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## "Indecent" Language: A New Class of Prohibitible Speech? *F.C.C. v. Pacifica Foundation*

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## “INDECENT” LANGUAGE: A NEW CLASS OF PROHIBITABLE SPEECH? FCC V. PACIFICA FOUNDATION

Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government . . . . But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern . . . . It may even be an instrument of oppression.<sup>1</sup>

### I. INTRODUCTION

Courts in this country have long recognized that the first amendment guarantee of freedom of speech, while written in absolute terms,<sup>2</sup> is not an unyielding bar to all government regulation.<sup>3</sup> The basic question left unresolved, however, is under what circumstances the government may intervene on behalf of itself or its citizens to place restrictions upon the great protected right of communication.<sup>4</sup> Mr. Justice Holmes, speaking for the Supreme Court in *Schenck v. United States*,<sup>5</sup> indicated that the question was whether the words used would create a “clear and present danger” of bringing about “substantive evils that Congress has a right to prevent.”<sup>6</sup> Inherent in this philosophy was a balancing model which the Court still utilizes today. Under this model, constitutionally protected expression may be regulated only upon a showing by the government that a compelling, countervailing interest so dictates.<sup>7</sup>

However, the Supreme Court has also recognized an area of communication for which there exists no constitutional protection.<sup>8</sup> This approach, which one commentator has referred to as a “two-level theory of free

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1. National Broeasting Co., Inc. v. United States, 319 U.S. 190, 228 (1943)(Murphy, J., dissenting).

2. “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I.

3. “[T]he character of every act depends upon the circumstances in which it is done. [Citation omitted]. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre . . . .” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

4. See generally Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U.L. REV. 761 (1970).

5. 249 U.S. 47 (1919).

6. *Id.* at 52.

7. See, e.g., *Cohen v. California*, 403 U.S. 15, 21 (1971).

8. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words . . . . [S]uch utterances are no essential part of any exposition of ideas . . . .

*Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-2 (1942).

speech,"<sup>9</sup> is premised on the belief that certain classes of communication have no value and may thus be prohibited entirely.<sup>10</sup> Within this area fall "fighting words," which the Court in *Chaplinsky v. New Hampshire*<sup>11</sup> defined as, "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . ."<sup>12</sup> While purporting to apply an objective standard—that which would cause an "average addressee" to fight<sup>13</sup>—the Court upheld the appellant's conviction for referring to a city marshall as "a God damned racketeer" and "a damned Fascist."<sup>14</sup> While certain language in *Chaplinsky*, if not the decision itself, would tend to support the proposition that words could be proscribed if harmful to the sensibilities of others, subsequent decisions by the Court made it clear that this was not so.<sup>15</sup> Rather, it was held that offensive speech was proscribable only when it threatened the single, tightly drawn interest in preventing a violent response by an average addressee.<sup>16</sup>

In *FCC v. Pacifica Foundation*,<sup>17</sup> the Supreme Court found itself once again grappling with the problems of offensive words. This time, however, the words were spoken over the airwaves rather than on the city streets, and it was this factor that the Court found particularly significant. Citing the "uniquely pervasive presence" of the broadcast medium,<sup>18</sup> a majority of the Court<sup>19</sup> voiced its concern that offensive material could be indiscriminately carried by radio waves—thus assaulting children and unwilling adults, and invading the privacy of the home.<sup>20</sup> In light of these important interests, the Court upheld a Federal Communications Commission (FCC) order<sup>21</sup> which determined that certain "indecent" words are proscribable in the broadcast medium, even though they would be constitutionally

9. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10.

10. "[The] common ground of prohibited speech would include the direct advocacy of serious criminal action, contempt of court, libel, invasions of privacy, and above all obscenity." Kalven, *Broadcasting, Public Policy, and the First Amendment*, 10 J.L. & ECON. 15, 33 (1967).

11. 315 U.S. 568 (1942).

12. *Id.* at 572.

13. *Id.* at 573.

14. *Id.* at 574.

15. See *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (*per curiam*); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 902 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971).

16. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. C.R.-C.L.L. REV. 1, 27 (1974).

17. 98 S. Ct. 3026 (1978).

18. *Id.* at 3040.

19. Justices Brennan, Stewart, White and Marshall dissented.

20. 98 S. Ct. at 3040.

21. *Pacifica Foundation*, 56 F.C.C.2d 94 (1975).

protected elsewhere.<sup>22</sup> The decision is startling, not merely because the Court appears to have adopted yet another class of prohibitable speech, but because it portends the ominous consequences of a government dictating what words we shall, or shall not, hear.

