CONSTITUTIONAL LAW — FIRST AMENDMENT — INDECENT SPEECH RELATING TO COMMERCIAL TELEPHONE MESSAGES IS CONSTITUTIONALLY PROTECTED WHILE OBSCENE SPEECH IS NOT—*Sable Communications of California v. Federal Communications Commission*, 109 S. Ct. 2829 (1989).

The first amendment to the United States Constitution provides that: "Congress shall make no law . . . abridging the freedom of speech . . . ."[1] This mandate, however, has been subject to varying interpretations, depending on the type of speech involved. Obscene speech, for example, has not been afforded the first amendment protection extended to forms of expression labelled indecent.[2] In an era marked by significant technological advances in communications, free speech rights under the first amendment must be carefully balanced against important societal interests.[3]

The constitutionality of a complete ban on dial-a-porn recorded messages[4] has become a controversial issue in recent years.[5] Dial-a-porn has received widespread attention since Congress amended the Communications Act of 1934 (Act) to prohibit indecent, as well as obscene, commercially transmitted interstate telephone messages.[6] Supporters of the constitutionality of the Act argue that Congress has a compelling interest in

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[1] U.S. CONST. amend. I.

[2] Roth v. United States, 354 U.S. 476, 481 (1957) (because there is no redeeming social value to obscene speech, such speech is not afforded guaranteed protection of the first amendment). *But see* FCC v. Pacifica Foundation, 438 U.S. 726, 731 (1978) (while indecent speech is protected by the first amendment, it is subject to limitations in the broadcast industry).

[3] Tovey, *Dial-a-Porn and the First Amendment: The State Action Loophole*, 40 FED. COMM. L.J. 267 (1988).

[4] Dial-a-porn messages are sexually oriented telephone recordings. Sable Communications of Cal. v. FCC, 109 S. Ct. 2829 (1989).

[5] L.A. Daily Journal, April 20, 1988, at 1, col. 2.

[6] 47 U.S.C. § 223(b) (1988). Section 223(b) of the Communications Act of 1934, as amended states in pertinent part:

> (1) Whoever knowingly—
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> (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
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> (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, or imprisoned not more than two years, or both.
>
> (2) Whoever knowingly—

regulating dial-a-porn messages and that the ban is properly within the powers of the legislature.[7] Advocates further contend that the indecent speech at issue is an "insidious form of attractive nuisance for children."[8]

Opponents of the Act argue that the total ban on sexually oriented pre-recorded messages is fatally overbroad[9] because less restrictive means are available to prevent children from exposure to these messages.[10] In other contexts, the United States Supreme Court itself has held that the adult population cannot be reduced to reading only that material that is fit for children, noting that to hold otherwise would be akin to "burn[ing] the house to roast the pig."[11] *Sable Communications of California v. Federal Communications Commission*[12] was the result of Congress' attempt to torch the house by placing a total ban on both obscene and indecent recorded telephone messages.

In 1983, Sable Communications, Inc. (Sable), a Los Angeles based affiliate of Carlin Communications, Inc., began offering sexually oriented, pre-recorded telephone messages to the public.[13] These messages were commonly referred to as dial-a-porn.[14] In order to implement its dial-a-porn service, Sable contracted with Pacific Bell, a telephone network.[15] Under this ar-

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> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
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> (B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Id.

7 The compelling interest claimed is the limiting of the exposure of dial-a-porn recordings to minors. L.A. Daily Journal, *supra* note 5, at 1, col. 2.

8 *Id.*

9 *Id.* Harvard law professor Laurence Tribe is one such opponent of the Act. Professor Tribe informed the Supreme Court that although he would not want his own children to hear these dial-a-porn messages, Congress exceeded its power by banning them altogether. *Id.*

10 *Id.*

11 Butler v. Michigan, 352 U.S. 380, 383 (1957). *See infra* notes 68-74 and accompanying text for a discussion of the offensive material in *Butler*.

12 109 S. Ct. 2829 (1989).

13 *Id.* at 2832.

14 *Id.* A typical message can last anywhere between thirty seconds and two minutes. *Id.* at 2832 n.1 (citing Comment, *Telephones, Sex and the First Amendment*, 33 UCLA L. REV. 1221, 1223 (1986)).

15 *Id.* at 2832.

rangement Pacific Bell supplied special telephone lines capable of handling large volumes of simultaneous calls.[16] Sable and Pacific Bell each shared in the profits.[17] These messages could reach beyond the Los Angeles metropolitan area via the use of long distance toll calls.[18]

At issue in *Sable* was the 1988 amendment to section 223(b) of the Communications Act of 1934.[19] The amended provisions of the Act imposed a complete ban on both indecent and obscene interstate commercial telephone messages.[20] Prior to the 1988 amendment, the Act restricted minors' access to these sexually oriented dial-a-porn messages.[21] In order to accomplish this goal, Congress required the Federal Communications Commission (FCC) to promulgate regulations to insure that underaged callers would be screened.[22] Compliance with FCC procedures[23] would provide dial-a-porn sponsors with a defense against prosecution.[24]

In 1988, Sable brought suit in the United States District Court for the Central District of California seeking declaratory and injunctive relief against enforcement of the amended Act.[25] Specifically, Sable sought to enjoin the FCC, as well as the Justice Department, from instituting any criminal, civil, or administrative proceeding under the Act.[26] In addition, Sable sought a declaratory judgment, arguing that the indecency and obscenity provisions of the Act were unconstitutional under the first amendment of the United States Constitution.[27] The district court denied Sa-

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16 *Id.* A single pre-recorded message may be heard by as many as 50,000 people hourly. *Id.* at 2832 n.1. (citing Comment, *supra* note 14, at 1223).

