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AUTHOR Glasser, Theodore L.; Jassem, Harvey C.
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ABSTRACT

In the 1978 "FCC v. Pacifica Foundation" ruling, the United States Supreme Court considered the authority of the Federal Communications Commission (FCC) to regulate indecent radio programing, finding that the public has a constitutionally protected interest in being protected against objectionable programing. The FCC suit, arising out of a broadcast of comedian George Carlin's "Filthy Words" satire, focused on three aspects of radio which distinguish it from less obtrusive modes of communication, justifying special treatment of offensive or objectionable broadcasts: children, often unsupervised, have access to radios; radios are in the home where the privacy interest is entitled to extra consideration; and unconsenting adults may tune in a station without any warning that offensive language is being broadcast. Confusion surrounds the type of balance sought by the Court in conflicts between intrusive expressions and privacy claims. While government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and language which cannot be totally barred from public dialogue, no substantial agreement exists regarding when intrusion by expression constitutes an invasion of privacy. (DF)

INDECENT BROADCASTS AND THE LISTENER'S RIGHT OF PRIVACY

Theodore L. Glasser
Assistant Professor

Harvey C. Jassem
Assistant Professor

Department of Communication Arts
University of Hartford
West Hartford, CT 06117

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INDECENT BROADCASTS AND THE LISTENER'S RIGHT OF PRIVACY

It is a fundamental truism -- albeit a tenuous one -- that of all forms of public communication broadcasting receives the least First Amendment protection. Quite unlike their print counterpart, broadcast media qualify as a quasi-public utility, an agency of communication over which the federal government assumes jurisdiction. Accordingly, broadcasters must settle for the role of fiduciary, a kind of guardian of the airwaves whose limited discretionary powers circumvent the laissez-faire premise of the First Amendment.

In a dramatic departure from our libertarian heritage, Congress and the courts have come to regard the social value of broadcasting as far more important than any individual broadcaster's First Amendment guarantees. To be sure, in an effort to promote programming in the "public interest, convenience and necessity," the broadcaster's freedom of expression emerges as more conditional than absolute. As the Supreme Court found in 1943, the "avowed aim" of Congress when it wrote the Communications Act of 1934 was to secure the maximum benefits of broadcasting for all the people; and to this end Congress endowed the Federal Communications Commission with the "comprehensive powers to promote and realize the vast potentialities" of broadcasting.[1] Or as the Court of Appeals acknowledged in 1966, broadcasters are necessarily burdened by "enforceable public obligations"; whereas print media can be operated at the whim of their owners, broadcast media cannot.[2] Thus, insofar as broadcasting is concerned, Justice White reasoned in Red Lion,

viewers and listeners have the right to suitable access to a balanced and equitable "marketplace of ideas"; it is, in short, the consumer's right to hear, not the producer's right to be heard, which is paramount.[3]

But as of the summer of 1978 it is not only the public's right to hear with which broadcasters must concern themselves. For in its recent ruling on the authority of the FCC to regulate indecent programming, the Supreme Court introduced a new and novel dilemma for broadcasters: the listener's right not to hear. Given the "uniquely pervasive presence" of broadcast media, the Court found in FCC v. Pacifica Foundation,[4] the public's need to be untrammeled by objectionable programming also warrants Constitutional protection. More succinctly, certain kinds of broadcast expressions may constitute a form of intrusion and thus violate the listener's right of privacy.

WBAI and the "Filthy Words"

On December 3, 1973 the Federal Communications Commission received a complaint from a man who, while driving in his car with his young son in the early afternoon, had tuned to a recording of humorist George Carlin's "Filthy Words" monologue.[5] Broadcast by WBAI-FM, Pacifica Foundation's non-commercial station in New York City, Carlin's 12 minute satire was part of a regularly scheduled live program on society's attitudes toward language. "Whereas I can perhaps understand an 'X-rated' phonograph record's being sold for private use," the complaintant wrote the FCC, "I certainly cannot understand the broadcast of same over the air. . . . Any child

could have been turning the dial, and tuned in to that garbage."[6]

In response to the FCC's inquiry, Pacifica described Carlin's monologue as "an incisive satirical view of the subject under discussion."[7] Calling Carlin a "significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl," Pacifica defended the broadcast in terms of its contributions to the further understanding of language in contemporary society:

> . . . Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes toward these words.[8]

Realizing the monologue might be offensive to some, however, WBAI advised listeners about the sensitive language and suggested that those who might be offended should change the station and return in 15 minutes.

