10-1-1989

Does the Supreme Court Extend the Definition of Obscenity To "I Know It When I Hear It?": *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829 (1989)

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RECENT DEVELOPMENTS

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Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829 (1989).

I. INTRODUCTION

Sable Communications, which offered sexually-oriented prerecorded telephone messages, brought suit to enjoin the Federal Communications Commission (FCC) and the Department of Justice from enforcing section 223(b) of the Communications Act of 1934,[1] which, as amended, imposed a blanket prohibition on obscene, as well as indecent, interstate commercial telephone messages.[2] Sable claimed that the absolute ban on obscene and indecent speech embodied in section 223(b) was repugnant to the

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1. 47 U.S.C. § 223(b) (1982), *as amended by* Act of April 28, 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424. Section 223(b) of the Communications Act of 1934, as amended in April of 1988, and as it appeared when Sable commenced this action, provided:

> (b)(1) Whoever knowingly—
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> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
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> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2834 & n.4 (1989). The April 1988 amendment proscribed "indecent as well as obscene interstate telephone communications directed to any person regardless of age." *Id.* at 2834. Before the Court noted probable jurisdiction, Congress again amended section 223(b). Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7524, 102 Stat. 4502 (1988). This most recent amendment places the prohibitions against obscene and indecent commercial telephone messages in separate subsections. *Sable*, 109 S. Ct. at 2834 n.5. This separation essentially removed any issue of severability from the case. *Id.* at 2835 n.6.

2. Sable also sought a declaratory judgment that the indecency and obscenity provisions of the amended section 223(b) were violative of the first amendment. *Id.* at 2832.

first and fourteenth amendments to the United States Constitution.[3]

The United States District Court for the Central District of California held that "the first amendment does not permit a flat-out ban of indecent as opposed to obscene speech"[4] and issued a preliminary injunction prohibiting the enforcement of Section 223(b) as it applied to indecent speech.[5] The District Court refused, however, to grant Sable's request for an injunction against the enforcement of the ban on *obscene* telephone messages.[6]

On appeal,[7] the Supreme Court of the United States affirmed.[8] Specifically, the Court had to resolve two issues: (1) whether the prohibition against providing obscene interstate commercial telephone messages in Section 223(b) was consonant with the first amendment; and (2) whether the prohibition against providing indecent interstate commercial telephone messages in Section 223(b) was sufficiently narrow to survive a constitutional attack. The Court held that "[b]ecause the statute's denial of adult access to telephone messages which are indecent but not obscene far exceed that which is necessary to limit the access of minors to such messages," the complete ban of *indecent* speech in section 223(b) violates the first amendment.[9] However, the Court affirmed the district court's refusal to enjoin enforcement of the statute as it applied to *obscene* telephone communications, rejecting, as did the district court, Sable's argument that the statute unconstitutionally created a national standard of obscenity.[10] This Note analyzes the Supreme Court's holding and suggests that unresolved issues remain.

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3. *Id.*

4. Sable Communications of California, Inc. v. FCC, 692 F.Supp. 1208, 1209 (C.D. Cal. 1988) (quoting Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1296 (9th Cir. 1987)).

5. *Sable*, 692 F. Supp. at 1210.

6. *Id.*

7. Sable appealed to the Ninth Circuit the trial court's holding that the FCC's ban on obscene speech was constitutional. The FCC's direct appeal to the Supreme Court on the indecency issue had the effect of transferring Sable's Ninth Circuit appeal directly to the Supreme Court, allowing both issues to be determined simultaneously. *Sable*, 109 S. Ct. at 2832-33 n.2.

8. Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829 (1989).

9. *Id.* at 2839.

10. *Id.* at 2835-36.

