balancing described above, the Court held that states can ban the distribution of materials described by section 263.15, even when these materials are not legally obscene under the *Miller* standard.⁷¹ Because the Court accepted Judge Jasen's assumption⁷² that child pornography and obscenity statutes protect different state interests,⁷³ it feared the category of obscene material would not include all depictions of children's sexuality in which production had involved the sexual abuse of a child.⁷⁴ The Court also was concerned that the prosecutorial burden involved in obtaining an obscenity conviction would preclude adequate enforcement of child pornography laws if those laws incorporated the *Miller* guidelines.⁷⁵ Since the Court was motivated by these fears, and had accepted the legislative judgment that the harm which accrues from producing depictions of adolescent sexuality greatly outweighs any social value attached to the resulting work, the Court did not require that the states make exceptions for works of serious value, as it did in *Miller*. Concern for the possibility that "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography"⁷⁶ led the Court to substitute a standard more protective of children and less protective of first amendment rights than the *Miller* guidelines.

Next, the Court explained why the New York legislature was not restricted to penalizing only producers of child pornography. According to the Court, limiting punishment to producers while allowing distribu-

⁶⁷ *Ferber*, 102 S. Ct. at 3358.

⁶⁸ *See Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁶⁹ *See Roth v. United States*, 354 U.S. 476 (1957).

⁷⁰ *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁷¹ *Ferber*, 102 S. Ct. at 3357.

⁷² *See supra* note 38 and accompanying text.

⁷³ *Ferber*, 102 S. Ct. at 3356-57. This assumption is correct, for child pornography statutes are designed to protect children from abuse, while obscenity statutes are designed to protect the moral character of the community, guard against illegal conduct which might be caused by exposure to obscene literature, and preserve the community from the deteriorating effects of outlets for adult materials. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 57-61 (1973). Admitting that this assumption is correct does not imply, however, that the Court's conclusion that obscenity statutes fail to protect against instances of child abuse is correct. *See infra* notes 136-42 and accompanying text.

⁷⁴ *Ferber*, 102 S. Ct. at 3356-57.

⁷⁵ *Id.* at 3357, n.12.

⁷⁶ *Id.* at 3356-57.

tors to escape punishment would be an inadequate solution to the child pornography problem.⁷⁷ First, the mechanics of child pornography production are such that it may be impossible to stop the child abuse that accompanies production by merely regulating producers, for "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."⁷⁸ Second, the distribution of material in and of itself is harmful to the child. The Court explained that distribution of the material invades the child's privacy interest⁷⁹ and also causes emotional harm because the child fears later exposure.⁸⁰ Justice White also employed a third rationale for regulating distributors: the doctrine that the first amendment does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute."⁸¹ Recognizing that the production of child pornography is illegal throughout the nation,⁸² the Court suggested that the advertising and selling of child pornography is an "integral part" of its production, because the sale of child pornography provides an economic incentive for the production of such materials.⁸³ Therefore, the Court held that, in the context of child

⁷⁷ *Id.* at 3356.

⁷⁸ *Id.* Finding the producers of child pornography is a very difficult task for law enforcement officials:

The production of child pornography takes little more than a photographer, a child, a room and an hour; successful dissemination requires an established commercial network and far greater public exposure. Thus, although expensive undercover operations are necessary to discover, arrest, and convict clandestine producers, much simpler police procedures can eliminate child pornography. . . .

Note, *supra* note 40, at 716.

⁷⁹ *Ferber*, 102 S. Ct. at 3355, n.10.

⁸⁰ *Id.*

⁸¹ *Ferber*, 102 S. Ct. at 3357 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

⁸² *Id.*

⁸³ *Id.* In claiming that the dissemination of child pornography is an integral part of production merely because dissemination provides an economic motive for production, the Court greatly stretches the meaning of the word "integral" and misapplies the holding of *Giboney*. The Court declared in *Giboney* that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Giboney v. Empire Storage & Ice Co.* 336 U.S. 490, 502 (1949). The *Ferber* Court takes this statement to mean that speech can be deemed illegal because it is related to conduct which is criminal. That conclusion, however, does not follow. *Giboney* supports the proposition that the state can punish the child pornography producer because he is engaged in criminal conduct, regardless of the effect that this regulation on conduct has on stopping the free flow of literature; but it does not give the state license to suppress speech in order to deter conduct.

Giboney is not only inapplicable to the facts of *Ferber*, but is also of doubtful continuing vitality. For example, in *Cohen v. California*, 403 U.S. 15 (1971), the Court held that the act of wearing a jacket emblazoned with the legend "Fuck the Draft" could not be punished under a statute directed at punishing breaches of the peace, in part because the conduct and

pornography, a state can punish both the distribution and the production of expressive materials in order to reach conduct. The sum of all these considerations was the Court's holding that "[a]s applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth."⁸⁴

Although she joined the majority opinion, Justice O'Connor wrote a separate concurrence to stress that material containing serious literary, artistic, scientific, or educational value can be banned if it contains depictions of explicit sexual behavior by minors:

The compelling interests identified in today's opinion . . . suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions

An exception for depictions of serious value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment.⁸⁵

The majority opinion is somewhat ambiguous on the issue of whether the statute can be constitutionally applied to a work containing serious value, although the opinion's predominant theme suggests that serious works are not exempt from the statute. Because the Court held that works containing depictions of child sexuality need not be considered as a whole,⁸⁶ the first amendment inquiry might be limited to determining whether an offensive picture, viewed in isolation, falls within the statutory definition of child pornography. If the first amendment inquiry is limited in this fashion, the value of a work may never be discovered, much less discussed, by courts. Therefore, Justice O'Connor's assessment that the majority does not plan to exempt works of value from suppression appears to be accurate.

