

CASENOTES

Broadcasting Seven Dirty Words: *FCC v. Pacifica Foundation*¹—On October 30, 1973, at two o'clock in the afternoon, New York educational, non-profit radio station WBAI, owned by and licensed to the Pacifica Foundation,² aired a recorded twelve-minute satiric monologue by George Carlin entitled "Filthy Words."³ The Carlin monologue was broadcast during the course of a regularly scheduled live program. The program, whose format consists of commentary by the host and listener call-ins, on this day was focusing on contemporary society's attitudes towards language.⁴ The record was played towards the end of the program, and was selected because "it was regarded as an incisive satirical view of the subject under discussion."⁵ During the course of his monologue, Carlin repeatedly discusses the seven filthy words that "you couldn't say on the public . . . airwaves . . . the ones you definitely wouldn't say."⁶ The record was immediately preceded by a warning to listeners that it included sensitive and perhaps offensive language.⁷ Those who might be offended were advised to change the station and return to WBAI after fifteen minutes.⁸

On December 3, 1973, the Federal Communications Commission (Commission) received a complaint from a listener who had heard the WBAI broadcast of the Carlin monologue while driving with his young son.⁹ The listener demanded to know what action the Commission intended to take in regard to his complaint.¹⁰ The Commission forwarded the complaint to

¹ 438 U.S. 726 (1978).

² Pacifica Foundation, a non-profit educational foundation formed in 1946, owns five other FM radio stations across the country: KPFA and KPFB, Berkeley, Cal.; KPFT, Houston, Texas; KPFK, Los Angeles, Cal.; WPFW, Washington, D.C. Brief for Respondent at 2 n.2, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

³ *In re Pacifica Foundation*, 56 F.C.C.2d 94, 95 (1975). The segment was from the album "George Carlin, Occupation: Foole," Little David Records. The album was recorded live at the Circle Theatre in San Carlos, California. *Id.*

⁴ 438 U.S. at 730.

⁵ Letter from Edwin A. Goodman, President of Pacifica Foundation, to William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, FCC (January 7, 1974), reproduced in Petition for Writ of Certiorari app. at 3, 438 U.S. 726 (1978). Mr. Goodman wrote the letter in response to a listener's complaint which had been forwarded to Pacifica Foundation by the Commission. See text at note 10 *infra*.

⁶ 438 U.S. at 729. For a complete text of the monologue see G. Carlin, *Filthy Words*, in "George Carlin, Occupation: Foole," Little David Records, transcribed in 438 U.S. at 751 (appendix). The seven dirty words are: shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. *Id.*

⁷ *Pacifica Foundation v. FCC*, 556 F.2d 9, 11 (D.C. Cir. 1977). It is unknown whether the lodger of the complaint heard this warning.

⁸ *Id.*

⁹ 438 U.S. at 730. This was the only complaint lodged with either the Commission or WBAI about the airing of the monologue. Brief for Amici Curiae American Civil Liberties Union, et al. at 6. Brief for Amici Curiae American Broadcasting Co., Inc., et al. at 7. 438 U.S. 726 (1978).

¹⁰ Letter from John H. Douglas to the Commission (November 28, 1973), reproduced in Petition for Writ of Certiorari app. at 2. 438 U.S. 726 (1978). Mr. Douglas wrote:

Pacifica Foundation (Pacifica) for comment.¹¹ Pacifica responded by claiming that Carlin was "a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl," and that airing the monologue in the context of the program was "natural and contributed to a further understanding on the subject."¹² Pacifica was not requested to and did not choose to address the issue of the monologue's offensiveness or the appropriateness of the time of day of the broadcast.¹³

After receiving Pacifica's response, the Commission issued a Memorandum Opinion and Order (Order)¹⁴ pursuant to its statutory authority under 18 U.S.C. section 1464¹⁵ and 47 U.S.C. section 303.¹⁶ The Order defined the indecent language prohibited by section 1464 as that language which 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."¹⁷ The Commission found that the language used in the monologue was broadcast in a manner patently offensive by contemporary community standards and at a time when children were undoubtedly in the audience.¹⁸ Applying the foregoing standard, the Commission concluded that the broadcast was indecent and thus prohibited by section 1464.¹⁹ As a further justification for its actions, the Commission cited its statutory obligation under section 303(g) to promote the larger and more effective use of radio in the public interest.²⁰ The Order imposed no formal sanctions against Pacifica;²¹ but the Commission put the Order into Pacifica's file and

Whereas I can perhaps understand 'X-rated' phonograph records being sold for private use, I certainly cannot understand the broadcast of the same over the air Any child could have been turning the dial, and tuned into the garbage I'd like to know, gentleman, just what *you're* going to do about this outrage, and, by copy, I'm asking our elected officials the same thing.

Id. at 2-3 app.

¹¹ 438 U.S. at 730.

¹² *In re Pacifica Foundation*, 56 F.C.C.2d 94, 96 (1975) (quoting letter from Pacifica Foundation to Commission, January 7, 1974).

¹³ Brief for Respondent at 3-4 n.3, *Pacifica*, 438 U.S. 726 (1978).

¹⁴ *In re Pacifica Foundation*, 56 F.C.C.2d 94 (1975).

¹⁵ 18 U.S.C. § 1464 (1976) 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."

¹⁶ 47 U.S.C. § 303 (1976) provides in pertinent part:

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

....

(g) . . . generally encourage the larger and more effective use of radio in the public interest;

¹⁷ 56 F.C.C.2d at 98.

¹⁸ *Id.* at 99.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* For violations of 18 U.S.C. § 1464, Congress has empowered the Commission to revoke a station's license or construction permit, 47 U.S.C. § 312(a)(6) (1976); issue a cease and desist order, 47 U.S.C. § 312(b)(2) (1976); or impose a

threatened that it would use its administrative sanctions if it received further complaints.²²

Pacifica appealed the Commission's finding that the broadcast was indecent and prohibited by section 1464. On appeal, the United States Court of Appeals for the D.C. Circuit agreed with the position espoused by Pacifica, and reversed the Commission's Order.²³ There was, however, no consensus among the three judges on the panel. Consequently, there were three separate opinions written, with one judge dissenting.²⁴

The Supreme Court granted certiorari,²⁵ and in a plurality decision, reversed the decision of the court of appeals.²⁶ The Court found that the monologue was indecent as broadcast,²⁷ and concluded that in view of the unique characteristics of broadcasting, the Commission was within both its statutory authority and the constitutional limits in prohibiting the broadcast.²⁸

The Supreme Court limited the scope of its review to the Commission's determination that the monologue was indecent "as broadcast."²⁹ Justice Stevens, writing for the plurality, noted that the Order was issued in and limited to a specific factual setting. The Court therefore expressly reserved questions concerning the Commission's handling of similar situations in the future.³⁰ The Court underscored the narrowness of its holding by pointing out that the indecency³¹ standard was not necessarily applicable to broadcast mediums other than radio, to the broadcast of renowned literary works, or to the broadcast of a similar record when the time of day and the content of the

monetary forfeiture, 47 U.S.C. § 503(b)(1)(E) (1976). The Commission can also deny a license renewal or grant a short-term renewal if such action is consistent with the public interest. 47 U.S.C. § 307 (1976).

²² 56 F.C.C.2d at 99.

²³ *Pacifica Foundation v. FCC*, 556 F.2d 9, 10, 18 (D.C. Cir. 1977).

²⁴ Judge Tamm found the Order invalid on either of two grounds; first, on the ground that it constituted censorship in direct violation of 47 U.S.C. § 326 (1976), and, alternatively, on the ground that the Order was overbroad and vague. *Id.* at 18. Chief Justice Bazelon concurred on the basis that the Commission's indecency standard went beyond the limits of the Supreme Court's guidelines for obscenity, and that no other exception under the first amendment was justified for offensive speech in the broadcast context. *Id.* at 24-29 (Bazelon, C.J., concurring). Judge Leventhal dissented, and would have upheld the Commission's regulation of the monologue as broadcasted. *Id.* at 36-37 (Leventhal, J., dissenting).

²⁵ 434 U.S. 1008 (1978).

²⁶ 438 U.S. at 751. Justice Stevens delivered the opinion for the majority of the Court for parts I, II, III, and IV-C. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined in part IV-C of the majority opinion. *Id.* at 729, 755. For parts IV-A and IV-B, Justice Stevens wrote a plurality opinion in which Chief Justice Burger and Justice Rehnquist joined, *id.* at 729, and Justices Blackmun and Powell concurred. *Id.* at 755, 756. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. *Id.* at 762. Justice Stewart also dissented and was joined in his opinion by Justices Brennan, White, and Marshall. *Id.* at 777.

²⁷ *Id.* at 741.

²⁸ *Id.* at 748-51.

²⁹ *Id.* at 734-35.

³⁰ *Id.* at 743.

³¹ As it is used in this article, the term "indecency" refers only to speech and not to conduct. It is used synonymously with the term "indecent speech."

program would indicate that the number of children in the audience would be at a minimum.³² Moreover, in limiting its review to the proscription of this particular broadcast, the Court declined to consider the hypothetical effects of the indecency standard,³³ and thus avoided what it saw as an "unnecessary" adjudication of constitutional issues.³⁴ The Court, therefore, was able to dismiss *Pacifica's* argument that even if the prohibition against this particular broadcast was constitutionally valid, the Commission's construction of section 1464 encompassed so much constitutionally protected speech as to be unconstitutional.³⁵

The Court addressed two relevant statutory issues presented by the case.³⁶ The first issue was the relationship between section 1464 of the Criminal Code, which prohibits the broadcast of indecent, obscene, or profane language,³⁷ and section 326 of the Communications Act which prohibits the Commission from interfering with the broadcaster's right of free speech.³⁸ The second statutory issue was whether the broadcasted monologue was indecent under section 1464 despite the absence of the element of prurient appeal necessary to constitute obscenity.³⁹

In addressing the first of these two statutory issues, the Court examined judicial precedent and legislative history, and determined that the anti-censorship provision of section 326 was not a limitation on the Commission's authority to regulate the broadcast of obscene, indecent, or profane language under section 1464.⁴⁰ Examining the judicial precedent, the Court noted that since the enactment of the anti-censorship provision in 1927, the Federal Radio Commission, its successor, the Federal Communications Commission, and the Court of Appeals for the District of Columbia, the appellate-forum for broadcast-related litigation, all have consistently interpreted section 326 as a prohibition against only prior restraint of proposed broadcasts.⁴¹ Section 326 has not been seen as a denial of the Commission's power to take into account the content of the broadcast after it has been completed.⁴² The Court im-

³² 438 U.S. at 748-49 & n.29.

