
INTRODUCTION

A New York statute prohibits both the production and the promotion or dissemination of materials in which a child portrays a "sexual act" in a manner not necessarily obscene.\(^1\) The purpose of the statute is to protect the child models from harm and sexual abuse.\(^2\) In People v. Ferber,\(^3\) the New York Court of Appeals determined the statute was unconstitutional because it prevented the distribution of materials protected by the first amendment.\(^4\) The United States Supreme Court reversed, holding that sexual materials depicting children are not entitled to constitutional protection.\(^5\) This comment will explore the constitutionality of the New York statute and discuss the significance and infirmities of the Ferber decision.

In 1977, the public was alerted to the problem of the sexual abuse of children that resulted from the production of "kiddie porn."\(^6\) Public outcry stimulated hasty legislative response.\(^7\) Con-
gress and forty-eight states have passed laws dealing with child pornography. Nineteen states, including New York, prohibit the production and dissemination of all sexually explicit materials involving children, regardless of whether it is obscene.

The court states that the Texas law was passed in nineteen days as emergency legislation. Id. at 590.


10. The laws prohibit dissemination of any material portraying children engaged in specific types of sexual activity. In enacting its statute, the New York Legislature declared:

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 exploita-
Unlike most obscenity statutes, section 263.15 of the New York Penal Code is not concerned with the effect of the sexually explicit material on the viewer. Instead, it is concerned with the mental and physical well-being of the children used as models for the materials. Some evidence suggests that children have been compelled to watch hardcore pornography or are molested before or after the photographic session takes place. In enacting the statute, the New York Legislature declared:

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

New York is one of the largest production and distribution centers of child pornography in the country. The statute is intended to eliminate the industry by subjecting all parties involved, including solicitors, producers and distributors, to criminal liability.

New York has a comprehensive statutory framework designed
to extinguish the market for child pornography. Section 263.15 is the controversial provision. Section 263.15 makes it a felony to produce, direct or promote any performance which includes sexual conduct by a child less than sixteen years of age. It is clear from the statutory scheme that this provision is intended to prohibit both real and simulated acts performed by children even if they are not obscene by traditional constitutional standards.

On its face the statute invites first amendment challenge. It is not an affirmative defense to the statute that only an isolated portion of the material is prohibited, nor can prosecution be

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19. Article 263, entitled Sexual Performance by a Child, consists of six sections. Section 263.00 is definitional; § 263.05 prohibits the use of a child in a sexual performance; § 263.10 prohibits the promotion of an obscene sexual performance by a child; § 263.15, the section in controversy here, prohibits the promotion of a sexual performance by a child; § 263.20 provides for affirmative defenses and § 263.25 provides for proof of age of a child. N.Y. PENAL LAW §§ 263.00 - 263.25 (McKinney 1980).

20. Section 263.15 provides: “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.”

21. The violation of § 263.15 is a class D felony. The maximum term of imprisonment is seven years. Id. at § 70.00(2)(d).

22. “‘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.” Id. at § 263.00(5).

23. “‘Performance’ means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.” Id. at § 263.00(4).

24. The term “any performance” means different things depending on which section is referred to. In § 263.15, the performance does not have to be obscene, while under § 263.10, a narrower provision, the performance must be obscene. Section 263.10 provides: “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 16 years of age.” Id. (emphasis added). Section 263.15 is identical except it substitutes the word “a” for the words “an obscene.”

25. “Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” Id. at 263.00(3).

Thus, under the New York statute, a child pornography conviction will technically result against a person who sells or lends a book of many pages and not about sex that contains one photograph depicting a child’s genitals in a “lewd” manner.

26. In the practice commentary which accompanies the statute itself, the unconstitutionality of § 263.15 is anticipated:

It is precisely this broad reach of § 263.15 that renders it of questionable validity. It appears to encompass, for example, an unobscene play or motion picture of genuine artistic merit which happens to include one fleeting scene where a child simulates masturbation. It could also apply to a person who gives someone a gift (“promotes”) of a fine book which contains one photograph (“performance”) depicting innocent “sexual conduct” by a child. . . . [S]ince the language of the statute clearly reaches such conduct, its validity is, at least, suspect.

N.Y. PENAL LAW § 263.15 (practice commentary) (McKinney 1980).
avoided by contending that the material possesses significant educational or scientific merit. The constitutional uncertainties are attributable to the fact that, while New York intends to protect the welfare of its younger citizens, in doing so it prohibits the circulation of some arguably constitutionally protected communication. The statute does not exempt literary, scientific or educational materials.

The first amendment has not been interpreted literally by the Supreme Court. Some very narrow exceptions have been carved out of the doctrine. Neither "fighting words" nor obscenity are protected. However, the standard by which speech is prohibited by the New York child pornography statute falls short of the obscene. It is, therefore, subject to constitutional scrutiny.

Regulation of free speech is determined by balancing the right to uninhibited expression with conflicting state interests. Great

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27. This constitutes a wholesale attack on the obscenity doctrine. Under Miller v. California, 413 U.S. 15 (1973), the work, taken as a whole, must lack "serious literary, artistic, political, or scientific value." Id. at 24.

Under Pa. Stat. Ann. tit. 18, § 6312(e) (Purdon Supp. 1980), it is an affirmative defense that the material has serious literary, artistic, educational or scientific value. The Pennsylvania statute does not require that the work be obscene. Id. at 6312(a).

28. See note 19 and accompanying text supra.

29. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. 1.