Justice Brennan, with whom Justice Marshall joined, strenuously disagreed with the majority and Justice O'Connor on the constitutionality of suppressing works of value. While agreeing that the statute was properly applied to Paul Ferber, Justice Brennan stated that the application of the statute to any depiction of a child that had serious value would violate the Constitution, because "the limited classes of speech,

the speech were not separable. *Id.* at 18. Justice Blackmun, in his dissent, cited *Giboney* to support his conclusion that Cohen's conduct could be punished. *Id.* at 27 (Blackmun, J., dissenting).

⁸⁴ *Ferber*, 102 S. Ct. at 3363-64 (footnote omitted).

⁸⁵ *Id.* at 3364 (O'Connor, J., concurring). Justice O'Connor stated that "[a]s drafted, New York's statute does not attempt to suppress the communication of particular ideas." *Id.* She apparently believes that an exception for works of value would allow states to single out works containing particular viewpoints for suppression.

⁸⁶ *Id.* at 3358.

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."⁸⁷ Justice Brennan argued that because any depiction which in itself is a serious contribution to literature, art, science or politics is, by definition, not of slight social value, it cannot be stripped of first amendment protection.⁸⁸ Thus, Justice Brennan was not willing to abandon the *Miller* test: he would at least retain the component of the test requiring that works be protected unless, "taken as a whole, [they] do not have serious. . . value."⁸⁹

According to Justice Brennan, the retention of this component of the *Miller* standard would not hamper the state's ability to protect children. He argued that the Court's assumption that children are harmed whenever they are photographed in lewd poses is not necessarily true when the children are participating in the production of a serious work.⁹⁰ The state's compelling interest fades as the state turns from regulation of the "low profile clandestine industry" which produces purely obscene materials, to the regulation of works of value produced by legitimate businesses.⁹¹ Since he was unwilling to make the assumption that all sexual depictions necessarily involve damage to the child and that any work which contains such a depiction is valueless, Justice Brennan did not endorse the categorical balancing approach employed by the majority.

Justice Stevens also wrote a concurrence which agreed that the statute was constitutional as applied to Ferber and criticized the majority for categorically removing all works containing sexual depictions of children from first amendment protection.⁹² He declared that "[t]he question of whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context."⁹³ Indeed, he argued that the first amendment would protect even the films which led to Ferber's conviction, if the films were shown in a proper setting for a legitimate purpose.⁹⁴ Justice Stevens therefore would also retain the *Miller* requirement that material be con-

⁸⁷ *Id.* at 3365 (Brennan, J., concurring in the judgment).

⁸⁸ *Id.* (Brennan, J., concurring in the judgment).

⁸⁹ *Miller*, 413 U.S. at 24.

⁹⁰ *Ferber*, 102 S. Ct. at 3365 (Brennan, J., concurring in the judgment).

⁹¹ *Id.* (Brennan, J., concurring in the judgment).

⁹² *Id.* at 3367 (Stevens, J., concurring in the judgment).

⁹³ *Id.* at 3366 (Stevens, J., concurring in the judgment).

⁹⁴ Justice Stevens explained:

[T]he exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psy-

sidered as a whole, to ensure that challenged communications will be examined in their context, as required by the first amendment.

Contrary to the majority, Justice Stevens reasoned that the first amendment provides nonobscene depictions of child sexuality with some marginal degree of protection, but not a degree sufficient to warrant the use of the overbreadth doctrine to invalidate the statute.⁹⁵ By avoiding overbreadth analysis, he sought to circumvent any discussion of future applications of the statute, and he criticized the majority for discussing "the contours of the category of nonobscene child pornography that New York may legitimately prohibit" in an "abstract setting."⁹⁶ Such speculation about future cases results in an "abstract, advance ruling," and Justice Stevens expressed his concern that "[h]ypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication."⁹⁷

Therefore, Justice Stevens did not sanction the categorical prohibition of child pornography advanced by the majority, preferring instead to leave the decision regarding what is protected to case-by-case adjudication. He believed that a categorical prohibition constitutes substitution of "broad, unambiguous state-imposed censorship for the self-censorship that an overbroad statute might produce."⁹⁸ He acknowledged that case-by-case adjudication might result in a chilling effect, as people will be unsure of the reach of the statute. Nevertheless, Justice Stevens apparently would prefer to chill some sexually explicit speech, which is of slight value in his eyes, rather than define a rigid category which could be used to prohibit socially valuable speech.

IV. ANALYSIS

The analysis used by the Court in *Ferber* is unprecedented, unpersuasive, and shocking in its disregard for the interests underlying our commitment to free expression.⁹⁹ The category of exempted material

chiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection.

Id. (Stevens, J., concurring in the judgment).

⁹⁵ *Id.* at 3367-68 (Stevens, J., concurring in the judgment). Justice Stevens has on several occasions suggested that sexually explicit speech, while protected by the first amendment, deserves less protection than other types of speech. *See, e.g., Schad*, 452 U.S. at 80 (Stevens, J., concurring in the judgment); *Pacifica*, 438 U.S. at 744-48; *Young*, 427 U.S. at 69-71.

⁹⁶ *Ferber*, 102 S. Ct. at 3367 (Stevens, J., concurring in the judgment).

⁹⁷ *Id.* at 3367 (Stevens, J., concurring in the judgment).

⁹⁸ *Id.* (Stevens, J., concurring in the judgment).

