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The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality From the Airwaves

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COMMENT

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I. INTRODUCTION

In the 1978 case of *FCC v. Pacifica Foundation*,¹ the United States Supreme Court first recognized the Federal Communications Commission's (FCC) authority to regulate the broadcast of indecent subject matter. The FCC narrowly interpreted this authority during the nine years that followed, limiting its indecency prohibition to seven "dirty" words.² The seven proscribed words, although worthy

1. 438 U.S. 726 (1978).

2. *Id.* In 1973, a New York radio station, a licensee of Pacifica Foundation, Inc., broadcast George Carlin's twelve-minute-long satiric routine called "Filthy Words." *Id.* at 729. In the routine, Carlin joked about the seven "dirty" words that cannot be broadcast. *Id.* The seven words are "fuck," "shit," "cunt," "piss," "motherfucker," "tit," and "cocksucker." *Id.* at 751. For a detailed discussion of *Pacifica*, see *supra* notes 98-137 and accompanying text.

of first amendment protection if printed or spoken in public, could not be aired in a repetitive manner when there was a reasonable risk that children were in the broadcast audience.³ Broadcasters, although indignant over their second-class status as first amendment players, were relieved at the FCC's narrow reading of its indecency authority.⁴

A radical change occurred in April 1987, however, when the FCC abruptly adopted a broad generic indecency standard.⁵ In July 1988, the United States Court of Appeals for the District of Columbia upheld this standard in *Action For Children's Television v. FCC*.⁶ A broadcast becomes indecent under this standard if it is "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."⁷ As defined by the FCC, indecency is a broad and vague category of activities. Its parameters lie somewhere between the images of a passionate embrace and a hardcore sexual encounter, and between dialogue with hints of sex and a profane account of sexual activities. Thus, indecency is a mysterious class of material that requires circularity in its definition:

3. *Id.* at 750. The Supreme Court did not precisely articulate the first amendment rights of broadcasters in *Pacifica*, but did state that the FCC properly can prohibit the broadcasting of the seven "dirty" words at a time of day when children are likely to be in the audience. *Id.* In a footnote, however, the Court stated that it was not considering whether playing the Carlin monologue at night would be permissible since broadcast audiences at that time contain so few children. *Id.* at 750 n.28; see also Note, *FCC v. Pacifica Foundation*, 57 U. DET. J. URB. L. 95 (1979).

4. See Hsiung, *Indecent Broadcast: An Assessment of Pacifica's Impact*, 9 COMM. & L. 41, 43 (1987) (*Pacifica* at first raised great fear in broadcasters, which were proved false by the FCC's subsequent action).

5. 62 Rad. Reg. 2d (P & F) 1218 (April 29, 1987). On April 16, 1987, the FCC cited three separate stations for broadcasting indecent material and later issued a Public Notice summarizing the Commission's actions and stating that a new standard would be applied to the regulation of indecency. *Id.* at 1218-19. The FCC stated that the generic standard came from its 1975 *Pacifica* decision [*Pacifica Foundation—WBAI*, 56 F.C.C.2d 94 (1975)]. *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad. Reg. 2d (P & F) 211, 214 (Dec. 29, 1987). The 1987 indecency standard language, in fact, was slightly expanded from the 1975 standard. See, e.g., *Pacifica Foundation*, 56 F.C.C.2d at 98 (The early standard was limited to descriptive language and not the more general category of "depictions" of "material."). For a more indepth discussion of the FCC's actions after *Pacifica* see *infra* section III.

6. 852 F.2d 1332 (D.C. Cir. 1988).

7. *Id.* at 1335. The FCC observed that, under the prior standard, material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue—and, consequently, of concern with respect to its exposure to children—would have been permissible to broadcast simply because it avoided certain words. That approach, in essence, ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency. This made neither legal nor policy sense.

In re Infinity Broadcasting Corp. of Pennsylvania, 64 Rad. Reg. 2d (P & F) 211, 214 (Dec. 29, 1987).

Something is indecent if it is patently offensive, and it is patently offensive if it is indecent. Ironically, the FCC's more intrusive regulatory approach comes during a period when the Commission is making significant strides in deregulating the broadcast industry and suggesting that broadcast content should get heightened first amendment protection.⁸ But it also comes at a time when explicit sexual accounts and depictions are the norm instead of the exception on radio and television.⁹ Broadcasters increasingly are finding that sex attracts larger audiences, despite FCC claims that it receives approximately 20,000 indecency complaints annually.¹⁰

In *Action*, the D.C. Circuit unflinchingly accepted the FCC's argument that limiting the Commission's authority to the regulation of a particular list of indecent words would have an anomalous effect on the prohibition of indecent broadcasts.¹¹ The FCC asserted that the word-list method of enforcement, while offering a bright-line rule for broadcasters, was underinclusiveness because of its failure to regulate double entendre and sexual innuendo.¹² This assertion resurrected the debate concerning the FCC's authority and role in regulating the moral content of broadcasts.¹³ Furthermore, the D.C.

8. Geller, *The FCC Under Mark Fowler: A Mixed Bag*, 10 HASTINGS COMM. & ENT. L.J. 521 (Winter 1988) (Fowler brought and carried through a philosophy of deregulation.); Fowler, *The Federal Communications Commission 1981-87: What the Chairman Said*, 10 HASTINGS COMM. & ENT. L.J. 409, 455 (Winter 1988) (Supervision of children's viewing habits should be left to parents so that government control can be relaxed.).

9. See, e.g., *Planned Parenthood tracks sex on TV*, BROADCASTING, Feb. 15, 1988, at 121 (The Planned Parenthood Federation of America released a study estimating there were 65,000 episodes of sexual behavior or references to it during the prime time programming on the three major broadcast television networks during the 1987-88 season.).

10. See e.g., *Where Are the Censors? A titillating fall raises questions about network standards*, TIME, Dec. 12, 1988, at 95 (During the recent wave of cost cutting, the ranks of network departments of standards and practices—the censors reviewing what is broadcast—has been reduced from a peak of seventy-five to eighty per network during the 1970s to thirty to forty presently.); *Indecency: Radio's sound, FCC's fury*, BROADCASTING, June 22, 1987, at 46-49 (The 20,000 complaints, according to FCC staff, involve mostly television and the sex it presents.). Two months after the FCC's 1987 crackdown on indecency, during one month it received 272 letters regarding obscenity, indecency and profanity involving AM and FM stations and a category headed AS (all services). *Id.* at 46. Television and cable complaints totalled 357 for the same month. *Id.*

11. *Action For Children's Television v. FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988).

12. *Id.*

13. Broadcasters sanctioned by the FCC argued that the broadened FCC standard was unconstitutionally vague and reached far beyond the class of material that the FCC could define as indecent. Petitioner's Brief at 19, *Action*. Furthermore, they asserted that the standard chills fully protected material, including material that has serious literary, artistic, political, and scientific merit, such as news and informational programming. *Id.* Because broadcasters risk loss of license for failure to comply with the standard, the chilling effect has great consequences. The broadcasters argued that the new standard gave the FCC virtually unlimited discretion to define proscribed program material, thus reopening the question of

Circuit failed to account for *Pacifica*, the precedent it ostensibly relied upon. *Pacifica* was not a clear-cut case, yielding a definitive answer on the broad category of indecency. This is evidenced by the lack of a majority in any section of the Court's opinion.¹⁴ The Supreme Court's concern that speech protected under the first amendment would be chilled apparently was not considered in enacting the FCC's new standard.

The FCC has analogized indecent speech to nuisances, which should be directed away from those who may be injured by them.¹⁵ In effect, indecent material is taboo only when foisted upon the wrong audience, namely children.¹⁶ Therefore, until recently, when Congress required a total indecency ban,¹⁷ the FCC sought to channel indecent material to those hours when children were not likely audience members.¹⁸ Obscene material, by comparison, has a prurient appeal to its

whether the FCC has become a censor in this area. *Id.* Broadcasters also contended the FCC offered no justification for the new standard, thereby making it arbitrary and capricious, as well as, unconstitutional. *Id.* at 32-36.

14. *Pacifica*, 438 U.S. 726. The *Pacifica* opinion had no majority, with a maximum of three justices agreeing on any section of the opinion. *Id.* Justice Powell, joined by Justice Blackmun, wrote a concurrence. *Id.* at 755. Dissents were filed by Justice Brennan, who was joined by Justice Marshall, and by Justice Stewart, who was joined by Justices Brennan, White, and Marshall. *Id.* at 762, 777.

15. The FCC has characterized the repetitious use of profanity as "patently offensive," although not obscene, and has found that such speech should be regulated by principles analogous to those found in nuisance law, in which the law speaks to channeling behavior rather than prohibiting it. *Pacifica* Foundation, 56 F.C.C.2d 94, 98 (1975). The Supreme Court's *Pacifica* opinion quoted Justice Sutherland's opinion in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), as support for the nuisance approach:

A 'nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.' . . . We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

Pacifica, 438 U.S. at 750.

16. *Pacifica*, 438 U.S. at 749. (The rationale for channeling indecent speech to the late evenings hours was to allow parents to properly control what their children could be exposed to.). The usual justification for the regulation of broadcasting is that a limited number of licenses are available and thus governmental intervention is justified. *See NBC v. United States*, 319 U.S. 190 (1943) (FCC regulation of certain broadcast content is proper because of the limited nature of the available broadcast frequencies.).

17. *See In re Enforcement of Prohibitions Against Broadcast Obscenity and Indecency*, 65 Rad. Reg. 2d (P & F) 1038 (Dec. 21, 1988) (Under pressure from Congress that budget money might be withheld, the FCC adopted a twenty-four-hour ban of indecency.); N.Y. Times, Dec. 24, 1988, at 46, col. 5 (FCC reinstates total ban on indecency.). *But cf. In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad. Reg. 2d (P & F) 211, in which the FCC stated that it did not have authority to completely ban indecent broadcasts from the airwaves. *Id.* at 215. The FCC stated that *Pacifica* did not give it authority to regulate programming that might be objectionable to some audience members, but the Court did give it authority to restrict the broadcast hours for such material. *Id.*

18. *Pacifica*, 438 U.S. at 749.

audience and always has been entirely banned from broadcasting.¹⁹

Placing the judicial seal of approval on a generic indecency standard is an unfortunate episode in first amendment law, regardless of whether indecency is banned completely or only during the daytime. First, it expands the FCC's authority to regulate protected speech²⁰ with a nonchalance that portends unbridled control in this area. Second, it fails to articulate a precise standard by which unprotected speech can be distinguished. As a result, a generic standard shows a troubling disregard for following careful first amendment protection. The FCC argues that, when balanced, the rights of parents to control their children's access to indecency outweighs the free speech rights of broadcasters. Yet, in the end, the FCC has the authority both to categorize indecent speech and then to balance the intangible interests that are inherent in deciding whether a broadcast deserves first amendment protection. There is little doubt that broadcasters, who are subject to license renewal, will limit their speech, even though it may be "decent," rather than risk the substantial economic losses that would attend the nonrenewal of a license.²¹

Section II of this Comment outlines the first amendment questions involved in regulating broadcast indecency and the FCC's approach to its authority in this area. Section III describes the factual setting leading to the change in the FCC's indecency regulation. Sec-

19. To be obscene, material must meet a three-pronged test: 1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; 2) the material must depict or describe, in a patently offensive manner, sexual conduct specifically defined by the applicable state law; and 3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 25 (1973). The *Miller* test applies to words as well as pictures and requires consideration of the work "as a whole." *Id.* at 25 n.7. For an interesting discussion of the obscenity issue, see Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (1986) (arguing for more specific rationales for restricting obscenity than the vague justifications that it causes crime). The court's obscenity view had moved from a standard by which obscenity was unprotected because the material was utterly worthless, see *Roth v. United States*, 352 U.S. 964 (1957), to an approach in which the obscene material not only must be utterly worthless but also must appeal to prurient interest as measured by community standards, see *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), and finally to the *Miller* standard. The most notable change in the *Miller* test is that it substitutes the *Roth* standard of utter worthlessness with "lacks serious literary, artistic, political, or scientific value." The problem with any obscenity test, however, is that it ultimately will suffer from aspects of overbreadth and vagueness. If the Court draws a test that is specific, such as one that proscribes "any depiction of sexual or excretory activities," its test will suffer from overbreadth because it does not account for scientific or artistic displays. If it tries to qualify this broad test with phrases such as "prurient interests" and "patent offensiveness," the law ultimately will be vague because the terms are meaningless in themselves.

20. See *infra* notes 48-57 and accompanying text.

21. See, e.g., *Lengthening line of sellers adds to TV's buyers market*, BROADCASTING, Nov. 28, 1988, at 51 (a local Cleveland television station was valued at \$180 million).

tion IV then analyzes the *Action* opinion and compares it with *Pacific*. Section V challenges the rationales for holding broadcasting to a different first amendment standard than is applied to the print media, and also examines the child audience. Section VI then argues that the chilling effect of a generic indecency standard, because of its overbreadth and vagueness, outweighs any of its purported advantages. Finally, Section VII concludes that a standard similar to that used for determining obscenity, which considers the entire broadcast, should be employed to reduce that chilling effect.

II. INDECENT SPEECH: A BACKGROUND

Censorship that is based purely on the form of language used by a speaker or writer is largely taboo in media other than broadcasting. In order to analyze the disparate treatment of broadcasting, therefore, one must consider the purpose of the first amendment, the history of content control in broadcasting, the standard of judicial review for broadcast cases, and the emergence of the FCC's regulation of indecency.

A. *The First Amendment Overview*

The core controversy over the FCC's authority in content regulation concerns defining free expression within the first amendment. The drafters of the United States Constitution were keenly aware of the potential repression of free speech by a centralized government.²² They had experienced Great Britain's control of the colonial press by licensing, which often led to imprisonment for publishing what the government considered seditious.²³ Despite this knowledge, the new states ratified the Constitution without mention of free speech. It was only after the First Congress met that the states adopted the Bill of Rights, which provided for protection of free speech in the first amendment.²⁴

22. See generally T. CARTER, M. FRANKLIN & J. WRIGHT, *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 111-30 (1986) (government control of the press by licensing was well known to the framers) [hereinafter T. CARTER, M. FRANKLIN & J. WRIGHT].

23. *Id.*

24. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I; cf. T. CARTER, M. FRANKLIN & J. WRIGHT, *supra* note 22. This was the third of 12 amendments submitted to the states for ratification. *Id.* When the first two failed, this became the first amendment to the Constitution. *Id.* Although early drafts of the amendment included the language that freedom of press or speech could not be infringed upon "by any state," the states struck a compromise, and the amendment provided only for a control on the Congress. *Id.* It is well-established today, however, that the prohibitions of the

Even though the first amendment has no clear definition of free speech,²⁵ many Supreme Court Justices have considered free expression to be intrinsic to American freedom.²⁶ The first amendment embodied America's most prized hopes that freedom would reign for speech, assembly, petition, religion, the press, and, later by implication, association.²⁷ An analysis of the first amendment should begin with the question of whether freedom of speech should be regarded as an end in itself—one that defines the type of society we wish to live in—or if freedom of speech should be a means to an end, such as a method of discovering "objective" truth or effecting proper government.²⁸ Generally, Supreme Court Justices and legal commentators have relied on three broad models of the first amendment in order to construct their conceptions of free speech protection. The first is the "marketplace of ideas" model, the second is the "self-government" model, and the third is the "self-fulfillment" model. In different ways, these models define protected areas of speech in a manner that promotes underlying values for why society or individuals need freedom of expression.²⁹

The Supreme Court primarily has utilized the "marketplace of ideas" model in determining speech protection.³⁰ The concept was

first amendment extend to all branches of the federal and state governments via the fourteenth amendment. *Id.*

25. Records of the Constitutional Convention give little insight into the values given to free speech, but it is known that the discussion of the Bill of Rights did not take place until the last few days of the convention. See T. CARTER, M. FRANKLIN & J. WRIGHT *supra* note 22.