II. THE SUPREME COURT'S DECISION

A. *History*

In *Roth v. United States*,[11] the Supreme Court, for the first time, expressly held that obscenity was not protected by the first amendment.[12] Defining "obscene material" as "material dealing with sex in a manner appealing to prurient interests," the Court enunciated a test for lower courts to apply when attempting to determine whether allegedly obscene material does indeed fall within that unprotected realm: "whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."[13]

In 1966, the Supreme Court decided two companion cases which significantly revised the *Roth* test. In *Memoirs v. Massachusetts*,[14] the Court limited the scope of obscenity, rendering the *Roth* test more difficult to apply. Specifically, *Memoirs* modified the *Roth* test by concluding that a work cannot be proscribed as obscene unless found to be "*utterly* without redeeming social value."[15]

In 1973, in *Miller v. California*,[16] the Supreme Court rejected the definition of obscenity it had formulated in *Memoirs*[17] and delineated the current tripartite test. When assessing whether a work is obscene under the *Miller* test, the fact finder must decide:

> (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.[18]

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11. 354 U.S. 476 (1957). In *Roth*, the defendant was convicted of mailing obscene advertisements in violation of the federal obscenity statute, currently codified at 18 U.S.C. § 1461 (1982).

12. *Roth*, 354 U.S. at 485.

13. *Id.* at 489.

14. 383 U.S. 413 (1966).

15. *Id.* at 419 (emphasis in original).

16. 413 U.S. 15 (1973). Miller had been convicted of mailing unsolicited sexually explicit material in violation of a California law which had incorporated the obscenity test enunciated by the Supreme Court in *Memoirs*. *Id.*

17. For a discussion of how the *Miller* test differs from the test in *Memoirs*, see Main, *The Neglected Prong of the* Miller *Test for Obscenity: Serious Literary, Artistic, Political or Scientific Value*, 11 S. ILL. U.L.J. 1159 (1987).

18. *Miller*, 413 U.S. at 24-25. In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the companion case to *Miller*, the Supreme Court reaffirmed its announcement in *Roth* that

Miller remains the relevant constitutional standard when assessing whether material is or is not obscene. Accordingly, it was of critical importance to the *Sable* Court's scrutiny of section 223(b).

B. *Obscene Speech*

In *Sable*, the Supreme Court first addressed the district court's refusal to enjoin enforcement of the prohibition in section 223(b) of obscene commercial telephone messages.[19] As the Court clearly noted, it was not endeavoring to decide what is or is not obscene, but simply to determine whether the Constitution empowered Congress to proscribe the transmission of obscene telephone messages.[20] Sable's main contention was that section 223(b) created an impermissible national standard of obscenity by requiring national telephone services to fashion their messages to conform with the least tolerant community, an unconstitutional requirement in light of *Miller's* first prong.[21] Sable argued that it was a national telephone service because its messages were received nationally, and, that being the case, it was therefore unconstitutional for the FCC to require that Sable's communications to the more tolerant communities be limited to what would be acceptable in the least tolerant community.[22]

In holding that "there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings," the Supreme Court emphatically rejected Sable's claim.[23] Comparing section 223(b) to the federal statutes prohibiting the mailing of obscene materials and the broadcasting of obscene messages, the Court refused to find that section 223(b) establishes a national standard of obscenity in contravention of *Miller*'s community standard requirement.[24] Clearly, the Court noted, "the *Miller* standards . . . apply to federal legislation."[25] As a result, they continued, "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are ob-

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the first amendment's protection of speech does not extend to obscenity. *Id.* at 54. The Court also recognized that there are legitimate state interests in curbing the flow of commercialized obscenity. *Id.* at 57.

19. Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2835 (1989).

20. *Id.*

21. *Id.* The first prong of *Miller* requires a fact finder to apply "contemporary *community* standards" when determining whether a work is obscene. Miller v. California, 413 U.S. 15, 24 (1973).

22. *Sable*, 109 S. Ct. at 2835.