⁹⁹ Professor Emerson has grouped the interests protected by our commitment to free expression into four broad categories:

Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing partici-

created in *Ferber* is unlike any other category which has previously been exempted from first amendment protection. In addition, the means by which the Court created this category were questionable. Unless the Court retreats from its analysis in future cases, the protection traditionally afforded to socially valuable speech may be severely curtailed.

In its opinion, the Court attempted to demonstrate that precedent exists for absolutely denying first amendment protection to any work which contains a depiction of one of several specified sexual acts involving children. First, the Court explained that it has, on previous occasions, adhered to a two-level analysis of speech¹⁰⁰ and has relegated obscenity,¹⁰¹ libel,¹⁰² and fighting words¹⁰³ to unprotected status, under the standard set forth in *Chaplinsky v. New Hampshire*:

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 the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas. . . .¹⁰⁴

The categories mentioned in *Chaplinsky* differ, however, in two significant ways from the category created in *Ferber*. First, the *Chaplinsky* Court justified its treatment of libel, obscenity, and fighting words by explaining that these classes of speech were outlawed in many states when the Constitution was ratified, and that the founding fathers had therefore never intended these modes of expression to be protected by the first amendment.¹⁰⁵ This historical justification does not apply, however, to nonobscene depictions of children engaging in sexual be-

pation by the members of the society in social, including political, decisionmaking, and (4) as maintaining the balance between stability and change in the society.

Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 878-79 (1963).

¹⁰⁰ The two-level theory of speech, whereby all speech is either fully protected or not protected at all, has been strong criticized. See Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 443-44 (1980); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1. One problem with the two-level analysis first used in *Chaplinsky* is that this analysis does not justify extending protection to speech which only is valuable as a means of promoting individual self-fulfillment. Emphasis was placed mainly on protecting speech which has value "as a step to truth." *Chaplinsky*, 315 U.S. at 571-72.

It is curious that the Court relied on this theory in the area of child pornography, for the theory is being abandoned by the Court in the areas in which it was originally applied. Libel, for example, was given some constitutional protection in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

¹⁰¹ *Roth*, 354 U.S. 476.

¹⁰² *Beauharnais*, 343 U.S. 250.

¹⁰³ *Chaplinsky*, 315 U.S. 568.

¹⁰⁴ *Id.* at 571-72.

¹⁰⁵ See *infra*, note 107.

havior.¹⁰⁶ *Ferber*, therefore, represents the first instance in which a category of speech once sheltered by the first amendment has been stripped of that protection.¹⁰⁷ Second, the classifications mentioned in *Chaplinsky* are not absolute. For example, there is no list of words which are always fighting words;¹⁰⁸ the context and manner in which the words are spoken will be examined before a particular utterance is placed outside of the first amendment's protective mandate.¹⁰⁹ Likewise, there is no list of specified sexual acts which are always obscene when depicted or described.¹¹⁰ Yet, as Justice Stevens recognized, the statute involved in *Ferber* consists of an "abstract, advance" list of acts which, in any context, will always constitute unprotected child pornography.¹¹¹

Further, the nonabsolute categories of libel, obscenity, and fighting words have been carefully tailored by the Court to protect socially valuable speech. For example, by definition, socially valuable materials cannot be obscene.¹¹² The Court has similarly given libelous statements first amendment protection when such statements are part of a good faith criticism of a public official, because failure to protect the "erroneous statement [which] is inevitable in free debate"¹¹³ would result in self-censorship of valuable criticisms of government.¹¹⁴ Likewise, fighting words are protected when they serve the useful purpose of inviting

¹⁰⁶ A survey of legislation reveals that nonobscene depictions of children's sexuality were not illegal in any state before 1974. *House Crime Hearings*, *supra* note 44, at 227-34. The federal law aimed at child pornography was not enacted until 1978, and includes an obscenity provision. 18 U.S.C. § 2552(a) (Supp. IV 1981).

¹⁰⁷ The Court does not even attempt to justify the exclusion of nonobscene child pornography on historical grounds. In previous instances in which a category of speech has been denied first amendment protection, the Court has always discussed the category's historical exclusion from first amendment protection. *See Roth*, 354 U.S. at 482-85; *Beauharnais*, 343 U.S. at 254-58; *Chaplinsky* 315 U.S. at 571-72.

¹⁰⁸ While the *Ferber* majority stated that it is the content of an utterance that determines whether it is a fighting word, the Court will not declare an utterance to be unprotected merely on the basis of its content; the context in which the speech occurs is equally important. *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1973) (Powell, J., concurring). For example, the word "fuck" is sometimes a fighting word, sometimes an obscenity, and sometimes neither, depending on the context and manner in which the word is used. *See Cohen v. California*, 403 U.S. 15 (1971).

¹⁰⁹ *See Pacifica* 438 U.S. at 746.

¹¹⁰ As the Court held in *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam), "[a] reviewing court must, of necessity, look at the context of the material, as well as its content," before that material may be deemed obscene.

¹¹¹ *Ferber*, 102 S. Ct. at 3367 (Stevens, J., concurring in the judgment).

¹¹² While the definition of what is obscene has changed over the years, the definition has, for a long time, included a requirement that the work be lacking in value before it may be declared obscene. *See Miller*, 413 U.S. at 24; *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966); *Roth*, 354 U.S. at 484.

¹¹³ *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964).

