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DIAL-A-PORN: A PRIVATE AFFAIR

I. INTRODUCTION

For years people have debated how to deal with their enigmatic interest in sex. As Supreme Court Justice William Brennan wrote, "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."¹ Throughout history sex has been presented in many different forms, and humanity has devised many methods to deal with these different presentations.² For example, in 1815 a Pennsylvania court decided that exhibiting a picture of a nude couple for profit was a crime.³ Congress passed the first federal obscenity statute in 1842 which prohibited the importation of obscene pictorial matter.⁴ However, no obscenity statute was strictly enforced until 1873 when Congress made sending obscene material through the mail a criminal offense.⁵

Today courts and legislatures have a more difficult job in attempting to regulate obscenity. Over the years attitudes about what is obscene or indecent have changed,⁶ as have the modes by which people gain access to obscene and indecent material.⁷ This evolution has created a problem: obscene and indecent material that could once be kept from an audience of children now cannot be. There are two sides to the issue of how to keep this material from children while making it accessible to adults. On one side are those who aim "to protect the morals of society from the taint of obscenity."⁸ On the other side are those who oppose the suppression of even the most offensive speech for fear of a domino

1. *Roth v. United States*, 354 U.S. 476, 487, *reh'g denied*, 355 U.S. 852 (1957).

2. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 904-08 (2d ed. 1988) for a discussion of early obscenity cases.

3. *Id.* § 12-16 at 906 (citing *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815)).

4. 5 Stat. 566 (1842). This statute was an attempt to restrict the French postcard trade.

5. L. TRIBE, *supra* note 2, § 12-16, at 906.

6. See Gray, *Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male*, 29 Soc. PROBS. 387, 388 (1982).

7. N.Y. Times, Jan. 28, 1988, at 17, col. 1. Computer pornography, which provides access to dirty jokes, pornographic pictures, and formats for trading sexual messages, is the newest form. This form is so new that legal issues, such as whether it is protected by the first amendment, are yet to be determined. *Id.*

8. M. ERNST & A. LINDEY, *THE CENSOR MARCHES ON* 218 (1971).

effect.⁹

A mode of pornography which has recently emerged is telephone pornography, commonly known as dial-a-porn.¹⁰ Dial-a-porn was popularized in New York by Gloria Leonard, who published the messages, and the New York Telephone Company, which provided the phone lines on which the messages were carried.¹¹ The "976" prefix for dial-a-porn numbers¹² was originally established to provide a variety of pre-recorded information services, such as sports scores and weather reports.¹³ When dial-a-porn was first introduced in 1983, it received nineteen million calls in just one month.¹⁴ Although the initial interest has faded, the New York Telephone Company still reports five million calls a month to the pornographic services.¹⁵ Many of the "976" lines are operated by tiny companies or individuals.¹⁶ However, Carlin Communications, Inc., an affiliate of *High Society* magazine, receives 500,000 calls each day in seventeen cities,¹⁷ making it the largest provider of dial-a-porn.

Since March 1983, dial-a-porn services have generated substantial revenue for the providers of the messages as well as the telephone companies on whose lines the messages are carried.¹⁸ Hundreds of parents nationwide have complained about the easy access to pornography these

9. Chemerinsky, *Outlawing Pornography: What We Gain, What We Lose*, HUM. RTS., Spring, 1985, at 48 ("[C]ould a censor prohibit broadcast of the old 'Leave it to Beaver' reruns because June Cleaver's character is degrading to women? Could the television show 'The Jeffersons' be banned because George Jefferson is degrading to blacks?").

10. Dial-a-porn can be either a sexually explicit pre-recorded message or a live message. The customer pays for the pre-recorded messages with the regular monthly telephone bill. The live message must be paid for in advance, with a credit card. Since children are not issued credit cards, they presumptively do not have access to the live messages. Therefore, the live messages are not as controversial and will not be an issue in this comment. See Comment, *First Amendment Constraints on the Regulation of Telephone Pornography*, 55 U. CIN. L. REV. 237 n.5 (1986).

11. *The Voice with the Leer*, FORBES, Mar. 26, 1984, at 12, 14.

12. N.Y. Times, Oct. 15, 1986, at 26, col. 4. Telephone companies have been criticized for catering to dial-a-porn providers by giving them special numbers at their request. Examples of these numbers are 976-FOXX, 976-4SEX, and 97-NASTY. The telephone companies claim they issue these numbers at the customers' request without screening them and were shocked at the words used. *Id.*

13. Reidinger, *Ring My Bell*, A.B.A. J., Dec. 1, 1987, at 108.

14. N.Y. Times, Oct. 15, 1986, at 26, col. 4.

15. *Id.*

16. *Id.*

17. *Id.* As a result of California's technological ingenuity, dial-a-porn callers with Touch-Tone telephones can choose from one of several scenarios by pressing the appropriate button, after listening to a brief description of the available scenes. *Id.*

18. N.Y. Times, Oct. 16, 1986, at 25, col. 3 (pre-recorded messages can take 50,000 calls an hour without giving a busy signal). See also Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 48 Fed. Reg. 43,349 (1983) (codified at 47 C.F.R. ch. 1); *The Voice with the Leer*, *supra* note 11.

services provide for their children.¹⁹ The dilemma is how to block children's access effectively to dial-a-porn, while at the same time allowing adults access to the services. Earlier this year Congress passed legislation banning interstate dial-a-porn, but in the final analysis, the Supreme Court may have to determine if dial-a-porn can be constitutionally regulated. Dial-a-porn is, however, only one of many influences in our society that may be harmful to children, as well as to adults. In order to maintain a society which tolerates diverse interests, the Supreme Court should give parents, rather than government, the primary responsibility to censor those influences that may have a detrimental effect on their children.

II. THE REGULATION OF OBSCENE AND INDECENT SPEECH

A. *Early Attempts to Define Obscenity*

In the 1868 case of *Regina v. Hicklin*,²⁰ Lord Chief Justice Cockburn developed a test for obscenity: "whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."²¹ Contemporary courts understood this test to mean that they were to measure obscenity by its possible effect on the most susceptible and to judge the obscenity of the work by isolated passages.²²

In 1933 a New York federal district court rejected the *Hicklin* standard in *United States v. One Book Called "Ulysses"*,²³ when it determined that James Joyce's book *Ulysses* was not obscene. This ruling led to the termination of the *Hicklin* standard in American jurisprudence.²⁴ The court based the standard adopted in *One Book Called "Ulysses"* on the effect the work would have on the average reader and on the dominant theme of the work as a whole.²⁵ This resulted in a much more lenient standard than that in *Hicklin*. A work that may have been obscene

19. 134 CONG. REC. E1255 (daily ed. Apr. 27, 1988) (letter from the National P.T.A. to Reps. Dingell and Markey, supporting legislation to regulate dial-a-porn).

