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In the 1986 session of the Maryland General Assembly a great deal of public attention was focused on the so-called "Obscene Record Bill." The introduction of this bill was an attempt to deal with the problem of record lyrics which various persons and organizations deemed indecent, obscene, and harmful to the youth of this state and the country. While the bill was not enacted into law, it did focus public attention on this specific problem. One specific example of the type of lyric that these people and groups seek to regulate is the song "Darling Nikki," from Prince's Grammy and Oscar award-winning album *Purple Rain*, which contains the following verse: "I knew a girl named Nikki/I guess you could say she was a sex fiend./I met her in a hotel lobby/Masturbating with a magazine./She said 'how'd u like to waste sometime?/And I couldn't resist when I saw/Little Nikki grind."[1]

One particular organization, the Parents' Music Resource Center (PMRC), was established in 1985 to help alleviate this problem. Its mission is "to get the music world to clean up its act."[2] The PMRC has proposed several methods of dealing with the problem of obscene lyrics and their effect on children. First, they want record companies to voluntarily label records using a rating system similar to that used to rate motion pictures. The rating system would label those records whose lyrics deal with such subjects as violence, sex, suicide, drugs and alcohol, or the occult.[3] Second, the PMRC would like all lyrics to be printed on record covers to enable parents to better decide what their children should listen to.[4] Finally, the PMRC wants to establish "a nationwide 'Media Watch' to 'monitor radio and TV stations consistently for a period of time' and 'record the objectionable words/songs/scenes.'"[5]

Another attempt to deal with this particular problem is through the use of legislation to protect children from these allegedly obscene lyrics. One Maryland legislator, Del. Joseph E. Owens, described sexually oriented lyrics as "filth" and "slime" and declared that its distribution is "probably the worst type of child abuse we've got . . . this is mass child abuse, that's what it is . . . slime affecting children."[6] This article will examine one such legislative attempt to deal with this problem in light of the constitutional limitations and practical considerations involved.

A bill was introduced in the 1986 session of the Maryland General Assembly which was designed to prohibit the sale, rental, distribution, or advertising of obscene records, tapes, or compact discs to persons under the age of eighteen.[7] The bill, H.B. 111, would add phonograph records, magnetic tapes, and compact or laser discs to the list of other obscene materials which were already enumerated in the Maryland statute prohibiting the sale, distribution, or advertising of obscene materials to minors.[8] After its introduction, H.B. 111 was passed by the House of Delegates by a vote of 96 to 11.[9] The bill was then sent to the Senate Judicial Proceedings Committee, where public hearings were held and the bill was defeated by a vote of 7 to 4.[10]

The statute, as amended by this bill, would have read:

> (a)(1) A person may not willfully or knowingly engage in the business of selling, showing, advertising for sale, or distributing to any person under the age of 18 years any still picture, photograph, book, pocket book, pamphlet, magazine, video disc, [or] video tape, PHONOGRAPH RECORD, MAGNETIC TAPE, COMPACT OR LASER DISC the cover or content of which is principally made up of descriptions or depictions of illicit sex, or which consists of pictures nude or partially denuded figures posed or presented in a manner which an average person applying contemporary community standards would find, taken as a whole, appeals to prurient interest and lacks serious literary, artistic, political or scientific value.
>
> (2) An owner, operator, franchisee, manager, or any employee with managerial responsibility of a newsstand or any other place of business may not openly and knowingly display at the newsstand or other place of business, if it is frequented by persons under the

age of 18 years, any of the items whose sale, showing, or advertising is prohibited by paragraph (1) of this subsection.

(3) Violation of this section is a misdemeanor.

(b) In this section the following words have the meanings indicated:

(1) "Description or depictions of illicit sex" shall mean:

(i) Human genitals in a state of sexual stimulation or arousal;

(ii) Acts of human masturbation, sexual intercourse, or sodomy; or

(iii) Fondling or other erotic touching of human genitals.

(2) "Distributing" includes renting.

