

11-1-1979

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### Recommended Citation

Jacqueline Shapiro, *"Filthy Words": One Man's Lyric or Broadcasting's Indecency?*, 34 U. Miami L. Rev. 147 (1979)

Available at: <https://repository.law.miami.edu/umlr/vol34/iss1/7>

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## NOTES

### “Filthy Words”: One Man’s Lyric or Broadcasting’s Indecency?

*The author discusses the legal and philosophical implications of the Supreme Court’s pronouncement in FCC v. Pacifica Foundation, which restricts the right to broadcast and emphasizes the right to prevent “indecent” speech from intruding upon individual privacy.*

At approximately 2 o’clock in the afternoon on October 30, 1973, WBAI-FM, a noncommercial New York City radio station licensed to the Pacifica Foundation, broadcast a short monologue entitled “Filthy Words,” by satirist George Carlin.<sup>1</sup> After listing the “seven words you couldn’t say on the airwaves,”<sup>2</sup> Carlin proceeded to illustrate their usage in a variety of colloquial expressions.<sup>3</sup> Two weeks later, a man who had heard the Carlin piece while driving in his car with his teenage son, protested its broadcast in a letter to the Federal Communications Commission (FCC).<sup>4</sup> The complaint was forwarded to Pacifica, which pointed out that the segment was presented in the context of a program dealing with contemporary views toward language.<sup>5</sup> Further, Pacifica explained, “Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.”<sup>6</sup> Pacifica noted that prior to the broadcast, listeners were warned that the piece contained “sensitive language which might be offensive to some.”<sup>7</sup> Neither Pacifica nor the FCC received any further com-

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1. The piece was taken from an album by the comedian, entitled *George Carlin, Occupation: Foole*, Little David Records (LD 1005).

2. For a verbatim transcript of the seven infamous words together with the remainder of the monologue, see *FCC v. Pacifica Foundation*, 438 U.S. 726, 751-55 app. (1978).

3. *Id.* at 752.

4. 56 F.C.C.2d 94 (1975). The complaint read, in pertinent part, “This was supposed to be part of a comedy monologue, . . . [a]ny child could have been turning the dial, and tuned in to that garbage.” *Id.* at 95.

5. The Pacifica Foundation explained that the segment was broadcast during a regularly scheduled live program called “Lunchpail,” hosted by Paul Gorman, and that on October 30 the program “consisted of Mr. Gorman’s commentary as well as analysis of contemporary society’s attitudes toward language,” that the subject was discussed with listeners who called in, and that “Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society.” *Id.* at 95.

6. *Id.* at 96.

7. *Id.* at 95-96.

plaints regarding the broadcast. On February 21, 1975, the FCC issued a declaratory order characterizing the monologue as "indecent"<sup>8</sup> and prohibiting its rebroadcast.<sup>9</sup> Clarifying its position in a subsequent opinion,<sup>10</sup> the FCC explained that its intent had not been to ban indecent speech altogether.<sup>11</sup> Drawing an analogy to nuisance law, the Commission asserted that patently offensive language, such as the Carlin monologue, should be "channeled" to those times of the day when children are least likely to be in the listening audience.<sup>12</sup>

Pacifica appealed the ruling in the United States Court of Appeals for the District of Columbia, which reversed the Commission's order.<sup>13</sup> Judge Tamm, joined by Chief Judge Bazelon, viewed the FCC's action as censorship in clear violation of section 326 of the Communications Act.<sup>14</sup> Dissenting Judge Leventhal, however,

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8. [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

*Id.* at 98.

9. Acknowledging that WBAI could have been the subject of administrative sanctions, the Commission declined to impose formal penalties; instead, it decided to keep the order in the station's license file for reference in the event future complaints were received. *Id.* at 99.

The Commission claimed its power to regulate indecent programming derived from two statutes: 18 U.S.C. § 1464 (1976), which prohibits the use of "any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C. § 303(g) (1976) which requires the Commission to "encourage the larger and more effective use of radio in the public interest." Additionally, the FCC identified four characteristics unique to broadcasting which, the Commission argued, mandate its distinctive treatment: (1) broadcasting intrudes directly into the home, where privacy interests are greatest; (2) television and radio are particularly accessible to children, who are often left unsupervised in the home; (3) unwilling adult listeners may be exposed to offensive programming, with no prior warning; and (4) scarcity of spectrum space requires strict governmental licensing of stations in the public interest. 56 F.C.C.2d at 97.

