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Clay Calvert
University of Florida-Gainesville

Of Burning Houses and Roasting Pigs: Why *Butler v. Michigan* Remains a Key Free Speech Victory More than a Half-Century Later

Clay Calvert*

* Professor and Brechner Eminent Scholar in Mass Communication and Founding Director of the Marion B. Brechner First Amendment Project at the University of Florida-Gainesville; B.A. in Communication, Stanford University; J.D., (Order of the Coif), University of the Pacific-McGeorge School of Law; Ph.D. in Communication, Stanford University. Member, State Bar of California. The Author thanks Mirelis Torres of the University of Florida for her suggestions and editing of a draft of this Article.

I. INTRODUCTION

When thinking about celebrated free speech cases since 1950, a dozen or so U.S. Supreme Court rulings involving the First Amendment[1] probably come readily to mind. They likely include, chronologically, free speech victories such as *New York Times Co. v. Sullivan*,[2] *Tinker v. Des Moines Independent Community School District*,[3] *Brandenburg v. Ohio*,[4] *Cohen v. California*,[5] *New York Times Co. v. United States*,[6] *Miami Herald*

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1. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, a defamation case in which Alabama applied a strict liability fault standard, the Court held that:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279–80. *See also* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 906 (2001) (calling *Sullivan* "perhaps the most important First Amendment case of the modern era"); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 601 n.332 (2001) (calling *Sullivan* "[t]he most important First Amendment case of recent times . . . .").

3. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). In *Tinker*, the Court extended First Amendment speech protection to minors in public school settings, reasoning that:

> State-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

Id. at 511.

4. Brandenburg v. Ohio, 395 U.S. 444 (1969). In *Brandenburg*, the Court held that:

> The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447. *See also* John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L. Q. 1157, 1221 (2000) (considering *Brandenburg* among the "key First Amendment cases dealing with various forms of criminal syndicalism statutes . . . .").

5. Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, the Supreme Court protected the speech rights of a man who wore a jacket emblazoned with the words "Fuck the Draft" in the corridors of a Los Angeles-area courthouse during the Vietnam War era. *Id.* at 26 (concluding that "the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

Publishing Co. v. Tornillo,[7] *Hustler Magazine v. Falwell*,[8] *Texas v. Johnson*,[9] *Florida Star v. B.J.F.*,[10] *McIntyre v. Ohio Elections Commission*,[11] *Reno v. ACLU*,[12] and *Snyder v. Phelps*.[13] Besides *Snyder*,

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6. N. Y. Times Co. v. United States, 403 U.S. 713 (1971). In *New York Times Co*., the Supreme Court held, in a per curiam opinion, that the government could not properly restrain the publication by the *New York Times* and the *Washington Post* of excerpts taken from a stolen, classified government study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." *Id.* at 714. *See also* James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. MICH. J.L. REFORM 497, 505 (1982) (observing that *New York Times Co. v. United States* "remains the key first amendment case of the decade.").

7. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974). In *Tornillo*, the Supreme Court struck down a Florida statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, reasoning that:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

8. Hustler Magazine v. Falwell, 485 U.S. 46 (1988). In *Falwell*, the Court, in examining the scope of First Amendment protection for the publisher of an ad parody suggesting that a well-known reverend experienced his first sexual encounter in a fly-infested, goat-eradicated outhouse with his mother and that he preached while intoxicated, held that:

> [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 56.

9. Texas v. Johnson, 491 U.S. 397 (1989). In *Johnson*, the Court protected the right of a person to burn the American flag as a form of symbolic protest near a political convention, observing that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

10. Fla. Star v. B.J.F., 491 U.S. 524 (1989). In *Florida Star*, which centered on the publication of the name of an alleged sexual assault victim, the Court held "that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ." *Id.* at 541. *See also* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1021–22 (2003) (calling *Florida Star* "perhaps the most important First Amendment case involving disclosure protections . . . .").

11. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995). In *McIntyre*, the Court declared unconstitutional an Ohio statute that prohibited the distribution of anonymous campaign literature, reasoning that "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

other relatively recent cases like *Bartnicki v. Vopper*[14] and *Brown v. Entertainment Merchants Association*[15] might also come to First Amendment scholars' minds.

This Article contends, however, that one of the most important free speech cases since 1950—an especially vital case today when considered within the context of the ongoing culture wars in which shielding minors from supposedly harmful content is an often-used government rationale, or perhaps excuse, for censorship—is the much less celebrated 1957 high court decision in *Butler v. Michigan*.[16] One current constitutional law casebook devotes a meager three sentences—in a "note" section, no less—

Anonymity is a shield from the tyranny of the majority." *Id.* at 357. *See also* David L. Hudson, Jr., *Stevens' Top 10 in First Amendment Jurisprudence,* FIRST AMENDMENT CENTER (Apr. 14, 2010, 12:00 AM), http://www.firstamendmentcenter.org/stevens-top-10-in-first-amendment-jurisprudence (listing *McIntyre* as one of the top ten First Amendment opinions written by former Justice John Paul Stevens).

12. Reno v. ACLU, 521 U.S. 844 (1997). In *Reno*, the Court struck down a portion of the Communications Decency Act and reasoned, in the process, that when it comes to speech conveyed on the Internet, there was "no basis for qualifying the level of First Amendment scrutiny that should be applied . . . ." *Id.* at 870. *See also* Mark S. Kende, *Lost in Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125, 1154 (1998) ("Some commentators have called the Supreme Court's first cyberspace decision in *Reno* the most important free speech case of the last twenty years.").

13. Snyder v. Phelps, 131 S. Ct. 1207 (2011). In *Snyder*, the Court protected the First Amendment speech rights of members of the Westboro Baptist Church to protest, with offensive signs, near a funeral held for a U.S. soldier killed in Iraq, observing that the "Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing." *Id.* at 1213.

14. Bartnicki v. Vopper, 532 U.S. 514 (2001). In *Bartnicki*, the Court held that the First Amendment protected the disclosure by a radio talk show host of the contents of an illegally recorded cell phone conversation about a topic of public concern, reasoning that "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

15. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011). In *Brown*, the Court declared unconstitutional a California statute restricting minors' access to video games depicting violent content, reasoning that:

> [T]he legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other. Legislation such as this, which is neither fish nor fowl, cannot survive strict scrutiny.

Id. at 2742.

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

to *Butler*,[17] while another casebook fails to mention it at all.[18] The *Butler* opinion spans a mere five pages in the United States Reports and consists of fewer than ten total paragraphs.[19] It illustrates, however, that brevity, concision, and unanimity are powerful characteristics when a Supreme Court opinion identifies—employing a memorable phrase in the process—a clear-cut, timeless legal principle upon which future courts and jurists can build and premise their own decisions.

Part II of this Article provides an overview of *Butler*, including background on the key protagonists in the controversy.[20] Part III then illustrates how the central holding of *Butler* has been employed numerous times over the past fifty years across multiple media platforms, including the Internet, and in a wide range of factual scenarios.[21] Next, Part IV argues that *Butler* will remain important in the near future, and identifies the reasons why *Butler* has proved so powerful despite not typically falling within the pantheon of celebrated First Amendment victories.[22]

II. THE STORY BEHIND *BUTLER* AND THE PRINCIPLE TO WHICH IT GAVE RISE: BURNING DOWN THE FIRST AMENDMENT HOUSE TO ROAST THE OFFENDING PIG

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[23]

This critical observation in *Butler* gave rise to a pivotal principle in First Amendment jurisprudence—that the government cannot, in the name of shielding minors from supposedly objectionable content, implement a blanket ban on that content and thereby reduce the scope of speech available to consenting adults. The effect of such measures, as Justice Felix Frankfurter colorfully wrote, is "to burn the house to roast the pig."[24] In short, *Butler* is a crucial victory for the First Amendment rights of adults to

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17. GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1179 n.3 (6th ed. 2009).

