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Court of Appeals, People v. Fraser

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FREEDOM OF SPEECH

United States Constitution Amendment I:

Congress shall make no law . . . abridging the freedom of speech.

New York Constitution Article 1, Section 8:

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

COURT OF APPEALS OF NEW YORK

People v. Fraser¹
(decided February 20, 2001)

Paul Fraser was charged with two counts of possessing a sexual performance by a child in violation of Penal Law Section 263.16,² as well as possessing an obscene sexual performance by a child.³ Prior to trial, the People moved to dismiss the charges of obscene sexual performance and proceeded solely on the two counts of Penal Law Section 263.16.⁴ Fraser was convicted on both counts and sentenced to five years probation, 550 hours of community service and a \$1000 fine.⁵ On appeal, the Appellate

¹ 96 N.Y.2d 318, 752 N.E.2d 244, 728 N.Y.S.2d 115 (2001).

² N.Y. PENAL LAW § 263.16 (McKinney 2000) provides in pertinent part: "A person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he knowingly has in his possession or control any performance which includes sexual conduct by a child less than sixteen years of age."

³ *Fraser*, 96 N.Y.2d at 322, 752 N.E.2d at 244, 728 N.Y.S.2d at 116.

⁴ *Id.*

⁵ *Id.*

Division, Fourth Department affirmed the conviction.⁶ Fraser contended his conviction was a violation of his rights of freedom of expression as protected by the First Amendment⁷ of the Federal Constitution and Article I, Section 8⁸ of the New York Constitution. Further, Fraser alleged that his equal protection rights under the Federal⁹ and State¹⁰ Constitutions were violated.¹¹ He also purported that the trial court violated his due process rights in refusing to allow a defense of scientific justification.¹² The New York Court of Appeals affirmed his conviction, holding that the State has a compelling interest to protect its children, and that pornographic material involving children is not protected by the First Amendment.¹³ The court further held that defendant's equal protection argument was also devoid of merit.¹⁴ The New York statutory scheme of Section 235.00(1)¹⁵ allows for possession of

⁶ *Id.*

⁷ The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend I.

⁸ Article 1, Section 8 provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST. art. 1, § 8.

⁹ The Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁰ Article 1, Section 11 provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. 1, § 11.

¹¹ *Fraser*, 96 N.Y.2d at 323-24, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

¹² *Id.* at 324, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

¹³ *Id.*

¹⁴ *Id.* at 325, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

¹⁵ N.Y. PENAL LAW § 235.00(1) (McKinney 2000) provides:

Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its

pornographic material, as long as the material is not defined as obscene.¹⁶ The court reasoned that this scheme “need only be supported by some rational basis to survive constitutional scrutiny.”¹⁷ Absent a showing by the defendant that the statutory scheme was irrational, his equal protection argument was unsuccessful.¹⁸

Paul Fraser held a Master’s Degree in Social Work and was a certified social worker specializing in child abuse cases.¹⁹ When Fraser took his computer to a repair shop for servicing, a technician noticed some graphic files with titles that connoted child pornography.²⁰ The technician copied the files and viewed the copy with two other employees.²¹ The files revealed pictures of young children participating in sexual activity with adults, and Fraser was subsequently charged with two counts of possession of a sexual performance by a child, in violation of Penal Law Section 263.16.²²

At trial, Fraser asserted an affirmative defense pursuant to Penal Law Section 235.15(1),²³ alleging that the child pornography he possessed did not violate the statute in that the pornography was being used for a “scientific purpose.”²⁴ Fraser testified that he was

dissemination to be designed for children or other specially susceptible audience.

N.Y. PENAL LAW § 263.00(2) (McKinney 2000) provides: “ ‘Obscene sexual performance’ means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.”

¹⁶ *Fraser*, 96 N.Y.2d at 325, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

¹⁷ *Id.* (quoting *People v. Walker*, 81 N.Y.2d 661, 668, 623 N.E.2d 1, 603 N.Y.S.2d 280 (1993)).

¹⁸ *Id.* at 325-26, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

¹⁹ *Id.* at 322, 752 N.E.2d at 245, 728 N.Y.S.2d at 116.

