



1979

The "Seven Dirty Words" Decision: A Potential Scrubbrush for Commercials on Children's Television?

Gerald J. Thain
University of Wisconsin

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Thain, Gerald J. (1979) "The "Seven Dirty Words" Decision: A Potential Scrubbrush for Commercials on Children's Television?," *Kentucky Law Journal*: Vol. 67 : Iss. 4 , Article 9.
Available at: <https://uknowledge.uky.edu/klj/vol67/iss4/9>

This Symposium Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@sv.uky.edu.

The "Seven Dirty Words" Decision: A Potential Scrubbrush for Commercials on Children's Television?

BY GERALD J. THAIN*

INTRODUCTION

On February 28, 1978, the Federal Trade Commission capped an extensive inquiry into television advertisements directed to children.¹ The Commission unanimously voted to institute a rulemaking inquiry² along the lines urged upon it by a 340-page staff report produced by a special Children's Advertising Task Force of the Commission.³ The Commission Staff Report recommended that the Commission, in a rulemaking proceeding, consider adoption of the following proposals to remedy the "unfair" practices it found in the present system

* Associate Professor of Law, University of Wisconsin Law School. J.D., University of Iowa College of Law, 1960. Member, Iowa and Wisconsin Bars. FTC staff attorney (Office of the General Counsel) 1963-70. Director, FTC Division of National Advertising, 1970-73. Assistant to Director, FTC Bureau of Consumer Protection, 1973-74.

As co-director of the Center for Public Representation, a non-profit public interest law firm located in Madison, Wisconsin, Professor Thain has participated in the FTC rulemaking proceeding concerning television advertising directed to children discussed in this commentary. He presented, on behalf of the Center, the results of research conducted by a team of academic specialists in consumer responses to mass communications messages, under a grant from the Commission. This testimony was presented on January 19, 1979, in San Francisco. See Transcript, FTC TRR No. 215-60 (record reference #LL-51).

¹ The specific inquiry began with the arrival in 1977 of Michael Pertschuk as the new chairman of the Federal Trade Commission. Advertising Age, Oct. 24, 1977, p. 1. Pertschuk had expressed concern at his confirmation hearing over advertising to children, and particularly over the manipulation of "sound and symbol" to exploit the vulnerabilities of children. ANTITRUST & TRADE REG. REP. (BNA), No. 808, p. A-25, E-7 (April 7, 1977). Prior to that hearing there had been a series of actions and proposed actions at the FTC indicating concern with advertising messages directed to children. See Thain, *Suffer the Hucksters to Come Unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act*, 56 BOSTON U. L. REV. 651, 661-64 (1976).

² 43 Fed. Reg. 17,967 (1978) (to be codified in 16 C.F.R. Part 461).

³ See ANTITRUST AND TRADE REG. REP. (BNA), No. 853, p. A-1 (March 3, 1978). Copies of the staff report may be obtained from the Federal Trade Commission, Distribution and Duplication Branch.

of television advertising to children:⁴

1. A prohibition of all commercials directed to pre-school age children;

2. A prohibition of any advertisement for "highly sugared" products, such as candies and snack food, directed to children under 12;

3. A requirement that advertisers of heavily sugared products, in return for being allowed to continue advertising to children, provide financial support for "counter-messages" which would urge good nutritional and health habits and cautious consumer behavior upon children.

At this writing, the Commission has held the first of a series of hearings concerning the rulemaking. Assuming, as is expected, that the hearings will continue to a phase at which all interested or affected parties will be provided the opportunity to question and cross-examine those with opposing views on matters which the Commission has determined to be in controversy, the decision of the Presiding Officer at the hearings would then be subject to an appeal to the five members of the Commission.⁵ They would review the recommendations of the

⁴ The FTC is authorized to proceed against advertising practices that are "unfair," although they are neither deceptive ("deceptive" advertisements have a tendency or capacity to deceive a significant percentage of the audience to which the particular message is addressed. See generally, I. PRESTON, *THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING* (1975); and S.C. OPPENHEIM & G. WESTON, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION* 636-44 (3d ed. 1974)), nor violative of antitrust principles. See Thain, *supra* note 1.

⁵ A Trade Regulation Rule is the administrative equivalent of a statute and carries the force of law. See Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 *MERCER L. REV.* 651, 673-79, 681-82 (1974) and statutory references therein.

The Commission instituted expedited procedures for the children's television advertising rulemaking proceeding pursuant to 16 C.F.R. § 1.20 (1978). The procedures, adapted from the model followed by the Environmental Protection Agency, provided that all information relevant to the proposed rule is to be submitted during the quasi-legislative hearings. Participants are not allowed to direct questions to other participants or to cross-examine in this phase of the hearings, but are limited to submitting written proposed questions to the Presiding Officer who may use or reject them. The Presiding Officer may also ask questions of his own. If the Commission determines, after a review of the quasi-legislative record, that there are disputed issues of material fact that are necessary to resolve, it will order subsequent, quasi-judicial hearings to resolve those issues. At this hearing, typical trial procedures, including cross-examination and presentation of rebuttal witnesses, are used. See 43 *Fed. Reg.* 17,968 (1978). After the quasi-judicial proceedings have been held, the Presiding Officer will

Presiding Officer and decide whether to affirm, reject, or modify them. Undoubtedly, if the Commission rendered a decision which would alter significantly the present state of advertising to children on television, that decision would be appealed to the federal courts by affected broadcasters or advertisers, eventually reaching the United States Supreme Court.

