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First Amendment--Disconnecting Dial-A-Porn: Section 223(b)'s Two Pronged Challenge to First Amendment Rights

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FIRST AMENDMENT—DISCONNECTING DIAL-A-PORN: SECTION 223(b)'S TWO PRONGED CHALLENGE TO FIRST AMENDMENT RIGHTS

Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829 (1989).

I. INTRODUCTION

In *Sable Communications of Cal. v. FCC*,[1] the United States Supreme Court examined the constitutionality of 47 U.S.C. § 223(b) of the Communications Act of 1934.[2] After briefly summarizing the history of modern obscenity law, the evolution of section 223(b), and the Court's opinions in *Sable*, this Note addresses the majority's decision that section 223(b)'s prohibition of indecent telephone communications is unconstitutional.[3] This decision reaffirms the right of adults to do, hear, or see that which may be inappropriate for children.[4] This Note argues that although the majority reached the correct result in this portion of the opinion, it erred in omitting the interest of parents in the upbringing of their children from its balancing of interests analysis. The Court thus laid a dangerous foundation for the usurpation by the state of the parent's role.

This Note further argues, however, that in ruling that the ban on indecent communications is unconstitutional,[5] the majority correctly indicated that it is inappropriate for judges to determine which types of protected speech have the most value. The Court thus maintained a two-tiered, definitional approach to obscenity law, refusing to create intermediate categories of protected speech, and maintaining an important safeguard of first amendment rights.

Second, this Note addresses the Court's decision to uphold section 223(b)'s provision prohibiting obscene telephone communica-

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1 109 S. Ct. 2829 (1989). FCC is the acronym for the Federal Communications Commission.

2 *See infra* note 98.

3 *Sable*, 109 S. Ct. at 2839.

4 *See infra* note 173 and accompanying text.

5 *Sable*, 109 S. Ct. at 2839.

tions.[6] This Note argues that the Court avoided addressing the issue of how the *Miller* requirement—that obscenity be judged by contemporary community standards[7]—is to be applied to telephone pornography. This Note further argues that the majority wrongly treats telephone communications as it has treated other methods of communication in the past.[8] This Note concludes that the majority's decision does in effect what it purports not to do; it establishes a national standard of obscenity, leaving dial-a-porn companies with the difficult choice of tailoring their messages to the least tolerant communities or risking prosecution and possible bankruptcy.

II. BACKGROUND: A BRIEF HISTORY OF MODERN OBSCENITY LAW

A. THE OBSCENITY STANDARD

Modern obscenity law in the United States has its foundations in *Chaplinsky v. New Hampshire*.[9] In *Chaplinsky*, the Supreme Court introduced the concept that the lewd and obscene are "limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[10]

In *Roth v. United States*,[11] the Court attempted to arrive at a clearer definition of obscenity but concluded only that because obscenity is utterly without redeeming social importance, "obscenity is not within the area of constitutionally protected speech or press."[12] This conclusion was modified by the Court's decision in *Memoirs v. Massachusetts*.[13] There, a plurality of the Court set forth a new test for obscenity. That test required: 1) that the dominant theme of the material taken as a whole appeal to a prurient interest in sex; 2) that the material be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and 3) that the material be utterly without redeeming social value.[14] The Court's decision in *Memoirs* repre-

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6 *Id.* at 2835.

7 *See infra* notes 18-22 and accompanying text.

8 *See, e.g., infra* notes 26-29 and accompanying text.

9 315 U.S. 568 (1942).

10 *Id.* at 571-572. The Court went on to say that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572.

11 354 U.S. 476 (1957).

12 *Id.* at 485. The Court also stated that "all ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [first amendment] guarantees. . . ." *Id.*

13 383 U.S. 413 (1966).

14 *Id.* at 418.

sented a major shift from the *Roth* decision. Whereas in *Roth*, the Court presumed that obscenity is utterly without redeeming social value,[15] *Memoirs* required that to prove obscenity the prosecution affirmatively establish that the material is "utterly without redeeming social value."[16] This burden was a heavy one for prosecutors, because the defense could usually show that the material in question had "redeeming social value" to some group of people.[17]

In *Miller v. California*,[18] the Court rejected the *Roth* "utterly without social value" test and instituted a tripartite test of its own.[19] The *Miller* Court held that the basic guidelines for the trier of fact must be: 1) whether the average person, applying "contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[20]

The *Miller* Court emphasized that the work in question must be judged according to contemporary community standards and not by a national standard.[21] Justice Burger, writing for the Court, stated that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that people of Maine or Missouri accept public depiction of conduct found tolerable in Las Vegas or New York City."[22]

In *United States v. 12 200-ft. Reels of Film*,[23] the Court held that the standards enunciated in *Miller*, including the "contemporary

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15 *Roth*, 354 U.S. at 485.

16 *Memoirs*, 383 U.S. at 419. Thus, in *Roth*, obscenity was unprotected because it was utterly worthless, but in *Memoirs*, obscenity was unprotected only if utterly worthless. *See* L. TRIBE, CONSTITUTIONAL LAW § 12-16 at 908-909 (1988).

17 *Memoirs*, 383 U.S. at 459 (Harlan, J., dissenting). For this reason, Justice Harlan questioned whether the "utterly without redeeming social value" test had any meaning at all. *Id.*

18 413 U.S. 15 (1973).

19 *Id.* at 24. *Miller* did, however, retain as the first part of the test the formulation, originating with *Roth*, that obscenity is material that appeals to the prurient interest. *See Roth*, 354 U.S. at 488-89.

20 *Miller*, 413 U.S. at 24. The *Miller* definition therefore made the burden on the prosecution far lighter and paved the way for subsequent obscenity convictions.

21 *Id.* at 30.

22 *Id.* at 32. Justice Burger also stated:

> [O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all fifty states in a single formulation, even assuming the prerequisite consensus exists. . . . To require a state to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

Id. at 30.

23 413 U.S. 123 (1973).

community standards" requirement,[24] are applicable to federal legislation.[25] Applying *12 200-ft. Reels of Film*, the Court in *Hamling v. United States*[26] held that 18 U.S.C. § 1461[27] incorporated the *Miller* standard of "the average person, applying contemporary community standards."[28] The Court thus upheld the application of *Miller* to federal obscenity statutes, making clear that "the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional."[29]

B. OBSCENITY AND THE ADULT'S RIGHT TO PRIVACY

In a holding consistent with the Court's decision in *Roth*,[30] *Miller* reiterated that obscenity is not protected by the first amendment.[31] In *Stanley v. Georgia*,[32] however, the Court held that a state obscenity statute which punished the mere private possession of obscene material violates the first amendment.[33] In *Stanley*, federal and state agents found three reels of film in the appellant's home.[34] The agents subsequently concluded that the films were obscene.[35] The appellant was convicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of Georgia law.[36] The Supreme Court reversed his conviction,[37] stating emphatically that "the right

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24 *Miller*, 413 U.S. at 30. *See supra* notes 21-22 and accompanying text.

25 *12 200-ft. Reels of Film*, 413 U.S. at 130. Here, the constitutionality of the Tariff Act of 1930, 19 U.S.C. § 1305(a), which prohibited the importing into the United States of obscene materials, was upheld. *Id.*

26 418 U.S. 87 (1974).

27 18 U.S.C. § 1461 prohibited the use of the mails to convey any "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." 18 U.S.C. § 1461 (1974).

28 *Hamling*, 418 U.S. at 104.

