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FCC - Constitutional Right to Free Speech - Limp Libidinal Language (Pacifica Foundation v. FCC)

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RECENT DECISIONS

FCC—Constitutional Right To Free Speech—Limp Libidinal Language—The timidity of the District of Columbia Court of Appeals was vividly displayed in *Pacifica Foundation v. FCC.*[1] Squarely presented with the opportunity to become the first court to define "indecent language," as it pertains to the United States Criminal Code,[2] the appellate court attempted to avoid the challenge altogether. Rather than make any determination on the issue of indecency, the court retreated to safer ground and produced a ruling based on a nonexistent obscenity issue.

During the early afternoon hours of October 30, 1973, WBAI-FM, a New York radio station licensed to Pacifica Foundation, conducted a general discussion of the attitudes of contemporary society toward language. The discussion was part of the station's regular programming. Toward the end of the program, a selection was broadcast from the record album entitled "George Carlin, Occupation: Foole." Before playing the record, the WBAI commentator warned listeners that the recording included language which might be regarded as offensive to some. Those who were likely to be offended were advised to change the station and return to it after fifteen minutes. The album segment was a satirical comedy monologue, lasting about twelve minutes, regarding the use of ten "words you couldn't say on the public . . . airwaves,"[3] words which depicted sexual or excretory organs and activities.[4]

On December 3, 1973, the Federal Communications Commission received a complaint from a man who heard the broadcast while driving in his car with his young son. This was the only complaint of record received by either the FCC or the radio station.

Acting on this complaint, the FCC issued a declaratory order[5] in 1975 prohibiting the station from rebroadcasting the

1. 556 F.2d 9 (D.D.C. 1977).

2. 18 U.S.C. § 1464 (1970).

3. 556 F.2d at 38 (Leventhal, J., dissenting and quoting from the monologue transcript, Appendix 1).

4. For the strong of heart, the original seven words (used in various contexts) can be found in the Appendix to the opinion. *Id.* at 38-39.

5. 56 F.C.C.2d 94 (1975).

monologue whenever children are likely to be part of the listening audience. The Commission determined that its power to issue such an order derived chiefly from 18 U.S.C. section 1464, which provides that, "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Noting that there was authority supporting the proposition "that the two terms ['obscene' and 'indecent'] refer to two different things,"[6] the FCC ruled that the material from the record album was indecent as distinguished from obscene. This distinction was made explicit in the text of the order. "This order does not deal with the somewhat different problem of 'obscene' language."[7]

Although the United States Supreme Court has developed standards for determining obscenity, no court has ever authoritatively defined indecency. The FCC, therefore, initially chose to rely upon a definition which the Commission itself had offered in *Eastern Educational Radio,*[8] a ruling issued in 1970. "[W]e believe that the statutory term, 'indecent,' should be applicable, and that, in the broadcast field, the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."[9] This definition was linked to the then existing Supreme Court obscenity standards announced in *Memoirs v. Massachusetts.*[10]

> [I]t must be etablished that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[11]

Thus, in 1970 the FCC decided that indecency could be distinguished from obscenity on the sole basis that indecent material need not appeal "to a prurient interest in sex."

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6. *Id.* at 97.
7. *Id.* at 94-95.
8. 24 F.C.C.2d 408 (1970).
9. *Id.* at 412.
10. 383 U.S. 413 (1965).
11. *Id.* at 418.

Since the Supreme Court revised its obscenity standards in *Miller v. California*[12] in 1973, the FCC felt compelled to reformulate its own prior definition of indecency when issuing the *Pacifica* order.

The Commission viewed the problem of indecency as if it were a public nuisance. "Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it."[13] The purpose of the order was to "channel" the broadcast of indecent language in such a way as to assure that children do not hear it.

> Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[14]

The Commission conceded that different standards could be employed when the number of children in the audience is reduced to a minimum.

In comparison with the FCC's definition of indecency, the current Supreme Court obscenity standards are enunciated in *Miller* 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.[15]

In its *Pacifica Foundation* order, the FCC expressed the opinion that indecent language is distinguishable from obscene language in only two respects. First, "it lacks the element of appeal to the prurient interest, . . . and [secondly], when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value."[16]

12. 413 U.S. 15 (1973).
13. 56 F.C.C.2d at 98. (Emphasis in the original).
14. *Id.*
15. 413 U.S. at 24.
16. 56 F.C.C.2d at 98.

It should be noted that in his concurring opinion, Chief Judge Bazelton detected an additional distinction not raised by the FCC in its order. "[T]he Commission does not test the 'indecency' of speech under 'local community standards,' but rather on the basis of what it terms 'contemporary community standards for the broadcast industry'."[17] Arguably at least, the "broadcast medium" approach implies a national standard, one which would be determined by nationwide members of the radio industry. This would conflict with the "local community" test which expressly endorses the use of local standards established by "average" citizens.