It should be noted that the FTC has neither taken nor proposed any action within the last decade which has caused greater outcry from industry and those who champion their cause.⁶ While it is true that the FTC rulemaking proceedings probably will not reach a conclusion within the next two calendar years—and it is quite possible that it will take much longer⁷—this is nonetheless an appropriate opportunity to consider the Commission's authority in this context. A recent Supreme Court decision, *FCC v. Pacifica Foundation*,⁸ provides persuasive arguments that efforts by the FTC to alter children's advertising will pass constitutional scrutiny.

I have written elsewhere of the *legal* ability of the Federal Trade Commission, exercising its authority under Section 5 of

promulgate a decision resolving the disputed issues. That decision is then subject to the regular process of appeal to the five members of the Commission. 16 C.F.R. § 1.13 (1978); see 3 TRADE REG. REP. (CCH) ¶ 9801 (1978) Subpart B. The Commissioners' determination, if adverse to the interests of broadcasters or advertisers, is subject to review in the United States Court of Appeals. 15 U.S.C. § 45 (d) (1976).

⁶ For general descriptions of industry response to the proposed rule, see *Candy Makers Await FTC Proposal; Upset by 'Sticky' Charge From Cereals*, Advertising Age, Dec. 5, 1977, at 3; *We're Not Like 'Sticky' Sweets, Cereal Markets Inform FTC*, Advertising Age, Nov. 28, 1977, at 1; *Candy Spot Foes Insist on Ban, Not Counter-Ads*, Advertising Age, July 25, 1977, at 2, col. 4. See also BROADCASTING MAGAZINE, March 6, 1978, at 86, 91 (denunciation of proposed Rule by broadcasters and organized advertising groups); *President of CBS Broadcast Group Attacks Proposed Rule*, Advertising Age, July 24, 1978, at 46.

Congressional response centered on efforts to block the FTC's use of appropriated funds for promulgation of a Rule affecting children's advertising. After months of debate during which appropriations for fiscal year 1979 appeared in jeopardy, the House and Senate passed a bill funding the FTC, but prohibiting any use of the funds to issue regulations dealing with television advertising to children. Presumably, hearings on the proposed Rule may continue. *Congress Lets FTC Begin Its Kid TV Hearing*, Advertising Age, Oct. 2, 1978, at 1, 98. See TRADE REG. REP. (CCH), No. 353, p. 1 (Oct. 4, 1978).

⁷ *Earliest for Kids Ad Rule is Mid-80's: Pertschuk*, Advertising Age, March 26, 1979 at 2, col. 4. The headline is slightly misleading because, as the article notes, Chairman Pertschuk in fact has stated recently that it would be mid-1980 before the Presiding Officer's report was ready for Commission consideration.

⁸ 98 S. Ct. 3026 (1978).

the Federal Trade Commission Act (arguably the most elastic statute ever adopted by the United States Congress),⁹ to issue a Trade Regulation Rule which would eliminate or severely restrict advertising on commercial television directed to children.¹⁰ However, in that article I did not treat extensively the validity of a first amendment defense to any limitations by the Federal Trade Commission on the advertising which companies may place on television programs viewed by children.¹¹ My views as expressed in that article may be summarized as follows: advertising is "commercial speech," and although recent decisions of the United States Supreme Court quite properly have given greater protection to commercial speech than it may have appeared to enjoy at times in the past,¹² the first amendment to the Constitution¹³ presents no obstacle to the legal authority of the FTC to take actions such as those listed at the beginning of this commentary.

The views of those who believe that the first amendment presents a major stumbling block to the FTC's legal authority (as opposed to *political* obstacles which, in my view, present the major barrier to the proposed Rules),¹⁴ I believe fair to summarize as follows: recent decisions of the United States Supreme Court have narrowed, if not abrogated, the distinction which earlier existed between the first amendment protections afforded "commercial speech" and "free speech." The result of this narrowing is that if television advertisements directed to children are neither deceptive, in the usual sense of

⁹ See, e.g., Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962).

¹⁰ Thain, *supra* note 1. See Oppenheim & Weston, *supra* note 4, at 600-03, 628-40.

¹¹ Thain, *supra* note 1, at 673-75.

¹² *Compare* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) with *Linmark Assoc., Inc. v. Township of Willingboro*, 413 U.S. 85 (1977).

¹³ The first amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

¹⁴ An FTC staff memorandum written in 1977 (prior to Pertschuk's taking office as chairman) recommended that the Commission take no action to limit broadcast advertising directed to children. The memorandum stated: "A social decision of this magnitude should be made only by the U.S. Congress." See *Old Staff Memo Warns FTC to Let Congress Handle Children's Ad Ban*, Advertising Age, November 27, 1978, at 100, col. 3.

that word,¹⁵ nor unsafe, in terms of the product advertised, then it is beyond the constitutional boundaries of the Federal Trade Commission's authority to prohibit such advertising.¹⁶

The questions of the distinction between "commercial speech" and other kinds of speech—questions which go to the very heart of the meaning and purpose of the first amendment¹⁷—are questions which require a larger canvas on which to draw than time or space allows here. My purpose in this commentary is to indicate the impact of the *Pacifica* decision on the arguments concerning the constitutional validity of the FTC staff's proposed remedies for children's television advertising. In sum, my argument is that *Pacifica* gives strong additional weight to the constitutional validity of an FTC effort to reshape the structure of this nation's television.