²⁰ *Id.* at 321, 752 N.E.2d at 245, 728 N.Y.S.2d at 116.

²¹ *Fraser*, 96 N.Y.2d at 322, 752 N.E.2d at 245, 728 N.Y.S.2d at 116.

²² *Id.*

²³ N.Y. PENAL LAW § 235.15(1) (McKinney 2000) provides in pertinent part: “[I]t is an affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating or viewing same.”

²⁴ *Fraser*, 96 N.Y.2d at 322, 752 N.E.2d at 245, 728 N.Y.S.2d at 116.

invited to assist with a treatment program for persons convicted of child pornography crimes, and explained that he possessed the pornography to bolster his “scientific research” in treating persons transmitting child pornography on the Internet.²⁵ Fraser alleged that he gathered the material from individuals with whom he communicated in child pornography chat rooms.²⁶ The trial court precluded this defense, and the New York Court of Appeals agreed, holding that the scientific use defense is limited to either obscenity or offenses enumerated in Section 235,²⁷ neither of which was at issue.²⁸

The second defense was mistake of law, in that Fraser was acting as though he believed his conduct was legal.²⁹ The trial court denied him from asserting this defense as well, and the Court of Appeals affirmed the ruling. The court reasoned that to utilize the mistake of law defense, a person must base the mistaken belief “upon an official statement of the law contained in a statute or other enactment.”³⁰ Defendant did not make this showing; rather he attempted to prove that the images on his computer were not photographs as defined by Penal Law Section 263.00(4).³¹ Therefore, the court held that this defense was also unavailable to him.³²

On appeal, Fraser argued that his conviction violated his First Amendment right of freedom of expression as well as his equal protection rights under the Federal³³ and State³⁴

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 235 of the Penal Law includes offenses of obscenity and disseminating indecent material to minors. N.Y. PENAL LAW § 235.15 (McKinney 2000).

²⁸ *Fraser*, 96 N.Y.2d at 323, 752 N.E.2d at 246, 728 N.Y.S.2d at 117.

²⁹ *Fraser*, 96 N.Y.2d at 322, 752 N.E.2d at 246, 728 N.Y.S.2d at 117.

³⁰ *Id.* at 326, 752 N.E.2d at 249, 728 N.Y.S.2d at 120.

³¹ *Id.* at 327, 752 N.E.2d at 249, 728 N.Y.S.2d at 120. N.Y. PENAL LAW § 263.00(4) (McKinney 2000) provides: “ ‘Performance’ means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.”

³² *Fraser*, 96 N.Y.2d at 327, 752 N.E.2d at 249, 728 N.Y.S.2d at 120.

³³ See *supra* note 9. The Equal Protection Clause is found in Section 1 of the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend XIV, § 1.

Constitutions.³⁵ In particular, he asserted that the unavailability of a “scientific justification” affirmative defense renders the child pornography statute unconstitutional.³⁶ Further, the defendant argued that the trial court’s denial of his defense of scientific justification violated his due process rights.³⁷ The New York Court of Appeals did not subscribe to any of defendant’s arguments.

The court began its analysis with Fraser’s allegation that his conviction violated his First Amendment right of freedom of expression.³⁸ The court initially cited the United States Supreme Court case of *New York v. Ferber*.³⁹ In *Ferber*, the United States Supreme Court upheld the constitutionality of a New York Penal Law statute, reasoning that child pornography is not within the protection of the First Amendment.⁴⁰ Ferber, a proprietor of a bookstore in Manhattan that specialized in sexually oriented products, sold two films to an undercover police officer depicting young boys masturbating.⁴¹ Ferber was indicted and later convicted on two counts of violating Section 263.15.⁴²

The New York Court of Appeals reversed, holding that Section 263.15 violated the First Amendment, finding the statute to be underinclusive and overbroad.⁴³ The statute was underinclusive in that it did not prohibit the distribution of films of other dangerous activity, and was overbroad because it prohibited the distribution of materials made outside the State, as well as medical books and educational sources.⁴⁴

The United States Supreme Court granted the State’s petition for certiorari to resolve the issue of whether the New York

³⁴ See *supra* note 8, 10. New York’s free speech and equal protection rights are enumerated in Article I of its Constitution. N.Y. CONST. art. 1, §§ 8, 11.