18. NORMAN REDLICH ET AL., CONSTITUTIONAL LAW (4th ed. 2002). *Butler* is not listed in the table of cases in this book. *Id.* at TC-1–TC-19.

19. The decision spans from page 380 through page 384 in the bound version of the United States Reports, which "contain the final, official opinions of the Supreme Court of the United States." BOUND VOLUMES, U.S. SUPREME COURT, http://www.supremecourt.gov/opinions/boundvolumes.aspx (last visited Feb. 20, 2012).

20. *See infra* notes 23–87 and accompanying text.

21. *See infra* notes 88–167 and accompanying text.

22. *See infra* notes 168–98 and accompanying text.

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

24. *Id.*

receive controversial speech.[25] It also marks a key defeat for the long-standing notion of censoring speech in the name of protecting children.[26]

How did the Court reach this result in *Butler*? It all began with a 1952 novel by John Howard Griffin called *The Devil Rides Outside*[27]—a title that, ironically, is never mentioned in the Supreme Court's ruling in *Butler*. The *New York Times* described the book as "a frankly autobiographical account of [Griffin's] spiritual experiences living in French monasteries while he pursued his musical studies."[28] While *The Devil Rides Outside* ultimately spawned a Supreme Court decision, it was Griffin's later book, *Black Like Me,* based upon Griffin's travels through the South for six weeks after he died his skin black,[29] for which he is perhaps more famous.[30] *Black Like Me*, as the *Washington Post* observed, "opened a window to the wider public on the Southern system of racial interaction and changed Griffin's life forever."[31]

While *Black Like Me* might have opened a window to the public on white Southern bigotry, *The Devil Rides Outside* opened a window on Northern censorship. *The Devil Rides Outside* was a best-selling novel,[32] despite a *New York Times* review that described it as plagued by "a series of heavy faults" and that "[p]assage after passage is overlong: the prose is overblown and trails endlessly, like a thin mist on a Scottish moor."[33]

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25. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, the right to read . . . .") (emphasis added); *see also* Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (observing that the First Amendment freedom of speech "necessarily protects the right to receive it.").

26. *Cf.* Alan E. Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565, 566, 568 (2005) ("The notion that children need to be sheltered from inappropriate speech long predates Janet Jackson's 'wardrobe malfunction' or Bono's expletive-enhanced acceptance of a Golden Globe" and asserting that "desire to protect children, though well-intentioned, has always been on a collision course with freedom of speech. The collision between these two values has occurred gradually.").

27. *See* Jerome Weeks, *Black Like Me*, DALL. MORNING NEWS, Sept. 8, 1997, at 1C (providing background on John Howard Griffin) ("An acclaimed debut, The Devil Rides Outside was banned in Detroit by a Catholic decency group. In 1957, the U.S. Supreme Court struck down the Michigan ban.").

28. Joan Cook, *John H. Griffin Dead; White Novelist Wrote Book 'Black Like Me'*, N.Y. TIMES, Sept. 10, 1980, at D21.

29. *See* Georgina Kleege, *The Strange Life and Times of John Howard Griffin*, 26 RARITAN 96, 96 (2007) (describing *Black Like Me* as "Griffin's account of the six weeks he spent disguised as an African American traveling through the Deep South . . . .").

30. *See* Fritz Lanham, *Publisher Reissues 'Black Like Me,'* HOUS. CHRON., May 23, 2004, www.chron.com/life/article/Publisher-reissues-Black-Like-Me-1573282.php.

31. Karen De Witt, *Black Like Me, 20 Years Later*, WASH. POST, Oct. 30, 1977, at Style F1.

32. *Author Suddenly Regains Sight*, N.Y. TIMES, Jan. 11, 1957, at 25.

33. Thomas Sugrue, *Everyman's Triumph*, N.Y. TIMES, Oct. 29, 1952, at BR5.

Censors "objected to Griffin's lengthy descriptions of sexual activity,"[34] including one passage in which the book's narrator describes "a vision of strong legs, deep navels, bursting milk-white breasts—insatiable, grasping, choking triangles of pubic greyness before my eyes."[35]

One of those best-selling copies of *The Devil Rides Outside*, as it turns out, was purchased by a Detroit police inspector from a book dealer named Alfred E. Butler, who was fined one hundred dollars for the illegal transaction.[36] Alfred Butler, in fact, was no ordinary bookseller; he was the Detroit district sales manager for Pocket Books.[37] Pocket Books was America's first paperback publisher.[38]

How did a copy of the book come to be purchased by a Detroit police officer? In a 1955 essay published in *The Antioch Review*, James Rorty explains that the National Organization for Decent Literature ("NODL"), formed in 1937 under the leadership of a group of Catholic bishops, was actively campaigning against literature of the day that it deemed objectionable.[39] In Detroit, the NODL had helped to organize the Citizens Committee for Better Youth Literature, which had a stated goal of working "actively for elimination from publication and circulation of such literature as may be detrimental to, or have no beneficial value in, the intellectual, social, cultural, or spiritual development of children and youth."[40] More importantly, Rorty writes that the NODL also found in Detroit its most important ally in a police inspector named Herbert W. Case, who headed Detroit's License and Censor Bureau,[41] and who Case characterized as "America's number 1 book censor."[42]

Remarkably, Case's bureau had a staff of twelve employees who read about 125 books each month, screening for those tomes that it thought were

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34. DAWN B. SOVA, BANNED BOOKS: LITERATURE SUPPRESSED ON SEXUAL GROUNDS 36 (rev. ed. 2006).

35. *Id.*

36. *High Court Upsets Ban on 'Rugged' Writing*, WASH. POST, Feb. 26, 1957, at A1; *High Court Voids Obscene-Book Act*, N.Y. TIMES, Feb. 26, 1957, at 1 (Butler "was arrested after he had sold the book to a Detroit police officer. He was found guilty of violating the Michigan statute and fined $100.").

37. ROBERT W. HANEY, COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL 33 (1960).

38. *See A Brief History of Simon & Shuster*, SIMON & SCHUSTER, http://www.simonandschuster.biz/corporate/history (last visited Feb. 20, 2012).

39. James Rorty, *The Harassed Pocket-Book Publishers*, 15 ANTIOCH REV. 411, 412–13 (1955).

40. *Id.* at 414.

41. *Id.* at 417–18.

42. *Id.* at 419.

obscene.[43] Such proactive governmental efforts at screening content in Detroit are astonishing when one compares them with the FCC today, which does not employ a single staff member to screen television shows and radio content for indecency.[44] As Rorty explains the situation in Detroit:

> An assistant prosecuting attorney, a postal inspector, and an FBI agent are permanently attached to the bureau. If the official censors believe that a given pocket book violates the law, the passages considered objectionable—not the book as a whole—are submitted to the district attorney. If the latter confirms the censor's verdict, the distributor is notified to that effect and he in turn notifies the publisher. The result, in most cases, is that the book is withdrawn from circulation without a court test.[45]

Alfred E. Butler was charged after selling a paperbound reprint of *The Devil Rides Outside*.[46] In an interesting twist, however, the sale to the Detroit police officer actually was pre-arranged to set up a test case. As a *Time* magazine article from the era notes:

> Alfred E. Butler, Detroit distributor for Pocket Books, Inc., deliberately got himself arrested and fined $100 for selling a police inspector a 50¢ paperback copy of John Howard Griffin's The Devil Rides Outside, an earnest, if second-rate, novel about the sexual torments of a young man trying to attain monkish chastity. The fine was rescinded, however, and both Butler and the cops pushed the test case toward the Supreme Court for an answer.[47]

Test cases involving deliberate arrests related to selling sexually explicit material, of course, are not rare.[48] In this one, the Michigan statute under

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43. *See id.* at 418.