Channeling Indecent Expressions

Without denying the need to maintain the broadcaster's broad discretion in the area of programming, and without violating its own prohibition against censoring or interfering with a broadcaster's right of free speech,[9] the Commission sought to enforce the statutory prohibition against "obscene, indecent, or profane" broadcasts.[10] In a Declaratory Order adopted and released in February

1975, the FCC granted the complaint but declined to impose any sanctions on WBAI. Instead, the Commission used its Order as a "flexible procedural device" to "clarify the standards which the Commission utilizes to judge 'indecent language'."[11]

Beyond the scarcity of spectrum space, the FCC cited three unique qualities of radio which distinguished it from other, less intrusive modes of communication and which, therefore, justified special treatment of offensive or objectionable broadcasts: "(1) children have access to radio receivers 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 extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast."[12] Unable to justify an outright ban of such programming, however, the Commission rested its case on "principles which are analogous to those found in cases relating to public nuisance."[13] Thus, while it could not prohibit offensive language, it could, the Commission reasoned, channel it to a more appropriate time. "Nuisance law generally speaks to channeling behavior more than actually prohibiting it," the Commission explained. "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."[14]

In contrast to obscene language, which could be banned under the guidelines established by the Supreme Court in Miller v. California,[15] indecent language, in the Commission's view, both lacks the element of appeal to prurient interest and cannot be

redeemed as having literary, artistic, political or scientific value when children are in the audience. Accordingly, the concept of indecent, as the FCC defined it, 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. Obnoxious gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.[16]

Thus Constitutionally protected, yet objectionable, words may be broadcast during the late evening hours "provided the programs in which they are used have serious literary, artistic, political, or scientific value."[17] Or as Commissioner Robinson hypothesized in his concurring statement, "If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being 'indecent' within the meaning of the statute."[18]

Channeling as Censorship

In its appeal to the District of Columbia Court of Appeals, Pacifica argued that the prohibition against "obscene, indecent and profane" broadcasts is unconstitutionally vague unless "indecent"

is subsumed under "obscene." And since Carlin's monologue neither appeals to prurient interest nor lacks literary and political value, Pacifica sought protection for its broadcast under the standards established by the Supreme Court in Miller. In essence the Court of Appeals agreed and subsequently reversed the Commission's Order:

> Despite the Commission's professed intentions, the direct effect of its Order is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications. In promulgating the Order the Commission has ignored both the statute which forbids it to censor radio communications and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee.[19]

Dismissing the Commission's distinction between prohibiting a broadcast and channeling a broadcast, the Court saw the Order as "censorship regardless of what the Commission chooses to call it."[20] That is, since the effect of the Order is that of censorship, in the Court's view the FCC had gone beyond its mandate.

The Court left unresolved the distinction between indecency and obscenity and instead focused its attention on the Commission's failure to accommodate the First Amendment rights of the broadcaster. While acknowledging the authority of the FCC to promulgate rules in the area of programming, "any such actions . . . must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the

Communications Act."[21] In particular, the FCC's order to regulate non-obscene speech, the Court found, is overbroad and vague[22] and thus fails to meet the Supreme Court's requirement that, when Constitutional guarantees are at stake, "precision of drafting and clarity of purpose" are essential.[23] As Judge Bazelon wryly commented, under the Commission's definition of indecency, its own Order could not be read over the air.[24]

In sum, the Court of Appeals found the FCC's Order in violation of its duty to avoid censorship. And even if there was, as the Commission argued, a category of unprotected speech other than obscenity, the Commission's Order, the Court said, would still be unconstitutional by virtue of its breadth and lack of clarity.