30. Even Justice Black, a constitutional fundamentalist, distinguished "direct" abridgements which the first amendment absolutely prohibited from "indirect" abridgements whose constitutionality is tested by balancing the competing interests. See Freund, Mr. Justice Black and the Judicial Function, 14 U.C.L.A. L. Rev. 467, 471-72 (1967).

31. 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.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnotes omitted) (Court upheld the conviction of a Jehovah's Witness for calling a city official a "damned Fascist").

32. "[O]bscene material is unprotected by the First Amendment." Miller v. California, 413 U.S. 15, 23 (1972) (Court held the criteria for obscenity applied to defendant who sent out brochures for adult books to unwilling recipients).

33. The balancing approach weighs the state's interest in regulating the activity against the free speech of the actor. Dennis v. United States, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring) (statute making it a crime for any person to advocate the overthrow of the United States does not violate the first amendment). Mendelson, The First Amendment and the Judicial Process: A Reply to Mr. Franz, 17 Vand. L. Rev. 479, 481-82 (1964) (author suggests that every judicial decision involves a balancing approach, and concludes that it is desirable that this balancing be clearly articulated). Other leading opinions employing the ad hoc balancing test are: Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961); Konigsberg v. State Bar, 366 U.S. 36, 51 (1961); Talley v. California, 362 U.S. 60, 66
respect must be accorded freedom of speech and the infringing state interest must be tailored with precision. To assure constitutional validity, the Court has insisted that: (1) the statute demonstrate a compelling state interest; 34 (2) the legislation be drafted narrowly to avoid "overbreadth;" 35 and (3) the state adopt the least restrictive means to accomplish its end. 36 The New York statute did not survive this test in the lower courts. 37


For criticism of the balancing approach, see Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 912-14 (1963). "[T]he 'balancing' test has tended to reduce the first amendment, especially when a legislative judgment is weighed in the balance, to a limp and lifeless formality." Id. at 877; Franz, The First Amendment in the Balance, 71 Yale L.J. 1424, 1434 (1962) (the specific nature of the first amendment does not require judges "to live in a universe which contains nothing but ad hoc decisions").

34. The term "compelling state interest" is used as part of the balancing test to uphold state action in the face of constitutional attack when the need for such state action is great. The term is commonly used in first amendment cases where the Court applies a two-part balancing test, asking first whether the burden on the exercise of the first amendment practice is substantial and, second, whether such a burden would only be valid if the Court found it necessary to a "compelling state interest" which outweighed the degree of impairment of free exercise rights. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963) (state cannot deny unemployment benefits so as to compel a worker to disregard religious obligation).

35. "An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." J. Nowak, R. Rotunda & J. Young, Constitutional Law 722 (1978); see Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (overturning conviction of a Jehovah's Witness who had angered a group by playing a phonograph record containing slurs on Catholicism). The overbreadth doctrine applies regardless of whether the case at bar shows injury. NAACP v. Button, 371 U.S. 415, 432 (1963) (statute prohibiting the NAACP from soliciting and financing litigation held unconstitutionally overbroad).

36. The least restrictive means test is a valuable test in analyzing first amendment cases. It provides that even if the purpose of a statute promotes a legitimate governmental interest, "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 abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted). See also NAACP v. Alabama, 377 U.S. 288, 307-08 (1963); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (statute requiring disclosure of membership list must be very specific in order to survive first amendment challenge); Schneider v. State, 308 U.S. 147, 164 (1939) (invalidating restrictions on distributing circulars where valid governmental purposes could be achieved by less restrictive alternatives).

Facts and Holding

On March 2, 1981, Ira Ferber, the owner of a Manhattan bookstore specializing in pornography, sold two films to an undercover police officer. The films depicted young boys masturbating. Ferber was indicted for promoting an obscene sexual performance by a child and for promoting a sexual performance by a child which was not necessarily obscene. Ferber contended that the latter charge, brought pursuant to section 263.15, was unconstitutional under the first amendment. A jury acquitted Ferber on the obscenity charge, but found him guilty of promoting a sexual performance by a child. The Appellate Division of New York

Book were taken in Germany long before the New York statute was passed, the court declared § 263.15 unconstitutional on substantive due process grounds. 440 F. Supp. at 1205-07 n.14.

The court, in dictum, was also mindful of first amendment problems: “The Court is in the dark in trying to evaluate the state’s interests and the means chosen to effectuate those interests inasmuch as defendants did not address this issue.” Id. at 1205 n.15. The court further stated that “[T]here is a serious question whether the state, in choosing to punish publishers, distributors, advertisers and booksellers for their activities with respect to a non-obscene book, has chosen the least drastic means of accomplishing its goal consistent with preserving first amendment rights.” Id. at 1205. By insinuation, the court achieves a balance in favor of first amendment priorities, and foreshadows what was to be more directly developed in People v. Ferber, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981) and Ferber, 102 S. Ct. 3348 (1982).

38. The first film shows a naked young boy lying face down on a bed, rubbing against the bed. After a while, the boy turns over onto his back and masturbates twice to ejaculation. Then, lying on his side, he places a dildo between his buttocks as if to insert it into his anus. The second film shows a naked young boy masturbating to ejaculation and inserting a dildo into his anus. The second film also includes scenes of other naked boys, including some no older than seven or eight years of age, jumping, sitting and reclining on a mattress. In addition, these boys are engaged in solo and mutual masturbation and in conduct suggesting oral-genital contact. At the end of the second film, the main child performer dresses very slowly, then picks up what appears to be United States currency and holds it toward the camera. 