44. *See Complaint Process*, FCC, http://transition.fcc.gov/eb/oip/process.html (last visited Feb. 20, 2012). The FCC only responds to complaints that it receives. In particular, the FCC's website provides:

> FCC staff reviews each complaint to determine whether it alleges information sufficient to suggest that a violation of the obscenity, profanity or indecency prohibition has occurred. If it appears that a violation may have occurred, the staff will commence an investigation, which may include sending a Letter Of Inquiry ("LOI") to the broadcast station.

Id.

45. Rorty, *supra* note 39, at 418.

46. Fanny Butcher, *The Literary Spotlight*, CHI. DAILY TRIB., May 5, 1957, at G11.

47. *The Supreme Court: To Roast the Pig*, TIME, Mar. 11, 1957, http://www.time.com/time/magazine/article/0,9171,824704,00.html.

48. For instance, during an all-out offensive by Fulton County Solicitor General Hinson McAuliffe during the mid-1970s against adult content in Atlanta, Georgia, *Hustler* magazine publisher Larry Flynt hurried there "from Cincinnati, where he had been convicted on pornography charges. Renting a newsstand for a day, he sold his publication and dared the solicitor to arrest him. Mr. McAullifee [sic] obliged." B. Drummond Ayres, Jr., *Anti-Obscenity Drive Disputed in Atlanta*, N.Y. TIMES, Dec. 12, 1977, at 22.

which Butler was prosecuted made it a crime to sell or give away to anyone, be it a child or an adult, a newspaper, book, magazine, or other printed content "tending to incite minors to violent or depraved or immoral acts" or "manifestly tending to the corruption of the morals of youth . . . ."[49] A trial judge denied Butler's motion to dismiss the case and found him guilty because the language was offensive and, demonstrating his own supposed literary understanding about plot development, because the offending language "was not necessary to the proper development of the theme of the book nor of the conflict expressed therein."[50] The Supreme Court of Michigan denied an appeal, and the U.S. Supreme Court chose to hear the case in February 1956.[51]

In defending its statute before the high court, Michigan's Solicitor General argued 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."[52] In other words, keeping such content out of the hands of consenting adults in order to protect children was simply a necessary cost paid in promoting the greater good of the general public welfare. Put differently, a little collateral damage to the reading habits of willing adults is merely a small price borne for safeguarding minors.

Justice Felix Frankfurter, joined by all of his fellow Justices, quickly dismissed this line of statutory defense. Frankfurter found the sweep of Michigan's statute far too vast and overinclusive, writing that it was "not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."[53] He summed it up in what Professor Amitai Etzioni aptly called an "inimitable phrase"[54] that would have lasting influence in many key free speech victories in subsequent decades: "Surely, this is to burn the house to roast the pig."[55]

The Court's reasoning in *Butler* was simply that succinct; there was no extended analysis, as the entirety of the opinion was fewer than ten paragraphs in length. The decision was a victory for consenting adults to access and receive materials that, in the determination of legislative bodies,

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49. Butler v. Michigan, 352 U.S. 380, 381 (1957) (quoting MICH. PENAL CODE § 750.343 (1954)).

50. *Id.* at 382.

51. Butler v. Michigan, 350 U.S. 963, 963 (1956) (noting "probable jurisdiction").

52. *Butler*, 352 U.S. at 383.

53. *Id.*

54. Amitai Etzioni, Symposium, *Do Children Have the Same First Amendment Rights as Adults?: On Protecting Children From Speech*, 79 CHI.-KENT L. REV. 3, 30 (2004).

55. *Butler*, 352 U.S. at 383.

are not suitable for minors. Sacrificing adults' First Amendment rights in the process of protecting minors, in other words, simply was far too great of a Constitutional price to be paid. Michigan's law, as one legal commentator contemptuously observed, "would have rendered the adult population to reading The Cat in the Hat."[56] To prevent this result, legislative bodies would need to draft more narrowly tailored laws in the future to protect adults' rights to receive speech while simultaneously shielding minors from alleged ills of speech. The statutory bludgeoning of the First Amendment rights of adults to access otherwise protected speech was no longer tolerable.

From where did the *Butler* principle first arise? Perhaps its origins exist in Judge Learned Hand's[57] opinion nearly one hundred years ago in the obscenity case of *United States v. Kennerley*.[58] Hand wrote in *Kennerley*:

> I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses. Indeed, *it seems hardly likely that we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few*, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature. That such latitude gives opportunity for its abuse is true enough; there will be, as there are, plenty who will misuse the privilege as a cover for lewdness and a stalking horse from which to strike at purity, but that is true to-day and only involves us in the same question of fact which we hope that we have the power to answer.[59]

Professor Lawrence Lessig observes that *Butler* is about proportionality and the narrow tailoring of statutes as a First Amendment requirement, such that "to banish the adult to protect the child would be to 'burn the house to roast the pig.' Something more carefully focused is required."[60] Indeed, the *Butler* principle goes hand-in-hand with the overbreadth doctrine,[61] with Justice John Paul Stevens writing, in the

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56. Christopher S. Maravilla, *The Enforcement of First Amendment Obscenity Jurisprudence and New Technologies*, 4 FLA. COASTAL L.J. 67, 75 (2002).

57. *See generally* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994) (providing an excellent biography of Learned Hand).

58. United States v. Kennerley, 209 F. 119 (S.D.N.Y. 1913).

59. *Id.* at 120–21 (emphasis added).

60. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 884–85 (1996).

61. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6

context of considering the constitutionality of the Child Online Protection Act, that "[i]n evaluating the overbreadth of such a statute, we should be mindful of Justice Frankfurter's admonition not to 'burn the house to roast the pig.'"[62] Under the overbreadth doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech."[63]

When the U.S. Supreme Court issued its ruling in *Butler*, Manuel Lee Robbins, the attorney from New York representing Butler, called it "a landmark in preserving the freedom of the press."[64] Robbins, who died at sixty-five years of age in 1975,[65] certainly had the legal chops to win such a case, having graduated from Harvard College in 1932 and Harvard Law School in 1935.[66] Before taking on *Butler*, Robbins had served as an assistant district attorney in New York City[67]—he worked under Thomas E. Dewey, who later became Governor of New York and twice ran unsuccessfully as a Republican for President of the United States[68]—and then worked in private practice at Stern & Reubens.[69] Perhaps even more importantly, he had previously argued two other cases in front of the nation's high court, thus giving him added experience and preparation for *Butler*.[70]

(2008) ("A law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'") (quoting New York v. Ferber, 458 U.S. 747, 769–71 (1982)); *see also* United States v. Williams, 553 U.S. 285, 293 (2008) ("The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers"). *See generally* John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004) (providing an excellent overview of the overbreadth doctrine, including its use in both First Amendment situations and other contexts); Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (providing a critical examination of the overbreadth doctrine and suggesting ways to improve it).

62. Ashcroft v. ACLU, 535 U.S. 564, 604–05 (Stevens, J., dissenting) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

63. *Williams*, 553 U.S. at 292.

64. *Book Ruling Hailed: Lawyer Calls Supreme Court Ruling a 'Landmark,'* N.Y. TIMES, Feb. 27, 1957, at 29.