(3) "Nude or partially denuded figures" means:

(i) Less than completely and opaquely covered human genitals, pubic region, buttocks, or female breast below a point immediately above the top of the areola; or

(ii) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.[11]

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ."[12] The freedoms granted by the First and Fourteenth Amendments are not and have never been treated as absolutes.[13] There are various types of freedoms that the Supreme Court has held to be restricted.[14]

Obscenity is not within the area of the protected speech or press under the First and Fourteenth Amendments. The states have the power to enact statutes designed to regulate obscene materials, but such regulations must be carefully limited.[15] After numerous efforts at defining obscenity, the Supreme Court in *Miller v. California*,[16] finally established a three part test for determining whether certain materials are obscene. The *Miller* test is as follows:

(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.[17]

It is clear that any material which is considered obscene for adults will also be considered obscene for children. The problem which arises, and is particularly apparent in examining H.B. 111, involves regulating the distribution of material to children which would not be considered obscene for adults.

In order to analyze the rights of children as to their constitutional rights, particularly First Amendment rights, it is necessary to acknowledge a child's less than full capacity for choice.[18] Children are presumed to be incapable of making mature, competent, and responsible choices.[19] The Supreme Court has stated that, "Children, by definition, are not assumed to have the capacity to take care of themselves."[20]

Society looks first to the parents to make decisions on behalf of their children.[21] In those situations "[w]here the parents lack the [necessary] power to make their authority over the listening and reading activities of their children effective, they may seek to invoke the [state's] power and resources . . . to reinforce their supervision."[22] "[T]he State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"[23]

The Supreme Court first addressed the problem of the state's power to regulate children's access to materials considered obscene to them, but not to adults, in the 1968 case of *Ginsberg v. New York*.[24] In *Ginsberg*, the defendant was convicted for selling "girlie" magazines to minors under a New York State statute which prohibited the sale to persons under seventeen years of age of material defined to be obscene to minors.[25] The statute's definition of obscenity as to minors conformed to the *Roth* test and included material which: "(i) predominately appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."[26]

The New York statute was held to be constitutional by the *Ginsberg* court, thereby establishing the constitutionality of the variable obscenity test for minors. The Court held that the statute, in defining obscenity on the basis of its appeal to minors, did not involve an invasion of the constitutionally protected freedoms of minors.[27] Holding that the well-being of children was within New York's constitutional power to regulate, the Court found two interests to justify the limitations imposed by the statute: (1) "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society;"[28] and (2) "The State also has an independent interest in the well-being of

its youth."[29] Finally, the Court upheld the statute on the basis that it was rationally related to the objective of safeguarding minors from harm.[30]

In *Erznoznik v. City of Jacksonville*,[31] the Supreme Court examined the constitutionality of a city ordinance prohibiting the exhibition of films containing nudity by a drive-in theatre when its screen is visible from a public street or place. Among the arguments made in support of the ordinance's constitutionality was that it was "an exercise of the city's undoubted police power to protect children."[32]

The Court recognized the rule of *Ginsberg* that a state or municipality can adopt regulations imposing stricter controls on materials available to children than on those available to adults. Minors are still entitled to a significant portion of their First Amendment protections and the government may only prohibit the public dissemination of protected materials to minors if done in relatively narrow and well-defined circumstances.[33] The city's argument was rejected by the Court based on its finding that the ordinance was broader than permissible.[34]

The Supreme Court in *FCC v. Pacifica Foundation*,[35] addressed the authority of the FCC to regulate broadcasting of indecent speech. In *Pacifica*, the FCC issued a declaratory order against the broadcaster under its power to control the use of vulgarity in broadcasting under the statute forbidding the use of "any obscene, indecent, or profane language by means of radio communications."[36] The case involved the broadcasting of a monologue by comedian George Carlin, entitled "Filthy Words," which was aired by Pacifica's radio station in mid-afternoon.[37] The FCC characterized the language used in the monologue as "patently offensive," but not necessarily obscene.[38]

Pacifica's primary constitutional claim was that the First Amendment forbids any abridgments of the right to broadcast material which is not obscene.[39] The Court rejected this argument based on two distinctions between broadcasting and other forms of communication. First, the pervasive presence of the broadcast media allows it to confront adults with indecent material in the privacy of their own homes.[40] Second, the Court stated that "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting."[41]

The Maryland proposal, H.B. 111, would be the first statute in the country to prohibit the sale or distribution of obscene records or tapes to minors. An analysis of the constitutionality of the bill, if passed, must be based upon the principles set forth by the Supreme Court in *Ginsberg*, *Erznoznik*, and *Pacifica* and those cases which have examined similar state and municipal laws in light of these Supreme Court cases.