³⁵ *Fraser*, 96 N.Y.2d at 323-24, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

³⁶ *Id.* at 324, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 458 U.S. 747 (1982).

⁴⁰ *Ferber*, 458 U.S. at 764. At issue in *Ferber* was the constitutionality of Penal Law § 263.15, which does not require proof that the material be obscene.

⁴¹ *Id.* at 751-52.

⁴² *Id.* at 752.

⁴³ *People v. Ferber*, 52 N.Y.2d 674, 422 N.E.2d 523; 439 N.Y.S.2d 863 (1981).

⁴⁴ *Id.*

Legislature could, consistent with the First Amendment, "prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene," in an effort to prevent the abuse of children forced to engage in sexual conduct for commercial purposes.⁴⁵ The Supreme Court answered the question in the affirmative, reversing the judgment of New York's highest court.⁴⁶ The Court wrote,

when a definable class of material, such as that covered by Section 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.⁴⁷

The *Ferber* Court further declared that, "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. 'It is irrelevant to the child who has been abused whether or not the material . . . has a literary, artistic, political or social value.'"⁴⁸

The New York Court of Appeals in *Fraser* next discussed the compelling interest a state has in protecting its children.⁴⁹ The court cited the United States Supreme Court case of *Osborne v. Ohio*⁵⁰ as support for this notion.⁵¹ In *Osborne*, the Supreme Court reiterated its own decision in *Ferber*, holding that the state has an interest in stamping out child pornography.⁵² The *Ferber* Court had reasoned that the compelling state interest in eliminating child pornography, and in preventing child exploitation and abuse justified the prohibition against child pornography.⁵³ In *Osborne*, the United States Supreme Court upheld an Ohio statute that

⁴⁵ *Ferber*, 458 U.S. at 753.

⁴⁶ *Id.* at 774.

⁴⁷ *Id.*

⁴⁸ *Id.* at 761 (quoting Memorandum of Assemblyman Lasher in Support of § 263.15).

⁴⁹ *Fraser*, 96 N.Y.2d at 324, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

⁵⁰ 495 U.S. 103 (1990).

⁵¹ *Fraser*, 96 N.Y.2d at 324, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

⁵² *Osborne*, 495 U.S. at 110.

⁵³ *Ferber*, 458 U.S. at 761.

prohibited the mere possession of child pornography.⁵⁴ To accomplish this goal, Ohio enacted a statute similar to the statute at issue in *Fraser*, but not as narrowly drawn.⁵⁵ Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison after four photographs were found in his home depicting nude male adolescents posed in sexually explicit positions.⁵⁶ The United States Supreme Court affirmed the conviction, holding that a state cannot regulate private thoughts and possessions of adults, but it could, however, try to terminate a market that exploits its children.⁵⁷ The Court recognized that a state's interest in regulating the possession of child pornography included not only the children used to create the material but also the protection of children who may be sexually abused by pedophiles who use child pornography to entice their victims to engage in sexual conduct.⁵⁸

The statute at issue in *Osborne* did contain exceptions for possessing child pornography such as literary, educational and scientific purposes, but the Supreme Court's opinion did not indicate that these limitations were required for a statute to pass

⁵⁴ *Id.*

⁵⁵ *Osborne*, 495 U.S. at 106. OHIO REV. CODE ANN. § 2907.323(A)(3) (West 1989) provides in pertinent part:

(A) No person shall do any of the following:

(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance.

(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred.

⁵⁶ *Osborne*, 495 U.S. at 107.

⁵⁷ *Id.* at 109.