65. *Manuel Robbins, 65, Lawyer, Dewey Aide*, N.Y. TIMES, Dec. 23, 1975, at 28.

66. *Dewey Names Three as Staff Assistants*, N.Y. TIMES, July 16, 1936, at 2.

67. *Eleanore Landau to Wed: Graduate of Dalton School Will Become Bride of Lee Robbins*, N.Y. TIMES, Jan. 10, 1941, at 24.

68. *See generally Republicans Didn't Vote, Dewey Says*, WASH. POST, Nov. 7, 1948, at M2 (describing Dewey as "the twice-defeated White House aspirant" and noting that he lost his second bid for president "by about two million votes.").

69. *Hogan's Aide Resigns*, N.Y. TIMES, Aug. 15, 1947, at 15.

70. *See* Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 664 (1953) (identifying Robbins as counsel for respondent); United States v. Int'l Boxing Club of N.Y.C., 348 U.S. 236, 237 (1955) (identifying Robbins as Special Assistant Attorney General of New York and arguing on behalf of the New York State Athletic Commission).

A *Washington Post* editorial at the time of the *Butler* ruling chimed in that "[i]t should not have required a Supreme Court decision to inform the Michigan Legislature and the City of Detroit that they cannot deprive the general public of raw literary fare because it may tend to corrupt the morals of children."[71] The *Post*'s editorial wryly noted that what the Detroit judge who initially convicted Alfred E. Butler had failed to do was to take into account that the police officer who purchased offending copy of *The Devil Rides Outside* "was not a child."[72]

Finally, it must be noted that the aphorism "burning down the house to roast the pig" actually was, as Professor Robert L. Tsai pointed out in an article about metaphors and constitutional law, a "favorite saying of Justice Frankfurter's."[73] Professor Tsai explained:

> In its first incarnation in *Thiel v. Southern Pacific Co.*,[74] the adage appeared as "burning down the barn to roast a pig."[75] A year later, Frankfurter shrewdly modernized the saying by replacing the barn with the more evocative and commonplace house.[76] Given the post-war boom, the rise of home ownership, and the decline of the agrarian economy, a burning house certainly offered a more potent mental image than its predecessor.[77]

After *Butler*, Professor Tsai observed, "jurists dispatched the legal chestnut with greater regularity."[78] For instance, *Butler* had an immediate impact in the Washington state case of *Adams v. Hinkle*[79] involving a law that, in the name of preventing juvenile delinquency,[80] forbade the sale of comic books to both minors and adults.[81] In striking down the law in 1958, the Supreme

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71. *Michigan Quarantine*, WASH. POST, Feb. 27, 1957, at A12.

72. *Id.*

73. Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 218 (2004).

74. 328 U.S. 217 (1946).

75. *Id.* at 234 (Frankfurter, J., dissenting) ("[T]o reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of *burning the barn in order to roast the pig*.") (emphasis added).

76. Int'l Salt Co. v. United States, 332 U.S. 392, 403 (1947) (Frankfurter, J., dissenting) ("No doubt, when a court condemns practices as violative of the Sherman Law and the Clayton Act, it has the duty so to fashion its decree as to put an effective stop to that which is condemned. But the law also respects the wisdom of *not burning even part of a house in order to roast a pig*.") (emphasis added).

77. Tsai, *supra* note 73, at 219–20 (citations omitted) (footnotes not in original).

78. *Id.* at 220.

79. 322 P.2d 844 (Wash. 1958).

80. The statute declared that "crime comic books are a factor in juvenile delinquency." *Id.* at 847.

81. *Id.* at 852 ("While ostensibly aimed at sales to minors, it is not so limited. It applies to all sales and to all people.").

Court of Washington analogized it to the law deemed unconstitutional in *Butler*, and it quoted *Butler*'s analogy of burning the house to roast the pig.[82]

In 1959, *Butler* proved key in a federal judge's decision in *Paramount Film Distributing Corporation v. City of Chicago* to enjoin a city ordinance that prohibited the showing of the movie *Desire Under the Elms* to anyone under twenty-one years of age because the movie "was unfit for children."[83] Specifically, the ordinance permitted "a limited license when a film approaches producing a harmful notion in the mind of anyone from one to twenty-one years of age."[84] In striking down the law, U.S. District Judge Sullivan used *Butler* to demonstrate its vast overbreadth in serving its ostensible goal:

> *Assuming without deciding* that the City might correct the evil of exhibiting films unfit for "children" the present section is unsuitable for the purpose. Under it, a twenty year old, married service man would be prevented from seeing a film that might not be suitable for a girl of twelve. As Justice Frankfurter remarked in a similar situation, "Surely, this is to burn the house to roast the pig". As in the case just cited, the remedy is not appropriate for the end at which it is presumably aimed, and is an invalid exercise of police power.[85]

With this background on *Butler* in mind, this Article now examines how the case repeatedly has influenced First Amendment jurisprudence during the fifty-five years following Justice Frankfurter's parsimonious decision.

III. THE LASTING LEGACY OF *BUTLER* ON FIRST AMENDMENT JURISPRUDENCE

As emphasized at the end of the last part of this Article, *Butler* had an immediate impact in several cases at the state-law level.[86] This Part illustrates how the *Butler* principle—that the First Amendment right of consenting adults to receive otherwise lawful speech[87] cannot be sacrificed

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82. *Id.* at 854.

83. 172 F. Supp. 69, 70 (N.D. Ill. 1959).

84. *Id.* at 72.

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

86. *See supra* notes 79–87 and accompanying text.

87. The phrase "otherwise lawful speech" refers to speech that does *not* fall into one of the narrow categories of content that the U.S. Supreme Court has held are not protected by the First Amendment. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."). *See also* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (identifying categories of historically and traditionally unprotected content to

by government adoption of blanket, all-inclusive bans on that speech in the name of protecting minors from it—has been applied repeatedly by the Supreme Court not only to a wide variety of factual scenarios, but also to a multitude of modes of speech delivery.

A. Ginsberg v. New York[88]

In a recent article, Professor Stephen Bates asserted that "*Butler* led to what came to be known as the 'variable obscenity' doctrine—the notion that materials may be obscene as to minors but not as to adults."[89] Indeed, eleven years after *Butler*, the high court in *Ginsberg* "sanctioned the concept of variable obscenity, whereby the state can restrict a minor's access to indecent speech or sexually explicit speech, which for adults is constitutionally protected."[90] It is not surprising, then, that a close *Butler*-to-*Ginsberg* linkage exists for some scholars, such as Professor Donald Garner, who wrote:

> Taken together, *Ginsberg* and *Butler* stand for a relatively straightforward proposition: In order to protect children from the psychological and moral harm that may be inflicted on them by viewing explicitly sexual materials at a tender age, governments may adopt reasonable measures to make them inaccessible to children—so long as the measure does not prohibit or overly restrict adult access to the materials.[91]

Ginsberg centered on a New York statute that prohibited the sale to minors—individuals under seventeen years of age—so-called "'girlie' picture magazines" that are not obscene for adults.[92] In other words, children could not purchase such magazines, but adults could do so. As framed by the U.S. Supreme Court, the issue was whether it was constitutionally impermissible for New York "to accord minors under 17 a

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include: a) obscenity; b) defamation; c) fraud; d) incitement; and e) speech integral to criminal conduct); IMS Health Inc. v. Ayotte, 550 F.3d 42, 52 (1st Cir. 2008) (identifying "agreements in restraint of trade," "statements or actions creating hostile work environments," and "promises of benefits made by an employer during a union election" as "other species of speech-related regulations that effectively lie beyond the reach of the First Amendment," despite the fact that "for whatever reason, the Justices have never deemed it necessary to address why or how these content-based prohibitions manage to escape First Amendment scrutiny.").