One commentator believes that the Ferber films are obscene and that the book Show Me!, the object of dispute in St. Martin’s Press, was clearly not. Therefore, he regrets that St. Martin’s Press was not appealed for it would present the issue of the constitutionality of section 263.15 in a more sympathetic light. H. Kaufman, “Supreme Court to Consider Limits of ‘Child Pornography’ Legislation,” in N EWSLETTER ON INTELLECTUAL FREEDOM (Krug, J. ed.) Vol. XXXI, No. 3 at 105.

40. Id. at § 263.15.
42. 52 N.Y.2d 674, —, 422 N.E.2d 523, 524, 439 N.Y.S.2d 863, 864 (1981). Because of the sexually explicit nature of the Ferber films (see note 38 supra), one might argue that § 263.15 is a necessary component of the child pornography statute. Without it,
affirmed the conviction without opinion.43

The issue on appeal was whether section 263.15 circumvented rights protected by the first amendment.44 The New York Court of Appeals recognized the state's interest in protecting children45 but held the statute unconstitutional on two grounds. First, by prohibiting the dissemination of scientific, educational and other socially valuable information along with hard-core child pornography, the statute was overbroad by first amendment standards.46 Second, by choosing to prohibit only sexual activity that could be harmful to a child's well-being, the statute was underinclusive. By not prohibiting physically dangerous stunts and the like, the statute discriminated against the sexual content of materials.47

The majority opinion was accompanied by a vigorous dissent.48 Citing empirical studies and descriptive journalism on child pornography,49 Judge Jasen argued that the state had adopted the only potent weapon available to solve the problem. "The Legislature has apparently taken the view that no more narrowly drafted statute will achieve an adequate level of protection for our children, and that a proscription of the promotion of such sexually exploitive material involving children is essential. I am persuaded that this conclusion is correct. . ..50 Judge Jasen's argument was policy oriented, while the majority employed traditional constitutional analysis.

The United States Supreme Court granted certiorari51 and considered the question: "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"52 A unanimous Court held the statute con-

the films would escape successful prosecution. However, it is just as likely that the jury uses § 263.15 as a catch-all or safety valve to penalize "dirty" pictures without encountering the complexities of the obscenity doctrine head on. See notes 82-88 and accompanying text infra.

45. Id. at 679, 422 N.E.2d at 525-26, 439 N.Y.S.2d at 866.
46. Id. at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865.
47. Id. at 680, 422 N.E.2d at 526, 439 N.Y.S.2d at 866.
48. Id. at 681-88, 422 N.E.2d at 526-31, 439 N.Y.S.2d at 867-71.
49. Id. at —, 422 N.E.2d nn.1, 2 and 5 at 527-529, 439 N.Y.S.2d nn.1, 2 and 5 at 867-70.
50. Id. at 686, 422 N.E.2d at 529, 439 N.Y.S.2d at 869-70.
51. 102 S. Ct. 3348, 3352 (1982).
52. Id. at 3352 (emphasis added). The Court adopted the state's wording of the question. Brief for Petitioner, supra note 38. This is a significant misrepresentation of the genuine issue presented to the Court. See Brief for Respondent at 1, People
stitutional in light of the state’s "compelling interest" in protecting the welfare of its children.  

The Court took notice of the fact that the use of children as models for sexually explicit materials is harmful to the physiological, emotional and mental health of the child. A balancing of first amendment rights and legislative intent was made. Because the prevention of sexual exploitation and abuse of children is a "government objective of surpassing importance," the states are to be given great freedom when regulating sexual materials depicting children. The Court accepted the argument that production of these materials provided an economic incentive for child abuse and that a less restrictive legislative response was not available. In other words, the less restrictive alternative of requiring an obscenity standard for the control of the distribution of such materials would not have been sufficient to combat the harm caused in their production.

The Court side-stepped the well-settled test for obscenity provided in Miller v. California. Whether the material in question,

v. Ferber, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981), 102 S. Ct. 3348 (1982) [hereinafter cited as Brief for Respondent]. It appears to limit the holding to cases in which "children . . . engage in sexual conduct for commercial purposes." 102 S. Ct. 3348, 3351 (emphasis added). The issue as stated is therefore incompatible with language in the opinion which holds that children may not engage in sexual conduct for medical and educational purposes. Id. at 3385.

53. Id. at 3354.
54. Id. at 3355.
55. Id. at 3355. The Supreme Court has been criticized throughout the twentieth century for taking into consideration extra-legal materials when deciding cases. See generally P. Freund, THE SUPREME COURT OF THE UNITED STATES 150-54 (1961). It has been said that in this capacity the Court becomes a "super-legislature." Southern Pacific Co. v. Arizona, 325 U.S. 761, 788 (1945) (Black, J., dissenting). The criticism was initially directed at the Court's substantive due process cases, see, e.g., R. McClusky, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," THE SUPREME COURT REVIEW 34-62 (1962). An extreme example of this practice is Brown v. Board of Education, 347 U.S. 483 (1954), where the Court took notice of over a thousand pages of sociological and psychological data. Id. at 494 n.11. For criticism see Cahn, Jurisprudence, 30 N.Y.U.L Rev. 150, 157-60 (1955). Full explication of the prudence of this practice is beyond the scope of this article. It is only suggested here that the Court indulges in this practice in Ferber, 102 S. Ct. 3348, 3355 n.9 (1982). The resulting policy-oriented decision may induce and aggravate the problems associated with an ad hoc balancing approach. See notes 129-37 and accompanying text infra.
56. 102 S. Ct. at 3358.
57. Id. at 3355.
58. Id. at 3354-55.
59. Id. at 3357.
60. Id. at 3355-56.
61. 413 U.S. 15 (1973). The basic guidelines for the trier of fact must be:
(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . .
considered in its entirety, appeals to the prurient interest of the average viewer or possesses serious social value was not of consequence to the Court. "[The Miller criteria] bears no connection to the issue of whether a child has been physically or psychologically harmed. . . ." The Court concluded that the Miller standard did not provide an adequate remedy for the child abuse problem inherent in child pornography and therefore should not be applied.

