Keeping the Airwaves Safe for "Indecency" - Pacifica Foundation v. Federal Communications Commission

Greg Kinczewski

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KEEPING THE AIRWAVES SAFE FOR “INDECENCY”—
PACIFICA FOUNDATION V. FEDERAL COMMUNICATIONS COMMISSION

An American courtroom, circa 1925:

RADIO MAN: We have a direct wire to WGN, Chicago. As soon as the jury comes in, we'll announce the verdict.

DRUMMOND: Radio! God, this is going to break down a lot of walls.

RADIO MAN: (Hastily.) You're—you're not supposed to say "God" on the radio!

DRUMMOND: Why the hell not?
(The Radio Man looks at the microphone, as if it were a toddler that had just been told the facts of life.)

RADIO MAN: You're not supposed to say "Hell" either.

DRUMMOND: (Sauntering away.) This is going to be a barren source of amusement.¹

In the half-century since the above exchange, “God” and “Hell” have become routine utterances on radio and television as American society and the Federal Communications Commission (FCC)² have changed their perception of what is “offensive” language. The FCC’s perception of “offensive” language was jarred recently by the decision of the United States Court of Appeals for the District of Columbia in *Pacifica Foundation v. FCC.*³ The court of appeals invalidated an

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¹ J. Lawrence & R. Lee, *Inherit the Wind,* Act Three (1955). This play was based on the famous “Scopes Monkey Trial,” and the Drummond character was based on Clarence Darrow.

² The FCC is authorized to regulate the broadcast media for the “public convenience, necessity or interest” by the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. (1970). The key to the FCC’s regulatory power is its authority to grant, renew or revoke a broadcaster’s license to operate. Normally, a license is granted for a three-year period. Among the specific ways the FCC can punish a station which has broadcast offensive speech are: revoking the station’s license, 47 U.S.C. § 312(a) (1970); issuing a cease and desist order, 47 U.S.C. § 312(b); denying a license renewal, 47 U.S.C. § 307 (1970); or by imposing a monetary forfeiture, 47 U.S.C. § 503(b)(1)(E) (1970). See Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, ARIZ. ST. L.J. 457 (1974).

³ 556 F.2d 9 (D.C. Cir. 1977). The decision by the three-judge panel produced three opinions: the majority opinion by Judge Tamm, a concurring opinion by Chief Judge Bazelon, and a dissent by Judge Leventhal. All three will be discussed at some length later in this casenote.
FCC declaratory order banning the future broadcast of seven vulgar words the FCC felt were "indecent" but which the Supreme Court would not consider "obscene"—primarily because the words did not appeal to the prurient interest and because the Order did not consider the words in the context of the literary, artistic, political or scientific value of the works in which the words appeared. The prospective thrust of the Order represented a new tactic by the FCC, which had previously exercised control over offensive language on a case-by-case basis. Significantly, the invalidation was grounded on the court finding that the FCC ban violated a statute which forbids the FCC to act as a censor, not on whether the FCC can constitutionally regulate "indecency" differently than "obscenity." 5

The purpose of this casenote is threefold. First, it will discuss the implications the court of appeals decision has for future FCC control of offensive language. Second, it will argue that the Supreme Court, which has decided to review the case, should affirm the court of appeals' decision because the Order, if implemented, would produce unwarranted results. And finally, this Note will show that it would be

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See note 15 and accompanying text infra for a complete discussion of the Supreme Court's obscenity standards. It should be noted here that Cohen v. California, 403 U.S. 15 (1971), makes it extremely unlikely that any words alone can be obscene. According to Cohen, since words "are often chosen as much for their emotive as cognitive force," 403 U.S. at 26, they cannot be considered in isolation but must be considered as part of the overall message that is being communicated. Thus, if the overall message is not obscene, the words are not obscene. 556 F.2d at 23.

5. The court of appeals ruled that by banning "indecent" language, the FCC violated 47 U.S.C. § 326 (1970). 556 F.2d at 11. Section 326 states that:

Nothing in this chapter [the Communications Act of 1934] shall be understood to give the Commission the power of censorship . . . 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.

"Censorship" has been defined as any examination of thought or expression in order to prevent publication of objectionable material. Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969). It is vital to any analysis of Pacifica to remember that the no-censorship dictate of Section 326 is a statutory provision, similar to but entirely separate from the First Amendment to the United States Constitution which commands that "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend I. Thus, it is possible for a court to find that the FCC violated Section 326 and never delve into a constitutional analysis. This is exactly what occurred in Pacifica. See text accompanying notes 28 & 28 infra. It should also be noted that Section 326's no-censorship provision has not prevented the FCC from punishing the broadcast of material that would be "obscene" under Supreme Court standards. See Illinois Citizens For Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975). Thus, Section 326 does not provide broadcasters with more protection than that provided by the First Amendment. See Note, Limits of Broadcast Self-Regulation Under the First Amendment, 27 STAN. L. REV. 1527 (1975).
prudent for the Supreme Court to defer any decision on whether the
FCC can constitutionally regulate speech which is "indecent" but not
"obscene" until a more appropriate case arises.

