

# **The First Amendment and the Media: A Report of the Center for First Amendment Studies**

---

**By Craig R. Smith, Director  
California State University, Long Beach**

---

Contact:  
Center for First Amendment Studies  
104 UTC, Long Beach, CA 90840-2801  
(562) 985-4313  
Copyright, September, 2007

# Chapter 1: Indecency and the Media

By Craig Smith, Director

This chapter focuses on the relationship between indecency and the media. Indecency has emerged as a softer version of obscenity that is much more open to interpretation and arbitrary application. While the Supreme Court has continually narrowed and defined what may be considered obscene material, it has been less careful with indecency thereby allowing the Federal Communications Commission, the Congress, states and localities to craft laws that threaten the First Amendment. This chapter proceeds in three stages. It defines indecency by reviewing the Supreme Court's rulings on the matter. It demonstrates that the definition of indecency is problematic. And it concludes by offering a solution.

## The Current State of the Law

*Pacifica Broadcasting* served as the test case for the application of the indecency standard of the Federal Communications Commission (FCC). After several complaints about programs dealing with homosexual themes and issues, including broadcast of the play *The Zoo Story*, by Edward Albee, and readings by several homosexual poets and authors, the Commission held that most of the material broadcast was a serious treatment of a social problem. Moreover, the Commission noted that the two instances where the material was particularly offensive occurred in broadcasts after the hour of 10:00 p.m., when children were less likely to be in the audience. The Commission concluded that no action other than an admonition to Pacifica was appropriate given these facts.

These pre-*Miller*<sup>1</sup> cases suggested that the FCC had backed away from its earlier position in *Palmetto Broadcasting*<sup>2</sup> that required protection of the most sensitive of listeners. Instead, the Commission stated that while some of Pacifica's programming was offensive to some listeners, this did not mean that such broadcasts could or should be censored. Despite the FCC's warning in *Palmetto*, even serious literary works such as James Joyce's *Ulysses* or D. H. Lawrence's *Lady Chatterly's Lover*, which would not be found obscene under the *Roth*<sup>3</sup> standard, could nevertheless be banned from the airwaves, particularly if the more lurid details were included in any reading or dramatization.<sup>4</sup> The different treatment could also be explained by the fact that the Pacifica Foundation stations were noncommercial and supported by listener donations. Although quite liberal in orientation, both politically and culturally, the controversial programs were "serious" literary works rather than smirking innuendo of a broadcast announcer attempting to be clever. Although not precisely similar, the *Palmetto* case presaged the Supreme Court's holding in *Ginzburg v. United States*,<sup>5</sup>

---

<sup>1</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>2</sup> *In re Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962).

<sup>3</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>4</sup> *Palmetto*, 33 F.C.C. at 298-99.

<sup>5</sup> *Ginzburg v. United States*, 383 U.S. 463 (1966).

two years later, that *pandering* may constitute separate (and perhaps conclusive) evidence that a work is obscene.

Two other decisions by the FCC prior to *Miller* fleshed out the legal theory that indecent, though non-obscene, material broadcast over the airwaves could be prosecuted under 18 U.S.C. § 1464.<sup>6</sup> In *In re WUHY-FM, Eastern Education Radio*, the Commission admonished a station for broadcasting an interview with Grateful Dead lead singer, Jerry Garcia, whose responses were sprinkled with four-letter expletives.<sup>7</sup> The interview was part of a regular program called *Cycle II*, which was broadcast after 10:00 p.m.<sup>8</sup> *Cycle II* dealt with avant-garde artistic expression and had frequently included interviews in which four-letter words were used.<sup>9</sup>

In maintaining that the protections in *Roth* did not apply to broadcasting, the Commission again distinguished broadcasting from other forms of media such as books, magazines, and motion pictures.<sup>10</sup> Unlike print media or motion pictures, said the FCC, broadcasting is *episodic in nature*. Listeners are constantly tuning in and out of a program, so that their exposure to a program may not ever be of an entire work. This was especially true for radio,<sup>11</sup> so that the *Roth* requirement that the work be “taken as whole” was not necessary when examining broadcast matter.<sup>12</sup> If a part of the broadcast was obscene, it could be heard in isolation. That would create a context for the listener that was harmful, particularly for station-surfing minors.

