Child Pornography: Ban the Speech and Spare the Child? - New York v. Ferber

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CHILD PORNOGRAPHY: BAN THE SPEECH AND SPARE THE CHILD?—NEW YORK V. FERBER

What does child pornography have in common with advocacy of illegality, deceptive advertising, and obscenity? Each is a category of speech¹ that the government may regulate despite the first amendment's proscription against laws abridging freedom of speech.² Prior to the United States Supreme Court's decision in New York v. Ferber,³ speech had been deemed undeserving of first amendment protection from government regulation only when society maintained a strong interest in preventing the harms caused, either actually or potentially, by the speaker's words. According to the Court, advocacy of illegal action,⁴ deceptive advertising,⁵ and obscenity⁶ have a detrimental effect on society and, therefore, are unprotected by the first amendment.⁷ In Ferber, the Court held that the first amendment did not

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2. U.S. Const. amend. I.

3. 102 S. Ct. 3348 (1982).

4. Speech that advocates that the audience take illegal action, if it has a substantial likelihood of causing imminent harm, is unprotected. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); see infra notes 48-58 and accompanying text.

5. Advertising that is false or misleading, or is in a form that could be used to deceive the audience, is unprotected. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); see infra notes 59-75 and accompanying text.

6. To be obscene, material must meet each of the following criteria: (1) the work depicts or describes, in a patently offensive way, sexual conduct as specifically defined by state law; (2) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex; and (3) taken as a whole, the work does not have serious literary, artistic, political or scientific value. Miller v. California, 413 U.S. 15, 24 (1973); see infra notes 76-100 and accompanying text.

7. Fighting words also have been held to be unprotected by the first amendment. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Fighting words are defined as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572. Thus, by definition, the rationale for holding fighting words unprotected is the harm such words cause. Nevertheless, the Court has not upheld a conviction for fighting words since Chaplinsky. See, e.g., Gooding v. Wilson, 405 U.S. 518, 528 (1971) ("White son of a bitch, I'll kill you"); Cohen v. California, 403 U.S. 15, 20 (1971) ("Fuck the draft"); Street v. New York, 394 U.S. 576, 592 (1969) ("We don't need no damn flag"); Terminiello v. Chicago, 337 U.S. 1, 3 (1949) ("slimy scum").

Libel is another category of speech held unprotected by the first amendment. See, e.g., Time
protect depictions of minors engaged in actual or simulated sexual activity.\textsuperscript{4} Yet, \textit{Ferber} did not hold that such depictions were unprotected because of their harmful effect on society; rather, they were declared unprotected because they were obtained by sexually abusing and exploiting children.

The \textit{Ferber} Court's decision that child pornography\textsuperscript{9} is less deserving of first amendment protection than political speech is seemingly appropriate.\textsuperscript{10} Nonetheless, when the rationale underlying \textit{Ferber} is examined, it becomes clear that the decision is both significant and alarming because it establishes

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v. Firestone, 424 U.S. 448 (1976) (magazine incorrectly identified grounds for plaintiff's divorce); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (magazine article accused plaintiff of being a communist); New York Times v. Sullivan, 376 U.S. 254 (1964) (newspaper advertisement criticized police reaction to civil rights movement). Generally, libel is "any publication that is injurious to the reputation of another." BLACK'S LAW DICTIONARY 824 (5th ed. 1979). The theory underlying the Court's decisions holding libel unprotected is that the damage done to an individual's reputation by libelous utterances should be compensated. Thus, as with advocacy of illegality, deceptive advertising, and obscenity, libel is unprotected because of the harm it causes.

8. 102 S. Ct. at 3359. The New York statute upheld in \textit{Ferber} criminalized promotion of any sexual performance by a child less than 16 years of age. N.Y. PENAL LAW § 263.15 (McKinney 1980). Because another section of the statute criminalized promotion of an obscene sexual performance, \textit{id.} § 263.10, the section attacked in \textit{Ferber} clearly referred to nonobscene depictions. The primary distinction between sexual performance by a minor and obscenity is that the former need not appeal to prurient interests of the average person, be patently offensive, or be considered in context of the whole work in order to fall within the prohibition. 102 S. Ct. at 3358; see infra notes 76-100 and accompanying text for a discussion of obscenity.

9. As used in this Note, the term "child pornography" refers only to nonobscene depictions of minors engaging in sexual activity. This term will be used synonymously with sexual performance by a minor, as defined by the New York statute at issue in \textit{Ferber}. Sexual performance was defined as "any play, motion picture, photograph or dance, . . . or other visual representation exhibited before an audience" which included "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." N.Y. PENAL LAW § 263.00 (McKinney 1979).

10. Political speech is fully protected from government regulation by the first amendment. Perhaps the clearest statement by the Supreme Court of the doctrine that political speech is at the core of the first amendment was in New York Times v. Sullivan, 376 U.S. 254 (1964), where Justice Brennan, writing for the majority, declared that there is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." \textit{Id.} at 270; see also Roth v. United States, 354 U.S. 476, 484 (1957) (the first amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes"); Bridges v. California, 314 U.S. 252, 270 (1941) ("it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions"); Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principal of our constitutional system."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."). See generally Meiklejohn, \textit{The First Amendment Is an Absolute}, 1961 SUP. CT. REV. 245 (arguing that first amendment protects speech only insofar as it relates to self-government). For a discussion of the variety of expression that has been held to be political speech, see infra note 21.
an entirely new principle for holding speech unprotected. Prior to *Ferber*, the Supreme Court uniformly justified holding a category of speech unprotected on the theory that government has the authority to prevent certain specific harms. Thus, speech that potentially caused such harms was subject to the government’s regulatory authority. This theory allowed censorship only when the speech posed a danger to society. In contrast, the *Ferber* Court justified holding child pornography unprotected because it is the result of a societal harm: sexual exploitation of minors. The government’s authority to prevent sexual exploitation of minors for commercial gain was held to be a sufficient justification for classifying the resultant speech as unprotected. Therefore, the *Ferber* decision expanded governmental censorship authority by permitting speech to be suppressed without requiring proof that the speech, per se, is harmful to society. Thus, the *Ferber* principle eventually may erode the first amendment’s protection of speech.

The two divergent theories for holding speech unprotected, the pre-*Ferber* “causal” theory and the *Ferber* “result” theory, are the subject of this Note. Focusing on three questions, this Note will initially consider why the Court held that child pornography, like advocacy of illegality, deceptive advertising, and obscenity, was unprotected by the first amendment. Second, this Note will examine how *Ferber* differs from prior Supreme Court decisions. Next, the impact of the *Ferber* decision on future first amendment adjudication will be assessed. Finally, this Note will conclude that the Court went further than was necessary to reach the desired result in *Ferber* and, in so doing, established a precedent for increased government censorship of speech.

**BACKGROUND**

To appreciate the significance of the *Ferber* decision, it is important to have a general understanding of the Court’s framework in analyzing first amendment issues. The first amendment to the United States Constitution

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11. The question presented for review was as follows: “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?” 102 S. Ct. at 3352. Convinced that the states were entitled to regulate child pornography, the Court answered this question in the affirmative. *Id.* at 3354.