Pacifica's Background and Ruling

The FCC has always exercised control over offensive language on
the broadcast media despite the statutory prohibition against FCC
censorship. Traditionally, the FCC justified its control over offensive
language by relying on 18 U.S.C. § 1464, which punishes the
broadcast of obscene, indecent or profane language, and 47 U.S.C. §
6. See note 5 supra.
Whoever utters any obscene, indecent or profane language by means of radio com-
munication shall be fined not more than $10,000 or imprisoned not more than two
years, or both.

According to the FCC, Congress has clearly indicated that both the Department of Justice
and the FCC are obliged to enforce Section 1464. Order, 56 F.C.C.2d at 96.

Cases on two similarly worded statutes—18 U.S.C. § 1461 (1970), which prohibits the mail-
ing of "obscene" or "crime-inciting" material, and 19 U.S.C. § 1305(a) (1970), which prohibits
the importation of "immoral articles"—have ruled that "indecent" must be construed as re-
quiring "obscenity" standards or else the statutes would be unconstitutionally vague. Hamling v.
United States, 418 U.S. 87 (1974) (construing Section 1461); United States v. 12 1200 Foot
Reels of Super 8 MM Film, 413 U.S. 123 (1973) (construing Section 1305(a)). Other cases have
involved Section 1464 but have not resolved the issue of whether the FCC can define and
regulate "indecency" differently than "obscenity." United States v. Smith, 467 F.2d 1126 (7th
Cir. 1972) (reversed because of erroneous jury instructions); Illinois Citizens For Broadcasting v.
FCC, 515 F.2d 397 (D. C. Cir. 1975) (see note 2 supra); Tallman v. United States, 465 F.2d
282 (7th Cir. 1972) (an obscenity case); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966)
(reversed because of prejudicial jury instructions); Duncan v. United States, 48 F.2d 128 (9th
Cir. 1931), cert. denied, 283 U.S. 863 (1931) (language found to be neither obscene nor inde-
cent).

It should also be noted that no Supreme Court case since Chaplinsky v. New Hampshire, 315
U.S. 568 (1942), has held profanity to be a category of unprotected speech. See generally Reg-
ulating Broadcast Obscenity, supra note 2, at 600. For a listing of categories of unprotected
speech, see text accompanying note 12 infra.
303, which empowers the FCC to promote the use of the broadcast media for the public interest. The FCC has occasionally used these statutes to regulate offensive broadcast speech without meeting the Supreme Court tests that apply to offensive speech which is printed or spoken. The Supreme Court has provided some general authority for the FCC's departure from the rules that govern other media by stating that "differences in the characteristics of the new media justify differences in the first amendment standards applied to them," but the Supreme Court has never indicated that these differences justify censorship. If the FCC can use a different standard for offensive language, then the FCC could strip speech of its constitutional protection by determining that it is "indecent." This

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

9. The FCC's basic rationale for ignoring the standards applicable to other media was presented in Eastern Educational Radio (WUHY-FM), 24 F.C.C.2d 408, 411 (1970):
   And here it is crucial to bear in mind the difference between radio and other media. Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public . . . under circumstances where reception requires no activity of this nature. Thus it comes directly into the home and frequently without any advance warning of its content.

See also Sonderling Broadcasting Corp., 27 Rad. Reg.2d (P&F) 285, 288-89 (1973). See note 11 infra for cases in which the FCC ignored Supreme Court obscenity standards.

10. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 387 (1969). Red Lion gave as reasons for the dichotomy between First Amendment treatment of the broadcast media and the print media the scarcity of broadcast frequencies, the public ownership of the airwaves, and the danger of a few broadcasters monopolizing the airwaves. Id. at 486-96. Red Lion upheld the personal attack and political editorial rules of the FCC's fairness doctrine. Such rules, which involve a right-to-reply to these types of broadcasts, cannot be imposed upon the print media. See Miami Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Note, Reconciling Red Lion and Tornillo: A Consistent Theory of Media Regulation, 28 Stan. L. Rev. 563 (1976).

Chief Judge Bazelon's concurring opinion in Pacifica interprets Red Lion as providing the basis for "increasing the diversity of speakers and speech, [but] it has never been held to justify censorship." 556 F.2d at 29. See Writers' Guild of America, West v. FCC, 423 F. Supp. at 1147.

In Illinois Citizens, 515 F.2d at 406, Judge Leventhal, a dissenter in Pacifica, relied upon the unique qualities of the broadcast media to partially justify the FCC's use of condensations of programs, not the whole programs, to determine if the programs were obscene. Leventhal noted that, although the Supreme Court requires that a work be judged as a whole, it is appropriate for the FCC to use condensations because radio programs are episodic and listened to only in short "snatches." Id. However, Judge Leventhal also noted that the "pervasive pandering approach" of the programs in issue made the broadcasts obscene even if some elements of them were unoffensive. Id.

11. See, e.g., Eastern Educational Radio (WUHY-FM), 24 F.C.C.2d 408 (1970). In that case, the FCC considered a complaint lodged against the broadcast of an interview with Jerry Garcia, leader of "The Grateful Dead" rock band, over an educational radio station in Philadel-
would be similar to a court stripping speech of its constitutional protection by determining that it is obscene, inherently likely to provoke a violent reaction, intended to disrupt the draft or a courtroom, or thrust upon unwilling listeners who cannot avoid it.¹² Prior to Pacifica, no court had ever submitted the FCC's claim over "indecency" to an in-depth analysis.

