

The Burger Court Opinion Writing Database

New York v. Ferber

458 U.S. 747 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1982

Re: 81-55 - New York v. Ferber

Dear Byron:

I join.

Regards,

A handwritten signature in dark ink, appearing to read 'WEB', written in a cursive style.

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 4, 1982

MEMORANDUM TO: Justice Marshall
Justice Blackmun
Justice Stevens

RE: No. 81-55 New York v. Ferber

We four are in dissent in the above. I am willing
to undertake the dissent.

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 4, 1982

RE: No. 81-55 New York v. Ferber

MEMORANDUM TO: Justice Marshall
Justice Blackmun
Justice Stevens

I advised you on March 30 that I'd undertake the dissent in the above. Now, however, that I've read Byron's circulation, I am inclined to think that he is right both on the merits and the overbreadth question. If any of you still remains unpersuaded and intends to try a separate writing, I'll await its circulation before joining Byron.

BW
W.J.B.Jr.

Will join BW

To: The Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice Brennan**

Circulated: JUN 22 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS OF NEW YORK

[June —, 1982]

JUSTICE BRENNAN, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in *Ginsburg v. New York*, 390 U. S. 629 (1968), the State has a special interest in protecting the well-being of its youth. *Id.*, at 638-641. See also *Globe Newspapers v. Superior Court*, — U. S. —, — (1982), slip. op. at 11. This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material. *Ginsburg v. New York*, *supra*, at 637, 638 n. 6, 642-643, n. 10. See also *Jacobellis v. Ohio*, 378 U. S. 184, 195 (1964) (Opinion of BRENNAN, J.). I also agree with the Court that the "tiny fraction", *ante*, at 25, of material of serious artistic, scientific or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See *Broadrick v. Oklahoma*, 413 U. S. 601, 630 (1973) (BRENNAN, J., dissenting).

But in my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific or medical value, would violate the First Amendment. As the Court recognizes, the

Chief Justice
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

2nd Draft

From: Justice Brennan

SUPREME COURT OF THE UNITED STATES, dated: _____

No. 81-55

Recirculated: June 30, 1982

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS OF NEW YORK

[July 2, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, |
 concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in *Ginsburg v. New York*, 390 U. S. 629 (1968), the State has a special interest in protecting the well-being of its youth. *Id.*, at 638-641. See also *Globe Newspapers v. Superior Court*, — U. S. —, — (1982) (slip. op. at 11). This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material. *Ginsburg v. New York*, *supra*, at 637, 638 n. 6, 642-643, n. 10. See also *Jacobellis v. Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.). I also agree with the Court that the "tiny fraction", *ante*, at 25, of material of serious artistic, scientific or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See *Broadrick v. Oklahoma*, 413 U. S. 601, 630 (1973) (BRENNAN, J., dissenting).

But in my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific or medical value, would violate the First Amendment. As the Court recognizes, the limited classes of speech, the suppression of which does not

To: The Chief Justice
 ✓ Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: 4 JUN 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF NEW YORK

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.¹ The federal government and forty-nine of the states have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-six states and the United

¹“Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.” S. Rep. No. 95-438, at 5 (1978). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* “Such magazines depict children, some as young as three to five years of age . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism.” *Ibid.* In Los Angeles alone, police reported that 30,000 children have been sexually exploited. *Sexual Exploitation of Children, Hearings before the House Comm. on Educ. and Labor, 95th cong., 1st Sess. 41-42 (1977).*

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 8, 1982

Re: 81-55 - New York v. Ferber

Dear Sandra,

Thanks for your letter about this case. As you may have suspected, I crossed this bridge in the course of preparing the circulating draft, but I am perfectly willing to reconsider. I am recirculating eliminating the last sentence of the paragraph ending at the top of page 16 and changing the first paragraph of part III dealing with overbreadth. This may satisfy a good deal of your concern, although it may make the draft considerably less attractive in other quarters.

I doubt, however, that it is possible to avoid case-by-case adjudications that will be content-oriented, any more than it is possible to avoid such cases in the obscenity context under Miller and Paris Adult. Inevitably, for example, there will be submissions in the New York courts that a depiction is not lewd within the meaning of the statute and that if it is deemed to be lewd, the statute is being unconstitutionally applied. But those kinds of cases need never get to us if the New York courts tend to their business.

Sincerely yours,



Justice O'Connor

Copies to the Conference

cpm

85

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 8, 1982

MEMORANDUM TO THE CONFERENCE

Re: 81-55 - New York v. Ferber

As you suspected, I circulated to the Conference my response to a letter from Sandra that itself had not gone to the Conference. A copy of that letter is attached, with her consent.