¹¹⁴ *Id.* at 279.

dispute¹¹⁵ and do not create a "clear and present danger of a serious substantive evil."¹¹⁶ These categorizations all permit the presence of social value to insulate a work from suppression. In *Ferber*, however, the Court defines nonobscene child pornography as encompassing any work which contains a lewd scene involving a child. Following this reasoning, the question of whether the work has social value is irrelevant in considering whether it can be suppressed. The *Ferber* majority's failure to acknowledge the importance of context renders the earlier cases on obscenity, libel, and fighting words inapposite precedents for the Court's decision to unconditionally strip constitutional protection from nonobscene depictions of child sexuality.

The Court also attempted to find support for the *Ferber* decision in previous cases involving regulation of speech in the interest of protecting children. Although the Court cited these cases as precedent for the proposition that speech can be stripped of all protection and totally suppressed to protect children, the cited cases can be easily distinguished because they involved regulation, not the absolute prohibition of speech. For example, the Court cited *Young v. American Mini Theatres*¹¹⁷ to support the proposition that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."¹¹⁸ *Young*, however, concerned a zoning ordinance which prohibited adult movie theatres from concentrating in one area, and while the Court did allow the ordinance to stand, it stressed that the ordinance merely regulated the placement of adult theatres within the city: "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."¹¹⁹ Although a plurality of the Court in *Young* held that nonobscene but sexually explicit speech was of lesser value than political expression, the Court stressed that the speech was protected and that "the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value."¹²⁰

The Court's reliance on *FCC v. Pacifica Foundation*¹²¹ to support the excision of child pornography from the first amendment's protective

¹¹⁵ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

¹¹⁶ *Id.*

¹¹⁷ 427 U.S. 50 (1976).

¹¹⁸ *Ferber*, 102 S. Ct. at 3358.

¹¹⁹ *Young*, 427 U.S. at 71 n.35.

¹²⁰ *Id.* at 70. The Court's attempt to use *Young* as a precedent in *Ferber* is especially curious in light of the Court's discussion in *Schad*, where the Court explained that *Young* "did not purport to approve the total exclusion from the city of theatres showing adult, but not obscene, materials." *Schad*, 452 U.S. at 76.

¹²¹ 438 U.S. 726 (1978).

mandate was similarly flawed. In *Pacifica*, a George Carlin monologue satirizing contemporary attitudes toward four-letter words was held to be subject to regulation because the monologue had been broadcast at a time when children were likely to be in the listening audience. The Court emphasized, however, that the value of speech can vary with the circumstances, and that "this monologue would be protected in other contexts."¹²² Thus, while *Pacifica* is precedent for the proposition that some words or pictures may be regulated in certain circumstances in the interest of protecting children, it does not provide support for a complete ban on a particular form of expression. Although the cases cited by the *Ferber* Court illustrate that the state's interest in protecting minors has been used to justify statutes which operate in the area of first amendment freedoms,¹²³ this interest has never been deemed sufficient to take the challenged speech out of the protective reach of the first amendment.¹²⁴

In short, the Court's attempt to find precedent for its decision in *Ferber* was unsuccessful. Neither the cases involving historical, nonabsolute exclusions from first amendment protection nor the cases involving regulation of sexually explicit speech in order to protect children, provide precedent for the absolute categorical exclusion created in *Ferber*.

The process by which the Court removed the category of child pornography from the realm of constitutional protection is also a curious one. Although the Court admitted that section 263.15 is a content-based regulation, it did not subject the regulation to the exacting scrutiny that is usually applied to such regulations.¹²⁵ Normally, the Court will uphold a content-based regulation only if it fits into one of the traditionally excluded categories of speech,¹²⁶ or if the government demonstrates that the regulation is justified by a compelling state interest¹²⁷

¹²² *Id.* at 746.

¹²³ See *supra* notes 47-49 and accompanying text.

¹²⁴ When faced with a statute like section 263.15 which totally suppresses speech, the Court has, in the past, struck it down and required the state to regulate in some less restrictive manner. See, e.g., *Butler v. Michigan*, 352 U.S. 380 (1957). In *Butler*, the Court declared a statute unconstitutional because it banned all books which might be harmful to children. The books were sexually explicit but not obscene. In striking down the statute, the Court explained: "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* at 383. This was likened to "burning the house to roast the pig." *Id.*

¹²⁵ The Court subjected the regulation to a balancing test. *Ferber*, 102 S. Ct. at 3358.

¹²⁶ See *supra* notes 105 & 107 and accompanying text.

¹²⁷ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1977); *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438-39 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *N.A.A.C.P. v. Alabama ex. rel. Patterson*, 357 U.S. 449, 463 (1958); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Schneider v. State*, 308 U.S. 147, 161 (1939).

and constitutes the least restrictive means of obtaining the state's goal:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of less drastic means for achieving the same basic purpose.¹²⁸

This type of analysis has been labeled strict scrutiny, and can be contrasted with the lesser level of scrutiny which applies to content-neutral¹²⁹ statutes which infringe upon first amendment rights. This lesser level of scrutiny employs a balancing test which finds regulatory choices acceptable as long as they do not unduly restrict communication.¹³⁰ "Unless the inhibition resulting from such a content-neutral abridgment is significant, government need show no more than a rational justification for its choices."¹³¹

In *Ferber*, the Court admitted that nonobscene sexual depictions of children did not fall into any traditionally excluded categories of speech, and began to employ a strict level of scrutiny by examining whether the state's interest was really compelling. Once the Court found there was indeed a compelling interest, however, it did not turn to a discussion of least restrictive alternatives, as strict scrutiny analysis requires. Instead, the Court declared that the presence of a compelling need and an absence of important first amendment interests on the other side of the balance placed nonobscene child pornography outside the reach of the

¹²⁸ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Justice Marshall stated the test in the following manner in his dissent in *Village of Belle Terre v. Borass*, 416 U.S. 1, 18 (1974) (Marshall, J., dissenting) (footnote omitted):

And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden.