17 *Id.* at 2832.

18 *Id.*

19 47 U.S.C. § 223(b) (1988).

20 For a relevant portion of § 223(b) see *supra* note 6.

21 *Sable Communications of Cal. v. FCC*, 109 S. Ct. 2829, 2833 (1989). The pre-amended version of this statute criminalized the use of 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.* (quoting 47 U.S.C. § 223(b)(1)(A) (1982), *amended by* 47 U.S.C. § 223(b) (1988)).

22 *Id.*

23 *See infra* notes 95-130 and accompanying text for a discussion of the FCC procedures.

24 *Sable*, 109 S. Ct. at 2833. The Act did not make these sexually oriented messages a crime when played to adults, regardless of whether they were obscene or indecent. *Id.*

25 *Id.* at 2832.

26 *Id.*

27 *Id.*

ble's request for a preliminary injunction relating to the Statute's complete ban on obscene telephone communications.[28] The court did, however, strike down the Statute's provision concerning indecent speech.[29] Accordingly, the court issued a preliminary injunction against any communication alleged to be indecent.[30] Both Sable and the FCC appealed.[31] The United States Court of Appeals for the Ninth Circuit dismissed Sable's motion for an injunction pending appeal because the FCC had filed a direct appeal.[32] Consequently, Sable's appeal was transferred to the Supreme Court, which noted probable jurisdiction to hear both appeals.[33]

The first case to address the constitutionality of an obscenity statute was *Roth v. United States*.[34] Roth, a New York businessman, published and sold obscene books, photographs, magazines, and used circulars and advertising material to promote sales.[35] He was convicted of violating a federal statute prohibiting the mailing of obscene material.[36] The Court in *Roth* stressed that speech with any redeeming social value must be given first amendment protection in order to allow the public to

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28 *Id.* Sable argued that § 223(b) was unconstitutional because it created a "national standard" of obscenity. *Id.* Previously in Miller v. California, 413 U.S. 15 (1973), the Court established that obscenity must be viewed based on "contemporary community standards." *Id.* at 24. The district court rejected this argument. *Sable*, 109 S. Ct. at 2832.

29 *Id.* The district court noted that this result is consistent with FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), which held that indecent speech in the broadcasting industry could be regulated. *Sable*, 109 S. Ct. at 2832. Accordingly, the *Sable* Court held that there was not an outright ban on such speech. *Id.* The district court determined that "[w]hile the government unquestionably has a legitimate interest in, e.g., protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment." Sable Communications of Cal. v. FCC, 692 F. Supp. 1208, 1209 (C.D. Cal. 1988), *aff'd*, 109 S. Ct. 2829 (1989) (citing Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1296 (9th Cir. 1987)).

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

31 *Id.* Sable appealed the decision relating to the obscenity provision of the Act and filed an emergency motion to enjoin the FCC pending appeal. *Id.* at 2832 n.2. The district court granted the motion and the FCC appealed this preliminary injunction. *Id.* The United States Court of Appeals for the Ninth Circuit ordered Sable to either move for voluntary dismissal or to show cause regarding the court's jurisdiction. *Id.* at 2832 n.2, 2833.

32 *Id.* at 2832 n.2.

33 *Id.* at 2832.

34 354 U.S. 476 (1957).

35 *Id.* at 480.

36 *Id.* Roth was charged with and convicted of violating 18 U.S.C. § 1461 (1952 & Supp. IV 1956). *Id.* at 479. This statute provides, in pertinent part:

express social and economic views.[37] The Court, however, cautioned that the first amendment implicitly rejected obscenity as having any redeeming social importance.[38] Accordingly, the *Roth* Court held that obscenity does not fall within the boundaries of constitutionally protected speech.[39]

The Court, in 1973, reiterated the holding of *Roth*, whereby obscene material was not protected by the first amendment, and endorsed the contemporary community standard of obscenity. In *Miller v. California*,[40] the defendant mass mailed unsolicited

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> Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and-
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> . . .
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> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . whether sealed or unsealed . . .
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> . . .
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> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
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> Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. at § 1461.

