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First Amendment; Freedom of Speech; Broadcasting; Obscenity; FCC v. Pacifica Foundation

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only that news which it is able to find outside the closed doors and locked files of officialdom.

If "a victory [for a free press] at the bar of the Supreme Court enhances and enlarges freedom for all,"[132] is the converse also true? Does a loss at the bar of the Supreme Court on the issue of first amendment free press rights diminish freedom for all?

"First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop," according to Justices Black and Douglas.[133] Nor are they any less taken away by a turn of semantics, by saying that a privilege is not a right, or that limiting is different from abridging. "Congress shall make no law . . . abridging the freedom . . . of the press." The first amendment still rings with the words. But that ring has a hollow tone to it these days.

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[132] W. HATCHEN, *supra* note 18, at 6.

[133] 417 U.S. 817 (Douglas J., dissenting).

CONSTITUTIONAL LAW

First Amendment • Freedom of Speech
Broadcasting • Obscenity

FCC v. Pacifica Foundation, 98 S. Ct. 3026 (1978).

"I WAS THINKING about the curse words and the swear words, the cuss words and the words you can't say . . . the words you couldn't say on the public, ah, airwaves . . . the ones that will curve your spine [and] grow hair on your hands. . . ."[1] While this is the satiric opinion of George Carlin, the Federal Communications Commission (FCC)[2] and a bare majority of the United States Supreme Court have embraced it as their genuine opinion.[3] They have decided to protect the public from the fate of hearing Carlin's social criticism regarding seven "dirty" words.[4]

Humorist George Carlin was recorded in a live performance in which he made the above quoted and other statements. He went on to analyze cur-

[1] Reference should be made to the appendix of the Court's opinion where the full text of Carlin's performance and the subject words are set forth. FCC v. Pacifica Foundation, 98 S. Ct. 3026, 3041 app. (1978).

[2] In re WBAI (FM), 56 F.C.C.2d 94 (1975).

[3] 98 S. Ct. at 3029.

[4] *Id.* at 3041.

rent societal attitudes concerning these words. His contention was that it is not the words themselves which should be regarded as unacceptable, but instead the manner in which they are sometimes used to hurt people, just as many other words are so used, *e.g.*, racial or ethnic slurs. He also examined the colloquialisms which have grown up around many of these words.[5] While the piece was certainly for the entertainment of his audience, implicit in that entertainment was the hope that an intelligent analysis both of the words and of society's outlook on their use would ensue.

Radio station WBAI (FM), a small community service station[6] in New York, broadcast the Carlin selection in conjunction with a program dealing with "analysis of contemporary society's attitudes toward language."[7] A single citizen's complaint gave rise to review by the FCC.[8]

The broadcast was concededly not obscene in the constitutional sense, nor did it fall into any other unprotected area.[9] In order to regulate such speech, the Commission indicated a desire to reformulate its definition of the word "indecent" as found in 18 U.S.C. § 1464.[10] They wished to do this since the previous definition[11] was based on the Supreme Court's definition of obscenity prior to *Miller v. California*.[12] However, this time the Commission went far afield in arriving at its definition of "indecent." It would almost seem that the FCC bends over backward to ignore the definition of obscenity in *Miller*. The definition refers not to any local standards, but to something the Commission calls "contemporary community standards."[13] This standard is apparently nothing more than ideas of morality possessed by the commissioners themselves; they neither sought nor evinced any outside assistance in framing it, aside from the single citizen complaint.[14] There was no account taken of whether or not the broadcast would have serious literary, artistic or scientific value during anything but the late evening hours, and apparently only at the Commission's whim and fancy then.[15] In fact, as Chief Judge

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[5] *Id.* at 3043 app.

[6] In re WUHY - FM, 24 F.C.C.2d 408, 423 (1970) (Johnson, Comm., dissenting).

[7] 56 F.C.C.2d at 95.

[8] *Id.* at 94.

[9] 98 S. Ct. at 3044 (Powell, J., concurring).

[10] 56 F.C.C.2d at 97. The Code states: "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." 18 U.S.C. § 1464 (1976).

[11] 56 F.C.C.2d at 97. The old definition contained two elements: "(a) patently offensive by contemporary community standards; and (b) . . . utterly without redeeming social value." 24 F.C.C.2d at 412.

[12] 413 U.S. 15 (1973). *See* 56 F.C.C.2d at 97.

[13] 56 F.C.C.2d at 98.

[14] FCC v. Pacifica Foundation, 556 F.2d 9, 23 (1977) (Bazelon, C.J., concurring).

[15] 56 F.C.C.2d at 98.

