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GEORGE CARLIN, CONSTITUTIONAL LAW SCHOLAR

Christine A. Corcos*

*There are 400,000 words in the English language, and there are seven of 'em ya can't say on television. What a ratio that is. Three hundred and ninety-nine thousand nine hundred and ninety three to seven. They must really be bad.*¹

I. INTRODUCTION

When the Supreme Court handed down its 1978 ruling in *Federal Communications Commission v. Pacifica Foundation*,² it upheld the authority of the Federal Communications Commission (FCC) to regulate indecency on the public airwaves. Unfortunately, the Court gave the agency relatively little guidance concerning the definition of “indecency,” a point that George Carlin made repeatedly during a 1973 monologue that, ironically enough, was the subject of the ruling. But a clear message that the Court did deliver to the FCC and to licensees was that Carlin had successfully identified seven words that the FCC could regulate on broadcast television and radio.³

* © 2008, Christine A. Corcos. All rights reserved. Associate Professor of Law, Louisiana State University Law Center, Baton Rouge, Louisiana. I wish to thank Jonathan Entin, Associate Dean and Professor of Law and Political Science, Case Western Reserve University Law School, for the suggestion, made in passing during my law school days so many years ago, that George Carlin is a constitutional law scholar. I also wish to thank my colleagues Professor Lee Ann Lockridge and John Devlin for reading drafts of this essay and for their valuable suggestions, and John Crigler, of Garvey Schubert Barer, Washington, D.C., for taking the time to discuss the George Carlin and Sarah Jones cases with me. Any errors or misstatements are my own.

1. George Carlin, *Seven Words You Can Never Say on Television*, in *Class Clown* (Atlantic Recording Corp. 1972) (CD).

2. 438 U.S. 726 (1978).

3. For a verbatim transcript of Carlin's monologue, see *id.* at 751-755.

We have now lived with *Pacifica* and Carlin's insights for three decades.⁴ In this Article, the Author would like to make some suggestions concerning the importance of the points Carlin made in his monologue entitled *Seven Filthy Words*.⁵ Further, given the recent Second Circuit ruling in *Fox Television Stations v. FCC*,⁶ the Author urges the FCC to revisit its current indecency policy, which seems to have become increasingly unworkable.

II. BASIS FOR AND HISTORY OF FCC REGULATION UNTIL THE PACIFICA RULING

Before one can understand the importance of Carlin's observations and of the impact he had on subsequent media law, one should spend some time considering the history of FCC enforcement actions. To start, it is worth noting the distinction between "obscenity" and "indecency." Two commentators, Keith Brown and Adam Candeub, have examined the historical meanings of "obscenity" and "indecency." They suggested that the Court was incorrect in ascribing separate meanings to the words "obscene" and "indecent" (as it did in *Pacifica*) for the following historical reason:⁷

[Doctor] Milagros Rivera-Sanchez suggests that the 1927 Radio Act⁸ language was largely lifted from the Commerce Department pamphlet of 1914, Regulation 210 discussed above. The First Radio Conference produced a draft radio bill dated April 18, 1922; section 3(E)(e) of the document states that an operator's license shall be suspended if he

4. George Carlin died from heart failure on June 22, 2008 in Santa Monica. Ed Payne, *Award-Winning Comedian George Carlin Dies*, <http://us.cnn.com/2008/SHOWBIZ/06/23/carlin.obit/index.html> (June 23, 2008). He was 71. *Id.* Of the case which made him famous to generations of lawyers and law students, he said the following: "So my name is a footnote in American legal history, which I am perversely proud of." *Id.* He was wrong. His name was, and is, much more than a "footnote," as the Author hopes this Article demonstrates.

5. Carlin, *infra* n. 47. This monologue is sometimes entitled *Seven Dirty Words*; however, this Article will consistently use the title *Seven Filthy Words*.

6. 489 F.3d 444 (2d Cir. 2007).

7. Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. Rev. 1463, 1478 (2005).

8. The 1927 Radio Act stood for the proposition that radio waves are public and thus private ownership of them was forbidden. *Id.* at 1474-1475. One could use these airwaves only with the government's permission. *Id.* at 1475.