By

To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

- pp. 16, 18, 25-26 & stylistic

- Circulated: _____

Recirculated: 9 JUN 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF NEW YORK

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.¹ The federal government and forty-nine states have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-six states and the United States

¹"Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." S. Rep. No. 95-438, at 5 (1978). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Ibid.* In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the House Comm. on Educ. and Labor, 95th Cong., 1st Sess. 41-42 (1977).

To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 17 JUN 1982

p. 25
 3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF NEW YORK

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.¹ The federal government and forty-nine states have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-six states and the United States

¹“Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.” S. Rep. No. 95-438, at 5 (1978). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* “Such magazines depict children, some as young as three to five years of age . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism.” *Ibid.* In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the House Comm. on Educ. and Labor, 95th Cong., 1st Sess. 41-42 (1977).

To: The Chief Justice
 Justice Brennan
 Justice Marshall ✓
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 6-25-82

pp. 1, 11, 15, 18;
 stylistic changes throughout

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF NEW YORK

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.¹ The federal government and forty-nine States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States

¹"Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." S. Rep. No. 95-438, p. 5 (1978). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.*, at 6. In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the Subcommittee on Select Education of the House Comm. on Ed. and Labor, 95th Cong., 1st Sess., 41-42 (1977).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 30, 1982

MEMORANDUM TO THE CONFERENCE

Re: 81-55 - New York v. Ferber

Unless there is objection, I propose to replace footnote 7 with the following, which more accurately reflects the current statutes than does the law review article cited in the old footnote:

¹Thirty-seven States and the District of Columbia have either legislatively adopted or judicially incorporated the Miller test for obscenity. Ala. Code §13A-12-150 (Supp. 1981); Ariz. Rev. Stat. Ann. §13-3501(2) (1978); Ark. Stat. Ann. §41-3502(6) (Supp. 1981); Colo. Rev. Stat. §18-7-101(2) (Supp. 1981); Del. Code Ann., Tit. 11, §1364 (Supp. 1981); Lakin v. United States, 363 A.2d 990 (DCCA 1976); Ga. Code §26-2101(b) (1978); Haw. Rev. Stat. §712-1210(6) (Supp. 1981); Idaho Code §18-4101(A) (1979); Iowa Code §228.4 (1979) (only child pornography covered); Ind. Code §35-30-10.1-1(c) (1979); Kan. Stat. Ann. §21-4301 (2) (a) (1981); Ky. Rev. Stat. §531.010(3) (1975); La. Rev. Stat. §14:106(A) (2) & (A) (3) (West Supp. 1982); Ebert v. Md. St. Bd of Censors, 19 Md. App. 300, 316 A.2d 536 (1974); Mass. Gen. Laws Ann., ch. 272, §31 (West Supp. 1982); People v. Neumayer, 405 Mich. 341, 275 N.W.2d 230 (1979); State v. Welke, 298 Minn. 402, 216 N.W.2d 641 (1974); Mo. Rev. Stat. §573.010(1) (1979); Neb. Rev. Stat., §28-807(9) (1979); Nev. Rev. Stat. §201.235 (1981); N.H. Rev. Stat. Ann. §650:1(IV) (Supp. 1981); N.J. Stat. Ann. §2C:34-2 (West Supp. 1981); N.Y. Penal Law §235.00(1) (1980); N.C. Gen. Stat. §14-190-1(b) (1981); N.D. Cent. Code §12.1-27.1-01(4) (1976); State v. Burgun, 56 Ohio St.2d 354, 384 N.E.2d 255 (Ohio 1978); McCrary v. State, 533 P.2d 629 (Okla. Crim App. 1974); Ore. Rev. Stat. §167.087(2) (1981); 18 Pa. Cons. Stat. §5903(b) (1982); R.I. Gen. Laws §11-31-1 (1981); S.C. Code §16-15-260(a) (1981); S.D. Comp. Laws Ann. §22-24-27(10) (1979); Tenn. Code Ann. §39-3001(17) (1981); Texas Penal Code Ann. §43.21(a) (1982); Utah Code Ann. §76-10-1203(1) (1978); Va. Code §18.2-372 (1982); 1982 Wash. Laws., Ch. 184, §1(2).

Four States continue to follow the test approved in Memoirs v. Massachusetts, 383 U.S. 413 (1966). Calif. Penal Code Ann. §311(a) (Supp. 1982); Conn. Gen. Stat.