I. "COMMERCIAL SPEECH" AND THE FIRST AMENDMENT

To set the stage for a discussion of *Pacifica*, it is necessary to review briefly the Supreme Court's development of the concept of "commercial speech" as distinguished from speech which is entitled to first amendment protection. The starting point is the Court's very brief opinion (later characterized by

¹⁵ See definition at note 4, *supra*. "Deception" occurs legally when demonstrably inaccurate or misleading material is contained in a given advertising message. See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386-87 (1965). The term "deception" still is undergoing some development as better research techniques and expertise contribute to an understanding of how consumers perceive claims (and even meaning) contained in advertisements. See Preston, *A Comment on Defining "Misleading Advertising" and "Deception in Advertising,"* J. OF MARKETING, July, 1976, p. 54. Cf., *Firestone Tire and Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973). See also Note, *Federal Trade Commission: Developments in Advertising and Antitrust Policies*, 41 GEO. WASH. L. REV. 880 (1973).

¹⁶ Professor Charles Alan Wright of the University of Texas Law School stated at hearings on the proposed rule that he has concluded on the basis of his research (funded by General Mills Corporation), "If there is a constitutional right to present truthful advertisements of sugared products in other media, there is a constitutional right to do so on television." BROADCASTING MAGAZINE, March 19, 1979, at 84. Cf. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

¹⁷ See generally Baker, *Commercial Speech: A Problem In The Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1970); Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?* 61 MINN. L. REV. 705 (1977).

Mr. Justice Douglas as "almost offhand"¹⁸) rendered in 1942 in *Valentine v. Chrestensen*.¹⁹ In that matter, a private entrepreneur was restricted by New York state law from distributing handbills advertising the tours of a submarine he had purchased and docked. He unsuccessfully argued that his freedom of speech had been unconstitutionally restrained by the state's action.²⁰ The Supreme Court indicated that the first amendment guarantee of freedom of speech provided no protection against governmental regulation of commercial advertising. Significantly, Mr. Justice Black, the Supreme Court Justice generally considered the most vigorous proponent of the overriding authority of the right to free speech,²¹ joined the other members of the Court in issuing this opinion. Indeed, he found it appropriate to state in an action arising nearly a decade later that the first amendment does not extend its protection to the solicitations of "a 'merchant' who goes from door to door 'selling pots'."²²

Apparently, the Supreme Court felt the great purposes of the first amendment—the guarantee of unbridled speech to matters of political concern or artistic expression²³—are not normally at issue in matters involving the solicitations of those wishing to sell goods or services to the public. Thus, neither Mr. Justice Black nor Mr. Justice Douglas, both ardent advocates of a "strict" interpretation of the first amendment guarantee of the right to speak,²⁴ found it inconsistent to support governmental action regulating trade by prohibiting commercial speech.²⁵

¹⁸ *Cammanano v. United States*, 358 U.S. 498, 514 (1959) (concurring opinion).

¹⁹ 316 U.S. 52 (1942).

²⁰ *Id.* at 53. Ironically, the New York Court of Appeals many years later declared the same statute unconstitutional. *People v. Remeny*, 355 N.E.2d 375 (N.Y. 1976).

²¹ *See, e.g.*, J. FRANK, MR. JUSTICE BLACK, THE MAN AND HIS OPINIONS (1949).

²² *Breard v. City of Alexandria*, 341 U.S. 622, 650, at footnote (1951) (Black, J., dissenting).

²³ *See*, A. MEIKLEJOHN, POLITICAL FREEDOM (1965); Emerson, *supra* note 17; Redish, *supra* note 17.

²⁴ *See, e.g.*, the separate dissenting opinions of Justices Black and Douglas in *Feiner v. New York*, 340 U.S. 315, 321-31 (1951).

²⁵ *See, e.g.*, *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937), in which the Court (per Justice Black) upheld the authority of the Federal Trade Commission to prohibit

The Supreme Court, in the years following *Valentine*, made it very clear that the kind of "commercial speech" to which it had held the protections of the first amendment did not extend was only that which simply urged commercial transactions ("buy my wares"); any kind of speech which was "editorial" in nature, even though that editorial speech might also have some elements of commerce involved in it (such as an advertisement for a newspaper urging one to subscribe because of its ideological content) was clearly protected.²⁶ The former was purely commercial speech; the latter was protected speech, albeit speech with commercial overtones.

In 1975, in *Bigelow v. Virginia*²⁷ the Supreme Court had before it a matter which involved the publication in a Virginia newspaper of an advertisement for an abortion clinic in New York. The services advertised were then illegal under Virginia law, but were legal in New York where they were offered.²⁸ A criminal conviction of the publisher of the newspaper²⁹ was reversed by the Supreme Court. The Court stated that the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"³⁰ The Court also stated that the "relationship of speech to the marketplace of products or services does not make it valueless in a marketplace of ideas."³¹ Thus, for the first time, the Supreme Court expressly indicated the possible existence of an area common to both the "marketplace of ideas," protected by the first amendment, and the marketplace of mere "commercial speech," generally thought to be unprotected.