12. In all of its prior decisions, the Court has concluded that the general purpose behind the first amendment was to prohibit government censorship of speech. See, e.g., Landmark Communications v. Virginia, 435 U.S. 829, 838 (1978) (the purpose of the first amendment is to “protect the free discussion of governmental affairs”); Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (the policy of the first amendment favors dissemination of information and opinion); Cohen v. California, 403 U.S. 15, 24 (1971) (the first amendment was “designed and intended to remove governmental restraints from the arena of public discussion”); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969) (the purpose of the first amendment is to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail”); Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967) (the first amendment was designed not only to prevent government censorship, but also to prohibit any governmental action that would prevent free and general discussion).
provides that "Congress shall make no law . . . abridging the freedom of speech." Although it is well established that speech enjoys a "preferred position" in the hierarchy of constitutionally guaranteed rights, the first amendment does not operate as "an unlimited license to talk." Speech may be subject to two kinds of government regulation. First, the government has the authority to regulate the "time, place, or manner" of speech so long as the regulation is not based on the content or subject matter of the speech. For example, the government may prohibit picketing in front of a school during school hours to prevent interference with that institution's function; such a law merely regulates the time and place of the speech. If, however, the law exempted labor picketing from the ban, it would be unconstitutional because its application would depend on the content of the speech.

This is not to say that the government may never regulate speech based


14. Perhaps the most widely quoted source of this doctrine is a footnote in the Carolene Products case in which Justice Stone wrote that, in contrast to regulating commerce, "[t]here may be [a] narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938). For a thorough discussion of case law creating and applying the preferred position doctrine, see Kovacs v. Cooper, 336 U.S. 77, 90-97 (1948) (Frankfurter, J., concurring).

15. Konigsberg v. State Bar, 366 U.S. 36, 50 (1961); see also Cohen v. California, 403 U.S. 15, 19 (1971) (the first amendment does not give absolute protection to speak wherever, whenever, or in whatever form one chooses); Times Film Corp. v. Chicago, 365 U.S. 43, 47-49 (1961) (the right of free speech, at times, may be subject to prior restraints).


[A] government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial government 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.


17. Grayned v. City of Rockford, 408 U.S. 104, 121 (1972) (ordinance banning demonstrations within 150 feet of public school during school hours held constitutional).

on its content. The Court defines the constitutionally permissible scope of content-based regulation by holding that the first amendment either fully protects, partially protects, or does not protect a given category of speech. If a category of speech has been held fully protected, the government may employ a content-based regulation to suppress the speech only if such a regulation is necessary to achieve a compelling state interest and there is no less restrictive alternative means to achieve that interest. For example, political speech is fully protected. A law banning this type of speech would be constitutional only if there were a compelling interest which could not be achieved by a less restrictive alternative. Partially protected speech, such


20. This is the traditional formulation of strict judicial scrutiny, which has been said to be "strict in theory and fatal in fact." Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). Strict scrutiny is applied explicitly in the area of equal protection, but the Court implicitly applies it to content-based regulations of fully protected speech by refusing to recognize asserted state interests as sufficient to justify such regulations. See, e.g., Brown v. Hartlage, 456 U.S. 45, 59-60 (1982) (interest in preserving integrity of electoral processes is not sufficiently compelling to justify a restriction on candidate's offering of material benefits in exchange for votes); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 72-74 (1981) (neither the zoning power nor the police power of a state is sufficient to justify an ordinance prohibiting live entertainment); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 540-43 (1980) (prohibition of bill inserts is not sufficiently justified by state interest in protecting a captive audience, in allocating public resources, or in protecting ratepayers from subsidizing speech); Carey v. Brown, 447 U.S. 455, 464-70 (1980) (ordinance prohibiting all picketing, except labor picketing, in residential neighborhoods is not sufficiently justified by state interest in protecting privacy, or in protecting labor protests); First Nat'l Bank v. Bellotti, 435 U.S. 765, 787 (1978) (ordinance prohibiting corporations from influencing the outcome of a vote by spending money is not justified by state interest in protecting the role of individuals in the electoral process, or in protecting shareholders with differing views); Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-15 (1975) (ordinance prohibiting drive-in theatres from showing movies containing nudity is not sufficiently justified by state interest in protecting privacy of passers-by, in protecting children, or in regulating traffic); Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969) (prohibition of armbands protesting the Vietnam War is not justified by desire to avoid discomfort and unpleasantness).

as commercial speech,22 is protected by the first amendment from some, but not all, content-based regulations. To satisfy the Constitution, a content-based regulation of commercial speech must be substantially related to an important governmental interest.23 Finally, a content-based regulation that affects an unprotected category of speech is constitutional if it merely is rationally related to a legitimate state interest.24 Advocacy of illegality, deceptive advertising, obscenity, and child pornography have been classified as unprotected categories of speech.

To determine the constitutionality of a content-based regulation of speech, the Court must apply a bifurcated analysis. First, the Court must ascertain the category of speech regulated by the challenged statute. Second, the Court must apply the appropriate level of judicial scrutiny to determine the regulation's validity. Consequently, the extent to which the first amendment protects a particular category of speech is critical because less first amendment protection permits more government censorship. Thus, by holding a category


23. The Court articulated a four part test to determine the validity of content-based regulations of commercial speech in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). First, the speech must relate to a lawful transaction in a manner that is not misleading. Second, the asserted state interest must be substantial. Third, the regulation must directly advance the asserted state interest. Finally, the regulation must be no more restrictive than necessary. Id. at 566. Other commercial speech cases have articulated this intermediate level of scrutiny in slightly different ways. For example, in In re R.M.J., 455 U.S. 191, 203 (1982), the Supreme Court declared that a “state must assert a substantial interest and the interference with speech must be in proportion to the interest served. . . . Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the State’s substantial interest.” One year earlier, in Metromedia v. San Diego, 453 U.S. 490, 507 (1981), the Court announced:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Previously, in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court stated that commercial speech is “afforded . . . a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values.” Id. at 456.

24. This is commonly referred to as the rational basis test and is the minimum constitutional requirement imposed on all legislation. This test merely requires that laws may not be arbitrary or capricious. See generally Bice, Rationality Analysis in Constitutional Law, 65 MINN. L. REV. 1, 2-3 (1980); Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197, 200 (1976).
of speech unprotected, the Court gives the government constitutional authority to enact virtually any law regulating or banning the speech within that category. The Court's justification for holding a given category of speech unprotected must be examined to determine if it can be reconciled with the initial premise that governmental regulation of speech is generally undesirable. The following analysis reveals that the Ferber decision is inconsistent with the first amendment's goal of prohibiting censorship.

**The Ferber Decision**

Paul Ira Ferber owned a Manhattan bookstore in which, among other items, pornographic films were sold. In March of 1978, an undercover police officer purchased two films from Ferber. These films depicted young boys, some of whom appeared to be no more than eight years old, masturbating to ejaculation and engaging in conduct suggestive of oral-genital contact. Ferber was arrested and indicted on two counts of promoting a sexual performance by a child in violation of a New York statute. Ferber moved to dismiss the indictment, alleging that the state could not prosecute him for selling the films unless it were determined that the films were obscene. The statute, Ferber claimed, was unconstitutional because it did not require that the prohibited “performance” be obscene; thus, the statute banned the sale of protected speech. The trial court rejected this contention, finding that the primary legislative intent in enacting the statute was to prohibit the use of children in pornographic films. In balancing Ferber's right to disseminate concededly protected speech against the legislature's right to protect children, the trial court held that the compelling state interest in preventing sexual exploitation of children prevailed, and therefore the statute was constitutional.

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25. See, e.g., Cohen v. California, 403 U.S. 15, 24 (1971) (the first amendment was designed and intended to free the arena of public discussion from governmental restraints); Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967) (the first amendment was designed not only to prevent government censorship, but also to prohibit any governmental action which would prevent free and general discussion).


