

“Indecent” Speech in 2009

GUYLYN CUMMINS

The decades-old legal struggle to define what is “obscene” expression lying outside of First Amendment protection has always seemed to me more like a “slippery cliff” than a “slippery slope.” As former Justice Potter Stewart of the U.S. Supreme Court, in attempting to classify what material constituted exactly “what is obscene,” famously wrote, “I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it. . . .”¹

That infamous “I know it when I see it” standard has now moved into the “indecent” speech arena for broadcasters, and its migration presents an even more serious assault on free speech than it did in regulating obscenity. How did we get here?

In the broadcast arena, federal law for decades has prohibited the broadcasting of any indecent language, which includes expletives referring to sexual or excretory activity or organs.² The Communications Act of 1934 established a system of limited-term broadcast licenses subject to various burdens, which were designed to maintain control of the air waves, on the grounds that they were a scarce resource and that the pervasiveness and intrusiveness of the medium could potentially harm children through its content.

When broadcasters were granted a license to use the air waves, that franchise was thus burdened with public obligations. One such burden is the indecency ban—the statutory proscription against “utter[ing] any obscene, indecent, or profane language” via the air waves—between the hours of 6 a.m. and 10 p.m. This obligation is enforceable through fines or denial of license renewals.

Guylyn Cummins (gcummins@sheppardmullin.com) is a partner in the San Diego office of Sheppard Mullin Richter & Hampton LLP.



Guylyn Cummins

While the indecency ban has survived for nearly a century, it was first invoked in 1975, when George Carlin’s *Seven Dirty Words* radio monologue was deemed to be indecent. The FCC announced its definition of indecent speech as that which prohibits “language that describes, in terms of patently offensive as measured by contemporary community standards

for the broadcast medium, sexual or excretory activities or organs, at times of day when there is a reasonable risk that children may be in the audience.”³ Carlin’s “indecent” monologue could be banned, the Supreme Court said, in light of the “uniquely pervasive presence” of the medium and the fact that broadcast programming is “uniquely accessible to children.”

Thereafter, the FCC took a cautious approach to indecency enforcement. It distinguished between “repetitive” and “nonrepetitive” uses of indecent words, and “literal and nonliteral” uses of evocative language. The FCC said “literal ‘description or depiction of sexual or excretory functions’ must be examined in context to determine whether it is patently offensive,” but that “deliberate and repetitive use . . . is a requisite to finding indecency” when a complaint by the public “focuses solely on the use of nonliteral expletives.”

In the interim, the Communications Decency Act was tested. The most controversial portions of the Act were those relating to indecency on the Internet, which were introduced due to fears that Internet pornography was readily available to—or even thrust upon—vulnerable children. The Act, which affected the Internet and cable television, marked the first attempt to expand indecency regulation to these new mass media.

Enacted in February 1996, the Act imposed criminal sanctions on anyone who knowingly (A) uses an interactive

computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. It further criminalized the transmission of materials that were “obscene or indecent” to persons known to be under 18.⁴

The ACLU and other free speech advocates, however, were able to successfully overturn the Act’s indecency provisions (but not its obscenity provisions) in the case of *Reno v. American Civil Liberties Union*.⁵ There, the ACLU pointed out how much speech protected by the First Amendment would suddenly become unlawful when posted to the Internet, like novels, reporting on sex crimes, medical information, and other sexually explicit material. The Supreme Court agreed, finding the indecency provisions were an unconstitutional abridgment of the First Amendment right to free speech because they did not permit parents to decide for themselves what material was acceptable for their children, extended to noncommercial speech, and did not define “patently offensive,”

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a term with no prior legal meaning.

Other narrower attempts to regulate children's exposure to Internet indecency followed but also were struck down under the First Amendment.

Then came the wave of FCC "liability notices" for indecent broadcasts. On April 28, 2009, the Supreme Court handed down its decision in *Federal Communications Commission v. Fox Television Stations, Inc.*⁶ The "indecent" broadcasts leading to the FCC's rulings included

- Fox Television's 2002 Billboard Music Awards, on which singer Cher exclaimed, "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em."
- Fox Television's 2003 Billboard Music Awards, during the presentation of an award to Nicole Richie and Paris Hilton, wherein Richie said, "Why do they even call [the television program] *The Simple Life*? Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."
- Performer Bono's fleeting comment on NBC's 2004 broadcast of the Golden Globe Awards, with respect to his award, that "This is really, really, fucking brilliant."
- CBS's broadcast of Janet Jackson's "wardrobe malfunction" exposing her naked breast at the 2004 Super Bowl half-time show.