Those cases which have examined the constitutionality of state and local laws, have done so on a number of constitutional issues including: (1) vagueness, (2) overbreadth, (3) equal protection, and (4) prior restraint. The challenged statutes dealt with both the sale or distribution of obscene materials to minors and the display of those materials.

Various state statutes and municipal ordinances have been challenged on the ground of vagueness. The primary concerns of the vagueness doctrine are to provide actual notice as to what the particular statute commands or forbids and to set forth minimal guidelines to govern law enforcement.[42] The purpose of striking down statutes which are held to be vague is to prevent the arbitrary enforcement of laws which fail to give notice to officials or the public of what conduct or material is prohibited.[43]

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Those laws threatening to inhibit First Amendment freedoms require that a more stringent vagueness test be used.[44] The Supreme Court has enumerated three important values which are offended in the First Amendment area by vague laws. First, individuals are not given fair warning of what is prohibited. Second, the lack of precise standards permits arbitrary and discriminatory enforcement. Finally, vague statutes encroach upon First Amendment freedoms by causing citizens to forsake engaging in protected activities for fear it may be prohibited.[45]

The United States Court of Appeals for the Tenth Circuit, in *M.S. News Company v. Casado*,[46] examined a Wichita, Kansas ordinance which prohibited the promotion of sexually oriented materials to minors. The court found that the ordinance was not vague and set forth three reasons for its findings: (1) "the ordinance provides fair warning of what is prohibited;"[47] (2) it did "not perceive any real danger of arbitrary enforcement;"[48] and (3) it was "not persuaded that the ordinance will lead citizens to forsake activity protected by the First Amendment."[49]

In *American Booksellers Association v. McAuliffe*,[50] the court held that it "must apply the same constitutional standards relating to vagueness that it would apply if it were dealing with a statute pertaining to adults."[51] The court found several grounds to support its finding that the statute was unconstitutionally vague. First, it found that the language of the act was vague as to the materials prohibited and the manner of complying with the act.[52] Second, the court held that certain terms in the act were without a definite meaning and, therefore, unconstitutionally vague.[53]

There have also been several state laws and municipal ordinances which have been challenged on the ground that they are unconstitutionally overbroad. The basis of the overbreadth doctrine argument is that the particular state or local law restricts the access of both adults and minors to materials which are constitutionally permissible.[54] The primary purpose of striking down an overbroad statute is to "assure the public that the dissemination of materials protected by the First Amendment will not be suppressed."[55] The Supreme Court has stated that invalidating legislation as overbroad on its face is "manifestly strong medicine" which should be employed sparingly and "only as a last resort."[56]

In *American Booksellers Association v. McAuliffe*,[57] the court addressed the issue of whether the statute was overbroad as to both adults and minors. The statute prohibited the sale or display of certain materials which were deemed to be harmful to minors. The court reiterated the three part obscenity test, as set forth in *Miller*, and stated that any materials which did not satisfy the test were protected under the First Amendment.[58] The court examined the act and determined that it infringes on the protected rights of adults because "[t]he language includes a public display prohibition which necessarily prevents perusal by, and limits sale to, adults."[59]

The *McAuliffe* court then compared the

Georgia statute with the New York statute which was upheld by the Supreme Court in *Ginsberg* to determine if it was overbroad as to minors. The court held the statute to be overbroad because it lacked the guidelines set forth in *Ginsberg*.[60]

The court in *Rushia v. Town of Ashburnham*,[61] examined a local ordinance prohibiting the sale or display of indecent publications to minors, to determine if it was constitutionally overbroad. While the court recognized the state's interest in protecting its children allows a greater degree of control over communicative materials available to them,[62] it found that the ordinance also infringed on the rights of adults.[63] There were several reasons given by the court to support its conclusion. First, it held that the terms of the ordinance were much more sweeping than *Miller* and could potentially deter a substantial range of constitutionally protected expression.[64] Second, the ordinance was broader than the statute upheld in *Ginsberg* because it was not limited to materials which are obscene as to minors.[65]

Most recently, in *American Booksellers Association, Inc. v. Virginia*,[66] the Court of Appeals for the Fourth Circuit examined an amendment to the Virginia obscenity statute prohibiting display of books with sexual content deemed harmful to juveniles.[67] The court held that the amendment was facially invalid for overbreadth because it discourages the exercise of first amendment rights in a real and substantial manner, and is not readily subject to a narrowing interpretation as to withstand an overbreadth challenge.[68]

