Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Free Speech/Media

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Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115 (1989)

Sable Communications of California offered "dial-a-porn" services. Callers who paid a fee could dial a number in the California area and hear sexually provocative messages. In 1988, Congress amended the Communications Act of 1988 to prohibit persons from making "any obscene or indecent communication for commercial purposes to any person." Sable Communications filed a lawsuit against the Federal Communications Commission that asked for an injunction prohibiting the federal government from enforcing this provision on the ground that the law violated the First and Fourteenth Amendments. The federal district court declared that Congress could forbid obscene dial-a-porn, but not indecent dial-a-porn. Sable Communications appealed that ruling to the Supreme Court of the United States.

Many groups concerned with the media filed amicus briefs. The American Civil Liberties Union, numerous media organizations, the Consenting Adults Telephone Rights Association and the San Francisco AIDS Foundation urged the Supreme Court to strike down the federal ban on indecent and obscene communications. The brief for the San Francisco AIDS Foundation stated,

> *This Court is called upon to fashion rules which will determine the enforceability of an outright ban on sexually oriented telephone communications, even as they may be directed at or received by mature and receptive adults. Because sexually explicit telephone communications may play a positive role in curbing the AIDS epidemic, the nation's obscenity laws ought not be construed so as to ban all such materials. Sexually explicit telephone communications deserve First Amendment protection if they may help to save lives by deterring or replacing life-threatening behavior.*

Such prominent socially conservative organizations as Morality in Media filed amicus briefs urging the Supreme Court to sustain the federal law. The brief for Morality in Media declared,

> *The ease with which children obtain access to "dial-it" services is well documented. Children access such services by mistake, out of curiosity, through peer pressure, for the "fun of it," and because of addiction. Unlike the mails which arrive once during the day and usually at a set time, "dial-it" services, like radio or TV broadcast, are accessible twenty-four hours a day, inside the home and out, and do not arrive in a sealed envelope or require an ability to read.*

The Supreme Court unanimously declared unconstitutional the federal ban on indecent phone services. Justice White's majority opinion insisted that government regulation of telephones had to be consistent with general First Amendment standards. White maintained that a constitutional distinction existed between telephones and broadcast media, which the Supreme Court in FCC v. Pacifica Foundation *(1978) had held were subject to greater government regulation. On what basis did he make that distinction? Is that distinction constitutionally correct?*

JUSTICE WHITE delivered the opinion of the Court.

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[T]he District Court upheld [the] prohibition of obscene telephone messages as constitutional. We agree with that judgment. In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial-a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech. *Paris Adult Theatre I v. Slaton* (1973). The cases before us today do not require us to decide what is obscene or what is indecent but rather to determine whether Congress is empowered to prohibit transmission of obscene telephonic communications.

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Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

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[*FCC v. Pacifica Foundation* (1978)] is readily distinguishable from these cases, most obviously because it did not involve a total ban on broadcasting indecent material. The FCC rule was not "'intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.' . . ."

The *Pacifica* opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica.* In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike 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.

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The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. . . .

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There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, that under the FCC regulations minors could still have access to dial-a-porn messages, the congressional record presented to us contains no evidence as to *how* effective or ineffective the FCC's most recent regulations were or might prove to be. It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system. The bill that was enacted, however, was introduced on the floor; nor was there a committee report on the bill from which the language of the enacted bill was taken. No

Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages. On the other hand, in the hearings on H.R. 1786, the Committee heard testimony from the FCC and other witnesses that the FCC rules would be effective and should be tried out in practice. . . .

For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. Under our precedents, § 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of "burn[ing] the house to roast the pig."

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JUSTICE SCALIA, concurring.

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I join the Court's opinion because I think it correct that a wholesale prohibition upon adult access to indecent speech cannot be adopted merely because the FCC's alternate proposal could be circumvented by as few children as the evidence suggests. But where a reasonable person draws the line in this balancing process—that is, how few children render the risk unacceptable—depends in part upon what mere "indecency" (as opposed to "obscenity") includes. The more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the more reasonable it becomes to insist upon greater assurance of insulation from minors. . . .

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part and dissenting in part.

In my view, 47 U.S.C. § 223(b)(1)(A)'s parallel criminal prohibition with regard to obscene commercial communications violates the First Amendment. I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable. In my judgment, "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." . . .