23. *Id.*

24. *Id.*

25. *Id.*

scene in some communities under local standards even though they are not obscene in others."[26]

The Court suggested that Sable, in order to comply with *Miller*'s community standard principle, could tailor its messages to the communities it chooses to serve.[27] However, the costs Sable undoubtedly will incur in developing a system to screen incoming calls, the Court noted, do not affect the constitutionality of a law necessitating such costs.[28] Ultimately, the Court claimed, where a communicator, like Sable, directs its message to various communities with differing local standards, the communicator "ultimately bears the burden of complying with the prohibition on obscene messages."[29]

C. *Indecent Speech*

The Court next addressed the more problematic issue concerning the constitutionality of the blanket prohibition on *indecent* speech embodied in section 223(b). The District Court, in enjoining the enforcement of section 223(b) against indecent speech, had concluded that although the government does have a legitimate interest in shielding children from indecent dial-a-porn messages, section 223(b) was not a narrowly drawn mechanism to advance that interest and thus violated the first amendment.[30] The Supreme Court affirmed the injunction.

Because indecent speech receives first amendment protection, the government can regulate the content of indecent speech only to further a compelling governmental interest.[31] Moreover, the regulation implemented must be the least restrictive means available to advance this compelling governmental interest.[32] Citing *Ginsberg v. New York*[33] and *New York v. Ferber*,[34] the Supreme Court in

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26. *Id.* at 2836.

27. *Id.*

28. *Id.* The Court suggested that Sable has various options in attempting to provide messages which are compatible with community standards, including the hiring of operators to determine the origin of the calls or even arranging with the telephone company to screen or block calls from outside a certain community. *Id.*

29. *Id.* The constitutionality of *Miller's* definition of obscenity was not challenged by Sable, but some commentators believe that the community standards test is too indefinite and amorphous to endure as a constitutional principle. *See, e.g.*, Wright, *Defining Obscenity: The Criterion of Value*, 22 NEW ENG. L. REV. 315, 335-338 (1987-88).

30. *Sable*, 109 S. Ct. at 2836.

31. *Id.*

32. *Id.*

33. 390 U.S. 629 (1968).

34. 458 U.S. 747 (1982).

Sable accepted the government's contention that there is a compelling interest in protecting minors from indecent literature.[35] The Court, however, did not accept the government's assertion that the complete ban on indecent speech in section 223(b) constituted the least restrictive means available to advance this compelling interest and held that the blanket prohibition on indecent speech was unconstitutional.[36]

The government argued that a total ban on indecent telephone service was necessary because any lesser restriction would not effectively prevent minors from accessing Sable's services.[37] The Court, however, was not persuaded, primarily because the FCC itself previously had determined that more sophisticated methods such as scrambling systems, access codes, and credit card payments were effective alternatives to a complete ban.[38] The Court conceded that, in general, deference should be given to a legislative finding that no acceptable alternative existed;[39] however, in the instant case, the Court stated, the requirement of "deference . . . [to] legislative findings [does] not foreclose our independent judgment of the facts bearing on an issue of constitutional law . . . [and] the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means."[40] The usual deference cast aside, the Court concluded that the "FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective . . . [and, as a result,] § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from

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35. *Sable*, 109 S. Ct. at 2836. According to at least one commentator the government also could have claimed a legitimate interest in protecting women from sexual degradation. *See* Dworkin, *Pornography as a Civil Rights Issue for Women*, 58 U. MICH. J.L. REF. 55 (1987-88).

36. *Sable*, 109 S. Ct. at 2837. *Cf.* Butler v. Michigan, 352 U.S. 380 (1957) (reasoning that the adult population cannot be restricted to reading only what is permissible for children).

37. *Sable*, 109 S. Ct. at 2837.

38. *Id.*

39. *Id.* at 2838. Congress, in amending section 223(b) in 1988, had expressed its view that, short of a complete ban on indecent messages, there was no sufficient method of preventing access to dial-a-porn to minors. *Id.* at 2837.