Second, the Commission contended that language need not appeal to the prurient interest in order to be proscribed under the statute.<sup>13</sup> It was enough, the Commission said, that the matter being broadcast was “patently offensive.”<sup>14</sup> This shift opened the door to the later fines imposed on such broadcasters as Howard Stern and his parent company Trinity Broadcasting. Further, despite the fact that the FCC received no complaints about the program, it held that the expletives were “patently offensive by

---

<sup>6</sup> 18 U.S.C. § 1464 (2004). “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.” *Id.*

<sup>7</sup> See *In re WUHY-FM, Eastern Education Radio*, 24 F.C.C.2d 408, 409 (1970).

<sup>8</sup> *Id.* at 408.

<sup>9</sup> *Id.* at 408, n.1. The Commission had been monitoring the Cycle II program following receipt of several complaints; however, it had received no complaints about the Garcia interview. *Id.* at 409, n.2.

<sup>10</sup> *Id.* at 411.

<sup>11</sup> The 1938 Orson Wells broadcast of H.G. Wells’ “War of the Worlds” is a case in point. Prior to the broadcast it was announced that the program, broadcast on Halloween night, was only a dramatization of the science fiction story written by British novelist H.G. Wells at the turn of the century. Many people in the northeast listening to the CBS broadcast, however, tuned in too late to hear the introduction, and believed that the U.S. was under attack by Martians. Panic set in as word spread by telephone and more people tuned in to listen to the broadcast which was written in the form of a series of newscasts. See *Radio Listeners Panic, Taking War Drama as Fact*, NEW YORK TIMES, Oct. 31, 1938, at 1.

<sup>12</sup> *In re WUHY-FM*, 24 F.C.C.2d at 412.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 411.

contemporary community standards.”<sup>15</sup> The Commission concluded that WUHY-FM's broadcast of the interview constituted “indecent” and was a violation of 18 U.S.C. § 1464.<sup>16</sup> Thus, the stage was set: indecency for broadcasters would cover much more material than obscenity, and this new indecency standard would not apply to the print media.

### The Carlin Case

In October, 1973, WBAI-FM, a Pacifica Foundation-owned radio station in New York, broadcast a 12-minute monologue from a recording of a live performance by satiric humorist George Carlin entitled *Filthy Words*.<sup>17</sup> A few weeks later, a man—who stated that he had heard the broadcast while driving with his young son—wrote a letter complaining to the FCC.<sup>18</sup> In response to the complaint, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language.<sup>19</sup> They also explained that, immediately before its broadcast, listeners had been advised that it included “sensitive language which might be regarded as offensive to some.”<sup>20</sup> “Carlin [was] not mouthing obscenities,” said Pacifica, “he [was] merely using words to satirize as harmless and essentially silly our attitudes towards those words.”<sup>21</sup> Carlin was teaching a semantics lesson, as he often did and still does in his comedy routines.

Sixteen months later, the Commission issued a declaratory order granting the complaint and holding that Pacifica “could have been the subject of administrative sanctions.”<sup>22</sup> The Commission took the occasion to “clarify the standards which will be utilized in considering” the growing number of complaints about indecent speech on the airwaves.<sup>23</sup> It advanced several reasons for treating broadcast speech differently from other forms of expression.<sup>24</sup> The Commission stated that its power to regulate

---

<sup>15</sup> *Id.* at 410. The Commission reasoned that the widespread use of such language on the radio would undermine the usefulness of the broadcast medium for millions of people because listeners would never know whether or not their children would be exposed to such “vile expressions” whenever they tuned in to a station's broadcast. This, in turn, would severely curtail their use of radio, which was not in the public interest. *Id.* at 411.

<sup>16</sup> *Id.* at 413-16. The licensee was given a nominal fine of \$100, making it uneconomical for Eastern to appeal the ruling to the courts. *Id.* at 416.

<sup>17</sup> *In re* Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975) [hereinafter *In re* WBAI].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 95-96.