Bazelon points out in his concurring circuit court opinion, the Commission's ruling itself could not be broadcast according to their own definition since it contains the words which, in the Commission's opinion (and hence that of the "contemporary community"), "debas[e] and brutaliz[e] human beings by reducing them to their mere bodily functions."[16] This would be true even though the ruling must be said to possess some serious political value.

The clear implication is that the Commission's ruling will bar the use of a particular group of words without regard to the ideas that are inevitably bound up in those words. The Supreme Court has spoken to this area, saying "[w]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[17] Justice Stevens, when faced with the same question here, chose to ignore this previous statement by quoting Justice Murphy's declaration that "such utterances are no essential part of any exposition of ideas . . . ."[18] Justice Stevens consoles himself by saying that the restriction on the use of these words "will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[19]

How could one express the thought that banished words should not really be offensive without using those same words? There would be no substance left in a thought expressed in this manner. Again, quoting Justice Harlan from *Cohen:*

> "[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which . . . may often be the more important element of the overall message sought to be communicated."[20]

It has not been asserted that these words are obscene, but even in the context of obscenity the words above quoted of Justice Murphy are rejected in the consideration of redeeming social value. Justice Stevens notes that "words offend for the same reasons that obscenity offends."[21] Yet he would allow the Commission's definition of "indecent" under which the words were banned to take into account almost none of the considerations which the Supreme Court felt to be essential parts of any regulation regarding obscenity in *Miller.*[22]

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[16] 556 F.2d at 23 (Bazelon, C.J., concurring).

[17] Cohen v. California, 403 U.S. 15, 26 (1971).

[18] 98 S. Ct. at 3039, *quoting* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[19] 98 S. Ct. at 3037 n.18.

[20] 403 U.S. at 26.

[21] 98 S. Ct. at 3039.

[22] 413 U.S. at 24-25.

The bases upon which the Supreme Court rests *Pacifica* are two: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans," (*i.e.*, its intrusive effect); "Second, broadcasting is uniquely accessible to children . . . ."[23]

First, the Court reasoned that broadcasting differs from any other form of communication in that it enters the home at the mere flick of a switch, concluding that the right to privacy while at home outweighs the broadcaster's first amendment rights.[24] In support of this proposition, Justice Stevens cites *Rowan v. United States Post Office Department*.[25] *Rowan* upheld the constitutionality of a statute which provided that, upon the request of a householder, a mailer may be required to remove the householder's name from his lists.[26] Clearly there are crucial distinguishing factors here. First, *Rowan* makes no governmental determination of what the resident may or may not object to receiving through the mails, while *Pacifica* has permitted the FCC to make this very personalized decision for everyone. Second, in *Rowan*, the individual who desires to receive the message is in no way hampered from doing so, while here, those who wish to hear Mr. Carlin and others may be effectively stopped from doing so.[27]

In addition, this basis for the Court's reasoning necessarily rests on the assumption that no act of any consequence is performed in the acceptance of broadcasts by the public. This is not the case, for as Justice Brennan further points out in his dissent, when an individual performs the positive act of turning on the radio or television set, he is partaking in a sort of "public discourse," albeit only on a listener's level.[28] It would indicate a consent to take the first blow. Beyond that, continued listening would be, as it has always been, totally in the listener's discretion.

This is not the case of the sound truck outside one's home which was used as an example of what might constitute an intolerable intrusion in *Cohen*.[29] The householder has no control whatever over the duration or volume of that broadcast. He does, of course, retain control over these factors in a radio broadcast, and most importantly he retains the privilege to choose

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[23] 98 S. Ct. at 3040.

[24] *Id.*

[25] 397 U.S. 728 (1970).

[26] *Id.*

[27] While it is true, as Justices Powell and Stevens assert, that willing adults may still purchase Carlin's records, or perhaps see his performance live, they apparently are unable to empathize with those who are unable economically to avail themselves of all these alternatives. 98 S. Ct. at 3053 (Brennan, J., dissenting).

[28] *Id. See also* Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975).

[29] 403 U.S. at 21.

from a wide range of programs and channels, *i.e.*, the content of the broadcast. The FCC would have the choices reduced by one.

Turning to Justice Stevens' second basis for allowing curtailment of concededly protected speech, it is apparent that there are large numbers of parents who do not wish to have their children exposed to this type of language. However, since the monologue was concededly not obscene in the constitutional sense,[30] it runs head on into the Court's statement that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[31] No sufficient explanation of this is to be found in Justice Stevens' opinion.