27. N.Y. Pen. Law § 263.15 (McKinney 1980). The term *promote* is defined as “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.” Id. § 263.00(5).

28. 96 Misc. 2d 669, 676, 409 N.Y.S.2d 632, 637 (1978). Ferber also attacked the validity of the statute on the grounds that it was “overly broad, vague, irrational, arbitrary, serve[d] no legitimate state interest, [was] penally excessive and violate[d] the doctrine of equal protection of the laws.” Id. at 673, 409 N.Y.S.2d at 635.

29. Id. at 676, 409 N.Y.S.2d at 637 (citing Memorandum in Support A-3587-C, Assemblyman Lasher). The legislative purpose in enacting the law was “[t]o eliminate the sexual exploitation of children by establishing strict criminal sanctions against individuals who induce children to participate in sexual performances and who profit from the distribution of such material.” Id. at 675, 409 N.Y.S.2d at 636.

30. Id. at 677, 409 N.Y.S.2d at 637. The New York court noted two practical points in support of its holding. First, alternative means were available to make it appear as if children
Ferber was convicted by a jury, and his conviction was affirmed without opinion by the New York Supreme Court, Appellate Division. The New York Court of Appeals, however, reversed Ferber's conviction and dismissed the indictment, stating that the statute was an unconstitutional content-based regulation of protected speech. In reaching this conclusion, the court of appeals noted that because the statute did not require that the material be obscene, it potentially could ban speech that was fully protected by the first amendment. In addition, the New York court held that notwithstanding the state's legitimate interest in protecting the well-being of the child performers, the statute was not the least restrictive means of achieving this goal, and therefore was unconstitutional as written.

The state sought review of this decision, and the United States Supreme Court granted the petition for certiorari. Interestingly, none of the state's arguments urging the Court to uphold the law suggested that nonobscene child pornography constituted an unprotected category of speech. Instead, the state argued that the statute was a necessary means of achieving the state's compelling interest in protecting the welfare of its children. The statute achieved this interest, according to the state, by eliminating the economic incentive for child exploitation that necessarily is involved in the production of child pornography. The state further contended that the statute was the least restrictive means of achieving this interest. If the statute banned only obscene depictions of minors engaged in sexual activity, the

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In pertinent part the court held:

[T]he statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content, and since no justification has been shown for the distinction other than special legislative distaste for the portrayal, the statute cannot be sustained. . . . [T]hose who present plays, films, and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner.

33. Id. at 679, 422 N.E.2d at 525. In response to the state's contention that the obscenity of the work was immaterial to the child performers, the court of appeals noted that the purpose for censoring the protected expression was immaterial because of the impact of censorship on first amendment freedom. Id.
34. Id. at 680-81, 422 N.E.2d at 526. For example, if the purpose was to protect New York children, then the statute impermissibly failed to distinguish between films or photographs taken in New York and those taken elsewhere. Id. at 679-80, 422 N.E.2d at 526. Furthermore, if the purpose was to insure the well-being of children, then the legislature had not done so uniformly because children were legally permitted to engage in other activities harmful to their welfare, such as dangerous stunts. Id. at 680-81, 422 N.E.2d at 526.
37. Id. at 7-8.
state argued, it would be ineffective to protect the children for two reasons. First, the prosecutorial difficulties in obtaining obscenity convictions would not sufficiently deter traffic in child pornography to destroy the profit motive. Second, the children who were engaged in the production of the pornography were harmed irrespective of whether the material produced was classified as obscene. Thus, the state maintained that the statute, despite permitting a content-based regulation of fully protected speech, survived strict scrutiny.

The Ferber Court went further than the state had urged and held that nonobscene child pornography was an unprotected category of speech. Consequently, the Court upheld the statute because it was rationally related to a legitimate state interest. The Ferber Court enumerated five points in justification of its conclusion. First, the Court accepted the legislative determination that the sexual exploitation of children that occurred in the production of child pornography seriously threatened the children's welfare. Second, the Court accepted the state's judgment that distribution of child pornography harmed the children involved in its production regardless of whether the material produced was obscene. The third justification in Ferber was that a ban on the sale of child pornography would eliminate the economic incentive for producing such material.

38. Id. at 8.
39. Id. The state attributed the prosecutorial difficulties to the uncertainties inherent in the legal definition of obscenity. Id.
40. Id.
41. Id. at 3359. The Court held that the test to be applied was the Miller obscenity test, as defined supra note 6, with the following adjustments: "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." Id. at 3358. The Court also held that the statute was not overly broad. Id. at 3363.
42. Id. at 3354-55. Because the state's interest in protecting its children's welfare had always been deemed compelling, the legislative purpose was held to be "a governmental objective of surpassing importance." Id. at 3354.
43. Id. at 3355-57. The legislature had found that distribution harmed the children in two ways. Distribution of the material to the public exacerbated the initial harm to the children by widely disseminating a permanent record of their participation in sexual activity. Id. at 3355. Moreover, prosecutorial efforts to enforce laws that prohibit using children to produce child pornography would be hindered if the state could not criminalize the distribution of child pornography. Because the production of child pornography is a "low-profile, clandestine industry," probably the only effective means of enforcing laws against the production of such material would be to "dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Id. at 3356.
44. Id. at 3357. The Ferber Court reasoned that the state had authority to remove the profit motive for engaging in the illegal activity of using children to produce child pornography. According to the Court, if the enforcement of laws against production of child pornography were fully effective, no child pornography would be sold because none would be produced. As a result, the first amendment impact, a ban on the sale of child pornography, would be no greater than fully effective antiproduction laws; in both instances, no child pornography would be sold. Id.
tion was that any literary, scientific, or educational purpose that might be served by depicting children engaging in sexual conduct could be served equally as well without sexually exploiting children. Finally, the Ferber Court noted that its decision was consistent with precedent because other categories of speech had been deemed unprotected solely on the basis of content.

Taken together, these five justifications yield the conclusion that a category of speech is unprotected if there is a state interest in preventing a harm that occurs during the production of such speech. The Ferber Court, however, did not address the issue of whether child pornography, once produced, has a detrimental effect on society in general. In fact, by pointing out the potential literary, scientific, or educational value of depictions of minors engaging in sexual activity, the Ferber Court implicitly conceded that such depictions possibly could have a beneficial effect on an audience in certain circumstances.

The only relevant inquiry in Ferber was whether a ban on the sale of child pornography would prevent children from being sexually exploited for commercial profit. In direct contrast, the pre-Ferber decisions which held certain speech unprotected were based solely on the speech’s detrimental effect on its audience. This justification was created and applied uniformly in the Court’s advocacy of illegality, deceptive advertising, and obscenity decisions. Thus, Ferber allowed censorship of speech without considering whether the speech involved, in and of itself, would fall within the only previously recognized exception to first amendment protection.

Advocacy of Illegality

When confronted with speech that might prompt an audience to take an illegal action that is advocated by the speaker, the Supreme Court has permitted such speech to be suppressed. The evolution of case law in this area reveals a continuing effort by the Court to define the point at which the interest in preventing the illegal action takes precedence over the interest in free speech. Speech that is sufficiently capable of persuading its audience to take illegal action is harmful and therefore unprotected.

For example, in Schenck v. United States, the Court upheld Congress’s ability to criminalize advocacy of draft resistance after the United States
entered World War I. Justice Holmes, writing for a unanimous Court, articulated the point at which speech advocating illegal action was unprotected by the first amendment: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."9 Because the defendant's speech in Schenck could persuade its audience to resist the draft, and because draft resistance was illegal, the speech was held to be unprotected by the first amendment.

