

B. CHILD PORNOGRAPHY

1. *The Ferber case.* In *NEW YORK v. FERBER*, 458 U.S. 747 (1982), the Court unanimously rejected a First Amendment attack on a New York law designed to deal with the problem of child pornography. The law prohibited the distribution of material depicting children engaged in sexual conduct; it did not require that the material be legally obscene. Ferber, the owner of a bookstore specializing in sexually oriented products, was convicted under § 263.15 of the New York Penal Law for selling two films devoted almost exclusively to depicting young boys masturbating. The provision stated: "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." Another section of the law defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." The Court found Ferber's conviction constitutional.

In upholding the law, Justice WHITE, who wrote the majority opinion, echoed the Chaplinsky approach by "classifying child pornography as a category of material outside the protection of the First Amendment." Justice White noted that this case was the Court's "first examination of a statute directed at and limited to depictions of sexual activity involving children.¹ We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children [than in regulating obscenity]." In his view the 1973 Miller obscenity standard did not delineate the extent of state power over child pornography. The portions of his opinion explaining why states have "greater leeway" over child pornography stated:

"*First.* It is evident [that] a state's interest in 'safeguarding the physical and psychological well being of a minor' is 'compelling.' The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. [The] legislative judgment [is] that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the [child].

"*Second.* The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. [Ferber argues] that it is enough for the State to prohibit the distribution of materials that are legally obscene under the Miller test. While some States may find that this approach properly accommodates [their interests], it does not follow that the First Amendment prohibits a State from going further. The Miller [standard] does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. [E.g.,] a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. 'It is irrelevant to the child [who has been abused] whether or not the material has a literary, artistic, political, or [social value].'

Third. The advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation. 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.' We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws have not been questioned, the First Amendment implications

1. Justice White had noted earlier that, "[i]n recent years, the exploitive use of children in the production of pornography has become a serious national problem." The federal government and 47 states had enacted statutes "specifically directed at the production of child pornography." At least half of these did not require "that the materials produced be legally obscene." Moreover, 35 states and Congress had passed legislation

prohibiting the distribution of such materials. Twenty of these states prohibited the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene. New York was one of these 20 states. (The laws in the other 15 states, as well as the federal law, prohibited the dissemination of such material only if it was obscene.)

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would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. [I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. [See *American Mini Theatres* and, e.g., *Chaplinsky*; *Beauharnais*.] [Thus], it 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].

"There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. [The] test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

"[The law's] prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. [We] hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally 'underinclusive' about a statute that singles out this category of material for proscription. It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State."