20. L.R. 3 Q.B. 360 (1868), noted in L. TRIBE, *supra* note 2, § 12-16, at 906 n.16.

21. *Id.* at 368, noted in L. TRIBE, *supra* note 2, § 12-16, at 906 n.16.

22. L. TRIBE, *supra* note 2, § 12-16, at 907.

23. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

24. L. TRIBE, *supra* note 2, § 12-16, at 907.

25. *One Book Called "Ulysses"* 5 F. Supp. at 185. Judge Woolsey stated:

It is only with the normal person that the law is concerned. Such a test as I have described, therefore, is the only proper test of obscenity

I am quite aware that owing to some of its scenes "Ulysses" is a rather strong draught to ask some sensitive, though normal, persons to take. But . . . whilst in many places the effect of "Ulysses" on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac.

under the *Hicklin* test, because of the effect a single passage might have on the most susceptible reader, would now be judged by the effect on the average reader of the overall theme.

B. *The Supreme Court Steps In*

1. *Roth v. United States*

The test for obscenity evolved further in the 1957 Supreme Court decision of *Roth v. United States*.²⁶ This was the first case to present the Supreme Court squarely with the obscenity question.²⁷ Roth had been convicted under 18 U.S.C. section 1461²⁸ for mailing obscene books, circulars, and advertising.²⁹ The Court held that obscenity is not constitutionally protected speech.³⁰ The obscenity test adopted by the Court in *Roth* was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."³¹ The Court also rejected the *Hicklin* test because that test might prohibit material legitimately dealing with sex, thus unconstitutionally restricting freedom of speech.³²

In 1966 the Supreme Court, in a plurality opinion, added another element to the *Roth* test in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*.³³ This element required the prosecution to establish that "the material is utterly without redeeming social value."³⁴ This standard gave the prosecution the obligation of proving a negative, a burden which is virtually impossible to meet in our criminal justice system.³⁵

Id. Judge Woolsey's main factor in determining obscenity was whether or not a work was written with "pornographic intent," i.e., written for the purpose of exploiting obscenity. *Id.* at 184.

26. 354 U.S. 476, *reh'g denied*, 355 U.S. 852 (1957).

27. *Id.* at 481.

28. 18 U.S.C. § 1461 (1940) makes a crime of sending through the mail material that is "obscene, lewd, lascivious, indecent, or filthy . . . or other publication of an indecent character." *Roth*, 354 U.S. at 479 n.1.

29. *Id.* at 480.

30. *Id.* at 485.

31. *Id.* at 489. The Court pointed out that:

[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.

Id. at 487 (footnotes omitted).

32. *Id.* at 489.

33. 383 U.S. 413 (1966).

34. *Id.* at 418.

35. *Miller v. California*, 413 U.S. 15, 22, *reh'g denied*, 414 U.S. 881 (1973). See BLACK'S LAW DICTIONARY 930 (5th ed. 1979) (A negative averment is an allegation that is negative in form but affirmative in substance, for which the party making the allegation has the burden of proof.).

2. *Miller v. California*

In the 1973 case of *Miller v. California*,³⁶ the Supreme Court formed a majority in an obscenity case for the first time since *Roth* to agree on guidelines to isolate obscenity from expression protected by the first amendment.³⁷ The *Miller* Court, agreeing with the Court in *Roth*, said that the lewd and obscene “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.”³⁸ The Court in *Miller* then attempted to make the test for obscenity more concrete by laying out the basic guidelines for the trier of fact:

(a) Whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁹

In *Miller*, Chief Justice Burger recognized that the “utterly without redeeming social value” element added to the obscenity test in *Memoirs* created an unworkable standard, which no member of the Court at the time of *Miller* supported.⁴⁰ However, the Court in *Miller* seems to have refined, not rejected, this element. Under the *Miller* formulation, the prosecution must still prove a negative by affirmatively establishing that the work lacks serious literary, artistic, political, or scientific value.⁴¹

36. 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

37. *Id.* at 29.

38. *Id.* at 20-21 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941) (emphasis added by the Court in *Roth v. United States*, 354 U.S. 476, 484-85, *reh'g denied*, 355 U.S. 852 (1957))).

39. *Id.* at 24 (citation omitted). The Court confined regulation of speech to works depicting or describing sexual conduct. Sexual conduct is identified as “(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” *Id.* at 25. In order to be protected by the first amendment, a “depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value.” *Id.* at 26. See generally *Hamling v. United States*, 418 U.S. 87, *reh'g denied*, 419 U.S. 885 (1974) (upholding the *Miller* test as constitutionally permissible); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (using the *Miller* test to determine that the movie *Carnal Knowledge* is not obscene); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, *reh'g denied*, 414 U.S. 881 (1973) (using *Miller* standard to conclude that obscene material shown to consenting adults is not constitutionally protected); *Kaplan v. California*, 413 U.S. 115, *reh'g denied*, 414 U.S. 883 (1973) (stresses special difficulty of keeping printed material from being distributed to children); *United States v. Orito*, 413 U.S. 139 (1973) (allowing Congress to forbid interstate transportation of obscenity for private transporter's use).

40. *Miller*, 413 U.S. at 23.

41. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 98 (Brennan, J., dissenting), *reh'g denied*, 414 U.S. 881 (1973) where Justice Brennan states:

In regard to the *Miller* test, Chief Justice Burger explained that the vague term “community standards” did not create a national standard for obscenity.⁴² The inherent diversity of the different states caused the Court to conclude that reading the first amendment as requiring people in one region of the country to accept conduct found acceptable by people in another region would not be constitutionally sound.⁴³

However, in *Pope v. Illinois*,⁴⁴ the Court determined that the third element of the *Miller* test would not be governed by a community standard, writing that “[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a *reasonable person* would find such value in the material, taken as a whole.”⁴⁵ Thus, the Court shifted from a community standard to a reasonable person standard for this element of the *Miller* test. The Court also explained that the reasonable person standard could still be met if only a minority of the population believes a work has serious value.⁴⁶

3. “Obscenity” — An Unreliable Standard

The obscenity standard has a history of instability. This is clearly manifested by the transformation of Justice Brennan’s reasoning concerning obscenity. Justice Brennan wrote the opinion of the Court in *Roth*, which held that obscenity is not constitutionally protected speech,⁴⁷ but he dissented in *Miller*, where the Court reaffirmed this view.⁴⁸ Justice Brennan explained this change in his dissent in *Paris Adult Theatre I v. Slaton*⁴⁹ by stating, “I am convinced that the approach initiated 16 years ago in *Roth* . . . cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure

One should hardly need to point out that under the third component of the Court’s test the prosecution is still required to “prove a negative” — *i.e.*, that the material lacks serious literary, artistic, political, or scientific value. Whether it will be easier to prove that material lacks “serious” value than to prove that it lacks any value at all remains . . . to be seen.

Id.

42. *Miller v. California*, 413 U.S. 15, 30-34, *reh’g denied*, 414 U.S. 881 (1973) (“[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation . . .”). *Id.* at 30.

43. *Id.* at 32.

44. 107 S. Ct. 1918 (1987).

45. *Id.* at 1921 (footnote omitted) (emphasis added).

46. *Id.* at 1921 n.3.

47. *Roth v. United States*, 354 U.S. 476, 485, *reh’g denied*, 355 U.S. 852 (1957).

48. *Miller v. California*, 413 U.S. 15, 36, *reh’g denied*, 414 U.S. 881 (1973).

49. 413 U.S. 49, *reh’g denied*, 414 U.S. 881 (1973).

from that approach.”⁵⁰ Justice Brennan noted that the Court, throughout the years, has failed to create a standard that draws a distinct line between protected and unprotected speech,⁵¹ and therefore, in his view, the unconditional abolition of obscene speech could not be reconciled with the underlying principles of the first amendment.⁵²

The hazy guidelines of the obscenity standard have left members of the Court unsure about how to apply these guidelines to specific instances of alleged obscenity. In order to guard against the suppression of speech which deals legitimately with sex, the Court should refrain from outlawing speech in the name of obscenity until clear guidelines determining what is obscene are established. Consequently, the Court should not outlaw dial-a-porn on the basis of obscenity.

C. Indecency

The first amendment does not protect obscene speech, but it does protect indecent speech.⁵³ However, indecent speech may be regulated by reasonable time, place, and manner restrictions.⁵⁴ Indecent speech has been defined as “language that describes, in terms patently offensive as measured 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.”⁵⁵ In order to determine that a communication is indecent, a court must consider the content of the communication and the time, place, and manner in which it is used.

50. *Id.* at 73-74 (citation omitted). Justice Brennan felt that since no one can say for certain what is obscene until at least five members of the Supreme Court, applying obscure standards, say it is obscene, conviction under an obscenity statute was unconstitutional. *Id.* at 92. The only way to be certain about what is obscene is “by drawing a line that resolves all doubt in favor of state power and against the guarantees of the First Amendment.” However, this would lead to overbroad standards permitting the suppression of a wide array of literary, scientific, and artistic masterpieces. No free society could possibly tolerate such suppression. *Id.* at 94.

51. *Id.* at 83.

52. *Id.* See also L. TRIBE, *supra* note 2, § 12-16, at 913 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505 (1985)) (“State and local anti-obscenity statutes cannot, however, go so far as to characterize as obscene that which provokes only ‘normal and healthy sexual desires.’”). In the evolution of the obscenity standard, the Court has “moved from a view in which the obscene was unprotected *because* utterly worthless (*Roth*), to an approach in which the obscene was unprotected *if* utterly worthless (*Memoirs*), to a conclusion in which obscenity was unprotected even if *not* ‘utterly’ without worth (*Miller*).” *Id.* at 909 (original emphasis).

53. *FCC launches attack on indecency*, 112 BROADCASTING, Apr. 20, 1987, at 35.

54. *FCC v. Pacifica Found.*, 438 U.S. 726, 750, *reh’g denied*, 439 U.S. 883 (1978).

55. *Id.* at 732 (citing 56 F.C.C. 2d at 98). “[T]he commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience.” *Id.* at n.5.

In *FCC v. Pacifica Foundation*,⁵⁶ Pacifica made an afternoon broadcast of George Carlin's "Filthy Words" monologue in which Carlin discussed "words you couldn't say on the public . . . airwaves. . . ."⁵⁷ A father driving with his young son heard the monologue and complained to the Federal Communications Commission.⁵⁸ The FCC charged that Pacifica had violated 18 U.S.C. section 1464, which prohibits the use of any obscene, indecent, or profane language over the radio. Pacifica Foundation claimed that the broadcast was not indecent because there was a lack of prurient appeal.⁵⁹ Prurient appeal is an element of the obscene, but indecency refers to a deviation from established moral standards.⁶⁰ The Court therefore rejected Pacifica's contention on the grounds that prurient appeal is not an essential component of indecent language.⁶¹ As a result, the Court held that the FCC could regulate indecency for time, place, and manner on a nuisance basis.⁶²

By concluding that indecent speech can be regulated, the Court considered "[t]he ease with which children may obtain access to broadcast material"⁶³ and the "uniquely pervasive presence" the broadcast media occupy in the lives of Americans.⁶⁴ Accordingly, the *Pacifica* decision does not apply to the regulation of indecent dial-a-porn messages.⁶⁵ Private telephone calls are substantially different from the public broadcast in *Pacifica*.⁶⁶ Indecent speech is permissible over telephone lines because existing technology enables parents to prevent their children's access to

56. 438 U.S. 726, *reh'g denied*, 439 U.S. 883 (1978).

57. *Id.* at 729. *See id.* at 751 for a verbatim transcript of the "Filthy Words" monologue.

58. *Id.* at 730.

59. *Id.* at 739-40. In *Hamling v. United States*, 418 U.S. 87, *reh'g denied*, 419 U.S. 885 (1974), the Court held that although 18 U.S.C. § 1461 prohibits mailing "indecent" material, this prohibition actually applies only to the mailing of "obscene" materials. Consequently, Pacifica Foundation, relying on *Hamling*, claimed that the prohibition against "indecent" speech in 18 U.S.C. § 1464 should also be construed to mean only "obscene" speech. However, because § 1461 applies to mail and § 1464 applies to broadcasts, the Court in *Pacifica* determined that, as applied to broadcasts, indecent speech is a violation of the statute. The Court explained that "[i]t is unrealistic to assume that Congress intended to impose precisely the same limitations on the dissemination of patently offensive matter by such different means." *Pacifica*, 438 U.S. at 741.