The seeds for Pacifica were sown at approximately 2 p.m. on October 30, 1973, when radio station WBAI in New York played a monologue from a George Carlin album as part of its regularly scheduled program, "Lunchpail." The topic of the program was contemporary society's attitudes toward language. The Carlin monologue examined seven words he had concluded could not be said on radio and television.¹³ A man who was driving his car heard the Carlin monologue and filed a complaint with the FCC on December 3,
1973, adding that his young son was with him at the time of the broadcast.

The FCC agreed with Carlin that these seven words were indeed the seven words that could not be uttered on the public airwaves. The FCC issued a declaratory order which defined “indecency” as:

language that described 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 children may be in the audience.\(^{14}\)

The FCC admitted that its definition of “indecency” was not equivalent to the obscenity standards established by the Supreme Court\(^ {15}\) because the FCC definition did not require an appeal to prurient interest, nor did it enable material to be redeemed by its literary, political or scientific value if children were likely to be in the audi-

\(^{14}\) Order, 56 F.C.C.2d at 98. The FCC explained that it issued a declaratory order instead of any of the other options available, see note 2 supra, because it “is a flexible procedural device admirably suited to terminate the present controversy between a listener and a station, and to clarify the standards which the Commission utilizes to judge ‘indecent language.’” Order, 56 F.C.C.2d at 99. The FCC later issued a clarifying memorandum exempting live coverage of public events from the Order. Pacifica Foundation, 36 Rad. Reg.2d (P&F) 1008 (1976).

\(^{15}\) The Supreme Court’s basic test for obscenity was established in Miller v. California, 413 U.S. 15 (1973). This test instructs the trier of fact to determine:

(a) whether “the average person, applying contemporary community standards,” would find that the work, taken as a whole, appeals to the prurient interest [citation omitted];

(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. *Miller* also provides examples of what can be defined as patently offensive descriptions and depictions of sexual conduct:

(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;

(b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.

*Id.* at 25. The Court’s recent decision in Ward v. State of Illinois, 97 S. Ct. 2085 (1977), ruled that “sado-masochistic materials” can be proscribed even though they were not expressly listed in *Miller*.

ence. The FCC justified its deviation from obscenity standards by asserting that the unique qualities of the broadcast media allow it greater latitude in regulating offensive speech. As proof of the unique qualities of the broadcast media, the FCC cited the following four factors:

(1) children have access to radios and in many cases are unsupervised by parents;
(2) radio receivers are in the home, a place where people’s privacy interest is entitled to have extra deference . . . ;
(3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast;
(4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Pacifica Foundation, which owns WBAI, challenged the Order on the grounds that prior court rulings establish that the term “indecent” is subsumed by the concept of obscenity, the seven specific words banned by the Order are not obscene, and the unique qualities of the broadcast media do not enable the FCC to suppress otherwise constitutionally protected speech. Pacifica Foundation also argued that the Order was overbroad because it would affect many works of serious literary, artistic, political or scientific value.

The FCC defended its Order by asserting its control over “indecency,” its power to regulate the broadcast media in the public interest, and the unique qualities of the broadcast media. The FCC also argued that the Order was not actually censorship, but merely a way to “channel” indecent language away from those times of the day.

16. Order at 98. Additionally, Chief Judge Bazelon’s concurring opinion in Pacifica pointed out other differences between the FCC’s approach to “indecency” and Miller’s standards. He stated that the FCC used “contemporary community standards for the broadcast medium” instead of “local community standards” and that the FCC focused on specific words rather than the work as a whole. 556 F.2d at 22-24.

17. Order, 56 F.C.C.2d at 97. See note 10 supra for the factors the Supreme Court has recognized for treating the broadcast media differently than the print media.

18. 556 F.2d at 12.

19. Id.


21. 556 F.2d at 11. See notes 12-14 and accompanying text supra.
when children are likely to be in the audience. The FCC additionally claimed that the Order was necessary to prevent the widespread use of indecent language on the public's airwaves.

The court's decision reversing the Order, written by Judge Tamm, was limited to a finding that the FCC had entered "the forbidden realm of censorship." The court dismissed the FCC's attempt to label the Order as a channeling device because it felt that the FCC's clear intent was to censor certain non-obscene language when children were likely to be in the audience, regardless of the language's literary, artistic, political or scientific value. According to the court, the clear effect of the Order was censorship because studies showed that large numbers of children are in the broadcast audience until 1:30 a.m. This would mean that adults, as well as children, would not have been able to hear the uncensored exchange of ideas on a variety of issues and subjects on television or radio until well past midnight.

The court did not reach the constitutional issue of whether the FCC could regulate speech which is "indecent" but not "obscene" except in an arguendo analysis. The court stated that even if the FCC had the constitutional power to regulate "indecency," the Order was still unconstitutionally vague because children were never de-

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22. The FCC stressed in the Order that:

We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance [citation omitted]. Nuisance law generally speaks to channeling behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what . . . . [T]his problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear.

When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same . . . . However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims . . . .

56 F.C.C.2d at 98.

23. Order, 56 F.C.C.2d at 100. The FCC argued such widespread use of indecent language would: "(1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children."

24. 556 F.2d at 11.
25. Id. at 13.
26. Id. at 14.
27. Id. at 13.
28. Id. at 15. See note 7 supra for text of Section 1464, which punishes "indecent" broadcasts. Judge Tamm summarily dismissed the FCC's claim that the Order was justified by Section 303 which empowers the FCC to promote the broadcast media for the public interest.
fined by age. In addition, the Order would be overbroad, because "indecent" words were banned even if used in an innocent or educational context. The court also indicated that it did not find the FCC's unique qualities of the broadcast media rationale very persuasive since the Supreme Court had ruled that government control of objectionable speech can be tolerated only when substantial privacy interests are being invaded. The court reasoned that when listeners turn on the radio, their interest in privacy is diminished, and if they find a broadcast offensive, then "the radio can be turned off." In addition, the court doubted that the Order was necessary to stem a flood of filth on the airwaves. It noted the absence of empirical proof and reasoned that, since broadcasters air what advertisers pay for and advertisers pay for only what the public wants, then "the market should limit the filth accordingly."

The court concluded that decisions on whether to broadcast potentially offensive speech should be left to the discretion of the individual broadcaster's "judgment, responsibility, and sensitivity to the community's needs, interests and tastes."

Pacifica's Implications for the FCC's Control of Offensive Speech

The court of appeals' ruling in Pacifica has not changed the law because it never reached the unsettled constitutional issue of whether

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Tamm noted that the FCC had previously decided that the "public interest" requires "balanced programming" (i.e., more than programs suitable only for children), which was impossible under the Order because it limited adults to watching and listening to programs that were suitable only for children until well past midnight. 556 F.2d at 18. See Renewal of Standard Broadcast and Television License in Oklahoma, Kansas and Nebraska, 14 F.C.C.2d 1, 8 (1968).

29. 556 F.2d at 16-17. The Supreme Court has repeatedly emphasized the need for precision when regulating speech. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-218 (1975). Justice Stevens' opinion in Young v. American Mini-Theatres, Inc., 427 U.S. 50, 59, rehearing denied, 429 U.S. 873 (1976), noted that a person whose own speech is not constitutionally protected can challenge the constitutionality of regulations that affect protected speech:

In such cases, it has been the judgment of this Court, that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be muted... because of the possible inhibitory effects of overly broad statutes.

Id. at n.17.

30. 556 F.2d at 17. See note 3 supra.


32. 556 F.2d at 18. As support for his own theory of the market as a safeguard against a flood of filth, Tamm cited the thousands of angry calls that swamped a London television station and various newspapers after the station broadcast a program in which members of a rock band used a string of obscenities. Id. at n.26.

33. Id. at 18.
the First Amendment prevents the FCC from regulating speech which is "indecent" but not "obscene." But *Pacifica*'s reaffirmation of broadcaster discretion over potentially offensive speech, plus its *arguendo* disparagement of the FCC's rationale for controlling "indecent" speech, will have a significant impact on the way the FCC will approach offensive language in the future.

First of all, the court of appeals' decision will discourage the FCC from applying sanctions against the occasional use of language it considers "indecent." If a broadcaster's overall record has been good, it would be very difficult to prove that such occasional usage of indecency is an abuse of the broadcaster discretion endorsed by the court. Sanctions would still be available against a broadcast which is obscene.

Secondly, the court of appeals' decision enables the FCC to pursue two options if the airwaves actually are flooded by indecency in the future. One option is for the FCC to wait until the license of the broadcaster who has aired the indecent language comes up for its three-year renewal. Then the FCC could apply sanctions against the broadcaster for failing to use his discretion to meet what the court termed the "community's needs, interests and tastes." This language is almost identical to the broadcaster's obligation to "discover and fulfill the problems, needs and interests of the public within the station's service area" if the broadcaster wishes to have his license renewed. The drawback of this option is that the broadcaster could

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34. See note 2 supra.

35. Ironically, an earlier case involving Pacifica Foundation, Pacifica Foundation, 36 F.C.C. 147 (1964), provides an example of how broadcaster discretion might be judged in light of the majority opinion. In that case, viewers had complained about five programs broadcast by Pacifica over a four-year span. Even though Pacifica admitted that two of the programs should not have been broadcast, the FCC renewed Pacifica's license because "on an overall basis [Pacifica's programming] has been in the public interest." Id. at 149. Much of Pacifica's programming was devoted to public affairs and cultural coverage.

36. See note 4 supra on the difficulty of words alone being considered obscene.

37. 556 F.2d at 18.

38. Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants, 35 Rad. Reg.2d (P&F) 1555 (1975). A broadcaster meets his obligation to *discover* "the problems, needs and interests of the public" by surveying leaders within the community and general public. The FCC then determines at license renewal time if the broadcaster's performance has *fulfilled* the "problems, needs and interests" revealed in the survey. Possible grounds for the FCC not to renew the license of a broadcaster who aired "indecent" language would be that such broadcasts were blatantly at odds with the surveys or that members of the community have lodged so many complaints that the broadcasts are obviously not in the "public interest."