The following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³² the Supreme

representations which would fool the "ignorant" and "incredulous" but not a reasonable person.

²⁶ *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁷ 421 U.S. 809 (1975).

²⁸ 1877-78 Va. Acts c. 2, § 8 codified at VA. CODE § 18.1-63 (1950) (as amended by 1960 Va. Acts c. 358), read: "If any person, by publication . . . or in any other manner, encourage or promote the processing of an abortion . . . he shall be guilty of a misdemeanor."

²⁹ *Bigelow v. Commonwealth*, 191 S.E.2d 173 (Va. 1972).

³⁰ 421 U.S. at 822.

³¹ *Id.* at 826.

³² 425 U.S. 748 (1976).

Court reviewed a state statute which prohibited pharmacists from advertising the prices of prescription drugs.³³ The Court noted that

the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist [who wishes to advertise but is restrained from doing so by the statute in question] does not wish to editorialize on any subject, cultural, philosophical, or political. . . . The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."³⁴

Significantly, the Supreme Court conceded that the advertiser's interest in this matter was "purely economic," but nonetheless went on to find that this fact hardly disqualified "the matter for protection under the First Amendment."³⁵ The Court emphasized that consumers cannot be adequately informed about the prices and availability of goods or services or the sources from which they are available if information concerning these facts—information normally conveyed through the medium of advertising—is not readily available to the public.³⁶ The Court, in effect, voiced as its standard the model of "consumer sovereignty" which the Federal Trade Commission and other trade regulation authorities utilize in exercising their administrative or prosecutorial discretion to bring or to forego action.³⁷

Despite the protection given the "commercial speech" involved in *Virginia State Board*, the Supreme Court stressed that commercial speech is not free from governmental regulation simply because it constitutes "free speech." The Court noted that it had consistently allowed the government to place restrictions on the "time, place, and manner of any form of free

³³ VA. CODE § 54-524.35(3) (1974).

³⁴ 425 U.S. at 760-61.

³⁵ *Id.* at 763.

³⁶ *Id.* at 763-65.

³⁷ See Thain, Book Review, 56 BOSTON U. L. REV. 435, 439-40 (1976). Cf. SNOW & WEISBROD, *Consumerism, Consumers and Public Interest Law*, in PUBLIC INTEREST LAW (B. Weisbrod, J. Handler & N. Komesar 1978) at 395-455. See also the collected essays in ADVERTISING AND SOCIETY (Y. Brozen ed. 1974); Thain, *Corrective Advertising: Theory and Cases*, 19 NEW YORK L. F. 1, 17-18 (1973). See generally Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977).

speech.”³⁸ It further noted that both “untruthful” speech (whether commercial speech or otherwise) and speech which is deceptive or misleading could be prohibited by the proper governmental agencies without violating the first amendment.³⁹

Virginia State Board thus stood for the proposition that it is an infringement of first amendment rights to prohibit normal commercial advertising but that restrictions on commercial speech which misleads or deceives remain valid. The validity of challenges to advertising which constitutes “unfair” practices, even though not falling under the normal rubric of deception,⁴⁰ was not specifically considered by the Court. In any event, the Court has never specifically reversed or questioned its ruling in *Federal Trade Commission v. Sperry & Hutchison*⁴¹ that the Federal Trade Commission may attack and prohibit trade practices which are unfair to the consuming public even though the practices are neither deceptive nor anti-competitive under the traditional definitions of those terms.⁴²

The *Virginia State Board* decision was soon applied in *Bates v. State Bar of Arizona*,⁴³ in which the Supreme Court ruled that efforts by a state to prohibit all advertising by lawyers violated the first amendment. The Court continued to confirm the ability of appropriate state authorities to place “time, place and manner restrictions” on commercial speech.⁴⁴ The Court even hinted that it might be possible to justify greater restrictions on the advertising of the services of attorneys or other professional groups than on advertisements for standard commercial products.⁴⁵ Nonetheless, the case seemed

³⁸ 425 U.S. at 771.

³⁹ *Id.* at 771-72.

⁴⁰ See note 4 *supra* for a definition of deception; Thain, *supra* note 1, at 667-70.

⁴¹ 405 U.S. 233 (1972).

⁴² *Id.* at 239. See Reed & Coalson, *Eighteenth-Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733 (1977); Note, *Unfairness Without Deception: Recent Positions of the Federal Trade Commission*, 5 LOYOLA U.L.J. 537 (1974); Note, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 WIS. L. REV. 1071; Note, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WIS. L. REV. 1097.

⁴³ 433 U.S. 350 (1977).

⁴⁴ *Id.* at 384.