37 Roth v. United States, 354 U.S. 476, 484 (1957). More specifically, the Court stated that first amendment protection is granted to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.*

38 *Id.*

39 *Id.* at 485. The Supreme Court reached the same result in United States v. Reidel, 402 U.S. 351 (1971). The defendant in *Reidel* was convicted of a similar obscene mailing statute. *Id.* at 353-54. The Court upheld the constitutionality of the statute even though the obscene matter was distributed to willing recipients who stated they were adults. *Id.* at 352. The *Reidel* Court followed the *Roth* decision, and noted that Stanley v. Georgia, 394 U.S. 557 (1969), did not alter that result. *Reidel*, 402 U.S. at 354. In *Stanley*, federal and state agents, while legally searching for evidence relating to bookmaking activities, found obscene films in the defendant's bedroom. *Stanley*, 394 U.S. at 558. The majority in *Stanley* held that the private possession of obscene material cannot be made a crime in light of the Constitution. *Id.* at 559. The Court distinguished the *Stanley* case from *Roth*, noting that *Stanley* dealt with the fundamental right to be free from intrusion in ones own home, as guaranteed by the fourth amendment. *Id.* at 560-61. The Court then emphasized that *Roth* and its progeny were not impaired by this holding. *Id.* at 568. The Court posited that "states retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Id.*

40 413 U.S. 15 (1973). The first part of the Court's three-prong guideline for defining obscenity is " 'whether the average person, applying contemporary com-

sexually explicit material.[41] The majority noted that although the powers and limitations of the states do not vary from community to community, obscenity could not be gauged by a uniform national standard as to what appeals to the prurient interest.[42] The *Miller* Court emphasized that the determination of obscenity is a factual issue.[43] The majority reasoned that it would be unrealistic and unreasonable to base the outcome on an abstract formulation, particularly in light of the size and diversity of our country.[44]

The contemporary community standards issue was further analyzed a year later in *Hamling v. United States*.[45] Hamling was charged with mailing obscene illustrations in violation of a federal statute.[46] Applying the *Miller* standard, the Court maintained that a juror may draw on the knowledge of his community or vicinage to determine how the average person, applying contemporary community standards, would decide an obscenity issue.[47] The majority noted that the district court was at liberty to admit evidence regarding standards of another location, if such evidence would aid the jury in resolving the issue.[48] Distributors who transmit obscene material into more than one judicial district, the majority reasoned, may be subjected to varying community standards.[49] Therefore, the Court determined that the federal statute's failure to identify a uniform national standard did not render it unconstitutional.[50] The Court further acknowledged that such distributors may also be exposed to multiple state prosecutions.[51]

In the 1968 case of *Ginsberg v. New York*,[52] the Court consid-

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munity standards' would find that the work, taken as a whole, appeals to the prurient interest." *Id.* at 24 (quoting *Roth*, 354 U.S at 489).

41 *Id.* at 16-18.

42 *Id.* at 30.

43 *Id.*

44 *Id.* at 31. The Court noted that "it is neither realistic or constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Id.* at 32 (footnote omitted).

45 418 U.S. 87 (1974).

46 *Id.* at 91-92. The defendant in *Hamling* was convicted of violating 18 U.S.C. § 1461 (1952 & Supp. IV 1956), the same obscenity statute that was at issue in *Roth*. For the pertinent text of this statute see *supra* note 36.

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

48 *Id.* at 106.

49 *Id.*

50 *Id.* (citing United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973)).

51 *Id.*

52 390 U.S. 629 (1968).

ered the constitutionality of a statute that prohibited the sale of material which may not have been classified as obscene by adult standards, yet would have a harmful affect on minors.[53] The *Ginsberg* majority reasoned that the state could subject minors to more restrictions than adults, because the state is constitutionally empowered to regulate when the well-being of its children is at stake.[54] Parents and teachers, stressed the Court, have the primary responsibility of safeguarding the well-being of their children.[55] The majority recognized that the legislature reasonably concluded that parents and teachers were entitled to receive support through laws designed to aid in this function.[56] Furthermore, the Court concluded, such statutes do not bar parents from obtaining obscene matter for their children if they desire.[57]

In *Paris Adult Theatre I v. Slaton*,[58] the Supreme Court reiterated the holding of *Roth*, stating that obscene material is not protected by the first amendment.[59] In *Paris*, two Atlanta, Georgia movie theatres displayed adult movies.[60] The operators of these theatres were charged with violating the state's obscenity statute.[61] The Court first noted that limiting obscene material from exposure to juveniles and unconsenting adults was not the only

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53 *Id.* at 631. Mr. Ginsberg operated a stationery store that sold "girlie" magazines. *Id.* He was convicted of selling such magazines to a sixteen-year-old boy. *Id.*

54 *Id.* at 639.

55 *Id.*

56 *Id.*

57 *Id.* In deciding this issue, the *Ginsberg* Court quoted an earlier New York case:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

Id. at 640 (quoting People v. Kahan, 15 N.Y.2d 311, 312, 206 N.E.2d 333, 334 (1965) (Fuld, J., concurring)).

58 413 U.S. 49 (1973).

59 *Id.* at 54.