The Court held that the New York statute was not unconstitutionally overbroad. Applying the "substantial overbreadth" doctrine from Broadrick v. Oklahoma, the Court assumed that cases in which the statute would be applied so as to prohibit the distribution of material with serious literary, scientific or educational value would be exceedingly rare. The Court also held that materials prohibited by section 263.15 are unprotected speech, and thus subject to content-based regulation, and that the statute was not underinclusive.

ANALYSIS

The analysis begins with a survey of the legislative intent of section 263.15. An applied discussion of the overbreadth doctrine, content-based discrimination, and New York's parens patriae power follows. A redesign of the obscenity doctrine is considered. With the methodology employed in New York v. Ferber in mind, the Court is criticized for ameliorating values fundamental to the first amendment. The Court does this by using an ad hoc balanc-

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24.
62. 102 S. Ct. at 3356.
63. Id. at 3357.
64. Id. at 3363.
65. Id. at 3361.
67. 102 S. Ct. at 3363.
68. Id. at 3359 n.18.
69. Id. at 3359.

[The function of the overbreadth doctrine is] a limited one at the outset, and attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct . . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Id. at 615.
67. 102 S. Ct. at 3363.
68. Id. at 3359 n.18.
69. Id. at 3359.
ing approach and refusing to give the overbreadth doctrine the consideration it deserves. Finally, legislative alternatives to section 263.15 are proposed.

To determine the constitutionality of section 263.15, New York's interest in preventing sexual abuse of children used in the production of explicit materials must be balanced with the first amendment's interest in protecting the distribution of nonobscene speech.70 The New York Legislature found existing child abuse, sexual abuse and pornography laws inadequate to solve the child pornography problem in New York City.71 Section 263.15 was drafted broadly to effectuate an economic disincentive for the production of sexual materials depicting children by omitting an obscenity requirement in its proscription of the dissemination of the end product. Because of the irrelevancy of the obscenity doctrine at the production stage and the prosecutorial barriers the doctrine imposes, the legislature determined that omitting an obscenity requirement was the least restrictive method whereby the production of such materials could be curtailed.72

The state insisted that effective legislation must supplement existing law by eliminating the market demand for child pornography.73 A strong argument was made that mere regulation of the coercers and producers who make the pictorial representations possible would not effectively deter child abuse.74 "Production will stop if there is no market for the results, or if the penalties for transporting and marketing make it impossible to do business economically or profitably."75 The printed materials previously protected by the first amendment encouraged sexual performances by children because of the economic demand for the photographs. Consumer demand for child pornography encourages instances of child abuse.76 Therefore, the New York statute was drafted broadly to punish the producers, manufacturers, distributors and sellers

70. See note 33 supra.
71. See note 10 supra.
72. Brief for Petitioner, supra note 38, at 10-12.
73. Id.
74. This argument prevailed in the federal child labor laws. 29 U.S.C. § 212 (1976). These laws prohibit not only employing children for use in the manufacturing process, but also the passage of goods produced by children in interstate commerce. Id. Of course, in the case of child labor, the fundamental first amendment interests are usually not involved.
76. Economists speak of this encouragement as "drive demand for production factors." For example, consumer demand for a product translates into drive demand for a laborer to make a product. P. SAMUELSON, ECONOMICS 514 (8th ed. 1970).
who knowingly participate in marketing the product of such child abuse.\textsuperscript{77}

Another argument advanced by the state as justification for the broad reach of section 263.15 was the irrelevancy of the obscenity doctrine as applied to the child pornography problem.\textsuperscript{78} The doctrine is arguably irrelevant because the elements of obscenity—prurient appeal, patent offensiveness and lack of social value—all pertain to the content of the material and not the incidents of production. Application of the doctrine, therefore, has nothing to do with the state interest of protecting children from sexual exploitation incurred in the production of sexually explicit materials.\textsuperscript{80} A sexually abused child suffers the same trauma regardless of whether the work which contained the depiction of the sexual performance is legally obscene.\textsuperscript{81} Production of a film can result in abuse to a child but this may not be apparent due to editing.