See also *Schad*, 452 U.S. at 69-69 n.7; *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977); *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

¹²⁹ A content-neutral regulation is one which applies to speech regardless of the content of the speaker's message. An example of a content-neutral regulation can be found in *Kovacs v. Cooper*, 336 U.S. 77 (1949). In *Kovacs*, the Court upheld a regulation banning the use of loudspeakers in residential zones. This regulation was content-neutral because it applied to all speech which violated the legislature's objective of keeping neighborhoods quiet, and did not single out for suppression the communication of information concerning a particular subject matter or expressing a particular viewpoint. See also *L. TRIBE*, *supra* note 55, at 584-88.

¹³⁰ *L. TRIBE*, *supra* note 55, at 684. For example, in *Pell v. Procunier*, 417 U.S. 817 (1974), the Court upheld a prison regulation forbidding inmates to conduct press interviews. The Court found that the regulation was, on its face, a content-neutral attempt to prevent disorder in the prison. Therefore, the Court held that this regulation was constitutional, as long as this restriction operates in a neutral fashion and as long as alternate channels of communication are open to prison inmates. *Id.* at 827-28. See also *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972); *Kovacs*, 336 U.S. 77.

¹³¹ *L. TRIBE*, *supra* note 55, at 684.

first amendment, obviating the need to consider whether the statute employed the least restrictive means available.¹³²

What renders the Court's balancing approach so frightening is the Court's willingness to accept both the legislature's determinations regarding the gravity of the state interest involved and the degree to which that state interest will be served by the challenged statute.¹³³ This acceptance skews the balancing in favor of the state interest, because once the Court has accepted the legislature's premises, it is "nearly inevitable" that the Court will award the balance struck by the legislature "extreme, almost total, judicial deference."¹³⁴

In this case, close, independent scrutiny would have revealed that the state's interest is compelling only with regard to obscene materials. There is no close nexus between the dangers discussed by the Court and nonobscene materials; the studies and hearings from which the Court draws its empirical conclusions¹³⁵ focused upon obscene child pornography which is produced in a clandestine underground for the sole purpose of appealing to pedophiles. As the Senate Committee on the Judiciary concluded:

It was the opinion of the experts who testified before the Committee that virtually all of the materials that are normally considered child pornography are obscene under the current standards. . . .

In comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential.¹³⁶

Thus, it appears that Justice Brennan and the New York Court of

¹³² See *supra* note 128 and accompanying text. The Court's analytical approach is illogical. Either nonobscene depictions of adolescent sexuality are protected speech, in which case both a compelling interest and a less restrictive means analysis must be used, or these depictions are unprotected, in which case no compelling justification for their suppression need be discussed.

¹³³ The balancing approach has frequently been criticized for being insufficiently protective of first amendment values, in large part because in applying the approach the Court often accepts the legislative judgment and does not upset it unless it is "outside the pale of fair judgment." *Dennis v. United States*, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring). See also Comment, *supra* note 55, at 911-18. Indeed, the balancing doctrine has been called "no doctrine at all but merely a skeleton structure on which to throw any facts, reasons, or speculations that may be considered relevant. . . . [T]he test is so vague as to yield virtually any result in any case." Emerson, *supra* note 100, at 451-54. The Court's analysis in *Ferber* demonstrates the validity of these observations.

¹³⁴ Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1444 (1962).

¹³⁵ As Justice Stevens noted, the Court's "empirical evidence . . . 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." *Ferber*, 102 S. Ct. at 3366 n.4 (Stevens, J., concurring in the judgment). The remainder of the Court's empirical evidence was drawn mainly from studies of the effects of sexual molestation by adults on the child victim. See *id.* at 3355 n.9.

¹³⁶ S. REP. NO. 438, 95th Cong., 1st Sess. 13 (1977). A similar conclusion was reached by the House Committee which studied the child pornography problem. "We have viewed much of this material, and there seems little doubt that they [sic] would be found obscene

Appeals were correct in their respective assessments: when children are exploited or harmed in production, the resultant work is virtually always obscene, and will be punishable under applicable obscenity statutes. There is, therefore, no compelling interest to justify banning nonobscene child pornography, and section 263.15 burdens freedom of expression without substantial corresponding benefits.¹³⁷

Apparently, the Court feared that works involving the sexual exploitation of children will not be found obscene under the *Miller* standard; this fear is unrealistic, however. Even a brief description of child pornography which has been seized by government officials reveals that these materials are made solely for the purpose of stimulating sexual deviants.¹³⁸ Further, a theme of sado-masochism pervades a great deal of the material.¹³⁹ It is inconceivable to suggest that juries could find such depictions inoffensive and socially valuable,¹⁴⁰ or that juries could believe that such depictions would not appeal to the prurient interest of the average pedophile.¹⁴¹ Likewise, no evidence has been presented that

under existing federal and state obscenity laws." H. R. REP. NO. 696, 95th Cong., 1st Sess. 7 (1977).

¹³⁷ As the legislature has the burden of proof under traditional first amendment principles to show that it is using the least restrictive means, and the legislature's proof consists of documentation showing only that children are harmed by engaging in obscene performances, the prohibition of nonobscene depictions of child sexuality also fails the second part of the strict scrutiny test. See *supra* note 128. Section 263.10, which prohibits the promotion of obscene sexual performances involving children, would constitute the least restrictive means of achieving the state's goals. See *supra* note 18.