## II. FACTS

In the early afternoon of October 30, 1973, radio station WBAI-FM, New York, New York, a Pacifica Foundation affiliate, broadcast a twelve-minute segment from the album, "George Carlin, Occupation: Foole."<sup>23</sup> The monologue was titled "Filthy Words," and consisted of a comedy routine almost entirely devoted to the repetition of seven "words you couldn't say on the public . . . air waves . . . ."<sup>24</sup>

In response to a listener's complaint,<sup>25</sup> the FCC handed down a declaratory order<sup>26</sup> which held that the seven words contained in the Carlin monologue were prohibited by 18 U.S.C. § 1464 (1970)<sup>27</sup> which proscribes the use of "obscene, indecent, or profane language" in radio broadcasts. Conceding that the Carlin monologue was not obscene,<sup>28</sup> the FCC nevertheless deter-

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22. "Some uses of even the most offensive words are unquestionably protected. [citation omitted] Indeed, we may assume, *arguendo*, that [these words] would be protected in other contexts . . . . It is a characteristic of speech such as this that both its capacity to offend and its 'social value' . . . vary with the circumstances." 98 S. Ct. at 3039 (footnote omitted).

23. The segment was broadcast as a portion of a regularly scheduled live program, "Lunchpail," which was hosted by an employee of WBAI. The October 30, 1973 broadcast consisted of an "analysis of contemporary society's attitudes toward language." 56 F.C.C.2d at 95.

24. The words were "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker," and "tits." A transcript of the monologue may be found in the appendix of the Supreme Court's decision. 98 S. Ct. at 3041-3.

25. On December 3, 1973, the FCC received a complaint from a man in New York City who stated that he had heard the broadcast while driving in his car with his young son. In accordance with its policies, the FCC forwarded the complaint to radio station WBAI-FM with a request for its comments. In its response, Pacifica likened George Carlin to such significant social satirists as Mark Twain and Mort Sahl, and stated that Carlin was "merely using words to satirize [how] harmless and essentially silly our attitudes towards those words [are]." 56 F.C.C.2d at 96. However, Pacifica indicated that, having recognized the sensitive nature of the Carlin monologue, the WBAI commentator had advised listeners who might be offended, to change the station and return to WBAI in 15 minutes. *Id.*

26. Pacifica Foundation, 56 F.C.C.2d 94 (1975).

27. 18 U.S.C. § 1464 (1970) provides: "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years or both."

28. In *Roth v. United States*, 354 U.S. 476, 489 (1957), the Court indicated that obscenity was to be found according to "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Similarly, in the Court's latest effort to define "obscenity," one of the basic guidelines set forth was, "whether 'the average person, applying contemporary community stan-

mined that it was "indecent."<sup>29</sup> Recognizing that indecent speech, unlike obscenity, is not wholly proscribable, the Commission spoke in terms of channeling such speech into the late evening hours when fewer children would be in the listening audience.<sup>30</sup> Cognizant that the term "indecent" had never been authoritatively construed by the courts in connection with section 1464, the FCC imposed no sanctions on Pacifica Foundation. It did, however, place the order in Pacifica's license file to be considered upon the receipt of any subsequent complaints.<sup>31</sup>

Pacifica Foundation appealed the FCC's ruling to the United States Court of Appeals in Washington, D.C. The federal court reversed the FCC ruling in a 2-1 decision<sup>32</sup> in which each of the three judges wrote an opinion.<sup>33</sup> On certiorari, the United States Supreme Court reversed the federal

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dards' would find that the work, taken as a whole, appeals to the prurient interest . . . ." *Miller v. California*, 413 U.S. 15, 24 (1973). Consequently, the Commission has recognized that words lacking such an erotic appeal are not "obscene" within the meaning of section 1464. For a history of the Supreme Court's efforts to define "obscenity," see generally, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-114 (Brennan, J., dissenting); F. SCHAUER, *THE LAW OF OBSCENITY* (1976).

29. The FCC has taken the position that the terms "indecent" and "obscene" refer to two different things. See, e.g., *Eastern Educ. Radio*, 24 F.C.C.2d 408 (1970); *Jack Straw Memorial Foundation*, 21 F.C.C.2d 833, *aff'd on rehearing*, 24 F.C.C.2d 266 (1970). As reformulated by the Commission, 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." 56 F.C.C.2d at 98.

30. "[D]uring the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political or scientific value." 56 F.C.C.2d at 100. The FCC recognized that the regulatory scheme it was espousing would be impermissible in other media. Four considerations were listed which, it was felt, necessitated giving the broadcast medium special treatment: (1) children, often without parental supervision, have access to radios; (2) radio receivers are located in the home, where privacy interests are given greater deference; (3) an audience may consist of unwilling adult listeners; and (4) a scarcity of spectrum space, the use of which must be licensed by the government in the public interest. *Id.* at 97.