Pacifica appealed from the FCC order to the District of Columbia Court of Appeals. Its argument was "that section 1464 is unconstitutionally vague unless the term indecent is subsumed by the term obscene as defined in *Miller v. California.*"[18] The appellant maintained that the monologue could not be termed obscene since "it does not appeal to any prurient interest and because it has literary and political value."[19]

At the very least, Pacifica argued, indecency "refers to material which appeals to prurient interest as distinguished from material which is merely coarse, rude, vulgar, profane or opprobrious."[20] Furthermore, Pacifica contended that the FCC definition was "overbroad as it does not assure that programs of serious literary, artistic, political or scientific value will be allowed to air."[21]

Undeniably, the issue raised on appeal was "indecency." The FCC and Pacifica were in apparent agreement that the broadcast material in question did not fall into the category of "obscenity." The FCC's position was that indecency was something different than obscenity, and that the standards for determining indecency were less stringent than those applicable for obscenity. Pacifica insisted that indecency and obscenity were, in effect, different names for the same concept.

Despite the clear-cut presentation of the indecency issue, the court of appeals chose not to "resolve this difficult ques-

17. 556 F.2d at 22.
18. *Id.* at 12.
19. *Id.*
20. *Id.*
21. *Id.* at 13.

tion."[22] "We do not find it necessary to determine whether the term 'indecent' can be more narrowly defined than the term 'obscene'."[23] The court felt it could base its ruling solely on 47 U.S.C. section 326, which prohibits the FCC from acting as a censor or interfering "with the right of free speech by means of radio communication."[24]

According to the court, the purpose and effect of the FCC order was "to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communication."[25] Therefore, the order was reversed. The FCC's public nuisance analogy and channeling arguments were not accepted.

> The Commission claims that its Order does not censor indecent language but rather channels it to certain times of the day. In fact the Order is censorship, regardless of what the Commission chooses to call it. The intent of the Commission is clear. It is to keep language that describes sexual or excretory organs and activities from the airwaves when there is a reasonable risk that children may be in the audience.[26]

Unfortunately, the court neglected to provide the FCC with any workable standards by which it might determine at what point its duty to prohibit the broadcast of "obscene, indecent or profane language" ends and where the impermissible activity of censorship begins. Taken by itself, the following definition, as offered by the court, is not very helpful: "Any examination of thought or expression in order to prevent publication of objectionable material is censorship."[27]

Other language in the opinion, however, suggested that 47 U.S.C. section 326 is merely a statutory restatement of the first amendment guarantee of free speech:

> Under its mandate to promote the public interest, the Commission may promulgate rules on a variety of matters, includ-

22. *Id.* at 15.

23. *Id.*

24. 47 U.S.C. § 326 (1970) provides that:

> Nothing in this chapter shall be understood or construed to give the [Federal Communications] Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

25. 556 F.2d at 13.

26. *Id.*

27. *Id.* at 14.

> ing broadcast programming. However, any such actions by the Commission must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the Communications Act.[28]

How then, are "the requirements of the first amendment" to be satisfied? The court first applied the *Miller* obscenity standards to determine whether or not the first amendment applied in this situation. The material was found to be nonobscene. "[T]hese words quite possibly could have literary, political or artistic value. Therefore this nonobscene speech is entitled to First Amendment protections."[29] Thus, the court which earlier had ignored the determinative issue of indecency, raised an obscenity question which was never at issue.

Apparently then, all nonobscene material relating to sexual matters falls under the protection of the first amendment. By inference the court was stating that if indecent language could be distinguished from obscene language, indecent language would be protected by the constitutional guarantee of free speech.

After determining that the first amendment was applicable to the case, the court found that the FCC's action was unconstitutional in the first instance. Furthermore, the order also was found to be overbroad in that it failed to consider the context in which the prohibited language was used, and vague in that it failed to define with any precision what class of "children" was to be protected by the prohibition.

Interestingly, in its discussion of overbreadth, the court again reverted to an obscenity analysis. One of the grounds upon which the FCC had distinguished its concept of indecency from that of obscenity was that indecency could not "be redeemed by a claim that it has literary, artistic, political or scientific value"[30] whenever children were in the audience. Whether language had such value was the third consideration employed by the *Miller* obscenity standards.

Perhaps the most unsettling and confusing aspect of this decision was that the court created grave doubt as to whether the FCC had the power to prohibit or "regulate non-obscene

28. *Id.* at 15.
29. *Id.* at 16.
30. 56 F.C.C.2d at 98.

speech"[31] in any manner whatsoever. Since the order was found to be both overbroad and vague anyway, the court felt it was unnecessary to discuss the FCC's power. For the sole purpose of determining these other issues, the majority opinion merely assumed "arguendo" that the Commission could regulate such speech.[32] This approach could have the remarkable effect of rewriting 18 U.S.C. section 1464 in such a way as to delete "profane," as well as "indecent," language from the list of prohibited radio broadcast material. If this were accomplished, the appellate court would be justified in its refusal to discuss indecency.

Ironically, the court quoted with approval the following language from *Erznoznik v. City of Jacksonville:*[33] "Speech that is neither obscene as to youths *nor subject to some other legislative proscription* cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[34] The FCC never claimed that the monologue was obscene, but based its order upon an interpretation of "some other legislative proscription," namely, that against indecency. Yet, without bothering to construe the meaning of this pertinent "other legislative proscription," the court nevertheless found a first amendment violation.