The Meaning of Indecent

In reversing the Court of Appeals, the Supreme Court reasoned that while Carlin's monologue deserved Constitutional protection, the FCC acted within its jurisdiction when it sought to channel the program to a later time period. Specifically, in response to the Commission's petition for certiorari, the Court (i) found Carlin's satire indecent as broadcast, (ii) ruled that the FCC's order was not in violation of Section 326 of the Communications Act, and (iii) concluded that the Commission's authority to impose sanctions on licensees who engage in indecent broadcasting does not conflict with the First Amendment. In short, the Court for the first time established the Constitutionality of the FCC's power to regulate--though not ban--indecent programming.[25]

Being the first Supreme Court review of the statutory prohibition against "obscene, indecent, and profane" broadcasts, FCC v. Pacifica Foundation offers an important remedy for what had become a "hazy but perilous" distinction between obscene and indecent.[26] In dismissing Pacifica's contention that Carlin's monologue was not indecent because it did not appeal to prurient interests, the Court argued that "obscene, indecent, and profane" are used in the disjunctive: each word, Justice Stevens explained, has a separate meaning. Unlike obscenities, the Court said, indecencies have no prurient appeal. Drawing on Webster's Dictionary, the Court defined indecent as unseemly, inappropriate; indecent language can be identified simply by its "nonconformance with accepted standards of morality."[27]

In its attempt to distinguish between obscenity and indecency, the Court portrayed the latter as -- to use Commissioner Robinson's phrase -- more atmospheric than substantive.[28] In the case of obscenity the content of the broadcast must appeal to prurient interests; for a broadcast to be indecent, however, its form must defy contemporary standards of morality. From the Court's perspective, it follows, words and ideas -- i.e., form and content -- rank differently in the hierarchy of First Amendment values: "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."[29]

Emphasizing the narrowness of its holding, the Court expressly assumed, arguendo, that Carlin's monologue would be protected

in other contexts: ". . . the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context."[30] Clearly, the Court made no effort to either curtail the distribution of recordings or inhibit any live performance of Carlin's routine; presumably, the Court's ruling would not preclude First Amendment protection for the monologue had it been broadcast at a later time. "Words that are commonplace in one setting," Justice Stevens explained, "are shocking in another."[31] Simply put, the Court found Carlin's performance indecent only as broadcast.

While the sense and substance of a program may warrant Constitutional protection, then, the context in which it is presented -- or the circumstances under which it is aired -- lies at the "periphery of First Amendment concern."[32] To identify an indecent program, therefore, the FCC must assess a host of variables bearing on context and circumstance; or to use the Court's metaphor, the Commission must decide for itself whether a "pig has entered the parlor."

The "Pig in the Parlor" Test

Significantly, Carlin's monologue per se, the Court found, was neither indecent nor obscene. Moreover, proof that WBAI's broadcast was indecent did not depend on finding the monologue itself obscene. "We simply hold," the Court concluded, "that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[33]

It is uncertain, however, exactly how constraining the Court's

test will prove to be. In WUHY,[34] Sonderling[35] as well as Pacifica, the FCC relied heavily on the Supreme Court's definition of obscenity as put forth in Roth,[36] Memoirs,[37] and refined in Miller. But of the six requisite elements of obscenity established by the Court,[38] it is unclear which ones apply to broadcast indecency. In its most narrow reading, for example, the Court's decision in Pacifica implies that the obscenity tests "are altered only to the extent that, when children are likely to be in the audience, there is no requirement that the broadcast materials appeal to the prurient interest"; the remaining five tests "remain intact and must be met before the FCC may censure a broadcaster for its presentation of morally objectionable material."[39] But in Wing's broader interpretation, the Court's decision suggests that only the requirement that a work be patently offensive applies to indecent broadcasts.[40] Which interpretation comes closer to being correct is itself subject to considerable conjecture, since the FCC and the Court declined to specify standards for defining indecent language.

Although the Court does establish a distinction between obscene and indecent, the "Pig in the Parlor" test allows the FCC virtually unlimited discretion when it comes to deciding questions of indecency. Indeed, the most important variable of all -- the composition of the audience -- remains an unresolved issue: "whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided."[41] And since the Commission itself expects to resolve indecency controversies on an

ad hoc basis rather than by deciding a priori which words, in which context, are proscribed as indecent, what emerges as the test for indecency roughly corresponds to Justice Stewart's, "But, I know it when I see it" test for obscenity.[42]

Indecent Programming as Intrusion

More important than the Court's distinction between obscene and indecent, however, is its endorsement of the FCC's "nuisance" rationale for channeling objectionable language. For the Pacifica Court not only sanctions channeling as an appropriate remedy for intrusive programming but does so because of what it views as the "pervasive presence" of broadcast media, especially their unique accessibility to children. What the Court offers, then, is an important, though brief, explication of how and why indecent programming constitutes a form of intrusion, a tort commonly associated with an individual's right of privacy.