26. See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Justice Cardozo, delivering the opinion of the Court, stated that freedom of thought and speech is the indispensable condition necessary to nearly every other form of freedom.); *Cohen v. California*, 403 U.S. 15, 23 (1970) (Justice Harlan, delivering the opinion of the Court, stated that the constitutional right of free expression places "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").

27. Although freedom of association is not specifically mentioned in the first amendment's text, it has been judicially recognized as deriving from the rights of speech and assembly. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (The freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause, which embraces freedom of speech.).

28. See DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161 (1972) (The implementation of a system of freedom of expression should begin with an inquiry into the purposes of the freedom as guaranteed by the first amendment.).

29. See Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983) (Courts should adopt a language that permits a first amendment analysis of concrete cases and produces decisions that are falsifiable in meaningful ways rather than relying on categorical approaches.).

30. See Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV.

first articulated by John Milton,³¹ and developed by John Stuart Mill³² and adopted by Justice Oliver Wendell Holmes in his oft-cited dissent in *Abrams v. United States*.³³ This model challenges government's authority to censor, with many of its proponents asserting that "objective" truth is best tested by the ability of a thought to receive acceptance in the competition of the market, and that society requires truth to properly function.³⁴ Those seeking equal first amendment status between print and broadcasting often enlist this model.³⁵ They argue that the marketplace must be as open as possible in order to allow optimal access for the greatest number of messages.³⁶ Critics of the marketplace model, however, bemoan its failure to meet its goal for two reasons: first, because truth is not and cannot be "objective,"³⁷ and second, because the market analogy fails due to monopoly control of the media. Thus, it is difficult to argue that speech can be an instrument of truth in the media because so few have access to its outlets.

The next first amendment model is that of "self-government," under which free speech is viewed as a necessary element for achieving proper government in a democracy. Speech, in this construct, is vital for effective democratic political participation,³⁸ for it permits

20 (1975) (The equality principle is apt to protect speech because it places an affirmative burden on those who would justify a restriction on expression to demonstrate that it is necessary to achieve a compelling state interest.).

31. J. MILTON, *Areopagitica*, in *AREOPAGITICA AND OTHER PROSE WORKS* 1, 38 (W. Haller ed. 1927) (offers seminal view that freedom of expression enhances the social good).

32. J.S. MILL, *On Liberty*, in *SELECTED WRITINGS OF JOHN STUART MILL* 135-36 (M. Cowling ed. 1968):

[T]he peculiar evil of silencing the expression of an opinion is that it is robbing the human race. . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Id. at 135.

33. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes stated:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Id.

34. *Id.*

35. See L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 11-12 (1987).

36. *Id.* at 12.

37. DuVal, *supra* note 28, at 162.

38. Lewis, *Keynote Address: The Right to Scrutinize Government: Toward a First*

the publication of violations that take place against the rights of others in society.³⁹ Without such freedom, the government simply could silence those whose rights it invaded and improperly stockpile power.⁴⁰ Some proponents of this theory, most notably Professor Alexander Meiklejohn, limit the application of this model to public discussion on issues of civic importance—speech on public issues or concerning self-government.⁴¹ Arguably, this model would not protect indecent speech because indecency concerns form rather than the content of speech. It equally could be argued, however, that public-issue-oriented speech that uses indecent language should be protected. Critics of the “self-government” model point to the difficulty in determining which issues are public issues. In fact, almost any information offered to the public could be termed as being of civic importance. Furthermore, in Meiklejohn’s view broadcast was no more than a medium for entertainment, which categorically had no claim to the principles of free speech, regardless of what subject was discussed.⁴²

The remaining model, the paradigm of “self-fulfillment,” holds free expression to be an end in itself.⁴³ Unlike the two utilitarian models described above, the self-fulfillment model holds speech as a constitutive part of personal autonomy and a basis for self-fulfillment.⁴⁴ Rather than focusing on the intellectual and rational basis relied on by the previous models, this model accommodates the emotive role of free expression. Indecent speech therefore would be protected by this model because certain people may need to use such language for personal fulfillment. This model is criticized, however, as being too constricted in its vision because it ignores the necessity of a societal approach to free expression.⁴⁵ Ultimately, in an indecency argument, there is a clash of self-expression liberties. One person’s

Amendment Theory of Accountability, 34 U. MIAMI L. REV. 793 (1980) (In order to achieve success in a self-governing democracy, there must be accountability through an informed public.).

39. A. MEIKLEJOHN, *POLITICAL EXPRESSION* 27 (2d ed. 1960); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

40. A. MEIKLEJOHN, *supra* note 39, at 27.

41. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), revised as *POLITICAL FREEDOM* 78-79 (1960).

42. *Id.*

43. See, e.g., Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-14 (1972) (A rational government is one in which citizens can recognize its authority while still regarding themselves as equal, autonomous, and rational agents.).

44. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970); see also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963) (Every man, in the development of his personality, has the right to form his own beliefs and opinions and to express them.).

45. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 313 (1982) (There are no single values served by protecting free speech, but only a

liberty to express himself with whatever language suits him meets head-on with the liberty of a parent to shield his children from that same language. In the end, government must decide which liberty interest it will legitimize.

Although each of these models have valid criticisms, any satisfactory theory of free speech must come to terms with their varied implications. It is difficult to square the disparate treatment between the print and broadcast mediums without analyzing each form of speech within the context of the first amendment. Too often, in the Supreme Court's discussion of the broadcast industry, however, the Court fails to analyze the foundational values given speech by the first amendment. It seems at times that Supreme Court Justices decide cases solely on their normative judgments of speech protection, rather than first amendment principles.

Broadcasting has suffered as part of the Supreme Court's search for categorical protection of speech. Through the years, the Court generally has defined the parameters of the first amendment by excluding certain types of speech from the sphere of the amendment's protection. In the 1942 case of *Chaplinsky v. New Hampshire*,⁴⁶ for example, the Court constructed a two-level theory.⁴⁷ Protected speech was placed on one level, while the other level was occupied by categories of unprotected speech, such as speech that incites a fight,⁴⁸ obscenity,⁴⁹ and libel.⁵⁰ Since *Chaplinsky*, however, a multi-level approach emerged in Supreme Court opinions with a series of speech categories that receive less-than-complete constitutional protection. These categories include speech that is inflicted upon captive audiences,⁵¹ offensive or indecent in broadcasting,⁵² commercial in nature,⁵³ near-obscene,⁵⁴ nonobscene but dealing with child pornog-

conglomeration of traditionally accepted values, e.g., preventing the government from silencing its critics.).

46. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (Calling someone a "damned racketeer" and "damned fascist" amounts to using "fighting words.").

47. *Id.*

48. *Id.*

49. *Id.*; see also *Miller v. California*, 413 U.S. 15 (1973).

50. *Chaplinsky*, 315 U.S. at 572; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (Government may treat libels against private citizens more severely than libels against public officials.).

51. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952). An audience is said to be captive when it is exposed to certain language by necessity and not by choice. *Id.* at 451. In this case, vehicles equipped with loud speakers traveled the streets of cities blaring messages. *Id.* These vehicles were said to deprive the audience of its volition to choose not to listen. *Id.*

52. *FCC v. Pacifica*, 438 U.S. 726 (1978).

53. *Central Hudson Gas v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) (Regulation of commercial speech by the government must be weighed by a means-end test to decide if first amendment values sufficiently outweigh the state's interest in regulation.). *But*

raphy,⁵⁵ defamatory,⁵⁶ and uttered by public employees.⁵⁷

In order to understand the special treatment of broadcast speech, one must first consider *Cohen v. California*.⁵⁸ In *Cohen*, the defendant was arrested in the corridor of a Los Angeles courthouse for disturbing the peace by wearing a jacket, within the view of children, which bore the slogan "Fuck the Draft."⁵⁹ Cohen was convicted and he ultimately appealed to the Supreme Court,⁶⁰ where Justice Harlan, writing for the majority, carefully analyzed the role of offensive speech within the first amendment.⁶¹ Harlan found that Cohen's act was a form of speech that did not fit into any of the previously defined unprotected categories.⁶² Thus, the issue became whether the state could act as "guardians of public morality" in punishing the public utterance of "this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic."⁶³ In reversing Cohen's conviction, Harlan concluded that the Constitution "leaves matters of taste and style largely to the individual."⁶⁴

cf. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986) (Puerto Rico could ban advertising for casino gambling aimed at its residents.).

54. *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (Nonobscene adult books and movies are of lesser value than other types of speech, especially political debate.).

55. *New York v. Ferber*, 458 U.S. 747 (1982) (A state may ban the distribution of materials depicting children engaged in sexual conduct, even though the material is not legally obscene.).

56. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (The government may treat libels against private citizens more severely than libels against public officials.).

57. *Pickering v. Board of Education*, 391 U.S. 563 (1968) (A teacher's interest as a citizen in making public comment must be balanced against the government's interest in promoting the efficiency of its employees' public service.).

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

59. *Id.* at 15.

60. *Id.*

61. *Id.*

62. *Id.* at 20. Harlan stated: "It cannot plausibly be maintained that this vulgar allusion to the Selective Service would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket." *Id.* Nor is the statement an instance of "fighting words" uttered face-to-face. *Id.* Nor did it involve inflicting offensive language on a captive audience: "Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21.

63. *Id.* at 23.

64. *Id.* at 25. Harlan's answer to the constitutional question of offensive speech offers an interesting perspective:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might

B. *A Historical Perspective of Radio Regulation*

It would appear that *Cohen* answered all the offensive speech questions before they were raised seven years later in *Pacifica* and, again, in *Action*. But this is where the special qualities of broadcasting become an important factor and require, in the Supreme Court's view, a different standard. Since the inception of comprehensive broadcast regulation in 1927, Congress and federal regulatory agencies enthusiastically have regulated the content of broadcast speech.⁶⁵ Three reasons have been given for such regulation: first, the pervasiveness of the broadcast medium into homes; second, the scarcity of broadcast frequencies; and third, the government's licensure of broadcasting requires it to pass laws that bring about the most efficient use of stations.

In its early days, radio was considered to be an entertainment medium.⁶⁶ It developed in the early 1920s as amateur talk shows emanating from garages and evolved into full-scale stations.⁶⁷ There was little applicable law in the early years, but it was clear that operating a radio station required some form of license.⁶⁸ At the time, few Americans probably considered that the government's reaction toward licensing this new, unknown medium was much like that of

seem a trifling and annoying instance of individual distasteful abuse of privilege, these fundamental societal values are truly implicated. . . .

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the 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. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id. at 24-25.

65. L. POWE, *supra* note 35, at 11-31.

66. *Id.*

67. G. ARCHER, *HISTORY OF RADIO TO 1926*, at 249 (1938).

68. *Id.* at 106. In 1910, Congress passed an act to amend the Interstate Commerce laws by extending their operation to interstate transmission of intelligence by wire and wireless. *Id.* This regulation was extended in 1912 by an act that included radio-telegraphic communication. *Id.* The Radio Act forbade the operation of a radio apparatus without a license from the Secretary of Commerce and Labor. *Id.* Further, it prohibited and penalized willful and malicious interference with radio communication. *Id.* Uttering or transmitting false or fraudulent signals called for a penalty of \$2,500 or imprisonment for not more than five years or both. *Id.*

the English government when printing presses were developed 350 years earlier.⁶⁹ For the early broadcaster, it was not free speech concerns but the recurrent problem of signal interference that made licensing a good idea.⁷⁰

After much political haggling, Congress passed the Radio Act of 1927,⁷¹ which established the airwaves as publicly owned and controlled by the government.⁷² The Act was vague and suggested that a radio license was a privilege that required, in return, that the licensee use the license for some form of undefined public service.⁷³ The Act set forth the powers and duties of the Federal Radio Commission—the prototype of the FCC—and directed the agency to make regulations in the “public interest, convenience or necessity.”⁷⁴

With the new licensing scheme and the increasing demand of would-be licensees, the government believed that broadcast content regulation became justified based on the scarcity of the radio spectrum and the need to maximize the productive use of the limited number of stations.⁷⁵ The Supreme Court recognized these justifications in 1943 in *NBC v. United States*,⁷⁶ and, again, twenty-five years later in *Red Lion Broadcasting v. FCC*.⁷⁷ *NBC* was an outgrowth of the first FCC attempt to come to grips with the development and apparent dominance of large broadcasting networks.⁷⁸ In *Red Lion*, by comparison, the Court decided that broadcasters could be required to grant individuals the right to reply to personal attacks broadcast on a station.⁷⁹ Thus, broadcasting could be shackled by more intrusive

69. W. VAN ALSTYNE, *INTERPRETATIONS OF THE FIRST AMENDMENT* 69 (1984).

70. G. ARCHER, *supra* note 67, at 104-06.

71. Ch. 169, 44 Stat. 1162 (1927).

72. L. POWE, *supra* note 35, at 52-67.

73. *Id.* at 61.

74. Communications Act of 1934, 47 U.S.C. § 402 (1982).

75. L. POWE, *supra* note 35, at 62.

76. 319 U.S. 190 (1943).

77. 395 U.S. 367 (1969).

78. *NBC*, 319 U.S. at 190. In pursuing competition in the broadcast industry, the FCC passed a number of rules that encouraged localism in broadcasting. *Id.* at 194-95. *NBC*, joined by other networks, attacked the rules, arguing in part that the FCC lacked the authority under the Communications Act to make such rules, and that the rules violated the first amendment. *Id.* at 209. The Supreme Court was unimpressed with the networks' arguments and found that there was no first amendment violation. *Id.* at 226. The Court found that the limited radio spectrum was a sufficient reason for allowing the FCC to affect the content of broadcasts. *Id.* See also L. POWE, *supra* note 35, at 31-45.

79. *Red Lion*, 395 U.S. at 370. A taped commercial program aired by the Red Lion Broadcasting Company mentioned a journalist from New York in a politically disparaging manner. *Id.* at 371-73. In due course, the FCC directed the radio station to provide free reply time to the disparaged individual. *Id.* *Red Lion* protested, arguing that it had volunteered to let the offended person reply on its station for a standard \$5 fee, and otherwise claiming that the imposition of the FCC order abridged its own editorial freedom under the first amendment.

regulation because not everyone could be a broadcaster.