Chief Judge Bazelton, who authored a concurring opinion, also felt that the statutory ban on censorship as outlined in 47 U.S.C. section 326, was violated. However, he objected to the majority's broad unlimited interpretation of this statute. "Althought the language of section 326 is very broad, the scope of that section is apparently limited by 18 U.S.C. section 1464 and 47 U.S.C. section 503(b)(1)."[35]

In order to determine whether or not nonobscene speech may be regulated, Chief Judge Bazelton suggested a two-step process. First, it must be determined whether such speech would be protected by the first amendment in other media. If so, the second step would require an analysis of the unique character of broadcasting in order to discover whether it could

31. 556 F.2d at 18.

32. *Id.* at 16 and 18.

33. 422 U.S. 205 (1975).

34. 556 F.2d at 16, *quoting* 422 U.S. at 213-14. (Emphasis added).

35. 556 F.2d at 20. 18 U.S.C. § 1464 (1970) provides for criminal punishments on those who utter "any obscene, indecent, or profane language by means of radio." 47 U.S.C. §1503(b)(1) (1970) provides that the Federal Communications Commission has the power to impose forfeitures on licensees who violate 18 U.S.C. § 1464.

somehow justify an expanded regulation of speech. After determining that the monologue generally would be constitutionally protected in other media, Chief Judge Bazelton could find no rational basis for denying this protection to the broadcast medium.

Written by Judge Leventhal, the dissent adopted an approach to this case which in its own way was every bit as bizarre as the majority's decision. While acknowledging the distinction between indecency and obscenity offered by the FCC, the dissent found that it was inconsequential. "In the last analysis, the FCC's opinion on what is 'indecent' stands as a functional equivalent to the Supreme Court's current 'obscenity' ruling (*Miller*), save for an adaptation to bridge the difference posed by the characteristic of radio presentation."[36]

In other words, the FCC was mistaken in attempting to distinguish between the two terms. In this respect, the dissent accepted the position urged by Pacifica. However, Judge Leventhal then found that the monologue was obscene, a position taken by neither party.

The "adaptation" of the obscenity standards was required in this case because of the broadcast industry's "special access to the home."[37] According to Judge Leventhal, families should have the right to decide whether or not to protect their children from hearing "special vocabularies appropriate only for special groups, times and places."[38] Furthermore, families should be permitted to exercise this right free from any outside interference. "With the pervasiveness of TV-radio and its reach into the home the choice made by broadcasters precludes an effective choice by the family."[39]

Although the dissenting opinion determined that the material was obscene, it did not reach this conclusion by a conventional application of the *Miller* test:

> Under *Miller* matter is not "obscene" if it has literary, educational, artistic, political or scientific value, and accordingly is not "indecent" (under a *Miller*-analogue test) if it has such value. But the fact that it has such value for adults does not mean that it has such value in a broadcast geared to

36. 556 F.2d at 32.
37. *Id.* at 33.
38. *Id.*
39. *Id.*

> children — or in a broadcast where a substantial number of children are likely to be in the audience without parental supervision.[40]

In effect, the dissent endorsed the concept of "variable obscenity." In *Ginsberg v. New York*[41] the United States Supreme Court had ruled that "the concept of obscenity . . . may vary according to the group to whom the questionable material is directed or from whom it is guaranteed."[42] However, as the concurring opinion in *Pacifica* pointed out, "variable obscenity" must also be subject to the *Miller* approach. The dissent failed to determine that the monologue appealed to the prurient interests of children or that it was without serious value to them. It merely stated that different subjective standards apply for children. It failed to state specifically how these standards differ in this case or how they apply within the *Miller* analaysis.

The effect of *Pacifica Foundation v. FCC* was to eliminate the statutory term "indecent" from 18 U.S.C. section 1464. Faced with an FCC order prohibiting the broadcast of alleged "indecent" language, the court held that this material could not be banned since it was not obscene. The broadcast of nonobscene matter was held to be protected by the first amendment. Furthermore, the FCC may be without the power to regulate nonobscene language in any manner. Therefore, the court reasoned that the issue regarding the definition of indecency was moot.

The most troublesome aspect of *Pacifica* was that the above results were arrived at inferentially. The court refused to deal directly with the indecency issue. Only the dissent attempted to construe this term, and ironically, the same conclusion was reached. Indecency was merely another name for obscenity.

Adding to the confusion was the court's inability to decide whether the FCC was vested with the authority to regulate broadcast material which was not obscene. The tone of the opinion suggested that the FCC might not have such authority.

On January 10, 1978, the United States Supreme Court granted certiorari to review the court of appeals ruling.[43] It

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40. *Id.* at 36.
41. 390 U.S. 629 (1968).
42. *Id.* at 636.
43. 46 U.S.L.W. 3426 (Jan. 10, 1978).

remains to be seen if an authoritative definition of indecency will be forthcoming, or if the FCC may properly regulate non obscene material.

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