29 *Id.* at 106. The Court rejected Justice Brennan's argument that by holding that a federal obscenity case may be tried on local community standards, the Court was doing violence to Congress' decision and to the Constitution. *Id.* One commentator has suggested that mailed packages always have an intended destination and, therefore, the relevant community is the one in which materials come in contact with the group that the statute is designed to protect from the materials. F. SCHAUER, THE LAW OF OBSCENITY 129 (1976).

30 Roth v. United States, 354 U.S. 476 (1957). *See supra* note 11 and accompanying text.

31 Miller v. California, 413 U.S. 15 (1973).

32 394 U.S. 557 (1969).

33 *Id.* at 568.

34 *Id.* at 558.

35 *Id.*

36 *Id.* at 558-59.

37 *Id.* at 568.

to receive information and ideas, regardless of their social worth, is fundamental to our free society."[38] Justice Marshall then stated:

> If 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. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[39]

Although a right to receive obscenity and to possess it in one's home seems to suggest a corresponding right to distribute such materials,[40] the Court was quick to reaffirm the constitutionality of prohibiting the distribution or sale of obscene materials, even to consenting adults. In *United States v. Reidel*,[41] the Court declined to overrule *Roth*, holding that 18 U.S.C. § 1461[42] is not unconstitutional as applied to the distribution of obscene materials to willing adult recipients.[43] Similarly, in *United States v. Orito*,[44] the Court held that the government has the power to prevent obscene material from entering the stream of commerce.[45] The Court stated in dicta that the constitutionally protected zone of privacy does not extend beyond the home.[46]

In *12 200-ft. Reels of Film*,[47] moreover, the Court held that Congress may constitutionally proscribe the importation of obscene matter even if that material is for the personal and private use and possession of the importer.[48] Finally, in *Paris Adult Theatre I v. Slaton*,[49] the Court found that for purposes of privacy rights, a commer-

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38 *Id.* at 564 (citing Winters v. New York, 333 U.S. 507, 510 (1948)).

39 *Id.* at 565.

40 It seemed, indeed, that the reasoning in *Stanley* could be extended to allow consenting adults to obtain obscenity. *See* F. SCHAUER, *supra* note 29, at 66.

41 402 U.S. 351 (1971).

42 *See supra* note 27.

43 *Reidel*, 402 U.S. at 356.

44 413 U.S. 139 (1973).

45 *Id.* at 143.

46 *Id.* In this case, Orito was convicted of violating 18 U.S.C. § 1462 for "knowingly transport[ing] and carry[ing] in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier . . . copies of [specified] obscene, lewd, lascivious, and filthy materials." *Id.* at 140. The Supreme Court upheld Orito's conviction. Justice Douglas dissented from the Court's opinion, stating that under *Stanley*, a person reading an obscene book on an airplane or train or carrying an obscene book in his pocket during a journey for his own personal pleasure is subject to prosecution, and that 18 U.S.C. § 1462's ban on such interstate carriage was therefore overbroad. *Id.* at 146 (Douglas, J., dissenting).

47 413 U.S. 123 (1973).

48 *Id.* at 128. The Court stated that to allow the importation of obscene matters for the importer's personal and private use would be like compelling the Government to permit importation of illegal or controlled drugs for private consumption as long as such drugs are not for public distribution or sale. *Id.*

49 413 U.S. 49 (1973).

cial theater cannot be equated with a private home.[50] The Court explained that there is no zone of privacy that follows a consumer of obscenity wherever he goes.[51] The Court held, therefore, that Congress has the power to prohibit obscene movies in commercial theatres.[52] Through these holdings, the Court clearly limited the *Stanley* holding[53] strictly to its facts.

C. INDECENT MATERIALS AND THE PROTECTION OF CHILDREN

Although the Court has deemed obscenity to be unprotected, speech that lacks prurient appeal may be labelled merely "indecent," and therefore worthy of constitutional protection.[54] Nevertheless, the Court has recognized that the protection of indecent material is limited, distinguishing between material that is acceptable for adults and material that is acceptable for children.[55] The concept that identical materials might be acceptable for adults but not acceptable for children was directly acknowledged in *Butler v. Michigan*.[56] In *Butler*, the Supreme Court invalidated a Michigan statute making it an offense to sell, distribute, or otherwise make available to the public a publication "tending to the corruption of the morals of youth."[57] The Court found that because the statute "reduce[d] the adult population of Michigan to reading only what is fit for children,"[58] it was not reasonably restricted to the evil with which it was said to deal.[59] *Butler* therefore introduced the idea that statutes aimed at regulating sexually oriented speech to protect children must be narrowly tailored to that purpose.

The Court explicitly affirmed the protection of minors from "indecent" materials as a compelling state interest in *Ginsberg v. State of New York*.[60] The *Ginsberg* Court upheld a statute prohibiting the sale to minors under seventeen years old of material defined to be

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50 *Id.* at 65.
51 *Id.* at 66.
52 *Id.* at 69.
53 Stanley v. Georgia, 394 U.S. 557 (1969).
54 *See* Roth v. United States, 354 U.S. 476, 485 (1957).
55 *See* FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978).
56 352 U.S. 380 (1957).
57 *Id.* at 381-83.
58 *Id.* at 383.
59 *Id.* In the words of Justice Frankfurter, *Butler* was a case of "burn[ing] the house to roast the pig." *Id.* *Butler* was primarily based on the doctrine of "the least restrictive alternative." This doctrine says that if the state may potentially infringe upon some fundamental right such as freedom of speech, then the valid government interest may be furthered only in the manner which represents the smallest encroachment on the rights involved. F. SCHAUER, *supra* note 29 at 156-57.
60 390 U.S. 629 (1968).

obscene on the basis of its appeal to them regardless of whether it was obscene to adults.[61] In so doing, the Court emphasized the state interest in the well-being of its youth, stating that this interest "justif[ies] the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful."[62] The Court noted that "parents and . . . teachers . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[63] The Court also noted the state's independent interest in the well-being of its youth, to promote their "growth into free and independent well-developed" persons.[64] The Court's decision to uphold the statute prohibiting minors from buying indecent materials was consistent with *Butler*[65] because it did not diminish the rights of adults to buy materials not fit for children.

In *FCC v. Pacifica Found.*,[66] the Court held that the FCC had the power to regulate a radio broadcast that was indecent but not obscene.[67] The Court, in an explicitly narrow holding, found that indecent broadcasting merited special treatment.[68] In *Pacifica*, a father heard an afternoon radio broadcast of George Carlin's monologue entitled "Filthy Words" while he was driving with his young son.[69] The father complained to the FCC.[70] The FCC, in a memorandum opinion, stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints concerning indecent speech on the airwaves.[71] The Commission found:

> the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as mea-

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61 *Id.* at 649-50.

62 *Id.* at 639.

63 *Id.*

64 *Id.* at 640 (citing Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 165 (1944)). Justice Fortas, in his dissent, voiced his discontent with the Court's decision because he felt it "give[s] the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility." *Id.* at 674 (Fortas, J., dissenting).

65 Butler v. Michigan, 352 U.S. 380 (1957).

66 438 U.S. 726 (1978).

67 *Id.* at 738.

68 *Id.*

69 *Id.* at 729-30.

70 *Id.* at 730.

71 56 F.C.C.2d 94 (1975). The FCC found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. § 1464 (1976) (forbidding the use of "any obscene, indecent, or profane language by means of radio communications"); and 47 U.S.C. § 303(g) (requiring the FCC to "encourage the larger and more effective use of radio in the public interest"); *see* FCC v. Pacifica Found., 438 U.S. 726, 731 (1978).