60 *Id.* at 50-51. The entrance to the theatres were inoffensive, and a warning sign stated: "If viewing the nude body offends you, PLEASE DO NOT ENTER." *Id.* at 52. Another sign mandated that persons entering the theatres be twenty-one years old. *Id.*

61 *Id.* at 51. The statute, GA. CODE ANN. § 26-2101 (1968) reads, in pertinent part:

> (a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any

legitimate state interest that permitted regulation in this area.[62] The *Paris* majority recognized that states also have a legitimate interest in eliminating obscenity in public places and local commerce, provided such regulations do not infringe upon specific constitutional provisions.[63] The Court stated that there was an interest in the public's quality of life and in the total community environment, as well as in public safety itself.[64] The *Paris* Court substantiated its reasoning with documented reports linking crime and obscene material.[65] Although no scientific data conclusively proved such a correlation, the majority held that it would be reasonable for the Georgia Legislature to determine that such a nexus might exist.[66] Accordingly, the Court ruled that because obscenity is unprotected by the first amendment, there is no constitutional barrier to prohibiting the distribution of obscene material.[67]

In response to the Court's rulings, legislatures have attempted to limit the distribution of obscene material solely under the guise of protecting minors.[68] In *Butler v. Michigan*,[69] the Court confronted the constitutionality of a statute which prohibited any person from making available to the public materials which may have a harmful effect on minors.[70] Butler was con-

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> description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . .
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> (b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

Id. The constitutionality of the Georgia obscenity statute was upheld in Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969), *aff'd per curiam*, 397 U.S. 592 (1970).

62 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973).

63 *Id. See also* United States v. Thirty-Seven Photographs, 402 U.S. 363, 376-77 (1971).

64 *Paris*, 413 U.S. at 58.

65 *Id.*

66 *Id.* at 60-61.

67 *Id.* at 69. Outside of the obscenity area, the Court has steadfastly held that to limit first amendment freedoms there must be a compelling state interest, and the government's regulation must be accomplished with narrow specificity. NAACP v. Button, 371 U.S. 415, 433, 438 (1963). *See also* Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 617 (1976) (holding that the ordinance must be narrowly drawn so as not to give governing officials unfettered power to decide what messages people will hear).

68 Butler v. Michigan, 352 U.S. 380, 383 (1957).

69 352 U.S. 380.

70 *Id.* at 381.

victed because he made available a book that had "obscene, immoral, lewd, lascivious language, or descriptions."[71] The book, however, was not considered obscene or indecent by adult standards.[72] The Court held that this regulation was not restricted to the evil with which it dealt.[73] In the Court's view, this legislation was invalid, as it attempted to reduce the adult population to reading material which was only fit for children.[74]

The Supreme Court has, however, permitted control of material that is not obscene where the speech is broadcast over the radio.[75] In *Federal Communications Commission v. Pacifica Foundation*,[76] the Court held that the FCC had the power to regulate radio programming which was indecent but not obscene.[77] In *Pacifica Foundation*, a radio station aired a monologue by George Carlin, a comedian, entitled "Filthy Words."[78] Justice Stevens, writing for the majority, determined that the material was indecent and, unlike obscene speech, was protected by the first amendment.[79] Although society may find this speech offensive, the Court noted that this was an inadequate reason to suppress it.[80] Justice Stevens asserted that "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."[81] The Court stated, however, that it is not an absolute rule that the first amendment prohibit all governmental regulation that depends on the content of the speech.[82] Justice Stevens set forth that vulgar, offensive, and shocking speech, such as that of the Carlin monologue, is not entitled to absolute constitutional protection.[83] The majority emphasized that broadcast speech receives the most limited first amendment

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71 *Id.*

72 *Id.* at 382-83.

73 *Id.* at 383.

74 *Id.* Justice Frankfurter, writing for the majority in *Butler*, disagreed with the state's position that by "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig." *Id.*

75 FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

76 *Id.*

77 *Id.* at 729.

78 *Id.* The broadcast aired at two o'clock in the afternoon. *Id.*

79 *Id.* at 745. The Court defined indecency as "nonconformance with accepted standards of morality." *Id.* at 740.

80 *Id.* at 745.

81 *Id.* at 745-46 (footnote omitted).

82 *Id.* at 744.

83 *Id.* at 747.

protection and noted two reasons for this limitation.[84] First, such speech goes into the privacy of the home, where the right to be free from intrusion outweighs first amendment rights.[85] Second, the indecent material is easily accessible to children.[86] The Court thus granted the FCC the power to regulate indecent broadcasting, but emphasized the narrowness of its holding due to the differences between broadcast speech and other forms of expression.[87]

Turning to the area of dial-a-porn, the first dispute involving adult messages on the telephone arose in an administrative action.[88] The FCC concluded, in this action, that section 223 of the Communications Act of 1934 did not encompass dial-a-porn.[89] In reaction to this ruling, Congress explicitly addressed dial-a-porn by amending the Act.[90] The amendment extended the Act to include pre-recorded messages and sought to restrict access of dial-a-porn to minors.[91] The Act also required the FCC to promulgate regulations by which dial-a-porn sponsors could screen out underaged callers.[92] These protective measures would act as a defense against prosecution only if the defendant restricted access to adults.[93]

The first litigation to involve dial-a-porn, *Carlin Communica-*

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84 *Id.* at 748-49.

85 *Id.* (citing Rowan v. Post Office Dep't., 397 U.S. 728 (1970)). The Court noted that listeners of radio broadcasts are not given any prior warnings regarding the content of the broadcast. *Id.*

86 *Id.* at 749. The Court maintained that young children can hear indecent speech that they would not even be able to read. *Id.*

87 *Id.* at 750.