In view of the evolution of broadcasting into the principal form of mass communication in American life, these valid privacy concerns necessarily have become tempered by the growing public nature of the medium. The real fight turns not on the degree to which traditional privacy interests must be favored in the balance of a particular situation, but rather on how broadly the "public interest" standard must be interpreted, given the first amendment mandate and the changing nature of privacy itself.

10. *Pacifica Foundation*, 59 F.C.C.2d 892 (1976). The clarification order was in response to a petition by the Radio and Television News Directors Association.

11. *Id.*

12. *Id.* at 893.

13. *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. Cir. 1976).

14. *Id.* at 18. 47 U.S.C. § 326 (1970) provides that:

[N]othing in this Act 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

found a compelling state interest in the protection of children which empowered the Commission to regulate indecent language.<sup>15</sup> Granting *Pacifica's* petition for certiorari, the Supreme Court of the United States *held*, reversed: The scope of United States Code, title 18, section 1464, is not limited to "obscene" language; "indecent" language may be prohibited from the airwaves at times when children are likely to be in the listening audience. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).<sup>16</sup>

The broadcast medium juxtaposes clashing constitutional interests: the right of speakers to communicate over the public airwaves, and the right of listeners to prevent intrusion of undesired

by the Commission which shall interfere with the right of free speech by means of radio communication.

In a concurring opinion for the court of appeals, Chief Judge Bazelon rejected the efficacy of a nuisance theory as a means of avoiding censorship; on that basis, he felt compelled to reach the constitutional issues. Recognizing that the effect of channeling might be that of a complete bar, the Chief Judge found the FCC order violative of the first amendment and, by extension, the statutory ban on censorship of the airwaves. 556 F.2d 9, 18 (1977). Judge Tamm, speaking for the majority in the same decision, cited empirical data indicating that substantial numbers of children remain in the listening audience until 1:30 a.m. Thus, Judge Tamm saw the Commission's order as veiled censorship, which would, in effect, "reduce the adult population to hearing or viewing only that which is fit for children." *Id.* at 17 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Alternatively, Judge Tamm interpreted the FCC order as the functional equivalent of a rule and therefore overbroad. 556 F.2d at 18.

The validity of any distinction between censorship of specific language prior to broadcast and the creation of a "flexible" category of indecent speech was also challenged by Commissioner Cox in *Jack Straw Memorial Foundation*, 21 F.C.C.2d 833 (1970). Dissenting to the Commission's imposition of sanctions for the broadcast of offensive language, he stated:

If a list of all the words which either offend the majority—or which they think will offend too many of the public—were ever published as banned from the air, that would clearly be prior censorship prohibited by section 326 of the Communications Act, as well as the first amendment. But failure to publish the list may have even more chilling effect upon broadcast programming, because licensees may avoid the use of many, many more words out of fear they may be on the Commission's secret list.

*Id.* at 838.

15. 556 F.2d at 30-37.

16. Justice Stevens wrote the plurality opinion, in which he was joined by Chief Justice Burger and Justice Rehnquist. According to this opinion:

Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language.

438 U.S. at 737.

In a separate opinion, Justices Powell and Blackmun rejected the legitimacy of value distinctions made by the plurality among different types of protected speech. Justice Stewart dissented on grounds of statutory interpretation; he found no power in the FCC to regulate nonobscene speech. In addition to opposing its statutory construction, Justice Brennan, in a separate dissent joined by Justice Marshall, challenged the premises and conclusions of the plurality.

speech into the privacy of their homes. The Federal Communications Commission has been empowered to coordinate these competing concerns within a broad framework of encouraging "the larger and more effective use of radio in the public interest."<sup>17</sup> Approval by the Supreme Court of the Commission's interpretation of the public interest standard in *Pacifica* to permit a ban of indecent speech reflects, in turn, a cutback in the established meaning and reach of the first amendment.

Recognizing the value of open expression to individual self-definition<sup>18</sup> and to a healthy polity,<sup>19</sup> the Court, in other contexts, has upheld regulation of speech only where necessary to preserve the very existence of the social order<sup>20</sup> or where competing, fundamental

17. 47 U.S.C. § 303 (1970) provides as follows:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall—

(g) study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

18. The Supreme Court has long recognized the significance of freedom of expression to the full development of individual identity. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring). This principle has also been stated eloquently in Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 880-82 (1963).