⁴⁵ *Id.* at 383-84. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), where the Court held that the right of lawyers to advertise does not prevent states from disciplining those who engage in “ambulance chasing” and other forms of barratry. *Cf.*

to many to give greater stature to commercial speech than it had ever before enjoyed,⁴⁶ for the decision rested solely on the protection to be afforded the speech involved. In fact, the Court specifically rejected an alternative "non-speech" argument by the advertising lawyers that the prohibition of speech was simply a restraint of trade in violation of traditional anti-trust law.⁴⁷ Bypassing this possible alternative ground for its decision, the Court explicitly held that the state's prohibition of lawyer advertising could not be challenged successfully on anti-trust grounds but was unlawful because it violated the first amendment.⁴⁸ Nonetheless, the Court, consistent with its opinion in *Virginia State Board*, gave as much emphasis to the need of consumers to obtain information as it did to the right of attorneys to provide such information.⁴⁹ In this sense, it seems that the Court was, in effect, reinstating the antitrust argument presented in *Bates* under the caption of "free speech."⁵⁰

Citing these decisions,⁵¹ opponents of the Federal Trade

In re Primus, 436 U.S. 412 (1978) (lawyer's acts of advising women of their legal rights and of subsequently advising one of the women through a letter of free legal assistance from a nonprofit organization did not subject her to disciplinary action).

⁴⁶ See notes 19-26 *supra* and accompanying text for a discussion of the basis for such a belief.

⁴⁷ 433 U.S. at 359-362.

⁴⁸ 433 U.S. at 362.

⁴⁹ See *id.* at 363-64 ("such speech should not be withdrawn from protection merely because it propose(s) a mundane commercial transaction. Even though the speaker's interest is largely economic, the court has protected such speech in certain contexts . . ."); *id.* at 365-66 ("the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance."); *id.* at 374 ("It seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision.")

⁵⁰ See *id.* at 377-78 where the Court, commenting on the state bar association's argument that lawyer advertising would increase the costs of providing professional services and thus create "a substantial entry barrier, deterring or preventing young attorneys from penetrating the market," states, "In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys." This statement appears in the court's discussion of the first amendment issues involved in the case.

⁵¹ One critic of the proposed Rule is Stuart Land, a senior partner in the law firm of Arnold & Porter. In remarks made during one of a series of seminars concerning advertising to children held at Georgetown University Law Center under a grant from the Ford Foundation, Mr. Land characterized the impact of *Virginia State Board* and *Bigelow* as follows:

The courts in the past regarded advertising as a stepchild among the various areas of business activity which are subject to judicial protection from

Commission's children's television advertising rulemaking proceeding contend that the effort to prohibit advertising as unfair or deceptive to children—even though the advertising is not deceptive or misleading in any traditional legal sense of those words—violates the first amendment. The argument of these opponents, however strong one may find them—and I do not find them persuasive—is severely weakened by the rationale of the *Pacifica* decision.

II. *FCC v. Pacifica Foundation*

Pacifica, now celebrated as the “seven dirty words” case, involved the broadcast by an FM radio station at 2:00 p.m. of a recording by comedian George Carlin.⁵² Carlin's recording dealt, in a quasi-humorous way, with words considered taboo in our society. Specifically, he recited what he thought are the seven most taboo words—all related to excretory or sexual bodily functions⁵³—and treated, in a satirical fashion which many would find to have a serious underlying purpose, what he considered to be the hypocrisy of these taboos.⁵⁴ A father driving his automobile in New York, with his young son as a passenger, heard this program on his car radio and complained to the Federal Communications Commission.⁵⁵ The Federal Communications Commission, pursuant to statutory authority, fined the station for carrying “indecent” material. The Supreme

agency regulation. The judicial neglect was rationalized by denying any First Amendment rights to advertising, and by positing in a group of political appointees . . . an expertise to determine the the [sic] messages which the public took from advertising and to decide on the basis of their judgments and intuition what advertising was false and misleading. But I think those days for the Commission are pretty much over.

Copies of Mr. Land's remarks are on file at the University of Wisconsin Law School and the Georgetown University Law Center.

⁵² 98 S. Ct. at 3030.

⁵³ The seven words were “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.” These words were repeated constantly throughout Carlin's twelve minute monologue. 98 S. Ct. at 3041.

⁵⁴ *Id.* at 3041-43. A transcript of Carlin's monologue is set forth in an appendix to the Court's opinion.

⁵⁵ 56 F.C.C.2d 94 (1975). The father's complaining letter to the FCC stated that while he could perhaps understand “the record's being sold for private use, I certainly cannot understand the broadcast of [it] over the air that, supposedly, you control.” 98 S. Ct. at 3030.

Court, in a closely divided decision,⁵⁶ upheld the authority of the Federal Communications Commission to discipline a station for violating that statute.⁵⁷ Contentions that the action contravened the first amendment rights of the speaker or the station were rejected by the majority of the Supreme Court.⁵⁸

Significantly, the Supreme Court first determined that the language, as used in the broadcast, was not "obscene."⁵⁹ Because the Supreme Court has held that "obscene" material is not entitled to constitutional protection,⁶⁰ a decision that the material was obscene would have supported the FCC's action without any need to expound on other "free speech" aspects of the matter. The Court did find the words offensive to many viewers because their use is normally frowned upon in polite society.⁶¹ Consequently, the categorization of these words by the FCC as "indecent" was appropriate.