31. *Id.* at 99. In addition to 18 U.S.C. § 1464, the FCC justified its declaratory order on the basis of 47 U.S.C. § 303(g) which provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest." *Id.*

32. *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. Cir. 1977).

33. In the view of Judge Tamm, the FCC's ruling was overbroad and constituted censorship in violation of 47 U.S.C. § 326 (1970) which provides: "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station . . ." In a concurring opinion, Chief Judge Bazelon, while agreeing that the FCC had censored, did not agree that section 326 was dispositive. That section, he believed, could not protect speech which was otherwise unprotected by the Constitution. In examining the first amendment implications of the Commission's actions, Chief Judge Bazelon concluded that the Commission had both disre-

circuit court decision. Adopting the position taken by dissenting Circuit Judge Leventhal, the Court purported to limit its judicial review to the Commission's determination that the monologue, as broadcast, was "indecent" within the meaning of section 1464.<sup>34</sup> So limited, the Court determined that the Commission's actions were congressionally mandated, and did not constitute impermissible censorship.<sup>35</sup> Additionally, the Court adopted the FCC's position that the terms "obscene" and "indecent" have separate meanings within the context of section 1464, and that the Carlin monologue could be proscribed even though it was not obscene.<sup>36</sup>

Because of the tremendous, potential impact that the *Pacifica* decision has on the broadcast medium, it is important to examine the holding carefully. Does it comport with previous Supreme Court doctrine, or is it, in fact, an aberration?

### III. ANALYSIS

Although the Supreme Court purported to limit its judicial review to the Commission's determination that the monologue, as broadcast, was indecent, it is clear that the scope of the FCC's order is much broader. The Commission itself characterized its declaratory order as a "clarification of] the standards which *will be utilized* in considering the public's complaints about the broadcast of 'indecent' language."<sup>37</sup> Thus, "[i]nstead of merely considering the words 'as broadcast' " by WBAI-FM, "the Commission adopted a legislative-type rule which it then applied to the facts of the case."<sup>38</sup> To hold, as did the Court, that the FCC did not engage in the "promulgation of any regulations,"<sup>39</sup> is to ignore the "nature of the beast." The FCC, as the agency charged with overseeing the broadcast industry, has been given wide regulatory power which it has readily exercised. While an in-depth analysis of FCC control of programming is beyond the scope of this comment, the seeming incongruity of government regulation in an

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garded and misread Supreme Court precedent in the area. In dissent, Judge Leventhal was supportive of the FCC ruling which he viewed as narrowly holding "only 'that the language as broadcast was indecent and prohibited by 18 U.S.C. § 1464.'" 556 F.2d at 31 (Leventhal, J., dissenting).

34. 98 S. Ct. at 3033.

35. *Id.* at 3035.

36. *Id.* at 3036.

37. 56 F.C.C.2d at 94 (emphasis added). Additionally, in its *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418, 425 (1975), the Commission expressed its hope that the "effects on the declaratory order . . . will clarify the broadcast standards for obscene and indecent speech . . . and will prove effective in abating the problems . . . ."

38. 556 F.2d at 19 n.2 (Bazelon, C.J., concurring).

39. 98 S. Ct. at 3032.

area of first amendment concerns has been noted,<sup>40</sup> and will be considered briefly here.

The FCC believes that, due to the special nature of the broadcast medium, it must be regulated for the whole public.<sup>41</sup> Consequently, it administers sanctions for programming which does not fall within its conception of the "public interest."<sup>42</sup> The Commission argues that this does not constitute censorship because it does not impose prior restraints,<sup>43</sup> but the prac-

40. See generally Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15 (1967); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

41. Prior to 1927, the allocation of radio frequencies was left entirely to the private sector. The result was a chaotic "cacaphony [sic] of competing voices, none of which could be . . . heard." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 376 (1969). It became apparent that radio frequencies were a scarce resource which required government regulation. Consequently, in 1927, Congress passed the Radio Act which created the Federal Radio Commission and endowed it with wide licensing and regulatory powers. The Commission's powers were not limited to technical aspects of regulation, however, but also included the task of choosing from among the many applicants who applied for radio licenses. Licenses were to be allocated in a manner responsible to the public "convenience, interest, or necessity." *Id.* at 377. Today the FCC, which evolved from the Federal Radio Commission, has been given a similar congressional mandate under 47 U.S.C. § 303 (1970) which provides: "[T]he Commission from time to time, as public convenience, interest or necessity requires, shall . . . (g) Study new uses for radio . . . and generally encourage the larger and more effective use of radio in the public interest."