Additionally, the state argued, and it must be conceded, the obscenity doctrine is conceptually and practically difficult to apply.\textsuperscript{82} The effort to separate unprotected obscenity from other sexually oriented but constitutionally protected speech has "produced a variety of views among the members of the [Supreme] Court unmatched in any other course of constitutional adjudication. . ."\textsuperscript{83} The conceptual difficulties of determining prurient appeal, community standards, and serious value, and then applying those factors to a specie of speech, are compounded in the area of child pornography.\textsuperscript{84} A judge or jury is asked to determine, in highly emotional circumstances, whether the material in question is obscene by gauging its effect on the reader, while the more appropriate focus for the purposes of child pornography legislation is the effect on the children portrayed.\textsuperscript{85}

Finally, the state maintained that it is often difficult to prove

\textsuperscript{77} See note 21 supra for the definition of "promote" as used throughout the statutory scheme.
\textsuperscript{79} See note 61 supra.
\textsuperscript{80} Brief for Petitioner, supra note 38, at 10.
\textsuperscript{81} 102 S. Ct. at 3356-57.
\textsuperscript{83} Interstate Circuit Inc. v. Dallas, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring) (an ordinance classifying films as suitable or not suitable for young persons was held violative of the first amendment as being unconstitutionally vague).
\textsuperscript{85} Id. at 713.
obscenity because the prurient appeal of child pornography is often limited to the pedophile. This is the state's weakest argument. At least one empirical study maintains that convictions under the obscenity doctrine have not decreased when materials presented involved children. Assuming the truth of the matter asserted, what the state may view as a prosecutorial impediment is in reality a constitutional safeguard. While the obscenity doctrine may bring inherent weaknesses into the battle against child pornography, it provides a valuable hedge against encroachment on free speech interests and insulates the child pornography statutes from any conflict with the first amendment.

The Overbreadth Doctrine

Child pornography statutes synthesize characteristics of two types of crimes: (1) those prohibiting conduct, i.e., the abuse of children; and (2) those prohibiting obscene speech. The constitutional infirmity of the New York statute is attributable to this bifurcation. Child abuse is not properly a first amendment issue. That children are abused is a fact that demands criminal sanctions—but it is not necessarily a fact of constitutional significance. It only becomes so when the distribution of material previously protected by the first amendment is incidentally victimized by a statute aimed at child abuse. It is true that New York has a legitimate interest in protecting its children, but its lawmakers should be required to conform to constitutional standards by drafting statutes narrowly and employing the least restrictive means available to arrest child abuse.

The decision in New York v. Ferber is morally meritorious, but seems to be constitutionally incorrect in light of the overbreadth doctrine.

"An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." The Supreme Court should apply the

86. Brief for Petitioner, supra note 38, at 10-11.
87. Those adults whose sexual preference is for children.
89. See note 36 supra.
overbreadth doctrine more vigorously in first amendment challenges than in other constitutional challenges. It did not do so in Ferber. Instead, the Court dismissed the possibility that section 263.15 would censor a significant amount of protected speech and required that the overbreadth be substantial. This standard has its origin in Broadrick v. Oklahoma. We believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. This test does not provide easily recognizable guidelines, and is perhaps most important in showing an attitude of hesitancy to employ the doctrine. When the issue of overbreadth is dismissed in this way, less meaningful and unnecessarily narrow holdings result.

Prior to Ferber, section 263.15 would have appeared to be a fa-

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92. 102 S. Ct. at 3363.

93. Id. at 3361.


95. Id. at 615. See note 66 supra.

96. For a pre-Burger Supreme Court precedent that contravenes the opinion in Ferber, consider the following:

[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. NAACP v. Button, 371 U.S. 415, 432 (1963) (emphasis added). See also Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). In their dissenting opinion in Lewis v. City of New Orleans, 415 U.S. 130 (1974), Justice Blackmun, joined by Justice Rehnquist and Chief Justice Burger, contended that the Court was not just applying constitutional limitations by holding the statute overbroad, but was invalidating statutes because they might, at a future time, restrict protected speech. Id. at 137 (Blackmun, J., dissenting). The trend of the Burger Court is clearly enunciated in Broadrick and now Ferber.

97. It should be remembered that the case of St. Martin's Press, Inc. v. Carey, 440 F. Supp. 1196 (S.D.N.Y. 1977), rev'd, 605 F.2d 41 (2d Cir. 1979), discussed in note 37 supra, which involved the sex education book Show Me!, would have provided a different factual situation and probably would have demanded a different result. As a result of the Court's decision in Ferber, the book was chilled out of existence. "The publishers of the children's book 'Show Me!' says it has stopped distribution
tally overbroad statute. Before the decision, for speech to be prohibited because of its sexual content, it must have been found obscene under the standards delineated in *Miller v. California.*

The New York statute bans material depicting children engaged in any sexually explicit conduct\(^9\) and thereby prohibits the distribution and sale of protected and socially valuable materials that may contain only isolated instances of child nudity or sexual activity as part of a more meaningful overall purpose.\(^{100}\) It would seem indefensible to propose that only nonobscene materials which cause harm to the children depicted will be prosecuted.\(^{101}\) Neither should it be a defense to insist that law enforcement officials will exercise discretion and prosecute only the most heinous offenses.\(^{102}\) Section 263.15 bans obscene and nonobscene materials alike and therefore seems unconstitutionally overbroad.

Section 263.15 also discriminates against the content of speech protected by the first amendment.\(^{103}\) "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."\(^{104}\) As pointed out in *People v. Ferber,* the New York provision bans only harm suffered by children sexually abused during the production of sexually explicit materials, but does not prohibit dangerous nonsexually related activities.\(^{105}\)

In *Erznoznik v. City of Jacksonville,*\(^{106}\) the Court held a Jacksonville, Florida ordinance, making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films because of a U.S. Supreme Court ruling upholding a New York child pornography law." Omaha Sunday World-Herald, Sept. 26, 1982, at 27.