<sup>21</sup> *Id.* at 96 (quoting Pacifica's response to the complaint). Pacifica said it was unaware of any complaints and had received none until the FCC made its inquiry. *Id.*

<sup>22</sup> *Id.* at 99. The Commission did not impose any formal sanctions on Pacifica, but stated that the order would be “associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress.” *Id.* at 99. The sanctions that the FCC may impose are (1) revocation of license; (2) issuance of cease and desist orders; (3) imposition of monetary penalties; (4) denial of renewal of license; or (5) granting renewal for less than a standard term. *Id.* at 96, n.3.

<sup>23</sup> *Id.* at 94.

<sup>24</sup> *Id.* at 97. The Commission recited that:

indecent broadcasting was found in two federal statutes: 18 U.S.C. § 1464 (which prohibits the broadcast of obscene, indecent or profane language),<sup>25</sup> and 47 U.S.C. § 303(g) (which requires the Commission to “encourage the larger and more effective use of radio in the public interest.”).<sup>26</sup>

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance, where the “law generally speaks to *channeling* behavior more than actually prohibiting it.”<sup>27</sup> The commission concluded:

[T]he concept of “indecent” is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.<sup>28</sup>

The Commission argued that certain words used by Carlin depicted sexual and excretory activities in a patently offensive manner and noted that they were broadcast at a time when children were undoubtedly in the audience (early afternoon).<sup>29</sup> Further, the pre-recorded language, with these offensive words “repeated over and over,” was willful and deliberate, in violation of 18 U.S.C. § 1464.<sup>30</sup>

The National Association of Broadcasters, as well as other groups, filed petitions seeking reconsideration of the *Pacifica* ruling.<sup>31</sup> The petitioners asked the FCC to clarify its opinion by ruling that the broadcast of indecent words, as part of a live newscast, would not be prohibited.<sup>32</sup> The Commission issued another opinion stating that it, “never intended to place an absolute prohibition on the broadcast of this type

---

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

(citations omitted). *Id.*

<sup>25</sup> 18 U.S.C. § 1464 (2004).

<sup>26</sup> See 47 U.S.C. § 303(g) (2005) (mandating that the F.C.C. “[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”).

<sup>27</sup> *In re WBAI*, 56 F.C.C.2d at 98.

<sup>28</sup> *Id.* Given the importance of the first criteria, the Commission observed that if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. *Id.* at 98, 100.

<sup>29</sup> *Id.* at 99.

<sup>30</sup> *Id.*

<sup>31</sup> *In re* “Petition for Clarification or Reconsideration” of a Citizen’s Complaint against Pacifica Foundation, Station WBAI (FM), 59 F.C.C.2d 892, 892 (1976).

<sup>32</sup> *Id.* at 893, n. 1.

of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.”<sup>33</sup> The Commission also noted that its declaratory order was issued in a “specific factual context,” and declined to comment further on various hypothetical situations presented by the petition.<sup>34</sup>

The rulings were appealed to the U.S. Court of Appeals, D.C. Circuit, which reversed by a vote of 2-1, with each judge writing a separate opinion and advancing several theories.<sup>35</sup> The FCC obtained a *writ of certiorari* from the Supreme Court. Justice Stevens delivered the opinion of the Court, which reversed the Court of Appeals and upheld the original decision by the FCC.<sup>36</sup> He limited the scope of the decision to four issues: “(1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent ‘as broadcast’; (2) whether the Commission's order was a form of censorship forbidden by § 326 [of the Communications Act]; (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.”<sup>37</sup> On the issue of facial validity,<sup>38</sup> the Court disagreed saying that while “[i]t is true that the Commission's order may lead some broadcasters to censor themselves...the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.”<sup>39</sup> This statement was important because it provided the model for those who would later attempt to define violence in specific non-vague terms in order to meet with the standard. The Court dismissed the importance of protecting the broadcast of some of these references, contending that such references, “surely lie at the periphery of First Amendment concern.”<sup>40</sup> That is to say that indecent material was not the focus of the Founders’ concern, Benjamin Franklin’s scatological writings notwithstanding.

However, Justice Stevens admitted that offensive language by itself is not sufficient to justify the curtailment of a person's First Amendment rights. “If there were any

---

<sup>33</sup> *Id.* at 892.

<sup>34</sup> *Id.* at 893. The Commission did acknowledge that under circumstances where “public events likely to produce offensive speech are covered live, and there [was] no opportunity for journalistic editing . . . it would be inequitable for us to hold a licensee responsible for indecent language. We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes.” *Id.* at 893, n.1 (citation omitted).

