

***New York v. Ferber*, 458 U.S. 747 (1982)**

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In D. Schultz and J. R. Vile,
Encyclopedia of Civil Liberties in America, 661-62.
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In *New York v. Ferber*, the U.S. Supreme Court held that a state could prohibit the dissemination of material showing children engaged in sexual conduct, regardless of whether the material is obscene, without violating the First and Fourteenth Amendments. The case involved a bookstore owner who had been convicted under a New York child pornography statute of promoting the sexual performance of a child under the age of sixteen. On appeal, he argued that New York statute was unconstitutionally overbroad, because it did not contain a requirement that the child's performance was obscene. The New York Court of Appeals agreed and reversed his conviction, because it found that the statute would prohibit the promotion of materials traditionally entitled to First Amendment protection.

Justice White, writing for a unanimous Court, reversed the New York court's decision. The state had a compelling interest in regulating child pornography in order to protect the physical and psychological well-being of minors. The statute was also an appropriate means to promote the state's interest, because the value of permitting children to appear in pornographic films was exceedingly minimal. In these circumstances, where the evil to be restricted so substantially outweighed any First Amendment interests at stake, he concluded that a restriction on the content of speech was permissible. He rejected the *Miller v. California* (1973) obscenity test in these circumstances, because it focused on the harm the material posed to society, not to the psychological harm inflicted on the child. Since *Miller* was inapplicable, Justice White crafted a four-part child pornography test: (1) adequate definition of the offensive sexual conduct, (2) visual depiction, (3) the minority of the subject, and (4) the knowledge of the defendant. New York statute satisfied all four elements of this test.

Justice White also dismissed the claim that the New York statute was unconstitutionally overbroad, because it prohibited the distribution of medical and educational materials which portrayed adolescent sex in a non-obscene manner. Where conduct and not speech is involved, he said, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), had held that "the overbreadth of a statute must be real and substantial as judged by the statute's legitimate objective. Applying *Broadrick*, he found that the New York statute was not substantially overbroad, because its "legitimate reach dwarfed any impermissible applications. Even if the statute might forbid the distribution of material with serious literary, scientific, or educational value, he found that the statute would still not be substantially overbroad, because this material would be no more than a fraction of the material prohibited by the statute."

In sum, *New York v. Ferber* upheld state child pornography statutes which dispense with the obscenity requirement for the promotion and distribution of visual child pornography as long as these statutes comply with the court's four part test and are not substantially overbroad. *Ferber* now extends to even the private possession of child pornography with the court's decision in *Osborne v. Ohio* (1990). All other obscene sexual representations of children in books magazines, pamphlets, and oral recordings are governed by *Miller v. California*.