The Supreme Court also has allowed suppression of speech advocating the overthrow of the government by force or violence. After World War I, fear of a Communist revolution prompted Congress and many state legislatures to enact criminal syndicalism statutes which forbade the advocacy of force or violence as a means of political reform.10 In Dennis v. United States,11 the Court upheld the validity of the federal criminal syndicalism

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9. 249 U.S. at 52. Two cases decided only one week after Schenck further clarified the clear and present danger test. See Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919). In Debs, the Court added to the test and held that the speaker must intend that the audience take the action urged. 249 U.S. at 215. In Frohwerk, the Court emphasized that the clear and present danger test did not require a high degree of probability, so long as the words were spoken in a context "where a little breath would be enough to kindle a flame." 249 U.S. at 209; see also Abrams v. United States, 250 U.S. 616 (1919). In that case, Justice Holmes dissented from an affirmation of a conviction under the Espionage Act. Holmes argued that the clear and present danger test should not be applied if the action advocated posed only an indirect threat of illegality. Id. at 628-30 (Holmes, J., dissenting).


It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliated with, any such society, group, or assembly of persons, knowing the purposes thereof.

Id.

statute and affirmed the defendants' convictions under that statute. The defendants had been prosecuted for organizing the Communist Party of the United States of America. The Court reasoned that the Communist Party advocated violent overthrow of government, and even though the probability of success was doubtful and the likelihood of an immediate attempt was remote, the harm that would result from a successful Communist revolution was so great that the government could suppress the advocacy of this illegal action. Accordingly, because it might have had a cumulative effect over time of persuading audiences to rise up against the government, the speech was held unprotected.

When the country no longer perceived the threat of a Communist revolution as serious, the Supreme Court retreated from its Dennis holding. Although the Court continued to uphold criminal syndicalism laws, the later decisions distinguished between advocacy of abstract doctrine and advocacy of illegal action. In Brandenburg v. Ohio, the Court declared that speech could be suppressed only if it was aimed at inciting illegal action. In striking down Ohio's criminal syndicalism statute, the Brandenburg Court drew a line between protected and unprotected advocacy of illegality. Advocacy of illegality was unprotected only if it was "directed to inciting or produc-

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52. Id. at 497-98. The Court found that the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces; [that] the literature of the Party and the statements and activities of its leaders . . . advocate, and the general goal of the Party was, during the period in question, to achieve a successful overthrow of the existing order by force and violence . . .

Id. at 498.

53. Id. at 509.


57. Id. at 447. Addressing a Ku Klux Klan rally, Brandenburg stated: "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." Id. at 446. The Court reversed Brandenburg's conviction under Ohio's criminal syndicalism statute, Ohio Rev. Code Ann. § 2923.13 (Page 1954) (repealed 1974), on grounds that the statute unconstitutionally failed to distinguish between "mere advocacy" and "incitement to imminent lawless action." 395 U.S. at 449.
ing imminent lawless action and [was] likely to incite or produce such action."\(^{58}\)

In all of the advocacy of illegality cases, the Court held the speech unprotected when it determined that the speech might cause a significant harm. Although the requisite strength of the causal connection fluctuated over time, the principle unifying all of these cases was that government possessed the authority to suppress speech in order to prevent the harm that the particular speech might cause. To prevent draft resistance and the violent overthrow of government, the government was authorized to regulate speech that attempted to persuade audiences to take such action. The first amendment, therefore, did not restrain the government from regulating speech which could lead to a harm that the government had an interest in preventing.

**Deceptive Advertising**

Generally, commercial speech, speech that does no more than propose a commercial transaction,\(^ {59}\) is afforded partial protection under the first amendment.\(^ {60}\) The justification for providing protection for commercial speech arises from society's interest in disseminating accurate information to individuals, thereby enabling them to make economic decisions in an intelligent manner.\(^ {61}\) Inaccurate or misleading information would frustrate this interest and, therefore, the Court has held that deceptive advertising is unprotected.\(^ {62}\)

In so holding, the Court has relied on the principle that government possesses the authority to regulate advertising in order to prevent any harm, such as consumer fraud, that is caused by commercial speech.

Originally, the Court maintained the position that commercial speech was protected if it was truthful and did not mislead consumers. Thus, in *Bates v. State Bar*,\(^ {63}\) the Court held the application of a disciplinary rule prohibiting

\(^{58}\) 395 U.S. at 447. The Court applied this test in *Communist Party v. Whitcomb*, 414 U.S. 441, 447 (1974) (striking down a statute requiring political parties seeking office to take an oath), and in *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (reversing a conviction for yelling "We'll take the fucking street later (or again)" during an antiwar demonstration).


attorney advertising "to be violative of the first amendment." The Court reasoned that the information conveyed in the advertisement was protected because it was truthful and served the consumer's need for information concerning legal services.

A year later, however, in Ohralik v. Ohio State Bar Association, the Court modified its position in Bates. Ohralik was a licensed attorney who was suspended from practice for violating a disciplinary rule that prohibited in-person solicitation of clients for pecuniary gain. Although it was not alleged that any of the information conveyed by Ohralik to his potential clients was false or deceptive, the Court held that the disciplinary rule was a legitimate prophylactic measure designed to prevent fraud, undue influence, and public intimidation. Focusing on the form (in-person solicitation) used


A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id.

65. 433 U.S. at 384. In Bates, a group of attorneys formed a legal clinic that offered "routine services." The attorneys placed a newspaper advertisement describing the types of services available and the fees charged for these services. The advertisement stated that the clinic offered "legal services at very reasonable fees" and proceeded to enumerate the services available: "Divorce or legal separation—uncontested"; "Preparation of all court papers and instructions on how to do your own simple uncontested divorce"; "Adoption—uncontested severance proceeding"; "Bankruptcy—non-business, no contested proceedings"; "Change of Name"; and "Information regarding other types of cases furnished on request." Id. at 385 app. The state bar association charged the attorneys with violation of the disciplinary rule.

66. Id. at 372-75. Other justifications asserted in support of the disciplinary rule were the adverse effects of attorney advertising on professionalism, on administration of justice, on fees, and on the quality of service. The Court rejected each of these assertions, finding that "[n]one of the proffered justifications rise[s] to the level of acceptable reason for the suppression of all advertising by attorneys." Id. at 379.


68. Ohio Code of Professional Responsibility DR 2-103(A), DR 2-104(A) (1970). DR 2-103(A) provides: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." DR 2-104(A) provides: "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice. . . ."

Ohralik had heard about a car accident and visited one of the victims, an 18-year-old girl, in the hospital, where she lay in traction. He suggested that he represent her in a claim against the insurance company. When she demurred, Ohralik visited her parents with a concealed tape recorder, persuaded them to retain his services, and then returned to the hospital to have the daughter sign a contract of employment.

Ohralik also visited the other victim, also an 18-year-old girl, at her home, again with a concealed tape recorder. She orally agreed to allow Ohralik to represent her in a claim against the insurance company. Both girls later repudiated their agreements. 436 U.S. at 449-52.

69. 436 U.S. at 464.
to convey the information, the Court held that if the form has an inherent potential to deceive, the speech is unprotected.70 Accordingly, the Ohralik Court was unwilling to extend first amendment protection to harmful commercial speech, even if the harm caused by such speech was merely potential.71

Subsequently, this unwillingness to extend first amendment protection to deceptive advertising led the Supreme Court to hold that even when speech conveyed no information, it could be banned if it had the potential to defraud. In Friedman v. Rogers,72 the Court upheld a statute that prohibited the practice of optometry under a trade name73 because such trade names, though in and of themselves meaningless, could be manipulated in a variety of ways to deceive the public.74 As it had done in Ohralik, the Court in Friedman focused on the form of speech and its potential to deceive, rather than on the information conveyed by the speech. In both Friedman and Ohralik, the Court deferred to the legislatures’ conclusions that a form of commercial advertising could defraud consumers. Because the first amendment does not protect deceptive commercial speech, the Court reasoned, such speech is subject to rational regulations aimed at preventing consumer fraud.