88 Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) (citing *In Re* Cohalan, FCC File No. E-83-14, Memorandum Opinions and Orders Adopted May 13, 1983, and March 5, 1984). The statute at issue, 47 U.S.C. § 223, proscribed knowingly "permitting a telephone under ones control to be used to make any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent." Sable Communications of Cal. v. FCC, 109 S. Ct. 2829, 2833 (1989).

89 *Carlin*, 749 F.2d at 115.

90 H.R. REP. No. 356, 98th Cong., 1st Sess. 19, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 2219, 2235. The relevant part of this statute made it a crime to use telephone facilities to make obscene or indecent interstate telephone communications "for commercial purposes to any person under 18 years of age or to any other person without that person's consent." 47 U.S.C. § 223(b)(1)(A)(1982 Supp. II).

91 *Id.*

92 *Carlin*, 749 F.2d at 117.

93 *Id.* The defenses were available if the message provider took either of the following two steps:

tions, Inc. v. Federal Communications Commission (Carlin I),[94] was a challenge to the amended Act.[95] Carlin Communications, which provided a dial-a-porn service via pre-recorded messages, sought an injunction against enforcement of the Act.[96] The United States Court of Appeals for the Second Circuit assessed the time-channeling regulation.[97] The court noted that when a regulation is based on the content or subject matter of speech, a higher standard of scrutiny is required.[98] Thus, the court concluded that such regulations are to be reviewed under a strict scrutiny standard whereby a court must determine whether the regulation enhances a compelling governmental interest.[99] The court of appeals noted that shielding our youth from "salacious" matter is, without doubt, a compelling governmental interest.[100] The court, however, asserted that such an interest may only be served by narrowly drawn regulations.[101] Furthermore, the appellate court emphasized that the government must prove that there are no less intrusive restrictions available.[102]

Applying the strict scrutiny standard to *Carlin I*, the court posited that the FCC failed to prove that the time-channeling regulation was well-tailored to restricting access to adults only, or that less restrictive means would be ineffective.[103] Moreover, the *Carlin I* court held that this regulation was both overinclusive and underinclusive.[104] The court reasoned that the regulation denied adult use during accessible hours and, at the same time, the message was easily accessible to minors during the allowable hours.[105] Additionally, the court noted that there was no evidence as to why a prohibition was necessary during school hours,

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(a) Operating only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or

(b) Requiring payment by credit card before transmission of the messages.

Id.

94 749 F.2d 113 (2d Cir. 1984).

95 *Id.* at 115.

96 *Id.*

97 *Id.* at 120.

98 *Id.* at 121.

99 *Id.*

100 *Id.* (citing Ginsberg v. New York, 390 U.S. 629 (1968)).

101 *Id.* (citing Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)).

102 *Id.* (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 74 (1981)).

103 *Id.* at 121.

104 *Id.*

105 *Id.*

or why there was no prohibition after 9:00 p.m. Eastern Time.[106] The court of appeals also determined that there was no conclusive proof that time-channeling was the least restrictive means available.[107]

Two years later, the FCC promulgated new regulations to act as a defense against prosecution.[108] The FCC replaced the time restriction defense with a defense based on the use of access codes (user identification codes).[109] Under this new method, the caller had to provide an access code before he was entitled to hear the message.[110] This code was received through the mail after the message provider reviewed the application and verified that the applicant was at least eighteen years old.[111] Thus, it would now act as a defense if the message provider required either credit card payment or authorization by access or identification code prior to transmission of the recording.[112] The FCC once again rejected all forms of blocking.[113]

In *Carlin Communications, Inc. v. Federal Communications Commission (Carlin II)*,[114] Carlin Communications challenged the access code regulation. The Court of Appeals for the Second Circuit again was not convinced that this form of regulation was the least restrictive means to limit access to adult messages to persons eighteen years of age or older.[115] The court remanded the case and ordered the FCC to further explore the feasibility of shifting the expense of customer premises blocking to the telephone company and message provider, rather than passing on these additional costs to the customer.[116] The court recognized that, although the use of access codes may well be the least restrictive means available, it must be established under the strict scrutiny

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106 *Id.* During the day, children are in school under adult supervision. *Id.* Additionally, 9:00 p.m. Eastern Time translates into 6:00 p.m. Pacific Time. *Id.* In either time zone, this is still early, considering it only takes about ninety seconds for an unsupervised youth to hear the recording. *Id.*

107 *Id.* at 122. Furthermore, the court stated that the FCC did not show why alternatives such as "blocking," or the use of access codes would be less effective. *Id.* Accordingly, the time-channeling regulation was set aside, but the court did not reach the constitutionality of the statute. *Id.* at 123.

108 Carlin Communications, Inc. v. FCC, 787 F.2d 846, 852 (2d Cir. 1986) (citing 50 Fed. Reg. 42,699 (1985) (to be codified at 47 C.F.R. § 64,201)).

109 *Id.* at 853.

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* at 852.

114 *Id.* at 846.