¹³⁸ A list of items normally considered child pornography is contained in *Senate Hearings*, *supra* note 10 at 67. One popular child pornography film entitled "First Communion" was described by Anson, *supra* note 10, quoted in *Senate Hearings*, *supra* note 10, at 151:

The film shows five eight year-old girls receiving their first communion, perfect innocents in the perfect ceremony of innocence. Suddenly, a motorcycle gang breaks into the church. . . . [T]he gang pauses to beat up the priest with chains. Then they crucify him to the cross above the altar. Finally. . . the sex begins. You can actually see the little girls bleeding. All of them are screaming, except the movie is silent, and you can't hear their cries.

¹³⁹ See *Senate Hearings*, *supra* note 10, at 67 (testimony of Prof. Frank Osanka).

¹⁴⁰ In *United States v. Various Articles of Obscene Merchandise*, Schedule 1724, 460 F. Supp. 826 (S.D.N.Y. 1978), District Court Judge Leval held films of boys aged 14-17 engaging in masturbation, oral sex, and anal intercourse to be obscene. In the same case, he found a magazine depicting an adult man and woman engaging in similar sex acts not obscene. The Judge's experience has been that "[g]enerally all the items which display photographs of young children have been found patently offensive within the community standards, excepting those in which the child is not shown to be engaged in sexual activity or lewd display." *Id.* at 830. For other examples of convictions of child pornographers under obscenity law, see, e.g., *United States v. Espinoza*, 641 F.2d 153 (4th Cir. 1981); *United States v. Various Articles of Obscene Merchandise*, Schedule 1769, 600 F.2d 394 (2nd Cir. 1979); *United States v. Various Articles of Obscene Merchandise*, Schedule 1303, 562 F.2d 185 (2nd Cir. 1977); *United States v. Brown*, 328 F.Supp. 196 (E.D. Va. 1971); *Raymond Heartless, Inc. v. State*, 401 A.2d 921 (Del. Supr. 1979).

¹⁴¹ When sexual material is aimed at a deviant group and the average person would find the material sickening rather than titillating, the correct standard for determining obscenity is

the depictions of adolescent sexuality or children's genitals included in medical texts or major motion pictures present a threat of harm to the children involved similar to that presented by the clandestine underground which produces obscene materials.¹⁴² Therefore, an obscenity statute should adequately protect children from harm.

Another unpersuasive element of the Court's analysis is Justice White's claim that section 263.15 does not censor any particular viewpoint or portrayal of sexual activity, since ideas concerning teenage sexuality can still be expressed as long as these ideas are not illustrated by depictions of actual children.¹⁴³ This statement ignores Justice Harlan's admonition in *Cohen v. California*¹⁴⁴ that certain words—or, in *Ferber*, depictions—may be the only effective manner of conveying a particular idea,¹⁴⁵ and that, if allowed to ban certain words, "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."¹⁴⁶

In certain circumstances, a realistic depiction of children's sexuality may be necessary to communicate certain emotions or concepts, and in

whether the material appeals to the prurient interest of the deviants at which it is directed. *Mishkin v. New York*, 383 U.S. 502, 508 (1966).

¹⁴² See *infra* note 165 and accompanying text.

¹⁴³ *Ferber*, 102 S. Ct. at 3357-58. Justice White suggested that producers could utilize persons over sixteen who look younger when a visual depiction of adolescent sexuality is an important and necessary part of a literary, scientific, or educational work, and that, therefore, the first amendment interest "is limited to that of rendering the portrayal somewhat more 'realistic'". *Id.* This alternative will not suffice in all circumstances, however. In some cases, realism is essential. For example, a medical text on adolescent sexuality cannot depict adults pretending to be adolescents.

The Court seems to be implying that § 263.15 is merely a reasonable time, place, or manner restriction. This is not the case, however, since time, place, and manner restrictions are valid only if they are content-neutral. See *Schad*, 452 U.S. at 76-77; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Spence v. Washington*, 418 U.S. 405, 411 n. 4 (1974) (per curiam); *Grayned v. City of Rockford*, 408 U.S. 104, 115-16 (1972); *Mosley*, 408 U.S. 92; *Schneider*, 308 U.S. at 164.

¹⁴⁴ 403 U.S. 15 (1971).

¹⁴⁵ As the *Cohen* majority stated:

[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. . . . [T]hat emotive function . . . may often be the more important element of the overall message sought to be communicated.

403 U.S. at 26.

¹⁴⁶ *Id.* For example, the Guyon Society of California, with approximately 5000 members, may find that this ruling interferes with their political advocacy. The Guyons believe that the ideal world is one in which there is no sexual guilt. Claiming that children form their attitudes toward sex around age eight, they have adopted the slogan "Sex before eight or else it's too late!" The society works to change laws and attitudes concerning statutory rape and other sex crimes, by presenting documentary presentations at college campuses and on television. *Sexual Exploitation of Children: Hearings before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 167 (1977) (testimony of Tim O'Hara, President, Guyon Society).

such circumstances, the Court's ruling in *Ferber* has effectively suppressed such communication.¹⁴⁷ As the New York Court of Appeals correctly explained, pediatrics texts, documentaries explaining the sexual customs of other cultures, and presentations by anti-child pornography groups which include illustrations of the materials which they oppose could be suppressed under section 263.15.¹⁴⁸ Therefore, the Court's creation of an absolute exclusion to the first amendment's protective mandate is a form of censorship.