40. *Id.* at 2838. The government also relied on FCC v. Pacifica Foundation, 438 U.S. 726 (1978), in which the Court held the FCC has some power to regulate indecent radio broadcasts. However, the *Sable* Court distinguished *Pacifica* because of the unique attributes of radio: specifically, the unique accessibility of radio messages to children and the ability of a radio broadcast to intrude into the home without warning. *Sable*, 109 S. Ct. at 2837. For an in-depth analysis of *FCC* v. *Pacifica*, see Comment, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871 (1989).

being exposed to indecent telephone messages."[41]

III. UNANSWERED QUESTIONS

The Supreme Court's narrow holding in *Sable*, that the federal government may prohibit *obscene* interstate commercial telephone messages,[42] but that the first amendment proscribes the government from imposing a blanket prohibition on *indecent* messages,[43] left three issues unresolved. First, the Court has not defined obscenity in the context of pre-recorded telephone messages. Similarly, it has failed to expound on the meaning of indecent in that context. Finally, the Court has not announced how much deference courts must give to legislative findings when deciding obscenity issues.[44]

A. *How to Define Obscene?*

The Supreme Court has found it difficult to define obscenity.[45] In *Paris Adult Theatre I v. Slaton*,[46] Justice Brennan argued in dissent that the imposition of criminal penalties for the distribution of obscene materials to consenting adults is unconstitutional because "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms."[47] In this light, Sable could have argued that although the blanket prohibition on obscene speech is not facially unconstitutional, the *Miller* test for obscenity is unconstitutionally vague when applied to pre-recorded phone messages.

Further, Justice Brennan, in dissenting from the *Sable* Court's treatment of section 223(b) when applied to obscene telephone messages, argued that the complete ban of obscene telephone messages is unconstitutionally overbroad and, hence, facially inva-

41. *Sable*, 109 S. Ct. at 2838-39.

42. *Id.* at 2835.

43. *Id.*

44. The Supreme Court expressly declined to address at least two of the questions when it stated: "The case before us today does not require us to decide what is obscene or indecent." *Id.*

45. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (claiming that the effort to define obscenity constitutes an exercise in "trying to define what may be indefinable.").

46. 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

47. *Id.* at 103.

lid.[48] This absolutist approach, originally articulated by Justice Brennan in his *Paris Adult Theatre* dissent, is not currently the majority view; however, the *Sable* Court should have seen that Brennan's approach is more helpful when applied to phone messages.[49] It simply is not possible uniformly to determine the point at which heavy breathing, sighing, or moaning reaches the level of obscenity.[50]

Although the Supreme Court has held that expression by words can be legally obscene,[51] future litigants should continue attempting to convince the Court that it should not classify pre-recorded phone messages as obscene because it is impossible to apply the *Miller* tripartite test in the dial-a-porn context. However, until the Supreme Court reformulates its definition of obscenity or, alternatively, recognizes the practical worth of Justice Brennan's approach and removes obscenity from the realm of the unprotected, the lower courts will have to struggle with the problem on their own.[52]

B. How to Define Indecent?

The Supreme Court has not found it any easier to delineate a test for determining when a phone message is indecent. However, it is equally imperative that the Court formulate a workable test for indecency for two reasons. First, an indecency standard is necessary to allow lower courts to distinguish indecent speech from speech which is obscene. As the result in *Sable* poignantly indicates, the difference is critical. Second, an indecency standard also will enable the lower courts to distinguish indecent speech from neutral speech. Again, the difference is critical because neutral speech deserves full first amendment protection, while indecent speech does not. Justice Brennan's contention that the imposition

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48. *Sable*, 109 S. Ct. at 2840 (Brennan, J., dissenting).

49. One skeptical commentator has stated that "the acceptable, and therefore the nonacceptable, is a constantly changing norm in our society. What may be permissible under one authority may change with the next election." Note, People v. Freeman—*No End Runs on the Obscenity Field or You Can't Catch Me from Behind*, 9 LOY. L.A. ENT. L.J. 69, 94 (1989).

50. In the dial-a-porn context, the Supreme Court may have to create an "I know it when I hear it" test to define obscenity.

51. *See, e.g.*, Kaplan v. California, 413 U.S. 147 (1973) (holding that obscene material in book form is not entitled to first amendment protection merely because of the absence of pictorial content).