Broadcasting and Its Captive Audience

The reasons for distinguishing between print and broadcast media for purposes of resolving First Amendment controversies are many and complex, but two are particularly relevant to the Court's finding in Pacifica. The first has to do with the linear nature of broadcasting, which effectively undermines any effort on the part of the broadcaster to protect the listener or viewer from unexpected and potentially offensive programming. The second reason centers on the lack of control over where and by whom a broadcast can be received, a problem compounded by the Court's desire to shield

children from what Justice Powell describes as the kind of "verbal shock treatment" administered by WBAI when it aired Carlin's monologue.[43]

Listening to radio, the FCC observed in its Order, is less of a deliberate act than reading a book or attending a motion picture.[44] In this sense listeners are, in the Court's view, captives in their own homes; they are peculiarly susceptible to "intrusive programming." Consequently, broadcasters have a special obligation to protect the sanctity of the home by avoiding "offensive" language at "inappropriate" times. That listeners themselves can evade objectionable material by turning off the radio or by changing stations in no way establishes immunity for the intruder; for unlike print media, material broadcast over the airwaves arrives with little or no forewarning. Accordingly, Justice Stevens likens WBAI's broadcast to an indecent phone call:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away from the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.[44A]

Moreover, a message broadcast via radio or television is decidedly more fortuitous -- i.e., less "directed" -- than the same message published in, say, a newspaper or magazine. Not only is it

difficult to regulate the composition of a broadcast audience -- as the Court has done for print media -- but it is virtually impossible to segregate the audience in an attempt to selectively restrict access to a given program. Additionally, sampling broadcast fare is, in terms of the consumer's time and money, far more efficient than sampling print media; in fact many listeners, the FCC believes, regard radio as a kind of "electronic smorgasbord."[45] For these reasons it becomes very difficult to know, with any degree of certainty, who is in the audience at any given time. Specifically, it is difficult to know whether the audience has been "contaminated" by children, a class of citizen without the "full capacity for individual choice which is the presupposition of First Amendment guarantees."[46]

To resolve the problem of audience composition without actually prohibiting morally objectionable language, the Court prefers the FCC's solution to have offensive programming channeled to a time when fewer children are likely to be in the audience.

Channeling Protected Speech

In overturning the Court of Appeals and affirming the FCC's handling of Pacifica, the Supreme Court endorsed enforced channeling as an appropriate remedy for indecent broadcasting. Noting that the FCC's authority to regulate indecent broadcasting was legitimate and firmly in the 1927 Radio Act, and further reasoning that "subsequent review of program content is not the sort of censorship at which the [anticensorship] statute was directed," the Court approved channeling as appropriate and refused to equate it with censorship.[47]

By endorsing a policy of channeling objectionable broadcast language away from children, the Supreme Court was also, in effect, endorsing a policy of channeling such programming away from adults "with normal sleeping habits."[48] The Court of Appeals found that the Commission's attempt "to shield children from language which is not too rugged for many adults" would reduce "the adult population to hearing or viewing only that which is fit for children. The Commission's Order is a classic case of burning the house to roast the pig."[49] Whether called censorship or not, channeling restricts what may be broadcast during the majority of the broadcast day. But by its decision not to equate channeling with censorship, the Supreme Court was not compelled to deal seriously with the issue of prior restraint or the possible "chilling effect" its ruling might have.

The Listener's Right of Privacy

In its attempt to strike a balance between the First Amendment rights of the broadcaster and the need to protect the rights of the broadcaster's "captive audience," the Supreme Court in Pacifica alludes to what Emerson calls "invasion by expression" and introduces what it describes as a listener's right of privacy.[50] Not entirely without precedent, the Court's application of privacy rights to an audience for a public medium is sufficiently novel in that it views privacy as more of a social concern than an individual interest.