“has transmitted superfluous signals, or signals containing profane or obscene words or language.” This language exactly matches the Commerce Department pamphlet. When Senator Clarence Dill introduced H.R. 9971, however, he “inverted the order of the terms profane and obscene and added the word ‘indecent.’” There is no stated reason why Senator Dill did this and thus very little one can conclude about the significance of the revision. This version with slight changes was adopted into the 1927 Act. This interesting historical footnote suggests that the *Pacifica* opinion was probably incorrect in claiming that indecency and obscenity referred to different concepts. Certainly, there is no evidence that the statute’s drafters thought the two words had distinct meanings. Rather, the evidence, slim as it is, suggests that the congressmen envisioned prohibitions on one unitary category of inappropriate speech.⁹

Brown and Candeub further discussed the legislative history of subsequent Acts, noting that Congress adopted the “obscenity, indecency, and profanity language” into the 1934 Communications Act with no change and then into the 1948 Criminal Code.¹⁰

Additionally, Brown and Candeub noted that until the 1960s the FCC brought very few indecency enforcement actions against broadcasters.¹¹ Indeed, the period itself, which was one of manifest conformity, resulted in few complaints to the agency, and those complaints that did materialize ended in less-than-categorical censures.¹² Broadcasters themselves evinced no particular interest in challenging a status quo,¹³ established by both

9. *Id.* at 1478–1479 (citations omitted).

10. *Id.* at 1479. “[The 1934 Communications Act] established the Federal Communications Commission (FCC) and transferred authority over spectrum decisions from the [Federal Radio Commission] (FRC) to the FCC.” *Id.* The 1934 Communications Act appears generally within Title 47 of the United States Code, and the 1948 Criminal Code refers to the 1948 version of Title 18 of the United States Code.

11. *See id.* at 1482–1483 (noting that the shift in broadcasting enforcement occurred in the 1960s).

12. *Id.*

13. *Id.* This period was also the heyday of the anti-Communist search within government and business with which many media insiders participated wholeheartedly. *See generally* Edward Alwood, *Dark Days in the Newsroom: McCarthyism Aimed at the Press* (Temple U. Press 2007) (reviewing congressional investigations of communism and the press, previously undisclosed FBI files and interviews, and actions of publishers in protecting their economic interest to analyze the protections accorded under the First Amendment); *but see generally* Thomas P. Doherty, *Cold War, Cool Medium: Television, McCar-*

the FCC and the National Association of Broadcasters, that seemed to reflect social sensibilities.¹⁴

A shift in mores beginning in the early 1960s brought a consequent increase in FCC enforcement actions.¹⁵ As broadcasters became more adventurous (perhaps to appease the growing component of listening and viewing audiences, which showed more interest in what one might call “frisky” topics), the FCC responded to the complaints (about the language used) of those who disapproved of the shift toward such content.¹⁶ But while the lan-

thyism, and American Culture (Columbia U. Press 2003) (arguing that America became more tolerant and open through the media, notwithstanding McCarthyism). Note, however, that in other spheres, the media *was* challenging this “conformist” doctrine. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (reversing the state court’s decision that sustained a state agency’s refusal to issue a license for exhibition of a film on grounds that it was “sacrilegious”); see also *Times Film Corp. v. Chi.*, 365 U.S. 43, 44–45 (1961) (dismissing the complaint of a film company that asserted the city’s film-review board’s requirement that all films be presented for examination was unconstitutional as a prior restraint under the First and Fourteenth Amendments). Although many in the movie industry believed that the industry’s Production Code seal of approval was necessary for success, United Artists bucked the trend, and in 1953, it released Otto Preminger’s *The Moon Is Blue* (which used the forbidden word “virgin”) without the seal of approval. *New Pictures*, *Time Mag.* (July 6, 1953) (available at <http://www.time.com/time/magazine/article/0,9171,822872,00.html>); *The Moon Is Blue* (United Artists 1953) (motion picture). It was clear not every person felt the same way about the movie’s content:

In spite of the published controversy over the decency of the filmed version of [*The Moon Is Blue*], which has been passed by the New York State censors but judged improper by the industry’s own code, this glib little tract on maidenly virtue opened here yesterday. And, unless our observers missed it, the pit didn’t yawn nor the heavens fall.