88. 390 U.S. 629 (1968).

89. Stephen Bates, Symposium, *Father Hill and Fanny Hill: An Activist Group's Crusade to Remake Obscenity Law*, 8 FIRST AMEND. L. REV. 217, 265 (2010).

90. Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 118 (1996) (footnotes omitted).

91. Donald W. Garner, *Fighting the Tobacco Wars on First Amendment Grounds*, 27 SW. U. L. REV. 379, 394–95 (1998).

92. *Ginsberg*, 390 U.S. at 634.

more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see."[93]

The Court upheld New York's statute, reasoning that "[w]e do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms."[94] Giving great deference to legislative judgment, Justice William Brennan wrote for a unanimous Court that it was "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[95]

New York's statutory scheme thus was upheld because it embraced the lesson learned in *Butler*. Rather than adopting a blanket, all-inclusive ban on otherwise lawful speech in the name of protecting minors, the New York legislature crafted a system that allowed adults to access nonobscene sexually explicit magazines but denied minors the opportunity to purchase it. While *Butler* rejected a one-size-fits-all statutory scheme, *Ginsberg* sanctioned what Professor Dawn Nunziato calls "a two-tiered, age-dependent approach to regulating obscene content, in which states were granted greater latitude to regulate minors' access than adults' access to sexually-themed expression . . . ."[96] *Ginsberg* thus flows naturally as a corollary from *Butler*, reaffirming its basic principle[97] and extending its meaning to allow, as Professor Renee Newman Knake recently put it, "a state to define obscenity in a variable way, applying one definition to adults and another to children."[98] States today thus may adopt variable obscenity statutes[99] provided that those statutes, as the Supreme Court of Wisconsin

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93. *Id.* at 637.

94. *Id.* at 638.

95. *Id.* at 641.

96. Dawn C. Nunziato, *Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech*, 79 CHI.-KENT L. REV. 121, 129 (2004).

97. *See* Eric J. Segall, *In the Name of the Children: Government Regulation of Indecency on the Radio, Television, and the Internet-Let's Stop the Madness*, 47 U. LOUISVILLE L. REV. 697, 700 (2010) (writing that "[d]espite the *Ginsberg* Court's differing treatment of obscenity for minors and adults, the Court reaffirmed its prior holding in *Butler v. Michigan* that the state cannot restrict what adults can read in the guise of protecting its youth.") (footnote omitted).

98. Renee Newman Knake, *From Research Conclusions to Real Change: Understanding the First Amendment's (Non)Response to the Negative Effects of Media on Children by Looking to the Example of Violent Video Game Regulations*, 63 SMU L. Rev. 1197, 1209 (2010).

99. *See, e.g.*, State v. Weidner, 611 N.W.2d 684, 687 (Wisc. 2000) (referring to Wisconsin Statute Section 948.11, which restricts minors' access to "harmful material" as "a variable obscenity statute" and adding that "[v]ariable obscenity statutes are premised on established constitutional tenets recognizing the significance of age in First Amendment jurisprudence.").

observed in July 2011, "strike a proper balance between a state's compelling interest in protecting children and an adult's First Amendment right have access to materials not considered obscene for adults."[100]

B. FCC v. Pacifica Foundation[101]

In *FCC v. Pacifica Foundation*, the U.S. Supreme Court affirmed the FCC's statutorily granted power[102] to punish over-the-air broadcasters for carrying nonobscene,[103] yet nonetheless indecent[104] content.[105] The decision was justified, in large part, by the goal of shielding minors from content that, as was the case in *Butler*, a government entity deemed objectionable.[106] Despite this free speech defeat, the *Butler* principle stemmed the damage and prevented a complete rout by the FCC.

In particular, the Court ended its opinion by writing "to emphasize the narrowness of our holding."[107] It stressed that the FCC's decision to target indecent content "rested entirely on a nuisance rationale under which

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100. State v. Gonzalez, 802 N.W.2d 454, 478 (2011) (Prosser, J., concurring).

101. 438 U.S. 726 (1978).

102. *See* 18 U.S.C. § 1464 (2010) (providing that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both").

103. Obscenity is not protected by the First Amendment's guarantee of free speech. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (writing that "obscenity is not within the area of constitutionally protected speech or press"). In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court held that when determining if content is obscene, the fact finder must consider:

> (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 it depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether, taken as a whole, it lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

104. The FCC provides, "[i]ndecent material contains sexual or excretory material that does not rise to the level of obscenity." *Obscenity, Indecency & Profanity—FAQ*, FCC, http://www.fcc.gov/guides/obscenity-indecency-profanity-faq (last visited Feb. 20, 2012). The FCC considers material indecent:

> [I]f, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium. In each case, the FCC must determine whether the material describes or depicts sexual or excretory organs or activities and, if so, whether the material is patently offensive.

Id.

105. *Pacifica Found.*, 438 U.S. at 750–51.

106. The Court wrote that "broadcasting is uniquely accessible to children, even those too young to read" and that the broadcast at issue in the case "could have enlarged a child's vocabulary in an instant." *Id.* at 749.

107. *Id.* at 750.

context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission."[108] The Court added that "the composition of the audience" was another variable in this nuisance calculus.[109]

In other words, there are certain times of the day when children are less likely to be in the audience, and thus when indecent content must be allowed on the broadcast airwaves because adults have a First Amendment right to receive such content. To illustrate this point, the Court in *Pacifica*, much as it had done in *Butler* before, evoked a porcine metaphor of its own and wrote that a "'nuisance may be merely a right thing in the wrong place,'—like a pig in the parlor instead of the barnyard."[110] Thus, the monologue of George Carlin at issue in *Pacifica* was like a pig that had intruded in the broadcast parlor—the parlor being those times of the day when children are likely to be in the audience—when it more properly belonged in the broadcast barnyard (the late night and early morning hours when children are less likely to be in the audience). Like the blanket ban in *Butler* on selling certain magazines and books in Michigan because they might harm minors was impermissible under the First Amendment, so too was a complete twenty-four hour ban on indecent broadcast content in order to protect minors.[111]

The FCC acknowledges this fact today on its website, which states that "the courts have held that indecent material is protected by the First Amendment and *cannot be banned entirely*."[112] Thus, the First Amendment rights of adults to receive indecent speech cannot be completely quashed in the name of protecting children from that same expression. In fact, the U.S. Court of Appeals for the District of Columbia in 1995 instructed the FCC "to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m."[113]

The bottom line is that the *Butler* principle—that the First Amendment right of consenting adults to receive otherwise lawful

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108. *Id.*

109. *Id.*

110. *Id.* (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

111. Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991) ("The Commission must identify some reasonable period of time during which indecent material may be broadcast necessarily means that the Commission may not ban such broadcasts entirely. The fact that Congress itself mandated the total ban on broadcast indecency does not alter our view that, under *ACT I*, such a prohibition cannot withstand constitutional scrutiny.").

112. *Obscenity, Indecency & Profanity – FAQ*, FCC, http://www.fcc.gov/guides/obscenity-indecency-profanity-faq (last visited Feb. 20, 2012) (emphasis added).

113. Action for Children's Television v. FCC, 58 F.3d 654, 669–70 (D.C. Cir. 1995).

speech[114] cannot be sacrificed by government adoption of blanket, all-inclusive bans on that speech in the name of protecting minors from it—was stretched from the print medium in *Butler* to the broadcast medium in *Pacifica*. Although the Court certainly has adopted a medium-specific First Amendment jurisprudence that treats the print medium differently from the broadcast realm,[115] the *Butler* principle cuts across different forms of media to apply equally to both.