Traditionally, privacy law deals with "interests that are more individual and private than social or public"; typically, when a

person's privacy is violated the "injury is peculiar to the individual, rather than shared with others."[51] In Pacifica, however the Court presupposes a shared privacy right, presumably a concern common among listeners and viewers of broadcast media. From the Court's perspective, broadcasting in general -- radio in particular -- is a unique blend of private and public communication, a peculiarity the FCC explains in terms of radio receivers being in the home, "a place where people's privacy interest is entitled to extra deference."[52] Objectionable programming, therefore, may well intrude on the listener's solitude and thus violate the listener's right to be left alone: "Patently offensive, indecent material presented over the airwaves," the Court concludes, "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder."[53]

Significantly, of the several cases cited by the Court in support of its construction of a listener's right of privacy, none involves the private or secluded reception of broadcast programming. In Rowan v. Post Office,[54] for example, the Court upheld the Constitutionality of the Postal Revenue and Federal Salary Act of 1967, which gave recipients of unwanted mail the right to have their names removed from mailing lists: "The ancient concept that 'a man's home is his castle' in which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another."[55]

While the Rowan Court found that an individual has the right

not to receive unwanted communications, that right does not necessarily extend outside the home. Thus in Cohen v. California the Court ruled that the First Amendment protected the right of an individual to wear in public a jacket emblazoned with the message "fuck the draft."[56] "The mere presumed presence of unwitting listeners and viewers," the Court said, "does not serve automatically to justify curtailing all speech capable of giving offense."[57] Similarly, in Public Utilities v. Pollak the Court found that broadcasting music and commercials in streetcars and buses over the objections of passengers did not justify a claim of invasion of privacy.[58]

Still, there are times when essentially public communication can intrude on the listener in the privacy of the home. In Kovacs v. Cooper the Court justified restrictions on amplified speech, ruling that ordinances limiting the time, place, and volume of outdoor sound were not in conflict with the First Amendment.[59] But as Judge Bazelon reminds us, radio waves are not intrusive in the same sense as emissions from a sound truck: "Unlike the sound truck whose noise cannot be eliminated from the home even if desired, radio makes no sound unless a person voluntarily purchases it, brings it home and then switches it 'on'."[60]

A State of Confusion

There is, Emerson finds, general confusion surrounding the type of balance sought by the Court in cases involving conflicts between intrusive expressions and privacy claims.[61] While "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot

totally be barred from the public dialogue," as Justice Harlan proposed in Cohen,[62] there is no substantial agreement on when intrusion by expression constitutes an invasion of privacy.

Whether in principle radio broadcasts qualify as private communication or public dialogue is an issue to which the Court in Pacifica devotes little attention. Beyond its narrow ruling on the authority of the FCC to channel indecent language, the Court makes no attempt to confront the larger First Amendment concern: can broadcast programming that is not indecent be deemed intrusive and thus subject to the listener's right of privacy?

[1] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[2] Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 at 1003 (D.C. Cir. 1966).

[3] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[4] FCC v. Pacifica Foundation, 3 Med. L. Rptr. 2553 (S. Ct. 1978).

[5] The monologue (see Appendix) was aired at 2:00 p.m. on October 30, 1973.

[6] Letter from John H. Douglas to Federal Communications Commission (November 28, 1973) [available from the authors].

[7] Pacifica Foundation, 56 F.C.C. 2d 94, at 95 (1975) [hereinafter cited as Pacifica].

[8] Id., at 96.

[9] § 326 Communications Act of 1934 (Public Law 416, 73d Congress) prohibits the Commission from censoring or otherwise interfering with a broadcaster's right of free speech.

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

[11] Pacifica, supra note 7, at 99.

[12] Id., at 97.

[13] Id., at 98.

[14] Id.

[15] Miller v. California, 413 U.S. 15 (1973)

[16] Pacifica, supra note 7, at 98.

[17] Id., at 100.

[18] Id., at 108.

[19] Pacifica Foundation v. FCC, 2 Med. L. Rptr. 1465 (D.C. Cir. 1977) at 1467.

[20] Id., at 1468.

[21] Id., at 1469.

[22] The Commission's Order is especially vague in that it fails to define children. "Need a nineteen year old and a seven year old be protected from the same offensive language?" Id., at 1470.

[23] Id.

[24] Concurring opinion of Judge Bazelon, Id., at 1476.