The majority emphasized that the broadcast of the material at 2:00 in the afternoon made it "uniquely accessible to children."⁶² This accessibility appeared to be an important factor in the decision. The majority further found that because the issue arose in the context of broadcasting, rather than in the print media, any restraint or "chilling effect" on free speech was less significant than a similar action in the field of publication.⁶³ Broadcasters, in return for a government license to uti-

⁵⁶ The majority opinion was written by Mr. Justice Stevens and joined by Chief Justice Burger and Mr. Justice Rehnquist. Justices Powell and Blackmun joined Justices Stevens and Rehnquist and the Chief Justice in holding that the FCC's regulation did not violate the first amendment. 98 S. Ct. at 3030. Mr. Justice Stewart wrote a dissent, joined by Justices Brennan, White, and Marshall. *Id.* at 3055. Mr. Justice Brennan wrote a separate dissenting opinion, joined by Mr. Justice Marshall. *Id.* at 3047.

⁵⁷ While the FCC had statutory authority to fine Pacifica for its broadcast, 47 U.S.C. §§ 312(a) and (b) (1976), and 503(b)(1)(E) (1976), the Commission instead had imposed an informal sanction to be noted in the station's license file, presumably available for contemplation "in the event that subsequent complaints are received." 56 F.C.C.2d at 99.

⁵⁸ 98 S. Ct. at 3036-41.

⁵⁹ *Id.* at 3033.

⁶⁰ See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Miller v. California*, 413 U.S. 15 (1973).

⁶¹ 98 S. Ct. at 3039. The four dissenting justices would have held the statute authorizing regulation of indecent language by the FCC must be interpreted so that only "obscene" language could be regulated. They would not allow regulation of language which was no more than "indecent." *Id.* at 3050.

⁶² *Id.* at 3040.

⁶³ *Id.*

lize airspace belonging to the public,⁶⁴ make a commitment to operate "in the public interest, convenience and necessity."⁶⁵

The Court's decision in *Pacifica*, coming very close in time to the decision in the *Zurcher v. Stanford Daily* case⁶⁶ and the *Farber* matter,⁶⁷ led to a chorus of outcries that the Supreme Court was fencing in the constitutional zone of freedom of speech.⁶⁸ At least insofar as *Pacifica* is concerned,⁶⁹ a little calm reflection could well lead one to the conclusion that the outcry might have been undue. The following paragraphs set forth some arguments that the impact of the decision on free speech has been overstated. These arguments should be considered as the brief from a "devil's advocate" hoping to sharpen the lines of debate as to the actual holding of the "seven dirty words" case.

The Supreme Court, in *Pacifica*, did not go so far as to say that the words found objectionable could never be broadcast over the public airways; rather, it simply indicated that the "time, place and manner" of their broadcast would not justify their unlimited use over airways licensed by the government.⁷⁰

⁶⁴ D. GINSBURG, REGULATION OF BROADCASTING, 170-71 (1979).

⁶⁵ 98 S. Ct. at 3040, citing, *inter alia*, 47 U.S.C. §§ 309(a), 312(a)(2)i (1976) and FCC v. WOKO, Inc., 329 U.S. 223 (1946).

⁶⁶ 436 U.S. 547 (1978).

⁶⁷ 394 A.2d 330 (1978), *cert. denied sub. nom.*, New York Times Co. v. New Jersey, 99 S. Ct. 598 (1978).

⁶⁸ See, e.g., N.Y. Times, Nov. 28, 1978, at 1, col. 5; *id.*, Nov. 9, 1978, at 26 (editorial).

This reaction was intensified by the Court's most recent decision in the area of communications law—holding that when a journalist is alleged to have circulated defamatory material and is sued for such conduct, the first amendment gives no privileges to journalists prohibiting an inquiry into the editorial processes of those responsible for the publication. This decision was rendered in the suit brought by former Army Lt. Col. Anthony Herbert against the Columbia Broadcasting System and others associated with the "60 Minutes" program of February 4, 1973, treating Herbert's activities as a public figure. For industry reaction to this decision, see, e.g., "High Court Opens the Minds of Journalists to Investigation," BROADCASTING MAGAZINE, April 23, 1979, at 25.

⁶⁹ This commentary is concerned only with the ramifications of *Pacifica* on the FTC rulemaking proceeding and does not purport to evaluate the impact or constitutional correctness of the *Stanford Daily* or *Farber* decisions, or the effect of *Pacifica* in other areas.

⁷⁰ FCC Commissioner Abbott Washburn stated in a letter to the editor of the *New York Times*, "The decision was narrow . . . [the Court] emphasized the nuisance rationale, the importance of 'context' and the 'channeling' of such matters to hours when children are not apt to be a significant part of the audience." November 11, 1978.

It would surely be tragic were the government to use its power to restrain the airways from containing any satirical or "adult" material; but that is not what occurred in *Pacifica*. There is no indication that the broadcast of the very same material could be restrained were it to occur at a later evening hour when it is reasonable to presume that children should not be a significant part of the audience.