³³ *Id.* at 743.

³⁴ *Id.* at 734.

³⁵ *Id.* at 742-43.

³⁶ *Id.* at 735. The Court declined consideration of the Commission's reliance on 47 U.S.C. § 303(g) (1976) as an additional justification for its Order. *Id.* at 739 n.13. See text at note 20 *supra*.

³⁷ The text of section 1464 is set out in note 15 *supra*.

³⁸ 438 U.S. at 735-38. 47 U.S.C. § 326 (1976) provides:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications.

³⁹ 438 U.S. at 738-41.

⁴⁰ *Id.* at 738.

⁴¹ *Id.* at 735-37.

⁴² *Id.* at 735-37 & n.11 (citing *Idaho Microwave, Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), *cert.*

PLICITLY adopted this analysis and characterized the Order as involving only post-broadcast review, and hence not limited by the anti-censorship provision.⁴³

Turning to the legislative history, the Court pointed out that the anti-censorship provision and the prohibition against indecent or obscene language together comprised section 29 of the Radio Act of 1927.⁴⁴ The Court stated that the enacting Congress could not have intended the anti-censorship provision of section 29 to act as a limitation on the broadcast provision.⁴⁵ Otherwise, the dual provisions would have had a nullifying effect on each other. Even though these provisions of former section 29 are now located in different sections of the Code,⁴⁶ the Court found nothing in the legislative history to indicate that this rearrangement was intended to change the scope or meaning of section 326.⁴⁷ Rather, the Court noted that the separation was merely a by-product of a major revision of the Criminal Code in 1948.⁴⁸ Ac-

denied, 394 U.S. 930 (1969); *United Church of Christ v. FCC*, 359 F.2d 944 (D.C. Cir. 1966); *Bay State Beacon, Inc. v. FCC*, 171 F.2d 826 (D.C. Cir. 1948)). It is important to note, however, that the Court's reliance on these cited cases may be misplaced. The cases involved applications for license renewal, not direct enforcement of section 1464. The imposition of civil sanctions for violations of section 1464 of the Criminal Code, 47 U.S.C. § 1464 (1976), is more chilling of speech and threatening to licensees than an overall review of a station's performance at renewal time, and thus might be a violation of section 326. Consequently, the precedential value of the cases relied upon by the Court is questionable.

⁴³ 438 U.S. at 737-38.

⁴⁴ *Id.* at 738. Section 29 of the Radio Act of 1927 provided:

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Id. at 735 (quoting Radio Act of 1927, Pub. L. No. 632, ch. 169, § 29, 44 Stat. 1172-73 (1927)).

⁴⁵ 438 U.S. at 738.

⁴⁶ *Id.* The two provisions were re-enacted in the same section in the Communications Act of 1934. *Id.* In 1948, the prohibition against obscene, indecent, or profane language was transferred from the Communications Act and re-enacted in its present form as section 1464 of Title 18. The transfer of section 1464 was effected as part of a major revision of the Criminal Code. The anti-censorship provision, on the other hand, is still contained in the Communications Act of 1934, 47 U.S.C. § 326 (1976).

⁴⁷ 438 U.S. at 738. Both the Senate and the House Reports on the 1947 proposed revision of the Criminal Code stated that great care had been exercised to preserve the meaning of the existing law as then expressed. *See* S. REP. NO. 1559, 80th Cong., 2d Sess. 1-2 (1948); H.R. REP. NO. 308, 80th Cong., 1st Sess. 1-8 (1947). *See also* *Tidewater Oil Co. v. United States*, 409 U.S. 151, 162 & n.29 (1972). The *Tidewater* Court reaffirmed "a well-established principle governing the interpretation of provisions altered in the 1948 revision . . . that 'no change is to be presumed unless clearly expressed.'" *Id.* at 162 (quoting *Fournco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957)).

⁴⁸ 438 U.S. at 738.

cordingly, the Court found that section 326 was not applicable to section 1464, and thus did not limit the Commission's authority under that statute to regulate the broadcast of indecent, obscene, or profane language.

The second statutory issue addressed by the Court was whether the broadcast was indecent under section 1464 in the admitted absence of the prurient appeal element needed to constitute obscenity.⁴⁹ Pacifica argued that the Court's decision in *Hamling v. United States*⁵⁰ militated against finding that a broadcast was indecent absent a finding of prurient appeal.⁵¹ In *Hamling*, the Court held that 18 U.S.C. section 1461,⁵² which prohibits the mailing of obscene or indecent material, only prohibited the mailing of material which had prurient appeal.⁵³ The *Pacifica* Court, however, did not feel compelled by its previous opinion in *Hamling* to find that prurient appeal was a necessary definitional element of indecent language under section 1464.⁵⁴ In rejecting Pacifica's argument, the Court reasoned that, although sections 1461 and 1464 are both criminal statutes regulating the dissemination of offensive material, the different nature of the two modes of communication being regulated—discrete mailing to individuals versus public broadcasting—justified differing interpretations of seemingly similar statutes.⁵⁵ The Court found that under section 1464 indecency is merely "nonconformance with accepted standards of morality" and that it is not subsumed under the notion of obscenity.⁵⁶ Because the Court found that Pacifica had not questioned the finding that the broadcast was offensive, the Court reasoned that Pacifica's challenge of the finding that the broadcast was indecent was based solely upon the absence of prurient appeal.⁵⁷ Therefore, having resolved that prurient appeal was not a necessary element of indecency,⁵⁸ the Court concluded

⁴⁹ *Id.* at 738-39.

⁵⁰ 418 U.S. 87 (1974).

⁵¹ 438 U.S. at 740-41.

⁵² 18 U.S.C. § 1461 (1976) provides in pertinent part: "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance: . . .

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

⁵³ 418 U.S. at 112-13.

⁵⁴ 438 U.S. at 741. Although the Court had not expressly ruled on the meanings of the terms used in section 1464 prior to this case, Pacifica's contention that "indecent" is subsumed under the definition of "obscenity," and therefore requires an element of prurient appeal, finds support in precedent interpreting related statutes. See, e.g., *Hamling v. United States*, 418 U.S. 87, 112-13 (1974) (construing 18 U.S.C. § 1461); *United States v. 12 200-ft. Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973) (construing 18 U.S.C. § 1462, dealing with the importation or transportation of offensive material). Justice Stewart, in his dissent, relied on this judicial precedent when he advocated construing "indecent," as used in section 1464, to be synonymous with "obscene." 438 U.S. at 777-80.

⁵⁵ 438 U.S. at 741.

⁵⁶ *Id.* at 739-40.

⁵⁷ *Id.* at 739.

⁵⁸ See text at notes 49-56 *supra*.

that *Pacifica* had no further statutory objections to the Commission's finding that the broadcast was indecent.⁵⁹

Having disposed of the statutory issues, the Court addressed the question whether the first amendment circumscribes the Commission's power to prohibit the broadcast of indecent language in any circumstances.⁶⁰ The Court found that although the language was offensive and of "slight social value," it was still protected speech.⁶¹ The Court observed, however, that the Constitution does not require this protection to be absolute; it may vary according to the context in which the language is used.⁶² The Court noted that in the broadcasting context, otherwise protected speech constitutionally could be restricted.⁶³ The Court remarked that the special attributes of broadcasting historically have entitled the medium to only limited first amendment protection.⁶⁴ The Court has used two rationales to justify the regulation of broadcasting: the intrusive and pervasive nature of the broadcast medium, and the unavoidable presence of young children in the audience.⁶⁵ In *Pacifica*, the Court applied both of these rationales and decided that the Commission's action was constitutionally valid.⁶⁶

The significance of the decision in *Pacifica* is two-fold. First, the case represents the first time that the Supreme Court has reviewed the Commission's independent authority to enforce section 1464 of the Criminal Code which prohibits the broadcast of obscene, indecent, or profane language. By upholding the Order, the Court granted its tacit approval of the Commission's juris-

⁵⁹ 438 U.S. at 741. There are two major flaws in the Court's line of analysis on this point. First, *Pacifica* never addressed the offensiveness of the broadcast in its response to the Commission's inquiry because it was only requested "to submit comments" regarding the listener's complaint. "Accordingly, the fact that *Pacifica*'s response 'did not deny' certain of the facts underlying the Commission's subsequent Order cannot be construed as a tacit admission of such facts." Brief for Respondent at 4 n.3, *Pacifica*, 438 U.S. 726 (1978). Second, the Court's argument is flawed because it relied on an inappropriate standard for determining the offensiveness of the broadcast. Even assuming that *Pacifica* had admitted that the broadcast was offensive, such an admission should not have been dispositive. Rather, the Court should have applied the contemporary community standard, as articulated by the Commission, in determining the offensiveness of the broadcast. In general, application of the contemporary community standard could yield results inconsistent with those that might be obtained by applying the vendor's own standards of offensiveness. For example, language which might be considered offensive by the vendor, could conceivably pass muster under the contemporary community standard.

⁶⁰ 438 U.S. at 744.

⁶¹ *Id.* at 746.

⁶² *Id.* at 747.

⁶³ *Id.* at 748-51.

⁶⁴ *Id.* The Court discussed the fact that, unlike any other medium, broadcasters may be denied a license if the Commission decides that such action would best serve the public interest. *Id.* at 748. See 47 U.S.C. §§ 309(a), 312(a)(2) (1976). Second, the Court noted that, under the Fairness Doctrine, broadcasters, unlike newspaper publishers, are obliged to give free time for the expression of opposing viewpoints. 438 U.S. at 748. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), with *Miami Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁶⁵ 438 U.S. at 748-49.