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98. See note 61 supra.
100. Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 694 (1959) (statute requiring the denial of a license to show a motion picture when "its subject matter is adultery presented as being right and desirable" violates the first amendment as applied); Hillsboro News Co. v. City of Tampa, 451 F. Supp. 952 (M.D. Fla. 1978) (ordinance curtailing display, to individuals under seventeen years of age, of "offensive sexual materials" was held unconstitutional).
103. Professor Tribe argues that the Supreme Court has developed two distinct methods of analysis depending on whether the regulation is aimed at "communicative" or "noncommunicative" speech. L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580-84 (1978).
105. 52 N.Y.2d at 680, 422 N.E.2d at 526, 439 N.Y.S.2d at 866.
106. 422 U.S. 205 (1975).
containing nudity when the screen is visible from a public street, facially invalid as an infringement of first amendment rights. The city did not have similar restrictions for violence on the screen. The ordinance, by discriminating among movies solely on the basis of content, had the effect of deterring drive-in theaters from showing movies containing any nudity however innocent or even educational, and such censorship of the content of otherwise protected speech cannot be justified. Both the Jacksonville ordinance and section 263.15 prohibit only the portrayal of sexual activity. While it is true that the Court has recognized that a legislature may deal with one problem at a time, a legislature cannot single out one particular kind of subject matter just because it finds it distasteful or because it is thought to encourage a secondary sort of harm. The Supreme Court dismissed the content discrimination issue as being moot. “Today, we hold that child pornography as defined in section 263.15 is unprotected speech subject to content-based regulation.”

Parens Patriae and the Prohibition of Nonobscene Speech

Under the doctrine of parens patriae, the state acts in a fiduciary capacity to protect the welfare of its minor citizens. States most frequently exercise this power in the fields of family, juvenile and labor law. The State of New York argued that it is this power that justifies the enforcement of section 263.15. To support this proposition, the state drew attention to other statutes that protect children.

New York’s interest in the welfare of its children is often relied on by its legislature to protect children from harmful experiences, and as a basis for denying adults rights otherwise accorded to them. The rights of adults to employ children, enter into contracts, and impose criminal sanctions on children are all law-

107. *Id.* at 217-18.
108. *Id.* at 212.
110. 102 S. Ct. at 3359 n.18.
111. Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950).
115. *Id.*
118. N.Y. PENAL LAW § 30.00 (McKinney 1975).
fully restricted by statute. These statutes must be distinguished from the present one. Their infringement of free speech occurs by directly prohibiting the harmful conduct at its source. They protect children from hazardous work and long hours, severe criminal penalties, and contractual relationships which create unconscionable results. These laws directly prohibit the harm they intend to prohibit, such as the employment of minors under certain circumstances. Section 263.15 is different in that it directly prohibits the dissemination of evidence of child abuse, not the child abuse itself. Thus, not only does section 263.15 prohibit conduct, it prohibits speech.

Furthermore, the New York statute prevents adults from viewing nonobscene materials. The argument that the interests of young children may restrict the rights of an adult to view sexually explicit materials within their home was rejected in Stanley v. Georgia. The inadequacies of this argument are repeated in the state’s reading of Prince v. Massachusetts.

The state referred to Prince as authority for the proposition that the Court has taken into account the state’s compelling interest in the welfare of children in determining the scope of the first amendment. This is the view adopted by the Supreme Court in Ferber. This may be a misdirected view of the holding in that case. In Prince, the Court upheld a state law prohibiting the sale of merchandise in public places by a minor when applied to a minor who was distributing religious literature with her guardian. The government’s purpose—protecting children from exploitive labor—could not be achieved if adults were allowed to employ the young as street proselytizers for their opinions. The case does not stand for the proposition that the first amendment can, in effect, be ignored when the enforcement of laws written to benefit children prohibit protected speech. The state’s power of parens patriae is useful in the area of labor regulation but should not prevail when serious first amendment rights are poised on the chopping block.

120. 321 U.S. 158 (1944).
121. Brief for Petitioner, supra note 38, at 15.
122. 102 S. Ct. at 3354-55.
123. 321 U.S. at 170.
124. Id. at 168.
The Proper Role of the Obscenity Doctrine

The Miller test for obscenity was intended to be a potent check on the power of states to censor according to their own predilections. It was designed to guarantee that certain values would be considered in the balance between state and first amendment interests. These values included that the work be considered in its entirety, that the perceiver be "average" in susceptibility to offensiveness, and that the work lack serious scientific or educational merit. In New York v. Ferber, the United States Supreme Court refused to plug these important values into the equation. The Court discarded the Miller test because it did not provide an "adequate remedy" in the Ferber case. This is reasoning from the conclusion backwards because it assumes that an adequate remedy should be given. By dismissing the guidelines provided in Miller v. California, the Court proceeded with an unprincipled balancing analysis. There has been justifiable criticism of this approach:

[The balancing doctrine is no doctrine at all but merely a skeleton structure on which to throw any facts, reasons, or speculations that may be considered relevant. Not only are there no comparable units to weigh against each other, but the test is so vague as to yield virtually any result in any case.]