Another, more subtle form of censorship will arise from the Court's decision to extend the *Broadrick* ruling to statutes regulating pure speech.¹⁴⁹ This extension enabled the Court to employ a balancing test in measuring overbreadth, and to dismiss *Ferber*'s challenge that the statute was overbroad. Consequently, the statute remains on the books, and producers, publishers, and distributors of valuable material which might be covered by section 263.15 will be deterred from releasing such material in the marketplace for fear of prosecution.¹⁵⁰

While litigants traditionally have not been granted standing to challenge a statute on the grounds that it might be unconstitutionally applied to others in situations not before the Court,¹⁵¹ when first amendment interests are at stake, the Court has generally granted such standing.¹⁵² Such challenges have been permitted even when the defendant's conduct was clearly covered by the law and not within the ambit of the first amendment,¹⁵³ because of the judicial prediction that the very existence of an overbroad statute may cause a chilling effect on parties not before the Court,¹⁵⁴ and because of the preferred status of first amendment rights.¹⁵⁵

¹⁴⁷ See *supra* note 143.

¹⁴⁸ *Ferber*, 52 N.Y.2d at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865.

¹⁴⁹ See *supra* notes 59-62 and accompanying text.

¹⁵⁰ See *infra* notes 154 & 159-63 and accompanying text.

¹⁵¹ *Broadrick*, 413 U.S. at 610.

¹⁵² See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

¹⁵³ Justice Brennan explained in *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963):

[T]he instant decree may be invalid if it prohibits privileged exercises of first amendment rights *whether or not* the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

¹⁵⁴ Professor Schauer explains that a chilling effect "occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by government regulation not specifically directed at that protected activity." Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 BOST. U.L. REV. 685, 693 (1978) (emphasis omitted). A chilling effect will most likely occur when an individual wants to engage in expression which falls close to the line separating protected and unprotected speech. If the individual fears that his "marginal" conduct will be judged illegal, he is likely to engage in self-censorship. *Id.* at 696.

¹⁵⁵ See McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182, 1184 (1959).

In its original form, overbreadth analysis was not a balancing process. Overbroad statutes were invalidated even if the interests they promoted outweighed the corresponding damage to first amendment rights.¹⁵⁶ In *Broadrick*, however, the Court held that when a statute which is aimed at conduct is challenged because of its incidental effect on speech, it can be upheld even if it can be applied overbroadly in a large number of cases, provided that these impermissible applications are insubstantial when compared with the statute's legitimate applications.¹⁵⁷ This change in the overbreadth doctrine reflects the Burger Court's skepticism that any chilling effect will result from an overbroad statute.¹⁵⁸

Until *Ferber*, the *Broadrick* ruling was not applied to traditional forms of expression, such as films and books. The Court's decision to extend *Broadrick's* scope when confronted with New York Penal Law section 263.15 is puzzling, for this law had already caused a documented chilling effect, and had, therefore, been declared unconstitutional by another court. In *St. Martin's Press, Inc. v. Carey*,¹⁵⁹ the publishers of the children's sex education book *Show Me!*¹⁶⁰ sought injunctive and declaratory relief against section 263.15. The district court found that in 1977, when the statute was adopted, New York booksellers refused to carry or sell the book, fearing prosecution.¹⁶¹ The court further held that *Show Me!* was not obscene, although it did fall within the purview of section 263.15 because "at least one of the photographs meets the statutory definition of sexual conduct."¹⁶² Since the plaintiffs would have been risking a prison term of up to seven years if they distributed the book, "they effectively were forced to cease publication and sale of *Show Me!* The consequence of their decision is the irretrievable loss of the first amendment rights of the authors, booksellers, and readers."¹⁶³

When an educational or medical book like *Show Me!* is challenged in court in the wake of *Ferber*, the constitutional inquiry will be limited to determining whether the book contains one depiction which is prohibited by section 263.15. If it does, the book will be deemed outside the protective sphere of the first amendment, regardless of the social value of

¹⁵⁶ See, e.g., *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967).

¹⁵⁷ *Broadrick*, 413 U.S. at 615.

¹⁵⁸ See L. TRIBE, *supra* note 55, at 713.

¹⁵⁹ 440 F. Supp. 1196 (1977), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979).

¹⁶⁰ MCBRIDE & FLEISCHHAUER-HARDT, *SHOW ME!* (1975).

¹⁶¹ *St. Martin's Press*, 440 F. Supp. at 1203.

¹⁶² *Id.* at 1201.

¹⁶³ *Id.* at 1203. After the *Ferber* decision was handed down, *St. Martin's Press* stopped distribution of *Show Me!* within the United States. *Chi. Sun-Times*, Sept. 20, 1982, at 18, col. 1.

the work as a whole, and its authors, publishers and distributors will be subject to prosecution.

The *Ferber* decision will create a similar chilling effect in the entertainment industry. For example, the popular film *The Exorcist* could be banned and the various people involved in its production and sale could be prosecuted, because actress Linda Blair, a minor at the time the film was produced, simulated masturbation with a crucifix in the movie.¹⁶⁴ Prosecuting this film would serve no governmental purpose; Ms. Blair was not physically molested or emotionally damaged due to the fact that the film is being viewed by others.¹⁶⁵ Yet the Court's ruling in *Ferber* guarantees that future filmmakers will be wary of producing any film the script of which calls for a minor to engage in actual or simulated sexual activity.