115 *Id.* at 856.

116 *Id.*

standard.[117] Accordingly, the appellate court would not address the constitutionality of the regulation until the FCC concluded its examination of the cost shifting of premises blocking.[118]

In 1987, the FCC again rejected customer premises blocking, in favor of a third defense against prosecution.[119] In addition to the two already presented regulations, credit card payment and the use of access codes, the utilization of a message scrambler would also be available to shield providers of adult recordings from prosecution.[120] Under this new method, messages could not be heard without a descrambler.[121]

The Court of Appeals for the Second Circuit in *Carlin Communications, Inc. v. Federal Communications Commission (Carlin III)*,[122] considered whether the new FCC regulations were satisfactory. The court concluded that the use of the three defenses now made available by the FCC was a "feasible and effective way to serve [the] compelling state interest" of protecting minors from these pre-recorded adult messages.[123] The FCC proved, according to the court, that less restrictive means were neither available nor feasible.[124] The appellate court further posited that customer premises blocking would be too expensive and such devices could easily be disabled by minors.[125] The court concluded that descramblers were more effective, less expensive, and were not unduly cumbersome.[126] While *Carlin III* did not address the question of whether the government could use more restrictive means, such as a total ban on all obscene and indecent speech, this issue presented itself to the United States Supreme Court in *Sable Communications of California v. Federal Communications Commission*.[127]

In *Sable*, the Court considered whether Congress had the power, through section 223(b) of the Communications Act of 1934, to prohibit obscene and indecent telephone recordings.[128]

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117 *Id.* at 855.
118 *Id.*
119 Carlin Communications, Inc. v. FCC, 837 F.2d 546, 554 (2d Cir. 1988).
120 *Id.* at 549.
121 *Id.* Descramblers would be sold to adults only. *Id.* at 555.
122 *Id.* at 546.
123 *Id.* at 555.
124 *Id.* at 556.
125 *Id.*
126 *Id.* at 551. AT&T commented that battery operated portable descramblers could be purchased at a low cost. *Id.*
127 109 S. Ct. 2829 (1989).
128 Id. at 2831-32.

The Supreme Court affirmed the judgment of the district court, holding that the obscenity provision of the Act was constitutional, but the indecent aspect of the Act must be struck down as unconstitutional.[129] The Court adhered to past decisions and ruled that obscene speech is not protected by the first amendment.[130] Accordingly, the majority noted that no constitutional barrier exists pertaining to a ban on obscene recorded messages.[131]

Justice White, writing for the majority in *Sable*, stated that the Act does not contravene the "contemporary community standards" requirement enunciated in *Miller v. California*.[132] The Court reasoned that the Act did not establish a "national standard" of obscenity any more than other federal statutes.[133] The majority asserted that the absence of a uniform national standard of obscenity does not make a federal statute unconstitutional.[134] The Court recognized that some communications may be considered obscene in certain communities and not obscene in others.[135] Justice White concluded that there were no constitutional barriers to prohibiting such communications.[136] The majority posited that the burden of complying with a prohibition on obscenity rests with the message provider.[137] Justice White noted that Sable could vary its messages to conform to each particular community it serves.[138] While the Court realized that this may translate into additional costs for Sable, it would not render the Act unconstitutional.[139] In accordance with prior decisions relating to obscenity statutes, the *Sable* majority held that the Act's ban on obscene telephone messages was constitutional.[140]

Turning to the area of indecent speech, the Court asserted

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129 *Id.* at 2832, 2839.

130 *Id.* at 2835 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973)).

131 *Id.*

132 *Id.* *See supra* notes 40-44 and accompanying text for a discussion of *Miller*.

133 *Id.*

134 *Id.* at 2835-36 (quoting Hamling v. United States, 418 U.S. 87, 106 (1974)).

135 *Id.* at 2835.

136 *Id.* at 2836.

137 *Id.* The Court reasoned that communication companies, that wish to provide this type of service, are aware that its audience extends into more than one locality, and accordingly, must ensure that the message meets the various local community standards. *Id.*

138 *Id.*

139 *Id.* Justice White recognized that there are many options available to assure that the message will conform with local community standards. *Id.* Thus, the Court held that the decision as to which option to utilize rests with the message provider. *Id.*

140 *Id.*

that the sale of indecent material to adults could not be made a crime simply because the material was indecent.[141] Because indecent speech is constitutionally protected, the majority cautioned that such speech may be regulated only to promote a compelling governmental interest.[142] The Court further emphasized that the regulation must be the least restrictive means available to further that interest.[143] In order to pass constitutional muster, the majority demanded that the legitimate interest be served "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[144] The Court recognized that protecting the "physical and psychological well-being" of minors is a compelling interest.[145] Furthermore, Justice White noted that this interest included material that may not be considered indecent or obscene to adults.[146]

While protecting minors from exposure to indecent speech is compelling, the Court reasoned that this alone is not enough for a statute that bans all indecent dial-a-porn messages to pass constitutional scrutiny.[147] In addition to a compelling interest, the majority required that the regulation must be closely tailored to achieve the ends sought.[148] The Court concluded that the Act was not drawn narrowly enough to serve the legitimate state interest of protecting children from exposure to indecent dial-a-porn recordings.[149] Thus, the majority held that the section of the Act pertaining to indecent speech violated the first amendment.[150] The Court further reasoned that the Act was invalid because it limited telephone communications of adults to those recordings that were suitable for children.[151] The majority explained that the Act exceeded those measures that were necessary to shield minors from exposure to adult oriented

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141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.* (quoting Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980) (citations omitted)).