19. A noted political scientist, Alexander Meiklejohn, viewed the central goal of the first amendment as the protection of speech vital to the processes of self-government. *See, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT passim* (1948). The Supreme Court has acknowledged the inseparable relationship between freedom to communicate and the vitality of the political system. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which Justice Brennan propounded the principle that debate on public issues must be "uninhibited, robust and wide-open." *Id.* at 270.

20. On that basis, the Supreme Court has identified narrowly drawn categories of outlawed communication. Most notable among them are obscenity, "fighting words" and subversive speech. In *Roth v. United States*, 354 U.S. 476 (1957), Justice Brennan affirmed the principle that "[a]ll ideas having the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are entitled to the full protection of the first amendment. *Id.* at 484. The rationale he offered for prohibiting obscene speech derived from its total lack of "redeeming social importance." *Id.* Yet, after *Roth*, just as before, confusion continued to plague the Court in its attempts to identify obscenity. The subsequent standard articulated in *Miller v. California*, 413 U.S. 15, 23-24 (1973), broadened the scope of obscenity to encompass communication which lacks serious social value. Under the prevailing *Miller* test, three elements are required to uphold a finding of obscenity: "(a) whether 'the average person, applying contemporary community standards' would find the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (citation omitted). Another proscribed category of "fighting words"—personal insults aimed directly at listeners and provocative of violent retaliation—was established by the Supreme Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

rights would otherwise be threatened.<sup>21</sup>

In an effort to reconcile the elemental concerns of privacy and free speech in the context of broadcasting, the Court in *FCC v. Pacifica Foundation*<sup>22</sup> adhered to a methodology in which the degree of first amendment protection varies according to the particular medium involved.<sup>23</sup> Justice Stevens, writing for the plurality, concurred in the FCC's view of the unique concerns implicated in broadcasting, particularly the attributes of a captive audience.<sup>24</sup> In recognition of these concerns, the plurality labeled broadcasting as the medium least deserving of first amendment protection.<sup>25</sup>

Striking the balance in favor of unwilling adults and children on that basis, the plurality made a clear judgment regarding the value to society of the particular language utilized by Carlin. Underlying the plurality's determination appears to be a genuine, albeit unacknowledged, desire to preserve its particular vision of society. A comparable concern has been more openly voiced elsewhere:

Today's market is being pre-empted by dirty books, movies, etc. . . . [t]he settlement we are now living under, in which obscenity and democracy are regarded as equals, is wrong—it is

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In *Schenck v. United States*, 249 U.S. 47 (1919), Justice Holmes articulated the prohibition of speech which is "used in such circumstances and [is] of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. The Court's standard for controlling inciteful, subversive speech was reframed narrowly in the recent case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969); such language may be prohibited only where it is "directed to inciting or producing imminent lawless action and is likely to create or produce such action." *Id.* at 47 (footnote omitted).

21. For example, the Court has upheld speech regulations designed to protect interests of privacy in the home, see *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) ("a mailer's right to communicate [unsolicited advertisements for sexual materials] must stop at the mailbox of an unreceptive addressee"), and to shelter the sensibilities of listeners in the public streets, see *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding prohibition of loudspeakers attached to vehicles in public areas).

22. 438 U.S. 727 (1978).

23. Justice Stevens derived support for this methodological approach from the observation of the Court in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) that "[e]ach method [of expression] tends to present its own peculiar problems." *Id.* at 503. As Chief Judge Bazelon noted, however, in his concurring opinion for the court of appeals, 556 F.2d at 18, this assertion must be evaluated in conjunction with the sentence immediately following: "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." 343 U.S. at 503. Thus, despite the existence of problems peculiar to broadcasting, adherence to the basic doctrines of the first amendment in their solution necessarily remains constant.

24. Children who watch television and listen to the radio during the day (often without parental supervision), and adults who enjoy broadcasting in the privacy of their homes, have each been characterized as a captive audience by the Commission. 56 F.C.C.2d 94, 97 (1975).

25. 438 U.S. at 748.

incompatible with any authentic concern for the quality of life in our democracy.<sup>26</sup>

One might argue, however, that the development of individual identity through honest exposure of all aspects of the self is essential to the flowering of true social order. Under such a view, open communication becomes instrumentally valuable in the discovery process; and, in revealing the underside of existence, the irrationality and aberrations often masked in our daily lives, language—whether it be that of the lone dissident or of the artist or performer—may serve to illuminate the whole nature of the individual and produce a healthier society for it.