Under the scarcity of frequencies rationale, the government has a right and obligation to regulate broadcast content to ensure that those who are excluded will be given some measure of access and control.⁸⁰ This control amounts to limiting what broadcasters can air, that is, removing indecent material. Critics question, however, whether the scarcity of frequencies rationale should continue to exist.⁸¹ Some argue that if scarcity should be used as a rationale, then newspapers—often having little or no competition—certainly are more scarce than broadcast stations.⁸²

C. Judicial Review and Broadcasting

Judicial discussions of broadcast content regulation establish that broadcasting is judged by a standard that is narrowly tailored to further a substantial governmental interest,⁸³ and not by the compelling interest standard that is applied to the regulation of speech content in other first amendment areas.⁸⁴ From the inception of broadcast regu-

Id. The FCC and the Supreme Court disagreed, unanimously holding that the FCC had acted within its statutory authority, and that this did not offend the first amendment because broadcasters are held to a different standard due to the scarcity rationale. *Id.* at 396-401. *But cf.* *CBS v. Democratic National Committee*, 412 U.S. 94 (1973) (court rejected the view that a limited right of access existed for political advertising.).

80. See Dyk, *Full First Amendment Freedom for Broadcasters: The Industry as Eliza on the Ice and Congress as the Friendly Overseer*, 5 YALE J. ON REG. 299, 309 (1988) (Full first amendment protection is critical to preserving the independence and vitality of the broadcast medium.).

81. The D.C. Circuit, in *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 506-07 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3196 (1987), urged the Supreme Court to reconsider the scarcity theory as contradictory to the principles of the first amendment. *Id.* Judge Bork was joined in the opinion by judge, now Justice, Scalia. *Id.* at 502. See also *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988); *Syracuse Peace Council*, 2 F.C.C. Rcd 5043, 5048-49, 5054-55 (1987), *petition for review pending*, Nos. 87-1516, 87-1544 (D.C. Cir. Sept. 24, 1987).

82. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 250 (1974). In *Tornillo*, the Court found that newspapers are not required to give reply space for a personal attack. *Id.* The Court rejected the argument that the economic scarcity of newspapers—that is, the economic difficulty in starting a newspaper—was a sufficient reason to require newspapers to print replies to personal attacks. *Id.* Newspapers would tend to avoid subjects that would trigger the right to reply, which would dampen the vigor of the press's coverage of public events. *Id.*

83. *Id.*; see also *United States v. O'Brien*, 391 U.S. 367 (1968) (Government regulation of conduct may be justified if the regulation furthers a substantial government interest, which outweighs the suppression of free expression.); *but cf.* *Quincy Cable TV v. FCC*, 768 F.2d 1434 (1986) (Regulations requiring cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that was "significantly viewed in the community," or otherwise considered local under the FCC's rules, violated the first amendment.).

84. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

lation to date, the Supreme Court only once—in the 1984 case of *FCC v. League of Women Voters*⁸⁵—has found a regulation of broadcast content unconstitutional. In *League of Women Voters*, the Court invalidated a prohibition on editorializing by public stations that receive federal funds.⁸⁶ A major point of contention also swirls around the Fairness Doctrine⁸⁷ and the rights of federal candidates to receive access to the airwaves.⁸⁸

The rationale that courts give for encumbering broadcasters with special regulation includes the intrusive nature of airwaves into the home and the broadcast signal's unique accessibility to children.⁸⁹ Unlike other forms of communication that may require an affirmative act of purchasing or reading, broadcasting requires a comparatively passive act—pushing a button or turning a dial at home.⁹⁰ Children, by the simple act of operating a radio or television, also become more accessible to material that may not meet the approval of their parents.⁹¹

The Court, however, should not use these justifications as an

85. See Dyk, *supra* note 80, at 308 (The Supreme Court only once has struck down a content-based FCC regulation.).

86. *League of Women Voters*, 468 U.S. at 364.

87. The Fairness Doctrine requires that broadcasters devote time to controversial issues of public importance and, when they do so, that they present opposing views on those issues. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967) (approved aspects of the FCC's Fairness Doctrine, under which broadcasters are required to share their frequency with others, at least in a limited manner); *but see, In re Syracuse Peace Council*, 64 Rad. Reg. 2d (P & F) 1073 (1987) (The FCC held that the Fairness Doctrine, on its face, violates the first amendment and contravenes the public interest.); *Fairness held unfair*, BROADCASTING, Aug. 10, 1987, at 27. FCC General Counsel Diane Killory stated that the scarcity rationale does not justify imposing broadcast content regulations. *Id.* at 31. FCC Chairman Dennis Patrick, when announcing the *Syracuse* decision, stated:

Our action today should be cause for celebration, because by it we introduce the first amendment into the 20th century. Because we believe it will serve the public interest, we seek to extend to the electronic press the same First Amendment guarantees that the print media have enjoyed since our country's inception. . . . [T]he First Amendment does not guarantee a fair press, only a free press. . . . [T]he record in this proceeding leads one inescapably to conclude that the fairness doctrine chills free speech, is not narrowly tailored to achieve any substantial government interest, and therefore contravenes the First Amendment and the public interest. As a consequence, we can no longer impose fairness doctrine obligations on broadcasters and simultaneously honor our oath of office. By this action, we honor that oath, and, we believe, we promote the public interest.

Id. at 27.

88. *CBS v. FCC*, 453 U.S. 367 (1981) (FCC, acting pursuant to congressional authorization, could constitutionally require broadcasters to give reasonable, good faith attention to federal candidates' requests to buy advertising time.).

89. *Pacifica*, 438 U.S. at 748.

90. *Id.* at 749; see also *Sonderling Broadcasting Corp.*, 41 F.C.C. 2d 777 (1973).

91. *Pacifica*, 438 U.S. at 749.

excuse for not following the arduous requirements that the first amendment places on any curtailment of protected speech. The analysis of government regulations in the first amendment area generally fall into two tracks: (1) regulations aimed at the communicative impact of an act; and (2) regulation of the noncommunicative aspects of an act.⁹² Regulations of broadcast content should fall within the first track and, thus, the regulation should be unconstitutional unless the government shows that the message is in some way unprotected by the first amendment.⁹³ Indecency has ambiguous effects on its audience, and therefore the government should be required to show a compelling interest to make a content-based regulation of indecency.⁹⁴

D. *The FCC's Authority for Regulation of Indecency*

The FCC finds its authority to regulate indecent speech in Section 1464 of the United States Criminal Code, which provides that the broadcast of "any obscene, indecent or profane language" is actionable.⁹⁵ Facially, this contradicts Section 326 of the Federal Communications Act, which states that "no regulation or condition shall be

92. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789 (1987). Under the first track analysis, the government aims at the ideas or information of the speaker because of the negative effect it may have on the audience. *Id.* When the government regulation is aimed at unprotected speech, such as defamation, only minimal due process scrutiny is required. *Id.* at 792. On the second track, the government's interest in regulation is balanced against the value of free expression. *Id.*

93. *Id.*

94. The Supreme Court has allowed regulation of the content of speech when an ordinance is aimed at "secondary effects" rather than the particular content of speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult theaters from locating within 1,000 feet of a residential area, dwelling, church, park, or school. *Id.* at 49. The Court reasoned that the ordinance was aimed, not at the content of the films shown at adult theaters, but at the secondary effects of such theaters on the surrounding community. *Id.* at 49. The Court stated that the ordinance is designed to prevent crime, protect the city's retail trade, maintain property value, and generally help the quality of life in the community. *Id.* at 48. The *Renton* view, however, has opened the door for wholesale restriction of sexually explicit material. Under this rationale, listener reaction to a broadcast message might be considered a "secondary effect," thus giving the FCC unbridled discretion to impose a variety of content regulations. It is notable that, along with indecency, television violence often is cited for its ill effects on audience members. Under a "secondary effects" rationale, broadcast violence might be equally susceptible to restriction. Furthermore, if the FCC were truly concerned with the effects of broadcast material on children, it might adopt rules to restrict broadcasts of such fringe groups as the Klu Klux Klan. Soon, if this rationale were followed, the protection of children might be used to allow the broadcast of only what is acceptable to the vocal majority of the country.

95. 18 U.S.C. § 1464 (1982). Section 1464 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." *Id.* This section is one of a group of four similar statutes which prohibit the mailing, importation, and interstate transportation of obscenity.

promulgated or fixed by the commission which shall interfere with the right of free speech by means of radio communication.”⁹⁶ Furthermore, indecent speech, which is most notably distinguished from obscene speech by its lack of prurient appeal, cannot be regulated by the government under the first amendment as applied to the print media or private conversations.⁹⁷ Nevertheless, the Supreme Court in *Pacifica* found that the aforementioned statutes were not in conflict and the first amendment did not impede some control over what is broadcast. Thus, FCC censorship could prevent the broadcast of obscene, indecent, or profane language.⁹⁸

Pacifica, which is the Supreme Court’s only treatment of the broadcast indecency issue, arose at a time when the FCC was under considerable pressure from Congress and the White House to clear the airwaves of sex and violence.⁹⁹ As the sexual revolution burgeoned across the nation, radio stations devoted more broadcast time to subjects that pushed the edge of what might be said in polite company.¹⁰⁰ Against this background of change, New York’s WBAI—a public broadcasting station licensed to Pacifica Foundation, Inc.—aired a twelve-minute monologue from comedian George Carlin’s album “Occupation: Foole” during a school day in October 1973.¹⁰¹ The monologue was part of a program that dealt with attitudes toward language in contemporary society and was intended to highlight soci-

96. Communications Act of 1934, 47 U.S.C. 326 (1982). Section 326 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, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.” *Id.*

97. In *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court reversed the conviction of a man who walked through a county courthouse, where children were present, wearing a jacket emblazoned with the words “Fuck the Draft.” *Id.* Cohen was convicted under a statute prohibiting “offensive conduct” in public. *Id.* The California Court of Appeal affirmed the conviction and defined “offensive conduct” as “behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace.” *Id.* It further concluded that the conviction was justified, for it was “reasonably foreseeable” that others might be provoked to violent reaction by Cohen’s jacket. *Id.* Writing the majority opinion for the Supreme Court, Justice Harlan found that offensive speech is protected by the first amendment. *Id.* at 20. Harlan found that the language used on Cohen’s jacket was not obscene. *Id.* He further found that those in the courthouse were not a captive audience because they could avert their glance. *Id.* at 21. Finally, Harlan rejected the alternative rationale for censoring offensive speech—the argument that the states may regulate such speech to maintain the “public morality.” *Id.* at 22. In his view, the dangers that attend such regulation far outweigh any benefits that might be derived from it. *Id.* at 23.

98. *Pacifica*, 438 U.S. at 741.

99. See generally L. POWE, *supra* note 35, at 162-90 (Both the President and Congress effect political pressure on the FCC.).

100. *Id.*

101. *Pacifica*, 438 U.S. at 730.

ety's perceptions of "dirty" words.¹⁰² In his routine, Carlin prophetically announced the seven words that could not be said on the airwaves.¹⁰³

The FCC received a single complaint from a man who said he heard the Carlin broadcast while driving in his car with his fifteen-year-old son.¹⁰⁴ The complainant, John R. Douglas, was a member of the national planning board of Morality in the Media and a Florida resident who lived well outside of WBAI's signal.¹⁰⁵ After sitting on the complaint for a year, the FCC announced that Carlin's monologue was indecent and could be banned, except for possible late-night broadcast when children were not likely to be listening.¹⁰⁶ The FCC then drafted an indecency standard that essentially is the same as the one now in place.¹⁰⁷ Regardless of the literary, artistic, or scientific value—part of the test for obscenity—indecent language could not be aired no matter who wished to hear it.¹⁰⁸ News organizations immediately sought clarification and were told that live news events could use the proscribed words only if there was no time to edit them.¹⁰⁹

WBAI appealed to the D.C. Circuit, claiming that the FCC's standard was overbroad, vague, and unconstitutionally applied to speech that was protected under the first amendment.¹¹⁰ Citing Section 326—the no-censorship admonition of the Communications Act—the Court found the FCC's decision unconstitutional.¹¹¹ Chief Judge Bazelon viewed Section 326 as coextensive with the first amendment, thereby requiring the same protection of speech.¹¹² He concluded that the FCC's definition of indecency was too broad and that the FCC incorrectly asserted that material subject to regulation for children could be banned from broadcast to adults.¹¹³ Despite the

102. *Id.*

103. *Id.* at 751.

104. *Id.* at 730.

105. BROADCASTING, July 10, 1978, at 20.

106. On February 21, 1975, the FCC issued a declaratory order holding the seven words used in Carlin's monologue indecent within the meaning of 18 U.S.C. § 1464. *Pacifica Foundation*, 56 F.C.C.2d 94, 99 (1975). While not imposing formal sanctions against the station, the FCC noted that *Pacifica Foundation* could have been subject to sanctions. *Id.*

107. *Id.* at 98. In the FCC's order, it attempted to clarify the meaning of indecency as "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." *Id.*

108. *Id.*

109. 59 F.C.C.2d 892 (1975).

110. Final FCC adjudications can be appealed to the United States Court of Appeals for the District of Columbia. *See* Communications Act of 1934, 47 U.S.C. § 402(b) (1982).

111. *Pacifica Foundation v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1977).

112. *Id.* at 37.

113. *Id.*

strong cries for first amendment protection in the D.C. Circuit's opinion, however, the theory expressed by Judge Leventhal in his dissent had the greatest long-term effect on indecency.¹¹⁴ Judge Leventhal emphasized the limited posture of the case, asserting that the Carlin monologue should be considered solely as broadcast and not against an FCC indecency standard.¹¹⁵ It was only after the FCC subsequently adopted Leventhal's position on appeal that regulation of indecency met with success in the Supreme Court.¹¹⁶ Some critics, in fact, theorize that the FCC may have adopted Leventhal's more limited approach because of a change in Presidents from Ford to Carter, which resulted in a personnel change in the Commission itself.¹¹⁷

The Supreme Court embraced the FCC's limited indecency scope in finding that the FCC's action did not amount to a promulgation of broad regulation, but merely a limited adjudication of a narrow factual issue.¹¹⁸ As such, the Court restricted its review to the particular words in the Carlin monologue in deciding the constitutionality of regulating indecent programming.¹¹⁹ The Court upheld the FCC's view without a majority opinion on the constitutional issues.¹²⁰ Justice Stevens' three-man plurality opinion found that Carlin's "seven dirty words" could be regulated within the context in which they were used, but four justices flatly disagreed.¹²¹ Stevens, in a portion of his opinion joined by four other justices, noted that the FCC's decision

114. *Id.* at 30-37.

115. *Id.*

116. The Supreme Court granted certiorari, reversed the D.C. Circuit, and upheld the FCC's order. *Pacifica*, 438 U.S. 726. The Court found that the FCC had the authority to impose sanctions under the specific facts of the case before it. *Id.* at 750.

117. Powe, *The FCC's Indecency Rerun*, 10 HASTINGS COMM. & ENT. L.J. 571, 575 (1988).

118. The Supreme Court stated:

[The Supreme Court] reviews judgments, not statements in opinions . . . That admonition has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues. However appropriate it may be for an administrative agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions.

Pacifica, 438 U.S. at 734-35 (citations omitted).