60. *Id.* at 740.

61. *Id.* at 741.

62. *Id.* at 750. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 557 n.1 (1981) (Burger, C.J., dissenting) ("because of the limited spectrum available and the peculiar intrusiveness of the medium, broadcasting is subject to limitations that would be intolerable if applied to other forms of communication" (citation omitted)). *Id.*

63. *FCC v. Pacifica Found.*, 438 U.S. 726, 750, *reh'g denied*, 439 U.S. 883 (1978).

64. *Id.* at 748.

65. *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560 (2d Cir. 1988), *modified*, 56 U.S.L.W. 2433 (2d Cir. Jan. 15, 1988) (No. 87-4054), *petition for cert. filed*, July 5, 1988 [hereinafter *Carlin III*].

66. *Id.*

this presentation of objectionable speech.⁶⁷

III. THE PROTECTION OF CHILDREN: A COMPELLING GOVERNMENT INTEREST

A. Judicial Treatment of Children

In 1976 Justice Blackmun wrote in *Planned Parenthood v. Danforth*⁶⁸ that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights.”⁶⁹ However, children’s rights under the Constitution are not equal to the rights of adults.⁷⁰ The Court in *Bellotti v. Baird*⁷¹ recognized three reasons justifying this conclusion: (1) children’s vulnerability; (2) children’s inability to make informed, mature decisions; and (3) the important role parents play in guiding their children through adolescence.⁷²

As a result of this rationale, minors have consistently been denied access to material that adults have been held to have the right to possess.⁷³ In *Ginsberg v. New York*⁷⁴ the Court upheld the constitutionality of a New York statute⁷⁵ prohibiting the sale of “girlie magazines” to

67. *Id.*

68. 428 U.S. 52 (1976).

69. *Id.* at 74. See also *Breed v. Jones*, 421 U.S. 519 (1975) (holding that the double jeopardy clause of the fifth amendment applies to juveniles, as well as to adults); *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that juveniles are entitled to at least minimal due process before being expelled from school); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (holding that minor school students are protected by the free speech clause of the first amendment and the due process clause of the fourteenth amendment as long as they do not substantially interfere with “school discipline or the rights of others”); *In re Gault*, 387 U.S. 1 (1967) (holding that the constitutional guarantee of due process applies to proceedings in which juveniles are charged as delinquents for crimes which might lead to incarceration). See generally Note, *Children’s Rights Under the Burger Court: Concern for the Child But Deference to Authority*, 60 NOTRE DAME L. REV. 1214 (1985) (analyzing the constitutional rights of children under the Burger Court); Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. ST. L.J. 865 (1985) (analysis of the lessening of minors’ autonomy under the Burger Court).

70. *Bellotti v. Baird*, 443 U.S. 622, 634, *reh’g denied*, 444 U.S. 887 (1979) (holding that a Massachusetts statute which requires parental consent before an abortion can be performed on an unmarried woman under the age of 18 is unconstitutional).

71. 443 U.S. 622, *reh’g denied*, 444 U.S. 887 (1979).

72. *Id.* at 634.

73. See *infra* notes 74-80 and accompanying text. See generally R. REIMER, REGULATIONS OF SEXUALLY EXPLICIT COMMERCIAL TELEPHONE CONVERSATIONS [*Dial-A-Porn*]: A LEGAL ANALYSIS, Cong. Res. Serv. (Dec. 24, 1986) (history and legal discussion of laws regulating dial-a-porn as of 1986).

74. 390 U.S. 629, *reh’g denied*, 391 U.S. 971 (1968).

75. N.Y. PENAL LAW § 484-h(2) (McKinney 1965) states:

It shall be unlawful for any person knowingly to sell . . . to a minor:

- (a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or (b) any book,

anyone under the age of seventeen. The Court noted that the government has an interest in seeing that children do not come into contact with material which is unacceptable for them to view. Consequently, the government can exercise its authority to safeguard the morals of society by preventing the availability of books, deemed suitable for adults, to children.⁷⁶

In *M.S. News Co. v. Casado*⁷⁷ the United States Court of Appeals for the Tenth Circuit upheld as constitutional a Wichita, Kansas ordinance,⁷⁸ which made unlawful the promotion of sexually-oriented materials to minors. The ordinance provided that materials were not unlawfully "displayed" if they were behind "blinder racks." In *Upper Midwest Booksellers Association v. City of Minneapolis*,⁷⁹ the Eighth Circuit Court of Appeals upheld the constitutionality of a Minneapolis ordinance, which prohibited any person from knowingly displaying, for commercial purposes, material that was harmful to minors. This ordinance provided that materials were not unlawfully displayed if they were in sealed wrappers, behind opaque covers, or in "adults only" sections.⁸⁰

pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

Ginsberg, 390 U.S. at 647.

76. *Id.* at 636 (citing *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75, 271 N.Y.S.2d 947, 952, 218 N.E.2d 668, 671 (1966)).

77. 721 F.2d 1281 (10th Cir. 1983).

78. WICHITA, KAN., CITY CODE § 5.68.156 (2) (1979) states:

(2) *Offenses.* No person having custody, control or supervision of any commercial establishment shall knowingly:

(a) display material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material provided, however, a person shall be deemed not to have "displayed" material harmful to minors if the material is kept behind devices commonly known as "blinder racks" so that the lower two-thirds of the material is not exposed to view.

M.S. News Co., 721 F.2d at 1296-97.

79. 780 F.2d 1389 (8th Cir. 1985).

80. MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 15, § 385.131(6) (1984) states:

It is unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material which is harmful to minors in its content in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is at all times kept in a sealed wrapper.

(a) It is also unlawful for any person commercially and knowingly to exhibit, display, sell, offer to sell, give away, circulate, distribute, or attempt to distribute any material whose cover, covers, or packaging, standing alone, is harmful to minors, in any place where minors are or may be present or allowed to be present and where minors are able to view such material unless each item of such material is blocked from view by an opaque cover.