⁶⁶ *Id.* at 748-51.

diction. Therefore, this decision effectively broadened the authority of the Commission to control programming beyond its previous limits of licensing discretion and of issuing guidelines for maximizing community service.⁶⁷ The Commission now has the power, concurrent with and independent from the Justice Department, to enforce section 1464. Second, this case is significant because the Court found that the prohibition against indecent broadcasting in 18 U.S.C. section 1464 provides for the regulation of non-obscene,⁶⁸ constitutionally protected speech.⁶⁹ By carving out a new class of speech which is susceptible to government regulation, *Pacifica* authorizes a further limitation of first amendment freedoms.

This note will examine the Court's jurisdictional and substantive interpretations of 18 U.S.C. section 1464. It will first demonstrate the importance of this enlargement of the Commission's authority by placing the decision in its historical context. The article next will analyze the substantive standard for indecency by evaluating the rationales used by the Court to justify the regulation of protected speech. It will be submitted that the justifications used by the Court for regulating indecent speech in the broadcast arena are insufficient under existing standards of review. The analysis of the standard for indecency will continue by comparing the standard accepted by the *Pacifica* Court with the standard used for unprotected obscene speech. It will be demonstrated that the indecency standard is less tolerant than the obscenity standard, and that this discrepancy is unjustifiable in light of the similarities between the two areas being regulated. It will be proposed therefore that the Court should have imposed the same limitations on the indecency standard as were placed on the obscenity standard. Finally, the article will examine the impact of the decision on the Commission's policies and on broadcasters' freedom of speech.

I. THE COMMISSION'S AUTHORITY TO ENFORCE SECTION 1464

Although 18 U.S.C. section 1464 appears to be a substantial control on programming content, it has rarely been invoked by the Commission or the Justice Department both because obscene and indecent broadcasts are a relatively recent phenomenon,⁷⁰ and because of the Commission's uncertainty about its role in the statutory scheme.⁷¹ This uncertainty was conceivably

⁶⁷ This increase in administrative authority to regulate radio broadcasting stands in strong contrast with the trend towards deregulation in the areas of time devoted to advertising, news, and community services. See *FCC moves to Relax Radio-Station Rules in Some Large Cities To Test Deregulation*, Wall St. J., October 20, 1978, at 3.

⁶⁸ 438 U.S. at 741.

⁶⁹ *Id.* at 746.

⁷⁰ See *In re Sonderling Broadcast Corp.*, 41 F.C.C.2d 777, 778 n.5 (1973) (charting the rise in the number of listener complaints about allegedly obscene, indecent, or profane programming from fiscal 1971-73); *In re Pacifica Foundation*, 56 F.C.C.2d 94, 94 (1975). See also Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 457 & n.1.

⁷¹ *Proposed Amendment to the Communications Act of 1934: Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Commerce Comm.*, 91st Cong., 1st Sess. pt. 2 343-74 (1969) [hereinafter cited as 1969 *Hearings*].

attributable to the legislative history of section 1464. Originally, as the *Pacifica* Court pointed out, section 1464 was enacted as a provision of section 29 of the Radio Act of 1927, the predecessor of the current Communications Act.⁷² In 1948, Congress, as part of its major revision of the Criminal Code, removed the provision from the Radio Act and incorporated section 1464 into chapter 71 of Title 18 along with other federal criminal statutes regulating offensive material.⁷³ Consequently, the Commission arguably was left unsure whether the removal of section 1464 from the Communications Act was to be read as a reflection of congressional intent to strip the agency of its adjudicatory powers or whether the Commission was to have continued jurisdiction.

The Commission's confusion over the meaning of the statutory rearrangement was perhaps compounded by the fact that Congress made ambiguous cross-references in the Communications Act to section 1464 of the Criminal Code. These cross-references in the Communications Act empower the Commission to impose a variety of civil sanctions for "violations" of section 1464.⁷⁴ The use of the term "violation" makes it unclear whether a criminal conviction is a condition precedent to the imposition of these civil sanctions, or whether the Commission has the jurisdiction to determine independently if a violation has occurred.⁷⁵ Prior to 1970, the Commission chose to maintain a conservative policy of conditioning the imposition of the civil sanctions upon either a successful prosecution by the Justice Department, or upon a determination by the Justice Department that the offense was prosecutable.⁷⁶ The Commission thereby limited itself to forwarding complaints to the Justice Department which in turn rarely acted upon them.⁷⁷

⁷² 438 U.S. at 735.

⁷³ See note 46 *supra*. The other sections in chapter 71 of Title 18 involve mailing offensive or crime-inciting matter, 18 U.S.C. § 1461 (1976), importation or transportation of obscene matters, 18 U.S.C. § 1462 (1976), mailing offensive matter on wrappers or envelopes, 18 U.S.C. § 1463 (1976), and the transportation of offensive material for sale or distribution, 18 U.S.C. § 1465 (1976).

⁷⁴ For a discussion of the available sanctions, see note 21 *supra*.

⁷⁵ See Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 466.

⁷⁶ 1969 Hearings, *supra* note 71, at 347, 357, 359, 360, 373. Commissioner Cox told the Senate subcommittee:

If [the incidents] are not prosecutable, they are not obscenity. They therefore do not violate [section 1464], do not violate our rules, and cannot be the basis for adverse action.

....

The Senator is reading a criminal statute for which a man can be prosecuted, put in jail for two years, and fined \$10,000. If he does something which is criminal, then it is obscene. If it is not obscene enough to be criminal, then it is not obscene.

Id. at 357, 360.

⁷⁷ *Id.* at 347-48. "We present these cases to the Department of Justice who invariably fail to prosecute. They will feel under the Supreme Court standards they could not sustain a conviction." *Id.* at 347.

The Justice Department has prosecuted broadcasters for indecent or obscene language only five times: *United States v. Simpson*, 561 F.2d 53 (7th Cir. 1977); *United*

Despite the fact that the Commission relied on the Justice Department to formally enforce section 1464, the Commission's policy did not render it completely helpless in controlling obscene and indecent broadcasting. To the contrary, the infrequency of this type of broadcasting probably was attributable to the fact that the commercial value of the broadcast licenses, coupled with the Commission's broad discretionary power to renew them every three years,⁷⁸ gives the Commission effective leverage for keeping the policies and operations of current licensees in check without resorting to formal or direct sanctions. The Commission has exercised this leverage through informal methods of influencing program control, such as issuing guidelines, which have had a marked effect on broadcasters' programming decisions.⁷⁹ Furthermore, the Commission takes into consideration prior incidents of offensive broadcasting when evaluating the public interest for license grants and renewals.⁸⁰ In this

States v. Smith, 467 F.2d 1126 (7th Cir. 1972); Tallman v. United States, 465 F.2d 282 (7th Cir. 1972); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966); Duncan v. United States, 48 F.2d 128 (9th Cir.), *cert. denied*, 283 U.S. 863 (1931). The *Duncan* case was brought under the Radio Act of 1927, Pub. L. No. 632, ch. 169, § 29, 44 Stat. 1172-73 (1927). *Duncan*, 48 F.2d at 129. The other four cases were brought under 18 U.S.C. § 1464.

More often than not, however, the Justice Department has returned complaints forwarded to them by the Commission with a letter indicating that they did not believe the offenses to be prosecutable. The following is an excerpt from one such letter.

We have received the exhibits attached to your letter and agree that the facts do not warrant consideration of a criminal prosecution. Not only is the reading of the poem an inappropriate subject for an obscenity prosecution, but, it is evident that the station took steps to insure that the listening audience would contain few, if any, minors or other persons who would be offended by listening to its reading.

Letter from the Justice Department to the Commission, *quoted in 1969 Hearings, supra* note 71, at 348.

⁷⁸ 47 U.S.C. § 307(a), (d) (1976).

⁷⁹ A good example of this informal control was evident in the reaction of the broadcasters to Commission Chairman Dean Burch's annual address before the National Association of Broadcasters on March 28, 1973. Address by Dean Burch, Chairman of the Federal Communications Commission, before the National Association of Broadcasters, in Washington, D.C., March 28, 1973 (released as F.C.C. Public Notice No. 99446, *cited in* Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 464 n.50). In his address, Chairman Burch vehemently condemned the sex-talk show—"topless radio"—format and threatened to use strong administrative action to curtail such programs. 1974 ARIZ. ST. L.J. at 464. This address proved to be sufficient warning to licensees and provided ample impetus for the "cleaning-up" of these sex-talk shows. N.Y. Times, April 24, 1973, § 1, at 1, col. 1, (*cited in* Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 464).

⁸⁰ See *FCC v. American Broadcasting Co., Inc.*, 347 U.S. 284, 290 n.7 (1954), wherein the Court stated:

The 'public interest, convenience, or necessity' standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding. In any event, the standard is sufficiently broad to permit the Commission to consider the applicant's past or proposed violation of a Federal criminal statute especially designed to bar certain conduct by operators of radio and television stations.

way, any licensee found not to be in compliance with the Commission's standards can have its request denied. All listener complaints, including those concerning allegedly obscene, indecent, or profane broadcasts, and the licensee's response thereto, are associated with the broadcaster's file.⁸¹ This complete file is then employed by the Commission in determining whether, based on its past performance, a renewal of the broadcaster's license or a grant of another station to the broadcaster would be in the public interest.⁸² Thus, by capitalizing on its licensing powers, the Commission has been able to exert influence on the programming decisions of licensees.

These indirect methods, however, were apparently insufficient to control the rising level of broadcast obscenity and indecency. In 1969, the Commission's established pattern of deferring all formal enforcement of section 1464 to the Justice Department came under heavy attack by the Senate Subcommittee on Communications.⁸³ The Sub-Committee expressed its strong dissatisfaction with the agency's policy and suggested that it begin to act on its own initiative to curb the trend towards offensive broadcasting.⁸⁴ In re-

Id.; accord, *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 223 (1943) ("Nothing in the provisions or history of the Communications Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the 'public interest,' merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.").