[25] FCC Hearing Examiner Thomas Donahue (In re. Palmetto Broadcasting Co., 33 F.C.C. 265, 1961) denied renewal of radio station WDKD's license. The major focus of Donahue's decision was the alleged vulgar programing of air-personality Charlie Walker. Donahue called Walker's program "vulgar" and said that "Coarse," "vulgar," "suggestive," "obscene," and "indecent" were essentially synonomous. The Court of Appeals upheld the FCC's action but relied on licensee misrepresentation to the FCC, not the programming content, to support its decision. Thus Donahue's indecent/obscene synonyms did not receive judicial review or approval [334 F.2d 534 (D.C. Cir. 1964)].

In a 1964 case involving Pacifica, the FCC faced the problem of dealing with a complaint from a listener who objected to the airing of some allegedly "filthy" programs (Edward Albee's "Zoo Story," poems by Lawrence Ferlinghetti, a discussion program of and about homosexuals, a reading by author Edward Pomorantz of his unfinished novel entitled "The Kid," and a reading of the poem "Ballad of the Despairing Husband" by its author, Robert Creely). All of these programs (except the Creely reading) were broadcast after 10:00 p.m. Some of these programs used "swear" words. The Commission did not examine the individual programs to determine whether Pacifica had violated obscenity/indecency laws or regulations. Instead these programs were viewed as a component of Pacifica's overall programming. "Our function," wrote the Commission,

> is the very limited one of assaying, at the time of renewal, whether the licensee's programming, on an overall basis, has been in the public interest and, in the context of this issue, whether he has made programming judgments reasonably related to the public interest. This does not pose a close question in this case: Pacifica's judgments . . . clearly fall within the very great discretion which the [Communications] act wisely vests in the licensee. In this connection, we also note that Pacifica took into account the nature of

> of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum). [Pacifica 36 F.C.C. 147, at 149 (1964)]

Pacifica asserted that its normal policy was to take into account the times of the day when children might be in the audience and to broadcast material that might not suit that audience at another time. It also claimed to have had a procedure of screening questionable material before airing it, a procedure which Pacifica said mistakenly permitted the Ferlinghetti and Creely programs to be broadcast as and when they were. The Commission found that here where there were isolated programming errors,

> [t]he standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him where his overall record demonstrates a reasonable effort to serve the needs and interests of his sommunity. . . .
>
> We find . . . that the programmin matters raised with respect to the Pacifica renewals pose no bar to a grant of renewal. [Id., at 150]

Other objections to Pacifica's license renewals were also found to be insufficient cause for action.

Two major FCC decisions in the 1970's preceded the Carlin case and dealt with the issue of broadcast obscenity/indecency. In WUHY-FM [Eastern Educational Radio, 24 F.C.C. 2d 408 (1970)], the Commission found that WUHY-FM violated Section 1464 of Title 18 of the U.S. Code because it had aired (between 10 and 11 p.m.) a taped interview of Jerry Garcia (of musical group The Greatful Dead) in which Garcia used the terms "shit" and "fuck" indiscriminately. The FCC wrote:

> we have a duty to act to prevent the widespread use on broadcast outlets of such expressions . . . . For the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the "public interest in the larger and more effective use of radio" (Section 303 (g)). . . . [I]t conveys no thought to begin some speech with "Shit, man . . .", or to use "fucking" as an adjective throughout the speech. We recognize that such speech is frequently used in some settings, but it is not employed in public ones.

The Commission cited what it called the "crucial" differences between broadcasting and other media: the intrusive nature of broadcasting and the fact that it

easily reaches large numbers of children. While the FCC agreed with the licensee that the broadcast was not obscene, it called it indecent. An indecent program, according to the FCC, would be

> (a) patently offensive by contemporary community standards; and (b) . . . utterly without redeeming social value.

The Commission noted the absence of judicial directives in the area of indecency in broadcasting and said that its findings in this case were intended to curb any potential trend toward indecent-type broadcasting. It also realized that "the matter is one of first impression, and can only be definitevely settled by the courts." WUHY was fined "only $100.00" and encouraged to appeal the FCC's decision so that the Commission could get a clearer idea of what its responsibilities and authority were in the area of indecency.