The deceptive advertising cases are analogous to the advocacy of illegality cases; both involve speech that has the potential to cause harm to society. The first amendment protects these types of speech only to the extent that their potential for harm is insignificant. When speech threatens a significant societal interest, however, the first amendment ceases to protect the speech from governmental regulation.75

**Obscenity**

The Court has struggled with obscenity more than with any other category of unprotected speech, primarily because obscenity has been so difficult to define.76 Yet, the Court never has swayed from its conviction that obscenity,

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70. *Id.* at 464-66.
71. But cf. *In re R.M.J.*, 455 U.S. 191 (1982) (disciplinary rule prohibiting attorneys from advertising certain information held violative of the first amendment); *In re Primus*, 436 U.S. 412 (1978) (letter advising a layman that free legal advice was available from the ACLU held protected by the first amendment); Bates v. State Bar, 433 U.S. 350 (1977) (holding that attorney advertising of “routine services” is protected speech).
74. 440 U.S. at 12. The Court noted that, over time, the public associates a trade name with a certain price and quality of service. Consequently, trade names could be manipulated in a variety of ways to deceive the public. As an example of such manipulation, the Court pointed out that the staff of optometrists could be changed, thereby changing the quality of service, even though the trade name remained the same. *Id.* at 12-13.
75. But see Linmark Assoc. v. Willingboro, 431 U.S. 85 (1977) (state interest in preventing “white flight” held insufficient to justify ban on residential “For Sale” signs).
76. Between 1957 and 1968, there were a total of 55 separate opinions filed in 13 obscenity decisions. Interstate Circuit v. Dallas, 390 U.S. 676, 705 n.1 (1968) (Harlan, J., dissenting) (same opinion served as concurrence of Harlan, J., in *Ginsberg v. New York*, 390 U.S. 629 (1968)).
however it may be defined, is totally outside the protection of the first amendment.\textsuperscript{7} Although never explicitly stating its justification for holding obscenity unprotected, the Court repeatedly has stressed that obscenity is unprotected because it has no "redeeming social value";\textsuperscript{78} this factor, however, should not support a denial of first amendment protection. Many Supreme Court decisions emphasize that the first amendment does not permit government to assess the worth or importance of speech that it seeks to regulate.\textsuperscript{79} The rationale for placing obscenity beyond the scope of the first amendment is revealed by examining the various definitions of obscenity formulated by the Court.\textsuperscript{80} Under each of these definitions, material is classified as obscene only if it appeals to a prurient interest in sex. This standard implicitly assumes that it is harmful to appeal to the prurient interests of an audience. Consequently, by definition, obscenity causes a harm to society which renders this type of speech unprotected by the first amendment.

The Court first held that obscenity was unprotected speech in \textit{Roth v. United States}.\textsuperscript{81} Roth was a New York book publisher convicted of mailing

\begin{itemize}
\item \textsuperscript{79} In Abrams \textit{v. United States}, 250 U.S. 616 (1919), Justice Holmes forcefully argued that when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death. . . . \textit{Id.} at 630 (Holmes, J., dissenting); see also First Nat'l Bank \textit{v. Bellotti}, 435 U.S. 765, 777 (1978) (corporation held to be a speaker); Cohen \textit{v. California}, 403 U.S. 15, 24 (1971) ("Fuck the Draft"); Stanley \textit{v. Georgia}, 394 U.S. 557, 564 (1969) (obscenity); Winters \textit{v. New York}, 333 U.S. 507, 510 (1948) (magazine stories about bloody crimes).
\item \textsuperscript{80} See Miller \textit{v. California}, 413 U.S. 15, 24 (1973) (obscenity is material that depicts or describes sexual conduct and which, taken as a whole, appeals to a prurient interest in sex, portrays the conduct in a patently offensive way, and has no serious literary, artistic, political, or scientific value); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" \textit{v. Massachusetts}, 383 U.S. 413, 418 (1966) (obscenity is material the dominant theme of which, taken as a whole, appeals to prurient interests in sex in a patently offensive way, as judged by contemporary community standards, and which is utterly without redeeming social value); Roth \textit{v. United States}, 354 U.S. 476, 487 (1957) (obscenity is material that deals with sex in a manner appealing to prurient interests).
\item \textsuperscript{81} 354 U.S. 476 (1957) (consolidated with \textit{Alberts v. California}). \textit{Alberts} was a challenge to a state obscenity statute.
obscene literature in violation of federal law. In upholding Roth's conviction, the majority provided little insight into why obscenity was unprotected, other than noting that obscenity never had been presumed to be protected.

By defining obscenity as "material which deals with sex in a manner appealing to prurient interest," however, the Roth Court implicitly held that obscenity was unprotected because it appealed to prurient interests. Justice Harlan, in a concurring opinion, elaborated on the justification for denying first amendment protection to obscenity. He noted that a state could conclude rationally that obscenity "can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society."

Having determined in Roth that obscenity was unprotected, the Court spent the next twelve years refining its definition of obscenity and determining whether particular speech was obscene. During this period, the Court failed

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83. 354 U.S. at 484.

84. Id. at 487. Roth had contended that the obscenity statute was unconstitutional because it "punish[ed] incitation to impure sexual thoughts, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such thoughts." Id. at 485-86 (emphasis in original). The Court rejected this contention and held that the statute was constitutional because obscenity was not protected by the first amendment. Id. at 487. Then, the Court defined obscenity as material that appeals to prurient interests in sex, but failed to explain the distinction between "incitation to impure sexual thoughts" and "appeals to prurient interests in sex." Roth articulated the proper test for judging whether material is obscene as follows: ":[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." Id. at 489.

85. Id. at 501-02 (Harlan, J., concurring). Justice Harlan conceded that exposure to such material might not cause a person to engage in this type of conduct immediately. Nevertheless, according to Justice Harlan, obscenity could be regulated because "over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, [might] have an eroding effect on moral standards." Id. at 502. Justice Harlan's dissent from the majority's holding in Roth was based on his belief that the government interests served by obscenity statutes were the exclusive province of state legislatures and not the federal government. Id. at 504. Therefore, his dissent was simultaneously a concurrence in Alberts v. California, which involved a state obscenity regulation.

86. In Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959), the Court began to retreat from its broad language in Roth, and drew a distinction between obscenity and advocacy of immoral ideas by holding that a film which portrayed adultery as proper behavior under certain circumstances was constitutionally protected. Id. at 688. In Jacobellis v. Ohio, 378 U.S. 184 (1964), the Court attempted to make the Roth test easier to apply by defining "contemporary community standards" in terms of national standards. Id. at 195.

The Court formulated a new, three part test for obscenity in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966). This new test required that: (1) "the dominant theme of the material taken as a whole appeal[ ] to a prurient interest in sex"; (2) "the material [be] patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters"; and (3) "the material [be] utterly without redeeming social value." Id. at 418. Justice Harlan began to realize the difficulty of applying any test for obscenity, notwithstanding attempts to make the test more objective, and noted that case-by-case adjudication by the Supreme Court was inescapable. Id. at 460 (Harlan, J., dissenting).