⁸¹ *In re Application of Pacifica Foundation*, 36 F.C.C. 147, 148 (1964).

⁸² See, e.g., *In re Application of Palmetto Broadcasting Co.*, 33 F.C.C. 250, 255-58 (1962), *aff'd sub nom. Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843 (1964) (refusal to renew a license, in part attributable to "coarse, vulgar and suggestive" broadcasts during its previous license period). *Palmetto* was affirmed solely on the ground that the licensee was guilty of misrepresentation before the Commission in stating that he lacked knowledge of the broadcast material which was the source of the listener complaints about offensive broadcasts. The court stated: "[w]e intimate no views on whether the Commission could have denied the applications if Robinson had been truthful." 334 F.2d at 536. Thus, the court of appeals did not decide whether the prior offensive broadcasts, standing alone, would have justified the denial of the renewal application.

See also *In re Application of Jack Straw Memorial Foundation*, 21 F.C.C.2d 833, 833-34 (1970) (short-term, one-year renewal due to the broadcast of profane, indecent, or obscene language during its past license period); *In re Applications of WREC Broadcasting Service and WMPS, Inc.*, 19 F.C.C. 1082, 1113-14 (1955) (prior radio broadcast of six offensive songs a factor in television license denial).

But see *In re Application of the Meredith Corp.*, 37 F.C.C.2d 551, 556 (1972) (despite allegations of offensive broadcastings, the Commission granted a license renewal, noting that "[a]lthough certain programs may be offensive to listeners or viewers, those offended do not have the right, through the Commission's licensing power to remove such programming from the air."); *In re Petition by Oliver R. Grace*, 22 F.C.C.2d 667, 668 (1970) (in response to a listener complaint about offensive programming, the Commission commented that "there can be no governmental arbiter of taste in the broadcast field."); *In re Application of Pacifica Foundation*, 36 F.C.C. 147, 148-52 (1964) (the Commission granted licenses, despite listener complaints, because the Commission could not find that the "substantial pattern of operation [was] inconsistent with the public interest standard . . .").

⁸³ 1969 *Hearings*, *supra* note 71, at 343-74.

⁸⁴ *Id.* at 359, 362, 363, 373. The following excerpts are typical of the type of pressure placed on the Commission by the Senators:

sponse to such criticism, the Commission imposed its first civil sanctions on licensees for violations of section 1464.⁸⁵

The Commission first flexed its administrative muscles in *Eastern Education Radio*⁸⁶ only four months after the Senate Sub-Committee hearings. In *Eastern*, the Commission determined that the licensee had violated section 1464 by broadcasting an interview with rock musician Jerry Garcia in which Garcia gratuitously used language which the Commission found to be indecent.⁸⁷ Consequently, the Commission issued to Eastern a Notice of Apparent Liability and imposed a penalty of \$100 pursuant to 47 U.S.C. sections 503(b)(1)(A), (B), (E), and (b)(2).⁸⁸ In the winter of 1973, the Commission initiated formal proceedings against another licensee—Sonderling Broadcast Corporation—for violations of section 1464.⁸⁹ In *Sonderling*, the Commission found that the licensee's mid-day sex-talk radio show was obscene and indecent under the standards of section 1464.⁹⁰ The Commission therefore is-

SENATOR GURNEY: I don't see how it will do any good to buckpass with the Justice Department, and this is what you have been doing there. I should think you would take some initiative on your own . . .

SENATOR PASTORE: Today you are expressing an attitude of helplessness with regard to this permissiveness, and obscenity. You are saying you are almost powerless. . . . We are losing sight here of commonsense. To me, it is a question of guts.

Id. at 359; 362-63.

⁸⁵ See *In re WUHY-FM, Eastern Education Radio*, 24 F.C.C.2d 408 (1970). In initiating its action against *Eastern*, the Commission said: "In sum, we hold that we have the authority to act here under Section 1464 . . ." *Id.* at 414. See also *In re Pacifica Foundation*, 56 F.C.C.2d 94 (1975); *In re Sonderling Broadcast Corp.*, 27 R.R.2d 285, *reconsideration denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974).

⁸⁶ *Eastern*, 24 F.C.C.2d at 412-14.

⁸⁷ *Id.* The fifty-minute interview was broadcast on January 4, 1970 on non-commercial, educational radio station WUHY-FM in Philadelphia, Pa. *Id.* at 408-09. The show, entitled "Cycle II," was broadcast weekly, from 10:00 p.m. to 11:00 p.m. *Id.* at 408. During this particular interview, Garcia presented his views on ecology, music, philosophy and interpersonal relationships, and he made frequent use of the words "fuck" and "shit" as adjectives or as miscellaneous expletives. *Id.* at 409. For example, he said: "Political change is so fucking slow." *Id.*

⁸⁸ *Id.* at 408, 415. 47 U.S.C. § 503(b) (1976) provides in pertinent part:

(1) Any licensee or permittee of a broadcast station who—

....

(E) violates section . . . 1464 of Title 18,

shall forfeit to the United States a sum not to exceed \$1000. Each day during which such violation occurs shall constitute a separate offense. . .

(2) No forfeiture liability under paragraph (1) of this subsection (b) shall attach unless a written notice of apparent liability shall have been issued by the Commission and such notice has been received by the licensee or permittee . . .

⁸⁹ *In re Sonderling Broadcast Corp.*, 27 R.R.2d 285 (1973), *rehearing denied*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974).

⁹⁰ *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 403-04 & n.14 (1975). Sonderling broadcasted a listener call-in, sex-talk show entitled "Femme Forum" from 10:00 a.m. to 3:00 p.m. on WGLD-FM, Oak Park, Illinois. *Id.* at 401. The Commission focused on two programs: one, on February 21, 1973, discussed the

sued a Notice of Apparent Liability and imposed a penalty of \$2000 on Sonderling. The Commission again exercised its enforcement powers in its *Pacifica* decision, released in February of 1975.⁹¹ *Pacifica* differs from its two predecessors in that no formal sanctions were imposed upon the licensee⁹² and that it was a unanimous decision by the Commissioners.⁹³

Of the three licensees found by the Commission to have violated section 1464, only *Pacifica* chose to appeal the agency's findings.⁹⁴ The resulting decision in *FCC v. Pacifica Foundation*, therefore, represents the first time that the Supreme Court had the opportunity to review the Commission's underlying determination that it was vested with the necessary statutory authority to adjudicate pursuant to section 1464 without prior Justice Department action.⁹⁵ Although the Court did not explicitly address the issue of the Commission's assumption of independent jurisdiction, its tacit endorsement was

topic, "how do you keep your sex life alive?"; the other, on February 23, 1973, discussed oral sex techniques. *Id.*

Interestingly, Sonderling had banned all sex-related topics from the "Femme Forum" in response to Chairman Burch's address. See note 79 *supra*. The ban was issued two weeks prior to the date on which the station received its Notice of Apparent Liability from the Commission. See Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 465.

⁹¹ *In re Pacifica Foundation*, 56 F.C.C.2d 94 (1975). See also text and notes at notes 14-22 *supra*.

⁹² 56 F.C.C.2d at 99.

⁹³ *Id.* at 94. It is interesting to note that *Pacifica Foundation* had been the source of controversy for the Commission for many years. See, e.g., *In re Application of Pacifica Foundation*, 36 F.C.C. 147 (1964). In 1969, the Commission received more complaints directed at *Pacifica* than at any other licensee; up until that year, however, *Pacifica* was also the largest educational radio station owner in the country. 1969 *Hearings*, *supra* note 71, at 350, 361, 365. It was the granting of an additional license to *Pacifica Foundation*, despite the numerous complaints about its programming, that prompted the Senate subcommittee to investigate the Commission's inability to check the rise in offensive broadcasting. *Id.* at 343.

⁹⁴ *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. Cir. 1977). The Commission's ruling in *Sonderling* was appealed by a group of citizens, however, and affirmed *sub nom.* in *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974). The *Illinois Citizens* court confined its review to the Commission's finding that the broadcast was obscene, and thus reserved the question of the constitutionality of the Commission's interpretation of the term "indecent." *Id.* at 404 n.14.

⁹⁵ During the 1969 *Hearings*, *supra* note 71, Commissioner Rex Lee made it apparent that the Commission was desirous of a definitive judicial statement as to their authority under 18 U.S.C. § 1464 ("I think if we move toward issuing some orders which impose fines we soon will have a court case on the thing and a final answer." *Id.* at 374.). See also *id.* at 346. Similarly, in *Eastern*, the Commission invited the licensee to seek judicial review of its actions:

We believe that a most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reserve any action which runs afoul of the First Amendment. Thus, while we think that our action is fully consistent with the law, there should clearly be the avenue of court review in a case of this nature Indeed we would welcome such review, since only in that way can the pertinent standards be definitively determined.

24 F.C.C.2d at 415.

evidenced in two ways: (1) by the Court's approval of the Commission's Order;⁹⁶ and (2) by the Court's finding that the validity of a civil sanction was independent from the validity of a criminal penalty for the same offense.⁹⁷ This finding of independent validity implies that prior Justice Department action is not a condition precedent to the assumption of Commission jurisdiction. Thus, the offense need not be prosecutable before the Commission can declare a broadcast indecent and impose the appropriate civil sanction. Moreover, the Court expressly left open whether *Pacifica's* broadcast would have necessarily justified a criminal prosecution,⁹⁸ thereby implying that the Commission's construction of section 1464 is not binding on the Justice Department.⁹⁹ Under the *Pacifica* Court's statutory construction, therefore, the Commission and the Justice Department have concurrent yet independent authority to enforce section 1464.

In establishing this criminal-civil distinction, the Court looked to the legislative history and noted that although the Communications Act incorporates the criminal statute by reference, the history of the provisions establishes their independence.¹⁰⁰ The Court pointed out that in the Radio Act of 1927 and in the Communications Act of 1934 the statutory prohibition against indecent speech was distinct from the provision imposing the civil penalties and from the provision imposing the criminal penalties for transgressions of the prohibition.¹⁰¹ The Court noted that, under the terms of the Act, a finding that a provision was invalid would not affect the validity of the other provisions in the Act.¹⁰² The Court found that the 1948 revision of the Criminal Code was intended to change only the placement of the provisions and not this independent relationship between them.¹⁰³ The Court, therefore, concluded that the enforceability of section 1464 as a criminal statute was intended to remain

⁹⁶ 438 U.S. at 741.