Moreover, utilization of the airways must take into account the large numbers of listeners or viewers who are not aware of the nature of the material presented and cannot turn away from it until it has already entered their viewing or listening domain.⁷¹ Broadcast matter by its very nature differs from print matter; those who do not wish to receive written matter offensive to them have the option of simply ignoring, rejecting, or refusing such material without preventing the flow of speech from those who wish to communicate. With broadcasts, the protection of the recipient will always involve some restriction

Following the *Pacifica* decision, FCC Chairman Charles Ferris reassured the broadcast industry that the FCC would exercise extreme restraint in wielding the power authorized by the Court. BROADCASTING MAGAZINE, July 24, 1978, at 31. There appears to be no reason to believe that the present majority of the Commission welcomed the result in *Pacifica*. (The FCC's action took place when the agency had an earlier, philosophically different membership.)

⁷¹ The *Pacifica* opinion cited *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), to the effect that "a nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Mr. Justice Stevens then added, "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." 98 S. Ct. at 3041.

If there were greater controls available for listeners or viewers to utilize in determining what broadcasts will enter one's home or automobile, then much of the rationale of the majority's opinion in *Pacifica* would appear to be moot. For example, cable television subscribers in many areas of the country (including my own area of Madison, Wisconsin) may receive, for a monthly fee, uncensored films and other material not available on commercial television. Such programming in recent months has included a program of material by George Carlin including the words "you can't say on television." Those subscribing to this system receive, if they desire, the means to "lock" their television sets so children may not use it without parental acquiescence. I have been informed, in personal conversations with Professor Geoffery Cowan of the U.C.L.A. Law School and others who follow developments in communications, that it is now possible, technically, to produce a mechanism which would "lock out" or turn off portions of telecast material that viewers do not wish to see. The possibility that such a device might be promoted principally as a means for viewers to eliminate unwanted commercials from "commercial television" does not please broadcasters or advertisers and the future of this device is uncertain.

upon the speaker. Opponents of *Pacifica* have yet to indicate satisfactorily why it is less appropriate for government to limit the times at which speech offensive to many members of society may be spoken on public airwaves than it is for government to restrain candidates for political office from urging people to vote for them—surely the epitome of political speech—by utilizing sound trucks running through residential neighborhoods at times when the majority of residents could be expected to be sleeping.⁷²

Much of the reaction to the *Pacifica* decision is of what may be termed a “knee jerk” type—there seems little in the way of “freedom” which has been lost as a result of the decision other than the freedom repeatedly to say “shit” and “fuck” and similar words *at any time* on media licensed by the government. Vigilance concerning the potential reach or “chilling effect” of any decision restraining speech must be exercised, but the precise limits *Pacifica* places on speech are narrow indeed. Perhaps more significantly, this restriction of speech hardly compares with the restraints broadcasters place on speech thought offensive to sponsors or other important commercial interests.⁷³ Few raise objections to this pernicious form of censorship even though it often prohibits specific reference to, let alone discussion of, matters clearly in the “marketplace of ideas.”⁷⁴

⁷² This analogy is not intended to be exact but only to point out that certain limitations may be placed on most speech. (Also, I realize it is more likely for sound trucks rolling through a residential neighborhood in the wee hours of the morning to be proclaiming the virtues of one's opponent rather than of oneself). Still, there are striking similarities in the two matters.

⁷³ Examples of such censorship include the deletion of the word “gas” from the phrase “gas chamber” on a telecast about Nazi atrocities. The telecast was sponsored by the American Gas Association. Another example is General Electric Theater's refusal to telecast (due to the title) a version of Rudyard Kipling's “The Light That Failed.” See, e.g., E. BARNOUW, *THE SPONSOR: NOTES ON A MODERN POTENTATE*, 48-55 (1978).

⁷⁴ A classic instance of sponsor censorship that undercut political elements of a program's script occurred in a 1978 episode of the ABC network comedy series “Barney Miller.” This series is based on the daily activities in a fictitious New York police precinct; the episode involved a jailed “radical” voicing dissent to American involvement in Vietnam. In the filmed production, his statement mentioned two American corporations, Dow Chemical and DuPont, by name. When advised by network lawyers that the two companies might bring legal action, ABC's Standards and Practices Department (the network's censors) responded by erasing the audio portion of the

However consistent one finds the result in *Pacifica* to be with the basic purposes of the first amendment, the underlying rationale of the majority in *Pacifica*—that it is constitutionally appropriate to place certain restrictions on speech which is broadcast to an audience including many children—strengthens the FTC's position that its rulemaking proceeding is considering remedies which would not violate the first amendment. With the holding of the decision thus presented, we can now consider the impact of *Pacifica* on the FTC's rulemaking proceeding.

The FTC is proposing that certain television advertising be eliminated or restricted because it is directed to children at times when they compose the majority of the viewing audience.⁷⁵ There is no effort on the part of the Federal Trade Commission to say that those who now advertise their products to children on children's television programs will be prevented from using television to advertise their products at times when children are not the majority of the audience. Nor is there any effort to say that these people may not advertise their wares on other media. The limitations proposed by the Federal Trade Commission staff are addressed only to television, and are suggested because of the nature of the audience (children) receiving the messages.

videotape that mentioned the company names. See *Wisconsin State Journal*, section 1, p.2, December 9, 1978.

Of course, this type of censorship is not undertaken by any agency of government, but by private companies or individuals in the context of making business decisions (albeit broadcasters are supposedly acting as temporary private trustees of the public airwaves). My point is not that these actions violate the first amendment, but that they thwart the goal of robust discussion of public issues. The size and power of many "private" actors in our society often rivals or exceeds that of government. Indeed, it may not be inappropriate to consider organizations such as General Motors or CBS as "private government" insofar as their impact on citizens is concerned.