The Court again endeavored to make the test for obscenity easier to apply in Ginzberg v.
to identify further the reason why obscenity was unprotected; apparently, the Court was content with Justice Harlan's conclusion in *Roth* that obscenity caused antisocial conduct, and, therefore, was not entitled to first amendment protection.

Yet, in *Stanley v. Georgia,* decided twelve years after *Roth,* the Court rejected Justice Harlan's justifications for holding obscenity unprotected. Stanley was convicted of possessing obscene material in his home. The Court reversed his conviction, finding that none of the asserted state interests justified the violation of Stanley's fundamental right to privacy. The state asserted that obscenity caused moral corruption and that states had the right to protect their citizens from immorality. The *Stanley* Court, however, held that the state had no authority to control an individual's private thoughts.

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88. The materials were found in the course of an authorized search of Stanley's home for evidence of bookmarking activities. *Id.* at 558.
89. *Id.* at 568. The fundamental right of privacy was first recognized as a constitutionally protected right in *Griswold v. Connecticut,* 381 U.S. 479 (1965) (right to use contraceptives).
90. 394 U.S. at 565. The state argued that it had the ability to protect its citizens' bodies from the harmful effects of such things as narcotics, illegal firearms, and intoxicating liquor by prohibiting the "mere knowing possession" of such items. Brief for Appellee 26-27, *Stanley v. Georgia,* 394 U.S. 557 (1969). It would be anomalous, the state asserted, for the state to have constitutional authority to protect the bodies of its citizens, but be denied the power to protect their minds by prohibiting the "mere knowing possession" of obscenity. *Id.* at 27.
91. 394 U.S. at 566. In an often quoted passage, Justice Marshall wrote that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565.
Consistent with Justice Harlan's concurring opinion in Roth, the state also asserted that it had authority to regulate obscenity in order to prevent the resultant antisocial conduct.\(^9\) The Stanley Court rejected this contention, concluding that the claimed causal connection between obscenity and antisocial conduct was unsubstantiated.\(^9\) Thus, Stanley effectively rejected both of Roth's justifications for holding obscenity unprotected and, apparently, established a precedent for overruling Roth.\(^9\)

Nonetheless, in Miller v. California,\(^9\) the Court reaffirmed that obscenity was unprotected, thereby reaffirming the position maintained in Roth. The Miller Court did not explain its reason for doing so, but as in Roth, merely stated that obscenity appealed to prurient interests in sex.\(^9\) Consequently, Miller implicitly concluded that obscenity lacked first amendment protection because of the harm caused by obscene material.

This conclusion was affirmed by the Court's holding in Paris Adult Theater I v. Slaton.\(^9\) In that case, the state sought an injunction to prevent a public theater from exhibiting obscene films. To prevent unwilling adults from being exposed to such material, the theater had excluded minors and posted warnings as to the nature of the films.\(^9\) The Court, however, concluded

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92. Id. at 566.
93. Id. at 567. In support of this conclusion, the Court stated that "in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . ." Id. at 566-67 (citing Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis & Holmes, J.J., concurring)).
94. See Karalexis v. Byrne, 306 F. Supp. 1363, 1366 (D. Mass. 1969) ("restricted distribution [of obscenity], adequately controlled, is no longer to be condemned"), vacated and remanded per curiam on other grounds, 401 U.S. 216 (1971). Several contemporaneous law review articles also predicated that Stanley marked the beginning of the end of Roth. See, e.g., Comment, Stanley v. Georgia: New Directions in Obscenity Regulation?, 48 TEX. L. REV. 646 (1970) (by giving obscenity any first amendment protection, the Stanley Court rejected the notion that a category of speech either is or is not protected); Note, Constitutional Law—First Amendment: The New Metaphysics of the Law of Obscenity, 57 CALIF. L. REV. 1257 (1969) (Stanley's rejection of the governmental interests previously asserted to justify laws banning the sale of obscenity implies that such laws are unconstitutional after Stanley); Note, The Supreme Court, 1968 Term: Private Possession of Obscene Material, 83 HARV. L. REV. 147 (1969) (Stanley implies that obscenity can be banned only when it is a nuisance to others); Note, Stanley v. Georgia: A First Amendment Approach to Obscenity Control, 31 OHIO ST. L.J. 364 (1970) (the unanswered question is whether the same state interests rejected in Stanley can support general obscenity laws).
96. 413 U.S. at 24. In Miller, the Court attempted to deal with the inherent vagueness of obscenity regulation by requiring that state laws specifically define the types of sexual conduct that would be illegal to depict or describe. To guide state legislatures, the opinion listed the following examples of acceptable regulations: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated"; and "Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Id. at 25.
97. 413 U.S. 49 (1973).
98. The theatre had a single entrance and no pictures on the outside. Signs were posted indicating that the theatre exhibited "Atlanta's Finest Mature Feature Films." The entrance
that this was not enough to exempt the material from state regulation. 99 The Paris Court held that the societal interest in preventing moral corruption, which could lead to crime or other antisocial conduct, justified holding obscenity unprotected.100

The Court’s decisions in the obscenity cases can be summarized by the following syllogism: the first amendment does not protect speech that causes societal harm; moral corruption and antisocial behavior are societal harms; obscenity causes moral corruption and antisocial behavior; therefore, obscenity is unprotected by the first amendment. Although the evils of obscenity are far more nebulous, and far less susceptible to empirical proof than the evils caused by advocacy of illegality and deceptive advertising, the Court’s rationale for holding all three categories unprotected has been that the state can regulate such speech in order to prevent the societal harm it causes. In each of the three categories, an evil inherent in the publication of the speech has justified its regulation. All of the cases within these categories involved speech which directly tends to harm society. Thus, it was solely for this reason that the speech in these cases was held to be unprotected by the first amendment.

The Court’s decision in Ferber appears to be inconsistent with these prior opinions. The Ferber Court focused only on the harm involved in the production of child pornography and completely failed to consider whether the speech that resulted from the finished product was harmful to society. The causal theory applied prior to Ferber limited the government’s censorship

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99. Id. at 57. Apparently in order to avoid overruling Stanley, the Court stressed the public and commercial aspects involved in Paris by declaring: “The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States’ right . . . to maintain a decent society.” Id. at 69 (citing Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)). Nevertheless, Paris implicitly overruled the interpretation of Stanley provided in Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969) (granting a preliminary injunction against prosecution for public exhibition of the film I Am Curious (Yellow)), vacated and remanded per curiam on other grounds, 401 U.S. 216 (1971).

100. Specifically, the Court reasoned:

If we accept the unprovable assumption that a complete education requires the reading of certain books, . . . and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? . . . The sum of experience, . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

413 U.S. at 63.
power to exigent circumstances, and thus was consistent with the first amendment's goal of protecting free speech. Moreover, the Court's application of this theory was confined within narrow limits. Ferber's rationale considered the speech only insofar as it was the result of a harm. This rationale is difficult, if not impossible, to reconcile with the high value previously placed upon freedom of speech. Beyond this theoretical inconsistency, Ferber establishes a dangerous precedent; its effect on future first amendment adjudication might render the guarantee of free speech merely rhetorical.

IMPACT OF FERBER

The Ferber Court's decision to exempt child pornography from first amendment protection permits the government to suppress speech for purposes unrelated to any societal harm caused by the speech itself. While it is possible that the principle announced in Ferber will be limited to child pornography, to determine its validity, this principle must be tested by examining its possible implications. The Ferber principle, in its most general terms, is that government can censor speech which is the result of a societal harm that government has the authority to prevent.

