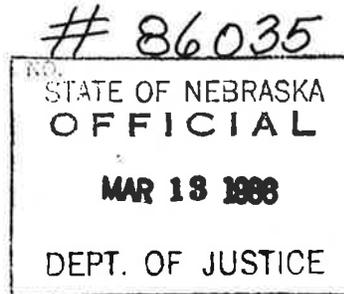


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 13, 1986

SUBJECT: LB 788 - Amendments to Child Pornography  
Prevention Act

REQUESTED BY: Senator John W. DeCamp  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of LB 788, a bill proposing to amend certain provisions of the Child Pornography Prevention Act, Neb.Rev.Stat. §§28-1463.01 to 28-1463.05 (Supp. 1985). Specifically, you ask whether the Act as amended violates the First Amendment by failing to define "pornography" in terms of the three-part definition of "obscenity" in Miller v. California, 413 U.S. 15 (1973), requiring that, to be obscene, materials must, "taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." Brockett v. Spokane Arcades, Inc., 472 U.S. \_\_\_\_\_, \_\_\_\_\_, 86 L.Ed.2d 394, 404, 105 S.Ct. 2794, 2800 (1985).

In New York v. Ferber, 458 U.S. 747 (1982), the Supreme Court considered the issue of the constitutionality of a New York criminal statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance. The statute defined "sexual performance" as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age," and defined "sexual conduct" as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." Id. at 751.

In upholding the constitutionality of the New York statutory scheme, the Court rejected the argument that the three-part "obscenity" standard articulated in Miller v. California, supra,

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was applicable in outlining the extent of the state's power to prohibit the production and distribution of materials depicting sexual conduct involving children:-

The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. . . . We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem.

458 U.S. at 761 (footnote omitted).

The Court in Ferber, stating that child pornography constituted "a category of material outside the protection of the First Amendment," established the following guidelines concerning legislation in this area:

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.

Id. at 763, 764 (footnote omitted).

Applying these standards to the Child Pornography Prevention Act, as amended by LB 788, we believe it is clear that the Act is constitutional under the guidelines enunciated in Ferber. The conduct prohibited is adequately defined, and the criminal offenses provided for under the Act are limited to materials which visually depict sexual conduct by children under 17 years

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of age. Furthermore, the types of sexual conduct proscribed, as defined in Section 1 of LB 788, are adequately limited and described. In fact, the definitions utilized in the Act are similar to those contained in the federal Child Protection Act of 1984, 18 U.S.C. §§2251 to 2255. The constitutionality of the federal Act was recently upheld in United States v. Tolczeki, 614 F.Supp. 1424 (N.D. Ohio, E.D. 1985).

We note that, in your letter, you direct our attention to a recent Seventh Circuit decision, American Booksellers, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), involving the constitutionality of an Indianapolis pornography ordinance. The ordinance challenged in Hudnut defined "pornography" as "the graphic sexually explicit subordination of women, whether in pictures or in words." Id. at 324. The court held that this definition, which did not refer to prurient interests, to offensiveness, or to standards of the community, and which also demanded attention to particular depictions and not to the work judged as a whole, violated the First Amendment. Id. at 332.

In our view, the decision in Hudnut does not in any way bring into question the constitutionality of the Nebraska Child Pornography Prevention Act. As was noted, the Supreme Court in Ferber specifically rejected the notion that the test for child pornography must be identical to the obscenity standard enunciated in Miller v. California. Ferber recognizes that a state may, consistent with the First Amendment, prohibit the production and distribution of materials which depict children engaged in sexual conduct, regardless of whether such material is "obscene." In fact, the court in Hudnut, supra, specifically recognized that Ferber clearly provides states with greater leeway in the regulation of materials containing pornographic depictions of children:

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), suggests that when a state has a strong interest in forbidding the conduct that makes up a film (in Ferber sexual acts involving minors), it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct.

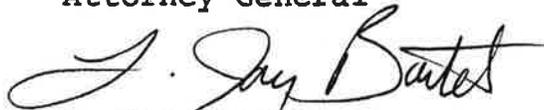
771 F.2d at 332.

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Based upon the foregoing, it is our opinion that the Child  
Pornography Prevention Act, as amended by LB 788, is  
constitutional.

Sincerely,

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Attorney General



L. Jay Bartel  
Assistant Attorney General

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cc: Patrick J. O'Donnell  
Clerk of the Legislature

APPROVED:



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