Novelist Henry Miller has offered a distinct explanation for societal decay, one which supports such a view of the crucial role of communication:

We do not have crime, we do not have war, revolution, crusades, inquisitions, persecutions and intolerance because some among us are wicked, mean-spirited or murderers at heart; we have this malignant condition of human affairs because all of us, the righteous as well as the ignorant and malicious, lack true forbearance, true compassion, true knowledge and understanding of human nature.<sup>27</sup>

Miller's insight, in thus providing justification for protection of so-called offensive speech, closely parallels the philosophy of the first amendment which the Court itself embraced in *Cohen v. California*,<sup>28</sup> when Justice Harlan acknowledged that "[t]he constitutional right of free expression is a powerful medicine in a society as diverse and populous as ours."<sup>29</sup>

In *Cohen*, the Court probed the right of an individual to stand outside a California municipal courtroom wearing a jacket which bore the words, "Fuck the Draft." Justice Harlan held that Cohen's right to exercise free speech clearly outweighed the offensiveness of

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26. Kristol, *Pornography, Obscenity and the Case for Censorship* in *PHILOSOPHY OF LAW* 165 (Feinberg & Gross, ed. 1975). Kristol is referring to obscenity here in a broad way, not according to the strict definition set out in *Miller*. His concerns appear to reflect those to which the Court alluded in *Pacific*, when it stated: "These words offend for the same reason that obscenity offends." 438 U.S. at 746. By this, the Court seems to suggest that values deeper than majoritarian taste—that is, taboos of cultural dimension—are threatened by the expression of sexual and excretory language. Yet, the Court's concession that Carlin's words would probably have full constitutional protection in other contexts undermines the notion that actual societal harm stems from such language, which is admittedly lacking in prurency.

27. H. MILLER, *HENRY MILLER ON WRITING* 214 (1964).

28. 403 U.S. 15 (1971).

29. *Id.* at 24.

the words on his jacket to children and other persons present in the corridor; the intrusion was minimal because people could easily turn away. Justice Harlan's adherence to a stringent test in evaluating the extent of first amendment protection afforded offensive speech derived from a recognition of its emotive and symbolic import, beyond its rational content, as well as its inherent nonmajoritarian aspect:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.<sup>30</sup>

Justice Brennan convincingly analogized the situation in *Pacifica* to that in *Cohen*: Since radio and television are enjoyed primarily in the home, the public medium of broadcasting necessarily implicates fundamental privacy interests.<sup>31</sup> The listener's affirmative choice to receive its communication, however, diminishes his expectations of privacy.<sup>32</sup> Any ensuing intrusion is therefore minimal, particularly since unwilling listeners may switch stations or simply shut off the radio, just as unwitting viewers of the inscription on Cohen's jacket could have averted their eyes.<sup>33</sup> The plurality, on the other hand, found that even momentary exposure of children to indecent speech in the home would constitute an unacceptable intrusion of privacy, exceeding that caused by Cohen's exhibition in a public corridor.<sup>34</sup>

In its attempt to distinguish the factual situation in *Pacifica* from that in *Cohen*, however, the plurality abandoned Justice Harlan's critical perception that language possesses a double aspect, communicating not only cognitive ideas, but otherwise inarticulable emotions which may be equally significant elements of the complete message.<sup>35</sup> Far more disturbing, therefore, than the inadequacies of the plurality's assessment of the privacy and speech interests at

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30. *Id.* at 21.

31. 438 U.S. at 764-65.

32. *Id.*

33. *Id.* at 765.

34. *Id.* at 749.

35. "[W]e cannot overlook the fact, because it is well illustrated by the episode involved here; that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." 403 U.S. at 25-26.

stake, is its willingness to narrow first amendment protection to only those words valuable in the rational discourse of ideas: "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."<sup>36</sup>

Attributing little worth to sexual and excretory language, even where constitutionally protected,<sup>37</sup> Justice Stevens dismissed the significance of any possible chilling effect of the plurality's reasoning.<sup>38</sup> Yet, in its attempt to create an artificial distinction between the content of speech and the form of its expression, the plurality has increased the danger that first amendment protection may be withheld to accommodate not merely countervailing interests but, more ominously, the moral preferences of the majority. Justice Harlan had specifically warned against such a devastating possibility in *Cohen*:

[W]hile 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.