⁵⁸ *Id.* at 111.

constitutional muster.⁵⁹ The same conclusion was drawn by the Fourth Circuit Court of Appeals in *United States v. Matthews*,⁶⁰ as well as the Court of Appeals of Washington in *State v. Williams*.⁶¹ In *Matthews*, a journalist was convicted under a federal statute for sending and receiving child pornography over the Internet.⁶² The reporter contended that he was researching a news story and was entitled to a defense of valid journalistic purpose, even though the statute did not provide such a defense.⁶³ Defendant maintained that the First Amendment entitled him to a defense under the statute.⁶⁴ The federal court held, as a matter of first impression, that no such defense exists within the “penumbra” of the First Amendment.⁶⁵ Following the holding in *Ferber*, the Fourth Circuit reasoned that Matthews’ asserted defense “misses the fundamental distinction between child pornography and adult pornography that the *Ferber* Court sought to draw.”⁶⁶ The Court of Appeals affirmed the conviction, stating that although the defense may be available in obscene adult pornography, defendant’s First Amendment rights are not violated by denying him the defense in the context of child pornography.⁶⁷ The court reasoned that child pornography, even if it contains literary, artistic or journalistic value, that value does not outweigh the abuse and harm caused to children, and therefore the statute at issue was found constitutional.⁶⁸

In *Williams*, the Washington Court of Appeals concluded that its state child pornography statute was constitutional, relying on many of the same principles as the *Matthews* court.⁶⁹ In *Williams*, the defendant was charged with possession of depictions of a minor engaged in sexually explicit conduct.⁷⁰ Defendant

⁵⁹ *Id.* at 114.

⁶⁰ 209 F.3d 338 (4th Cir. 2000).

⁶¹ 1998 Wash. App. LEXIS 1654 (1998).

⁶² *Matthews*, 209 F.3d at 339.

⁶³ *Id.* at 342.

⁶⁴ *Id.*

⁶⁵ *Id.* at 345.

⁶⁶ *Id.*

⁶⁷ *Matthews*, 209 F.3d at 345.

⁶⁸ *Id.*

⁶⁹ *Williams*, 1998 Wash. App. LEXIS 1654 at **1-2.

⁷⁰ *Id.* at *4.

claimed the Washington statute was overbroad, both facially and applied, as it failed to safeguard legitimate scientific, medical, or educational activities.⁷¹ The state court held that the statute was not overbroad, given the overriding [state] government concern for the physical and mental health of its children.⁷² Although the statute did not include an affirmative defense for journalistic purposes, defendant's First Amendment rights were not violated because the state's interest in protecting its children overrode defendant's interest in possessing this material for "legitimate purposes."⁷³

The statute at issue in *Osborne* was also not unconstitutionally overbroad, as the Court interpreted the statute to apply only to depictions of nudity involving a lewd exhibition or graphic focus on the minor's genitals.⁷⁴ The *Osborne* Court noted that the term "lewd exhibition of the genitals" is familiar in this area, and was first offered in *Miller v. California*⁷⁵ as an example of a permissible regulation.⁷⁶ The United States Supreme Court in *Miller* gave examples of what a state statute could define for regulation including "[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."⁷⁷

In *Fraser*, the defendant also argued on appeal that his conviction violated his equal protection rights under the Federal and State Constitutions.⁷⁸ The New York Court of Appeals was not persuaded by this argument either.⁷⁹ Defendant argued that Penal Law Section 263.16 violated the equal protection guaranteed by the Federal and New York Constitutions, because it criminalized possession of pornographic material allowed under Penal Law article 235,⁸⁰ if that same pornography were classified

⁷¹ *Id.* at **11-12.

⁷² *Id.* at **13-14.

⁷³ *Id.* at *14.

⁷⁴ *Osborne*, 495 U.S. at 113.

⁷⁵ 413 U.S. 15 (1973).

⁷⁶ *Osborne*, 495 U.S. at 114.

⁷⁷ *Miller*, 413 U.S. at 25 (emphasis added).

⁷⁸ *Fraser*, 96 N.Y.2d at 325, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

⁷⁹ *Id.*

⁸⁰ N.Y. PENAL LAW § 235 (McKinney 2000) provides in pertinent part:

as obscene.⁸¹ The court held that even though the statutory scheme of New York treats the offenses differently, it “need only be supported by some rational basis to survive constitutional scrutiny.”⁸² Defendant made no showing that New York’s statutory scheme was irrational or contrary to public policy, and therefore his equal protection argument did not carry the day.⁸³