> sured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.[72]

The FCC concluded that because the Carlin monologue was deliberately broadcast "when children were undoubtedly in the audience," the language as broadcast was indecent and prohibited by 18 U.S.C. § 1464.[73]

The Supreme Court upheld the FCC's findings.[74] Stating that "indecency is largely a function of context—it cannot be adequately judged in the abstract,"[75] the Court concluded that the constitutional protection accorded a communication containing patently offensive sexual and excretory language does not have to be identical in every context.[76] The Court went on to find that the unique attributes of broadcasting amply justify special treatment of indecent broadcasting.[77] However, the Court emphasized the narrowness of its holding; it was to be limited to the facts of *Pacifica*. Thus, the *Pacifica* decision was not to be considered precedent for the regulation of indecent speech in other contexts.[78]

III. The Evolution of 47 U.S.C. § 223(b)

The original version of 47 U.S.C. § 223 of the Communications Act of 1934, as passed in 1968, prohibited obscene, lewd, lascivious, filthy or indecent communications by means of the telephone.[79] In 1983, the statute was amended to permit obscene and indecent communications to adults but not to children.[80] The amended statute also required the FCC to promulgate regulations laying out methods by which dial-a-porn services could screen calls from un-

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72 56 F.C.C.2d at 98.

73 *Id.* at 99. In a clarification of its opinion, the FCC issued another opinion in which it stated that it "never intended to place an absolute prohibition on the broadcast of this type of language but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F.C.C.2d 892 (1976).

74 *Pacifica Found.*, 438 U.S. at 751.

75 *Id.* at 742.

76 *Id.* at 747.

77 *Id.* at 748-50. The Court found specifically that 1) the broadcast media has established a uniquely pervasive presence in the lives of all Americans, and 2) broadcasting is uniquely accessible to young children. *Id.*

78 *Id.* at 750.

79 47 U.S.C. § 223(a)(1)(A) (1982).

80 47 U.S.C. § 223(b)(1)(A) (1982). The relevant provision of the 1983 amendment to § 223 made it a crime to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent." *Id.*

derage callers.[81] Under the statute, compliance with such regulations constituted a defense to prosecution.[82]

The FCC, responding to the 1983 amendment, made several attempts to satisfy the requirement of formulating telephone communications regulations. The first set of regulations promulgated by the FCC required "time channeling," a method that placed restrictions on the times of day that dial-a-porn was available.[83] This regulatory scheme was set aside in *Carlin Communications Inc. v. FCC* (*Carlin I*)[84] because the Second Circuit found it to be both overinclusive and underinclusive and therefore not well-tailored to its ends.[85]

On October 22, 1985, the FCC released a second set of regulations which required authorized access codes or payment by credit card.[86] Under the access and identification code requirement, dial-a-porn providers were required to issue personal identification numbers or authorization codes to requesting adult customers.[87] Transmission of dial-a-porn messages would not occur until an authorized access code was communicated by the subscriber to the service provider.[88] Because of economic and technical infeasibility, the FCC rejected a proposal for "exchange blocking," a method which would block or screen telephone numbers at the customer's premises or at the phone company's offices.[89] The Second Circuit set aside this set of regulations, finding that the FCC had failed to consider sufficiently the possibility of exchange blocking.[90]

In 1987, the FCC promulgated a third set of regulations.[91] These regulations added the defense of message scrambling to the

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81 Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829, 2833 (1989); *see also* Second Report and Order, 50 Fed. Reg. 42,699, 42,700 n.11 (1985).

82 *See* Second Report and Order, 50 Fed. Reg. 42,699, 42,700 n.11 (1985).

83 Time channeling required operation of dial-a-porn services only between the hours of 9 p.m. and 8 a.m. eastern time. 47 C.F.R. § 64.201(a) (1983).

84 749 F.2d 113 (2d Cir. 1984).

85 *Id.* at 121. The court did not declare the regulations impermissible. Instead, it held that the record was insufficiently developed to uphold the regulations and that the FCC did not show convincingly that the first set of regulations was chosen after thorough, careful, and comprehensive investigation and analysis. *Id.* at 123.

86 Second Report and Order, 50 Fed. Reg. 42,699, 42,705-06 (1985). Under the second set of regulations, each offeror of dial-a-porn had to develop an identification code system where, before receiving a message, the caller would have to provide an access number or a credit card for identification. *Sable*, 109 S. Ct. at 2834.

87 Second Report and Order, 50 Fed. Reg. 42,699, 42,704-05 (1985).

88 *Id.*

89 *Id.* at 42,702-03. For a detailed description of the types of blocking rejected by the FCC in its Second Report, see Carlin Communications, Inc. v. FCC (*Carlin II*), 787 F.2d 847, 852-55 (2d Cir. 1986).

90 *Carlin II*, 787 F.2d at 855-56.

91 52 Fed. Reg. 17,760 (1987).

earlier defenses of access codes and credit card payment.[92] This defense permitted providers of dial-a-porn to scramble their messages, making them unintelligible unless a descrambler was used.[93] The sale of descramblers was to be limited to adults.[94] After considering exchange blocking, the FCC again rejected it as a possibility at that time.[95] Reviewing the third set of regulations, the Second Circuit held that the regulations were a "feasible and effective way to serve" the compelling state interest in protecting minors.[96] The court then instructed the FCC to reopen proceedings if any less restrictive technology became available.[97]

In April, 1988, Congress amended section 223(b) to completely prohibit all obscene and indecent interstate commercial telephone communications.[98] This ban on dial-a-porn was total, making it illegal for adults as well as children to have access to dial-a-porn.[99] Thus, section 223(b) eliminated the FCC's duty to promulgate regulations for restricting access to minors.[100] This version of section 223(b) was in effect when Sable commenced its action.[101]

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92 *Id.*

93 *Id.* at 17,761.

94 Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829, 2834 (1989).

95 *Id.*; *see* Carlin Communications, Inc. v. FCC (*Carlin III*), 837 F.2d 546, 554 (2d Cir. 1988).

96 *Carlin III*, 837 F.2d at 555.

97 *Id.* at 556.

98 47 U.S.C. § 223(b) (1988). The text of amended § 223(b) is as follows:

(b)(1) Whoever knowingly—

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Id.

99 *Id.*

100 Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829, 2834 (1989).

101 *Id.* The version that was in effect when Sable commenced its action was again amended by § 7524 of the Child Protection and Obscenity Enforcement Act of 1988. The most recent version of 47 U.S.C. § 223(b) states in pertinent part:

(b)(1) Whoever knowingly—

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i), shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly—

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communi-

IV. Factual Background and Procedural History

Sable is a Los Angeles based affiliate of Carlin Communications, Inc.[102] Since 1983, Sable has been offering pre-recorded, sexually oriented messages.[103] To provide this service, Sable uses special telephone lines provided by Pacific Bell.[104] Those who call the message number are charged a fee for their calls.[105] Sable receives part of the revenue from the phone calls and Pacific Bell receives the remainder.[106] Callers outside the Los Angeles area code are also able to hear phone messages by making long distance toll calls to Los Angeles.[107]

In 1988, Sable commenced an action in the federal district court seeking declaratory and injunctive relief against enforcement of the recently amended section 223(b).[108] First, Sable wished to enjoin any criminal investigation or prosecution, civil action, or administrative proceeding under the statute.[109] Second, Sable challenged the provisions of the statute prohibiting all obscene and indecent phone messages as unconstitutional under the first and fourteenth amendments to the United States Constitution.[110]

The district court, rejecting Sable's argument that the statute was unconstitutional because it created a national standard of obscenity, denied Sable's request for a preliminary injunction against enforcement of section 223(b)'s prohibition of obscene phone messages.[111] The district court then held, however, that the provi-

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cation for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for any activity prohibited by clause (i), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

47 U.S.C. § 223(b) (1988).

Furthermore, § 223(b) in its final form is enforceable only through criminal proceedings and not through the FCC's administrative proceedings. *Sable*, 109 S. Ct. at 2834, n.5.