The following discussion proposes a series of hypothetical situations to which the Ferber principle might be applied. While these hypotheticals might extend Ferber beyond its intended scope, the purpose of this discussion is to test the validity of its principle. Additionally, this exercise will demonstrate that a broad application of the Ferber principle would contravene the purposes of the first amendment by subjecting virtually all speech to content-based regulation.

101. It is not unusual for a holding ostensibly limited to the facts of a particular case to be applied to very dissimilar factual situations. In the context of the first amendment, the most striking example of this tendency has been the clear and present danger test. This test was formulated in Schenck v. United States, 249 U.S. 47, 52 (1919), and appeared, on its face, to be limited to advocacy of illegality: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. Since Schenck, however, the clear and present danger test has been applied in reviewing the validity of government regulation of a wide variety of categories of speech. See, e.g., Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959) (film portraying adultery as desirable in certain circumstances); Pennekemp v. Florida, 328 U.S. 331, 347 (1946) (criticism of pending litigation); Thomas v. Collins, 323 U.S. 516, 530 (1945) (urging audience to join a labor union).

Another example in which an apparently limited holding was applied in factually diverse circumstances is the intermediate level of scrutiny held to apply to gender-based discrimination challenged under the equal protection clause of the fourteenth amendment. In Craig v. Boren, 429 U.S. 190 (1976), the Court held: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Id. at 197. Nevertheless, the Court adopted this test as the appropriate one to be applied in commercial speech cases. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

102. Because the speech involved in each of the proposed hypotheticals is harmless in and of itself, it would be fully protected under the pre-Ferber principle.
Assume, for example, that a movie contains one scene in which the actors engage in homosexual activity, or one scene in which the actors engage in oral sex, or one scene in which a male and female who are not married to each other have sexual intercourse. Assume further that the scene is done in a manner that does not appeal to prurient interests, but that the actors actually engage in the conduct depicted. Many states have laws criminalizing homosexuality, oral sex, or extramarital and premarital sex, even between consenting adults. Such laws are based on the assumption that the prohibited conduct is harmful to the moral welfare of the participants. Just as Ferber permitted the state to ban films depicting minors engaged in sexual activity in order to protect those minors, Ferber's rationale similarly would permit the state to ban the hypothetical movie in order to protect the actors. Thus, Ferber would allow this otherwise fully protected form of speech, the movie, to be banned in order to prevent the harm that occurred in its production, even if the movie had serious artistic, political, scientific, or educational value.

Ferber also might be extended to allow suppression of films in which a dangerous stunt is performed. The state, of course, has a clear and compel-


105. Under Ferber the material need not be considered as a whole in order to ban the entire work; one scene in which harmful conduct was presented would be sufficient. 102 S. Ct. at 3358.
ling interest in protecting the life of its citizens. Many stunts seriously endanger the lives of the performers. Ferber's rationale would allow the state to ban a film in order to prevent actors from performing dangerous stunts. Just as child pornography necessarily is produced by exploiting children sexually, stunt scenes necessarily are produced by endangering the lives of the actors performing the stunts. Ferber allowed censorship of the resultant speech as a means of preventing the harm necessary to its production; this rationale would allow government to censor a film containing a dangerous stunt as a means of preventing the harm entailed in its production.

Furthermore, in its broadest interpretation, the Ferber rationale could be applied to written, as well as visual, forms of expression. For instance, suppose a newspaper publisher pays its employees less than minimum wages. Society has an interest in assuring the economic welfare of its citizens, and this interest is served by requiring employers to pay minimum wages. Yet, it might be economically advantageous for an employer to pay substandard wages in an effort to increase profits. The Ferber rationale would allow the state to suppress the newspapers produced by this hypothetical publisher in order to eliminate the economic incentive for paying substandard wages. In Ferber, the sale of child pornography provided an economic motive for sexually exploiting children; the Court held that banning the sale of such speech was justified by the state's interest in the welfare of its children. Similarly, the desire to maximize profits from the sale of newspapers provides an economic motive for publishers to pay substandard wages. Ferber's rationale, therefore, would justify a ban on the sale of newspapers in order to serve the state's interest in the economic welfare of its citizens.

To illustrate further, suppose a book publisher refuses to hire any member of a minority, in violation of Title VII of the Civil Rights Act. Title VII was enacted to ensure equal employment opportunities to people of all races. This publisher's books would be the products of his denial of equal opportunity to minorities. The Ferber principle is based on the premise that illegal activity can be deterred by banning the products which result from that activity. By analogy, government could forbid the publication of this publisher's books in order to prevent the racially discriminatory way in which they were produced. Under this logic, the social value of the books themselves would be irrelevant in determining whether they were protected by the first amendment.

108. 42 U.S.C. § 2000e-2(a) (1976) (it is unlawful for an employer to fail or refuse to hire any person because of race).
109. H.R. REP. No. 914, 88th Cong., 2d Sess., reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401. That report stated that the congressional purpose in enacting Title VII was the elimination of employment discrimination based on race.
Finally, if taken to its logical extreme, *Ferber* could be applied to suppress the reporting of certain news events. Consider the following situation: a man calls a television station requesting that a camera crew be sent to a certain place at a certain time, where he intends to set himself on fire to demonstrate his dissatisfaction with a particular governmental policy. The intended protest clearly is to be staged for the media in an effort to reach the widest possible audience. Most would agree that society has an interest in preventing people from setting themselves on fire. Therefore, if the station complies with the man’s request and films the event, *Ferber* seems to allow the government to prevent the station from showing the film in order to prevent people from staging similar protests. By suppressing the film, government could eliminate much of the incentive for this form of protest.

In each of the preceding hypotheticals, *Ferber* could be applied to censor speech, even though the speech otherwise would be protected from censorship by the first amendment. The principle announced in *Ferber* allows the state to ban any speech which is the result of an action considered harmful to society. This principle not only gives the government wide latitude to suppress speech, but also elevates other interests to the “preferred position” previously held solely by the interest in protecting free speech. In contrast, the pre-*Ferber* principle that speech only could be suppressed if it caused a societal harm, would protect the speech in all of the preceding hypotheticals because the speech itself was harmless. Therefore, the principle announced in *Ferber* sanctions government censorship that previously would have been unconstitutional.

A CONSISTENT ALTERNATIVE TO *FERBER*

Not only did *Ferber*’s innovative holding establish a dangerous precedent, but it did so unnecessarily. The Court could have reached its conclusion that government can suppress child pornography by using the rationale employed in the obscenity cases. By modifying the definition of obscenity to include material that appeals to the prurient interests of pedophiles, though not of the average person, child pornography would have been held unprotected solely because of its impact on the audience.

This proposal is not unprecedented. In two major obscenity cases, the Supreme Court similarly expanded the definition of obscenity. In *Mishkin v. New York*, the defendant was convicted of hiring authors to write pornographic books which he then sold. Mishkin had instructed the authors

110. This hypothetical is based on a true story which was reported in the New York Times. See N.Y. Times, Mar. 10, 1983, at A1, col.2.
111. See supra note 14.
112. See supra notes 78-102 and accompanying text.
113. A pedophile is “one affected with . . . [a] sexual perversion in which children are the preferred sexual object.” WEBSTER’S NEW COLLEGIATE DICTIONARY 838 (8th ed. 1981).
to include lurid descriptions of homosexuality and sado-masochism. In affirming Mishkin’s conviction, the Court noted that the books probably would not appeal to the prurient interests of the “average person, applying contemporary community standards,” because the books clearly were aimed at appealing to the prurient interests of “deviant sexual groups.” Nevertheless, the Court concluded that the books were obscene. The Mishkin Court reached this conclusion by modifying the obscenity definition for this type of material, and judging it in terms of its prurient appeal to “its intended and probable recipient group.” Because the material was aimed at, and primarily purchased by, people who found it to be erotic, it was deemed obscene for its appeal to its audience's prurient interests.