The court in *M.S. News Co.* also addressed the question of whether the municipal ordinance in question was overbroad.[69] The ordinance was held not to be overbroad for two reasons. First, the court held that "the ordinance has a clear and acceptable standard that will permit sale or distribution to adults of such materials."[70] Second, the portion of the ordinance dealing with the display of materials which are harmful to minors is reasonably written and any restrictions of the rights of adults to view these materials is reasonable.[71]

Several cases challenging these various statutes as unconstitutional have done so on the basis that these laws are violative of the Equal Protection Clause of the Fourteenth Amendment.[72] One such challenge was made in the case of *M.S. News Co. v. Casado*,[73] in which the ordinance in question distinguished between commercial and non-commercial enterprises. The court, recognizing that the material involved was obscene and therefore not subject to First Amendment protections, stated that "[s]uch classifications are upheld if they are rationally related to a legitimate state interest."[74] Applying this standard, the court determined that the distinction did bear a rational relationship to a legitimate state interest and that the ordinance did not violate the Equal Protection Clause.[75]

The Supreme Court of Colorado in *Tattered Cover, Inc. v. Tooley*,[76] held that a state statute distinguishing private, commercial bookstores from other entities, such as school bookstores, libraries, and museums, violated the Equal Protection Clause. The court acted under the presumption that the materials involved were not obscene and therefore entitled to the freedom of speech provisions of the First Amendment.[77]

When fundamental rights, such as the First Amendment right of free speech, are affected, the classifications in terms of the ability to exercise these rights must be judged against a strict scrutiny test.[78] The burden is upon the government to establish that the law is necessarily related to a compelling governmental interest.[79] The court in *Tattered Cover* concluded that "there is no compelling or overriding justification shown by the state in this case which supports the classification."[80]

The argument has also been made that these statutes and ordinances create an impermissible prior restraint on an individual's freedoms of speech and expression. Generally, the government may not regulate in advance what expressions may be uttered or published, even if such speech would be unconstitutional if spoken or published.[81] The Supreme Court has expressed its preference for subsequent punishment rather than allowing prior restraint.[82] A system involving any form of prior restraint on speech bears a heavy presumption against its constitutional validity.[83]

In *M.S. News Co. v. Casado*,[84] the court rejected a prior restraint argument for two reasons. First, there is no provision in the ordinance for a prior administrative determination of whether the material involved is obscene.[85] Second, there was no significant risk that a person may be prosecuted for engaging in protected conduct.[86]

Since the Maryland bill was first introduced, various persons and organizations have expressed reservations about the bill. State Senator Mike Miller, Jr., Chairman of the Senate Judicial Proceedings Committee, expressed his fear that the bill would have a "chilling effect" on artists.[87] A local organization known as the Recording Retailers Opposing Censorship (RROC) expressed its view that "[t]he action not only violates the recording artists' constitutional right to free speech, but usurps parental responsibility for children's development."[88] The RROC also found it unconscionable that the legislature would decide for parents what music their children should listen to and take the right of judgment on impressionability from the parents' hands.[89] Rock musician Frank Zappa, who testified in opposition of the bill, stated that the bill would force artists to censor their work in order to comply with the act.[90] Another opponent of the bill, Barry Lynn of the American Civil Liberties Union, stated that "[t]he bill is absurd and unconstitutional, and goes beyond any accepted definition of obscenity."[91] While not getting involved in the Maryland bill, the PMRC has stated that it does not endorse the legislative approach as a means of dealing with the problem.[92]

The Maryland bill must now be examined in terms of its constitutionality and practical effectiveness. While the present Maryland act has not been challenged on constitutional grounds, the Attorney General of Maryland has issued an Opinion advising the Governor as to the constitutionality of a bill before the Maryland Legislature amending section 419.[93] The Attorney General found two possible problem areas with that bill: (1) the portion of the bill which applies to the cover of certain material fails to satisfy the requirement of *Miller* that the work be "taken as a whole;"[94] and (2) the bill does not require that the proscribed material be "patently offensive" to the average person applying contemporary community standards.[95] The Opinion stated that the dissemination of material to minors which is indecent and offensive, but not necessarily obscene, could be constitutionally restricted.[96] This conclusion was based on the Supreme Court's holdings in *Ginsberg* and *Pacifica* that a statute aimed at protecting children need not meet the standards set forth in *Miller*.[97]

The act must also be examined in light of the decisions which have addressed similar statutes.[98] The Supreme Court has repeatedly held that obscene materials are not subject to the protections of the First Amendment.[99] The Court, in *Ginsberg*, gave its approval to state statutes prohibiting the distribution and display of material which is considered obscene to minors, but not obscene to adults.[100] The holdings of those courts which have examined similar statutes in light of *Ginsberg* will also help analyze the Maryland law's constitutionality.