In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), Justice Stevens' plurality opinion stated for the first time that offensive displays and speech categorically may receive lesser first amendment protection. *Id.* Stevens' opinion found that portions of a Detroit "Anti-Skid Row Ordinance," which differentiated between motion picture theaters that exhibit sexually explicit movies and those that do not, were constitutional. *Id.* at 54. *But cf. Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (The Court sustained a challenge to the facial validity of an ordinance prohibiting drive-in movie theaters from showing movies with "the human male or female bare buttocks, human female bare breasts, or human bare pubic areas.").

119. *Id.*

120. *Id.*

121. *Id.*

rested on "a nuisance rationale under which context is all-important."¹²² Stevens suggested that the time of day of a broadcast and the composition of the audience based on the type of program were examples of "context," along with whether the transmission took place on radio, television or closed circuit.¹²³ The Court, however, overlooked the fact that WBAI aired the Carlin monologue in the early afternoon while most children were in school, and that little chance existed that young children would listen to a public radio station such as WBAI.¹²⁴ These points appear to place the Carlin broadcast in a "context" within which Stevens would allow indecent broadcasts.

Noticeably absent from *Pacifica* is the scarcity rationale that usually is offered to distinguish different levels of control over the print and broadcast mediums.¹²⁵ In fact, the Court recently has questioned this critically disfavored rationale.¹²⁶ Instead, the Court noted the intrusiveness of radio into the home, making it "uniquely accessible to children" and "uniquely pervasive."¹²⁷ The implication is that if the material is not good enough for children, adults may not hear it either, unless they remain awake past 10 p.m. Furthermore, it seems illogical that radios are any more an "intruder" into a home than a newspaper or magazine. Unlike the captive audience situation in which amplification instruments are used to blast messages from the street,¹²⁸ radios and televisions, and their signals, are acquired by the volitional acts of users.¹²⁹ Moreover, newspapers are more accessible to youths, who can freely purchase them, and magazines are perused at any corner convenience store. Stevens, however, argued that a first grade student who may not be able to read profane language would instantly understand it if heard.¹³⁰ This point, of course, raises the

122. *Id.* at 750.

123. *Id.*

124. *Id.* at 729.

125. The scarcity of frequencies rationale, which suggests that broadcasting should be subject to government control because there is a fixed number of frequencies that are exceeded by the number who wish to use them, has generally been criticized by academicians for supporting the regulation of broadcast content. See, e.g., L. POWE, *supra* note 35, at 197-215.

126. In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Supreme Court questioned the frequently criticized airwaves scarcity doctrine and asked Congress or the FCC to confront the problem. 468 U.S. 364, 376-77n.11.

127. *Pacifica*, 438 U.S. at 748-49.

128. See *Kovacs v. Cooper*, 336 U.S. 77, 96-97 (1949) (The Court upheld a ban on amplification devices operated in public places that emit "loud and raucous noises.").

129. For a further discussion of this point, see *infra* Section V.

130. *Pacifica*, 438 U.S. at 747-50. Stevens raised this point in trying to distinguish *Cohen v. California*, 403 U.S. 15 (1970), which held that offensive speech is protected under the first amendment. *Id.*

question of whether protection of young children from "dirty" language is proper where the language is double entendre and innuendo that is beyond the young child's comprehension.¹³¹ In other words, should all forms of indecent speech be banned or merely those that young children may latch onto?¹³²

The FCC nearly decided not to appeal *Pacifica* to the Supreme Court.¹³³ The FCC long had asserted that it had some authority over broadcast content, but in touching on indecency, the Commission was attacking an area that apparently had been decided in *Cohen v. California* as protected under the first amendment.¹³⁴ Still, an indecency standard was alluring because the FCC could avoid the rigors of holding language to the level of inquiry required of obscenity standards.¹³⁵ Therefore, language did not have to appeal to the prurient interests of listeners to be indecent, and a variable community standard was unnecessary.¹³⁶ FCC members, however, still were unsure if the Supreme Court would be agreeable to this truncated standard for morality.¹³⁷

Prior to *Pacifica*, the FCC cautiously approached defining a standard for indecency.¹³⁸ Although there was recurrent discussion of the fear that the airwaves could be used as "a purveyor of smut and patent vulgarity" without controls,¹³⁹ it was not until the late 1960s that

131. See *infra* Sections IV and V.

132. *Id.*

133. See BROADCASTING, July 10, 1978, at 20. After the D.C. Circuit reversed the FCC's decision in *Pacifica*, commission attorneys recommended against seeking Supreme Court review for fear of a further defeat. *Id.* The FCC eventually appealed to the Supreme Court because FCC commissioners insisted on testing the extent of their authority to deal with indecent programming. *Id.*

134. See *supra* note 97, at 15.

135. See *supra* note 19.

136. See *supra* note 19.

137. See *infra* Sections IV and V.

138. The first case that dealt with indecent broadcasts was *In re Applications of E.G. Robinson, Jr., TR/Palmetto Broadcast Co., WDKD, Kingstree, S.C.*, 33 F.C.C. 250 (1962), *reconsideration denied*, 34 F.C.C. 101 (1963). *E.G. Robinson, Jr. v. FCC*, 334 F.2d 584, *cert. denied*, 379 U.S. 843 (1964). The issue of offensive programming was raised in conjunction with a license renewal hearing. *Id.* In 1960, the FCC received complaints that the Charlie Walker show, broadcast between January and April 1960, consisted of "vulgar, suggestive material susceptible of double meaning" and indecent connotations. *Id.* at 266. During the license renewal process, the radio station owner argued that he was unaware of the content in Walker's show. *Id.* at 267. The FCC denied the renewal. *Id.* at 308; see also *In re Sonderling Broadcasting Corp., WGLD-FM, Oak Park, Ill.*, 41 F.C.C.2d 777 (1973) (upholding the FCC's finding that a radio broadcast was indecent and obscene); *WUHY-FM, Eastern Education Radio*, 24 F.C.C.2d 408 (1970) (finding guitarist Jerry Garcia's four-letter words offensive.).

139. *Palmetto Broadcast Co.*, 33 F.C.C. at 256.

offensive speech became a significant problem on radio.¹⁴⁰ Some legal commentators have argued that the problem of offensive speech on radio never was as great for television because the networks and their affiliates always aimed at the largest possible audience, which resulted in sanitizing broadcasts.¹⁴¹ With the cultural revolution of the 1960s, however, radio stations began to exhibit the more particularized and diverse interests of the nation.¹⁴² Radio stations relaxed programming standards and the need to find a standard for regulation of indecency increased. The problem for the FCC, however, was developing a standard in lieu of the Supreme Court's troubled lead in defining obscenity.¹⁴³

Five years before *Pacifica*, the FCC assessed a \$100 fine against WUHY-FM, Eastern Education Radio, for broadcasting language similar to that found in Carlin's monologue.¹⁴⁴ That case involved an interview aired in 1970 with Jerry Garcia, a member of the Grateful Dead, a popular rock group.¹⁴⁵ During the interview—in which Garcia expressed views concerning ecology, philosophy, music, and interpersonal relationships—Garcia used the words “fuck” and “shit” repeatedly within the flow of conversation.¹⁴⁶ The FCC identified these words as having no social value and serving no public purpose.¹⁴⁷ The FCC thus made its first frontal attack on speech that it believed deviated from social norms, but was within the first amendment's protection. This was the first time the FCC charged a station with violating Section 1464 of the United States Criminal Code, which prohibits the broadcast of indecent language.¹⁴⁸

The case is notable for asserting the early FCC views on both the fear that indecent broadcasts would proliferate and the problem of children's access to such language.¹⁴⁹ The case also offers the first

140. L. POWE, *supra* note 35, at 162-63.

141. *Id.* (discussing the network editing of the movie *Midnight Cowboy*).

142. *Id.* at 164-67.

143. See H. KALVEN, A WORTHY TRADITION 33-54 (1987); McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960) (discussing the evolving definition of obscenity).

144. WUHY-FM, Eastern Educational Radio, 24 F.C.C.2d 408, 412 (1970).

145. *Id.* at 412.

146. *Id.*

147. The FCC concluded that Garcia's language “is patently offensive by contemporary community standards with very serious consequences to the ‘public interest in the larger more effective use of radio.’ ” *Id.* at 410 (citations omitted). Garcia's language, however, offers a good example of how the first amendment should protect self-expression purely because it encourages personal autonomy. Garcia's language was normal within the context of his feelings on the subjects he was discussing. The four-letter words he used were not offered to shock the audience, but to emphasize his emotions and to properly communicate his meaning.

148. See *supra* note 95.

149. WUHY-FM, 24 F.C.C.2d at 411.

formal definition of indecency as material broadcast that is patently offensive by contemporary community standards, and is utterly without redeeming social value.¹⁵⁰ It appeared from this definition that a mere indecent word, perhaps offensive only to the most susceptible listener, was sufficient to ban an entire broadcast. Most interesting in this initial foray into fashioning an indecency standard is that the sanction of the Garcia broadcast did not arise from a citizen's complaint;¹⁵¹ rather the FCC's staff actually had been monitoring the show.¹⁵² Conspicuously absent in the case, however, was an explanation for why indecent speech should undergo a lesser protection than obscene speech.

The FCC of the early 1970s, under the mandate of the Nixon administration, appeared to be molding broadcasting into a form most suitable to white, middle-class America.¹⁵³ Besides attacking indecent language on the radio, there also were efforts to ban songs that advocated the use of drugs.¹⁵⁴ Despite the FCC's early attempts to instill the fear of sanctions into broadcasters, between June 1972 and June 1973 the number of complaints of obscene, indecent, or profane broadcasts had a fifteen-fold increase from 2,141 to 32,438, exceeding by more than 10,000 the number of complaints received on all other topics.¹⁵⁵ During this period, a radio format known as "topless radio," which often featured explicit conversations about sexual behavior, exploded across the nation.¹⁵⁶ The FCC, responding to

150. *Id.* at 410. This FCC definition of indecency differed significantly from the Supreme Court's definition of obscenity at the time. *Cf.* *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413 (1966). In *A Book Named Woman of Pleasure*, the Supreme Court defined the evolution of obscenity from its beginning in *Roth v. United States*, 354 U.S. 476 (1957):

Under [the *Roth* definition of obscenity,] as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

A Book Named Woman of Pleasure, 383 U.S. at 418. The FCC's definition of indecency omitted the necessity of using the "dominant theme" of the work to censor an offensive word. *WUHY-FM*, 24 F.C.C.2d at 410. The Supreme Court had wrestled with requiring a dominant theme approach because for years judges had made ad hoc exceptions for "classic" works that contained questionable passages. *See, e.g., United States v. One Book called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933).

151. *See* L. POWE, *supra* note 35, at 176 (1987).

152. *WUHY-FM*, 24 F.C.C.2d, at 409 n.2.

153. L. POWE, *supra* note 35, at 162-65, 179-177.

154. *Id.* at 176-82.

155. FCC News Release (August 2, 1973), *quoted in* Powe, *Cable and Obscenity*, 24 CATH. U.L. Rev. 719, 732 (1975).

156. *See* BROADCASTING, Oct. 23, 1972, at 35.

pressure to act against the outrageous programs, targeted Chicago radio station WGLD-FM.¹⁵⁷ The FCC determined that a popular call-in talk show entitled "Femme Forum," which was aired between 10 a.m. and 3 p.m., violated both indecency and obscenity standards.¹⁵⁸ The FCC focused on a particular broadcast of this show that included explicit personal accounts of oral sex.¹⁵⁹ The FCC apparently believed these personal accounts to be so graphic that a mere indecency standard did not suffice.

The radio station paid a \$2,000 fine rather than appeal the ruling.¹⁶⁰ Two citizens groups, however, sought petition for reconsideration of the fine from the FCC.¹⁶¹ These requests were denied, which led the groups to petition the D.C. Circuit for review. In *Illinois Citizens Committee for Broadcasting v. FCC*,¹⁶² the D.C. Circuit upheld the FCC's ruling.¹⁶³ A disagreement arose within the court, however, as to what standard of obscenity to apply because between the FCC's resolution of the case and the appeal to the D.C. Circuit, the Supreme Court decided *Miller v. California*,¹⁶⁴ which set a new standard for defining obscenity.¹⁶⁵ The citizens groups then sought a rehearing, but the D.C. Circuit denied the request despite an impassioned dissent by Judge Bazelon, who argued that the Commission's action "illustrat[ed] a whole range of 'raised eyebrow' tactics" of FCC regulation, instances of which were "legion."¹⁶⁶

157. *In re Sonderling Broadcasting Corp.*, WGLD-FM, 41 F.C.C.2d 919 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).

158. Commissioner Nicholas Johnson, in a dissenting opinion, argued that it is improper to regulate both indecent and obscene language. *Id.* at 921. He attacked the regulation of indecency as constitutionally imprecise. *Id.* Johnson argued that the commission did not properly investigate the community standards in the Philadelphia area, which allowed the personal tastes of four commissioners to be used as the gauge for indecency. *Id.* at 922. Johnson found that the FCC had embarked on unprecedented censorship. *Id.* Johnson also argued that the majority did not define the community whose standards were supposed to have been violated. *Id.* Finally, Johnson argued that enforcement of 18 U.S.C. § 1464 should be left to the Justice Department, which would leave the problem of defining Section 1464 to the federal courts. *Id.*

159. *Id.* at 923.

160. *Id.* at 920.

161. *Id.* at 785 (reconsideration hearing). The citizen groups were the Illinois Citizens Committee for Broadcasting and the Illinois Division of the American Civil Liberties Union. *Id.* at 777.

162. 515 F.2d 397 (D.C. Cir. 1975).

163. *Id.*

164. 413 U.S. 15 (1973).

165. See *supra* note 19.

166. *Illinois Citizens Committee*, 515 F.2d at 407-09. Judge Bazelon particularly found problems with the court's finding of obscenity because the court only listened to a twenty-two-minute tape recording, thereby not allowing the court to consider the work as a whole. *Id.* at 417. Judge Bazelon argued that the specificity requirement of *Miller* was designed to provide

Similar to its treatment of the WUHY-FM broadcast of the Garcia interview, the FCC misapplied the obscenity test in reaching its conclusion. The FCC had a particularly difficult task to find this talk show format offensive to the community as a whole because it was the top-rated show in the Chicago area.¹⁶⁷ The D.C. Circuit, however, did not appear to be too concerned with the misapplication. First, the court solved the "dominant theme" problem by arguing that listening, unlike reading and watching, was episodic, and therefore anything dealing with sex became the "dominant theme."¹⁶⁸ Next, it resurrected *Ginzburg v. United States*¹⁶⁹—a case previously limited to its particular facts—for the proposition that nonobscene materials could be found to be obscene if they involved "pandering."¹⁷⁰ The court found that the announcer's efforts to solicit female callers to discuss sex amounted to pandering.¹⁷¹ Thus, indecency took on an amorphous quality that could be distinguished, in part, by the speaker's effort to incite offensive discussion. After the FCC sanctioned "Femme Forum," there really was no identifiable standard. The talk show did not violate the "dirty words" test of *WUHY-FM*, but it was not clear what standard was violated. Therefore, this left the issue to be decided in *Pacifica*.

more than fair notice to the broadcaster—it was designed to protect listeners who cannot get access to the programming they desired. *Id.* at 421.