§53a-193 (Supp. 1982); Fla. Stat. §847.07 (1976); Ill. Rev. Stat. ch. 38, §11-20(b) (1979). Five States regulate only the distribution of pornographic material to minors. Me. Rev. Stat. Ann., Tit. 17, §2911 (Supp. 1981-82); Mont. Code Ann. §45-8-201 (1981); N.M. Stat. Ann. §30-37-2 (1980); Vt. Stat. Ann., Tit. 13, §2802 (1981); W. Va. Code, §61-8A-2 (1977). Three State obscenity laws do not fall into any of the above categories. Miss. Code Ann. §97-29-33 (1973), declared invalid in ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123 (Miss. 1976); Wisc. Stat. §944.21(1)(a) (1977), declared invalid in State v. Princess Cinema of Milwaukee, Inc., 96 Wis.2d 646, 292 N.W.2d 807 (1980); Wyo. Stat. §6-5-303 (1977.) Alaska has no current state obscenity law.

A number of States employ a different obscenity standard with respect to material distributed to children. See, e.g., Fla. Stat. §847.0125 (1976).

The other changes, except for showing Justice Blackmun as concurring in the result, are stylistic. I do not plan to reprint for circulation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1982

Re: No. 81-55 - New York v. Ferber

Dear Byron:

I await the dissent.

Sincerely,



T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1982

Re: No. 81-55 - New York v. Ferber

Dear Bill:

Please join me in your opinion.

Sincerely,

J.M.
T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 28, 1982

Re: No. 81-55 - New York v. Ferber

Dear Byron:

At the end of your opinion, would you please set forth the following:

"JUSTICE BLACKMUN concurs in the result."

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1982

81-55 New York v. Ferber

Dear Byron:

Please join me.

Sincerely,



Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 8, 1982

Re: No. 81-55 New York v. Ferber

Dear Byron:

The one reservation I have about your otherwise excellent opinion is in the same area of concern as covered by your letter of June 8th responding to Sandra.

As a matter of original inquiry, it seems to me more consistent with the underlying logic of your opinion to omit any constitutional requirement that the state statute should "....exclude works in which photographs or other visual depiction of sexual conduct by children has serious literary, artistic, political or scientific value." Since we are dealing with child pornography, I don't think there is any inherent necessity for clinging to the Miller standards for adult pornography. I would think that so far as those portions of the New York statute in issue in this case are concerned, the probability that a film which violated the statute would also have "serious literary, artistic, political or scientific value" would be quite remote.

Thus I would prefer to see this requirement eliminated altogether from the test. But even if the test is to be retained in roughly the form you have it, I think a certain ambiguity results when the last sentence of the paragraph carrying over to page 16 is placed alongside the last clause of the second sentence in the following paragraph:

"A state offense should in addition exclude works in which photographs or other visual depiction of sexual conduct by children has serious literary, artistic, political, or scientific value." (emphasis supplied)

- 2 -

"...and the material at issue need not be considered as a whole."

By the use of the "works" in which visual depictions of sexual conduct have serious literary importance, I think you suggest that the work "considered as a whole" might be protected even though particular segments of it are clearly within the ban of the statute as approved in your opinion; to me, this contradicts the flat statement in the next paragraph that "the material at issue need not be considered as a whole." My concern here could be met by a revision of the first of the two quotes above to read as follows:

"A state offense should in addition exclude photographs or other visual depictions of sexual conduct by children which have serious literary, artistic, political or scientific value."

I would prefer my first, and broader, suggestion with respect to this aspect of the case. But I am perfectly willing to leave it to your judgment as to whether it is possible or desirable to obtain a majority for that proposition. I think that my second suggestion is simply a reflection of the dominant theme of Part II-C, and I would hesitate to join if it were not adopted or some other means of removing the ambiguity found.

This letter was conceived, although not dictated, before your letter to Sandra of June 8th. Since I had a stream of consciousness going, I did not want to lose the benefit of it even though I realize you are now planning to revise this part of the draft. Other than the points made above, I am more than happy to join the draft as written.

Sincerely,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1982

Re: No. 81-55 New York v. Ferber

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

.85

10

20

3

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 4, 1982

Re: 81-55 - New York v. Ferber

Dear Byron:

You have written a stronger and more persuasive opinion than I thought possible. Nevertheless, the case continues to trouble me so I shall await further writing and, I trust, will come to rest before the Ferry departs.