42. See, e.g., *Sonderling Broadcasting Corp.*, 41 F.C.C.2d 919, *on reconsideration*, 41 F.C.C.2d 777 (1973), *aff'd on other grounds sub nom.*, Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1974)(forfeiture assessed for broadcast of obscenity); *Eastern Educ. Radio*, 24 F.C.C.2d 408 (1970)(forfeiture assessed for broadcast of indecent language); *Jack Straw Memorial Foundation*, 21 F.C.C.2d 833, *aff'd on rehearing*, 24 F.C.C.2d 266 (1970)(short-term renewal of license required due to lack of licensee control over profane or indecent language in broadcast); *Pacifica Foundation*, 36 F.C.C. 147 (1964)(scrutiny by FCC of five specific broadcasts); *Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962), *aff'd sub nom.*, *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964)(licensee's application for renewal of license denied due to (1) misrepresentations and false statements made to FCC, and (2) broadcast of material which was "coarse, vulgar, suggestive, and susceptible of indecent, double meaning." The federal court affirmed on the first ground only.); *Mile High Stations, Inc.*, 28 F.C.C. 795 (1960) (cease and desist order issued for broadcast of offensive remarks and sound effects); *WREC Broadcasting Service*, 19 F.C.C. 1082 (1954)(applicant was granted a license to establish a television station, in part, because competing applicant's radio station had played six songs which were "vulgar and subject to double meaning").

43. The Commission has adopted Zechariah Chafee's narrow position that, "[prohibited censorship] means . . . the sort of censorship which went on in the seventeenth century in England—the deletion of specific items and dictation as to what should go into particular

tice is, nevertheless, a powerful censorial influence. Under the "public interest theory," the Commission is able to penalize a wide variety of speech which would be fully protected in other media.<sup>44</sup> Indeed, as one commentator has observed, the Commission merely treats the first amendment as an "interesting parallel development in other media."<sup>45</sup> First amendment rights of broadcasters are seen as only one factor to be considered in arriving at a public interest determination. And, in fact, those rights may be ignored if they interfere with the Commission's attempts to improve broadcasting for the whole public.<sup>46</sup>

While much of the FCC's attempts to control programming can only, realistically, be viewed as censorship, it does not necessarily follow that the Commission's *Pacifica* order is censorial. Because the FCC has been given authority to enforce the section 1464 ban against broadcasting "obscene, indecent, or profane language,"<sup>47</sup> the clear implication is that speech receiving no protection under the first amendment will receive no greater protection under the statutory prohibition of FCC regulations. It thus remains to be seen whether the Carlin monologue would be protected in other media and, if so, whether it may nevertheless be regulated, when broadcast, due to the "unique character" of the medium.<sup>48</sup>

There are a few decisions which have established the power of government to prohibit certain forms of expression simply upon a showing that such a form was employed. Within this area fall "fighting words" and obscenity. With its decision in *Pacifica*, the Court has seemingly added "indecent" language as yet another category of speech that may be prohibited.<sup>49</sup> Interestingly, the Court cited no judicial precedent for its position.<sup>50</sup>

programs." Z. CHAFEE, 2 GOVERNMENT AND MASS COMMUNICATIONS 641 (1947) quoted in *FCC v. Pacifica Foundation*, 98 S. Ct. 3026, 3033 n.9.

44. "[W]e all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication." Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 16 (1967).

45. Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343, 1346 (1970).

46. *Id.* at 1347.

47. Both 47 U.S.C. §§ 312 and 503(b)(1)(E)(1970) explicitly provide sanctions for the violation of 18 U.S.C. § 1464(1970).

48. 556 F.2d at 20 (Bazelon, C.J., concurring).

49. While it is true that the Commission spoke of "channeling" indecent words into the late evening hours rather than of prohibiting them entirely, it was said that this could be done "provided the programs in which they are used have serious literary, artistic, political or scientific value." 56 F.C.C.2d at 100. Consequently, the Carlin monologue, which would likely be characterized as entertainment, could be totally banned under the FCC order.

50. Although in a footnote, 98 S. Ct. at 3036 n.16, the Court cited several administrative rulings by the FCC, only one—WUHY-FM, 24 F.C.C.2d 408 (1970)—supported the position that "indecent" and "obscene" have different meanings. That decision was not appealed to a judicial tribunal.