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at 2839. *See generally* Butler v. Michigan, 352 U.S. 380 (1957) (holding that "the government may not reduce the adult population to only what is fit for children").

messages.[152] Accordingly, the Court asserted that this "legislation is not reasonably restricted to the evil with which it is said to deal."[153]

The majority refused to accept the FCC's argument that a complete ban is justified because anything short of a total ban would not prevent minors from accessing the prerecorded messages.[154] Justice White observed that the FCC had previously determined that its credit card payment, access code, and scrambling regulations were satisfactory solutions to preventing these messages from reaching minors.[155] Therefore, the Court concluded that these "screening" devices would be extremely effective.[156] The Court reasoned that only the most "enterprising and disobedient young people" would be able to gain access to the messages.[157]

The *Sable* Court next rejected the FCC's claim that these rules were not effective enough because some minors could manage to gain access to the dial-a-porn recordings.[158] The majority considered this argument unpersuasive because there was no evidence to support this claim.[159] Furthermore, the Court found that the FCC's procedures had not been tested over a sufficient period of time.[160]

The Court also took exception to the FCC's position that the Court must defer to Congress' finding that there was no effective way to shield minors, other than a total ban.[161] While this finding should not be ignored, the majority asserted that it was the Court's duty to determine whether Congress had violated the Constitution.[162] The majority was not convinced by Congress'

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152 Sable Communications of Cal. v. FCC, 109 S. Ct. 2829, 2839 (1989).

153 *Id.* at 2836 (quoting *Butler*, 352 U.S. at 383).

154 *Id.* at 2837.

155 *Id.* The *Sable* majority recognized that the court of appeals in Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988) held that these rules were a "feasible and effective" method to serve the compelling interest of protecting children from indecent speech. *Sable*, 109 S. Ct. at 2837.

156 *Id.*

157 *Id.* at 2838.

158 *Id.* at 2837.

159 *Id.*

160 *Id.* In response to the FCC's contention that anything less than a total ban would be ineffective, the majority posited that "[t]here is no evidence in the record before us to that effect, nor could there be since the FCC's implementation of § 223(b) prior to its 1988 amendment has never been tested over time." *Id.*

161 *Id.* at 2838.

162 *Id.* More specifically, Justice White stated that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)).

conclusion that there were no less restrictive means available to protect minors from hearing these pre-recorded messages.[163] Other than conclusory statements, the Court determined that the congressional record did not contain any evidence as to the potential effectiveness of the FCC's rules.[164] Justice White posited that no congressman or senator stated on the record how often minors could or would gain access to these pre-recorded messages.[165] Additionally, the majority emphasized that the FCC, as well as other witnesses, testified that the regulations arrived at were effective and should be utilized in practice.[166]

Rebutting the FCC's contention that *Federal Communications Commission v. Pacifica Foundation* justified the total prohibition of dial-a-porn messages, the Court noted the narrowness of the *Pacifica Foundation* holding.[167] The *Sable* Court distinguished *Pacifica Foundation* because it did not involve a total ban on the broadcasting of indecent material.[168] The majority next considered the unique attributes of radio broadcasting.[169] A radio program, in the Court's opinion, can enter the privacy of one's home without any warning to the listener as to the content of the show.[170] The majority reasoned that telephone communications differ from radio broadcasts in that a caller to a telephone recording must take affirmative steps to hear the communication.[171] Therefore, the Court surmised, the callers intend to hear

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163 *Id.*

164 *Id.* The enacted bill was introduced on the floor and was not accompanied by a committee report. *Id.*

165 *Id. See* 134 CONG. REC. H1691 (statement of Rep. Bliley), H1699 (statement of Rep. Coats), H1690 (statement of Rep. Hall) (daily ed. April 19, 1988); S4377 (statement of Sen. Hatch (daily ed. April 20, 1988); *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 2, 15 (statement of Rep. Bliley), 18 (statement of Rep. Coats), 20 (statement of Rep. Tauke) (1987).

166 *Sable*, 109 S. Ct. at 2838 (citing *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 2, 129, 130, 132-33, 195-96, 198-200, 230-31 (1987).

167 *Id.* at 2836-37. For a discussion of *Pacifica*, see *supra* notes 75-87 and accompanying text, where the Court determined that special treatment of indecent broadcasting was warranted.

168 *Sable*, 109 S. Ct. at 2837. The program in *Pacifica* was considered indecent and was restricted to certain times of the day when minors were least likely to hear it. *Id.*

169 *Id.*

170 *Id.* The Court posited that a radio broadcast is "uniquely accessible to children, even those too young to read." *Id.* (quoting FCC v. Pacifica Foundation, 438 U.S. 726, 748-49 (1978)).