Judge Bazelon further complained that the FCC's separate standard of indecency was inconsistent with the *Miller* obscenity standard because it was devoid of the requirement that material appeal to prurient interest in sex. *Id.* at 423. The issue of whether the material had redeeming social value was not even considered, which in effect could chase all sex-oriented talk shows off the air. *Id.* Bazelon also questioned whether the "FCC as a national administrative agency" was equipped to make findings that would better be left to courts, particularly with a community standard involved. *Id.* at 423-24. In conclusion, Bazelon wrote:

The First Amendment must, first, last and always, depend on the force of reason and constitutional command to vindicate its principle in favor of such unpopular speech as we have here. The Amendment is fragile, its commands easily avoided and its defense always difficult because the easy cases never come into court.

Id. at 424.

167. 41 F.C.C.2d at 924 (Commissioner Johnson, dissenting).

168. *Illinois Citizens Committee*, 515 F.2d at 405-06.

169. 390 U.S. 629 (1968). In *Ginzburg*, the defendant had emphasized the sexually provocative nature of the materials he sold through the mail by postmarking them with "Middlesex, N.J." *Id.* at 468. The court reasoned that, even if the mailed materials were not obscene, the lines of obscenity were crossed by the pandering manner of the advertising. *Id.* Thus the court held that it was illegal to market materials in a sexually provocative manner if the marketing would appeal to "prurient interests." *Id.* at 474.

170. *Illinois Citizens Committee*, 515 F.2d at 405.

171. *Id.*

III. ACTION FOR CHILDREN'S TELEVISION: MAKING PACIFICA WORKABLE

A. The Factual Setting of the Case

The FCC, primarily through staff rulings, followed *Pacifica* with an enforcement standard effectively limited to the repetitive use of words virtually identical to those used in the Carlin "Filthy Words" monologue.¹⁷² In fact, the early cases suggested a reluctance to take any action that would not survive judicial scrutiny. The rule remained that indecent broadcasts could be aired only after 10 p.m. In 1986, however, the FCC received complaints concerning three broadcasts that ultimately led it to conclude that the post-*Pacifica* approach had been too narrow.¹⁷³ The three FCC decisions were appealed to the D.C. Circuit under the case name of *Action For Children's Television v. FCC*.¹⁷⁴

The first complaint that led to the FCC policy change involved a program broadcast on KPFK-FM, Los Angeles, California—once

172. Soon after the *Pacifica* decision, a similar complaint of indecent programming arose in *In re Application of WGBH Educational Foundation*, 69 F.C.C.2d 1250 (1978). WGBH had come up for license renewal, and Morality in Media of Massachusetts, Inc. (Morality) filed a petition to deny the renewal application based on allegations that WGBH consistently had broadcast offensive programming. *Id.* The FCC rejected the allegations and granted the license renewal, stressing that it could not deny a license because certain materials were "offensive to some or even a substantial number of listeners," and that overall performance must be considered. *Id.* Furthermore, it stated that it only had the prerogative to intervene in cases of language similar to that found in *Pacifica*. *Id.* at 1254.

Not long after *WGBH*, the FCC refused to take action against a gubernatorial candidate who used the word "nigger" in his political spot announcements. *In re Complaint by Julian Bond Atlanta NAACP, Atlanta, Georgia*, 69 F.C.C.2d 943 (1978). The Commission found that such an utterance did not fall within the mandates of *Pacifica*. *Id.*

The Commission next dealt with the question of indecent broadcasting in 1982. A complaint had been received concerning an amateur radio buff in California named Kenneth Gilbert. *In re Revocation of License of Kenneth L. Gilbert*, 92 F.C.C.2d 130 (1982). An investigator found that Gilbert deliberately interfered with the frequencies of two other broadcasters, occasionally using four-letter words. *Id.* The FCC suspended Gilbert's license for his intentional interference with the other radio operators and ruled that Gilbert's bad language was indecent within the definition of *Pacifica*. *Id.*

In 1983, the FCC rejected a complaint against a radio station for broadcasting a morning show that consistently contained "off color" remarks. *In re Review Filed by Decency in Broadcasting, Inc. of a Denial of Its Complaint against Rahall Broadcasting of Indiana*, 94 F.C.C.2d 1162 (1983). Also during that year, a *Pacifica* Foundation station was challenged, while up for license renewal, for allegedly broadcasting indecent language, including the words "motherfucker" and "shit." *In re Application of Pacifica Foundation for Renewal of License for Noncommercial Station, WPFW-FM, Washington, D.C.*, 95 F.C.C.2d 750, 760 (1983). The FCC, however, determined that the use of profanity was occasional, and therefore it did not come within the purview of *Pacifica*. *Id.* at 760-61.

173. New Indecency Enforcement Standards To Be Applied To All Broadcast And Amateur Radio Licenses, Public Notice, 62 Rad. Reg. 2d (P & F) 1218 (April 29, 1987).

174. 852 F.2d 1332 (D.C. Cir. 1988).

again a licensee of Pacifica Foundation, Inc.¹⁷⁵ A regularly aired program entitled "I Am Are You?" was broadcast on Sunday, August 31, 1986, between 10 and 11 p.m.¹⁷⁶ It contained excerpts from a play called "The Jerker," which included a scene in which two homosexual men have a telephone conversation that includes explicit descriptions of anal intercourse and other sexual activity.¹⁷⁷

In response to an initial FCC inquiry, KPFFK-FM contended that

175. *In re Pacifica Radio*, 2 F.C.C. Rcd 2698 (April 29, 1987).

176. *Id.*

177. *Id.* at 2700. A portion of "The Jerker" was excerpted in the FCC's opinion. The material that follows probably is shocking, if not offensive, to most adults. The FCC excerpted it as a prime example of how the seven-dirty-word method failed. It is notable, however, that the FCC chose to lift small sections of a play that dealt with a serious subject—death. The play therefore cannot be judged fairly by these phrases alone. The opinion's excerpts began: "Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking." *Id.* at 2700. At another point, a character says no one could tell him that he was immoral if he loved "sucking ass," "taking piss from a guy's cock," or if he had "a quickie blow job in the Union Square men's room." *Id.* During a second vignette in the presentation, one character is trying to excite the other by telling a story that contained the following excerpts:

"We cuddled and played around a bit before he started working on my ass."

"I remember he was kneeling between my legs and he worked my asshole with lube for the longest time—just gettin' it to relax so there was no tension, no fear."

"He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain."

"His cock felt warm inside me—and full—so nice and full. So he began sliding his cock back and forth inside of my ass—but so gently, so gently."

"I don't think I've ever had such a gentle, sensitive fuck before or after. Well, he must [sic] gone at it for twenty minutes at the very least, just slidin' his cock back and forth inside my ass."

"And then he whispered to me, 'You're gonna feel me come inside of you.' And I did. Man, I could feel the cum pulse up his shaft inside of my ass. I could count the pulses and it felt warm and good."

And later in the program this exchange:

Actor 1: "You better get yourself ready for some brother-to-brother, sweaty, down-and-dirty, pig sex, you understand?"

Actor 2: "Yeah!"

1: "None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls and drink my piss like you never have before. You get me?"

2: "Hot throbbing cocks, hard pounding muscles."

1: "You've got it."

Id.

Few people would argue that children should be exposed to exchanges of this type. In fact, "The Jerker" as excerpted may have even violated the Supreme Court's obscenity standard. See *In re Sonderling Broadcasting Corp.*, WGLD-FM, 41 F.C.C.2d 919 (1973), *aff'd sub nom.* *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975). The FCC obviously excerpted extensively to show that the sexually explicit language was not a fleeting word or phrase. The key issue, however, becomes whether the FCC should be able to focus on a limited number of exchanges in making its indecency determination. A reading of only the sexually explicit portions of James Joyce's "Ulysses" certainly would place it within the same category as the FCC has placed "The Jerker."

its program, despite its strong language, was of public interest to the homosexual community in Los Angeles.¹⁷⁸ The station asserted that "The Jerker" dealt with Acquired Immune Deficiency Syndrome (AIDS), and in that context, strong language was needed to highlight the need to champion life in the face of death.¹⁷⁹ KPFFK-FM further argued that the FCC did not properly consider the context of the language when it decided that the play's language was patently offensive.¹⁸⁰ Thus, the station believed that the whole program must be considered rather than episodic statements. Additionally, in an effort to comply with the FCC's advice in earlier cases, KPFFK-FM aired a listener warning prior to the broadcast.¹⁸¹ Finally, KPFFK-FM asserted that there was little chance of children being in the listening audience, which was confirmed by its Arbitron ratings.¹⁸² The FCC rejected KPFFK-FM's arguments and concluded that the excerpts from "The Jerker" were indecent, regardless of the play's seriousness because of "the patently offensive manner in which the sexual activity was described."¹⁸³ The FCC only issued a warning, stating that prior agency decisions might have led the radio station to believe that the broadcast was permissible after 10 p.m.¹⁸⁴

The second complaint embodied in *Action* concerned station WYSP-FM, Philadelphia, Pennsylvania, which is licensed to Infinity Broadcasting of Pennsylvania.¹⁸⁵ The FCC received three complaints about a morning show hosted by announcer Howard Stern.¹⁸⁶ Stern's morning program originated at Infinity's co-owned station in New

178. *Id.* at 2698.

179. *Id.*

180. *Id.* The FCC also had received a complaint on July 10, 1986, alleging that on June 28, 1986, at approximately 7:45 p.m., local time, KPFFK aired a program entitled "Shocktime America," which allegedly contained a narration and song lyrics with such phrases and words as "eat shit," "mother fucker" and "fuck the U.S.A." *Id.* The complaint did not include a transcript or tape recording of the show; and, therefore, the FCC refused to consider it. *Id.*

181. The warning broadcast by KPFFK-FM stated:

The Supreme Court of the United States has directed that broadcasters must be especially aware of the effect of the use of so called "indecent" language during the hours when children may be listening. KPFFK's policy is to allow the freest possible expression consistent with that ruling. The following program contains material which some listeners may find objectionable. If you would be disturbed by the use of such sensitive material, please tune out for the next minutes.

Id. at 2698.

182. *Id.* Arbitron is a service that monitors the number of audience members for particular programs. The service is used by broadcasters and advertisers.

183. *Id.* at 2700.

184. *Id.* at 2701.

185. *In re* Infinity Broadcasting Corp. of Pennsylvania, 2 F.C.C. Rcd 2705 (April 29, 1987).

186. Donald E. Wildmon, National Federation for Decency, Tupelo, Mississippi, filed two complaints on September 26 and November 6, 1986, respectively. Mary V. Keeley, of Philadelphia, filed the third complaint on October 27, 1986. *Id.*

York and was simulcast on WYSP-FM. During a particular broadcast excerpted by the FCC, Stern made repeated jokes with sexual overtones and made references to sexual activities and organs.¹⁸⁷ Infinity contended that Stern's use of innuendo and double entendre did not amount to a violation of the Carlin seven-dirty-words rule.¹⁸⁸ It further asserted that Stern's morning show involved a wide-ranging discussion based on humor and satire that did not, on the whole, reach the realm of patent offensiveness.¹⁸⁹

In deciding *Infinity*, the FCC found that the various sexually oriented topics discussed on the Stern program were not per se "beyond the realm of acceptable broadcast discussion."¹⁹⁰ The FCC concluded, however, that the programs contained patently offensive material because of the manner in which Stern presented it.¹⁹¹ The

187. The FCC's opinion cited the following excerpts:

Excerpt 1

Howard Stern: "God, my testicles are like down to the floor. Boy, Susan, you could really have a party with these. I'm telling you honey."

Ray: "Use them like Bocci balls."

Excerpt 2

Howard Stern: "Let me tell you something, honey. Those homos you are with are all limp."

Ray: "Yeah. You've never even had a real man."

Howard Stern: "You've probably never been with a man with a full erection."

Excerpt 3

Susan: "No. I was in a park in New Rochelle, N.Y."

Howard Stern: "In a park in New Rochelle? On your knees?"

Susan: "No. no."

Ray: "And squeezing someone's testicles, probably."

Excerpt 4

Talking to a caller[.]

Howard Stern: "I'd ask your penis size and stuff like that, but I really don't care."

Excerpt 5

As part of a discussion of lesbians[:]

Howard Stern: "I mean to go around porking other girls with vibrating rubber products and they want the whole world to come to a standstill."

Excerpt 6

Howard Stern: "Have you ever had sex with an animal?"

Caller: "No."

Howard Stern: "Well, don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds? . . . Baaaaah. That's where I was thinking that Sherri Lewis, instead of like sodomizing all the people at the Academy to get that shot on the Emmys she could've had Lambchop do it."

Id. at 2706.

188. *Id.* at 2705.

189. *Id.* A distinction was made between vulgarities and patently offensive language; however, the court never explained the distinction or its importance. *Id.*

190. *Id.* at 2706.

191. *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad. Reg. 2d (P & F) 211, 217

FCC found that, because WYSP-FM aired the material during morning hours, there was a reasonable risk that children were in the audience.¹⁹² As in the case involving KPFB-FM, the FCC only issued a warning.¹⁹³

The third and final *Action* complaint involved KCSB-FM, Santa Barbara, California, which is licensed to the University of California.¹⁹⁴ During a music program aired after 10 p.m., KCSB-FM broadcast a song entitled "Makin' Bacon," which included graphic suggestions of sexual activity.¹⁹⁵ Finding the lyrics of "Makin' Bacon" patently offensive, the FCC held that the broadcast of the

(Dec. 29, 1987) (reconsideration order). The FCC agreed that much of the material was merely innuendo and double entendre, and neither patently offensive nor indecent, but some portions of the broadcasts could not meet this characterization. *Id.* at 217. These portions:

consisted of vulgar and lewd references to the male genitals and to masturbation and sodomy broadcast in the context of what we described, and which has not been disputed, as 'explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles.'

Id. (footnote omitted).

192. The FCC noted that the programs "did not contain merely an occasional off-color reference or expletive, but instead dwelt on sexual and excretory matters in a pandering and titillating fashion indicat[ing] that children who may have randomly tuned into them would have likely continued to listen." *Id.*

193. *Id.* at 2701.

194. *In re Regents of the University of California*, 2 F.C.C. Rcd 2703 (1987).

195. The FCC's opinion included this excerpt:

Makin' bacon, makin' bacon, makin' bacon, makin' bacon
[inaudible]

A ten-inch cropper with a varicose vein

Makin' bacon is on my mind

Come here baby, make it quick,

Kneel down there and suck on my dick

Makin' bacon is on my mind

Makin' bacon is on my mind

Turn around baby, let me take you from behind,

Makin' bacon is on my mind.

With your blue, blue knickers, you look so neat,

Bend over baby, gonna give you my meat,

Makin' bacon is on my mind.

Get down baby on your hands and knees

Take my danish and give it a squeeze

Makin' bacon is on my mind

Makin' bacon is on my mind

Turn around baby, let me take you from behind

Makin' bacon is on my mind.

* * *

Hey baby, got something to chew

Deep throat, baby, it's good for you

Makin' bacon is on my mind.