Rather, it seemed to rely primarily on a reading of the plain language of section 1464 and noted that, "the words 'obscene, indecent, or profane' are written in the disjunctive, implying that each has a separate meaning."<sup>51</sup> This conclusion, however, ignores precedent. Section 1464 may be found in the United States Code in Title 18, along with four other sections in Chapter 71 entitled "Obscenity." Each of these sections employ the term "indecent" along with other adjectives, including "obscene," and yet each of these other sections has been authoritatively construed by the courts to prohibit only that which is "obscene."<sup>52</sup>

While the Supreme Court cited no cases in support of its interpretation of section 1464, the Commission did refer to three federal appellate court decisions which appeared open to adoption of the Government's position that the terms "indecent" and "obscene" were not synonymous.<sup>53</sup> However, in 1977, the Seventh Circuit held that "'obscene' and 'indecent' in § 1464 are to be read as parts of a single proscription, applicable only if the challenged language appeals to the prurient interest."<sup>54</sup> Thus, prior to the *Pacifica* decision, no court had adopted the FCC's position that it could proscribe "indecent" language.

To support its theory that non-obscene language could be regulated as a nuisance, the Commission cited *Williams v. District of Columbia*.<sup>55</sup> Williams, the manager of a laundromat, had refused to move on from the sidewalk in front of his establishment when requested to do so by the police. After daring the officers to lock his "God damn ass up," and calling one of them a "son of a bitch," Williams was arrested for the use in public streets of "profane language, indecent and obscene words."<sup>56</sup> The federal court held that the ordinance would be valid only if interpreted to apply to those narrow circumstances in which the language threatened a breach of the peace. The court indicated that a breach might be threatened "either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards,' so grossly offensive to members of the public who actually overhear it as to

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51. 98 S. Ct. at 3035.

52. As the Seventh Circuit Court of Appeals noted, "We would ordinarily expect a word found in each of five sections comprising a chapter of the United States Code to mean the same thing wherever it appears in the chapter." *United States v. Simpson*, 561 F.2d 53, 56 (7th Cir. 1977).

53. *United States v. Smith*, 467 F.2d 1126 (7th Cir. 1972); *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972); *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966).

54. *United States v. Simpson*, 561 F.2d 53, 60 (1977).

55. 419 F.2d 638 (D.C. Cir. 1969) (*en banc*).

56. 22 D.C. CODE § 1107 (1967), *noted in*, *Williams v. District of Columbia*, 419 F.2d at 641.

amount to a nuisance."<sup>57</sup> This second prong of the *Williams* test appears to support the FCC's position. However, the current validity of *Williams* is highly questionable in light of more recent Supreme Court decisions involving offensive language.

In *Cohen v. California*,<sup>58</sup> the appellant had walked down a corridor of a Los Angeles courthouse with the words, "Fuck the Draft," inscribed upon his jacket. He was arrested and subsequently convicted under § 415 of the California Penal Code which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." The Court overturned Cohen's conviction and found the California statute unconstitutionally overbroad because it proscribed language which did not fall within the recognized categories of prohibitible speech.<sup>59</sup> In *Cohen*, the Court finally rejected the argument that public discourse could be regulated in the interest of protecting the sensibilities of listeners.<sup>60</sup> It noted that words have an emotive, as well as cognitive, function, and that the former may often be the more important in conveying a particular message. In order to constitutionally shut off discourse, the Court held that the government must show that "substantial privacy interests are being invaded in an essentially intolerable manner."<sup>61</sup> California had not made that showing in *Cohen* because persons confronted with Cohen's jacket could have simply averted their eyes.<sup>62</sup>

The year after the *Cohen* decision, the Court in *Gooding v. Wilson*,<sup>63</sup> struck down a portion of the Georgia Code which held that, "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." The statute was found to be unconstitutionally overbroad because it was not limited to the prohibition of "fighting words." An interest in protecting the sensibilities of others was quickly dismissed.<sup>64</sup> During the same term, three other cases were vacated and remanded in light of the *Cohen* and *Gooding* decisions.<sup>65</sup>

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57. *Id.* at 646.

58. 403 U.S. 15 (1971).

59. Cohen's expression, having no erotic appeal, was not obscene. And, as it was clearly not "directed to the person of the hearer" in a "personally provocative fashion" likely to provoke violent reaction, Cohen's expression could not be categorized as "fighting words." *Id.* at 20.

60. "[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below." *Id.* at 25.

61. *Id.* at 21.

62. *Id.*

63. 405 U.S. 518 (1972).

64. *Id.* at 527.

65. In *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), the appellant, while addressing a

Consequently, it would appear that the FCC's reliance upon the second prong of the *Williams* test is unsound. At least in public discourse, the sensibilities of listeners cannot justify the suppression of offensive words.