171 *Id.*

the message and cannot be considered part of a "captive audience."[172] The *Sable* Court concluded that telephone callers are willing to pay for the recording, and accordingly, cannot be surprised by an indecent message in the same way as a radio listener.[173]

In a concurring opinion, Justice Scalia agreed that a total ban on adult access to indecent speech could not be approved simply because a few children may manage to get access to dial-a-porn recordings.[174] Justice Scalia, however, asserted that the reasonableness of such a statute depends on how many children will have access to the message and how the terms "indecency" and "obscenity" are defined.[175] The Justice noted that a narrower definition of obscenity means that more material will be included in the residual category of indecent speech.[176] Accordingly, Justice Scalia called for greater insulation of minors.[177]

Justice Scalia next joined the Court's opinion, stressing that the majority did not mandate that Congress have conclusive data regarding the ineffectiveness of the FCC's regulations in order to render the Act constitutional.[178] The Justice reasoned that a statute placing a total ban on speech would be valid if the proposed regulations were ineffective and unfeasible.[179]

Justice Brennan, with whom Justices Marshall and Stevens joined concurring in part and dissenting in part, agreed with the majority's ruling regarding indecent speech.[180] Justice Brennan, however, dissented from the Court's holding relating to the obscenity aspect of the Act.[181] The Justice declared that criminal penalties could not be imposed for the distribution of obscene material to consenting adults.[182] Justice Brennan reasoned that fair notice cannot be given because the definition of obscenity is not sufficiently clear or specific.[183] The government, in Justice

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172 *Id.*

173 *Id.* Justice White reasoned that "[u]nlike an unexpected outburst on a radio broadcast, the 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.*

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

175 *Id.*

176 *Id.*

177 *Id.* at 2840 (Scalia, J., concurring).

178 *Id.*

179 *Id.*

180 *Id.* (Brennan, J., concurring in part and dissenting in part).

181 *Id.*

182 *Id.*

183 *Id.* Because of the inability to sufficiently define the concept of obscenity,

Brennan's opinion, does have a valid interest in protecting minors from exposure to harmful pornographic material.[184] The Justice set forth, however, that this interest does not justify an "unconstitutionally overbroad" ban on all obscene telephone messages for profit.[185] While the majority acknowledged that the Act was overreaching as far as indecent speech was concerned, Justice Brennan asserted that the same was true regarding obscene speech.[186] Justice Brennan emphasized that a complete ban is not necessary because the FCC's regulations would shield minors from the telephone messages, and at the same time allow access to adults who wish to hear the message.[187]

The *Sable* decision is a continuation of court holdings concerning which types of speech are entitled to first amendment protection. Obscene speech is considered to be without any redeeming social value, and accordingly, is not afforded first amendment protection.[188] Thus, the government may completely ban obscene speech. Indecent speech, on the other hand, does fall under the umbrella of first amendment protection. The FCC, however, may regulate such speech only if it conforms to certain requirements. There must be a compelling state interest at stake and the regulation must be drawn with narrow specificity.[189] Therefore, less restrictive means may not be available to regulate the speech.

Sable is a logical extension of the Court's prior decisions. The youth of today are the minds that will enhance our future. To allow the thoughts of minors to be corrupted by obscene or indecent speech would jeopardize the prosperity of the coming years. Courts throughout the years have recognized this point and have held that the well-being of minors is a compelling state interest. It is an interest that must be protected at all times.

The dissent argued that obscene speech should be treated in the same manner as indecent speech, in that as long as minors are shielded from the recordings, consenting adults should be

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Justice Brennan asserted that "the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable." *Id.*

184 *Id.* (citing New York v. Ferber, 458 U.S. 747, 775-77 (1982) (Brennan, J., concurring in judgment)).

185 *Id.* (quoting Miller v. California, 413 U.S. 13, 47 (1973) (Brennan, J., dissenting)).

186 *Id.* at 2840-41. (Brennan, J., concurring in part and dissenting in part).

187 *Id.*

188 Roth v. United States, 354 U.S. 476, 484 (1957).

189 NAACP v. Button, 371 U.S. 415, 433-38 (1963).

allowed to listen to the obscene speech.[190] The dissent, however, was mistaken in thinking that shielding minors was the only compelling state interest involved. States also have a compelling interest in the public's quality of life and "total community environment."[191] Furthermore, there was a reported nexus between obscenity and crime. Therefore, to permit even consenting adults to listen to obscene speech would be a grave mistake.

Although the distinction between obscene and indecent speech was not at issue in this case, it may have been beneficial for the Court to further analyze and conclude as to the difference between these two categories. The *Sable* majority neglected to give any insight into what will make a recording obscene, as opposed to indecent. Without such a distinction, the future of dial-a-porn recordings remains uncertain. What is certain is that the Court will allow Congress to place a total ban on the message if the speech is determined to be obscene, and will not allow a complete prohibition if the speech at issue is determined to be indecent.

George Koroghlian

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[190] Sable Communications of Cal. v. FCC, 109 S. Ct. 2829, 2840-41 (1989) (Brennan, J., concurring in part and dissenting in part).

[191] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).