C. Bolger v. Youngs Drug Products Corp.[116]

In 1983, the Supreme Court in *Bolger v. Youngs Drug Products Corp.* held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives violated the First Amendment speech rights of a company engaged in the manufacturing, sale, and distribution of contraceptives.[117] After initially concluding that the informational flyers and mailings of Youngs Drug Products Corporation fit within the scope of the Court's commercial speech[118] jurisprudence,[119] the Court examined the government's asserted interests justifying the prohibition.[120]

In particular, the government claimed that the law served two goals: "(1) shields mail recipients from materials that they are likely to find offensive; and (2) aids parents' efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control."[121] In addressing the latter of these two interests, the Court discussed the seeming ineffectiveness and futility of the law in facilitating the objective of helping parents control their children's access to particular types of sensitive content. Justice Thurgood Marshall, in delivering the opinion of the Court, wrote:

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114. *See supra* note 87 (explaining the meaning of the phrase "otherwise lawful speech").

115. There are distinct print and broadcast models of regulation under the Supreme Court's First Amendment jurisprudence. *See* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1721–24 (1995) (describing the print and broadcast models); Reno v. ACLU, 521 U.S. 844, 868 (1997) ("Some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers.").

116. 463 U.S. 60 (1983).

117. *Id.* at 61–64.

118. *See generally* R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953 (2007) (providing an excellent overview of the commercial speech doctrine).

119. *See Bolger*, 463 U.S. at 68 ("[A]ll of the mailings in this case are entitled to the qualified but nonetheless substantial protection accorded to commercial speech.").

120. *Id.* at 70–72.

121. *Id.* at 71.

> [P]arents must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects. Under these circumstances, a ban on unsolicited advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such stimuli.[122]

Citing *Butler*, the Court reasoned that "[t]his marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously made clear that a restriction of this scope is more extensive than the Constitution permits . . . ."[123] Justice Marshall then provided his own colorful take on the *Butler* principle as it applied to the facts in *Bolger*: "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."[124]

D. Sable Communications of California v. FCC[125]

In 1989, the U.S. Supreme Court held unconstitutional a federal statute that denied adults access to indecent telephone messages because the scope of the law "far exceeds that which is necessary to limit the access of minors to such messages."[126] In reaching this conclusion, the Court favorably cited *Butler*,[127] reasoning that "this case, like *Butler*, presents us with 'legislation not reasonably restricted to the evil with which it is said to deal.'"[128]

The Supreme Court made it clear that the complete ban on indecent telephone messages was much more like Michigan's unconstitutional statute in *Butler* than it was the FCC's regulation of indecent speech in the broadcast medium that survived judicial review in *Pacifica*. The Court wrote that "*Pacifica* is readily distinguishable from [this case], most obviously because it did not involve a total ban on broadcasting indecent material,"[129] adding that "issue of a total ban was not before the Court"[130] in *Pacifica*.

Attorney Christopher S. Maravilla encapsulates the result in *Sable* well, writing that the Supreme Court in *Sable* struck down federal dial-a-

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122. *Id.* at 73.
123. *Id.*
124. *Id.* at 74.
125. 492 U.S. 115 (1989).
126. *Id.* at 131.
127. *Id.* at 126–27.
128. *Id.* at 127 (quoting *Butler*, 352 U.S. at 383).
129. *Id.*
130. *Id.*

porn ban on indecent messages "for the same reasons" the Court in *Butler* struck down Michigan's statute—namely, the "statute barred adult access to protected speech while preventing minors from accessing it."[131] At this point, it should be clear that the *Butler* principle has subsequently guided the Supreme Court's opinions in the print medium (*Ginsberg*'s regulation of magazines), the broadcast medium (*Pacifica*'s regulation of indecency), and telephony (*Sable*'s regulation of dial-a-porn messages). This subsequent adoption demonstrates the benefits of the Court articulating clear-cut legal principles that can cut across all forms of media, as well as be applicable to different ranges of content, including second-class speech like commercial advertisements (*Bolger*).[132]

E. Reno v. ACLU[133]

In its first foray into the depths of cyberspace to consider the scope of First Amendment protection to extend to speech conveyed on the Internet, the U.S. Supreme Court in 1997 declared unconstitutional two federal statutory provisions of the Communications Decency Act of 1996 ("CDA").[134] Those provisions were known, respectively, as the indecent transmission provision and the patently offensive display provision.[135] The former provision prohibited "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age,"[136] while the latter "prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[137]

In striking down these parts of the law targeting nonobscene yet sexually explicit content, Justice John Paul Stevens cited *Butler*.[138] He

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131. Maravilla, *supra* note 56, at 75.

132. The U.S. Supreme Court concedes that it affords "commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). A federal appellate court recently observed that "other forms of expression are entitled to more protection under the First Amendment than is commercial speech." Pagan v. Fruchey, 492 F.3d 766, 770 (6th Cir. 2007).

133. 521 U.S. 844 (1997).

134. *See id.* at 885. In striking down the two provisions, Justice Stevens wrote that the Court presumed "that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id.*

135. *Id.* at 858–60 (describing the two provisions at issue in the case).

136. *Id.* at 859.

137. *Id.*

138. *Id.* at 875 n.40.

reasoned that although "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials," such an "interest does not justify an unnecessarily broad suppression of speech addressed to adults."[139] Justice Stevens went further to quote Justice Marshall's sandbox spin on the *Butler* principle in *Bolger*[140]—that "'the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'"[141] Stevens also analogized the sections of the CDA at issue in *Reno* to the statute declared unconstitutional under the *Butler* principle in the dial-a-porn case of *Sable*[142] addressed earlier in this Article.[143]

The problem, under the *Butler* principle, for the CDA provisions was that they would unnecessarily punish adult-to-adult communications in the name of protecting children. As Justice Stevens wrote:

> In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.[144]

Writing an opinion in *Reno* that both concurred and dissented in part from the Opinion of the Court, Justice Sandra Day O'Connor considered portions of the CDA to be a fatally flawed "attempt by Congress to create 'adult zones' on the Internet" because "they stray from the blueprint our prior cases have developed for constructing a 'zoning law' that passes constitutional muster."[145] In order for such a zoning law that attempts to strike a balance between the First Amendment rights of adults and minors to be valid, Justice O'Connor explained, two criteria must be satisfied: 1) the law must "not unduly restrict adult access to the material"; and 2) minors must have no First Amendment right to access the banned

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139. *Id.* at 875.

140. *See supra* Part III.C (discussing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

141. *Reno*, 521 U.S. at 875 (quoting *Bolger*, 463 U.S. at 74–75).

142. *Id.* ("The District Court was correct to conclude that the CDA effectively resembles the ban on 'dial-a-porn' invalidated in *Sable*.").

143. *See supra* Part III.D (discussing Sable Comm. v. FCC, 492 U.S. 115 (1989)).

144. *Reno*, 521 U.S. at 876.

145. *Id.* at 886 (O'Connor, J., concurring in part, dissenting in part).

material.[146] She elaborated on this zoning-based balancing of adult rights with protection of minors, writing:

> Our cases make clear that a "zoning" law is valid *only if adults are still able to obtain the regulated speech*. If they cannot, the law does more than simply keep children away from speech they have no right to obtain—it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population . . . to reading only what is fit for children."[147]

In brief, *Butler* proved its importance in *Reno* to a new medium of speech that today increasingly dominates communication.