102 *Sable*, 109 S. Ct. at 2832.

103 *Id.* The amended version of § 223(b) was passed in 1983, legalizing dial-a-porn; *see supra* notes 80-82.

104 *Id.* A typical prerecorded message may be called by up to 50,000 people hourly through a single telephone number. Comment, *Telephones, Sex, and the First Amendment*, 33 UCLA L. Rev. 1221, 1223 (1986).

105 *Sable*, 109 S. Ct. at 2832.

106 *Id.*

107 *Id.* Sable does not receive revenues from out of state calls, however. Brief of Appellant at 38, Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829 (1989) (Nos. 88-515, 88-525).

108 *Sable*, 109 S. Ct. at 2632.

109 *Id.*

110 *Id.*

111 Sable Communications of Cal., Inc. v. FCC, 692 F. Supp. 1208, 1209 (C.D. Cal. 1988).

sion banning "indecent speech" was unconstitutionally overbroad because it was not narrowly drawn to achieve the government's legitimate interest in protecting children from indecent dial-a-porn messages.[112] The district court therefore issued a preliminary injunction prohibiting the enforcement of section 223(b) with respect to allegedly "indecent communications."[113]

Sable appealed the obscenity ruling, and the FCC cross appealed the ruling on indecent telephone communications.[114] The Supreme Court noted probable jurisdiction on both the appeal and the cross appeal.[115]

V. SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

In *Sable*, the Supreme Court affirmed the district court's holding that 1) section 223(b) is constitutional with respect to its ban of all obscene telephone communications,[116] and 2) that section 223(b)'s ban of all telephone communications alleged to be indecent is unconstitutional.[117] Justice White delivered the majority opinion.[118]

1. The Obscenity Holding

Justice White began by stating that the Court's duty was to determine "whether Congress is empowered to prohibit transmission of obscene telephonic communications,"[119] not to decide what is

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112 *Id.*

113 *Id.*

114 *Sable*, 109 S. Ct. at 2832.

115 *Id.* Sable Communications appealed the district court ruling to the Court of Appeals for the Ninth Circuit and concurrently filed an emergency motion for an injunction pending appeal. The district court entered an order temporarily enjoining the FCC from enforcing the statute during pendency of the appeal. After the government filed its notice of appeal to the Supreme Court from the district court's grant of the preliminary injunction as to "indecent" communications, the Court of Appeals for the Ninth Circuit entered an order directing Sable Communications either to file a motion for voluntary dismissal or to show cause why the appeal should not be dismissed for lack of jurisdiction. Sable Communications filed an ex parte application to the Supreme Court for an injunction pending appeal. The court of appeals entered an order dismissing the appeal since the filing of a direct appeal by the FCC had the effect of transferring Sable Communications' appeal to the Supreme Court of the United States. *Id.* at 2832-33, n.2.

116 *Id.* at 2835. *See supra* note 98 for the text of § 223(b).

117 *Sable*, 109 S. Ct. at 2836.

118 Justice White was joined by Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, and Kennedy. Justices Brennan, Marshall, and Stevens joined in Parts I, II, and IV of the opinion. Justice Scalia filed a concurring opinion. Justice Brennan filed an opinion concurring in parts I, II, and IV and dissenting in Part III, in which Justices Marshall and Stevens joined.

119 *Sable*, 109 S. Ct. at 2835.

obscene or indecent.[120]

The majority emphasized that the protection of the first amendment does not extend to obscene speech.[121] Justice White then went on to reject Sable's argument that the obscenity provision was unconstitutional because it created a national standard for obscenity, thus placing message senders in a "double bind" by forcing them either to conform their messages to the standards of the least tolerant community or go out of business.[122]

In rejecting Sable's "national standard" argument, the majority examined the Court's prior decisions regarding federal statutes which prohibit the distribution of obscene materials.[123] Using *Reidel*[124] as a starting point, the Court embarked on an analysis of whether section 223(b) establishes a "national standard" of obscenity, thus contravening the "contemporary community standards" requirement of *Miller*.[125] The Court referred to its decision in *12 200-ft. Reels of Film*[126] to support the proposition that the *Miller* formulation of "contemporary community standards" applies to federal legislation.[127] Justice White added that " 'the fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.' "[128]

On the basis of *12 200-ft. Reels of Film*,[129] the majority held that

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120 *Id.*

121 *Id.* This principle has been firmly established by the Court in prior cases. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973); Miller v. California, 413 U.S. 15, 20 (1973).

122 *Sable*, 109 S. Ct. at 2835. In its brief, Sable discusses the unfairness of requiring citizens of areas such as Las Vegas or New York City to conform to the standards of Maine or Mississippi. Brief of Appellant at 45, *Sable* (Nos. 88-515, 88-525) (citing *Miller*, 413 U.S. at 32).

123 *Sable*, 109 S. Ct. at 2835.

124 United States v. Reidel, 402 U.S. 354 (1971). *See supra*, notes 41-43 and accompanying text for a discussion of *Reidel*.

125 *Sable*, 109 S. Ct. at 2835 (citing *Miller*, 413 U.S. at 24). *Miller* set forth three criteria for determining whether materials are obscene. *See supra* note 20 for these criteria.

126 United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973). *See supra* notes 23-25 and accompanying text for discussion of *12 200-ft. Reels of Film*.

127 *Sable*, 109 S. Ct. at 2835 (citing *12 200-ft. Reels of Film*, 413 U.S. at 130).

128 109 S. Ct. at 2835-36 (quoting Hamling v. United States, 418 U.S. 87, 106 (1974)). In *Hamling*, the petitioners were convicted of mailing and conspiring to mail an obscene advertising brochure in violation of 18 U.S.C. § 1461, which provided in pertinent part that "[w]hoever knowingly uses the mails for the mailing of . . . anything declared by this section to be nonmailable . . ." commits a crime. *Hamling*, 418 U.S. at 98, n.8. The *Hamling* Court found that 18 U.S.C. § 1461 did not contravene the *Miller* standard. *Id.*

129 413 U.S. at 123.

"section 223(b) no more establishes a 'national standard of obscenity' than do federal statutes prohibiting the mailing of obscene materials."[130] Responding to Sable's argument that it is unfair to make Sable conform its messages to satisfy the least tolerant community, Justice White added that although Sable might incur costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a company electing to provide such services.[131]

2. *The Indecency Holding*

In the final section of its opinion, the Court held that section 223(b) was not narrowly tailored to serve the legitimate government interest of protecting children from exposure to indecent telephone messages.[132] After reiterating the generally recognized principle that the government may regulate constitutionally protected speech in order to promote a compelling interest so long as it chooses the least restrictive means of promoting that interest,[133] Justice White identified the government's compelling interest as the protection of "the physical and psychological well-being of minors."[134] This interest, stated Justice White, was sufficient to justify protecting minors from the influence of materials that would not be obscene by adult standards.[135] He emphasized, however, the *Butler* Court's holding that a statute which made it an offense to make available to the general public materials found to have a potentially harmful effect on minors was insufficiently tailored since it limited the adult population to only those materials fit for children.[136]

The majority's task in *Sable* was to determine whether the route chosen by Congress to promote its compelling interest of preventing minors' exposure to dial-a-porn, namely section 223(b)'s blanket prohibition on all indecent telephone communications, was a

130 *Sable*, 109 S. Ct. at 2835 (quoting Miller v. California, 413 U.S. 15, 31 (1973)).