Ad hoc balancing leads to fact-sensitive opinions that are of limited precedential value. New York v. Ferber is a case in point. The

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125. See note 61 and accompanying text supra.
127. Id. at 24.
128. 102 S. Ct. at 3356-57. It should be observed that the three Miller criteria are adjunctive, not disjunctive. In Ferber, the Court promulgated a standard that is disjunctive; the Court assumed that because the sexual material depicting children was of slight social value, the other Miller criteria did not have to be obliged. This signals at least a temporary abandonment of a constitutional doctrine that was 40 years in tumultuous development. See generally C. Rembar, The End of Obscenity (1968) (book detailing the development of the obscenity doctrine as it relates to literary works).
130. 102 S. Ct. at 3354-58. The "absolutist view" of free speech is a foil to the balancing approach. "[I] believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting, joined by Douglas, J., and Warren, C.J.). The major proponents of the absolutist view have been Justices Black and Douglas. This view has never persuaded a majority of the Court. See authorities cited in J. Nowak, R. Rotunda & J. Young, Constitutional Law 720 n.7 (1978).
opinion appears to be limited to its facts. Ferber was acquitted on obscenity charges,\(^1\) but the Court said that his films bordered on the obscene.\(^2\) The holding of the case was specifically limited to "respondent and others who distribute similar materials."\(^3\) Four concurring Justices expressed doubt as to the soundness of the Court's discussion of the overbreadth doctrine and disagreed with the Court's position that sexual materials depicting children are totally without first amendment protection.\(^4\) No guidelines were provided for subsequent litigation.

Fact-sensitive opinions also disturb and distort the values which support constitutional jurisprudence. "[B]ecause of the Court's predilection for ad hoc balancing, its failure to take proper account of the dynamics of suppression, and its unwillingness to develop innovative doctrines in response to changing needs, the system has become less effective at serving its underlying values."\(^5\) In Ferber, materials of educational merit were left without first amendment protection; the scope of acts prohibited by the statute was left unclear. All that is certain is that the Court did not like Ferber's films.

An effort to protect children does not require an end-run around the obscenity doctrine. Because the Court found existing doctrines inadequate,\(^6\) Ferber may be helpful by providing an opportunity to explore alternatives to the Miller formulation.

In order to circumvent the difficulties presented by the obscenity doctrine,\(^7\) some scholars have argued that as applied to children, the Supreme Court should broaden its present definition of obscenity.\(^8\) Two alternative theories have been proposed: the

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\(^{132}\) 102 S. Ct. at 3352.

\(^{133}\) Id. at 3365 n.1 (Stevens, J., concurring). "Respondent's counsel conceded at oral argument that a finding that the films are obscene would have been consistent with the Miller definition." Id.

\(^{134}\) Id. at 3363-64.

\(^{135}\) In three separate concurring opinions, Justices O'Connor, Brennan, Marshall and Stevens write that § 263.15 would be unconstitutional when applied to depictions of children having serious literary, artistic, scientific or medical value. Id. at 3364 (O'Connor, J., concurring); id. at 3365 (Brennan, J., and Marshall, J., concurring); id. at 3365 (Stevens, J., concurring). "A holding that respondent may be punished for selling these very films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the pale of constitutional protection." Id. at 3366 (Stevens, J., concurring).

\(^{136}\) Emerson, First Amendment Doctrine and the Burger Court, 68 CALIF. L. REV. 422, 423 (1980). Two values mentioned in the article that apply to Ferber are individual self-fulfillment and the advance of knowledge and the discovery of truth. Id. at 423.

\(^{137}\) 102 S. Ct. at 3357.

\(^{138}\) See notes 82-88 and accompanying text supra.

\(^{139}\) See note 61 supra.
tripartite analysis enunciated in United States v. O'Brien,\textsuperscript{140} and
the "variable obscenity" concept.\textsuperscript{141}

As an alternative to incorporating the traditional obscenity
doctrine into the balancing test, some commentators have relied
on the O'Brien test in analyzing the constitutionality of child por-
nography statutes.\textsuperscript{142} In O'Brien, a criminal statute prohibiting the
destruction of a draft card was held constitutional.\textsuperscript{143} The Court
ruled that when an activity contains elements of both speech and
conduct, the state may impose \textit{incidental} restrictions on speech
where its primary purpose is to prohibit harmful conduct.\textsuperscript{144} In
such a situation, three requirements are imposed: (1) it must be
within the constitutional power of government to prohibit the con-
duct at issue; (2) the regulation must further an important or sub-
stantial governmental interest unrelated to the suppression of free
expression; and (3) the incidental restriction on alleged first
amendment rights must be no greater than is essential to the fur-
therance of that interest.\textsuperscript{145}

The New York statute does not meet the O'Brien criteria. The
first criterion, that a regulation is justified if within the constitu-
tional power of government, is satisfied in that states certainly
have the power to prohibit child abuse. The second criterion is
troublesome.\textsuperscript{146} The statute exists to protect children from the
harm that results from production of the photographs.\textsuperscript{147} However,
one the films reach the hands of distributors the state's interest is
related to the suppression of what may otherwise be free speech.
Finally, section 263.15 does not appear to meet O'Brien's third re-
quirement because the obscenity doctrine provides a somewhat

\textsuperscript{140} 391 U.S. 367 (1968) (The O'Brien test is not limited in its application to ob-
scenity but instead encompasses all challenged speech under the first
amendment).

\textsuperscript{141} Lockhart & McClure, \textit{Censorship of Obscenity: The Developing Constitu-
tional Standards}, 45 MINN. L. REV. 5 (1960) (authors advocate a "variable" concept
of obscenity which would make the validity of censorship depend on the sexual
material's primary audience).

discussion of the O'Brien criteria as applied to first amendment topics generally,
see Henkin, \textit{The Supreme Court, 1967 Term}, 82 HARV. L. REV. 63, 75-77 (1968); Nim-

\textsuperscript{143} 391 U.S. at 386.
\textsuperscript{144} Id. at 376 (emphasis added).
\textsuperscript{145} Id. at 377.