The argument can easily be made that the Maryland act is unconstitutionally vague. The values that the Supreme Court has stated must be protected, and may all be offended by the bill.[101] First, persons are not given fair and adequate warning of

what materials are prohibited.[102] Since records and tapes have not previously been regulated, it will be hard for record retailers to know which materials are obscene.

Second, the lack of precise standards may permit the law to be enforced arbitrarily and discriminatorily.[103] Without a clear indication of what materials are prohibited, law enforcement officials may apply their own standards which are not likely to be consistent.

Finally, the statute may cause persons not to engage in activities that are constitutionally protected, for fear that these activities are prohibited.[104] The most likely group of persons to be affected are record and tape retailers, who may not sell various materials to minors although they may not be considered obscene. The statute could also have a chilling effect on the freedom of speech rights of recording artists, who may have to alter their work to comply with the law.[105] Since minors constitute a substantial portion of the record buying public, the artists may have to err on the side of cautiousness to prevent their records from not being able to reach that particular group.

The Maryland bill is also subject to attack on the ground that it is overbroad. The main purpose behind declaring a law to be unconstitutionally overbroad is to protect the dissemination of constitutionally protected materials.[106] It is the fear that this dissemination of protected materials will be prohibited which explains why this bill may be overbroad.

While states are permitted to enact statutes which exercise a greater degree of control over the materials available to minors, the states may not do this at the expense of the constitutional rights of adults.[107] There are two major problems with the Maryland bill. First, the provision of the act prohibiting the display of materials which are in violation of the act denies access to these materials to adults.[108] Without displaying these records, adults will not be able to purchase these materials in many instances, because they will not know that these materials are available.

Second, the terms of the act are more sweeping than those guidelines set forth in *Miller* and *Ginsberg*.[109] The guidelines in the Maryland act do not require that the materials be taken as a whole and they do not require that the materials be harmful to minors. While the Attorney General has stated that this discrepancy is not relevant because of the state's power to regulate indecent or offensive material as to children,[110] this power is not without its restrictions. The Supreme Court has held that the dissemination of protected materials to minors may only be done in "relatively narrow and well-defined circumstances."[111] The court in *Pacifica* did not overrule the holding in *Ginsberg* that states could prohibit the dissemination of materials which are obscene as to minors, but made its decision based on the context in which the communication was expressed.[112]

The Maryland bill does not appear to make distinctions which would subject it to claims of unconstitutionality on equal protection grounds.[113] One argument which can be made is that the law distinguishes between those persons who distribute these obscene records and those persons who broadcast these same materials. The former are covered by the law, while the latter are not. However, while broadcasters are not subject to the law, their actions are subject to regulation in light of the Supreme Court's holding in *Pacifica*.[114]

The argument that the bill would be unconstitutional as a prior restraint on the right of free speech is also likely to be unsuccessful. While prior restraints on First Amendment rights are strongly disfavored by the courts, any such restraint, if it does exist, is implied in the law. The two reasons given by the court in *M.S. News Co. v. Casado* are also present here.[115] First, the Maryland bill does not require that a prior administrative determination be made as to whether the material is obscene. There is no requirement that a censor board screen every record before it is made available to the public. Second, there is no indication that the law will be enforced in such a way as to provide a substantial risk of prosecution for engaging in protected activities.[116]

There are also several reasons why the enactment of H.B. 111 is impractical, as well as possibly unconstitutional. First, this is an area in which parents, and not the state, should be making the decision as to what their children should be listening to. The government should not step in and usurp the parents' rights and responsibilities in raising their own children. Second, the determination of which records and tapes are obscene will be hard for police, prosecutors, and judges to make. There are no precise standards which can be used to define whether a particular record is obscene. There are many songs whose lyrics are subject to different interpretations. The artists claim that the lyrics have one meaning, while groups such as the PMRC allege that the lyrics have another obscene meaning.[117] This creates a problem in determining how far parties can go to find that a record violates the law. Third, the bill creates possible economic problems for record retailers. Since the bill prohibits the display of these materials, the retailers will be forced to remove the records from their display shelves and place them out of the public's view. This will substantially impair the sales of these records to all persons because the displaying of these products is an integral part of the marketing and sales practice for records. Finally, the bill may have a reverse effect which could increase the problem. In many cases, the children who purchase these records are unaware of the explicit lyrics. By singling out certain records as obscene, this may induce children to obtain these records and pay more attention to the lyrics.