131 109 S. Ct. at 2836. The Court also stated that "if Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.*

132 *Id.*

133 *Id.* (citing Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786, (1978); Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976)).

134 *Sable*, 109 S. Ct. at 2836 (1989).

135 *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968) (Court upheld statute banning sale to minors of material defined to be obscene to children regardless of whether materials obscene to adults)).

136 *Sable*, 109 S. Ct. at 2836 (citing *Butler*, 352 U.S. at 380).

narrowly tailored effort to serve that interest.[137] In deciding that section 223(b) was not narrowly tailored to achieve the goal of protecting children from the effects of dial-a-porn,[138] the Court first distinguished *Sable* from *Pacifica*,[139] the case relied on by the FCC to justify section 223(b)'s complete ban on indecent commercial telephone communications.[140] This distinction was made on two grounds. First, Justice White noted that the FCC rule at issue in *Pacifica* did not place an absolute ban on the broadcast of all "dirty" words, but instead sought to " 'channel it to times of day when children most likely would not be exposed to it.' "[141]

Second, the majority noted substantial differences between the broadcast media involved in *Pacifica* and the telephone communications involved in *Sable*.[142] Justice White pointed out that in *Pacifica*, the Court relied on the special characteristics of broadcasting.[143] Justice White then stated that in contrast to the public radio broadcast at issue in *Pacifica*, the dial-a-porn medium requires the listener to take affirmative steps to receive the communication.[144] "There is no 'captive audience' problem here," he stated, because "callers will generally not be unwilling listeners."[145] Justice White then emphasized the narrowness of the *Pacifica* holding,[146] reiterating that the government may not reduce the adult population to doing only what is fit for children.[147]

After rejecting the FCC's arguments derived from *Pacifica*, the majority addressed the FCC's argument that the total ban on indecent telephone communications was justified because nothing less could prevent minors from listening to the messages.[148] The Court

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137 *Id.*

138 *Id.*

139 FCC v. Pacifica Found., 438 U.S. 726 (1978); *see supra* notes 66-78 and accompanying text.

140 *Sable*, 109 S. Ct. at 2836-37.

141 *Id.* at 2837 (quoting *Pacifica*, 438 U.S. at 733). Although the statute at issue in *Pacifica*, 18 U.S.C. § 1464 (1976), provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined no more than $10,000 or imprisoned not more than two years, or both," the *Pacifica* Court also looked to 47 U.S.C. § 303(g), requiring the FCC to "encourage the larger and more effective use of radio in the public interest." *Pacifica*, 438 U.S. at 731, 731 n.3. The Court interpreted these two statutes as an attempt to channel behavior, not to prohibit it. *Id.*

142 *Sable*, 109 S. Ct. at 2837.

143 *Id.* (citing *Pacifica*, 438 U.S. at 748-49); *see supra* note 77 and accompanying text.

144 *Sable*, 109 S. Ct. at 2837.

145 *Id.* Justice White underscored this point by stating that "a message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.*

146 *Id.*

147 *Id.* (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

148 *Sable*, 109 S. Ct. at 2837.

recalled that in *Carlin Communications* (*Carlin III*),[149] the Second Circuit concluded that the regulations promulgated by the FCC were a "feasible and effective" way to serve the government interest of preventing minors from gaining access to dial-a-porn.[150] Expressing his unwillingness to defer to Congress' decisions concerning first amendment rights,[151] Justice White observed that the congressional record contained no legitimate findings to justify a conclusion that a total ban was the least restrictive means to achieve the government's goal.[152] Moreover, he stated that the Congressional Record contained no evidence as to the effectiveness of the FCC's third set of regulations.[153] Justice White explained that "for all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages."[154] He concluded the Court's opinion by reiterating that section 223(b)'s denial of adult access to indecent, but not obscene, telephone messages was a clear case of " 'burning up the house to roast the pig,' " and therefore could not survive constitutional scrutiny.[155]

B. JUSTICE SCALIA'S CONCURRING OPINION

Justice Scalia joined the Court's opinion,[156] but was dubious about the assumptions underlying the reasoning used by the majority to find section 223(b)'s ban of indecent speech unconstitutional.[157] Specifically, Justice Scalia questioned the reasoning through which the Court concluded that section 223(b) was not narrowly tailored to serve the government's goal of protecting children from dial-a-porn.[158]

Justice Scalia first referred to Justice White's statement con-

149 Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988).

150 *Sable*, 109 S. Ct. at 2837 (quoting *Carlin III*, 837 F.2d at 555). The FCC regulations approved by the Second Circuit were credit card payment, access codes, and message scrambling. *Id.*; *see supra* notes 91-97.

151 *Sable*, 109 S. Ct. at 2838 (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) (deference to a legislative finding does not limit judicial inquiry when first amendment rights at stake)).

152 *Sable*, 109 S. Ct. at 2838.

153 *Id.*

154 *Id.*

155 *Id.* at 2839 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

156 *Id.* at 2839 (Scalia, J., concurring).

157 *Id.* (Scalia, J., concurring).

158 *Id.* (Scalia, J., concurring).

cerning the effectiveness of the FCC's third set of regulations.[159] The flaw in the majority's reasoning, noted Justice Scalia, was that it could just as easily have come to the conclusion that section 223(b) was narrowly tailored to fit the government's purpose.[160] Justice Scalia hypothesized that the majority would have reached this alternative conclusion had it instead stated that "we know . . . that the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be inadequate, since some enterprising and disobedient young people will manage to secure access to such messages . . . ."[161]

Nonetheless, Justice Scalia joined the Court's opinion because of his belief that a ban on adult access to indecent telephone communications could not be adopted "merely because the FCC's alternate [third] proposal could be circumvented by as few children as the evidence suggests."[162] He emphasized the value judgments involved in *Sable*: how few children render the risk unacceptable depends in part upon what the categories of indecency and obscenity include.[163] Finally, he observed that as the meaning of "obscene" becomes narrower so that more pornographic materials are deemed indecent, "the more reasonable it becomes to insist upon greater assurance of insulation from minors."[164]

C. JUSTICE BRENNAN'S DISSENT IN THE OBSCENITY RULING

While agreeing with the Court's decision to strike down section 223(b)'s ban of indecent speech, Justice Brennan criticized the Court for upholding section 223(b)'s ban of obscene telephone communications.[165] According to Justice Brennan, section 223(b)'s complete criminal ban of obscene commercial telephone messages is " 'unconstitutionally overbroad, and therefore invalid on its face' " as a means for achieving the government's goal of protecting children from pornography.[166]

Justice Brennan argued that the majority should have used the

159 *Id.* (Scalia, J., concurring). *See supra* note 154 and accompanying text for Justice White's statement.

160 *Sable*, 109 S. Ct. at 2839 (Scalia, J., concurring).

161 *Id.* (Scalia, J., concurring).

162 *Id.* (Scalia, J., concurring).

163 *Id.* (Scalia, J., concurring).

164 *Id.* (Scalia, J., concurring). Justice Scalia went on to discuss the blurriness of the line between "obscene" and "indecent." He predicted that not all sexual activity portrayed over the phone lines would fall outside of the obscenity portion of the statute. *Id.*

165 *Id.* at 2840 (Brennan, J., concurring in part and dissenting in part). Justice Brennan was joined by Justices Marshall and Stevens.