* * *

Makin' bacon is on my mind

song violated the indecency standards because it contained lewd and graphic references that rendered any purported innuendo or double entendre in the remainder of the song to be of a sexual meaning.¹⁹⁶ As in the two *Action* cases before it, the University of California received only a warning based on its ignorance of the new standard.¹⁹⁷

B. Court of Appeals Review

The broadcasters cited in the three complaints, joined by citizen groups, successfully petitioned the FCC for reconsideration of the actions,¹⁹⁸ but in the rehearing, the FCC reaffirmed the generic standard.¹⁹⁹ The FCC emphasized, however, that the subject matter alone does not render material indecent,²⁰⁰ rather, it must be presented in a manner that is patently offensive.²⁰¹ This, of course, offered little in making the standard for indecent speech more concrete. The FCC, however, backed off its initial claim that no standard time could be set for deciding when children were likely to be in the audience, suggesting that midnight was a proper time after which indecent programming could be aired.²⁰²

Turn around baby, let me take you from behind
Makin' bacon is on my mind.

Id.

196. The court stated:

As noted in *Infinity Broadcasting Corp.* and *Pacifica Foundation*, also decided today, prior Commission rulings have applied the *Pacifica* definition of indecency in a manner that requires clarification. We find that this broadcast made several clearly discernible references to sexual organs and activities, and that these references are patently offensive as measured by contemporary community standards for the broadcast medium. In addition, as we noted in *Infinity*, innuendo can be, and in this case is, rendered explicit by surrounding explicit references that make the meaning of the entire discussion clear. Although the material aired does not involve the specific seven words at issue in the *Pacifica* case, we find that it would be actionable under our clarified definition of indecency set forth today.

Id. at 2703-04 (footnotes omitted).

197. *Id.* at 2704. In June 1988, the FCC, by a 2-1 vote, took action against Media Central's KZKC-TV, Kansas City, Missouri, for broadcasting a film the Commission deemed to be indecent. Brief Section, BROADCASTING, July 1, 1988, at 10. A \$2,000 fine was imposed making KZKC-TV the first television station to be fined for indecency. *Id.* The station had broadcast the film "Private Lessons" during prime time in May 1987. *Id.*

198. *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad. Reg. 2d (P & F) 211 (Dec. 29, 1987) (reconsideration order). Morality in Media filed opposing comments. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 217.

202. Commissioner Patricia Diaz Dennis concurred, but disagreed with the FCC's purported adoption of midnight as a "safe harbor." *Id.* at 220. She stated that the FCC's adoption of midnight was unclearly stated dicta. *Id.* Diaz further found that "after stating why an adjudicatory matter is not the vehicle for defining the critical hour after which

The broadcasters and citizens groups then petitioned the D.C. Circuit for review of the FCC's decision.²⁰³ The D.C. Circuit upheld the generic definition of indecency, but found that the FCC did not adequately justify its more restrictive channeling of indecent broadcasts into night hours.²⁰⁴ Although the court affirmed the FCC's declaratory warning order against the Howard Stern morning program, it vacated the FCC's orders regarding the two programs aired after 10 p.m.²⁰⁵ The court remanded those two cases to the FCC with instructions to reopen the channeling aspect of the rulings.²⁰⁶ The court specifically asked the FCC to consider whether the speech at issue had any first amendment protection, and if the FCC's objective was to assist parents and not to become a censor.²⁰⁷

IV. AN ANALYSIS OF ACTION WITH COMPARISONS TO *PACIFICA*

A. *Generic Indecency*

In sum, if acceptance of the FCC's generic definition of "indecent" as capable of surviving a vagueness challenge is not implicit

indecent material may be broadcast, [the majority] discuss[es] the merits of adopting a 12:00 midnight hour." *Id.*

Diaz also wrote that:

At stake are important constitutional issues and equally important societal values. Indecent speech is protected by the first amendment. On the other hand, the compelling government interest in protecting the welfare of children obligates us to channel the time, place, and manner of indecent speech so there is no reasonable risk that children may be in the audience. Yet, to avoid chilling broadcasters' speech by subjecting them to a vague or overbroad standard, we must be as specific as possible in describing how such speech should be channelled. The least we could have done was to establish a time certain after which indecent material may be channelled.

Id.

Diaz ultimately proposed a post-prime time hour as the "safe harbor" for airing indecent broadcasts. *Id.* at 221. This, she suggested would be either 10 or 11 p.m., depending on the community. *Id.* at 220. Weekend nights would require a midnight starting point. *Id.* at 221. She cited *Butler v. Michigan*, 352 U.S. 380 (1956), for the proposition that time, place, and manner restrictions imposed to advance the government and societal interests in protecting the welfare of children cannot reduce adult programming to the level of what is fit only for children. *Infinity Broadcasting Corp.*, 64 Rad. Reg. 2d (P & F) at 220.

203. *Action For Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The American Civil Liberties Union Foundation, Media Central, Inc., and the National Federation of Community Broadcasters intervened in support of the petitioners. *Id.* Monroe Communications Corporation intervened in support of the FCC. *Id.*

204. *Id.* at 1334-35.

205. *Id.*

206. *Id.* at 1334.

207. *Id.*

in *Pacifica*, we have misunderstood Higher Authority and welcome correction.

Judge Ruth B. Ginsburg²⁰⁸

The D.C. Circuit acknowledged that *Action* involved a considerable expansion of the rule set out before the Supreme Court in *Pacifica*.²⁰⁹ Where *Pacifica* addressed a single, narrowly focused FCC order, the court found that *Action* presented much broader policy considerations.²¹⁰ As such, a different judicial response was required.²¹¹ The court stated that the FCC used an informal adjudication format to promulgate a rule of general applicability.²¹² The court concluded that the FCC may not resort to adjudication as a means of insulating a generic standard from judicial review.²¹³

The broadcasters and citizens groups focused their argument on the vagueness and overbreadth of the indecency standard.²¹⁴ They contended that the FCC virtually had unlimited discretion in defining the material that could be proscribed, which in effect made the Commission a censor.²¹⁵ In response to the petitioners' vagueness argument, the court held that the nature of indecent language did not allow a more specific definition.²¹⁶ The D.C. Circuit agreed with the FCC—with little explanation—that the seven-word standard was not

208. *Id.* at 1339.

209. *Id.* at 1337. The FCC had urged the D.C. Circuit to review nothing more than the three specific FCC holdings declaring material 'indecent as broadcast' as the Supreme Court had in *Pacifica*. *Id.* at 1336. Thus the court only would have considered whether the programs were indecent, and, if so, whether they were aired at a time when children may have been in the audience. *Id.* at 1337. The court rejected this approach. *Id.*

210. *Id.*

211. *Id.* at 1336.

212. *Id.* at 1337.

213. *Id.*

214. Brief for Petitioners at 32, *Action*, 852 F.2d 1332 (D.C. Cir. 1988) (No. 88-1064).

215. *Action*, 852 F.2d at 18. When Congress adopted the indecency section of the Communications Act, which eventually became Section 326, it failed to explain the intended meaning or scope of the indecency prohibition. See H.R. CONF. REP. NO. 1918, 73d Cong., 2d Sess. 49 (1934); S. Doc. No. 200, 69th Cong., 2d Sess. 19 (1927); S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926).

216. The D.C. Circuit quoted with approval from Judge Leventhal's dissent in *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. 1977). *Action*, 852 F.2d at 1338. Judge Leventhal stated:

It is appropriate to acknowledge some inexactness in the agency's approach, and to say that this is an abiding discomfort but not a brand of invalidity. Vagueness is to some extent inherent in the subject matter, and is heightened by a procedure, of rulings in particular instances, that presents problems but also has virtues. The Supreme Court's long struggle with obscenity cases reflects the underlying complexities, and those cases involved criminal sanctions. Nor is regulation of indecency precluded by the administrative agency setting. *Miller* [*Miller v. California*, 413 U.S. 15 (1973)] has language that features the value of a finding by a jury representing the community. Yet *Miller's* continuation of an

sufficient to protect children from patently offensive material,²¹⁷ and therefore the FCC's generic definition was the best alternative.²¹⁸ Additionally, the court stated that "the generic definition now employed by the FCC is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case."²¹⁹

The D.C. Circuit's reference to *Pacifica* amounts to an oversimplification of the Supreme Court's treatment of indecency. Justice Stevens, in his *Pacifica* plurality opinion, stated that the Court's "review is limited to the question of whether the Commission has the authority to proscribe the particular broadcast."²²⁰ Stevens also noted that "questions concerning possible action in other contexts were expressly reserved for the future,"²²¹ and he declined to consider the broader question of the constitutionality of the standard.²²² This language demonstrates that the Court did not consider a broad indecency standard, although it had every opportunity to do so.²²³

Furthermore, the D.C. Circuit's decision neglected to detail the role that broadcast context plays in determining indecency.²²⁴ The FCC stated that the context will be important, but it did not elaborate on this point.²²⁵ In other words, the context in which an indecent remark is made is an indeterminate variable in an FCC equation that offers no benchmark by which broadcasters can measure their actions. Under this approach, broadcasters are given no meaningful direction to evaluate the relative values of content and form in broadcasting.²²⁶

obscenity exception to freedom of press has been approved in other cases where there was no criminal prosecution and no jury.

Pacifica, 556 F.2d at 35 (Leventhal, C.J., dissenting).

217. *Action*, 852 F.2d at 1338.

218. *Id.*

219. *Id.*

220. *FCC v. Pacifica Foundation*, 438 U.S. 726, 742 (1978).

221. *Id.* at 734.

222. *Id.* at 742-43.

223. Justice Powell, in concurrence, agreed that the Court appropriately had refused to consider the overbreadth challenge because the Commission's order was limited to the facts of the case. *Id.* at 761 n.4 (Powell, J., concurring).

224. *Id.* at 40.

225. *Public Notice*, 62 Rad. Reg. 2d (P & F) 1218, 1219 (April 29, 1987) ("[T]he context in which the allegedly indecent language is broadcast will serve as an important factor in determining whether it is, in fact, indecent.").

226. In a footnote to his *Pacifica* opinion, Justice Stevens stated: "A requirement that indecent language be avoided 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." *Pacifica*, 438 U.S. at 743 n.18. Taken on its face, Stevens creates an odd conception of the first amendment in which a person's thoughts are protected until uttered in a manner that might offend some people.

The Howard Stern program, broadcast on WYSP-FM, was a top-rated program in the Philadelphia radio market.²²⁷ The inescapable conclusion is that *someone* was interested in the message relayed by Stern.²²⁸ The court's failure to explain why Stern's joking references to sex are any more patently offensive than the occasional utterance of a four-letter word or explicit discussion of sex on a "serious" talk show further muddles the definition of indecency. The court should be required to state explicitly the interests at stake, and then discuss how it arrived at the weights it used to balance those interests. Simply saying that certain material may be harmful to children has no basis in reason or logic. The court must first state what the relevant ages of the child audience are and how the material may be harmful to them. Then it must give some weight to the first amendment rights of the broadcasters and discuss why those rights are outweighed by the interests of children.²²⁹

B. *The Channeling Rationale*

The D.C. Circuit remanded two of the three FCC orders that concerned programming after 10 p.m.²³⁰ In so doing, the court rejected the FCC's position that "safe harbors" should encompass different time periods across the nation.²³¹ Irrespective of the D.C. Circuit's concern about channeling, however, the FCC ultimately adopted a twenty-four-hour ban on indecency in December 1988.²³² The expansive ban directly resulted from congressional pressure in the form of a directive attached to the FCC's budget appropriations.²³³ The recent action directly conflicts with the Supreme Court's rationale for regulating indecency in *Pacific*, as well as the court's concerns in *Action*. FCC Chairman Dennis Patrick did not overlook this fact when he said that the expanded ban of indecency appeared to be unconstitutional.²³⁴

Thus the safe harbor issue remains in flux and is likely to be back in court. The FCC argues that, at a minimum, the need to protect children justifies the channeling of indecent broadcasts, although

227. *Indecency: Radio's sound, FCC's fury*, BROADCASTING, June 22, 1987 at 46-49 (Stern's show produced enough mail to fill five folders at the FCC.).

228. *Id.*

229. *See infra* Section V.

230. *Action*, 852 F.2d at 1334.

231. *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad. Reg. 2d (P & F) 211, 219 n.47 (Dec. 29, 1987).

232. *In re Enforcement of Prohibitions Against Broadcast Obscenity and Indecency*, 65 Rad. Reg. 2d (P & F) 1038 (Dec. 23, 1988).

233. *See* 134 CONG. REC. § 9912 (daily ed. July 26, 1988) (remarks of Sen. Helms).

234. *Enforcement of Prohibitions*, 65 Rad. Reg. 2d (P & F) at 1039.

Pacifica could be read to include the protection of vulnerable adults.²³⁵ Proponents of FCC control in this area argue that radio and television intrude so easily into the home that parents cannot control what their children are exposed to.²³⁶ This argument, however, ignores the desire of some parents to expose their children to material that the FCC might consider indecent.²³⁷ Furthermore, some argue that the pervasive nature of broadcasting is, in fact, a good reason to present more than a limited number of morally backed viewpoints.²³⁸

The problem in creating an indecent speech "safe harbor" is analogous to the controls on morally offensive printed material that might be distributed to children.²³⁹ In order to successfully create such a "safe harbor," the FCC must establish strict standards that allow adults access to this type of material.²⁴⁰ In *Action*, the D.C. Circuit remanded the "safe harbor" cases to the FCC with instructions to carefully tailor the channeling approach to assist parents without unnecessary censorship.²⁴¹ The court stated that, when possible, programs that might offend children should be broadcast late at night with warnings so that parents properly can supervise their children.²⁴² Undoubtedly, some youths will be awake when such broadcasts might be aired, but the numbers that are subject to legitimate government concern will be significantly lowered.²⁴³

Any channeling approach ultimately fails, however, for the same reason that regulating indecency with the current generic standard is

235. In its 1960 Programming Policy Statement, 44 F.C.C. 2303 (1960), the FCC asserted:

We recognize that the broadcasting medium presents problems peculiar to itself which are not necessarily subject to the same rules governing other media of communication. As we stated . . . 'radio and TV programs enter the home and are readily available not only to the average normal adult but also to children and to the emotionally immature. Thus, for example, while a nudist magazine may be within the protection of the first amendment the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464.'

Id. at 2307.

236. See Brief for Intervenor Monroe Communications Corporation at 7, *Action For Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (No. 88-1064).

237. *Pacifica*, 438 U.S. at 769-70 (Brennan, J. dissenting).

238. See *Eastern Educational Radio*, 24 F.C.C.2d 408; cf. *Ginzburg v. United States*, 383 U.S. 463, 489-91 (1966) (Douglas, J., dissenting).

239. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court held unconstitutional a state law that prohibited the sale of any books containing immoral language or pictures tending to corrupt the morals of youth. *Id.* at 384. The Court found that the statute, designed presumably to protect children, denied adults access to constitutionally protected materials. *Id.* at 383-84. Such a quarantine on general distribution would, in the context of *Butler*, "burn the house and roast the pig." *Id.* at 383.

240. Brief for Petitioners at 40, *Action*, *supra* note 214 (No. 88-1064).

241. *Action*, 852 F.2d at 1334.