The "public interest" standard by which the FCC awards license renewals is obviously vague and subject to abuse. Writers' Guild of America, West v. FCC, 423 F. Supp. at 1146-50. But this standard's vagueness can be cured on appeal since courts are not to be restricted by the deference usually shown to the expertise and discretion of an administrative agency. The First
continue to air indecent language up to the time of license renewal. Another option is for the FCC to devise a new, sufficiently narrow, precise definition of “indecency” that will meet constitutional requirements. Although the court’s opinion does not encourage a distinction between “indecency” and “obscenity” and Chief Judge Bazelon’s concurring opinion explicitly says it cannot be done, the “indecency” issue could be viewed very differently if there existed a narrow, precise definition of “indecency” designed to combat an actual flood of filth on the airwaves. A redefinition could be attempted before any flood occurs, of course. Then, however, the FCC would still be requesting courts to regulate what is normally constitutionally protected speech without producing any empirical data to justify the regulation. However, if “indecent” language were actually widespread on the broadcast media, or even on one station, and if there was tangible proof of public concern and harm, then the FCC would be able to point to these facts as palpable proof of the need for further FCC regulation. Under such circumstances, the FCC would undoubtedly find a court more receptive to considering the unique qualities of the broadcast media as a rationale for regulating speech.

Since the FCC sought review of *Pacifica* in the Supreme Court, it obviously does not welcome any of these implications. The next two sections of this casenote will be devoted to demonstrating that, if the Supreme Court grants certiorari, it should affirm the court of appeals and defer any decision on whether the FCC can regulate speech which is “indecent” but not “obscene.”

**The Necessity of Reversing the FCC’s Order**

The dissent in *Pacifica* raised three central issues which deserve study in this examination of why the Order required reversal. Other points raised in the dissent are soundly rebutted in the concurring opinion.  

Amendment issues at stake require courts to take a “hard look” at the case. See 556 F.2d at 35; WAIT Radio v. FCC, 459 F.2d 1203, 1204, *cert. denied*, 409 U.S. 1027 (1972).

39. See text accompanying notes 30-32 *supra*.

40. 556 F.2d at 18-30. See note 62 *infra*.

41. Judge Leventhal argued that the Order’s concurring opinions filed by FCC Commissioners Quello, Reid, Robinson and Hooks indicated that the Order only applied to the early afternoon hours and thus was an acceptable channeling device. 556 F.2d at 31-32. Chief Judge Bazelon rebutted this by pointing out that the clear thrust of the Order was to apply the ban to all times when children are likely to be in the audience. *Id.* at 19 n.2. Later, Leventhal argued that the FCC Order observed the “underlying considerations” of the Miller test for obscenity—a test Leventhal claimed is not limited to matters of prurient interest but which also encompasses “patently offensive representations of... excretory functions...” *Id.* at 32-33.
The first of these issues is whether the presence in the broadcast audience of children, frequently unsupervised by adults, gives the FCC special latitude to regulate "indecent" speech.\textsuperscript{42} The Supreme Court did recognize in \textit{Ginsberg v. New York}\textsuperscript{43} that a definition of obscenity can be adjusted by "permitting the appeal of this type of [magazine] material to be assessed in terms of the sexual interest . . . 'of such minors.' "\textsuperscript{44} Also, in \textit{Illinois Citizens for Broadcasting v. FCC},\textsuperscript{45} the presence of children in the audience was cited as one factor which warranted the imposition of a $2,000 forfeiture against a radio station that conducted call-in programs focused on sexual topics.\textsuperscript{46}

These cases, however, were concerned with "obscenity," not "indecency."\textsuperscript{47} Even assuming that the presence of children in the audience gives the FCC the latitude to regulate "indecency" for children,\textsuperscript{48} the Supreme Court has held that adults cannot be limited to hearing or viewing only that which is fit for children.\textsuperscript{49} This is exactly what the Order would have done, since it would not allow adults to hear "indecent" but "non-obscene" material until after 1:30 a.m.\textsuperscript{50}

\textsuperscript{42} Bazelon rebutted this by quoting passages from \textit{Miller} requiring an appeal to prurient interest. \textit{Id.} at 21 n.11. \textit{See Ward v. State of Illinois}, 97 S. Ct. at 2087 for a reaffirmation of the importance of prurient interest. Bazelon added that the Order did not observe \textit{Miller}'s other standards even if prurient interest were not required. 556 F.2d at 22-24.

\textsuperscript{43} 390 U.S. 629 (1968).

\textsuperscript{44} \textit{Id.} at 638.

\textsuperscript{45} 515 F.2d 397 (D.C. Cir. 1975).

\textsuperscript{46} \textit{Id.} at 404. The other factor in the combination was the station's "pervasive pandering approach." \textit{Id.} This opinion was written by Judge Leventhal.

\textsuperscript{47} In \textit{Illinois Citizens}, Judge Leventhal stressed that his decision did not rule on whether the FCC could regulate material that was "indecent" but not "obscene" because the FCC had found that the material at issue was "obscene." 515 F.2d at 404.