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.<sup>39</sup>

Notwithstanding Justice Harlan's logic, the FCC has historically imposed sanctions upon the broadcast of indecent language.<sup>40</sup> Acknowledging that insulation of the public from all possibly offensive programming would permit airing of only the blandest material,<sup>41</sup> however, the Commission developed a standard of indecency

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36. 438 U.S. at 743 n.18.

37. *Id.* at 746-47.

38. In a separate opinion, Justices Powell and Blackmun, although otherwise concurring with the plurality, strongly repudiated the latter's unprecedented reliance on a sliding scale approach. *Id.* at 761-62. They pointed out that once speech had been adjudged protected, the Court may not assess its value or usefulness; matters of taste or style must be left to the individual. *Id.* This position of Justices Powell and Blackmun echoes the Court's earlier view in the recent case of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). The Court there refused to compare the value of commercial speech—such as information regarding the price of pharmacy items—with that of explicitly political messages.

39. 403 U.S. at 25-26.

40. For a thoughtful examination of past sanctions imposed by the FCC on obscene and offensive broadcast messages, see Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 578 (1975).

41. *Eastern Education Radio, WUHY-FM*, 24 F.C.C.2d 408, 410 (1970).

encompassing more than merely offensive language. In *Eastern Education Radio (WUHY-FM)*,<sup>42</sup> the FCC proscribed as indecent speech which was *both* patently offensive according to prevailing community standards and "utterly without redeeming social value."<sup>43</sup>

In *Pacifica*, however, the FCC abandoned the latter prong of this definition; while recognizing the probable social value of Carlin's monologue, the Commission labeled it indecent merely because it was "patently offensive."<sup>44</sup> The Supreme Court, upholding the Commission's redefinition, phrased the distinction between obscenity and indecency in this manner: "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' refers to nonconformance with accepted standards of morality."<sup>45</sup> Equating moral nonconformity with indecency, within the meaning of section 1464, however, would seem to contravene long standing first amendment doctrine,<sup>46</sup> signalling a retreat to an abandoned, paternalistic

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42. *Id.* During a prerecorded interview on WUHY-FM, Jerry Garcia, leader of the rock group, "The Grateful Dead," interspersed his conversation with four-letter expletives. Over the dissent of Commissioners Cox and Johnson, the FCC imposed sanctions on the radio station for the "indecent" broadcast. Commissioner Johnson vehemently opposed the FCC's two-pronged test of indecency as censorious: "What the FCC condemns today are not words, but a culture - a lifestyle it fears because it does not understand." *Id.* at 422. Buttressing his assertion that the openness of offensive language often represents health and vitality, *see also* A. MONTAGU, *THE ANATOMY OF SWEARING* (1967), Commissioner Johnson presented the following insightful lyric and commentary:

Oh perish the use of the four-letter words  
Whose meanings are never obscure;  
The Angles & Saxons, those bawdy old birds,  
Were vulgar, obscene & impure.  
But cherish the use of the weaseling phrase  
That never quite says what you mean.  
You had better be known for your hypocrite ways  
Than vulgar, impure & obscene.  
Let your morals be loose as an alderman's vest  
If your language is always obscure.  
Today, not the act, but the word is the test  
Of vulgar, obscene & impure.

Whatever else may be said about the words we censor today, their meanings are not 'obscure.' I cannot say as much for the majority's standards for indecency.

24 F.C.C.2d at 425.

43. *Id.* at 412.

44. 56 F.C.C.2d at 97-99. In his dissent in *Miller v. California*, 413 U.S. 15, 37 (1973), Justice Douglas objected to the prong of "offensiveness" as an element of obscenity because such a standard "cuts the very vitals out of the first amendment." *Id.* at 45.

45. 438 U.S. at 740 (footnote omitted). "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U.S. 476, 487 (1956) (footnote omitted). By way of comparison, indecent material does not appeal to prurient interests but is nevertheless "patently offensive."