F. United States v. Playboy Entertainment Group, Inc.[148]

In 2000, the Supreme Court considered the constitutionality of federal statutes requiring cable system operators to either impose scrambling and blocking measures on channels that were primarily devoted to sexually explicit programming or, in the absence of such technological measures, to limit the transmission of those channels to an eight-hour window from 10:00 p.m. to 6:00 a.m.[149] In fact, this largely proved to be a false choice, as Justice Anthony Kennedy explained in writing the Opinion of the Court:

> The effect of the federal statute on the protected speech is now apparent. It is evident that the only reasonable way for a substantial number of cable operators to comply with the letter of § 505 is to time channel, which silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers.[150]

Although the federal statutes did not create a complete ban, Justice Kennedy reasoned that this made no difference, observing that "[t]o prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection. It is of no moment that the statute does not impose a complete prohibition."[151] Justice Kennedy deployed the *Butler* principle in declaring the law unconstitutional, writing that "[t]his case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."[152]

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146. *Id.* at 888.
147. *Id.* (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957) (emphasis added).
148. 529 U.S. 803 (2000).
149. *Id.* at 806.
150. *Id.* at 812.
151. *Id.*
152. *Id.* at 814.

G. Ashcroft v. Free Speech Coalition[153]

Forty-five years after *Butler*, the Supreme Court in *Ashcroft v. Free Speech Coalition* struck down portions of a federal statute that extended the Court's lack of First Amendment protection for child pornography involving real minors[154] to also sweep up virtual child pornography, namely "sexually explicit images that appear to depict minors but were produced without using any real children."[155] In defending the statute, the government argued, in part, that the law was necessary "because pedophiles may use virtual child pornography to seduce children."[156] In other words, images of virtual child pornography, when viewed by a minor who is shown them by a pedophile, might lead the minor to be sexually exploited at the hands of the pedophile.

Writing the Opinion of the Court, Justice Anthony Kennedy rejected this argument, citing *Butler* as a key precedent in doing so.[157] Kennedy wrote, "[t]he precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it."[158] He explained why the statute in *Free Speech Coalition* was controlled by the *Butler* principle:

> Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: *The Government cannot ban speech fit for adults simply because it may fall into the hands of children*.[159]

In light of the statute's broad reach, the Court ultimately concluded that the two sections of the Child Pornography Prevention Act of 1996 at issue in *Free Speech Coalition* were fatally overbroad.[160] From state bans on books like *The Devil Rides Outside* to federal proscriptions on fake child pornography, the maxim in *Butler* has repeatedly proven powerful before the nation's high court.

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153. 535 U.S. 234 (2002).

154. The Supreme Court has held that the distribution and possession of child pornography is not protected by the First Amendment. *See* United States v. Williams, 553 U.S. 285, 288 (2008) ("We have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment," and that "we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults.").

155. *Free Speech Coal.*, 535 U.S. at 239.

156. *Id.* at 251.

157. *Id.* at 252 (citing Butler v. Michigan, 352 U.S 380, 381 (1957)).

158. *Id.*

159. *Id.* (emphasis added).

160. *Id.* at 258.

IV. CONCLUSION

Butler's logic from the 1950s remains vibrant today in the digital media era. For instance, in June 2011—more than a half-century after *Butler*—a federal judge in *American Booksellers Foundation for Free Expression v. Sullivan* struck down an Alaska statute targeting the electronic distribution of indecent materials to minors.[161] The law was challenged, as U.S. District Judge Ralph R. Beistline observed, by "a spectrum of individuals and organizations -- including booksellers, a photographer, libraries, and organizations representing booksellers, publishers and other media interests -- that communicate, disseminate, display and access a broad range of speech in the physical world as well as through the Internet."[162] Although the statute was designed to protect minors, Judge Beistline pointed out "that adults communicating with other adults on the Internet may run afoul of the Alaska statute, as written, if the communication falls into the hands of a minor."[163]

Employing the *Butler* principle, Judge Beistline reasoned that, given the terms of the Alaska law, adults "who fear the possibility of a minor receiving speech intended for an adult may refrain from exercising their right to free speech at all -- an unacceptable result. *The Government may not reduce the adult population to only what is fit for children*."[164] As such, Judge Beistline concluded that the statute, although well intended, simply was "not narrowly tailored to achieve the State's compelling interest."[165]

The lasting importance of *Butler* thus is as straightforward as the five-page opinion itself: *free speech rights of adults cannot be sacrificed at the altar of child protection*. Instead, balances must be struck, compromises must be reached, and statutes should be narrowly drawn and carefully crafted to achieve such middle-ground outcomes that appeal to the First Amendment rights of adults and to those who believe minors need some level of protection.[166] All or nothing outcomes—blanket, overbroad bans

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161. Am. Booksellers Found. for Free Expression v. Sullivan, No. 3:10-cv-0193-RRB, 2011 U.S. Dist. LEXIS 70414 (D. Alaska June 30, 2011).

162. *Id.* at *5.

163. *Id.* at *10.

164. *Id.* at *12 (emphasis added).

165. *Id.* at *14.

166. As Professor Ronald D. Rotunda writes:

> [A] state may not "burn the house to roast the pig." The state law must be narrowly tailored and serve compelling governmental interests. A state, under the guise of child protection, may not constitutionally forbid the public from having access to materials on the grounds that the materials would be objectionable if children read or saw them.

Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 114–15 (2002) (citations omitted).

on content—will not cut it, as the doctrine of variable obscenity spawned by the holding in *Butler* and embraced by the Court in *Ginsberg* illustrate.[167] Likewise, *Butler*'s famous analogy of burning the house to roast the pig continues to resonate with courts today to exemplify the principle of overbreadth.[168]

Part of the power of the *Butler* principle lies in the fact that it is not tethered to any specific mode or medium of communication. It applies as easily to print as it does to the Internet. This is particularly significant in a time of media convergence, and courts would be wise to fashion similar non-medium-specific First Amendment standards.

The simplicity of the *Butler* principle also is important because it allows the principle to be tweaked and used by courts to stand for broader propositions. For instance, the U.S. Court of Appeals for the District of Columbia in 1984 cited *Butler* to support the position that "[s]peakers are not required to indulge the lowest common denominator of the populace; [F]irst [A]mendment protection is not limited only to messages which every reader, no matter how ill-informed or inattentive, can comprehend."[169]

Although at least one scholar may publicly doubt whether the framers of the First Amendment would have intended the *Butler* principle,[170] this Article has attempted to make it clear that, time and time again, the U.S. Supreme Court, as well as other courts, have embraced it in many different contexts.[171] For instance, in 2008, the U.S. Court of Appeals for the Fifth Circuit in *Reliable Consultants, Inc. v. Earle* considered the constitutionality of a Texas statute that made it a crime to promote or sell sex toys to adults.[172] That seems, of course, to be quite a long way from the

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167. *See supra* Part III.A.

168. *See, e.g.*, M.S. News Co. v. Casado, 721 F.2d 1281, 1288 n.12 (10th Cir. 1983) (citing Butler v. Michigan, 352 U.S. 380, 381, 383 (1957) ("Legislation whose purpose was to protect minors from exposure to sexually oriented materials has been stricken as *overbroad* when it unnecessarily restricted adults' access to the material.") (emphasis added); United States v. Dyers, No. 1:06-MJ-455-AJB, 2007 U.S. Dist. LEXIS 7549, at *17–*18 (N.D. Ga. Jan. 30, 2007) (using the "burn the house" quotation to illustrate the overbreadth doctrine).