Despite the fact that H.B. 111 failed to be enacted into law by the Maryland General Assembly in 1986, it is apparent that this bill, or a similar version of the bill, will be introduced again in 1987. While there are doubts as to the constitutionality of such a bill, there are stronger doubts as to its need and possible effectiveness. While acknowledging that many of the lyrics are offensive and tasteless, the legislators must be careful not to usurp the responsibilities of the parents in controlling the listening habits of their children.

Notes

[1]Prince, *Purple Rain*, "Darling Nikki," Warner Bros. Records (1984).

[2]Moran, *Sounds of Sex*, NEW REPUBLIC, Aug. 12 & 19, 1985 at 14.

[3]Hentoff, *The Disc Washers*, PROGRESSIVE, No. 1985, at 31. The Proposed ratings system would be set up as follows:

X for profanity, violence, suicide, or sexually explicit lyrics, including fornication, sadomasochism, incest, homosexuality, bestiality, and necrophilia.

D/A for lyrics glorifying the use of drugs or alcohol.

O for lyrics dealing with the occult.

V for lyrics concerned with violence.

[4]Moran, *supra* note 2, at 15-16.

[5]*Id.* at 14.

[6]Baltimore Sun, Feb. 16, 1986, at C1, col. 6. Delegate Owens is chairman of the House Judiciary Committee.

[7]H.B. 111, Md. Leg., 1986 Sess.

[8]*Id.* The bill would amend MD. ANN. CODE art. 27, Section 419 (1982 Repl. Vol. and 1985 Supp.).

[9]Baltimore Sun, Feb. 16, 1986, at C1, col. 6.

[10]Baltimore Sun, Apr. 2, 1986, at A1, col. 2-3.

[11]H.B. 111, Md. Leg., 1986 Sess. The capitalized words are added to the existing statute, MD. ANN. CODE art. 27, § 419 (1982 Repl. Vol. and 1985 Supp.). A violation of section 419 is punishable by a fine of not more than $1,000, imprisonment for up to one year or both. MD. ANN. CODE art. 27, § 424 (1982 repl. Vol. and 1985 Supp.).

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

[13]*Gitlow v. New York*, 268 U.S. 652 (1925).

[14]*See e.g. Gertz v. Robert Welch, Inc.*, 418 U.S. 324 (1974) (libel); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Yates v. United States*, 354 U.S. 298 (1957) (internal security, clear and present danger); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