\textsuperscript{48} This claim is very dubious. In \textit{Erznoznik v. City of Jacksonville}, 422 U.S. at 213 n.10, the Supreme Court stated that although it had not yet decided what effect \textit{Miller} will have on \textit{Ginsberg}'s concept of "variable obscenity," if something is to be classified as obscene to minors, it still "must be, in some significant way, erotic." \textit{Id.} This indicates that eroticism is the key to whether speech will lose its constitutional protection for minors. Eroticism is not a factor in the FCC's definition of "indecency." \textit{See} text accompanying note 16 supra. \textit{Erznoznik} additionally held that speech which is non-obscene to youths "cannot be suppressed solely to protect the young from ideas . . . that a legislative body thinks unsuitable." 422 U.S. at 213 n.10. The Supreme Court has also stated in \textit{Young v. American Mini-Theaters}, 427 U.S. 50, \textit{rehearing denied}, 429 U.S. 873 (1976), that:

\textit{The primary concern of the free speech guarantee is that there be full opportunity for expression in all its varied forms to convey a desired message. Vital to this concern is the corollary that there be full opportunity for \textit{everyone} to receive the message.}"

\textit{Id.} at 76 (emphasis added).


\textsuperscript{50} 556 F.2d at 14.
In addition, Ginsberg stressed that parents have the primary responsibility for determining what material is harmful to their children. The statute in Ginsberg did “not bar parents who so desire from purchasing the magazines for their children.” In *Pacifica*, the Order would have totally replaced parental judgment of what is harmful to children with FCC determination. Although the broadcast media does have characteristics that enable children to bypass this parental determination, the Supreme Court has recognized that a communication medium’s “greater capacity for evil, particularly among the youth ... does not authorize substantially unbridled censorship.” The Order would certainly seem to qualify as “unbridled censorship” since it would have limited adults to hearing only that which is fit for children. Also, it would have proscribed some words as unfit for children regardless of the literary, artistic, political or scientific value of the works in which those words appeared.

A second issue that warrants discussion is whether the broadcast media’s ability to intrude upon the privacy of the home justifies stricter regulation of broadcast speech than is allowed for speech in other media. Home audiences are a primary target of the broadcast industry, and the Supreme Court has held that the home-situs not only enables a person to possess obscene material there, but it also enables a person to prevent unwanted obscene material from being mailed to him. The dissent criticized the majority for ignoring the home-situs and for relying instead on cases that allowed offensive conduct in public places where annoyed bystanders could avoid the conduct by merely averting their eyes.

However, the majority’s analogy to the public place appears far more sound than the dissent’s analogy to the home-situs because the home-situs cases are grounded on an individual’s right to privacy. As

51. Ginsberg v. New York, 390 U.S. at 639 (emphasis added). In recognizing the primary role played by parents in making decisions for their children, the Supreme Court ruled in Wisconsin v. Yoder, 406 U.S. 205 (1972), that an Amish parent has a constitutionally protected right not to send his children to secondary schools for religious reasons.


53. 556 F.2d at 33.


56. 556 F.2d at 33. The cases Judge Leventhal referred to are Erznoznik, which involved nudity on a drive-in theater screen, and Cohen v. California, which involved the display of the printed word “fuck” in a courthouse. Cohen provides some support for Leventhal’s distinction between public places and the home by stating that “... government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue ...” 403 U.S. at 21. However, there are numerous elements involved in listening or watching the broadcast media that arguably diminish a person’s right to privacy in his home. See text accompanying note 57 infra.
the majority noted, a person's right to privacy in his home is diminished when that person opens his home to a public broadcast by voluntarily bringing in a radio or television and voluntarily switching it on. These voluntary acts mean that a broadcast is not an unwanted intruder of the privacy of the home—it is really similar to an invited guest. Furthermore, if a listener finds a broadcast to be offensive, he can rid himself of the now unwanted guest by simply turning off the radio or television. This is basically identical to a person in a public place averting his eyes from an offensive sight.

A final issue to be discussed is the majority's obvious belief that there is no market for filth in broadcasting. The dissent criticized this belief, stating that "[j]udges cannot . . . premise that there is not really a market that will endure." But this premise by the majority in Pacifica was merely dicta. Furthermore, the court stressed that the Order was unconstitutionally overbroad. The doctrine of overbreadth—wherein unprotected speech cannot be regulated if the regulation also reaches protected speech—would apply whether or not there was a market for filth in broadcasting.

The real significance of this issue, however, lies in the Supreme Court ruling that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Therefore, since the FCC was unable to present any empirical data indicating there was a market for indecency in broadcasting, the court would have had to presume there was no such market even if it really thought there was one.

The analysis of the above three issues should establish clearly the necessity of reversing the Order. The Order, which was prompted by an "undifferentiated fear" of indecency on the public airwaves, would have produced totally unwarranted results. It would have limited adults to hearing only what the FCC and George Carlin had arbitrarily decided was "decent." Parental supervision of children's listening habits would have been replaced with FCC supervision. And the simple alternative of letting people switch off those broadcasts that they find offensive would have been ignored. The court's invalidation

57. 556 F.2d at 17.
58. Id. at 35.
59. See note 29 supra for a sample of the Supreme Court's attitude toward overbroad regulation of speech.
60. Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969). Tinker is particularly applicable since the Court opted for freedom of expression over regulation despite the involvement of children (three public school pupils) and an environment with unique qualities (a school).
61. 566 F.2d at 18.
of the Order, on the other hand, refused to respond to the FCC's undifferentiated fear and wisely allowed for future FCC action if that fear results in a flood of filth on the public airwaves.