The FCC argued, however, that the unique characteristic of the broadcast medium justifies a greater degree of regulation. Radio waves, the argument goes, invade the privacy of the home. As noted previously, however, permissible intervention by the government to protect "substantial privacy rights" is made dependent upon a showing that they are being "invaded in an essentially intolerable manner."<sup>66</sup>

First it must be determined whether or not a "substantial privacy right" is really in issue. It is true that the Court has recognized that citizens have a particular right to privacy in the home,<sup>67</sup> and certainly radios are commonly found in the home. But radio programs do not enter the home uninvited as do the raucous noises emanating from sound trucks.<sup>68</sup> Rather, one must choose to admit radio programs into the home by the affirmative action of turning a dial. Because the airwaves are a public medium, one who chooses to turn on his radio is as effectively entering the public as does one who walks out into the street.<sup>69</sup> Consequently, it may be argued that the Commission's privacy-of-the-home argument for regulating offensive speech is ill-founded.

Assuming, however, that a "substantial privacy interest" is involved, does the broadcasting of offensive words constitute an "intolerable inva-

school board meeting which included women and children, used the term "motherfucker" four times. His conviction for the use of offensive language was vacated and remanded in light of *Cohen* and *Gooding*. In *Brown v. Oklahoma*, 408 U.S. 914 (1972), the appellant had been arrested and convicted following his use of the term "motherfucker" while giving the Black Panther viewpoint on a university campus. The conviction, similarly, was vacated and remanded in light of *Cohen* and *Gooding*. In *Lewis v. City of New Orleans*, 408 U.S. 913 (1972), the appellant's conviction for calling a policeman a "goddamn motherfucker" was vacated in light of *Gooding*. Significantly, while Justice Powell concurred in the Court's disposition of the case, the other three Nixon appointees—Justices Rehnquist and Blackmun and Chief Justice Burger—dissented. Burger cited *Williams* in support of his view that offensive speech could be prohibited to protect the sensibilities of others. On remand, the Louisiana Supreme Court upheld Lewis' conviction for the use of "obscene or opprobrious language." Thereupon, the U.S. Supreme Court granted certiorari and struck down the ordinance for overbreadth in light of *Gooding* and *Chaplinsky*. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

66. *Cohen v. California*, 403 U.S. at 21.

67. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971); *Stanley v. Georgia*, 394 U.S. 557 (1969).

68. The Court in *Kovacs v. Cooper*, 336 U.S. 77 (1949), upheld a Trenton, New Jersey ordinance which outlawed the use of sound trucks. *But see Saia v. New York*, 334 U.S. 558 (1948), in which the Court held that an ordinance forbidding sound amplification except by permission of the chief of police was an unconstitutional prior restraint.

69. Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 Va. L. Rev. 579, 618 (1975).

sion"? The Court in *Cohen* held that the appellant's form of expression did not constitute an "intolerable invasion" because unwilling viewers could simply avert their eyes.<sup>70</sup> Similarly, it may be said that an offensive program may be simply changed or turned off.<sup>71</sup> In *Rowan v. Post Office Department*,<sup>72</sup> the Court, in upholding a scheme which allowed offended householders to remove their names from mailing lists, said that "[t]o hold less . . . would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive . . . communication and thus bar its entering his home."<sup>73</sup> Although the majority of the Court in *Pacifica* did not believe that turning off the radio was an acceptable method for dealing with offensive broadcasts,<sup>74</sup> it would appear to be more consonant with first amendment ideals than total prohibition. Indeed, "in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege . . . fundamental societal values are truly implicated."<sup>75</sup>

As further justification for regulating "indecent" speech, the Commission cited the presence of children in the listening audience. That this concern for children is also shared by the Supreme Court was indicated in *Jacobellis v. Ohio*,<sup>76</sup> when Mr. Justice Brennan observed that: "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children."<sup>77</sup> But, as the Court had noted previously, the interest in shielding children from harmful material does not justify a total suppression of otherwise constitutionally protected expression.<sup>78</sup> Subse-

70. 403 U.S. at 21.

71. In *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), the Court reversed a lower court decision which had held that radio broadcasts on a public transit system violated constitutional guarantees. In dissent, Mr. Justice Douglas argued that, "[o]ne who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes . . . . But the man on the streetcar has no choice but to sit and listen . . . ." 343 U.S. at 469 (Douglas, J., dissenting). In *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court upheld the validity of a statute which banned cigarette and tobacco ads from billboards and streetcar signs because of their intrusiveness. The Court noted that, "people . . . have the message of the billboard thrust upon them by all the arts and devices that skill can produce . . . . The radio can be turned off, but not so the billboard or street car placard." 285 U.S. at 110.

72. 397 U.S. 728 (1970).

73. *Id.* at 737.

74. "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." 98 S. Ct. at 3040.

75. *Cohen v. California*, 403 U.S. at 25.

76. 378 U.S. 184 (1964).