⁹⁷ *Id.* at 739 n.13.

⁹⁸ *Id.* at 750.

⁹⁹ Interestingly, the Justice Department felt that the construction given to section 1464 by the Court for the imposition of civil penalties would be binding in criminal prosecutions. Brief for the United States at 9, *Pacifica*, 438 U.S. 726 (1978). The Department cited *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954), to support this position. In that case, the Supreme Court rejected the interpretive regulations that the Commission had promulgated with respect to an anti-lottery criminal statute, 18 U.S.C. § 1304 (1976). *American Broadcasting Co.*, 347 U.S. at 296. In so doing, the Court recognized that the Commission and the Justice Department had concurrent statutory enforcement duties pursuant to section 1304. 347 U.S. at 289. The Court found that the Commission's regulations were invalid, reasoning that although it was not a criminal prosecution, this litigation was pursuant to a criminal statute which must be strictly construed. 347 U.S. at 296. "There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." 347 U.S. at 296.

¹⁰⁰ 438 U.S. 739 n.13.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* See note 47 *supra*.

distinct from the applicability of the civil provisions in the Communications Act.¹⁰⁴

In addition to the legislative history rationale, the *Pacifica* Court's reluctance to bind the outcome of a criminal prosecution to the result in this civil case was apparently based on the differing degree of harshness between the criminal and civil penalties for violations of section 1464.¹⁰⁵ This reasoning was made apparent in the Court's attempt to reconcile the present decision with the holding in *Cohen v. California*¹⁰⁶ wherein the defendant was acquitted under a different statute but for a seemingly similar offense.¹⁰⁷ The Court thereby hinted that the severity of the potentially applicable criminal sanctions in the *Pacifica* case may have accounted for its reluctance to extend the holding in *Pacifica* to criminal prosecutions.¹⁰⁸ It can be implied, therefore, that the Court would review the imposition of a criminal penalty more strictly than the levying of civil sanctions for the same or similar offenses. For example, if *Pacifica* subsequently were criminally prosecuted by the Justice Department under the same statute for the same offense, the Court has retained the right to be more scrutinizing in this later review than it was with the standard used by the Commission in *Pacifica*. In summary, the Commission may impose civil sanctions for offenses that might not warrant a criminal penalty.

Although it appears that criminal prosecutions under section 1464 will be reviewed more strictly than will civil actions, the Court did not explain precisely how it envisioned the criminal and civil standards to differ. One potential difference might be reflected in the fact that the Court set forth in the civil standard no requirement of an intent to violate section 1464, whereas in the criminal prosecutions under the statute, the courts have consistently construed the statute as requiring a wrongful mental state.¹⁰⁹ The courts have

¹⁰⁴ This historical argument is unconvincing since it only establishes that a finding of the invalidity of one of the provisions will not affect the validity of the other. The Court's reasoning fails to explain, as it purports to, why the standard for the application of the civil and criminal penalties for violations of the same prohibition should differ.

¹⁰⁵ 438 U.S. at 747 n.25.

¹⁰⁶ 403 U.S. 15 (1971).

¹⁰⁷ 438 U.S. at 747 n.25. In *Cohen*, the Court reversed the appellant's conviction for disturbing the peace, and overturned his sentence of 30 days in prison. 403 U.S. at 26. Cohen was arrested for entering a Los Angeles courthouse wearing a jacket bearing the words "Fuck the Draft." 403 U.S. at 16. The Court in *Pacifica* pointed out that: "It should be noted that the Commission imposed a far more moderate penalty on *Pacifica* than the state court imposed on Cohen." 438 U.S. at 747 n.25.

¹⁰⁸ The criminal penalties provided for in 18 U.S.C. § 1464 (1976) for the broadcast of obscene, indecent, or profane language are not more than \$10,000 in fines, or not more than two years in jail, or both. In contrast, the civil penalties provided for a section 1464 violation consist of revoking a license, 47 U.S.C. § 312(a)(6) (1976), or issuing a cease and desist order, 47 U.S.C. § 312(b)(2) (1976), or imposing a fine of \$1000 per offense but not exceeding \$10,000, 47 U.S.C. § 503(b)(1)(E), (b)(3) (1976).

¹⁰⁹ *United States v. Simpson*, 561 F.2d 53, 61-62 (7th Cir. 1977); *United States v. Smith*, 467 F.2d 1126, 1128-30 (7th Cir. 1972); *Tallman v. United States*, 465 F.2d 282, 285 (7th Cir. 1972); *Gagliardo v. United States*, 366 F.2d 720, 724 (9th Cir. 1966). The *Tallman* Court noted: "Thus the common law mental element required for conviction under 18 U.S.C. § 1464, here more appropriately termed intent than sci-

stated that the defendant's intent in those criminal cases was a "very pertinent and necessary element."¹¹⁰ It appears that the Commission in *Pacifica* anticipated the imposition of this intent requirement. The Commission's Order stressed that the broadcast was deliberate and that the monologue was pre-recorded.¹¹¹ The Court nevertheless omitted these facts from its opinion and, therefore, did not require for civil actions that the broadcaster have intended to violate the law.¹¹²

Whatever form the different standards take, however, it remains certain that the *Pacifica* decision simultaneously gives the Commission the green light to adjudicate and to punish by civil action violations of a penal statute, and also provides for incongruent substantive standards to be used by the two authorities empowered to act pursuant to section 1464. Although the significance of these incongruencies may be minimized by the Justice Department's continued inactivity in this area,¹¹³ it is apparent that the difference in forum may now be outcome determinative.

II. THE INDECENCY STANDARD

In addition to approving the Commission's exercise of its regulatory power pursuant to section 1464, the *Pacifica* Court also found that the Commission was not constitutionally barred from the regulation of speech which is non-obscene¹¹⁴ and which heretofore had been fully protected by the first amendment.¹¹⁵ In other non-broadcast decisions the words used in this program and found to be indecent by the *Pacifica* Court have been held to be constitutionally protected.¹¹⁶ The Court noted, however, that the Constitu-

enter, would be satisfied if the defendant knew or reasonably should have known that uttering the words he did over the air was a public wrong." 465 F.2d at 288.

¹¹⁰ *Gagliardo*, 366 F.2d at 724.

¹¹¹ *Pacifica*, 56 F.C.C.2d at 99. Similarly, in a subsequent Memorandum Opinion and Order issued at the request of the Radio Television News Directors Association, the Commission stated that the standard in *Pacifica* would not apply to the coverage of live public events when there is no opportunity for editing. *In re* a Petition for Clarification or Reconsideration of a Citizen's Complaint against Pacifica Foundation, 59 F.C.C.2d 892, 893 n.1 (1976). This is further evidence that the Commission believed that the broadcast had to have been deliberate in order to have constituted a violation of section 1464.

¹¹² It should be noted, however, that 47 U.S.C. § 501 (1976) requires a willful and knowing violation of any provision in chapter V of Title 47 before the civil sanctions become applicable. Section 503(b)(1)(E), which incorporates section 1464 by reference, is in chapter V and is thus covered by the section 501 requirement.

¹¹³ See text at note 77 *supra*. The future of the Justice Department's involvement in the enforcement of section 1464 is uncertain. Commission Chairman Burch, during the 1969 Hearings, *supra* note 71, intimated that the Justice Department had promised to play a more active role in prosecuting offenses under section 1464. "I think it is safe to say that the Justice Department is not unwilling to take any one of these cases if the FCC asks them to, and either prosecute the criminal or to enforce any forfeiture that the FCC itself might impose." *Id.* at 367-68.

¹¹⁴ 438 U.S. at 741.

¹¹⁵ *Id.* at 746-48.

¹¹⁶ See, e.g., *Eaton v. City of Tulsa*, 415 U.S. 697, 697-98 (1974) (appellant, while answering a question on cross-examination at his trial, referred to his alleged assailants

tion does not require absolute protection, and that the nature of the forum may determine the precise degree of protection afforded to the speech by the first amendment.¹¹⁷ The Court found that this protected speech can be regulated in the broadcast arena according to principles analogous to the public nuisance rationale under which the context determines the degree of afforded protection.¹¹⁸ As in the case of public nuisances, the *Pacifica* Court sought to channel the speech to a more appropriate context. The Court reasoned that the unique characteristics of broadcasting make it an unsuitable medium for offensive language so as to warrant regulation of constitutionally protected speech.¹¹⁹ The Court pointed to two unique characteristics of broadcasting which justify the channelling of the offensive language: the intrusion of broadcasting into the privacy of the home, and the radio's accessibility to young children.¹²⁰

In the following analysis the appropriateness of utilizing these justifications for the regulation of constitutionally protected speech in the broadcast medium will be evaluated using the existing standards of review established by the Supreme Court for the triggering of these rationales. It will be submitted that neither of the factors cited by the Court justify this regulation. Next, the article will compare the standard approved by the Court for the regulations of protected indecent speech with the current standard for the regulation of non-protected obscenity, and will assess the justification for the large discrepancy between the two. It will be submitted that there is no valid explanation for the fact that the standard for indecency is far less tolerant than the standard for obscenity, and that the standard for regulating indecent speech articulated in *Pacifica* should have been as limited as the standard for regulating obscenity articulated in *Miller v. California*.¹²¹

In justifying the regulation of otherwise constitutionally protected speech, the *Pacifica* Court pointed to the fact that radio broadcasts frequently confront listeners in their home where privacy interests are high.¹²² The use of this privacy rationale in the present case, however, is inappropriate. Although an individual's privacy interest is entitled to great deference, it has been only one of the elements to be considered in the existing standard of review for the proscription of offensive speech; the invasion of the privacy interest must also be intolerable. The Court in *Cohen v. California*¹²³ stated:

The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . depen-

as "chicken shit"); *Papish v. University of Missouri Curators*, 410 U.S. 667, 670 (1973) (appellant distributed a publication containing an article entitled "Mother-fucker Acquitted"); *Cohen v. California*, 403 U.S. 15, 18 (1971) (appellant wore a jacket emblazoned with "Fuck the Draft" into a courthouse).