166 *Id.* (Brennan, J., concurring in part and dissenting in part) (quoting Miller v. California, 413 U.S. 15, 47 (1973) (Brennan, J., dissenting)).

same standard to judge both the obscenity and the indecency provisions of section 223(b).[167] In his opinion, only a compelling state interest can justify the prohibition of speech, whether it is obscene or indecent.[168] Justice Brennan emphasized that the prohibition of the transmission of all obscene messages is "unduly heavy handed" because the third set of regulations promulgated by the FCC was found to be an effective way to serve the government's interest in safeguarding children.[169]

Justice Brennan concluded his brief opinion by chastizing the majority for its decision upholding the ban on obscenity. This ban, he noted, was a completely unwarranted, "draconian restriction on the first amendment rights of adults who seek to hear the messages that Sable and others provide."[170]

VI. ANALYSIS

A. THE INDECENCY HOLDING

The *Sable* Court's holding that section 223(b)'s[171] ban on indecent speech was unconstitutional[172] is, on the whole, a victory for the first amendment. First, it reinforces the *Butler* Court's holding that Congress cannot limit adults to seeing, hearing, or doing only that which is appropriate for children.[173] That reinforcement, however, is undercut by the Court's refusal to frame the issue in terms of the right of parents to control the education and upbringing of their children. Second, by refusing to extend the *Pacifica* Court's holding to *Sable*, the Court has indicated a laudable unwillingness to create intermediate categories of protected speech, thereby reaffirming the right of ordinary citizens to judge the value of protected speech for themselves.[174]

The issue of whether section 223(b)'s ban of indecent commercial telephone communications is constitutional necessarily reflects a tension between three interests: 1) the government's compelling interest in protecting children from indecent materials; 2) the rights of adults to have access to materials that are inappropriate for children but not obscene; and 3) the right of parents to decide whether

167 *Id.* (Brennan, J., concurring in part and dissenting in part).
168 *Id.* (Brennan, J., concurring in part and dissenting in part).
169 *Id.* (Brennan, J., concurring in part and dissenting in part).
170 *Id.* at 2841 (Brennan, J., concurring in part and dissenting in part).
171 *See supra* note 27 for the text of the statute.
172 *Sable*, 109 S. Ct. at 2839.
173 Butler v. Michigan, 352 U.S. 380 (1957); *see supra* notes 58-59.
174 FCC v. Pacifica Found., 438 U.S. 726 (1978); *see supra* notes 66-78 and accompanying text.

their children are exposed to such materials.[175] The Court correctly reached the conclusion in *Sable* that adults cannot be limited to hearing only that which is appropriate for the ears of children, thus reaffirming *Butler*.[176] However, the Court wrongly ignored the third interest, that of parents, in reaching its decision.[177]

The primary role of parents in the upbringing of their children has been established beyond debate as an enduring American tradition.[178] In *Pierce v. Society of Sisters*,[179] the Court observed that "[a] child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[180] The Court later defined these "additional obligations" to include "the inculcation of moral standards, religious beliefs, and elements of good citizenship."[181]

The importance of parental responsibility has been particularly noted in the area of obscenity law. In *Ginsberg*,[182] the Court emphasized that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[183] Similarly, in *Pacifica*, the Court's goal in restricting hours during which indecent programs could be broadcast was to

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175 *See* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (examining competing interests in the broadcast context). In its brief, Sable focused on the third interest—that of parents to decide what is and is not appropriate for their children. According to Sable, the government's interest is to aid parents in bringing up their children, rather than an independent interest in the development of America's youth. Brief of Appellant at 22, Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829 (1989) (Nos. 88-515, 88-525).

176 Butler v. Michigan, 352 U.S. 380 (1957). Although *Sable* reaffirms *Butler*, the Court was not willing to apply the *Butler* Court's holding unconditionally to *Sable*. The Court created an implicit caveat to its affirmation of *Butler*, basing its decision that § 223(b) was not narrowly tailored to serve the government's interest on the findings of the Second Circuit that the FCC's third set of regulations was a "feasible and effective" way to serve the government's interest in protecting children from dial-a-porn. *See supra* note 96 and accompanying text. Thus, should the third set of regulations prove not to be "feasible and effective," the Court might find that a ban on indecent telephone communications is indeed the least restrictive means of serving the government's purpose. *But see* Fabulous Assocs. v. Pennsylvania Pub. Util. Co., 693 F. Supp. 332 (E.D. Pa. 1988) (new technology makes blocking of dial-a-porn numbers possible) (supports the proposition that other screening methods must be considered before a blanket ban is effected).

177 *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980) [hereinafter *Developments*].

178 Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

179 268 U.S. 510 (1925).

180 *Id.* at 535.

181 *Yoder*, 406 U.S. at 233.

182 Ginsberg v. State of New York, 390 U.S. 629 (1968). See *supra* notes 60-65 and accompanying text for discussion of *Ginsberg*.

183 *Ginsberg*, 390 U.S. at 639.

aid parents in supervising their children.[184]

The fundamental role of parents in making choices for their children and in deciding how to raise them should not become suddenly irrelevant when the medium at issue is the telephone instead of broadcasting or print. Because they are received in the home, dial-a-porn messages are more subject to parental control than, for example, pornographic magazines that children look at on a school playground during recess. Thus, parents can make educated judgments, based on the stage of development of their children, about whether their children should or should not be permitted to hear dial-a-porn messages. This important right of parents should not be usurped by the government.[185]

Because the responsibility for controlling children lies with parents, it is the individual responsibility of parents who believe that certain material is inappropriate for their children to take steps to prevent their children from gaining access to it.[186] If parents are unwilling to do so, the inference may be drawn that the parents are not overly concerned with the issue. If parents do not suppress or willingly receive dial-a-porn, the government should not have the right to undermine the parents' decision.[187]

By not considering this argument as part of its rationale for declaring section 223(b)'s ban on indecent communications unconstitutional, the Court overemphasized the independent interest of the state in the welfare of America's youth. The Court's decision in essence violates the principles of *Yoder*[188] by taking the job of instilling morality in children out of the hands of parents and putting it into the hands of the state. Thus, the *Sable* Court's reasoning comes dan-

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184 *Id.* at 750. The Court stated:

> We held in *Ginsberg* . . . that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. . . . The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment for indecent broadcasting.

Id.

185 One commentator has noted that:

> Unlike parental authority . . . the state's authority is not supported by such rationales as the bonds of love and kinship in a parent-child relationship, parental knowledge of a particular child's needs, and society's interest in pluralism. Accordingly, the state should be entitled to less authority over a child's free speech activities than the child's parent.

Cleary, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-a-Porn*, 22 HARV. J. ON LEGIS. 503, 526 (1985).

186 *Developments*, *supra* note 177, at 1201.

187 In Erzoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975), the Court held that the state may not curtail first amendment rights "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.*

188 Wisconsin v. Yoder, 406 U.S. 205, 213-215 (1972); *see supra* notes 178-181.

gerously close to suggesting that parents do not make the ultimate decisions about what their children may and may not do.

The Court instead should have emphasized that the government's proper interest is in helping parents to control their children's access to dial-a-porn.[189] The government can best exercise its interest by finding a "feasible and effective" way to protect minors from exposure to sexually-oriented material.[190] Placing an emphasis on the government's role of aiding parents would demonstrate the recognition of and respect for the responsibility of parents for the upbringing of their children by maintaining parents' rights to make ultimate decisions about what their children may do. At the same time, such emphasis would not reduce adult access to protected speech. Therefore, had the Court paid more attention to the parent's right to raise his or her child, it would have simultaneously served the interests of parents, adults, and the government.