<sup>35</sup> *Pacifica Found. v. FCC*, 556 F.2d 9, 10-11 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

<sup>36</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>37</sup> *Id.* at 734.

<sup>38</sup> In this context, *Pacifica* had argued that even if the Carlin piece could be deemed unprotected speech under the First Amendment, the FCC's indecency policy was constitutionally overbroad, and would cause broadcasters to engage in self-censorship. *Id.* This is also known as the so-called “chilling” effect. *Id.* at 761-62, n.4 (Powell, J., concurring).

<sup>39</sup> *Id.* at 743. Justice Stevens observed that, “There are few, if any, thoughts that cannot be expressed by the use of less offensive language.” *Id.* at 743, n.18.

<sup>40</sup> *Id.* at 743. The Court cited its prior decisions in *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-81 (1977) and *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) as support for the conclusion that there was a hierarchy of the subject matter of speech, and that commercial speech and indecent speech occupied the bottom rungs on the ladder, deserving of less protection than other kinds of speech. *Id.*

reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required.”<sup>41</sup> Here, however, the Commission was punishing speech *not* because it disagreed with Carlin's *opinion* that such language is harmless, but rather because of Carlin's use of the offensive words to support his opinion. The Court stated that lesser First Amendment protection afforded broadcast speech were quite complex. However, two reasons were pertinent to the Carlin case: (1) the “uniquely pervasive presence” of broadcasting in the lives of all Americans, *intruding* even, into the privacy of the home, where the individual's right to be let alone “plainly outweighs the First Amendment rights of an intruder;”<sup>42</sup> and (2) the unique accessibility of the broadcast medium to children even to those who are too young to read.<sup>43</sup> As noted by Justice Stevens, “[a]lthough Cohen's written message [in *Cohen v. California*] might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.”<sup>44</sup> As one might expect, the Court's ruling in *Pacifica* was far from unanimous. Justices Powell and Blackmun, although concurring in the general holding, did not agree that the Supreme Court was free to decide for itself, on the basis of content, which speech is more “valuable” and therefore deserving of First Amendment protection, and which is less “valuable” and therefore less deserving of such protection.<sup>45</sup> Justice Brennan, joined by Justice Marshall, dissented on the grounds that to restrict the airwaves to what was fit only for children, unconstitutionally deprived adult listeners of the kind of material represented by the Carlin monologue.<sup>46</sup> Moreover, despite the majority's assurance that the holding was limited to the specific facts of the case, Justice Brennan expressed his concern that no standards were articulated for judging which works could be banned from broadcast.<sup>47</sup> Justice Stewart also dissented, primarily on the point that there was no evidence whatsoever that Congress had specifically intended a different meaning to be ascribed to the term “indecent” in 18 U.S.C. § 1464 (broadcast obscenity) than it did in 18 U.S.C. § 1461 (obscenity by mail).<sup>48</sup> He held that the term “indecent” in 18 U.S.C. § 1464 prohibits nothing more than obscene speech,<sup>49</sup> as the Court had only recently reiterated in *Hamling v. United States*.<sup>50</sup> Thus, he would have affirmed the Circuit

---

<sup>41</sup> *Id.* at 746. Justice Stevens argued in a footnote that Carlin's opinion that society's attitude towards the use of “four-letter words” did not mean that they could be used in all contexts. “The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.” *Id.* at 746, n. 22.

<sup>42</sup> *Id.* at 748 (citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)).

<sup>43</sup> *Id.* at 749.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 761 (Powell, J., concurring in part).

<sup>46</sup> *See id.* at 767-68 (Brennan, J., dissenting).

<sup>47</sup> *Id.* at 770.

<sup>48</sup> *Id.* at 780 (Stewart, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 779.

Court's holding reversing the FCC's decision.<sup>51</sup> Justice Stewart's position is key because it undercuts the majority's attempt to get around the burdens of proof required in obscenity cases.