Partial nudity or suggestive sexual activity in television shows also became fair game.

Aside from the fact that we are all exposed to these sorts of "indecent" expressions many times a day in the course of everyday living—and that all of the subject broadcasts are still available for public viewing on the Internet—the FCC decided to punish such "indecent" expressions.

The Fox Television case recently reached the Supreme Court, but only on the narrow issue of whether the FCC's dramatic change to its indecent speech enforcement policies was an arbitrary and capricious change under the Administrative Procedure Act. By a five to four vote, the Court held only that the FCC's change in its previous policy regarding enforcement of the indecency ban, under which nonrepetitive use of

expletives was per se nonactionable, in favor of a context-based approach that allowed it to treat as actionably indecent even isolated uses of sexual and excretory words in broadcasts, was neither arbitrary nor capricious. The critical battle as to whether the FCC's ban on indecent speech complies with the strictures of the First Amendment is winding its way through the Second and Sixth Circuit Courts of Appeal.

The starting point in the battle is the First Amendment itself. It provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." Missing from this text is any exception for obscene or indecent speech.

The reach of these terms is extremely broad. Wikipedia notes that "obscenity" derives from the Latin word *obscenus*, meaning "foul, repulsive, detestable." It is "a term that is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality of the time. It is often replaced by the word salaciousness." Hopefully, we have progressed as a society beyond censoring speech that "offends the prevalent sexual morality of the time," as history has shown that offensive speech should not be suppressed by the prevailing majority.

As the discussion of obscenity on Wikipedia also notes, the definition of obscenity

differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions: usually including, but not limited to, pornographic material. As such censorship restricts freedom of expression, crafting a legal definition of obscenity presents a civil liberties issue.

Given the breadth of the term "obscenity" and the ambiguities inherent in its application, the government could censor a great deal of speech under the obscenity doctrine, if it chose to do so. Furthermore, government enforcement would unquestionably have a profound chilling effect, even if enforcement

actions were not uniformly successful.


The same concern about arbitrary application applies to the ban on "indecent" speech. As Wikipedia says,

[d]ecency is an individual's adherence to social standards of appropriate speech and conduct. Standards of decency vary greatly depending on the cultural context. Most nations have laws against indecency which regulate certain sexual acts, and restrict one's ability to display certain parts of the body in public (see indecent exposure).

While a five to four majority of the Supreme Court upheld the FCC's change in policy to the so-called indecency ban, Justice Thomas issued a strong-worded concurrence that hopefully is a harbinger of change. While joining in the majority's disposition, he noted the "questionable viability of the two precedents that support the FCC's assertion of constitutional authority to regulate programming in this case."⁷ According to Justice Thomas, both *Red Lion Broadcasting Co. v. FCC* and *FCC v. Pacifica Foundation* were "unconvincing when they were issued, and the passage of time has only increased doubt regarding their continued validity." As Justice Thomas aptly noted, "The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so" in these cases.

Justice Thomas also opined that, "the 'deep intrusion' into First Amendment rights of broadcasters is problematic" because it is based on the "scarcity of radio frequencies," at a time when spectrum scarcity is nonexistent. Moreover, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope is too broad." The concept that the scarcity of channels for the communication of speech justifies greater government control over speech lacks "any textual basis in the Constitution." Moreover, "spectrum scarcity, intrusiveness, and accessibility to children neither distinguish broadcast from other new mediums nor explain the relaxed application of the principles of the First Amendment to broadcast." As Justice Thomas concluded, "In cases involving

constitutional issues, that turn on a particular set of factual assumptions, this court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained.”

I agree. 

Endnotes

1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

2. 18 U.S.C. § 1464.
3. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).
4. 47 U.S.C. § 233(d).
5. 521 U.S. 844, 851–53 (1997).
6. 129 S. Ct. 1800 (2009).
7. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the “fairness doctrine” that discussion of public issues be presented on each side of the issue because the Government should be allowed to put

restraints on licensees in favor of others whose views should be expressed on this broadcast unique medium); *Pacifica Found.*, 438 U.S. 367 (allowing restraints on indecent speech as “broadcasting . . . has received the most limited First Amendment protection,” both because of the “pervasive presence” of the broadcast media in Americans’ lives and the fact that broadcast programming was “uniquely accessible to children”).