¹¹⁷ 438 U.S. at 746-47.

¹¹⁸ *Id.* at 750.

¹¹⁹ *Id.* at 748-51.

¹²⁰ *Id.*

¹²¹ 413 U.S. 15 (1973).

¹²² 438 U.S. at 748.

¹²³ *Cohen*, 403 U.S. 15 (1971).

dent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.¹²⁴

The Court has found that an invasion of privacy is intolerable enough to outweigh first amendment rights only when the offended individual is a member of a captive audience, such as in the cases of roving sound trucks,¹²⁵ or passengers on buses and streetcars.¹²⁶ The audience in those instances cannot escape from the offensive material. The Court, however, has consistently refused to ban speech where people who are exposed to offensive material can simply "avert their eyes" or otherwise avoid the speech.¹²⁷ If one can avoid exposure, the Court reasons that the intrusion is not intolerable. Privacy interests are thus only sufficient to justify restrictions on speech when the offended individuals are unable to avoid the offensive material.

In view of this established audience standard, it is surprising that the Court in *Pacifica* chose to uphold the right of a citizen to insulate himself at the cost of the rights of other persons to transmit and to receive the broadcast.¹²⁸ The offended radio listener can easily avoid prolonged exposure by turning off the broadcast, and thus avoiding an intolerable invasion of his privacy interests. It would appear as reasonable to request that unwilling recipients of a broadcast turn off their radio or change the station after suffering only momentary discomfort, as it does to assert, as the Court did in *Cohen*¹²⁹ and *Erznoznik v. City of Jacksonville*,¹³⁰ that passers-by "avert their eyes" to avoid seeing offensive material.¹³¹ The use of the rationale of the intrusive nature of broadcasting in this instance to justify a restriction of protected

¹²⁴ *Id.* at 21.

¹²⁵ *Kovacs v. Cooper*, 336 U.S. 77 (1949) ("In his home or on the street he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality." *Id.* at 87.).

¹²⁶ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). See also *Public Utilities Commission v. Pollack*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

¹²⁷ *Cohen*, 403 U.S. 15 (1971). ("In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities by simply averting their eyes." *Id.* at 21.) See also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (invalidating an ordinance making it a public nuisance for drive-in movie theatres to run films containing nudity on a screen which is visible from the street); *Spence v. Washington*, 418 U.S. 405, 412 (1974).

¹²⁸ In fact, in earlier cases where the Court has authorized the regulation of otherwise constitutionally protected speech, it has compared the regulated activity to the innocuousness of a radio which can easily be turned off. "The radio can be turned off, but not so the billboard or street car placard." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932). See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974); *Public Utilities Commission v. Pollak*, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting).

¹²⁹ 403 U.S. 15, 21 (1971).

¹³⁰ 422 U.S. 205, 211-12 (1975).

¹³¹ See note 127 *supra*. See also *Pacifica Foundation v. FCC*, 556 F.2d 9, 26 (1977) (Bazelon, C.J., concurring).

speech is thus contrary to precedent. *Pacifica* represents the first time that the interests of possible offended recipients, who could easily elect to avoid the material, have precluded protected speech from reaching potential willing recipients.

The fact that the radio broadcast invaded a privacy interest in the home, however, appears to have been accorded great weight by the Court. There is language in the *Pacifica* decision to suggest that the Court was willing to grant greater judicial respect to privacy interests in the home than to privacy interests in the public domain.¹³² The Court thereby suggested that the degree of the intrusion into the privacy of the home need not be as substantial as an intrusion outside the home to warrant regulation. In this regard, the Court relied upon its holding in *Rowan v. United States Post Office Department*¹³³ for the proposition that intrusions into the privacy of the home will outweigh the first amendment rights of any intruder.¹³⁴ However, this reliance on *Rowan* is inappropriate. In *Rowan*, the Court upheld the constitutionality of a statute which enabled a householder to require that mail advertisers remove his name from mailing lists and that they stop sending him offensive material.¹³⁵ In effect, by enabling a person to avoid further offense from a certain source, the *Rowan* statute merely gave the recipient the same opportunity, to cut off any offensive material, already inherently enjoyed by the radio listener. Each individual in *Rowan* was empowered to make his own determination about the material and thus, unlike in the present case, the unoffended householder was not precluded from receiving the material at the will of those offended recipients. The evaluation of the offensiveness of the material was vested in each individual, not in a government agency. *Pacifica* carries the privacy of the home rationale beyond that which was envisioned by the *Rowan* Court by allowing the government to prohibit the protected but regulated speech from entering anyone's home.¹³⁶ The *Pacifica* Court has expanded a justification for individual discretion into a justification for governmental censorship.

The *Pacifica* Court also used the fact of the accessibility of radio to children to justify the restriction of the broadcast, citing *Ginsberg v. New York*¹³⁷

¹³² 438 U.S. at 748-49 & n.27.

¹³³ 397 U.S. 728 (1970).

¹³⁴ 438 U.S. at 748.

¹³⁵ 397 U.S. 728, 738-40 (1970). Appellants challenged the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, 39 U.S.C. § 4009 (Supp. IV 1968). The section was extensively revised in 1970; it now appears as Pub. L. No. 91-375, 39 U.S.C. §§ 3008-3011 (1976).

¹³⁶ *But see* *United States v. Treatman*, 408 F. Supp. 944, 953-54 (C.D. Cal. 1976), wherein the court refused to extend the holding of *Rowan* to uphold the constitutionality of a statutory injunction prohibiting a defendant from mailing out offensive material to addressees who had solicited the material or who had expressed no opinion about receiving it. "The Supreme Court in *Rowan* struck a balance between the mailer's right to communicate and the unreceptive addressee's right to privacy. The balance was struck in favor of the addressee . . . But there is no such balance to be struck when considering the validity of an injunction against sending the advertisement to people who have asked for it." *Id.* at 953. Similarly, the *Pacifica* regulation will affect those who would be offended by the broadcast, those who wish to hear the broadcast, and those who have no opinion about hearing it.

¹³⁷ 390 U.S. 629 (1968).

and the governmental interest in safeguarding the well-being of youth.¹³⁸ Under existing standards, however, the mere presence of children in the audience is insufficient to justify the regulation. The *Ginsberg* Court adopted a variable obscenity standard under which a statute could prohibit the sale of material to minors which was otherwise constitutionally protected and was concededly not obscene for adults.¹³⁹ In upholding the New York statute's constitutionality, the *Ginsberg* Court found that it was permissible to control more stringently the materials which are available to children than those which are available to adults. In a situation where the statute denied access to protected materials to both adults and children because the materials were unsuitable for children, the Court found the regulation to be unconstitutional. In *Butler v. Michigan*,¹⁴⁰ the Court held that a prohibition on the sale of books to the general public on the basis of their potentially adverse effect upon minors violated the first amendment because it would "reduce the adult population . . . to reading only what is fit for children."¹⁴¹

Pacifica is more analogous to *Butler* than it is to *Ginsberg*. In *Pacifica*, the audience affected by the regulation is not a homogenous group of minors as in *Ginsberg*, but rather, is a mixed group of adults and children as in *Butler*. As the *Pacifica* Court acknowledged, the broadcast medium cannot segregate its audience as can bookstores or movie theatres, and thus the offensive material can only be withheld from minors by restricting the material at its source.¹⁴² Although the cause of the problem in *Butler* was an overinclusive state statute, whereas here it was the inherent nature of the broadcast medium, the effect is the same. In both cases, the suitability of material for children is determinative of its availability for adults. The Court in *Butler* tolerated the inevitable exposure of the unsuitable material to children in order to avoid treading on the rights of the adult population; this ordering of priorities should be applied to broadcast speech as well. It is submitted, therefore, that when the two audiences cannot be segregated, the mere presence of children in the audience provides an inadequate basis for the curtailment of basic constitutional rights of adults.¹⁴³

¹³⁸ 438 U.S. at 749-50.

¹³⁹ 390 U.S. at 635-37. The statute which was challenged in *Ginsberg* prohibited the sale of nude pictures of females to minors. *Id.* at 632.

¹⁴⁰ 352 U.S. 380 (1957).

¹⁴¹ *Id.* at 383. The *Butler* Court found unconstitutional a section of the Michigan Penal Code which made it a crime to sell to anyone a book containing language which tended to corrupt the morals of youth. *Id.* at 381, 383-84. The Court found that "[s]urely, this is to burn the house to roast the pig." *Id.* at 383.

¹⁴² 438 U.S. at 749-50.

¹⁴³ The Court also spoke of its obligation to uphold the right of parents to make decisions regarding their children's welfare. *Id.* at 749. Although this obligation has previously been cited by the Court, it has always been used to preserve independence, not, as it is here, to curtail independence by substituting the government's judgment about what children should or should not be exposed to. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (upholding the rights of Amish parents to disregard compulsory education laws by not sending their children to school beyond the eighth grade); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (upholding the rights of parents to disregard compulsory public school attendance laws by sending their children to privately operated schools).

Thus, under existing standards for the proscription of otherwise constitutionally protected speech, the "unique" characteristics of broadcasting—its intrusive nature and its accessibility to children—do not provide an adequate basis for the present regulation. To deny access to information to all potential listeners simply because the broadcast may reach children and unconsenting adults in their homes is unsupported by judicial precedent. When children in an audience cannot be segregated from adults, and when offended listeners are not a captive audience, those adults who wish to exercise their constitutional right to hear the broadcast should be accommodated.