242. *Id.* at 1343-44.

243. See Brief for Petitioners at 40, *Action*, *supra* note 214 (No. 88-1064).

inadequate. In order to channel indecency, it still must be readily identifiable. If the channeling approach will ever work properly, the type of show in which the indecency airs, the time it airs, and the likelihood that a child might listen to it should be considered in measuring indecency. Then the FCC could more properly establish the "safe harbor."

V. DEFINING INDECENCY AND THE CHILLING EFFECT ON FIRST AMENDMENT RIGHTS

Thus far in the discussion it has been apparent that the FCC and courts act under the assumption that broadcast programming, and not material in other media, may be held to a different standard for two reasons: first, the uniquely pervasive quality of the medium; and second, the detrimental effect that some material can have on unsupervised children, which outweighs the substantial first amendment interests of broadcasters and interested audience members.

A. *The Differences Between Broadcast and Other Media*

Justice Stevens, in *Pacifica*, concluded that because broadcasting is pervasive in the home and accessible to children, it presents special first amendment problems that require different treatment than is required for other media.²⁴⁴ Justices Powell and Blackmun considered this perfunctory rationale sufficient to join the majority, which held that the FCC may constitutionally regulate indecent, nonobscene broadcasting.²⁴⁵ This rationale, however, appears to be increasingly implausible, particularly with the advent of cable television and the increasing availability of printed materials. For the purposes of this discussion, radio is compared to books, magazines, and newspapers; and broadcast television is compared to cable television—although the arguments in each area overlap for the most part.

1. RADIO

Radio is no more an "intruder" into a home than a newspaper or a magazine, both of which operate under no indecency standards.²⁴⁶ In fact, newspapers and magazines are more accessible to youths, who can freely purchase or peruse them at any corner convenience store.²⁴⁷ Moreover, printed material arguably is more intrusive on parental

244. *Pacifica*, 438 U.S. at 747-50.

245. *Id.* at 757-59.

246. *Id.* at 748. In *Pacifica*, Justice Stevens reasoned that radio was an "intruder" in the home and thereby required different treatment. *Id.*

247. The annual SPORTS ILLUSTRATED swimsuit issue, which contains partial nudity, is the

control because it tends to be more permanent and can be used in a more secretive manner. Unlike broadcasts, improper language in print can be indefinitely reviewed, which could lead to more episodic rereading of indecent material. Broadcast, by contrast, requires taping a program for review, a procedure that is considerably more "public" than hiding a book under a pillow or reading it in a basement. Certainly the argument can be made that a Walkman, or any portable radio, places broadcast outside the area of parental control. But it is still the parent who must approve of a child possessing one of these types of radios.

2. TELEVISION

Courts have found that cable television, like printed material, is worthy of more constitutional protection than broadcast television.²⁴⁸ Cable operators generally have functioned under a municipal franchise awarded through a competitive bidding process.²⁴⁹ Efforts to restrict indecency on cable television have involved local ordinances or contractual provisions in the franchise agreement, which sometimes are backed by similar state statutes.²⁵⁰

The physical properties of broadcasting and cable, however, have many similarities. Electromagnetic radiation distributes both, although broadcast signals are transmitted through space and cable signals travel through wires. Nevertheless, the argument is made that a major distinction exists in the different ownership of the means by which signals are transmitted.²⁵¹ Under this distinction, it is proper to regulate broadcasting because the airwaves are owned by the public, while wires are owned by cable operators. By this logic, however, cable television could be regulated because wires are run through the

magazine's most successful issue of the year. See *Hot Issue*, Miami Herald, Feb. 7, 1989, at D1.

248. See *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah), *aff'd*, *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987). The district court held that a Utah statute that barred the showing of "indecent material" on cable television systems was overbroad. *Id.* at 1117. Although the legislature could constitutionally bar "obscene" material, the court reasoned that some "indecent material" is not "obscene," and thus the statute barred material that is protected by the first amendment, as well as unprotected material. *Id.*

249. See Winer, *The Signal Cable Sends, Part II—Interference From The Indecency Cases?*, 55 *FORDHAM. L. REV.* 459, 504 (1987).

250. A description of federal regulation in this area can be found in the 1984 Cable Act, 47 U.S.C. §§ 529-559 (Supp. IV 1986).

251. See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 *MINN. L. REV.* 67, 152 (1967) (Public ownership of the broadcast spectrum is logically meaningless, since it lacks the characteristics of property that can be owned.).

public right of way.²⁵² Furthermore, independent companies produce the majority of programming distributed by cable operators, and those programs are transmitted via satellite or by microwave relay stations to the operators.²⁵³ Thus, the distribution of cable programming relies on the same "public" airwaves as broadcasting.²⁵⁴ The only difference is that a step is added—local cable operators—to the process.

The obvious retort to the assertion that broadcasting and cable possess similar physical properties is that one must be a subscriber to receive cable programming.²⁵⁵ Yet, as long as individuals have free will and are not required to purchase a television set, the reception of broadcast airwaves also involves the free choice of consumers. In each case, a viewer must purchase equipment to receive the benefit of what is transmitted through the airwaves. Broadcast signals are no more intrusive into the homes of television owners than satellite transmissions are intrusive into the homes of satellite dish owners.

Parents arguably may limit cable viewing by purchasing lockboxes or parental discretion units (PDU), but few parents who are cable subscribers actually use such devices,²⁵⁶ and lockboxes are available for broadcast television as well.²⁵⁷ There also are other technological advances that could give parents more control over the programs available to their children.²⁵⁸ Consequently, broader regulation for broadcast is not justified simply because the alternative of less regulation requires new but available technological methods.²⁵⁹

252. See Winer, *supra* note 249, at 459, 512-13.

253. *Id.* at 513.

254. *Id.*

255. *Id.*; see also *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167 (D. Utah 1982).

256. See *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah), *aff'd*, *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986) (The Utah Attorney General argued that, although cable subscribers were advised of the availability of lockboxes either free or for less than \$20, fewer than 1% of the cable company subscribers chose to obtain this equipment.), *aff'd*, 480 U.S. 926 (1987).

257. Similar to the cable television lockbox, or parental discretion unit ("PDU"), which allow parents to lock out particular channels likely to contain material they do not want their children to see, public broadcast discretion devices have been created. See, e.g., Sony Trinitron Color Television 1988 (brochure available from Sony Corporation of America, Sony Drive, Park Ridge, New Jersey, 07656). Fourteen of twenty-four Sony television models offer devices that allow channels to be blocked out. *Id.*; see also General Electric, Inc., (Command Performance (TM) Series television sets) Pub. No. 76-4036, (available from General Electric's Video Products Business Division, Portsmouth, VA 23705). These new devices contain timing systems that allow a parent to block out designated channels, including those for playback of recorded material.

258. See Winer, *supra* note 249, at 459, 516-19 (1987).

259. The United States Court of Appeals for the Second Circuit recently rejected the FCC's efforts to regulate dial-a-porn through time-channeling or access code provisions because the

Ultimately, because technology equally could be used for cable and broadcast, the real question becomes the supervision and control that adults exercise over the viewing and listening habits of their children.

B. *The Child Audience and Indecency*

The idea that children require special protection from indecency emanates from the premise that freedom of speech requires a degree of maturity, intellect, and self-control on the audience's part.²⁶⁰ Thus, governmental intervention is necessary if the audience lacks any of these qualifications.²⁶¹ The vulnerable audience concept has common sense value, but, particularly in the area of indecency, it easily can inspire expansive regulation to protect what essentially could be defined as a limitless interest.²⁶² The most interesting problem raised by the child audience is that children are incapable of understanding some of the indecent material from which they are being protected. The argument could be made, particularly in regard to innuendo or double entendre, that certain indecent references are beyond the understanding of young children. Along these lines, perhaps the major problem for broadcasters has been defining the child audience itself. Certain phrases and descriptions that might be readily understood as indecent to a nine-year-old might be beyond the understanding of a four-year-old and innocuous to a seventeen-year-old. The courts and the FCC have given little guidance in this area, although the Commission recently has suggested that the definitional age of "children" should be twelve years old.²⁶³

The government claims a legitimate interest in the development of children, and thereby the materials available to them.²⁶⁴ Because

FCC failed to adequately consider less restrictive means that were technically and economically feasible, such as new ways of selectively screening or blocking such reception. See *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 855-57 (2d Cir. 1986); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 122-23 (2d Cir. 1984).

260. H. KALVEN, *supra* note 143, at 54-55.

261. *Id.* at 54.

262. *Id.* at 55.

263. A.B.A. J., Nov. 1, 1988, at 29. FCC General Counsel Diane Killory suggested that the definitional age for children would be shifted from eighteen to twelve-years old for the purposes of determining indecency. *Id.*

264. In *Pacifica*, Justice Stevens suggested that indecency could also be banned because some adults would not be able to avoid offensive words as they were switching through radio channels. 438 U.S. at 748-49. Although Stevens suggested that vulnerable adults needed protection, he also suggested that indecency could be broadcast in the late evenings hours when certainly some of those adults might still be listening. *Id.* at 750. Thus it appears Stevens contradicted his own argument. Furthermore, Stevens gave no support for the premise that broadcast should be held to the moral level of the most vulnerable people in society.

indecent speech does not reach the level of obscenity, the government's interest in regulating such speech lies in its authority to aid parents' efforts in raising and educating their children.²⁶⁵ Contrasting the problem of protecting children, the Court consistently has maintained that it is improper to reduce the adult population to viewing and reading only what is appropriate for children.²⁶⁶ The problem squarely becomes how to protect children without completely abridging the first amendment rights of adult listeners and broadcasters. Completely banning indecency eliminates protected communication.²⁶⁷ Restricting indecency to late evening and early morning hours, as suggested in *Pacifica*, also substantially intrudes on the rights of both programmers and viewers by effectively precluding protected expression during the hours when most adults are awake.²⁶⁸ It becomes obvious when one considers the polarized interests at stake that it is impossible for government to make a concrete regulation that would single out the youthful portion of the viewing and listening audience without substantially encroaching on the constitutional rights of adults.

In the home, however, parents are in a better position to make individualized judgments regarding household viewing habits of both sexual material and graphic violence.²⁶⁹ The Supreme Court long has deferred to a parent's right to control the development and upbringing of his children.²⁷⁰ Thus, parental control is not only the most effective method, but the most protective of first amendment rights. There is therefore no basis for distinguishing between cable television and broadcasting, or between print and radio, for indecency regulation because parental authority can be exercised in each medium.

265. *Id.* at 728; see also Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971).

266. See, e.g., *Butler v. Michigan*, 352 U.S. 380 (1957). In *Butler*, the defendant was convicted of making published material available to the general public that might have a deleterious influence on youth. *Id.* at 383. The court held that reducing the adult public to reading material that was suitable for children was overbroad and would amount to "burn[ing] the house to roast the pig." *Id.* at 384.

267. See *Pacifica*, 438 U.S. at 770-71 (Brennan, J., dissenting).

268. See *Community Television v. Wilkinson*, 611 F. Supp. 1099, 1117 (D. Utah), *aff'd*, *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

269. *Id.* at 1117.

270. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972) (Parents may remove children from public school if continued attendance would substantially infringe on legitimate religious beliefs.); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.").

VI. OVERBREADTH, VAGUENESS, AND THE CHILLING EFFECT²⁷¹

Even if the FCC's argument regarding the uniqueness of broadcasting is accepted, it seems odd that the scrupulous adherence to the protection of first amendment values would be discarded. The FCC's generic standard offers no guidance for defining which suggestive material is "patently offensive." The vagueness inherent in the indecency standard gives the FCC unbridled discretion to choose which first amendment values it will permit.

A. *The Overbreadth and Vagueness of a Generic Standard*

The vagueness problem that might invalidate a piece of legislation often accompanies overbreadth, but the two concepts are not identical. A law is overbroad if it is overinclusively drafted to proscribe expressive conduct that is beyond the government's constitutional authority.²⁷² Furthermore, an overbroad law often is void on its face and need not be attacked as applied to the particular facts of a case.²⁷³ Facial invalidation is appropriate for overbroad laws with two characteristics.²⁷⁴ First, the overbreadth must be substantial, and the protected speech must be a significant part of the law's "target area."²⁷⁵ Second, it must not be possible to excise the unconstitutional applications of the overbroad law.²⁷⁶ If, however, a court can adopt a limiting construction that omits unconstitutional applications the law is not overbroad.²⁷⁷ Similarly, the doctrine of vagueness voids a statute that defines forbidden conduct so unclearly that persons "of common intelligence must necessarily guess at its meaning and differ

271. The chilling effect stands for the proposition that the very existence of the legal rule in question will cause would-be speakers to shy away from the legitimate exercise of their first amendment rights because they will fear the possibility of either criminal or civil liability. See *Pacifica*, 438 U.S. 726, 762 (Brennan, J., dissenting).

272. See *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

273. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852 (1970). The author stated:

[The overbreadth doctrine] results often in the wholesale invalidation of the legislature's handiwork, creating a judicial-legislative confrontation. In the end, this departure from the normal method of judging the constitutionality of statutes must find justification in the favored status of rights to expression and association in the constitutional scheme.

Id. at 852.

274. L. TRIBE, *supra* note 92, § 12-27, to -28, at 1022-24.

275. See *New York v. Ferber*, 458 U.S. 747 (1982) (Upholding, without dissent, a criminal conviction under a state statute that prohibited the distribution of depictions of sexual performances by children under the age of sixteen.).

276. *Id.*

277. L. TRIBE, *supra* note 92, § 12-28, at 1024.

as to its application."²⁷⁸ In the first amendment area, an unduly vague statute has the same chilling effect on speech as does an overbroad one: one does not know whether his conduct is constitutionally protected, so he declines to exercise his right of speech.²⁷⁹

The overbreadth and vagueness doctrines evidence the Supreme Court's grave concern for the protection of first amendment values and the avoidance of "chilling" protected speech.²⁸⁰ In *Miller v. California*,²⁸¹ the Court attempted to further clarify the definition of obscenity by requiring that state statutes be "carefully limited," so as not to intrude upon legitimate expression.²⁸² Although *Miller* by no means completely answered the question of specificity in obscenity, it did require that material be considered as a whole and that patently offensive activity should be specifically defined by law.²⁸³ In *Community Television v. Wilkinson*,²⁸⁴ a federal district court held a Utah cable indecency statute overbroad and vague because it failed to account for *Miller*'s variable community standard and to consider the work as a whole.²⁸⁵ The Supreme Court affirmed the district court's holding.²⁸⁶

The FCC's generic standard suffers from the infirmities of overbreadth and vagueness. Consider the new standard's three component parts: 1) language or material that depicts or describes sexual or excretory activities or organs in a patently offensive manner; 2) as

278. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

279. The main difference between overbreadth and vagueness is that vagueness is "latent." See Freund, *The Supreme Court of the United States*, 92 HARV. L. REV. 15 (1979) (Both areas require that there be uncertainty about which applications of a statute constitutionally may be imposed.).

280. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970).

281. 413 U.S. 15 (1973).

282. *Id.* at 23-24.