THE PRUDENCE OF DEFERRING THE "INDECENCY" ISSUE

The court of appeals never reached the constitutional issue of whether the FCC can regulate "indecent" but "non-obscene" speech. However, it is arguable that the court should have reached the issue by a basic construction of Sections 326 and 1464 plus the court's prior decision in *Illinois Citizens*.62

Although Section 326 sweepingly forbids the FCC from having the power of censorship, this general prohibition is clearly modified by Section 1464's specific penalties for the broadcast of "obscene, inde-

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62. This argument was presented in Chief Judge Bazelon's concurring opinion. 556 F.2d at 20. He concluded the FCC could not regulate speech which is "indecent" but not "obscene." Although he admitted that no single Supreme Court decision forecloses the FCC's argument that "indecency" can constitute an additional category of unprotected speech, he interpreted the relevant existing case law as refuting the four factors cited by the FCC as illustrating the unique qualities of the broadcast media. See text accompanying note 10 supra. According to Bazelon, the theory that offensive speech may offend the privacy interests of unconsenting adults in their homes (FCC factors 2 and 3) is refuted by the Supreme Court decisions in *Cohen* and *Erznoznik*, which hold that voluntary turning on of radio broadcasts diminishes the right to privacy. 556 F.2d at 25-27. Also, according to Bazelon, the theory that the presence of children in the broadcast audience gives the FCC increased latitude in regulating speech (FCC factor 1) is refuted by the Supreme Court decisions in *Butler*, *Erznoznik*, *Tinker* and *Yoder*, which basically hold that everyone is entitled to a full opportunity of expression. 556 F.2d at 28. Bazelon stated that the theory that the scarcity of spectrum space justifies the Order (FCC factor 4) is refuted by *Red Lion*, which Bazelon interprets as justification only for increasing the diversity of speakers on the broadcast media, not for censorship. 556 F.2d at 29. See note 10 supra. Bazelon also dismissed miscellaneous FCC justifications for the Order: fear of a flood of filth; regulating for the more effective use of radio in the public interest; and the fact that the government could have denied the public access to the airwaves altogether. 556 F.2d at 29-30.

Bazelon's opinion also concluded that the *Miller* test for obscenity must be met before the FCC can regulate offensive speech. Bazelon stated that:

The Commission's definition of indecent speech that may be freely regulated thus goes well beyond *Miller* and is prima facie unconstitutional . . . . The Commission's definition can be affirmed only if, as it alternatively argues, there exists an additional category of offensive speech that is unprotected when broadcast.

556 F.2d at 23-24. Since Bazelon rejected the FCC's alternative argument, he apparently believes that *Miller* must be the test applied to determine if offensive material that is broadcast can be regulated by the FCC.

Other commentators, however, have questioned whether *Miller's* standards can be applied to the broadcast media because of the difficulty in determining what is the "whole" of the broadcast (one record, one program, one format, or one year's overall performance?) and which "community's" standard should be used for measuring prurient interest (the community at which the broadcaster is specifically aiming his programs, the community that is capable of receiving the broadcasts, or the entire community of the broadcaster's city of license). These questions are discussed in detail in *Regulating Broadcast Obscenity*, supra note 2, at 626-41.
cent or profane language.” Rudimentary statutory construction dictates that specific terms prevail over general terms in the same or another statute which otherwise might be controlling. Thus, it appears the court should have ruled on whether the general prohibition on censorship can be constitutionally modified by the specific punishment for the broadcast of “indecent” language.

Furthermore, this court had already decided in Illinois Citizens that the FCC could censor “obscene” language despite the prohibition on censorship. Thus, it already had ruled that broadcasters do not have more protection than that provided by the First Amendment. It would have seemed natural for this court to decide next if the FCC could regulate “indecent” speech and thus determine if broadcasters have less protection than that provided by the First Amendment.

Legal precedent and prudence, however, support the court’s decision to defer the “indecency” issue. First of all, courts have long recognized that cases should be decided on statutory grounds if this will avoid a constitutional question. Secondly, Pacifica simply did not provide an adequate setting for the resolution of the “indecency” issue. This is best illustrated by viewing Pacifica in terms of the “ripeness doctrine.” While the ripeness doctrine, per se, is used to determine whether there is a jurisdictional case or controversy, it is useful by analogy here because it is designed to protect all parties from being harmed by premature adjudication of hypothetical events. The doctrine achieves this by requiring deferral of issues unfit for judicial decision if deferral does not result in hardship to the parties.

In Pacifica, the issue of whether the FCC could constitutionally define and regulate “indecency” differently than “obscenity” was ob-

63. Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co., 322 U.S. 102, 108 (1942); Mahatico v. United States, 302 F.2d 880, 886 (D.C. Cir. 1962). The prohibition against the broadcast of obscene, indecent or profane language was originally included in Section 326, but later was transferred to the Criminal Code. Order, 56 F.C.C.2d at 96.
64. 515 F.2d 397. See note 2 supra and 556 F.2d at 20 (Bazelon, J., concurring).