An equally troubling aspect of this decision is that even if the characteristics of the broadcast industry did justify imposing a higher standard of conduct on that industry, they still would provide no justification for the imposition of a harsher standard for protected indecent speech than that imposed for unprotected obscene speech. Yet this decision affords less "protection" to language which the Court conceded is protected than the leading obscenity decision, *Miller v. California*,¹⁴⁴ provides to unprotected speech. In order to constitute obscenity, the *Miller* standard demands that three elements be present: (1) that the work taken as a whole appeals to the prurient interest of the average person applying contemporary community standards;¹⁴⁵ (2) that the work depicts, in a patently offensive manner, sexual conduct as specifically defined by the applicable state statute;¹⁴⁶ and (3) that the work taken as a whole lacks serious literary, artistic, political, or scientific value.¹⁴⁷ In contrast, the *Pacifica* Court upheld the Commission's finding that the monologue was indecent and hence prohibited by section 1464 merely because it 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 that children may be in the audience."¹⁴⁸

Although the Court in *Pacifica* clearly distinguished indecency from obscenity,¹⁴⁹ a comparison of the two standards is both relevant and revealing. The current standard for what constitutes obscenity, as articulated in *Miller*, is a product of almost twenty-five years of balancing possible injury to people's sensibilities against the constitutional rights of others to hear speech.¹⁵⁰ Because there are certain problems and principles common to all regulations of first amendment rights, and because the theoretical evil generated by unregulated indecency is similar to the harm associated with unregulated obscenity,¹⁵¹ it would seem wise to profit from the experience in this

¹⁴⁴ 413 U.S. 15 (1973).

¹⁴⁵ *Id.* at 24.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ 438 U.S. at 732 (quoting *In re Pacifica Foundation*, 56 F.C.C.2d at 98).

¹⁴⁹ See text at notes 49-56 *supra*.

¹⁵⁰ The first modern obscenity decision was *Roth v. U.S.*, 354 U.S. 476 (1957). See *Pacifica*, 56 F.C.C.2d 94, 104 (Commissioner Robinson, concurring).

¹⁵¹ Although the Supreme Court has never explicitly articulated the justification for regulating obscenity, Professor Kalven has found five possible justifications: (1) the incitement to anti-social conduct; (2) psychological excitement; (3) arousing feelings of revulsion; (4) the promotion of improper sexual values; (5) the impact on character

sensitive area in formulating a standard for indecent speech. The obscenity standard is also pertinent to the present case because the Commission, in its Order, claimed to be revising its earlier indecency standard to conform with the Court's reformulation of the definition of obscenity as articulated in *Miller*.¹⁵² The *Miller* standard was thus used as the purported basis for the present indecency standard.

It appears, however, that the current indecency standard disregards all of the elements of the *Miller* standard, except that the proscribed language must be offensive. The element of prurient appeal is, by judicial definition, absent from the Court's formulation of the indecency standard.¹⁵³ The indecency standard also lacks the balancing concept, stressed in *Miller*, which weighs the offensiveness of the material against its serious literary, artistic, political, or scientific value.¹⁵⁴ Furthermore, *Pacifica*, while purporting to apply a community standard test similar to the one in *Miller*, ignores the emphasis in *Miller* on an actual assessment of the local community's attitudes.¹⁵⁵ These differences result in a much less tolerant standard for indecency than that provided for obscenity.

The indecency standard used in *Pacifica* does not include an evaluation of a broadcast's worth and thus eliminates any possible balancing test. When children are in the audience, the use of offensive words cannot be redeemed by claiming that they have social value.¹⁵⁶ It is simply the presence of children in the broadcast audience that vests the Commission with the power to prohibit the offensive language. This stands in contrast to the obscenity standard which demands an evaluation of a work's value before it becomes censorable as obscenity. The *Miller* standard recognizes that not all patently offensive depictions of sexual conduct are obscene since they can be redeemed if they have serious social value. It is thus an anomaly that the *Pacifica* Court should find that every use of these offensive words, when children are in the

and, ultimately, on conduct. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CR. REV. 1, 3-4 & n.19. Similarly, the Commission claimed that indecency must be regulated because it "has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions . . ." *Pacifica*, 56 F.C.C.2d at 98.

¹⁵² 56 F.C.C.2d at 94. The Commission's earlier indecency standard was set forth in *In re WUHY-FM*, Eastern Educational Radio, 24 F.C.C.2d 408 (1970). See text and notes at notes 86-88 *supra*.

¹⁵³ See text at notes 49-56 *supra*.

¹⁵⁴ Interestingly, the Commission in *Eastern* applied a standard for indecency which required that the material broadcasted be "(a) patently offensive by contemporary community standards; and (b) utterly without redeeming social value." 24 F.C.C.2d at 412. The Commission found the broadcast in *Eastern* to be indecent because it was offensive and because the interviewee's remarks were purely gratuitous. *Id.* at 414. The "utterly lacking" test was based on the then current obscenity standard enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), which was overruled by *Miller*, replacing the "utterly lacking" test with a more relaxed standard for the prosecutor of "lacking serious social value." 413 U.S. at 24. Although the *Miller* standard does narrow the protection afforded to the defendant by *Memoirs*, the Commission's purported reformulation of its indecency standard in the light of *Miller* eliminated the value test entirely.

¹⁵⁵ 413 U.S. at 30-34.

¹⁵⁶ 56 F.C.C.2d at 98.

audience, constitutes indecency subject to regulation without regard for the value of the material.

When there are fewer children in the audience, there are indications that the *Pacifica* indecency standard might give way to an adult standard which would include a consideration of the value of the material comparable to that used in *Miller*. The Commission in its Order said that when the number of children in the audience is at a minimum, they "conceivably" might consider whether the material can be redeemed by its value.¹⁵⁷ Similarly, the Court left open this possibility by saying that the *Pacifica* holding did not extend to, and that they were declining to rule on, circumstances where, due to the time of the day or the content of the program, there would be less of a likelihood that children would be present.¹⁵⁸

It is difficult, however, to conceive of a fact pattern which would be more appropriate than the one in this case to trigger this adult standard for indecent speech. Both the time of day and the program content in *Pacifica* indicated that there would have been very few children in the listening audience. Statistics that were made available to the Court indicated that at the time of the 2:00 p.m. WBAI broadcast there were fewer children in the listening audience than at any other time of the day, except for very late at night.¹⁵⁹ The

¹⁵⁷ *Id.* Commissioners Reid and Quello, however, indicated in their concurring statements that they felt this language to be totally inappropriate for broadcast at any time. *Id.* at 102 (Commissioner Reid, concurring); *id.* at 103 (Commissioner Quello, concurring). Commissioner Quello stated:

However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

Id.

Shortly after the Order was released, the Commission's General Counsel, addressing a group of licensees at a workshop entitled, "FCC Enforcement," said that the Carlin broadcast would have been punishable at 2:00 a.m. as well. Brief for Respondent at 9 n.11, *Pacifica*, 438 U.S. 726 (1978) (citing Broadcasting, April 14, 1975 at 40).

¹⁵⁸ 438 U.S. at 750.

¹⁵⁹ Statistical Research, Inc., *Radar Magazine* 16 (Spring/Fall 1977) (cited in Brief for Amici Curiae American Civil Liberties Union, et al. at 9 n.7, *Pacifica*, 438 U.S. 726 (1978)). The statistics are summarized in the chart below:

AVERAGE-QUARTER-HOUR PERSONS 12-17 USING RADIO NATIONWIDE*

Day-Part	Monday-Friday		Saturday		Sunday	
	(000)	%	(000)	%	(000)	%
6-10AM	4,243	17.8	2,978	12.5	2,339	9.8
10AM-3PM	2,245	9.4	5,309	22.2	4,696	19.7
3-7PM	5,236	21.9	4,453	18.6	4,394	18.4
7PM-12M	4,178	17.5	3,811	16.0	3,440	14.4
12M-6AM	667	2.8	893	3.7	840	3.5

* Total number of persons 12-17 is 23,890,000. Data for children 2-11 is not compiled.

implication, therefore, is that the broadcast might only be permissible when played in the middle of the night. If indeed the Court intended this limit, then the decision authorizes near complete censorship without regard for the value of the program. With reference to the program content, the language at issue in *Pacifica* was broadcast on a program whose erudite format and topic selection would certainly not appeal to children.¹⁶⁰ It is thus unclear when, if ever, the number of children would be considered small enough to trigger an adult standard which would include a balancing of the broadcast's value and its offensiveness.

Moreover, even if a licensee did find a more appropriate time and manner for a broadcast which contained offensive language, two problems with adopting a *Miller*-type valuation of the broadcast would emerge. First, it would be difficult to apply the *Miller* test of the value of a "work taken as a whole." It is uncertain what the "whole" of the work would be for the purpose of evaluating a broadcast: each day, each program, or the individual record? Second, dicta used by Justice Stevens in his plurality opinion may have foreclosed the possibility of any meaningful assessment of the worth of a broadcast. Justice Stevens placed these words on the lowest rung of the first amendment hierarchy.¹⁶¹ His opinion characterized these words as "ordinarily lack[ing] literary, political, or scientific value."¹⁶² The benefits derived from their use were declared to be outweighed by the societal interest in morality.¹⁶³ Thus, even if there were few enough children to trigger an adult standard, it is unlikely that a lower court would ignore this dicta by finding that the value of the broadcast outweighed its offensiveness. Therefore, although the valuation of a broadcast may become an element in the indecency standard when there is a decreased likelihood that children are present in the audience, it is unclear when there would be few enough children to trigger this valuation, and whether the value judgments articulated as dicta in *Pacifica* have precluded the possibility of any meaningful balancing.

In addition to the differences associated with assessing the value of a work, the indecency standard set forth in *Pacifica* and the obscenity standard established by *Miller* significantly differ in their application of the community standard test for determining the offensiveness of the material. In defining indecency, the Commission articulated a community standard test similar to the one in *Miller*.¹⁶⁴ However, the *Pacifica* Court, unlike the *Miller* Court, did not require a realistic appraisal of the standards of the forum community. Although the Commission found that the broadcast was offensive, there was no mention of which community was used or what the community standard was. It can be inferred that the Commission, sitting in Washington, D.C., without the aid of expert testimony, was applying only its views on indecency. This action stands in contradiction to the *Miller* emphasis on realistic appraisals of the contemporary community standard. After eleven years of contrary prece-

¹⁶⁰ See text at notes 4-5 *supra*.