46. *See, e.g., Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959), where the

view of first amendment goals.<sup>47</sup>

The plurality sought to buttress its departure through an analysis of congressional intent regarding the broadcast medium. Justice Stevens pointed to the use of the word "or" in the statutory ban on language which is "obscene, indecent or profane," as further evidence of legislative intent to proscribe separate categories of broadcast speech.<sup>48</sup> Conflicting judicial construction of parallel statutes, however, undermines the persuasiveness of such linguistic interpretation.<sup>49</sup> In *Hamling v. United States*,<sup>50</sup> the Supreme Court interpreted section 1461 of title 18 of the United States Code,<sup>51</sup> which prohibits mailing of "obscene, lewd, lascivious, indecent, filthy or vile material,"<sup>52</sup> as banning obscenity only.<sup>53</sup> Similarly, in reviewing convictions for violations of title 18, section 1462<sup>54</sup> in *United States v. Twelve 200-Foot Reels of Film*,<sup>55</sup> the Court declared its readiness

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Supreme Court struck down a New York law under which the state had denied petitioner a license to show a filmed version of *Lady Chatterley's Lover*. New York's interest in protecting its citizenry from the movie's approving depictions of adultery was insufficient to abridge the first amendment guarantees:

[The protection of the first amendment] is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

*Id.* at 689. For reaffirmance of this view, see also *Roth v. United States*, 354 U.S. 476 (1957).

47. For a clear example of that long rejected paternalistic notion of the first amendment, see the dissenting opinion in *United States v. One Book Entitled Ulysses*, 72 F.2d 705, 709 (2d Cir. 1934) (Manton, J., dissenting).

48. Taken to its logical conclusion, the Court's linguistic analysis would suggest prohibition of yet a third category of profane speech. The Court declined to address this possibility, however, preferring to limit its statutory construction to accommodate a decision on the particular facts before it.

49. "Nothing requires the conclusion that the word 'indecent' has any meaning in § 1464 other than that ascribed to the same word in § 1461. Indeed, although the legislative history is largely silent, such indications as there are support the view that §§ 1461 and 1464 should be construed similarly." 438 U.S. at 779 (footnotes omitted) (Stewart, J., dissenting).

50. 418 U.S. 87 (1974).

51. 18 U.S.C. § 1461 (1976).

52. *Id.*

53. In so doing, the Supreme Court relied on an earlier interpretation of the same statute by Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1961). Although Justice Harlan recognized that the terms used in the statute had various shades of meaning, overriding congressional concern to prevent dissemination of prurient matter through the mails indicated the creation of a single ban on obscenity.

54. 18 U.S.C. § 1462 (1970).

55. 413 U.S. 123, 130 n.7 (1973) ("[I]f and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' [and] 'immoral' as used to describe material in section 1462," the Court would construe such terms as limited to the standard for obscenity, as elaborated in *Miller v. California*).

to construe as "obscene" all materials falling within the statutory ban on interstate transportation of "indecent, lewd, lascivious, filthy or immoral" materials. In an attempt to distinguish the statutes, Justice Stevens contrasted the primary legislative concern for deterring the dissemination of prurient matter through the mail with the efforts of the FCC to control nonprurient, offensive programming over the airwaves. This distinction, however, growing out of a concern for the special nature of broadcasting, is grounded in a basic misconception of the interests at stake. For unless one accepts at face value the plurality's unsubstantiated condemnation of sexual and excretory language,<sup>56</sup> its concern for the protection of listeners, especially minors, appears overly paternalistic. While in the context of obscenity, the requirement of prurency is more easily satisfied as to minors,<sup>57</sup> the Court has always required some minimal threshold of erotic appeal to justify prohibition of communications.<sup>58</sup> "Speech that is neither obscene as to youth nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."<sup>59</sup> Certainly, concern for the welfare of children does not end with the government's perception of the best interests of minors; the Court has long upheld the paramount right of parents to determine how best to rear their children.<sup>60</sup> Even accepting the plurality's assertion that most parents would find the Carlin monologue offensive, those who do not share the values of the dominant culture may find exposure of their children to Carlin's message acceptable.<sup>61</sup>

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56. 438 U.S. at 746-47.

57. *Ginsberg v. New York*, 390 U.S. 629 (1968).

58. *Erznoznik v. New York*, 422 U.S. 205, 213 n.10 (1975).

59. *Id.* at 213-14. In his *Pacifica* dissent, Justice Brennan noted that "a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the 'other legitimate proscription[s]' alluded to in *Erznoznik*." 438 U.S. at 768 n.3. Brennan also recognized that younger children lack the "capacity for individual choice," *id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 650 (1968)), necessary to evaluate the content of communications geared directly to them.

60. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

61. See, e.g., Jack Straw Memorial Foundation, 29 F.C.C.2d 334 (1971), providing comments by parents completely satisfied with radio programs containing "indecent" language. For example:

Peggy Goldberg is a housewife and mother of four children ranging in age from 12 to 23. She heard both the Sawyer and Bevel broadcasts. She remembers that she found Bevel's talk to be interesting, but that she was bored by Sawyer. She does not recall hearing any language which she considered offensive. She encourages her children to listen to KRAB and she thinks the Bevel broadcast was

Moreover, fears expressed by the Court and Commission that narrowing the standard of unprotected broadcast speech to obscenity alone would result in preemption of the airwaves by offensive programming appear unfounded. Most stations are commercially sponsored and, therefore, maintain their existence by catering to majority interests. Lamenting the media's aversion for the "novel and the heretical," one commentator has perceived that "inequality of air power" is as much a reality in broadcasting as is inequality of bargaining power for consumers.<sup>62</sup> Thus, governmental regulation is necessary, not to suppress speech, but rather to counteract this trend by keeping the airwaves open to a variety of cultural tastes and views. In his concurring opinion for the court of appeals, Chief Judge Bazelon echoed this view when he asserted that "[a]lthough scarcity [of spectrum space] has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship."<sup>63</sup> The common perception that radio and television have become the major instruments of mass communication lends additional support to this reasoning. Indeed, large segments of the population, particularly poor people, are limited in their ability to take advantage of any other media.<sup>64</sup> By granting the Commission power to relegate "indecent" programs to late night hours, the Court has effectively sanctioned the erosion of society's principal forum for divergent expression.<sup>65</sup>

In a case as recent as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>66</sup> the Court extended full protection of the first amendment to commercial speech, in recognition of the significance to society of the broad dissemination of such information. That holding stemmed from a comprehension that wide communication enhances responsible exercise of individual choice, a factor crucial to effective societal functioning. The plurality in *Pacifica* broke with this expanded view, deferring instead to competing majoritarian sensibilities. Yet, in the face of potential stultification of the airwaves, provision of an adequate warning prior

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meritorious and worth having in the Seattle area.

*Id.* at 348.

62. See J. Barron, *Access to the Press*, 80 HARV. L. REV. 1641 (1967).

63. 556 F.2d at 29 (emphasis in original).

64. 438 U.S. at 775.

65. This is particularly true for noncommercial, listener-sponsored stations such as WBAI-FM. The willingness of its subscribers to support the station financially indicates the extent to which its audience both values and needs this particular form of communication.

66. 425 U.S. 748 (1976).

to broadcast, coupled with the ability of listeners to turn off the program, would seem adequate to protect privacy rights of undesirable listeners. If the Court is to remain true, therefore, to that developing view of the first amendment as protecting not only speech deemed valuable as a matter of consensus, but also language which may appear iconoclastic and even offensive by virtue of its form, the balancing methodology of the Court, as paternalistically applied to the broadcasting medium in *Pacifica*, must be critically reappraised. Once the public interest standard governing the airwaves is seen as encompassing a constitutional concern for promoting the pursuit of individual identity as an essential means of fostering societal well-being, then the role of the Commission must be entirely different from that articulated in *Pacifica*. Rather than tailoring language to fit a procrustean bed of prevailing community acceptability, the FCC must commit itself to maintaining broadcasting as an open forum—a forum which, with appropriate prior warnings, will provide the widest possible range of diversified communications.

JACQUELINE SHAPIRO

### **Trading on Market Information: Rule 10b-5 and Market Insiders—*United States v. Chiarella***

*In United States v. Chiarella, the Court of Appeals for the Second Circuit held that anyone who regularly receives material nonpublic information is subject to the prohibitions of rule 10b-5. The author of this casenote discusses the expansion of liability created by this holding and analyzes the questions raised by the decision.*

Vincent Chiarella was an employee of Pandick Press, a printing house located in downtown Manhattan. Pandick Press specializes in printing financial documents such as annual reports, proxy statements and disclosure statements for tender offers and mergers. Between September 1975 and November 1976, Pandick Press printed documents for five separate takeover bids.<sup>1</sup> Chiarella, a "markup

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1. Four of the transactions in question involved tender offers and one was a merger. The record did not disclose whether the takeovers were "hostile." Neither the parties nor the court attached any significance to these distinctions.