169. Lebron v. Wash. Metro. Area Transit Auth., 749 F.2d 893, 897 n.8 (D.C. Cir. 1984).

170. *See* Kevin W. Saunders, Symposium, *The Framers, Children, and Free Expression*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 187, 208 (2011) ("[The Court's decision in *Butler*] seems reasonable, although it may be less clear what the Framers would have thought about it, given the sparse evidence of their intent regarding expression for entertainment and only the later judicial extension of First Amendment protection to speech for entertainment purposes.").

171. *See supra* Part III (describing cases that have followed the *Butler* principle).

172. 517 F.3d 738 (5th Cir. 2008). Specifically, the statute targeted so-called obscene

type of law at issue in *Butler*. But Texas argued that the statute was necessary to protect minors "from exposure to sexual devices and their advertisement."[173] Citing the *Butler* principle that the adult population cannot be reduced to only materials that are fit for children,[174] the Fifth Circuit reasoned in striking down the law that, while "[i]t is undeniable that the government has a compelling interest in protecting children from improper sexual expression,"[175] Texas's "generalized concern for children does not justify such a heavy-handed restriction on the exercise of a constitutionally protected individual right."[176]

When it is not being applied to bans on the sale and promotion of sex toys, the *Butler* principle is deployed by jurists with equal aplomb to proscriptions on beer bottles with offensive labels. The U.S. Court of Appeals for the Second Circuit began its lead paragraph of the 1998 case of *Bad Frog Brewery, Inc. v. New York State Liquor Authority*[177] with this humorous framing of the constitutional conflict:

> A picture of a frog with the second of its four unwebbed "fingers" extended in a manner evocative of a well known human gesture of insult[178] has presented this Court with significant issues concerning First Amendment protections for commercial speech. The frog appears on labels that Bad Frog Brewery, Inc. ("Bad Frog") sought permission to use on bottles of its beer products. The New York State Liquor Authority ("NYSLA" or "the Authority") denied Bad Frog's application.[179]

The NYSLA prohibited Bad Frog's use of the labels under all circumstances, asserting that the ban was justified in insulating children from vulgarity and promoting temperance.[180] In finding that this blanket

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devices that were "designed or marketed as useful primarily for the stimulation of human genital organs." *Id.* at 740–41 (quoting TEX. PENAL CODE ANN. § 43.21(a)(7) (West 2011), *invalidated by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008)) (internal quotation marks omitted). It contained a narrow exception for those who promoted such devices for "a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose." *Id.* at 741 (quoting TEX. PENAL CODE ANN. § 43.23(g) (West 2011), *invalidated by Reliable Consultants, Inc.*, 517 F.3d 738) (internal quotation marks omitted). The statute did not explain what a bona fide judicial use of a sex toy like a vibrator might be, although the possibilities surely boggle the mind.

173. *Id.* at 746.

174. *Id.* at 746 n.38.

175. *Id.* at 746.

176. *Id.*

177. 134 F.3d 87 (2d Cir. 1998).

178. *See generally* Ira P. Robbins, Digitus Impudicus*: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403 (2008) (providing an excellent review of the legal issues created by the middle finger gesture).

179. *Bad Frog Brewery,* 134 F.3d at 90 (citations omitted) (footnotes not in original).

180. *Id.*

prohibition was not narrowly tailored to serve those interests, the Second Circuit cited *Butler*.[181] It reasoned that "NYSLA's complete statewide ban on the use of Bad Frog's labels lacks a 'reasonable fit' with the state's asserted interest in shielding minors from vulgarity, and NYSLA gave inadequate consideration to alternatives to this blanket suppression of commercial speech."[182] In brief, from modern day bans on sex toys to all-out prohibitions on risqué beer labels, *Butler* is a proven, powerful antidote to censorial proclivities of legislative and administrative bodies across the United States.

In an excellent essay bridging the realms of literature and law published more than four decades ago in the *Journal of Aesthetic Education*, E. F. Kaelin asserted that one key result of the high court's ruling in *Butler* was to highlight:

> [T]he social effects of appeals to law as the primary means of social control: any law is universal in its application and thus may be too permissive or too restrictive to deal effectively with the social good it is intended to promote or the social evil it is to prevent; and unless society wishes to condone the violation of individual rights guaranteed by our Constitution, it must create other institutional procedures for protecting the morals of the young and incompetent.[183]

Today, those other institutional procedures and means for protecting the young are largely driven by technological developments that never could have been envisioned in 1957 when *Butler* was decided. For instance, when it comes to television content, any parent who is concerned about his or her child's viewing habits can use the V-chip.[184] In particular, according to the FCC's own website, all television sets thirteen inches or larger sold in the United States since January 1, 2000, must have a V-chip.[185] That means, of course, that more than one full decade has passed for any interested parent to purchase such a TV set and to make good use of the V-

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181. *Id.* at 101.

182. *Id.*

183. E. F. Kaelin, *The Pornographic and the Obscene in Legal and Aesthetic Contexts*, J. AESTHETIC EDUC., July 1970, at 69, 71.

184. The FCC provides on its website that:

> The V-chip allows parents or other caregivers to block programming on their televisions that they don't want children to watch. Most television programs are now assigned a rating according to a system established by the television industry. The rating is encoded with the program before it airs. Parents can use the remote control to program the V-chip to block the display of programs that carry certain ratings.

The V-Chip: Putting Restrictions on What Your Children Watch, FCC, 1, http://www.fcc.gov/cgb/consumerfacts/vchip.pdf.

185. *Id.*

chip if he or she sees fit. In brief, technology—not governmental censorship—facilitates parental authority over minors' viewing habits.

In conclusion, it was Anthony Comstock—the Secretary of the New York Society for the Suppression of Vice, which "censored literature in America for more than sixty years"[186]—who is first credited for turning the phrase "devil-traps" for the young.[187] As the late Professor Margaret Blanchard noted, Comstock was referring to dime novels "that featured brash Western heroes and hard-boiled big city detectives."[188] He believed, as Blanchard put it, that these writings "were leading youths down the path to destruction, for once a child had read such stories, no one could prevent a career of crime and the loss of an immortal soul."[189]

There will always be people who believe that certain types of media content—from messages posted on social media to violent video games to types of content we cannot even envision today—are devil-traps for minors. Indeed, Yale Law School Professor Jack Balkin has observed that society often:

> [T]urn[s] to children as the master trope, the perspective through which we can talk about cultural control, while at the same time professing our respect for freedom of speech. Because children have fewer first amendment rights than adults, because children need to be protected, shaped, educated, and so on, and because children are the future of our culture, we can reconcile our conflicting desires by viewing all cultural issues in terms of children and their interests and needs.[190]

But just as surely as such thinking will always cause those like Anthony Comstock to see devil-traps lurking wherever they look and in whatever form of media, the *Butler* principle, as this Article has demonstrated, will stand firmly against the type of censorship traps that ensnare adults at the same time that they shield minors.

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186. Robert Corn-Revere, *New Age Comstockery*, 4 COMMLAW CONSPECTUS 173, 173 (1996).

187. ANTHONY COMSTOCK, TRAPS FOR THE YOUNG 20 (Robert Bremner ed., Harvard Univ. Press 1967) (1883).

188. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—from Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 757 (1992).

189. *Id.*

190. *The Association of American Law Schools, Section on Mass Communications Law 1997 Annual Conference Panel: Sex, Violence, Children & the Media: Legal, Historical & Empirical Perspectives*, 5 COMMLAW CONSPECTUS 341, 353 (1997) (quoting Jack Balkin).