[15]*Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).
[16]413 U.S. 15 (1973).
[17]*Id.* at 24.
[18]Cleary, *Telephone Pornography: First Amendment Constraints on Shielding Children From Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503, 521 (1985).
[19]*Id.* at 520.
[20]*Schall v. Martin*, 104 S.Ct. 2403, 2410 (1984).
[21]Cleary, *supra* note 18, at 521.
[22]*Id.* at 522.
[23]*Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968).
[24]390 U.S. 629 (1968).
[25]*Id.* at 631. The statute in question, N.Y. PENAL LAW section 484-h (1965), is set forth in *Ginsberg*, 390 U.S. at 645-47 (1968).
[26]N.Y. PENAL LAW § 484-h(1)(f) (1965), *reprinted in Ginsberg*, 390 U.S. at 646. The case was decided under the obscenity standard as set forth in *Roth v. United States*, 354 U.S. 476 (1957). The Supreme Court has not yet examined a state statute prohibiting the distribution of obscene material to minors in light of the obscenity standard set forth in *Miller v. California*, 413 U.S. 15, 24 (1973).
[27]*Ginsberg*, 390 U.S. 629, 638 (1968).
[28]*Id.* at 639.
[29]*Id.* at 640.
[30]*Id.* at 643.
[31]422 U.S. 205 (1975). The municipal ordinance, section 330.313 of the City of Jacksonville Municipal Code (1972) is set forth in *Erznoznik*, 422 U.S. 205, 206-07 (1975).
[32]*Erznoznik*, 422 U.S. 205, 212 (1975).
[33]*Id.* at 212-13.
[34]*Id.* at 213.
[35]438 U.S. 726 (1978).
[36]*Id.* at 730-31. The FCC found its power to regulate indecent broadcasting under 18 U.S.C. § 1464 (1976) and 47 U.S.C. § 303(g) (1976). *Pacifica*, 438 U.S. 726, 731 (1978).
[37]The case evolved from a complaint filed with the FCC by a parent who heard the monologue while driving with his son. *Pacifica*, 438 U.S. 726, 729-30 (1978). A verbatim transcript of the monologue is set forth in the Appendix of the case. *Id.* at 751-55.
[38]*Id.* at 731.
[39]*Id.* at 742.
[40]*Id.* at 748.
[41]*Id.* at 750.
[42]*Rushia v. Town of Ashburnham*, 582 F. Supp. 900, 904 (D. Mass. 1983) (citing *Smith v. Gaguen*, 415 U.S. 566, 574 (1973).
[43]*American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50, 57 (N.D. Ga. 1981).
[44]*Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1290 (10th Cir. 1983).
[45]*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).
[46]721 F.2d 1281 (10th Cir. 1983).
[47]*Id.* at 1290. The court found that the ordinance clearly defined the obscenity standard as to minors. The court also discussed the ordinance's scienter requirement which must be satisfied in order to sustain a conviction. *Id.*
[48]*Id.* at 1291.
[49]*Id.* The court held that the ordinance was narrowly drawn within the standards set forth in *Miller* and *Ginsberg*. *Id.* For other cases upholding statutes against claims of vagueness *see Rushia v. Town of Ashburnham*, 582 F. Supp. 900 (D. Mass. 1983); *State v. Blecker*, 155 N.J. Super. 93, 382 A.2d 400 (1978); *State v. Seigel*, 139 N.J. Super. 373, 354 A.2d 103 (1975); *Capitol News Co. v. Metropolitan Government of Nashville and Davidson County*, 562 S.W.2d 430 (Tenn. 1978).
[50]533 F. Supp. 50 (N.D. Ga. 1981).
[51]*Id.* at 57. The court reiterated the Supreme Court's statement that "[T]he permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* (quoting *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968)).
[52]*Id.* at 57.
[53]*Id.* at 58. For other cases finding statutes to be void for vagueness *see People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.* 697, P.2d 348 (Colo. 1985); *Tattered Cover, Inc. v. Tooley*, 696 F.2d 780 (Colo. 1985); *Calderon v. City of Buffalo*, 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978).
[54]*See generally Butler v. Michigan*, 352 U.S. 380 (1957); *Rushia v. Town of Ashburham*, 582 F. Supp. 900 (D. Mass. (1983); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. (1981).
[55]*American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50, 55 (N.D. Ga. 1981).
[56]*New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).
[57]533 F. Supp. 50 (N.D. Ga. 1981).
[58]*Id.* at 55-56.
[59]*Id.* at 56. The court found that the act did not contain standards similar to those set forth in *Miller* and that the failure to do so results in the prohibition of non-obscene, protected material. *Id.*
[60]*Id.* at 56-57.
[61]582 F. Supp. 900 (D. Mass. 1983). The ordinance is set forth in the appendix to the opinion. *Id.* at 905-06.
[62]*Id.* at 904. *See Erznoznik*, 422 U.S. 205, 212 (1975); *Ginsberg*, 390 U.S. 629 (1968).
[63]*Rushia*, 582 F. Supp. 900, 904 (D. Mass. 1983).