(b) The provisions of this subdivision shall not apply to distribution or attempt to distribute the exhibition, display, sale, offer of sale, circulation, giving away of material harmful to minors where such material is sold, exhibited, displayed, offered for sale, given

Each of the foregoing courts recognized that reasonable regulations of speech normally protected under the first amendment are those which restrain minors' access to adult material, while allowing adults' access to this same material. These regulations promote the significant government interest of protecting children from adult material, without denying first amendment rights to adults or vendors of adult material.⁸¹ However, in *American Booksellers Association v. Commonwealth*⁸² the Fourth Circuit Court of Appeals invalidated an amendment to a Virginia law, which prohibited the knowing display of sexually explicit materials in a way that made them openly available to minors.⁸³ This amendment was nullified on the grounds that it was unconstitutionally overbroad,⁸⁴ since it could be loosely interpreted to deny guaranteed free speech rights.⁸⁵ Unlike the statutes in *M.S. News Co.* and *Upper Midwest Booksellers Association*, the amendment questioned in *American Booksellers Association* made no provision for a vendor to comply with the statute by making adult material inaccessible to minors.

away, circulated, distributed, or attempted to be distributed under circumstances where minors are not present, not allowed to be present, or are not able to view such material or the cover, covers, or packaging of such material. Any business may comply with the requirements of this clause by physically segregating such material in a manner so as to physically prohibit the access to and view of the material by minors, by prominently posting at the entrance(s) to such restricted area, "Adults Only—you must be 18 to enter," and by enforcing said restrictions.

Upper Midwest Booksellers, 780 F.2d at 1407-08.

81. See *id.* at 1394-95; *M.S. News Co.*, 721 F.2d at 1288.

82. 802 F.2d 691 (4th Cir. 1986).

83. VA. CODE ANN. § 18.2-391(a) (Supp. 1985) (as amended) states:

It shall be unlawful for any person knowingly to sell or loan to a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in paragraph (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles. (Emphasis supplied to show language added by the 1985 amendment.)

American Booksellers, 802 F.2d at 693 n.2.

84. *Id.* at 695. The court in *American Booksellers* disagreed with the rulings in *M.S. News* and *Upper Midwest Booksellers*. Judge Sprouse argued that adults' first amendment rights cannot be overly burdened by restrictive obscenity standards which apply to juveniles. *Id.* at 696.

85. Cleary, *Telephone Pornography: First Amendment Constraints On Shielding Children From Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503, 530 (1985). See also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844 (1970) ("Most laws affecting expressive activity comprehend at least some unconstitutional applications.").

B. *Implications for Dial-a-Porn*

The judicial trend, regarding the restriction of non-obscene materials that are harmful to minors, seems to allow restrictions which effectively separate the child and adult audiences and invalidate restrictions which group children and adults together. In *Butler v. Michigan*⁸⁶ the Supreme Court held a Michigan statute⁸⁷ unconstitutional because it criminalized making available books "found to have a potentially deleterious influence on youth."⁸⁸ The Court determined that this law was unconstitutionally overbroad since it denied adults their free speech rights by allowing them to read only what was acceptable for children.⁸⁹ The Court contended that this law was "not reasonably restricted to the evil with which it was to deal"⁹⁰ and that the law "burn[t] the house to roast the pig."⁹¹

These cases demonstrate that the courts will subject any attempt to regulate speech to strict scrutiny, demanding that the least restrictive means be used to further a compelling government interest. The Court has recognized that protecting youth is a compelling government interest,⁹² however, this interest cannot be furthered at the expense of denying adults material that they have a first amendment right to possess.⁹³ Accordingly, dial-a-porn can be regulated to further the compelling government interest of protecting youth insofar as that regulation does not unconditionally deny adults' access to the services.

86. 352 U.S. 380 (1957).

87. MICH. COMP. LAWS § 343 states:

Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor.

Butler, 352 U.S. at 381.

88. *Id.* at 382-83.

89. *Id.* at 383.

90. *Id.*

91. *Id.*

92. See *Ginsberg v. New York*, 390 U.S. 629, 640, *reh'g denied*, 391 U.S. 971 (1968).

93. See, e.g., *Butler v. Michigan*, 352 U.S. 380 (1957).

IV. ATTEMPTS TO REGULATE DIAL-A-PORN

When dial-a-porn emerged in 1983, the existing legislation that could have been used to regulate it was section 223 of the Communications Act of 1934.⁹⁴ This law prohibited the making of any “comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent”⁹⁵ over the telephone. However, prosecutors did not enforce this law with regard to dial-a-porn because they believed the section applied only to persons who spoke obscenely during calls that they had placed.⁹⁶

Because dial-a-porn was not covered by any regulation, Congress amended section 223 in 1983, making it a crime for commercial enterprises to provide indecent or obscene communications to adults without their consent or to minors.⁹⁷ Under this legislation, Congress charged the Federal Communications Commission with setting regulations which would effectively deny dial-a-porn access to persons under the age of eighteen. Compliance with these regulations would serve as a defense to prosecution for dial-a-porn providers.⁹⁸

94. 134 CONG. REC. E1110 (daily ed. Apr. 19, 1988) (statement of Rep. Dannemeyer).

95. 47 U.S.C. § 223(a) (Supp. II 1984) states:

Whoever-

(1) in the District of Columbia or in interstate or foreign communication by means of telephone-

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section,

shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

Id.

96. 134 CONG. REC. E1111 (daily ed. Apr. 19, 1988) (statement of Rep. Dannemeyer).

97. 47 U.S.C. § 223(b) (Supp. II 1984) states:

(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 under eighteen years of age or to any other person without that person's consent, 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.

98. 47 U.S.C. § 223(b)(2) (Supp. II 1984) states:

It is a defense to a prosecution under this subsection that the defendant restricted access to

A. FCC Regulations and the Second Circuit's Response

1. *Carlin I*

On September 16, 1983, the FCC issued a Notice of Inquiry⁹⁹ inviting public comment on the method the Commission should use to regulate dial-a-porn. In the resulting Report and Order, adopted June 4, 1984, the FCC issued its first dial-a-porn regulation which allowed the service to operate only between the hours of 9 p.m. and 8 a.m. Eastern time or require the caller to pay by credit card before hearing the message.¹⁰⁰ In *Carlin Communications, Inc. v. FCC (Carlin I)*¹⁰¹ the United States Court of Appeals for the Second Circuit set aside the Commission's regulations¹⁰² because the Commission had failed to demonstrate that limiting the operational hours of dial-a-porn effectively restricted minors' access to the sexually explicit transmissions without infringing upon the first amendment rights of adults to hear the messages.¹⁰³

2. *Carlin II*

On March 15, 1985, the FCC responded to the decision in *Carlin I* by issuing a Second Notice of Proposed Rulemaking¹⁰⁴ to solicit additional suggestions on how to regulate dial-a-porn. On October 10, 1985 the Commission adopted its Second Report and Order which regulated dial-a-porn services by requiring an authorized access or identification code or payment by credit card before transmission of the message began.¹⁰⁵ The access code could be received through the mail after the dial-a-porn provider had reasonably concluded, by reviewing a written application, that the applicant was not under eighteen years of age.¹⁰⁶

the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation.