### **The Problem with the Indecency Standard**

*Pacifica's* looser protections not only discriminate against broadcasters, they allow the FCC to violate the First Amendment rights of speakers who use the airwaves to convey a message in a way that is not obscene. *Pacifica* opened the door to arbitrary and capricious applications of the indecency rule. In some cases, such as with Howard Stern, the FCC has imposed fines because the *context* of his remarks made them indecent, even though he did not use any dirty words. Place his example against moments on "Will and Grace" where context clearly indicates that such things as erections and penises are being joked about and you experience the arbitrary nature of the FCC's application of the standard. In another case, Bono accepting a Golden Globe, a speaker inadvertently blurting out of a naughty word, while in another case, *NYPD Blue*, *scripted* variations on the s- and f- words were used. The FCC found both cases to be in the *same* category and imposed fines. Furthermore, in other cases where the FCC found words to be indecent, as they did "bull-shitter" on a CBS morning program, they did not impose a fine.

Thus, in one case the FCC may rely on context to make its rulings; in another it may rely on actual words; in another it may rely of "variations" of these words, and so forth. This gives the five members of the FCC, *all appointed by the President*, enormous power over what we see and hear. This power has sent a chill through the production community. When ABC aired the film "Saving Private Ryan," some affiliates refused to show it because of the use of indecent language. Programs have been put on five second delays giving network censors more power.

Our position has been vindicated in a June 4, 2007 ruling by the U.S. Second Circuit Court of Appeals in *Fox v. FCC*. This case stemmed from sanctions imposed after singing star Bono used the "F-Word" in a NBC's broadcast of the Golden Globes Awards. The F.C.C.'s staff was overruled by the full Commission, which imposed the sanction. In March of 2006 the FCC ruled that uttering even isolated or "fleeting" expletives telecast was indecent. The case at bar involved comments by Cher and others during the 2002 and 2003 *Billboard Music Awards*. The court found that the FCC's penalty of Fox was an "arbitrary and capricious" use of the indecency standard. This decision is a significant set back for the F.C.C. The two-to-one decision out of the New York court is sure to be appealed. But the majority was "sympathetic to the networks' contention the FCC's indecency test is undefined, indiscernible, inconsistent and consequently, unconstitutionally vague." The judges were "skeptical that the commission can provide a reasoned explanation for its 'fleeting expletive

---

<sup>51</sup> *Id.* at 780 (Stewart, J., dissenting).

regime that would pass constitutional muster.”

Because the ruling only applied to the case at bar, there is still work to be done to undo the damage of the FCC. For example, the dissenters in the *Pacifica* case raised an important point. Joined by Justice Marshall, Justice Brennan argued that to restrict the airwaves to what was fit only for children, unconstitutionally deprived adults of their choice of material. Despite the majority's assurance that the holding was limited to the specific facts of the case, Justice Brennan expressed his concern that no standards were articulated for judging which works could be banned from broadcast: “Taken to their logical extreme, these rationales would support the cleansing of public radio of any ‘four-letter words’ whatsoever, regardless of their context. The rationales could justify the banning from radio . . . Shakespeare, Joyce, Hemingway, Ben Johnson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.”

The final problem with the *Pacifica* ruling is that it is being applied to other media. Video games were the subject of a law passed in California seeking to prevent minors from playing them. Fortunately, the courts struck the law down as they have in every case where states, localities, and the federal government have attempted to censor material on the Internet or cable television. The Supreme Court has not granted *certiorari* in these cases indicating they approve of the rulings.

### The Solution

As the lower courts have done with the Internet, cable, and the video games, the Supreme Court should do with television and radio. It is time to bring them into the 21<sup>st</sup> Century by granting them equal First Amendment rights with other media. Radio is no more uniquely pervasive than the Internet, and contains far less indecent material, not to mention that it carries no obscene material. Radio is no longer the “scarce resource” that the Supreme Court envisioned in earlier cases, such as *Red Lion Broadcasting* (1969). There are more outlets for radio than the market can sustain and the industry is now threatened by satellite subscription radio. Finally, in every other instance where the Supreme Court allows the government to restrict freedom of expression, it must first show that the government has a compelling interest to advance and that the restriction achieves that interest. The FCC has failed on both counts when it comes to radio. They have never proved that indecent broadcast material is harmful. They have never shown that banning it on radio prevents minors from finding it somewhere else. In light of these facts, the Supreme Court should reverse its *Pacifica* ruling and the FCC should cease and desist from enforcing its indecency standard.