[64]*Id.* at 903-04.
[65]*Id.* at 904. For other cases finding statutes to be overbroad *see People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985); *Calderon v. City of Buffalo*, 61 A.D.2d 323, 402 N.Y.S.2d 685 (1978); *State v. Frink*, 60 Or. App. 209, 653 P.2d 553 (1982).
[66]792 F.2d 1261 (4th Cir. 1986).
[67]*Id.* at 1263. The amended section VA CODE § 18.2-391(a) (Supp. 1985), provides that: "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 or peruse: [Description of prohibited materials]." (Emphasis to show 1985 amendment.)*
[68]*Id.* at 1266.
[69]*M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).
[70]*Id.* at 1288.
[71]*Id.* For other cases upholding statutes as not being overbroad *see Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (display provision only); *State v. Blecker*, 155 N.J. Super. 93, 382 A.2d 400 (1982).
[72]U.S. CONST. amend. XIV provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."
[73]721 F.2d 1281 (10th Cir. 1983).
[74]*Id.* at 1291. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810-14 (1976).
[75]*M.S. News Co.*, 721 F.2d 1281, 1291 (10th Cir. 1983). "The Supreme Court has recognized that there are 'legitimate state interests at stake in stemming the tide of commercialized obscenity. . . .'" *Id.* (quoting *Paris Adult Theatre I v. Slaton*, 423 U.S. 49, 57 (1973).
[76]696 P.2d 780 (Colo. 1985). *See also people ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985).
[77]*Tattered Cover, Inc. v. Tooley*, 696 P.2d 780, 785 (Colo. 1985).
[78]*Id.* at 786. *See generally Speiser v. Randall*, 357 U.S. 513 (1958).
[79]*Tattered Cover*, 696 P.2d 780, 786 (Colo. 1985). *See generally San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973).
[80]*Tattered Cover*, 696 P.2d 780, 786 (Colo. 1985).
[81]*See Near v. Minnesota*, 283 U.S. 697 (1931).
[82]*See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975); *Carroll v. Princess Anne*, 393 U.S. 175, 180-81 (1968).
[83]*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
[84]721 F.2d 1281 (10th Cir. 1983). *See also American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (where the plaintiffs raised the issue that the statute constitutes a prior restraint on speech and press, but the court did not address this issue in rendering its decision).
[85]*Id.* at 1292. "[T]he Supreme Court has held that a system of prior administrative notice of a determination of obscenity as to particular publications, with subsequent criminal prosecution for distribution possible violated of constitutional rights protected by the Fourteenth Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-71 (1963).
[86]*M.S. News Co.*, 721 F.2d 1281, 1292 (10th Cir. 1983).
[87]Baltimore Sun, Apr. 2, 1986, at A8, col. 4.
[88]Baltimore Sun, Feb. 16, 1986, at C1, col. 6.
[89]*Id.* at C10, col. 2.
[90]Baltimore Sun, Mar. 19, 1986, at A10, col. 6.
[91]Baltimore Sun, Feb. 25, 1986, at B1, col. 2.
[92]*Id.*
[93]66 Op. Att'y Gen. 73 (1981). The bill S.B. 438, Md. Leg., 1981 Sess., was enacted into law and is the present MD. ANN. CODE art. 27, § 419 (1982 Repl. Vol. and 1985 Supp.).
[94]66 Op. Att'y Gen. 73, 75 (1981).
[95]*Id.* at 75-76.
[96]*Id.* at 76. The Opinion cited *Pacifica* as an example of such a regulation.
[97]*Id.*
[98]*See Ginsberg*, 390 U.S. 629 (1968). *See also supra* notes 42-83 and accompanying text.
[99]*Miller v. California*, 413 U.S. 15 (1973), *Roth v. United States*, 354 U.S. 476 (1957).
[100]*Ginsberg v. New York*, 390 U.S. 629 (1968).
[101]*See supra* notes 42-53 and accompanying text.
[102]*See supra* note 45 and accompanying text.
[103]*Id.*
[104]*Id.*
[105]*See supra* notes 87 and 90.
[106]533 F. Supp. 50, 55 (N.D. Ga. 1981).
[107]*See supra* note 62.
[108]*See supra* notes 57-71 and accompanying text.
[109]*Id.*
[110]*See supra* notes 93-97 and accompanying text.
[111]*Erznoznik*, 422 U.S. 205, 213 (1975).
[112]*See supra* notes 35-41 and accompanying text.
[113]*See supra* notes 72-80 and accompanying text.
[114]*See supra* notes 35-41 and accompanying text.
[115]*See supra* notes 84-86 and accompanying text.
[116]*See supra* note 86 and accompanying text.
[117]*See* Cocks, *Rock Is A Four-Letter Word*, TIME, Sept. 30, 1985, at 70 (The PMRC claimed that the song "Under the Knife" was a glorification of sadomasochism, while the song's author, Dee Snider of group Twisted Sister, stated that the song was about the Fear of Surgery).

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