\textsuperscript{146} For a view that O'Brien's second requirement must be applied strictly, see
Ely, \textit{Flag Desecration: A Case Study in the Roles of Categorization and Balancing
in First Amendment Analysis}, 88 HARV. L. REV. 1482, 1496-99 (1975) (where the au-
thor notes that in shifting from the first to the second criterion the Court moves
from "ontology to teleology").

\textsuperscript{147} See note 22 supra.
less effective but less drastic means through which New York may eliminate the economic demand for sexually related materials depicting children.

The variable obscenity concept originated in the work of Professors Lockhart and McClure.\textsuperscript{148} Under variable obscenity, material is judged by its effect on the audience to which it is primarily directed.\textsuperscript{149} Since section 263.15 is concerned with the use of children in the production of sexually explicit materials, not children as viewers of these products, the variable obscenity doctrine is irrelevant when considering the problem which this statute addresses.\textsuperscript{150}

If section 263.15 is to be constitutionally accommodated, the obscenity doctrine may have to be conceptually redesigned. It is unlikely that the doctrinal problems with the definition of obscenity will reach a state of rest until the Court redefines obscene speech as \textit{a priori} protected unless it falls into well-defined categories, such as regulation in the interest of unwilling viewers, captive audiences and especially young children.\textsuperscript{151} Once it is rediscovered that obscene speech should not be protected by the first amendment \textit{in toto}, a prohibition against well-defined sexual activities memorialized in photographs could be made.


\textsuperscript{149} Id. at 77.

\textsuperscript{150} In Ginsberg v. New York, 390 U.S. 629 (1968), the Court held that it was constitutionally permissible for New York to prohibit minors from viewing materials which were protected for viewing by adults. Id. at 635. The "harmful to minors" test upheld in \textit{Ginsberg} requires that the representation of nudity predominantly appeal to the prurient, shameful or morbid interests of \textit{minors}; be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material \textit{for minors}; and be utterly without redeeming social importance \textit{for minors}. Id. at 633. This broader definition of obscenity was approved based on the state's interest in protecting its children. Id. at 643.

As applied to child pornography, the doctrine would promulgate a double obscenity standard: one applicable to adults, and the other, more expansive in nature, to children. The standard of obscenity used would be the \textit{Miller} test, see note 61 \textit{supra}, adapted for the eyes of children and adolescents. However, because of the great similarity between the two tests, the variable obscenity concept inherits all the infirmities the traditional test brings to the present problem. See notes 80-88 and accompanying text \textit{supra}. Again, the focus is on the perceiver and not on the perceived, the work must be offensive as a whole, and social importance is considered. Section 263.15 creates a \textit{per se}, not a \textit{variable}, exclusion of speech. The variable concept is therefore of little relevance and less help as applied to section 263.15.

Less Restrictive Legislative Responses

As a tool to diminish sexual abuse suffered by children during the production of child pornography, section 263.15 was legitimately conceived. However, even if the legislative purpose is legitimate, "that purpose cannot be pursued by means that broadly stiffle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." The following less restrictive statutory schemes are available.

The State of New York could incorporate the obscenity doctrine and vigorously enforce its statute without section 263.15. This course of action would be constitutional because, at present, obscenity is not protected speech.

In 1977, federal anti-child pornography legislation was passed. In deference to the first amendment, the Senate and House Conference Committee added the word "obscene" to the Roth amendment before the federal bill was passed by both houses and became law. It decided to be safe within the first amendment and bifurcated the problem by punishing producers of child pornography as child abusers on the one hand, and sellers and distributors of obscene material depicting children in sexually explicit conduct on the other. In addition, New York could increase the penalties imposed on violators of child abuse, sexual abuse and pornography laws. Some states contemplate a double-barrelled legislative attack on child pornography. Producers of child pornography are treated as child abusers regardless of whether the material is obscene. The prosecution of distributors and retailers of "obscene" materials depicting minors takes place in the parameters of traditional first amendment analysis. The effect of such state laws is to make activities which are misdemeanors under general obscenity statutes felonies when children are depicted therein. California has a system of enhanced penalties. The younger the child, the more severe the penalty.

152. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted) (statute requiring Arkansas teachers to file an annual affidavit listing all organizations to which they belonged in the last five years held unconstitutional).
Under labor regulations, New York could require that all models employed for the use of nude photography be eighteen years of age or older. It would be an affirmative defense under the statute that nude photographs of persons under the age of eighteen were used if mandatory for educational or scientific purposes. This defense would apply, for example, in the narrow circumstances where pediatric textbooks illustrate genital diseases or where genitals are exhibited in a "neutral" manner solely for informational purposes in sex education materials.

CONCLUSION

In New York v. Ferber, the Supreme Court reached a socially desirable result. Convictions of child pornographers will not ruffle the first amendment. Under the New York statute, law enforcement agencies will be able to decrease the availability of child pornography by fining and incarcerating anyone who knowingly produces or distributes sexual materials depicting children. Unfortunately, this result was reached by way of questionable legal reasoning. The obscenity doctrine has been dismissed as an inadequate remedy and the potency of the overbreadth doctrine has been diminished. Inarticulated balancing leaves the scope of the Ferber holding uncertain.

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