77. *Id.* at 195.

78. In *Butler v. Michigan*, 352 U.S. 380 (1957), Mr. Justice Frankfurter, speaking for the Court, noted that total suppression of material deemed harmful to children would have the

quently, in *Ginsberg v. New York*,<sup>79</sup> the Court upheld the validity of a statutory scheme which provided for the application of a modified obscenity test to situations in which minors were exposed to such material. It is important to note, however, that the statute in *Ginsberg* still required a finding of obscenity; that is, it still required an appeal to prurient interest, still required patent offensiveness, and still required a lack of redeeming social value.<sup>80</sup> Material lacking any one of those three factors would receive constitutional protection.

Although both the FCC and the Supreme Court cited *Ginsberg* in support of the FCC's declaratory order, it would appear that that decision should dictate the order's invalidation.<sup>81</sup> The FCC's definition of "indecent" lacks *Ginsberg's* requirement of prurient appeal.<sup>82</sup> Furthermore, the FCC would prohibit "indecent" speech at times of the day when children may be in the audience, even though the broadcast might have serious literary, artistic, political, or scientific value<sup>83</sup>—a violation of the *Ginsberg* principle. And, finally, the FCC order would not require the essential finding of patent offensiveness to children.<sup>84</sup>

The mere pretense of shielding children from harmful material will not validate an otherwise impermissible statutory scheme. The Court scrutinized just such a scheme in *Erznoznik v. City of Jacksonville*,<sup>85</sup> and found it lacking. At issue in *Erznoznik* was a local ordinance which made it a public nuisance, and a punishable offense, for drive-in movie theaters to exhibit films containing nudity if the screen was visible from a public street or place. The ordinance was unconstitutional, the Court held, because it effectively deterred the showing of "movies containing any nudity, however innocent or even educational."<sup>86</sup> The FCC order is similarly over-

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effect of "reduc[ing] the adult population . . . to reading only what is fit for children." 352 U.S. at 383.

79. 390 U.S. 629 (1968).

80. *Id.* at 633.

81. Note, *Pacifica Foundation v. FCC: First Amendment Limitations on FCC Regulation of Offensive Broadcasts*, 56 N.C.L. REV. 585, 594 (1978).

82. *Pacifica Foundation*, 56 F.C.C.2d at 98.

83. *Id.*

84. The FCC would judge patent offensiveness by contemporary community standards for the broadcast medium. That approach would not only appear to violate the *Ginsberg* holding, that material which is believed to be obscene to minors must first be determined to be patently offensive to minors, but would appear to be unconstitutionally overbroad as well. Appellant's dismissal from school in *Papish v. Board of Curators*, 410 U.S. 667 (1973)(per curiam), was held to be an impermissible violation of the first amendment, even though her use, in a student newspaper, of the word "motherfucker" and of a cartoon showing the Statues of Liberty and Justice being raped by policemen, could have been held to be "patently offensive by contemporary community standards for the newspaper medium."

85. 422 U.S. 205 (1975).

86. *Id.* at 211.

broad, in that it deters the broadcast of offensive words even in an innocent or educational context.<sup>87</sup> The problem is exacerbated, however, by the FCC's use of the term "indecent" which is inherently vague, even as defined by the Commission.<sup>88</sup>

The Court did uphold a regulatory scheme in *Young v. American Mini Theatres*,<sup>89</sup> but it lacked many of the infirmities present in *Erznoznik* and the FCC's order. At issue in *Young* was Detroit's Anti-Skid Row Ordinance which restricted certain "adult" establishments from locating within 1000 feet of each other. The ordinance was enacted to protect the present and future character of Detroit's neighborhoods, but challengers claimed that it constituted a violation of their freedom of speech. The Court upheld the ordinance, however, noting that the 1000-foot restriction did not create an impermissible restraint on protected communication.<sup>90</sup> As Mr. Justice Powell noted in a concurring opinion, "Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [adult movies] . . . . [There is no] significant overall curtailment of . . . the opportunity for a message to reach an audience."<sup>91</sup>

By contrast, the FCC's declaratory order would significantly restrain protected communication. The channeling of programs into the late evening hours because of offensive language, would not only deny access to adults who go to bed at an earlier hour, but would preclude their being broadcast on nearly one-half of the nation's AM stations which operate only during the daytime.<sup>92</sup> Furthermore, the Court's holding that the Carlin monologue might be protected "in other contexts,"<sup>93</sup> is premised on the assumption that willing listeners will have access to those other contexts.

87. As Mr. Justice Brennan noted,

[The FCC's order could] justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.