Id.

99. 48 Fed. Reg. 43,348 (1983) (codified at 47 C.F.R. ch. 1).

100. 49 Fed. Reg. 24,996 (1984) (codified at 47 C.F.R. pt. 64).

101. 749 F.2d 113 (2d Cir. 1984) [hereinafter *Carlin I*].

102. See 48 Fed. Reg., *supra* note 99.

103. *Carlin I*, 749 F.2d at 121 (stating that the regulation is both underinclusive and overinclusive because it "denies access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours"). *Id.*

104. 50 Fed. Reg. 10,510 (1985) (codified at 47 C.F.R. pt. 64) (This Second Notice of Proposed Rulemaking specifically sought comments regarding technical means to restrict minors' access to dial-a-porn services.).

105. 50 Fed. Reg. 42,699, 42,704-06 (1985) (codified at 47 C.F.R. pt. 64).

106. *Id.* at 42,705.

The code could be cancelled if lost, stolen, or used by minors.¹⁰⁷ In *Carlin Communications, Inc. v. FCC (Carlin II)*¹⁰⁸ the Second Circuit Court of Appeals again invalidated the Commission's regulations on the ground that the New York Telephone Company system could not technologically relay the caller's access code to the dial-a-porn message provider.¹⁰⁹ The court also found that the Commission had not adequately investigated the possibility of using less restrictive means to limit minors' access.¹¹⁰

3. *Carlin III*

In response to *Carlin II*, the Commission released its Third Notice of Proposed Rulemaking on July 18, 1986.¹¹¹ In the resulting Report and Order, adopted April 16, 1987, the Commission reestablished access codes and the use of credit cards and identified scrambling as another acceptable method of restricting minors' access to dial-a-porn.¹¹²

In *Carlin Communications, Inc. v. FCC (Carlin III)*¹¹³ the Second Circuit held that the Commission's third attempt to regulate dial-a-porn was constitutionally permissible. These regulations survived strict scrutiny when the court concluded that the Commission had furthered a compelling government interest by using the least restrictive means.¹¹⁴ In allowing access codes to be one of these means, the court found it lawful that dial-a-porn providers would incur one-time charges of up to \$73,000 and monthly recurring charges of up to \$12,000.¹¹⁵ The court obviously accepted the Commission's assertion that the burden that these costs imposed on dial-a-porn providers was reasonable in light of the income generated by the pornographic services.¹¹⁶

In order to implement this method, an adult seeking access to dial-a-porn would be required to fill out an application form to obtain an access

107. *Id.*

108. 787 F.2d 846 (2d Cir. 1986) [hereinafter *Carlin II*].

109. *Id.* at 855. The court was not convinced that the use of access codes was the least restrictive means to comply with Congress' mandate. *Id.*

110. *Id.*

111. 51 Fed. Reg. 26,915 (1986) (codified at 47 C.F.R. pt. 64).

112. 52 Fed. Reg. 17,760 (1987) (codified at 47 C.F.R. pt. 64).

113. 837 F.2d 546 (2d Cir. 1988), *modified*, 56 U.S.L.W. 2433 (2d Cir. Jan. 15, 1988) (No. 87-4054), *petition for cert. filed*, July 5, 1988.

114. *Id.* at 556.

115. *Id.* at 555-56.

116. *Id.* at 556.

code.¹¹⁷ After reasonably determining that the application was legitimate, the provider would issue the access code.¹¹⁸ Under this method dial-a-porn calls would be sent from the telephone company's office to the provider's office, where the access code would be verified and the message transmitted immediately to the caller.¹¹⁹

In establishing scrambling as an acceptable method for regulating dial-a-porn, the Commission reversed an earlier decision which rejected this method.¹²⁰ The court allowed this reversal on the basis that the Commission had provided reasoned analysis justifying the change.¹²¹ Under this process, the message would be scrambled so that it would be unintelligible without the use of a descrambler available only to adult callers.¹²²

The Commission had originally rejected scrambling because it believed descramblers would have to be installed at the customer's premises.¹²³ It initially determined that this method would create an impermissible burden on customers and deny adult callers access to the messages from any telephone not equipped with a descrambler.¹²⁴ However, AT&T described a battery-operated descrambler which requires no installation and is simply held against the receiver's earpiece.¹²⁵ The Commission concluded that this device rendered scrambling acceptable, since it would permit access by adults from virtually any telephone and would not create an impermissible hardship on dial-a-porn providers.¹²⁶ The court also found the estimated cost of fifteen dollars for a portable descrambler to be an acceptable price.¹²⁷

B. *Congress' Ban of Dial-A-Porn*

On April 19, 1988 Congress, unsatisfied with the Second Circuit's validation of the Commission's regulations of dial-a-porn, approved a total ban of dial-a-porn, making it illegal for adults, as well as children, to

117. *Id.* at 554.

118. Second Report and Order, 50 Fed. Reg. 42,704-05 (1985) (codified at 47 C.F.R. pt. 64).

119. *Carlin III*, 837 F.2d 546, 550 (2d. Cir. 1988), *modified*, 56 U.S.L.W. 2433 (2d Cir. Jan. 15, 1988) (No. 87-4054), *petition for cert. filed*, July 5, 1988.

120. *Id.* at 556.