Without undertaking to survey the intricacies of the ripeness doctrine, it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.
viously unfit for judicial decision because the FCC's definition was blatantly overbroad and vague. Even the dissent agreed that the Order needed modification as to the words interdicted and the duration of the time during which the Order was in effect. Additionally, there was no evidence in Pacifica that either the challenging or challenged parties would suffer any hardship by a deferral. There certainly would be no hardship to Pacifica Foundation, the challenging party. The court's opinion indicates that Pacifica and other broadcasters should be allowed to exercise the very discretion over the language they air that the FCC had frequently claimed the broadcasters have always had. Even the challenged party, the FCC, could not show it would suffer from a deferral because it failed to present any empirical data to support its fear of a flood of filthy language on the airwaves. The FCC's data in Pacifica consisted of nothing more than one radio station playing one record which prompted one complaint. This does not lend credence to the theory that the unique qualities of the broadcast media justify stricter regulation of speech than that which is permissible in other media. Nor does it herald a "widespread use of indecent language on the public's airwaves."

This lack of empirical data does not mean, however, that "indecent" language will never flood the airwaves. This could happen despite the interplay of audience size, advertising revenues and broadcaster profit motive which the court relied upon as floodgates. These factors would certainly prevent the repeated broadcast of "indecency" by the vast majority of broadcasters who aim at broad, general audiences in America's cultural mainstream—audiences that would agree with the FCC that the words banned in the Order were "indecent." But these factors would have far less weight with broadcasters that target their programs for specific, narrow American

68. See note 20 supra and text accompanying note 29 supra.
69. See note 29 and accompanying text supra.
70. 556 F.2d at 36-37.
71. See note 5 supra.
72. 556 F.2d at 18.
73. See text accompanying note 17 supra.
74. Order, 56 F.C.C.2d at 100.
75. In fact, the Television Board of the National Association of Broadcasters (NAB) voted in June to change its Code from discouraging material that "by law" is considered obscene, profane and indecent, to material that is "generally perceived" to be so. Chicago Sun Times, June 30, 1977, at 3. The reason for the switch was that the NAB, which encompasses nearly 500 of the nation's 768 commercial television stations, felt that the legal definition was too liberal and the NAB should "reassert in more specific terms the broadcasters recognition of television as primarily a family medium." Id. On September 16, 1977, the Board adopted language stressing that broadcasters themselves determine what is to be considered obscene and that their standards should be "above and beyond the requirements of law." The new Code also advises broadcasters to consider the family atmosphere in which its programs are viewed.
subcultures—subcultures that are not offended by the type of words banned in the Order.

For example, a broadcaster who services an inner-city black audience could present the works of contemporary black literature and music plus call-in shows on various topical issues. As recently stated in Bazaar v. Fortune, the court of appeals' decision enables the FCC to combat them by devising a new, precise, narrow definition of "indecency." The mere redefinition of "indecency," of course, will not mean the FCC can constitutionally regulate it. This would simply force a court to confront directly the "indecency" issue. Then many of the same arguments from Pacifica would be resurrected. Is "indecency" subsumed by "obscenity" in Section 1464 as it is in similar statutes or do the unique qualities of the broadcast media enable the FCC to constitutionally distinguish the two terms? Can "variable obscenity" for children be stretched to reach "indecent" language? How broad an area can speech be "channeled" into before it cuts impermissibly into the right to hear constitutionally protected speech? New arguments would also surface, such as whether outraged casual listeners of a station can prevent that station's broadcast of "indecent" language even though the station's regular listening audience does not complain.


77. See note 11 supra.

78. See note 32 supra.
These complex questions, which could have First Amendment repercussions beyond the broadcast media, clearly deserve to be decided on sterner stuff than Pacifica's vague, overbroad attempt to stem the "undifferentiated fear" of a flood of filth on the public airwaves. Thus, it was prudent for the court to defer the "indecency" issue and give the FCC the opportunity to devise a precise, narrow regulation of an actual flood of "indecency." The Supreme Court would be doing a service to both broadcasters and the FCC if it does the same.

CONCLUSION

The court of appeals' reversal of the FCC's attempt to prospectively ban "indecent" language on radio and television was necessary because the ban was fatally overbroad and vague. Therefore, the Supreme Court should affirm. The true value of Pacifica, however, lies more in what it examined than in what it ruled.

Pacifica provided the first thorough judicial analysis of whether the FCC can regulate "indecency" differently than "obscenity." The constantly changing nature of what constitutes "offensive" language in our complex, heterogenous society virtually guarantees that the issue will arise again. When it does, the court of appeals' ventilation of the "indecency" issue will be a valuable guide to the litigants and judges who ultimately will decide the issue.

Greg Kinczewski

79. As previously noted, see text following note 40 supra, the FCC would be wise to postpone any redefinition of "indecency" until some kind of "flood" actually occurs. Then the FCC would be able to tailor its redefinition to meet this problem. However, it seems that the likelihood for court approval of any redefinition would be enhanced if it applied only (1) to those times of the day when scientific studies show that children are most likely to have unsupervised access to the broadcast media, and (2) to that type of speech which would not have literary, artistic, political or scientific value for children. For its definition of children, the FCC could select whatever age group that enables it to regulate the most time under factor (1).