Affirmance of the FCC ruling has the same effect as that of a state statute prohibiting the proliferation of reading matter containing allegedly obscene language, since it may fall into the hands of children. The Court has found such a statute to be unconstitutional.[32] Its effect was that it "reduced the adult population of Michigan to reading only what is fit for children."[33] In *Pacifica,* the Commission apparently felt that they avoided this conflict by assuring that another standard "might conceivably be used" late at night.[34] However, the effect is essentially the same. Even assuming that a less stringent standard was used when children were not likely to be in the audience, "[a]dults with normal sleeping habits will be limited to programs 'fit for children.' "[35]

The Commission stated that "parental interest has 'a high place in our society.' "[36] Since it is assumed that most parents find this language inappropriate,[37] the government, *i.e.*, the Commission itself, should ban it.[38] These premises clearly support the conclusion that parents, and not the government, are entrusted with the duty to make these decisions. As Justice Brennan points out, "[a]s surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."[39]

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[30] 98 S. Ct. at 3044 (Powell, J., concurring).
[31] Erzaznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975).
[32] Butler v. Michigan, 352 U.S. 380 (1957).
[33] *Id.* at 383.
[34] 56 F.C.C.2d at 98.
[35] 556 F.2d at 27 (Bazelon, C.J., concurring).
[36] 56 F.C.C.2d at 98, *citing* Wisconsin v. Yoder, 406 U.S. 206 (1972).
[37] *Id.*
[38] *Id.*
[39] 98 S. Ct. at 3051 (Brennan, J., dissenting).

The Court's holding clearly impinges upon these parents' right to raise their children as they see fit without governmental interference.

Based on these two grounds, the Court has granted the FCC a mandate to ban certain words from the airwaves. And since the FCC ruling contains no reference (with respect to the daytime and perhaps none late at night) to serious literary value as a redeeming factor,[40] it can safely be said that the Court paid no attention to its own admonition from *Miller* that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."[41] It is a distinguished list of literary works upon which the Commission's ruling could support a ban: they include works by "Shakespeare, Joyce, Hemmingway, Ben Jonson, Henry Fielding, Robert Burns and Chaucer."[42] Two other works which could be suppressed in part are the Nixon tapes and the Bible.[43]

The absence of any articulated limitations on the Commission's powers to censor intrusive radio broadcasts[44] brings up the question of how far the Commission might go in regulating what it finds to be offensive and dangerous to American youth. It is quite conceivable that dissidents using anything but the purest of middle class language could be banned or at least relegated to 3:00 A.M. broadcast times when they could not endanger the minds of American youth (or for that matter be heard by any but the most insomnious Americans). In fact, in a previous case with similar facts, one Commissioner was constrained to write in dissent that "[w]hat the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor or the blacks may not."[45] Support for this proposition is found in several works cited by Justice Brennan in his piercing dissent[46] as he diagnoses the condition of his brethren as a case of "acute ethnocentric myopia."[47]

Justice Powell suggests that it is initially the FCC's responsibility to keep a check on the administration and implementation of this demonstrably overbroad ruling.[48] This hardly seems a safe place to rest this faith. While

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[40] 56 F.C.C.2d at 98.

[41] 413 U.S. at 22-23.

[42] 98 S. Ct. at 3051-52 (Brennan, J., dissenting).

[43] *Id.*

[44] *Id.*

[45] 24 F.C.C.2d at 423 (Johnson, Comm., dissenting).

[46] 98 S. Ct. at 3054 (Brennan, J., dissenting), *citing* B. JACKSON, GET YOUR ASS IN THE WATER AND SWIM LIKE ME (1974); J. DILLARD, BLACK ENGLISH (1972); W. LABOR, LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR (1972).

[47] 98 S. Ct. at 3054 (Brennan, J., dissenting).

[48] *Id.* at 3046 (Powell, J., concurring).

the Commision was unanimous in its support of the ruling, two of the five commissioners were quite adamant in their view that it did not go far enough.[49] Commissioner Reid's words take on an almost scolding tone when she refers to "a few careless broadcasters . . . [as] a constant source of irritation. . . . I, for one, will not hesitate to enforce what I perceive to be the clear mandate of the public interest should this abhorrant practice continue. . . . I believe this language to be totally inappropriate for broadcast at anytime."[50] Commissioner Quello's comments were even stronger and more bewildering. He concurred in the result because he recognized "the need for an up-dated standard in light of the Supreme Court ruling in *Miller v. California.*"[51] Yet the Commission almost totally ignored the *Miller* standard. He goes on to say, "Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political or scientific value."[52] He apparently has not considered any of the works previously quoted from Justice Brennan's list. These are the people in whom Justice Powell entrusts the implementation of the definition of "indecency" given sanction by the Court. It would seem safer and saner to follow Justice Brennan's suggestion: "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a market place unsullied by the censor's hand."[53]

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[49] 56 F.C.C.2d at 102.
[50] *Id.* at 102 (Reid, Comm., concurring).
[51] *Id.* at 103 (Quello, Comm., concurring).
[52] *Id.*
[53] 98 S. Ct. at 3052 (Brennan, J., dissenting).