121. *Id.*

122. Third Report and Order, 52 Fed. Reg. 17,761 (1987) (codified at 47 C.F.R. pt. 64).

123. *Carlin III*, 837 F.2d at 556.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

have access to the sexually explicit messages.¹²⁸ Congress accomplished this by amending section 223 of the Communications Act of 1934, striking out the words "under eighteen years of age or to any other person without that person's consent."¹²⁹ This legislation now makes it a crime to make "any obscene or indecent communication for commercial purposes to any person."¹³⁰ On April 28, 1988, President Reagan signed the bill into law,¹³¹ outlawing dial-a-porn. However, because the legislation suppresses speech, serious first amendment questions are likely to be raised.¹³²

1. Clear and Present Danger

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech."¹³³ In 1972, Justice Marshall, writing for the Court in *Police Department of Chicago v. Mosley*,¹³⁴ stated that if the first amendment means anything it "means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹³⁵ However, in 1919, Justice Holmes had asserted

128. Washington Post, Apr. 21, 1988, at 7, col. 1.

129. H.R. 4401, 100th Cong., 2d Sess. (1988) (passed as a rider to the Elementary and Secondary Education Improvement Act).

130. 47 U.S.C. § 223(b)(1) now states:

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.

134 CONG. REC. H1707 (daily ed. Apr. 19, 1988) (statement of Rep. Frost).

131. N.Y. Times, Apr. 29, 1988, at 13, col. 1. The Telephone Decency Act of 1988 is only applicable to interstate dial-a-porn, while the bulk of dial-a-porn messages is transmitted within state lines. *Id.*

132. See 134 CONG. REC. H1696-97 (daily ed. Apr. 19, 1988) (Diane S. Killroy, General Counsel, advised Congress that a blanket prohibition of dial-a-porn may be determined to be unconstitutional since it includes indecent speech. Ms. Killroy also advised Congress to limit its prohibition to areas in which dial-a-porn could not be technologically regulated.). See generally Cleary, *supra* note 85 (analysis of the free speech rights of children and of adults and the limits of such rights in relation to obscene or indecent communication); R. REIMER, *supra* note 73; Comment, *Telephones, Sex, And The First Amendment*, 33 UCLA L. REV. 1221 (1986) (discussion of the constitutionality of regulating dial-a-porn). Suit has been filed in New York federal district court opposing the congressional ban. The plaintiffs requested an injunction from enforcement of the legislation, and the court granted an injunction against "indecent" dial-a-porn messages but denied an injunction against "obscene" dial-a-porn transmissions. *Jane Roe, John Doe, Inc. v. Meese*, No. 88-4420 (S.D.N.Y. July 22, 1988) (LEXIS, Genfed Library, Dist. file).

133. U.S. CONST. amend. I.

134. 408 U.S. 92 (1972).

135. *Id.* at 95.

in *Schenck v. United States*¹³⁶ that “[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”¹³⁷ As evidenced by its recent legislative action, Congress apparently believes that dial-a-porn creates a “clear and present danger” that the services will “bring about substantive evils” which it has a right to prevent. Congress has therefore restricted the first amendment guarantee of free speech in order to prevent minors from having access to materials which may have a “potentially deleterious influence” on them.¹³⁸

Dial-a-porn appears to have a deleterious effect on some minors. Parents whose children have either called the service and then sexually molested another child, or whose children have been sexually molested by a child who has listened to dial-a-porn, have filed lawsuits against dial-a-porn providers.¹³⁹ In one such case five minor males and one minor female called dial-a-porn while there were no adults in the house. Within forty-eight hours, two of the males had sexually molested the female, who encouraged them by asking them to touch her and “Do it with her” — phrases she allegedly heard on dial-a-porn.¹⁴⁰ Later in the same day another of the males had sexual intercourse with a girl because “it

136. 249 U.S. 47 (1919).

137. *Id.* at 52.

138. *See* *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

139. 134 CONG. REC. E1111 (daily ed. Apr. 19, 1988). A letter to a member of Congress states: “Dial-A-Porn” has deeply affected my family and friends . . . My 13-year-old son, Kevin, called the 900 number. Kevin’s friend Don, 15, was over and they were listening to the prerecorded messages. Later when I arrived home from work I immediately made them hang up. Unknown to me, Kevin’s 14-year-old brother was listening on another line with his two friends. They continued to listen passing it back and forth. Their sister Jacqueline, 10, was also listening on her extension.

Within 48 hours Don and his 11-year-old brother molested my daughter Jacqueline. The Clio Vienna Township Police were notified and in their investigation revealed the fact that Jacqueline had encouraged them by asking them to touch her and “Do it with her” — phrases she heard on the “Dial-a-porn.” Later the same day I learned that Kevin had sexual intercourse with a girl. His response when asked why was “it sounded like fun.” I asked him, “What sounded like fun?” and he said “You know the phone call, the \$74 phone call.”

This phone call has damaged our lives. It has caused strain and distrust in our family. We have had conflict with our neighbors when we had to inform them of their children’s involvement. Most of all it has done permanent damage to our daughter. Somehow the proper steps must be taken to eliminate this diseased pornography that is so readily available to children . . . Please help our children to prevent such occurrence again.

Id.

140. *Id.*

sounded like fun” on dial-a-porn.¹⁴¹ From this account dial-a-porn apparently may be a “deleterious” influence on youth and may present a “clear and present danger” to the morals of youth.

2. Implications for Other Types of Communication

Other modes of communication also appear to present a “potentially deleterious influence” on youth, as well as on society as a whole, by encouraging criminal or anti-social behavior.¹⁴² For example, after watching the movie *Tarantulas: The Deadly Cargo*, a fourteen-year-old girl went to a pet shop, bought a tarantula, and placed it in her parents’ bed. The girl’s parents later told authorities that she had threatened them before watching the movie.¹⁴³ Another incident occurred after the movie *Fuzz* had been shown on television in Boston. In one scene in the movie a person was doused with gasoline and set on fire. Two days later several youths, imitating the movie, set fire to a woman.¹⁴⁴ In yet another incident, the movie *Doomsday Flight*, which dealt with extortion of an airline, was shown on television in Australia. An extortion attempt was later made on Qantas Airlines using the exact method depicted in the film.¹⁴⁵ These instances show that television and movies, to which children constantly have unsupervised access, have a “deleterious” effect on the behavior of minors, as well as adults.

If Congress makes certain types of communication illegal because of the harmful effect that a particular communication has on society, then dial-a-porn is not the only form of communication that Congress has the obligation to regulate. A comment made by Justice Douglas in his dissent in *Miller v. California*¹⁴⁶ has relevance regarding dial-a-porn. He said, “the materials before us may be garbage . . . [b]ut so is much of what is said in political campaigns, in the daily press, on TV, or over the radio.”¹⁴⁷ There are many harmful influences with which children are in constant contact: violence on television, in movies, in books and magazines, and advertisements that suggest that harmful substances such as alcohol and tobacco are glamorous. However, Congress allows parents

141. *Id.*

142. See generally Spak, *Predictable Harm: Should The Media Be Liable?*, 42 OHIO ST. L.J. 671 (1981) (discussing the proposition that television and movie producers should be liable for violence and other harm that they should reasonably be able to predict will result from their productions).