Respectfully,



Justice White

Copies to the Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: Justice Stevens

Circulated: JUN 25 '82

Recirculated: _____

81-55 - New York v. Ferber

JUSTICE STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

The context of respondent's conduct, and the content of the films he promoted, persuade me that his conviction does not violate the Constitution. The two films that respondent sold contained nothing more than lewd exhibition; there is no claim that the films included any material that had literary, artistic, scientific, or educational value. Respondent was a willing

*Fn 1 added and Fn 4 deleted
stylistic changes marked*

To: The Chief Justice
Justice Brennan
Justice Rehnquist
Justice Marshall
Justice Stewart
Justice White
Justice Blackmun
Justice Stevens

From: Justice Stevens

15⁺ Printed Draft

Revised: _____
Recirculated: JUN 21 1982

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER v. PAUL IRA FERBER

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK**

[July 2, 1982]

JUSTICE STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

Before addressing that issue, I shall explain why respondent's conviction does not violate the Constitution. The two films that respondent sold contained nothing more than lewd exhibition; there is no claim that the films included any material that had literary, artistic, scientific, or educational value.¹ Respondent was a willing participant in a commercial market that the State of New York has a legitimate interest in suppressing. The character of the State's interest in protecting children from sexual abuse justifies the imposition

¹ Respondent's counsel conceded at oral argument that a finding that the films are obscene would have been consistent with the *Miller* definition. Tr. of Oral Arg. 41.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 7, 1982

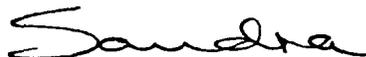
No. 81-55 New York v. Ferber

Dear Byron,

Although you have written a persuasive opinion, I am troubled by the exception for visual depictions that have serious literary, artistic, political, or scientific value. The points you make on pp. 8-15, it seems to me, have the same force no matter what the "value" of the depiction. In addition, an exception for pictures with serious literary, artistic, political, or scientific value will require the courts to make just the sort of content-based distinctions the First Amendment abhors. Finally, I believe it is unnecessary to create this exception in order to protect legitimate works that are unlikely to harm children. As your opinion makes clear, a State may prohibit only depictions of children engaged in "suitably limited and described" categories of sexual conduct. Slip op., at 16. I cannot imagine that medical or other scholarly works would find it necessary to picture children engaged in any of the categories of conduct listed in New York's statute. Only the reference to "lewd exhibition of the genitals" poses a risk of over-expansive interpretation. That part of the statute, however, is not at issue in this case and, for the reasons stated in part III of your opinion, respondent may not challenge any potential overbreadth of that phrase.

Would you consider eliminating the exception for depictions that have serious value, stressing instead the need to define categories of prohibited conduct?

Sincerely,



Justice White

85 10-11 617

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 8, 1982

No. 81-55 New York v. Ferber

Dear Byron,

With the proposed changes, please join
me.

Sincerely,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 14, 1982

No. 81-55 New York v. Ferber

Dear Byron,

Although I circulated a joinder in anticipation of your changes in the opinion in this case, I continue to be troubled by the concerns expressed in my letter to you. I, therefore, plan to circulate a brief partial concurrence which simply reserves joining you as to the exception for works of serious social value. Accordingly, my previous joinder is modified. Please show me as concurring in part and concurring in the judgment.

Sincerely,



Justice White

Copies to the Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: **Justice O'Connor**

Circulated: **JUN 14 1982**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF NEW YORK

[June —, 1982]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join all of the Court's opinion except for its suggestion, *ante*, at 25, that New York must distinguish between "depictions of juvenile sexual activity [that] . . . have serious literary, artistic, political or scientific value" and depictions of juvenile sexual activity lacking such value. This distinction does not follow logically from the analysis set out in Part II of the Court's opinion. The compelling interests identified by the Court, see *ante*, at 8-15, have the same force no matter what the social value of a depiction. For example, a twelve-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "artistic" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

The Court's suggested exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment. As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or photographing children." *Ante*, at 14.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 18, 1982

No. 81-55 New York v. Ferber

Dear Byron,

Please join me in the 3rd Draft of your opinion. I will modify my previous circulation as a concurrence, and make some points which I believe are not inconsistent with your draft.

Sincerely,



Justice White

Copies to the Conference

pp. 1, 2

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: **JUN 21 1982**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[June —, 1982]

JUSTICE O'CONNOR, concurring.

Although I join the Court's opinion, I write separately to stress that the Court does not hold that New York must except "material with serious literary, scientific or educational value," *ante*, at 18, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion, see *ante*, at 8-15, suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment. As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or

PP. 2

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

Circulated: _____

JUN 28 1982

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3rd DRAFT

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