¹⁶¹ 438 U.S. at 746-48.

¹⁶² *Id.* at 746.

¹⁶³ *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

¹⁶⁴ Compare 56 F.C.C.2d at 99 with 413 U.S. at 24.

dent, the Court in *Miller* abandoned its view that the jury must use a national standard in its evaluation of the offensiveness of allegedly obscene material.¹⁶⁵ Although *Miller* does not require the use of a local community standard, it emphasized that "offensiveness" is a question of fact for the jury which should be decided in the light of the realities of the circumstances.¹⁶⁶ The *Miller* Court pointed out that there cannot be one national standard because people in different communities vary in their tastes and attitudes; the standard used by the jury should reflect this diversity.¹⁶⁷ In contrast, the *Pacifica* Court was not concerned that the Commission, which assumes the role of the jury, did not attempt to ascertain or apply the values of the actual community within the broadcast range.¹⁶⁸ The Court in *Pacifica* thus perpetuated the very absolutism and imposed uniformity that the Court in *Miller* attempted to correct.

Thus, it is clear that the indecency standard, which contains neither a question of prurient appeal, a valuation of the material, nor a reference to the real standards of the forum community, is much more restrictive than the obscenity standard which includes these elements. To be suppressible as obscenity a work must have prurient appeal, lack social value, and be offensive to the forum community. In contrast, to constitute prohibitable indecency, a broadcast need only be found offensive by a board of commissioners.

The obvious justification for the more liberal obscenity standard would be that obscenity involves complete government suppression, whereas indecency theoretically only involves the relatively innocuous channeling of speech to a more appropriate context. In effect, however, the *Pacifica* decision does authorize the functional equivalent of complete censorship of these words for adults with normal sleeping habits and for the many licensees who can only broadcast during the daytime. For the reasons set forth in the foregoing discussion, it is uncertain when, if ever, there will be few enough children in the audience so that the *per se* violation will give way to a more liberal adult standard.¹⁶⁹ Given the facts of this case, the only time that the broadcast could possibly be permissible is very late at night when most adults are not listening to the radio and when many licensees are not broadcasting. This seemingly innocuous channeling mechanism, therefore, does constitute censorship for most, if not all, potential listeners.

Once the channeling versus censorship distinction is pierced, the discrepancies between the two standards become difficult to justify. Although inde-

¹⁶⁵ 413 U.S. at 31-34.

¹⁶⁶ *Id.* at 32-34.

¹⁶⁷ *Id.* The Court stated that, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Id.* at 32 (footnote omitted).

¹⁶⁸ If the Commission did actually attempt to use a realistic standard, the question of exactly what the station's local community would be remains. Would it be all of the people within the radius of the broadcast, or would it only be the actual audience of the station as determined by what particular group the station intended to serve and to attract with its programming? See Note, *Filthy Words, The FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 580, 636-40 (1975).

¹⁶⁹ See text at notes 159-60 *supra*.

cency is constitutionally protected, whereas obscenity is not, this false dichotomy only obscures the more important similarities between the regulation of obscenity and indecency: both result in censorship, both involve balancing injury to people's sensibilities against the constitutional rights of others, and both seek to avoid the same social harms. Thus, it seems illogical that the regulation of indecency should not be subject to the same restraints as the Court has imposed on obscenity regulation. It is submitted that the Court's definition of indecency should have incorporated the same limitations as were imposed on the definition of obscenity in *Miller*. The Court should have considered the value of the monologue, and should have determined its offensiveness by referring to the forum community's standard.

III. THE IMPACT OF THE *PACIFICA* DECISION

The *Pacifica* Court chose to confine its review to this particular monologue as broadcast, and, as Justice Powell stated, to proceed slowly and cautiously into this new area of the law of indecency.¹⁷⁰ The Court, by narrowing its focus to the specific setting, avoided the issue raised by *Pacifica* as to whether the Court's construction of section 1464 encompassed so much protected speech as to be unconstitutional.¹⁷¹ Unfortunately, as a consequence of this judicial restraint, the decision leaves in its wake confusion, unpredictability, and serious questions concerning the overbreadth of the standard and its constitutional limits.¹⁷²

The most disturbing aspect of the decision is that the Court failed to provide any readily discernible limitations on the power of the commission to censor broadcasters. The two demonstrably inadequate justifications¹⁷³—privacy and the presence of children—can be used by the Commission to censor the airwaves of any protected speech it considers offensive without regard for the value of the broadcast or for the true local community standard. Thus, the use of offensive words in the broadcast context could always constitute a violation of the statute.¹⁷⁴

Moreover, it cannot be assumed that the impact of the Order will be minimized by the fact that it was issued in response to a particular complaint. There is strong evidence in recent actions taken by the Commission to suggest that they viewed the Order as a general pronouncement of policy. One week after the *Pacifica* Order was issued, the Commission submitted to Congress its 1975 Report on Violent, Indecent, and Obscene Material¹⁷⁵ in which the Commission outlined its intention to fulfill its statutory obligation under section 1464 by applying to all future violations the standard set forth in its *Pacifica* Order.¹⁷⁶ The Commission even affixed the Order to its report to

¹⁷⁰ 438 U.S. at 755-56 (Powell, J., concurring).

¹⁷¹ See text at notes 29-35 *supra*.

¹⁷² *Id.*

¹⁷³ See text at notes 122-43 *supra*.

¹⁷⁴ *Id.*

¹⁷⁵ 51 F.C.C.2d 418 (1975).

¹⁷⁶ *Id.* at 425. The Commission indicated a readiness to combat the incidence of obscenity and indecency over the airwaves which generates no evil aside from offend-

demonstrate how it intended to handle possible future violations of section 1464. The Commission's intent to apply this indecency standard generally was also clearly demonstrated in *Trustees of the University of Pennsylvania*.¹⁷⁷ In this case, the Commission focused on the broadcast of a live listener call-in show which included, among other things, a conversation between a female listener and the male announcer concerning the sex life of the caller's three-year-old son.¹⁷⁸ The Commission found that the broadcast was either obscene under the *Miller* standard,¹⁷⁹ or, alternatively, indecent by reason of the standard established in the *Pacifica* Order.¹⁸⁰ Consequently, it imposed a Notice of Apparent Liability and a \$2000 forfeiture on the licensee in December of 1975.¹⁸¹ These two recent actions by the Commission can be read as establishing the Commission's policy on indecency, and strongly indicate that the effect of the *Pacifica* Order will be of general applicability.

The view that the Court's decision was a judicial invitation for the Commission to continue an activist regulatory role pursuant to section 1464 will be held not only by the Commission, but by the broadcast industry as well. The Court's failure to trace the limits of the Commission's authority and of the indecency standard realistically will have a chilling effect on the broadcaster's freedom of expression, and, therefore, will lead to self-censorship of otherwise protected speech. In an industry where they are dependent on the Commission for their continued existence,¹⁸² licensees will undoubtedly avoid broadcasting any material which could even remotely constitute indecent speech. The Court recognized this potential problem but indicated that judicial restraint was more important than protecting language which, the Court thought, "lies at the periphery of First Amendment concern."¹⁸³ The Court reasoned that the avoidance of any speech suspected of being prohibitable by section 1464 "will have its primary effect on the form, rather than the content, of serious communication. There are a few, if any, thoughts that cannot be expressed by the use of less offensive language."¹⁸⁴

ing listener's sensibilities. *Id.* In the same report, however, the Commission adopted a hands-off posture towards violent programming despite a Surgeon-General's report demonstrating the harmful effect of televised violence on children. *Id.* at 420. "Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems." *Id.* These two positions seem irreconcilable.

¹⁷⁷ 57 F.C.C.2d 782 (1975). Student-operated WPXN-FM in Philadelphia, Pa., broadcasted a live "free-form" music and listener call-in show called "The Vegetable Report" on Monday nights from 4:00 to 7:00 p.m. *Id.* at 782. The Commission focused specifically on the January 20, 1975 show. *Id.* It should be noted that the broadcast was live and thus, there was no opportunity for editing. *Id.* at 782. To find this broadcast to be a violation of section 1464, therefore, is a contradiction of the Commission's earlier announcement that it would not apply the *Pacifica* standard to live broadcasts. See note 111 *supra*.

¹⁷⁸ *Id.* at 782-88.

¹⁷⁹ *Id.* at 790.

¹⁸⁰ *Id.* at 791.

¹⁸¹ *Id.*

¹⁸² See text and note at note 78 *supra*.

¹⁸³ 438 U.S. at 743.

¹⁸⁴ *Id.* at 743 n.18.

The Court's notion that ideas can be divorced from the words chosen to communicate them does violence both to the Constitution and to judicial precedent. As the Court in *Cohen v. California* correctly pointed out, the suppression of words carries with it a substantial risk of also suppressing ideas since words serve both an emotive and cognitive communicative function.¹⁸⁵ This is well-illustrated by the facts in the present case wherein the emotive impact of Carlin's satire on our linguistic conventions would have been lost without his constant, almost nonsensical, repetition of the seven dirty words.

The magnitude of this intrusion into the heretofore insulated realm of first amendment freedoms cannot be taken lightly. It substantially infringes on the constitutional rights of broadcasters, recording artists, and listeners¹⁸⁶ to use the airwaves as an effective and diverse medium of communication. Whether the Court will review the indecency standard more strictly as the Commission chooses to exercise its jurisdiction more frequently remains to be seen. It is suggested, however, that in future decisions in this area the Court would do well to ponder seriously these words of Lord Devlin:

If freedom of the press . . . [or freedom of speech] perishes, it will not be by sudden death It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it.¹⁸⁷

ANN-ELLEN MARCUS

¹⁸⁵ 403 U.S. 15, 26 (1971). The Court in *Cohen* observed that, [L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotion as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id.

¹⁸⁶ The right to receive information and ideas is as protected by the first amendment as the right to express them. *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

¹⁸⁷ The quoted language appeared in Judge Bazelon's dissenting opinion in *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 606 (D.C. Cir. 1973) (motion for rehearing—motion denied).