98 S. Ct. at 3051-52 (Brennan, J., dissenting)(footnote omitted).

88. If a list of all the words which either offend the majority—or which they think will offend too many of the public—were ever published as banned from the air, that would clearly be [prohibited] prior censorship . . . . But failure to publish the list may have even more chilling effect upon broadcast programming, because licensees may avoid the use of many, many more words out of fear that they may be on the Commission's secret list.

Jack Straw Memorial Foundation, 21 F.C.C.2d 833, 838 (1970)(Cox, Comm., dissenting).

89. 427 U.S. 50 (1976).

90. *Id.* at 62.

91. *Id.* 78-79 (Powell, J., concurring).

92. *Amicus curiae, Committee for Open Media, San Francisco Chapter, as noted in, Pacifica Foundation v. FCC*, 556 F.2d at 20 n.5 (Bazelon, C.J., concurring).

93. 98 S. Ct. at 3039.

For many, however, nightclub performances and phonograph albums may constitute an unaffordable luxury.<sup>94</sup>

The most disturbing aspect of the *Pacifica* decision is the majoritarianism upon which it appears to rest. While most aspects of our political system are based on majoritarianism, certain freedoms, such as freedoms of speech, press, and religion, were felt to be too important to be left to the "vagaries of majority vote."<sup>95</sup> Yet the Court is willing to,

[grant deference] to the sensibilities . . . of the prevalent groups in society who happen to find . . . certain kinds . . . of words deeply repulsive, while [showing] no comparable concern . . . for minorities who may have no "hang-ups" about *those* particular [words], but who may be just as deeply offended by different . . . stimuli which few would seriously propose to exclude from the public forum.<sup>96</sup>

The Court, for instance, would not likely support a ban of religious broadcasts because atheists find such broadcasts offensive. Nevertheless, it supports a ban of "language that describes . . . sexual or excretory activities and organs,"<sup>97</sup> because it is determined that such language is "patently offensive as measured by contemporary community standards for the broadcast medium."<sup>98</sup> Yet who is to determine those standards? And what if the seven "filthy words" are used in a context that does not describe sexual or excretory activities and organs?<sup>99</sup> It is a fundamental precept of constitutional law that a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, is void for vagueness.<sup>100</sup> Under that standard, 18 U.S.C. § 1464 (1970) as construed by the Court in *Pacifica* should not pass constitutional muster.

94. *Id.* at 3053 (Brennan, J., dissenting).

95. Note, "Offensive Speech" and the First Amendment, 53 B.U.L. Rev. 834, 857 (1973).

96. Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken to?*, 67 Nw. U.L. Rev. 153, 191 (1972). As Mr. Justice Brennan noted, "[w]ords generally considered obscene like 'bull-shit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." (Bins, *Toward an Ethnography of Contemporary African American Oral Poetry*, Language and Linguistics Working Papers No. 5, at 82 (Georgetown University Press 1972)), *quoted in*, 98 S. Ct. at 3054 (Brennan, J., dissenting).

97. *Pacifica Foundation*, 56 F.C.C.2d at 98.

98. *Id.*

99. As an example, Chief Judge Bazelon pointed out that the phrase, "I'm shit-faced," has nothing to do with an excretory activity or organ, but means, "I am drunk." 556 F.2d at 23 n.17 (Bazelon, C.J., concurring). Many other examples may be gleaned from the Carlin monologue itself.

100. *See, e.g., Smith v. California*, 361 U.S. 147, 151 (1959); *United States v. Harriss*, 347 U.S. 612, 617 (1954).

## IV. CONCLUSION

Since its inception, the Federal Communications Commission has been active in controlling the content of broadcast programming. Because much of this control has consisted of insuring against monopolistic holds by a particular individual or viewpoint, the FCC has been seen as a benevolent agency worthy of omnipotence. Enjoying good grace with the public and judiciary, the Commission has zealously attempted to regulate in the "public interest." While enforcement of the ban against broadcast obscenity has posed few problems due to the Supreme Court's twenty-year struggle to define that term, the FCC's attempts to prohibit "indecent" speech has proven intractable. Holding firmly to its belief that "indecent" has a meaning independent of "obscene," the Commission has attempted to legislate and enforce a regulation against a classification of speech which, in all other media, receives constitutional protection. Concededly, "indecent" language is offensive to the sensibilities of most people and may even, arguably, be harmful to children. Yet a much greater harm may be envisaged when we permit a government to prohibit the broadcast of mere words. As the Court observed in *Cohen v. California*,<sup>101</sup> "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views . . ." <sup>102</sup> This is the danger, represented by the Supreme Court's holding in *FCC v. Pacifica Foundation*, against which we must guard.

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101. 403 U.S. 15 (1971).

102. *Id.* at 26.