The second case in which the Court expanded the definition of obscenity was Ginsberg v. New York. Ginsberg was convicted under a state statute that criminalized the sale of obscenity to minors. The statute defined obscenity in terms of its appeal to the prurient interests of minors. The Court upheld the constitutionality of the statute, reasoning that the state could conclude rationally that material which was not necessarily harmful to adults could be harmful to minors. The state’s interest in the well-being of children

115. The Court cited the testimony of two authors hired by Mishkin. The first testified that he was instructed to make the books “full of sex scenes and lesbian scenes. . . . [T]he sex had to be very strong, it had to be rough, it had to be clearly spelled out. . . . I had to write sex very bluntly, make the sex scenes very strong. . . . [T]he sex scenes had to be unusual sex scenes between men and women, women and women, and men and men. . . . [H]e wanted scenes in which women were making love with women. . . . [H]e wanted sex scenes . . . in which there were lesbian scenes. He didn’t call it lesbian, but he described women making love to women and men . . . and making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion.” The second author testified that he was instructed “to deal very graphically with . . . the darkening of the flesh under flagellation. . . .” Id. at 505 (brackets & ellipses in original).

116. Id. at 508-09. For a discussion of the average person test which was first articulated in Roth, see supra note 84.

117. 383 U.S. at 508-09. Mishkin never alleged that the books were not intended to appeal to prurient interests of “sexually deviant groups,” and the Court found the proof that they were so intended to be compelling. Id. at 509-10.

118. Id. at 510.

119. Id. at 509. Because the purpose of Roth’s “average person” requirement was held to be a rejection of the English “most susceptible person” standard for judging obscenity, the Court reasoned that Mishkin was not inconsistent with Roth. Id. at 508-09.

120. 390 U.S. 629 (1968).

121. N.Y. PENAL LAW § 484-h (McKinney 1965). The statute criminalized the sale of material which was harmful to minors and defined “material harmful to minors” as that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

122. 390 U.S. at 643. The legislature had concluded that “girlie” magazines were harmful to the ethical and moral development of minors. Id. at 641.
was at least legitimate, if not compelling.\textsuperscript{122} Therefore, the \textit{Ginsberg} Court sustained the statute under the rational basis test applied to unprotected categories of speech.\textsuperscript{124}

Both \textit{Mishkin} and \textit{Ginsberg} were reaffirmed in \textit{Miller}.\textsuperscript{125} The \textit{Miller} Court held that the primary concern of the "contemporary community standards" part of the obscenity test was that material be assessed in terms of its impact on a reasonable person, except insofar as the material was directed at a particular "deviant group."\textsuperscript{126} In such a case, the material was to be judged by its impact on the group to which it was directed.\textsuperscript{127} If the material appealed to the prurient interests of its intended audience, regardless of whether it also appealed to the prurient interests of the average person, the material could be classified as obscene.

On the authority of these cases, child pornography could have been held to be obscene. Depictions of young boys masturbating probably would not appeal to the prurient interests of the average person. Yet, it is not irrational to conclude that child pornography is produced for, and primarily purchased by, people who find such depictions to be erotic. Because material that appeals to the prurient interests of its intended audience is harmful and, therefore, unprotected by the first amendment,\textsuperscript{128} child pornography could have been held to be unprotected speech.

Under this proposed rationale, states could ban child pornography and accomplish all of the goals of the New York statute at issue in \textit{Ferber}. This proposal has the further advantage of being consistent with precedent because suppression of child pornography would be justified by the harmful effects of the speech on its audience. This is not to say that this proposal is free from problems; however, the problems that would arise are those that already inhere in the Court's definition of obscenity. For example, it is at least conceivable that some people would buy child pornography for purposes other than sexual arousal and, for such people, the material would not be obscene. Nevertheless, a person who sells a magazine depicting minors engaged in

\begin{itemize}
  \item \textsuperscript{123} \textit{Id.} at 639. In addition to the state's independent interest in protecting the welfare of children within its boundaries, the Court held that the right of parents to rear their children also justified the law. Because most parents would not want their minor children to be able to buy sexual materials, parents are entitled to support from the legislature in keeping such material from their children. Moreover, parents who do want their children exposed to such material can buy the material themselves and give it to their children. \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} at 643. Because obscenity is unprotected, laws regulating obscenity need only be rational in order to be valid. \textit{Id.} at 641. For a discussion of the rational basis test, see \textit{supra} note 24. The Court found this law to be rational because, even though scientific studies on the issue of whether obscenity is harmful to children were inclusive, laws need not be scientifically accurate to be rational. 390 U.S. at 641-43; cf. \textit{Butler v. Michigan}, 352 U.S. 380, 383 (1957) (law banning sale to the general public of sexual material harmful to minors held not rationally related to state interest).
  \item \textsuperscript{125} 413 U.S. 15 (1973).
  \item \textsuperscript{126} \textit{Id.} at 33. The \textit{Miller} Court distinguished between the "average person" and "a particularly susceptible or sensitive person—or indeed a totally insensitive one." \textit{Id.}
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} See \textit{supra} notes 76-102 and accompanying text.
\end{itemize}
sexual activity cannot be required to inquire into the sexual preferences of everyone seeking to buy the magazine. If the harm of obscenity is its appeal to prurient interests, theoretically, a magazine seller should ask everyone who buys any material relating to sex whether the material appeals to the purchaser's prurient interests, and refuse to sell the material if the purchaser answers in the affirmative. This, however, would be unrealistic and the Court seems to have accepted this inherent flaw in its obscenity decisions.

Another problem with this proposed rationale is that it would classify more material as unprotected than the Court did in Ferber. Specifically, the proposal would allow suppression of a book that described, in words alone, minors engaging in sexual conduct. The statute involved in Ferber would not allow suppression of such a book because children would not have been exploited in its production. Yet, the proposal would allow suppression of the book because words, as well as pictures, can appeal to prurient interests. Nevertheless, this expansion would be insignificant when compared to the range of previously protected material that could fall within the scope of the Ferber rationale, as demonstrated by the preceding discussion.

CONCLUSION

Until Ferber, the Supreme Court decisions on the issue of unprotected categories of speech revealed a consistent and universally applied principle. This principle was that speech was so highly valued by American society that it should be suppressed only when there was a danger to society posed by the speech itself. The Court applied this principle to allow suppression of advocacy of illegality which caused the audience to take illegal action, of deceptive advertising which caused consumers to be defrauded, and of obscenity which caused corruption of morals. In each instance, it was the speech itself that caused the harm, and the societal interest in preventing the harm justified suppression of the speech.

In contrast, the Ferber Court was willing to allow suppression of speech without even considering whether the speech had a harmful impact on its audience. Instead, the Court allowed suppression of the speech to prevent a harm that occurred in its production. Consequently, the Ferber principle permits suppression of speech that, in and of itself, might be constitutionally protected. Moreover, Ferber was an unnecessary expansion of the government's censorship powers because the same result could have been reached merely by holding that child pornography was obscene. If freedom of speech is subordinated to other interests, and the government is permitted to act as a censor to achieve goals unrelated to the impact of the suppressed speech, censorship ultimately will become the rule and free speech the exception.

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