Although the Court erred in ignoring the fundamental interest of parents in raising their children, it correctly declined to extend the reasoning which the *Pacifica* Court used to uphold a partial ban of indecent broadcasting[191] to the complete ban of indecent telephone communications at issue in *Sable*. The Court thus reaffirmed a two-tiered, definitional approach to obscenity law, rejecting a variable approach in which the Court freely creates intermediate categories of protected speech.[192]

A strictly definitional approach involves two categories of materials: obscene materials, which are not protected by the first amendment;[193] and non-obscene materials, which require first amendment protection.[194] Using a variable obscenity approach, the materials in question are evaluated by looking to the context of their distribution and the state's interest in the particular form of regulation.[195]

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189 *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1343 (D.C. Cir. 1988). The FCC's general counsel conceded at oral argument that the FCC did "not propose to act in loco parentis and to deny children's access contrary to parents' wishes." *Id.* The Court therefore concluded that the government's interest in protecting children from indecent material merged with the interest of parents to decide whether their children are exposed to such material. The government's role, therefore, was to "facilitate parental supervision of children's listening." *Id.*

190 *See* Comment, *supra* note 104, at 1241. Here, the author hypothesized that exchange blocking would be a feasible and effective way to limit children's access to dial-a-porn and would at the same time serve all three interests. *Id.*

191 FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

192 *See* Schauer, *The Return of Variable Obscenity*, 28 HAST. L.J. 1275 (1977).

193 Roth v. United States, 354 U.S. 476, 485 (1957).

194 *Id.*

195 Schauer, *supra* note 192, at 1277-79.

The definitional/variable model applies to cases involving the prohibition of sexually explicit but non-obscene materials.[196] Under a definitional theory, such indecent speech is protected by the first amendment simply because it is not obscene.[197] Under a variable approach, however, indecent speech is evaluated by the government on the basis of context of distribution and state's interest, a far more subjective standard.[198] The result is that intermediate categories of protected speech are created.

The Court addressed the concept of intermediate categories of protected speech in *Pacifica*.[199] There, Justice Stevens, writing for the majority, hypothesized that because dirty words offend people for the same reasons that obscenity does, dirty words do not merit first amendment protection.[200] He then stated:

> In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's [regulation] was constitutionally permissible.[201]

Justice Powell, in his concurring opinion in *Pacifica*, argued that the majority could not justify its creation of an intermediate standard for judging speech.[202] He criticized the majority for subscribing to the theory that Supreme Court justices are free to decide the value of speech protected by the first amendment on the basis of its content.[203] Justice Powell emphasized that the judgment of how much value a given type of speech has is a "judgment for each person to make, not one for the judges to impose upon him."[204]

Like Justice Powell, the majority in *Sable* declined to engage in a further content discrimination by relegating sexually-oriented messages "to a less robust form of judicial protection than that reserved for what the government deems to be more worthy subjects of conversation."[205] Section 223(b)'s ban on indecency outlawed commercial telephonic communication that "arouses normal sexual

196 Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding zoning restrictions on sexually explicit materials which were not definitionally obscene).

197 *Roth*, 354 U.S. at 485.

198 Schauer, *supra* note 192, at 1277-79.

199 FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

200 *Id.* at 746.

201 *Id.* at 747-48.

202 *Id.* at 761 (Powell, J., concurring).

203 *Id.* (Powell, J., concurring).

204 *Id.* at 761 (Powell, J., concurring).

205 *See* Brief of Appellant at 18, Sable Communications of Cal., Inc. v. FCC, 109 S. Ct. 2829 (1989) (Nos. 88-515, 88-525).

responses" in ordinary adults.[206] It is this sort of expression that enjoys first amendment protection.[207]

In refusing to uphold section 223(b)'s ban of merely "indecent" telephone conversations, the Court laudably chose not to implement a rule which would lead to speculation about the spot that any particular kind of speech would occupy in the hierarchy of first amendment values. By emphatically stating that sexual expression which is merely indecent is protected by the first amendment, and that the government may regulate the content of such speech to promote a compelling interest only if it chooses the least restrictive means to do so,[208] the Court showed a clear conviction that sexually explicit but not obscene speech should be held to the same strict scrutiny standard as any other form of protected speech. Thus, the Court took a definitional approach and did not embark on the slippery slope of declaring certain types of protected speech to be of lower value than others.[209] In sum, the Court's decision in *Sable* acts as a safeguard to first amendment rights because the Court refuses to leave decisions about which forms of protected speech have more or less value to the whims of judges.

2. *The Obscenity Holding*

The Court's holding that section 223(b)'s ban on obscene telephone communications is constitutional[210] does little to change or clarify the law of obscenity. In *Sable*, the Court did not deviate from the premise, first enunciated in *Roth*,[211] that obscenity is not protected by the first amendment.[212] The Court's holding is problematic because the Court did not devote due attention to the reality that dial-a-porn companies are subject to a national standard for obscenity if they want to stay in business.[213]

The Court's decision concerning obscenity seems difficult to justify in light of the *Miller* Court's "contemporary community stan-

206 *See id.* (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985) (definition of "prurient" as including "lust" was unconstitutionally overbroad in that it reached constitutionally protected materials that merely stimulated normal sexual responses)); *see also Pacifica*, 438 U.S. at 739 (indecent defined as "patently offensive references to excretory and sexual organs and activities").

207 *See* Brief of Appellant at 18, *Sable* (Nos. 88-515, 88-525).

208 *Sable*, 109 S. Ct. at 2836.

209 *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 295-96 (1981).

210 *Sable*, 109 S. Ct. at 2835.

211 Roth v. United States, 354 U.S. 476, 485 (1957); *see supra* note 12 and accompanying text.

212 *Sable*, 109 S. Ct. at 2835.

213 *Id.*

dards" requirement.[214] The *Miller* Court, in adopting "contemporary community standards" as the standard by which obscenity is to be judged, rejected the concept of a "national standard" of obscenity.[215] In *Sable*, the Court paid little heed to Sable's argument that dial-a-porn requires a different rule because of the inherently national character of the interstate telephone network. Dial-a-porn companies operate by sending out thousands of pre-recorded messages at a time to persons who dial a special phone number.[216] Because these calls can be made locally or long distance,[217] dial-a-porn services have little control over the final destination of their outgoing messages. Moreover, such companies can be prosecuted for violating the obscenity laws in any number of geographical areas.[218]

Because neither *Miller* nor prior obscenity decisions involved such an inherently national medium, the Court erred in cursorily analogizing *Sable* to *Hamling*[219] and *Reidel*[220] and in automatically applying the *Miller* Court's "contemporary community standards" requirement to *Sable*.[221] The federal mail system differs from the interstate telephone system used by dial-a-porn providers in that a mailed item must have an easily ascertainable destination.[222] Thus, before sending sexually explicit materials to a customer, the distributor knows where the package is going and has an opportunity to make sure that the enclosed materials are not obscene by that region's standards. Conversely, dial-a-porn companies, because of the nature of their business, are not aware of the destination of each message. Moreover, in declining to discuss Sable's plea that the telephone companies be required to block service to the least tolerant communities,[223] the Court placed the responsibility of geographical

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214 Miller v. California, 413 U.S. 15 (1973); *see supra* notes 19-22 and accompanying text.

215 *Miller*, 413 U.S. at 30.

216 *Sable*, 109 S. Ct. at 2832.

217 *Id.* Of the calls to Carlin Communications, Sable's New York affiliate, in 1983 and 1984, 80% were local and 20% long distance. Carlin Communications, Inc. v. FCC, 749 F.2d 113, 115 (2d Cir. 1984) (*Carlin I*).

218 *Sable*, 109 S. Ct. at 2835.

219 Hamling v. United States, 418 U.S. 87 (1974); *see supra* note 29.

220 United States v. Reidel, 402 U.S. 351 (1971); *see supra* note 43.

221 *Sable*, 109 S. Ct. at 2835-36.