In the case of Sonderling Broadcasting Corp, (WGLD-FM) [27 Rad. Reg. (P&F) 285 (1973)], the FCC found radio station WGLD-FM guilty of obscenity and indecency as a result of its carriage of a talk show shich focused largely on sex. The problem was not the use of cour-letter words, rather the Commission objected to the explicit discussions of such things as oral sex in a manner it deemed to be titilating.

> If discussions in this titilating and pandering fashion of coating the penis to facilitate oral sex, swallowing the semen at climax, overcoming fears of the penis being bitten off, etc., do not constitute broadcast obscenity within the meaning of 18 U.S.C. 1464, we do not perceive what does or could. . . .
>
> Our conclusions here are based on the pervasive and intrusive nature of broadcast radio, even if children were left completely out of the audience. However, the presence of children in the broadcast audience makes this an a fortiori matter.

The Commission added that if these broadcasts were not obscene, certainly they were indecent, and fined the licensee $2,000, again ugring an appeal for judicial clarification.

These FCC decisions never had judicial review because neither WUHY not WGLD appealed them to the courts.

For a review of the FCC's regulation of indecent programming, see John C. Carlin, "The Rise and Fall of Topless Radio," Journal of Communication 26:31-37 (Winter 1976). See also James W. Wasolowski, "Obscene, Indecent, or Profane Broadcast Language as Construed by the Federal Courts," Journal of Broadcasting 13:203-219 (Spring 1969).

[26] See Charles Feldman and Stanley Tickton, "Obscene/ Indecent Programming: Regulation of Ambiguity," Journal of Broadcasting 20:273-282 (Spring 1976).

[27] FCC v. Pacifica, supra note 4, at 2558.

[28] Pacifica, supra note 7, at 108. Or ad the Court put it, "indecency is largely a function of context - it cannot be adequately judged in the abstract." FCC v. Pacifica, supra note 4, at 2559.

[29] FCC v. Pacifica, supra note 4, at 2559, n. 18.

[30] Id., at 2561.

[31] Id.

[32] Id., at 2559.

[33] Id., at 2562.

[34] WUHY-FM, 24 F.C.C. 2d 408 (1970).

[35] Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P&F) 285, on reconsideration, 41 F.C.C. 2d 777 (1973).

[36] Roth v. U.S., 354 U.S. 476 (1957).

[37] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Commonwealth of Massachusetts, 383 U.S. 413 (1966).

[38] Under Miller, "morally objectionable material was protected unless it met six specific requirements: (1) the work appealed to the prurient interest of the average person; (2) the judgement of prurience was based on the work as a whole; (3) the work was judged by contemporary state or local standards; (4) the work affronted those community standards in a patently offensive way; (5) the sexual conduct involved was specifically described either by the statute or by later judicial construction; (6) the material as a whole lacked serious literary, artistic, political or scientific calue." Susan Wing, "Morality and Broadcasting: FCC Control of 'Indecent' Material Following Pacifica." Federal Communications Law Journal 31:156 (Number 1).

[39] Id., at 162.

[40] Id.

[41] FCC v. Pacifica, supra note 4, at 2562, n. 28.

[42] Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring).

[43] FCC v. Pacifica, supra note 4, at 2567 (Powell, J., concurring).

[44] Pacifica, supra note 7, at 97, citing Sonderling Broadcasting, 27 Rad. Reg. 2d (P&F) 288.

[44A] FCC v. Pacifica, supra note 4, at 2562.

[45] Pacifica, supra note 7, at 97, citing Sonderling Broadcasting, 27 Rad. Reg. 2d (P&F) 288.

[46] FCC v. Pacifica, supra note 4, at 2565 (Powell, J., concurring).

[47] Id., at 2557.

[48] Pacifica Foundation, supra note 19, at 1479.

[49] Id., at 1471.

[50] Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1979) at 558.

[51] Id., at 517.

[52] Pacifica, supra note 7, at 97.

[53] FCC v. Pacifica, supra note 4, at 2562.

[54] 397 U.S. 728.

[55] 397 U.S. 737.

[56] 403 U.S. 15.

[57] 403 U.S. 21.

[58] 343 U.S. 451.

[59] 336 U.S. 77.

[60] Pacifica Foundation, supra note 19, at 1478 (Bazelon, j., concurring).

[61] Emerson, supra note 50, at 559.

[62] 403 U.S. 22.