283. See *supra* note 19.

284. 611 F. Supp. 1099 (D. Utah), *aff'd*, *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 107 S. Ct. 1559 (1987).

285. 611 F. Supp. at 1110.

286. 480 U.S. 926 (1987); see also *Brown v. Oklahoma*, 408 U.S. 914 (1972) (The Court vacated and remanded a conviction under a statute barring obscene and lascivious language in any public place or in the presence of females.); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (The Court vacated and remanded a conviction under a breach of peace statute prohibiting offensive speech.); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (The Court summarily vacated and remanded a conviction under a disorderly persons statute prohibiting the use of offensive, profane, or indecent language in a public place.); *Cohen v. California*, 403 U.S. 15 (1971) (The Court invalidated a state law that found Cohen guilty for printing a four-letter word on his jacket.); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (The Court held unconstitutional a state law creating a commission that was to "educate the public concerning [materials] containing obscene, indecent or impure language, or manifestly tending to the corruption of youths.").

measured by contemporary community standards for the broadcast medium; and 3) is broadcast at a time when there is a reasonable risk that children would be in the audience.²⁸⁷

It is important to note, as evidenced in *Pacifica*, that the use of a patently offensive word is not always improper.²⁸⁸ Accordingly, patent offensiveness must be judged by some metaphysical standard whereby only repeated use of indecent words or phrases meets the generic test.²⁸⁹ Furthermore, innuendo and double entendre are not categorically indecent, which only can mean that such words or phrases are protected speech. Yet, the generic standard does not make a distinction for protected and unprotected patently offensive phrases. The FCC, in a 1976 legislative proposal for a new law regulating indecency, conceded that, short of defining a recognizable category of expression as unprotected, a generic standard probably would be overbroad and vague.²⁹⁰ The FCC's current definition, however, conflicts with the *Miller* requirements for obscenity and the Commission's own fears of overbreadth and vagueness.²⁹¹

Although limited by the Supreme Court in recent years, facial invalidation is the appropriate cure for the "chilling effect" created by overbroad laws.²⁹² The generic standard, as it stands, is impermissibly overbroad because it does not distinguish how the use of indecent words or phrases magically becomes patently offensive. Thus it chills protected speech and is vague because it is not possible to distinguish which patently offensive phrases are protected and which are not protected.

287. *In re Infinity Broadcasting Corp.*, 62 Rad. Reg. (P & F) 1218, 1219 (Dec. 29, 1987).

288. *Pacifica*, 438 U.S. at 726.

289. *Id.*

290. *In re Pacifica Foundation Station, WBAI-FM*, 56 F.C.C. 2d 94, 98 (1975).

291. *Id.* at 98 (literary and artistic merit may be considered for evening broadcasts). First, the FCC urges that its standard for indecency is part of the *Miller v. California*, 413 U.S. 15 (1973), test for obscenity and hence constitutional. *Infinity Broadcasting*, 64 Rad. Reg. 2d (P & F) at 216. Although the FCC's "patently offensive" standard for indecency is similar to the second part of the three-part test for obscenity articulated by the Supreme Court in *Miller*, there is an important difference. See *supra* note 19. Under *Miller*, the reach of the "patently offensive" part of the test is significantly narrowed because material must satisfy all three parts of the test to be obscene, including the requirements of appeal to prurient interest and the absence of serious merit when the work is considered as a whole. *Id.*

The FCC's notion of indecency, by contrast, is not limited by a requirement of prurient interest, nor does it consider serious merit a defense to a charge of indecency. *Id.* Taken alone, as the FCC has done in its new indecency standard, the "patently offensive" part of the *Miller* test is so sweeping that it amounts to a wholesale license to proscribe material. *Infinity Broadcasting*, 64 Rad. Reg. 2d (P & F) at 211.

292. See generally Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1981).

B. *A Proper Chill?*

The FCC concedes that broadcasters are "chilled" by its new standard, but it argues that this is "not an inappropriate chill"²⁹³ because it falls only on indecent speech. This last point is difficult to verify, but it is clear that broadcasters, who must petition the FCC periodically for renewal of their licenses, will refrain from broadcasting material that may be "decent."²⁹⁴ As a result, constitutionally protected material that may be controversial will be withheld.²⁹⁵ As Justice Marshall stated in *Arnett v. Kennedy*,²⁹⁶ an overbroad statute "hangs over [people's] heads like a Sword of Damocles. . . . That this Court will ultimately vindicate [a person] if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops."²⁹⁷ By articulating an inherently boundless standard, the FCC effectively has positioned itself as a "Sword of Damocles"—a censor free to forbid whatever is objectionable to "the most vocal and powerful of orthodoxies."²⁹⁸ Given that the FCC particularly is vulnerable to political pressure, the impetus to follow a centrist-orientation makes the Commission a poor arbiter of first amendment rights.²⁹⁹

Ironically, the FCC's concern with the anomalous effects created by a bright-line rule that found only certain words indecent, has developed a case-by-case method of discovering indecency that results in equal but opposite anomalous effects—with first amendment rights as the loser. In April 1988, the FCC, in an effort to further clarify its standard, dismissed indecency complaints against two television stations and three radio stations.³⁰⁰ FCC General Counsel Diane Kil-

293. *Infinity Broadcasting*, 64 Rad. Reg. 2d (P & F) at 219 n.45.

294. License renewals for radio are required every seven years, while renewals for television come up every five years. 47 U.S.C. § 307 (Supp. IV 1986).

295. See *Indecency: Radio's sound, FCC's fury*, BROADCASTING, June 22, 1987, at 46-49. Howard Stern was told to tone down his show after the FCC crackdown. *Id.* at 48. Stern's station also began to periodically run warnings regarding the tone of Stern's material. *Id.* In a speech to New England broadcasters two weeks after the *Pacifica* decision was announced, then FCC Chairman Charles D. Ferris tried to allay the fears of chilled speech by saying a reoccurrence of the fact situation in that case was "about as likely to occur again as Haley's Comet." *Which Way the Wind Blows at the FCC After WBAI*, BROADCASTING, July 24, 1978, at 31-32. The speech was given to the New England Broadcasters Association in Boston, Mass., on July 21, 1978. *Id.* at 31.

296. 416 U.S. 134 (1974).

297. *Id.* at 231.

298. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (Provisions of the New York Education Law that forbid the commercial showing of any motion picture without a license and authorize denial of a license on a censor's conclusion that a film is "sacrilegious" was held void as a prior restraint under the first and fourteenth amendments.).

299. L. POWE, *supra* note 35, at 55.

300. BROADCASTING, April 11, 1988, at 37-38. The action came in the form of letters, all

lory said the dismissals demonstrated that the Commission was "exercising a degree of care warranted by the first amendment."³⁰¹

These dismissals, however, do not clarify the indecency standard in any meaningful way.³⁰² For example, one complaint involved a sex education show for children entitled "Teen Sex, What About the Kids."³⁰³ The show included a discussion of sex, using models of sexual organs.³⁰⁴ The FCC refused to find this program patently offensive because its producers did not make an effort to "shock" the audience, and because it did not pander or titillate in any manner.³⁰⁵ The implication from this analysis is that one can talk explicitly about sex, but not joke about it as "Shock Jock" Howard Stern did in his

dated April 7, 1988 and sent to the individuals who complained about the respective broadcasts. *Id.*

301. *Id.* at 37.

302. The following is a list of the stations, the complaints, and the FCC responses from BROADCASTING, April 11, 1988, at 37-38:

*WCET(TV) Hamilton, Ohio: a complaint was received about the noncommercial station's broadcast of a segment of the film "Heimat" on Oct. 12, 1987, at 9:30 p.m. *Id.* at 37. It was not acted upon because the complaint consisted of written descriptions of films, which could not be judged as to patent offensiveness because a complete tape of the broadcasts was not made available. *Id.* The FCC pointed out that in order to determine context, a full tape recording or transcript of the broadcast must be made available. *Id.*

*WTMA(AM) Charleston, S.C.: North Charleston Mayor John E. Bourne complained that on July 15, 1987, WTMA broadcast a political advertisement opposing his efforts to purchase a clock for city hall, which contained the word "clocksucker." *Id.* The FCC said it "does not restrict broadcasts . . . unless the material involves a patently offensive depiction of sexual or excretory activities The political broadcast at issue does not meet this test in our view." *Id.*

*KING-TV Seattle: A husband and wife from Seattle complained about KING-TV's broadcast on June 3, 1987, of a program entitled "Teen Sex, What About the Kids," based on a sex-education course at an area high school. *Id.* The program included frank discussions of sexual topics using models of sexual organs. *Id.* The FCC said such descriptions of sex were not presented in a patently offensive manner, which would have required utilizing "lewd," "shocking" inferences. *Id.*

*WTRG-FM Rocky Mount, N.C.: A complaint was received regarding the June 3, 1987 broadcast of a song entitled "I Want to Kiss Her, But . . ." *Id.* at 38. The FCC explained that the innuendo and double entendre in this song were not actionable because they did not intermingle "explicit references" that allow only a sexual interpretation of the innuendo and double entendre. *Id.* Thus, the lyrics were not susceptible to solely a sexual interpretation. *Id.* "Rather," the FCC said, "the lyrics are capable of two meanings — one innocent, one sexual." *Id.*

*WBAI-FM New York: A complaint about explicit references to sexual and excretory organs was dismissed for lack of a tape recording or transcript of the program. *Id.*

303. *Id.* at 38-39.

304. *Id.*

305. *Id.* The pandering doctrine, revived from *Ginzburg v. United States*, 383 U.S. 463, 470 (1966), proves troublesome because it lacks objective criteria by which it can be determined. On a subjective basis, almost anything can appear to be pandering to someone.

morning program.³⁰⁶ The question the FCC does not address is how children will be injured by Stern's fleeting jokes more than they would be by models of sexual organs. This question particularly becomes important when one considers that a child of less than ten years old arguably would be more affected by pictures of sexual organs on television than the innuendo and double entendre found in Stern's show.

The FCC insists that it will proceed cautiously in enforcing its new standard because of the difficulty of determining what is indecent, and because each action sets precedent for further action.³⁰⁷ Instead of setting detailed guidelines, however, the FCC has allowed the guidelines to evolve from its periodic actions that are clearing up few questions.³⁰⁸ Thus, the context of a broadcast is supposed to be the most concrete standard by which broadcasters can judge indecency; however, such is not the case. The FCC never has explained the role of the context of the broadcast in its relation to patent offensiveness. Furthermore, the FCC has refused to explain why otherwise patently offensive material can become inoffensive simply by being discussed in a "serious" context. Reading James Joyce's "Ulysses" over the airwaves apparently is not indecent despite its portions of patently offensive language.³⁰⁹ The critically acclaimed play "The Jerker," however, does not rate the same consideration.³¹⁰ Moreover, the FCC has stated that serious merit is among many variables that will be considered in determining patent offensiveness, but in the same discussion, no mention is made of what other variables will be considered.³¹¹

The sum of these abstract indecency standard problems makes it unworkable, evidencing why it is impossible to regulate this area with a generic standard without offending the first amendment. Moreover, Mark Fowler, the recent chairman of the FCC, often emphasized that, as nearly as possible, the print media should be the regulatory model for the electronic media.³¹² Under Fowler, who left the FCC

306. See *supra* note 187 and accompanying text.

307. See *FCC rejects five indecency complaints*, BROADCASTING, April 11, 1988 at 37-38 (The FCC rejected five indecency complaints against two television stations and three radio stations.).

308. *Id.*

309. *Indecency: Radio's sound, FCC's fury*, BROADCASTING, June 22, 1987, at 48. The FCC described "Ulysses" as a classic. *Id.* The FCC allowed the work to be read. *Id.* A radio station manager described the new indecency standard as a "cloud" over contemporary literature, and one that would encourage right-wing groups to challenge license renewal applications. *Id.*

310. See *supra* notes 175-79 and accompanying text.

311. *Id.*

312. Fowler, *supra* note 8, at 455 (Supervision of children's viewing habits should be left to parents so that government control can be relaxed.).

four months before it announced the generic indecency standard, the FCC had remarkable success in carrying out a deregulatory program toward this goal. But apparently a shift in the personnel on the FCC and political pressure served to alter the Commission's attitude toward the free speech rights of broadcasters.³¹³

It becomes apparent that only a *Miller*-type standard, or one similar to it, is the proper method of regulating the first amendment rights of broadcasters. Unless broadcasters can weigh the merit of the material it broadcasts as a whole, they always will be unsure of whether a fleeting indecent statement may render a whole broadcast capable of sanctions. Ultimately, it is difficult to square the first amendment with the FCC's new standard for indecency and the D.C. Circuit's treatment of the standard. The first amendment at a minimum requires those who limit its protection to properly justify their actions. Neither the D.C. Circuit nor the FCC have attempted to put indecency within the framework of what purpose freedom of speech serves and why the liberty is so important.

VII. CONCLUSION

There are four general approaches that the FCC can take to deal with indecency in broadcasting. First, the FCC can ban indecent material entirely, as it recently did at the insistence of Congress. Second, the FCC can recognize that indecent material is protected under the first amendment and thereby outside the FCC's purview of regulation. Third, the FCC can recognize that indecent material is a class of speech that can be channeled to the late evening and early morning hours. And, finally, the FCC can offer technological advances as an alternative to a total ban, e.g., a special class of license to broadcast adults-only material, scrambled channels requiring a special receiver, or lock-out mechanisms.

It is notable that in three of the four possible approaches, indecency must be defined by a standard. Because of the inherent problems in categorizing a type of speech that is so particularly linked with personal preferences, it is difficult to make a general regulation in this area.³¹⁴ The higher the degree of abstraction with which indecent speech is defined, the more broadcasters are justified in demanding that the court or the FCC specify what factors render a given word or phrase indecent. Therefore, a more concrete principle or statement of

313. L. POWE, *supra* note 35, at 575.

314. See Note, *Morality and Broadcasting: FCC Control of "Indecent" Material Following Pacifica*, 31 FED. COMM. L.J. 145 (1978); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579 (1975).

the rule is necessary to permit verification that the court, or FCC, has placed the case in the proper category of indecency. Absent such a mediating principle, the only way to criticize an indecency ruling is simply to say that the ruling is no good, without being able to argue why it is incorrect.

It is apparent from the inherent problems involved in defining indecency that the FCC violates the first amendment by using such a nebulous standard. At a minimum, indecency should receive as rigorous a standard as that used to regulate obscenity. In *Miller v. California*,³¹⁵ the Supreme Court's leading case on obscenity, the Court appears to forbid such regulation unless it derives from specific prohibitions that give fair notice to broadcasters of the sexual conduct or excretory activities that they cannot portray. Since the generic standard promulgated by the FCC does not provide concrete detail of culpable conduct, it improperly chills the speech of broadcasters, who will refrain from airing programming that is questionable but not indecent—particularly because they are subject to license renewal.

Even if a channeling approach is followed, the FCC still must specify the words or types of discussion that it deems indecent. Conclusory declarations of the "patent offensiveness" of certain material effectively allows the FCC to be a roving censorship commission. The FCC and its reviewing court should require a strong factual record to show exactly how the parent's interest in protecting his children is being damaged by what is aired.

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315. 413 U.S. 15 (1973).