In the area of child pornography, Federal and New York law are similar with respect to an individual’s right to free speech. However, as discussed in *Ferber*, the United States Supreme Court held that states are entitled to greater leeway in regulating the pornographic depictions of children.⁸⁴ As support for this contention, the Court enumerated five reasons why the states should enjoy this additional authority.⁸⁵ First, the judgment of state legislatures that children used in pornographic material are harmed emotionally and physiologically, easily passes a First Amendment test.⁸⁶ Second, the standard promulgated by *Miller* for determining legally obscene material is not a solution to the problem of child pornography.⁸⁷ The *Miller* test “does not reflect the state’s particular and more compelling interest in prosecuting

Obscenity or disseminating indecent material to minors in the second degree; defense

1. In any prosecution for obscenity, or disseminating indecent material to minors in the second degree in violation of subdivision three of section 235.21 of this article, it is an affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, disseminating or viewing the same.

⁸¹ *Fraser*, 96 N.Y.2d at 325, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

⁸² *Id.* (citing *People v. Walker*, 81 N.Y.2d 661, 623 N.E.2d 1, 603 N.Y.S.2d 280 (1993)).

⁸³ *Id.* at 325-26, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

⁸⁴ *Ferber*, 458 U.S. at 756.

⁸⁵ *Id.* at 756-64.

⁸⁶ *Id.* at 758.

⁸⁷ *Id.* at 761. The *Miller* standard limits obscene material to “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller*, 413 U.S. at 24.

those who promote the sexual exploitation of children.”⁸⁸ Third, advertising and selling child pornography provides an economic incentive for an activity that is illegal throughout the nation.⁸⁹ Fourth, the value of permitting children to engage in live performances or lewd exhibitions is insignificant, if not *de minimis*.⁹⁰ And lastly, the Court discussed the compelling interest New York State has in protecting its children from engaging in pornographic acts, and such material does not warrant the protection of the First Amendment.⁹¹

In conclusion, the Court of Appeals in *Fraser* was not willing to accept defendant’s argument that his conviction violated his First Amendment right of freedom of expression.⁹² On a federal level, the First Amendment may be interpreted to encompass the possession of child pornography. However, as the *Fraser* court noted, “[s]tates enjoy greater latitude in regulating child pornography because of the government’s compelling interest in safeguarding its children.”⁹³ To protect the health, safety and well-being of children, courts tend to uphold statutes proscribing the possession and dissemination of pornographic materials involving minors.⁹⁴ As such, the statute at issue in *Fraser* was upheld as constitutional.

Fraser’s equal protection argument was also unpersuasive. *Fraser* claimed that Penal Law Section 263.16 violated the equal protection guarantees on both the state and federal level because he was denied the opportunity to assert an affirmative defense of scientific justification, which would have been available if he was charged with an offense delineated in Penal Law Section 235.⁹⁵ The court again stressed the compelling state interest of preventing child pornography as a justification for the distinction.⁹⁶ Penal Law Section 235 did include affirmative defenses for possession,

⁸⁸ *Ferber*, 458 U.S. at 760-61.

⁸⁹ *Id.*

⁹⁰ *Id.* at 762.

⁹¹ *Id.* at 764.

⁹² *Fraser*, 96 N.Y.2d at 323-25, 752 N.E.2d at 246-48, 728 N.Y.S.2d at 117-19.

⁹³ *Id.* at 324, 752 N.E.2d at 247, 728 N.Y.S.2d at 118.

⁹⁴ See *Ferber*, *Osborne*, and *Fraser*, discussed *supra*.

⁹⁵ *Fraser*, 96 N.Y.2d at 325, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.

⁹⁶ *Id.*

including scientific, educational or governmental purposes.⁹⁷ Nevertheless, the court held that this statutory scheme was supported by a rational basis to survive constitutional scrutiny.⁹⁸ The scheme is rationally related to a state's compelling interest to shield its children from this type of exposure. Finally, the scheme is consistent with public policy, and will defeat challenges on First Amendment or equal protection grounds such as in *Fraser*.

Evan M. Zuckerman

⁹⁷ See *supra* note 80.

⁹⁸ *Fraser*, 96 N.Y.2d at 325-26, 752 N.E.2d at 248, 728 N.Y.S.2d at 119.