143. Chicago Sun-Times, Aug. 21, 1980, at 48, col. 1.

144. N.Y. Times, Oct. 4, 1973, at 1, col. 2.

145. N.Y. Times, May 27, 1971, at 1, col. 6.

146. 413 U.S. 15 (Douglas, J., dissenting), *reh’g denied*, 414 U.S. 881 (1973).

147. *Id.* at 45.

to choose how to raise their children while they are surrounded by these influences.

C. *Right to Disconnect*

The United States Courts of Appeals for the Ninth and Eleventh Circuits have held that because telephone companies are privately owned utilities, they can deny phone lines to dial-a-porn providers without violating the providers' first amendment rights.¹⁴⁸ The courts said that a telephone company could decide for business reasons not to transmit dial-a-porn messages without engaging in "public censorship," as long as state action is not the cause of the telephone company's conduct.¹⁴⁹ In *Blum v. Yaretsky*¹⁵⁰ the Supreme Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."¹⁵¹ Telephone companies can thus deny phone lines to dial-a-porn providers, as long as this action is not the result of a state law which penalizes the telephone company for the content of the messages carried over its lines.¹⁵²

D. *Alternative Methods for Dealing with Dial-A-Porn*

1. Constitutional Amendment

In his dissent in *Miller v. California*¹⁵³ Justice Douglas suggested that any attempt at censorship should be done "by constitutional amendment after full debate by the people."¹⁵⁴ Presently there are no guidelines set forth in the Constitution for determining what is "obscene" and what is not. Therefore, the Supreme Court is able to determine what speech may be censored, even though the first amendment states in absolute terms that "Congress shall make no law . . . abridging the freedom of speech"¹⁵⁵ The Constitution is what the people of the United States look to in determining what action they may take. If it is to be enforced

148. See *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988); *Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986) .

149. *Mountain States*, 827 F.2d at 1297; *Southern Bell*, 802 F.2d at 1357.

150. 457 U.S. 991 (1982).

151. *Id.* at 1004.

152. *Southern Bell*, 802 F.2d at 1361.

153. 413 U.S. 15 (Douglas, J., dissenting), *reh'g denied*, 414 U.S. 881 (1973).

154. *Id.* at 41.

155. U.S. CONST. amend. I.

in a way that differs from its actual content, then, perhaps Justice Douglas was right when he said the document itself needs to be changed by the people.

Nonetheless, this method would be burdensome for the government as well as the people. There have been only twenty-six constitutional amendments in more than two hundred years, only eleven in this century, and none since 1971.¹⁵⁶ The relatively small number of amendments, as compared to the amount of legislation, suggests that the task is an arduous one. Also, since *Schenck* in 1919 the Court has continually allowed laws which restrict the first amendment's guarantee to freedom of speech.¹⁵⁷ This action by the Court suggests that the absolute wording of the first amendment is actually not absolute. The reason for this is that the Supreme Court is the final arbiter of the Constitution¹⁵⁸ and can therefore "amend" the Constitution by judicial interpretation.

2. Other Technical Methods

Technological means, other than scrambling and the use of access codes and credit cards, have also been suggested to regulate dial-a-porn. One such method would be the use of a customer premises "blocking" device by which access to one or more preselected telephone numbers can be prevented.¹⁵⁹ This method would allow parents to deny dial-a-porn access in their home by programming the device to "block" dial-a-porn numbers when dialed.¹⁶⁰ However, the FCC rejected blocking since, by tampering with this device, children could easily make this method ineffective.¹⁶¹

156. See R. ROTUNDA, *MODERN CONSTITUTIONAL LAW* lxvi-lxxviii (2d ed. 1985). The framers of the Constitution have purposely made it difficult to put through an amendment. A stringent two-thirds majority vote by Congress is required to propose a Constitutional amendment, and that proposed amendment must be ratified by the legislatures of three-fourths of the states. U.S. CONST. art. V.

157. See *Feiner v. New York*, 340 U.S. 315 (1951) (upholding defendant's conviction for making an inflammatory speech to a racially mixed crowd on a city street despite the defendant's claim that the conviction violated his first amendment right to free speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) (upholding, as constitutional, a New Hampshire statute, which stated: "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."); *Schenck v. United States*, 249 U.S. 47 (1919) (upholding, as constitutional, the Espionage Act of June 15, 1917 which prohibited the mailing of printed circulars with intent to influence men to avoid the draft).

158. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

159. Second Notice, 50 Fed. Reg. 10,510, 10,512 (1985) (codified at 47 C.F.R. pt. 64).

160. *Carlin III*, 837 F.2d 546, 554 (2d Cir. 1988), *modified*, 56 U.S.L.W. 2433 (2d Cir. Jan. 15, 1988) (No. 87-4054), *petition for cert. filed*, July 5, 1988.

161. *Id.*

Another method of limiting access to dial-a-porn is the screening of calls from particular numbers to particular numbers.¹⁶² As with blocking, a screening system would allow parents to regulate whether dial-a-porn is accessible from their home. However, because implementation would be costly, screening is not economically feasible.¹⁶³

The regulations set forth by the Commission in its Third Report and Order are technologically and economically feasible and constitutionally sound. The regulations allow adults access to dial-a-porn, while providing the means for children to be shielded from the messages. This accommodation gives deference to parents by allowing them to determine what influences their children will be subjected to in their own homes.

V. CONCLUSION

In a diverse society where freedom of speech is among the most highly valued of liberties, there will necessarily be types of communication which some segment of the population will oppose. However, just as people are free to speak as they like, people are also individually allowed to avoid those influences that they do not want to hear or see. Because many influences in our society are potentially harmful to minors, parents have always been responsible for determining which of those influences they believe will harm minor children. This allows adults the constitutional protection to which they are entitled, while protecting children from the potentially harmful influences of a free society.

Sean H. McKee

162. See 50 Fed. Reg., *supra* note 159.

163. *Carlin III*, 837 F.2d at 551. AT&T suggested that this "could be achieved in conjunction with one-way mass announcement services by connecting interactive access lines to each . . . mass distribution center." *Id.*