222 *See* F. SCHAUER, *supra* note 29, at 129.

223 *Sable*, 109 S. Ct. at 2835. Sable's main argument against the obscenity ban was that it placed dial-a-porn providers in a double bind. Sable stated:

> Its inability to play adult messages to consenting callers from areas where those messages are not obscene, for fear of later being prosecuted based on calls placed from other, less tolerant communities, has obviously been created by Congress' re-

screening entirely upon dial-a-porn providers.[224]

The effect of the Court's decision is that unless Sable and other dial-a-porn providers can develop a system for screening the locale of incoming calls, they will, to stay in business, either tailor all of their messages to the least tolerant communities or risk prosecution.[225] Neither of the options with which dial-a-porn companies are left seems viable. The great number of calls that dial-a-porn companies receive renders impracticable the use of operators to screen geographical locations.[226] In order to develop a system that can screen the locale of incoming calls, dial-a-porn companies may need the cooperation of the phone companies.[227] If the phone companies will not cooperate, dial-a-porn companies may indeed be in a "double bind."[228]

The Court's decision that dial-a-porn providers are wholly responsible for developing methods of geographical screening reflects a stalemate between the promotion of the capitalistic principle that businesses should be able to exist where there is a market, and the concept that the burden of geographical screening should not be placed on phone companies, a burden that would force the phone companies to rescue dial-a-porn companies from prosecution. Thus, the Court's decision seems to be a judgment that although Sable has a right to engage in the dial-a-porn business, the phone company has a right not to condone that business.[229]

However, in focusing on Sable's duty to find a "means for pro-

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fusal to follow its constitutional obligation to regulate speech only in the least restrictive manner.

Brief of Appellant at 39, *Sable* (Nos. 88-515, 88-525).

224 *Sable*, 109 S. Ct. at 2836.

225 *Id.* at 2836.

226 *See* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 49 Fed. Reg. 24,996, 25,000 (1984) (FCC rejected scheme to screen child callers by requiring intervention by live operators who would obtain access or identification codes from all callers because this scheme "would place substantial economic and administrative burdens on the recorded service provider.").

227 Brief of Appellants at 37-38, *Sable* (Nos. 88-515, 88-525).

228 *Id.* at 40.

> It is as though the Government said: "we will not enjoin (or induce the phone company to suppress) your protected speech, but we will compel you either to suppress it yourself or accompany it—unless you convince your local phone company to change its policy—with speech in which you do not wish to engage, which you know to be unprotected, and for which you will be federally prosecuted."

Id.

229 Justice Scalia, in his concurring opinion, commented that "while we hold the Constitution prevents Congress from banning indecent speech in this fashion. we do not hold that the Constitution requires public utilities to carry it." *Sable*, 109 S. Ct. at 2840 (Scalia, J., concurring); *see also*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (heavily regulated public utility with a partial monopoly did not have to accord "due process" when terminating electricity).

viding messages compatible with community standards,"[230] the Court avoided addressing the application of the *Miller* Court's "contemporary community standards" requirement[231] to new communications methods that are national in nature and whose target destinations may not be easily ascertained. Instead of dogmatically adhering to prior decisions concerning other media, the Court should have used a fairness analysis. An analysis of this sort would attempt to create a rule that would, to the greatest extent possible, allow the dial-a-porn provider to make an intelligent decision whether or not to incur the risk of transmitting its messages.[232] Fairness is especially demanded because of the importance of first amendment rights and the severity of section 223(b)'s criminal punishment.[233] Thus, "[the] solicitude for certainty and predictability" should apply with greater force when dealing with section 223(b).[234]

Using such a framework, one possible solution would be to judge the obscenity of materials at the point of distribution, rather than by the standards of the destination community.[235] A second possibility would be to set a threshold percentage of calls which must come from a particular area before a prosecution using the obscenity standards of that area could take place. This system would be much fairer to dial-a-porn companies whose business is primarily local.[236] Both solutions would promote certainty and prevent a problem that concerns dial-a-porn providers: that prosecutors will travel to a less tolerant area, place a call to a dial-a-porn service located in a more tolerant area, and then prosecute the provider for a section 223(b) violation using the standards of the less tolerant community.[237] Furthermore, both solutions would be most likely to eliminate "hard-core" pornography and preserve the less "hard-core" for those who wish to hear it.

These solutions do not undermine the basic policies underlying state regulation of obscenity, including "the interest of the public in

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230 *Sable*, 109 S. Ct. at 2836.

231 Miller v. California, 413 U.S. 15, 24 (1973); *see supra* notes 19-22 and accompanying text.

232 *See* Waples & White, *Choice of Community Standards in Federal Obscenity Proceedings: The Role of the Constitution and the Common Law*, 64 VA. L. REV. 399, 439 (1978).

233 *Id.* at 441.

234 *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 40-41 (1976); Smith v. Goguen, 415 U.S. 566, 573 (1974); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 86-88 (1973) (Brennan, J., dissenting); Smith v. California, 361 U.S. 147, 151 (1959)).

235 Congress has provided that a federal offense can be prosecuted in any district in which it was begun, continued, or completed. 18 U.S.C. § 3237 (1984).

236 *See supra* note 219.

237 Brief of Appellant at 38, Sable Communications v. FCC, 109 S. Ct. 2829 (1989) (Nos. 88-515, 88-525).

the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[238] Whereas children might find dial-a-porn naughtily enticing, adults are assumed to be capable of making rational and mature decisions about how to live their lives; if they do not want to hear a sexually explicit telephone message, they will not dial one. Thus, there is no chance of dial-a-porn messages accosting the ears of unwilling adults. The mere fact that it is possible for someone to access dial-a-porn from a community that is not tolerant of such messages does not imply that the community's moral environment will be corrupted or the public safety threatened.

Moreover, such solutions would have value as precedent for later cases involving new, high technology developments of national scope. After *Sable*, however, it remains an open question whether a new standard will be developed to define obscenity where the speech involved is, as in *Sable*, necessarily available throughout the nation.

VII. Conclusion

In *Sable*, the United States Supreme Court, in a two pronged decision, determined the constitutionality of 47 U.S.C. § 223(b)'s prohibition of obscene and indecent telephone communications. The Court's holding that the indecency prohibition violated the first amendment is a victory for the first amendment insofar as it reaffirms the rights of adults to see, hear, and do that which may be inappropriate for children. In coming to this conclusion, however, the Court failed to apply the correct balancing test, ignoring the interest of parents in the control and upbringing of their children. Even so, the Court then laudably applied a definitional approach to section 223(b)'s indecency ban, declining to create intermediate categories of protected speech. The Court's decision therefore acts as a safeguard of the right of ordinary citizens to decide what value any particular type of protected speech has.

The Court's decision to uphold section 223(b)'s obscenity ban demonstrates the problems involved with the application of current obscenity law in an era of an ever-increasing number of technological developments in the area of communications. Until recently, the law of obscenity has been primarily directed at modes of communication whose target destinations are easily ascertainable; with the advent of dial-a-porn services in the early 1980s, courts were faced with the task of applying obscenity law to an inherently national me-

238 *Paris Adult Theatre I*, 413 U.S. at 58.

dium. The Court's decision in *Sable* fails to achieve this task. In avoiding this important issue, the Court arrived at a conclusion which, in effect, imposes a national standard of obscenity upon dial-a-porn providers. This standard is likely to put dial-a-porn providers in the "double bind" of either tailoring their messages to the least tolerant communities or risking prosecution by providing messages that more tolerant communities desire.

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