The Court's extension of *Broadrick* enabled Justice White to claim that these examples of the suppression of first amendment freedoms are insignificant when compared with the legitimate sweep of section 263.15, and that therefore the statute is not overbroad. Even under *Broadrick*, however, this statute is clearly overbroad. As noted above, the statute's legitimate applications are, according to the Senate Judiciary Committee, very few and insubstantial.¹⁶⁶ On the other side of the equation the statute will chill or restrain pediatrics texts, sex education books, documentaries on the sexual abuse of children and on the sexual habits of children in other cultures, as well as films and plays having a great deal of entertainment value for the average audience. Even under the Court's balancing equation, section 263.15 should be declared invalid on its face due to unconstitutional overbreadth.

V. CONCLUSION

The Court's decision in *Ferber* categorically to exclude all works which depict sexual conduct or the lewd exhibition of genitals by children from first amendment protection is insufficiently protective of first amendment freedoms, unnecessary to protect children, and unsound. After *Ferber*, courts making or reviewing child pornography decisions can constitutionally suppress a work on the basis of an examination of its objectionable depictions in isolation. Any work which contains a depiction which falls within a statutory definition of child pornography

¹⁶⁴ S. REP. NO. 438, 95th Cong., 1st Sess. 12 (1977).

¹⁶⁵ *Senate Hearings*, *supra* note 10, at 108 (statement of Prof. Paul Bender):

[A] child acting in a film like "The Exorcist". . . [is not a victim of] child abuse of the sort that I think you are mostly worried about. . . [T]hat takes place in a more or less open situation with a well established business. There are parents or guardians who are looking after their child's best interest.

¹⁶⁶ See *supra* note 136 and accompanying text.

may be suppressed, even if the work as a whole is not obscene, and even if the work contains substantial literary, artistic, social, or political value.

To create this extraordinarily broad exclusion, the Court misused precedent and failed to subject the challenged statute to the exacting scrutiny required by the first amendment in cases of content-based regulations. Because the Court neglected to inquire whether a less restrictive means of serving the state's interest in protecting children exists, it upheld an overbroad statute. Furthermore, the Court's skepticism over chilling effects, manifested in its extension of the *Broadrick* doctrine to cases dealing with pure speech, is particularly inappropriate in this case because the New York statute has already caused a documented chilling effect. The Court's decision can only foster more self-censorship.

The most ominous aspect of the Court's ruling is its willingness to abandon the *Miller* obscenity standard, which requires a court to examine a work as a whole and save it from suppression if it contains social value. As explained by Justices Brennan and Stevens,¹⁶⁷ this standard is mandated by the first amendment. Hopefully, when officials use statutes such as section 263.15 to prosecute the producers or distributors of a book or film of some value, the Court will retreat from *Ferber* and incorporate the *Miller* standard into the definition of child pornography. The Court must not abandon the *Miller* standard, for if it were to regard as sound constitution procedure the censorship of material based on the isolated viewing of an offensive scene, the implications for mass censorship would be staggering.¹⁶⁸

¹⁶⁷ *Ferber*, 102 S. Ct. at 3365 (Brennan, J., concurring in the judgment); *Id.* at 3366 (Stevens, J., concurring in the judgment).

¹⁶⁸ This could signal a return to the *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868) standard that was popular with early American courts. Under *Hicklin*, the obscenity of the work as a whole was judged by the effect of isolated passages upon the most susceptible members of society. Theodore Dreiser's *AN AMERICAN TRAGEDY* and D.H. Lawrence's *LADY CHATTERLY'S LOVER* were among the works declared obscene under this standard. See *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930); *Commonwealth v. DeLacey*, 271 Mass. 327, 171 N.E. 455 (1930).

That some courts would welcome an opportunity to disregard the value of the work as a whole was vividly illustrated in *Salt Lake City v. Pipenburg*, 571 P.2d 1299 (Utah 1977). In that case, Chief Justice Ellet of the Utah Supreme Court upheld an obscenity conviction, stating:

A more sickening, disgusting, depraved showing cannot be imagined. However, certain justices of the Supreme Court of the United States have said that before a matter can be held to be obscene, it must "...when taken as a whole, lacks [sic] serious literary, artistic, political, or scientific value."

Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only to be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel in the filth which may have some redeeming value to his own taste.

An absolute categorical exclusion such as that created in *Ferber* has never before been permitted, and for excellent reasons. If this nation is seriously committed to preserving first amendment freedoms, it must allow no departure from the long-standing principle that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."¹⁶⁹ In order to detect such infringements, the Court must use sensitive tools.¹⁷⁰ As Justices Stevens and Brennan pointed out,¹⁷¹ however, an absolute categorization is not a sensitive tool; it is a blunt instrument. It renders the Court blind to any serious value which a work might contain.

The sexual exploitation of children in obscene publications and films is deplorable and shocking, and any discussion of the subject is likely to be characterized by the extreme emotionalism that prompted one witness in the House hearings to exclaim that "if I had to give up a portion of my First Amendment rights to stop this stuff, then I'd be willing to do it."¹⁷² In *Ferber*, the Supreme Court implicitly echoed this cry, and upheld a statute which infringes upon protected speech, even though children could be protected under a less restrictive statute incorporating an obscenity standard. The *Ferber* decision may protect children; it fails to protect the first amendment.

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Id. at 1299-1300.

¹⁶⁹ *Miller*, 413 U.S. at 22-23.

¹⁷⁰ *See Speiser*, 357 U.S. at 527.

¹⁷¹ *Ferber*, 102 S. Ct. at 3365 (Brennan, J., concurring in the judgment); *id.* at 3366 (Stevens, J., concurring in the judgment).

¹⁷² *House Crime Hearings*, *supra* note 44, at 41 (statement of Judianne Densen-Gerber, President, Odyssey Institute).