⁷⁵ The FTC's proposal actually refers to an audience where children comprise a "significant percentage" of the viewers. However, this is most likely to result in a definition centering on "majority" composition, due in part to the complexity of devising any other standard. Some consumer groups have urged other standards in order to take into account the large numbers of children who watch prime-time television, yet who comprise less than half the audience for shows broadcast during those hours. Nevertheless, the FTC's announcement of its proposed Rule explicitly noted that one of the petitions for rulemaking before it defined the term "children's programming" so as to cover those shows where the "average audience consist[s] of 50 percent or more individuals under 12 years of age." 43 Fed. Reg. 17,698, n.8 (1978).

Pacifica therefore seems particularly pertinent to the constitutional objections raised to the rulemaking proposals. In *Pacifica*, the Supreme Court found it appropriate for an agency of the government, acting under a properly adopted statute, to limit the broadcast of *speech* which was inconsistent with the statute. In the FTC's rulemaking proceeding, the Commission, under a valid statute administered by it (Section 5 of the Federal Trade Commission Act), is attempting to limit the broadcast of "*commercial speech*" at times when children form the principal audience to which that "speech" is addressed. Assuming, *arguendo*, that the Commission will be able to demonstrate that the utilization of this "speech" towards an audience of children is unfair or deceptive and therefore in violation of the statute, there appear to be no constitutional restraints on Commission action prohibiting or severely restricting such matter. Even if the Court in *Pacifica* had reached an opposite conclusion, such a decision would not impede the FTC's rulemaking activity. Unlike *Pacifica*, the material dealt with by the FTC in the rulemaking proceeding is *not* program matter (which generally is protected speech), but is "*commercial speech*" which, as noted above, clearly is not entitled to the full protection given other speech under the Constitution. As it is, the result in *Pacifica* greatly strengthens the conclusion that the FTC staff's proposals are within the boundaries of the first amendment.

CONCLUSION

In the words of Philip Elman, a former Federal Trade Commissioner, former law clerk to Supreme Court Justice Felix Frankfurter, and a noted constitutional lawyer, the impact of the Supreme Court's decisions in the commercial speech area essentially seem to paraphrase George Orwell's famous phrase in *Animal Farm* that "all pigs are created equal, but some pigs are more equal than others"⁷⁶ by finding that "all speech is created equal, but some speech is more equal than others."⁷⁷ In essence, despite certain scraps of language, recent holdings of the Supreme Court in matters involving commer-

⁷⁶ G. ORWELL, *ANIMAL FARM* (1946).

⁷⁷ Elman, *The New Constitutional Right to Advertise*, 64 A.B.A.J. 206, 208 (1978).

cial speech indicate that such speech is *not* speech which rises to the stature of full constitutional protection and may be severely restricted under appropriate circumstances. The Supreme Court's decision in *Pacifica* does not deal with commercial speech but it does indicate the more limited application of the first amendment to speech in the broadcast media. *Pacifica* also demonstrates the significance of protection of the child audience in weighing first amendment arguments against government regulation. These considerations weigh much more heavily when commercial speech, such as television advertising to children, is involved.

In brief, "commercial speech" may be "speech" which cannot—as once thought—be prohibited willy-nilly, but which can be subjected to appropriate governmental restrictions. Such restrictions are particularly appropriate when broadcasting is involved or when the audience to which the messages are addressed is an audience entitled to special protection, such as the child audience.⁷⁸ Both considerations apply to the FTC's rulemaking proceeding.

As a result of *Pacifica*, broadcasters now may not, with impunity, utilize the "seven dirty words" expunged by the Supreme Court from afternoon broadcast. *Perhaps* in the future, as a result of FTC rulemaking activity, they may be unable to impose on children's television programs words exhorting youngsters to buy their "pots" or other wares. Whatever the political consequences of the effort by the FTC to restructure television advertising to children, the constitutional guarantee

⁷⁸ The importance of these considerations is evident from the fact that while the five Justices forming the majority agreed that the combination of the special characteristics of broadcasting, the need to protect the child audience, and proper deference to one's right to reject speech (particularly in one's own home) rendered the FCC's action valid under the first amendment, these members divided as to the worth of the speech at issue in *Pacifica*. The Chief Justice joined Justices Stevens and Rehnquist in asserting that "such utterances [as Carlin's] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." 98 S. Ct. at 3039, (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Justices Powell and Blackmun disagreed, stating that it was not within the proper province of the Supreme Court "to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." *Id.* at 3046.

of free speech presents no barrier; the underlying concerns of the majority in *Pacifica* clearly demonstrate the validity of this assertion. A salesman's broadcast pitch to an immature audience is not to be confused with the philosophical, political, or artistic expression shielded by the first amendment.⁷⁹

⁷⁹ See Hammer, *FTC Knights and Consumer Daze: The Regulation of Deceptive or Unfair Advertising*, 32 ARK. L. REV. 446, 453-55 (1978); Wolinsky & Econome, *Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children*, 4 HASTINGS CONST. L.Q. 249 (1977).