52. *See* Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255 (1987-88)(arguing the Court should impose a per se rule with respect to obscenity because of the difficulty of defining obscenity adequately in all contexts).

of punishment for the transmission of obscene commercial communications runs afoul of the Constitution because of the Court's inability to sufficiently define obscenity is equally applicable to indecent communications.[53] Until the Court articulates a workable test for identifying indecent speech or, alternatively, decides that no workable test is possible and instead extends to indecent speech the full protection of the first amendment, the lower courts will have to struggle with the concept of indecency on their own.[54]

In *Pope v. Illinois*,[55] Justice Scalia suggested that the Supreme Court re-examine the *Miller* test.[56] Instead of labelling all speech as obscene, indecent, or neutral, Scalia essentially advocates that the Court place speech along a continuum. Under this sliding scale approach, "[t]he more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors."[57]

Although Scalia's approach eliminates the necessity of defining obscenity and indecency, it still provides no guidance as to where to place various types of speech along the continuum, nor does it reveal where on this continuum first amendment protection attaches. For these reasons, Scalia's methodology provides no more guidance than the Supreme Court's current approach.

C. *How Much Deference to the Legislature?*

1. How Effective Must the Regulations Be?

In *Sable*, the government argued that it had a legitimate interest in preventing all minors from accessing dial-a-porn services and that a blanket prohibition was the least restrictive means available to promote this interest.[58] The Court conceded that "[i]t may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system."[59] But the majority did not require an absolute foolproof plan; instead, the Court

53. Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829, 2840 (1989).

54. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting) (claiming that the "Court has not been able to enunciate [a national standard], and it would be unreasonable to expect local courts to divine one").

55. 107 S. Ct. 1918 (1987) (Scalia, J., concurring).

56. *Id.* at 1923.

57. *Sable*, 109 S. Ct. at 2839.

58. *Id.* at 2837.

59. *Id.* at 2838.

stated that the FCC's technological approach "would be extremely effective and only a few of the most enterprising and disobedient young people will manage to secure access to such messages."[60] With this reasoning, the majority avoided determining how many disobedient minors would be too many. As Justice Scalia summarized in his concurrence, "We could as well have said: the FCC's technological approach . . . [is] *inadequate*, since *some* enterprising and disobedient young people will manage to secure access to such messages."[61] In essence, the Court has left another issue dangling. Perpetuating the inability of the lower courts and the FCC to establish some determinative principles with respect to dial-a-porn, the Supreme Court has failed to articulate exactly how effective a regulation must be to pass constitutional scrutiny.

2. Which Alternative is the Least Restrictive?

Additionally, the *Sable* Court did not say which mechanism, or what combination of the numerous available mechanisms, will constitute the least restrictive means of shielding minors from dial-a-porn. As noted above, if the government opts to regulate the content of indecent speech, it must do so by implementing the least restrictive means available.[62] The FCC, in an attempt to find the least restrictive alternative to prevent minors from accessing dial-a-porn messages, has implemented a number of various alternatives, individually and in combination. Specifically, the FCC has advocated the use of time channeling, screening, user identification, access codes, and credit card payments.[63] However, the federal courts, surely with no help from the Supreme Court, have not told us what combination is the least restrictive mechanism. The Second Circuit has held that a regulation requiring the offeror of sexually-oriented pre-recorded telephone messages to adopt a system of payment by credit card, user identification, or access code was constitutional.[64] However, many alternatives exist. Until the Supreme Court decides which alternative or combination of alternatives is the least restrictive, the lower courts will have to assess each case on its own facts.[65]

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60. *Id.*

61. *Id.* at 2839 (emphasis added).

62. *See supra* text accompanying note 32.

63. *Sable*, 109 S. Ct. at 2833-34.

64. Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir. 1988).

65. For an excellent discussion of the possible alternatives, see Comment, *Telephones, Sex, and the First Amendment*, 33 UCLA L. REV. 1221 (1986) (suggesting that blocking is the least restrictive alternative).

IV. CONCLUSION

The Supreme Court's holding in *Sable* that the government may not impose an absolute ban on indecent speech but that it could restrict such speech if the regulation was narrowly drawn to achieve the legitimate interest of protecting children from exposure to indecent dial-a-porn messages, has failed to resolve numerous issues. The Supreme Court must resolve these issues to ensure proper first amendment protection as it relates to obscene and indecent language.

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