Bosley Crowther, “*The Moon Is Blue*,” *Preminger’s Film Version of Play, Opens at the Sutton and Victoria*, *N.Y. Times* (July 9, 1953) (available at <http://movies.nytimes.com/movie/review?res=9902E6DD173DE23BBC4153DFB1668388649EDE>) (describing also the film’s use of the taboo words “seduce” and “pregnant”). Three days later, Crowther gave an update of the situation, noting that in spite of the industry’s continued refusal to give the film a seal of approval, or perhaps because of it, the film was attracting large audiences. Bosley Crowther, *Outside the Code: “The Moon Is Blue” Hits Snag On Screen*, *N.Y. Times* (July 12, 1953). For more on the battle over the film, see Leonard J. Leff & Jerold L. Simmons, *The Dame in the Kimono*, 196–209 (2d ed., U. Press Ky. 2001) (explaining the flaws of rating by tracing the Production Code and motion picture censorship up to the year 2000). Leff and Simmons’ book also reproduces the Motion Picture Production Code, which went into effect in 1924. *Id.* at 285–300.

14. The media, including broadcasters and the motion picture industry, made certain for years to report faithfully both to governmental and quasi-governmental bodies about its activities in fighting what might be considered objectionable portrayals on screen and airwaves. Brown & Candeub, *supra* n. 7, at 1482–1483. For a copy of the code the industry used, see Motion Picture Assn. of Am., *A Code to Govern the Making of Motion Pictures; the Reasons Supporting It and the Resolution for Uniform Interpretation* (Wash. 1955).

15. Brown & Candeub, *supra* n. 7, at 1483.

16. In 1964, the D.C. Circuit affirmed the FCC’s denial of a license renewal to radio

guage used was suggestive, it was not, at least by Carlin's standards, indecent.¹⁷ That is, the language made reference to behavior that raised images in the listeners' minds, which was in part what had gotten earlier satirists and commentators into trouble.¹⁸ By themselves, the words used might not necessarily be considered "bad words," but they were "coarse, vulgar, suggestive[,] or susceptible of indecent double meaning."¹⁹ As Carlin pointed out in his famous monologue (and as was recognized in its variations), the words have no meaning by themselves; these meanings are learned.²⁰ Further, as commentator William A. Huston and others have noted, "in order for any word to have meaning, it must have an *a priori* meaning agreed upon by both parties. Hearing it again simply invokes this prior knowledge, or the memory of its meaning."²¹

station WDKD on the basis that the licensee had permitted indecent or offensive material to be broadcasted and/or that he had misrepresented facts to the FCC with regard to the broadcast of that material. *Robinson v. FCC*, 334 F.2d 534, 536 (D.C. Cir. 1964). The program involved what was generally known as the "Uncle Charlie" or the "Charlie Walker" program, a radio show with radio personality Charlie Walker that was deemed indecent. *Id.* at 535–536.

17. For a list of examples of radio personality Charlie Walker's "obscene" chatter, see dustbury.com, *Stern Realities*, <http://www.dustbury.com/archives/002324.html> (Feb. 29, 2004). One example references a dog urinating on cars, which is certainly not indecent under Carlin's standard. *Id.*

18. Another example of Charlie Walker's "double meaning" language is the following witty remark: "Now I done got sick and tired of all you fools giving me the devil about what I said about ol' so and so. Listen to me. Any of y'all out there that don't like what I said, y'all can all come up here to this radio station, and just kiss my ass . . . it's tied up right here at the back of the station!" *Id.*; see also *Robinson*, 334 F.2d at 535 (referring to Walker's language as "suggestive" and having a "double meaning").

19. See Milagros Rivera-Sanchez & Paul Gates, *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 Fed. Commun. L.J. 267, 283 n. 87 (1993–1994) (discussing how the FCC never defined "indecent," but instead used these other words to describe its definition).

20. *Pacifica*, 438 U.S. at 752.

21. William A. Huston, *Under Color of Law: Obscenity vs. the First Amendment*, 10 NEXUS 75, 77 (2005) (citation omitted) (emphasis in original). This phrase "*a priori* meaning" signifies that the person attached the particular meaning previously. *Id.* For example, an obscene word to a person who speaks English is not given the same meaning as that obscene word to a person who cannot speak English or who has never heard the word previously. *Id.* Indeed, Huston discusses briefly the notion that obscenity might be a thought crime "if one accepts the aforementioned propositions [that words have an agreed-upon meaning], and the utterance causes injury, how can one determine which utterance caused the injury? Since the injury derives from the stimulation of a memory, is obscenity in fact a thought crime?" *Id.* at 77–78.

By the early 1970s, while Richard Nixon served as president, the FCC was hot on the trail of "bad words."²² In 1970, the FCC fined Eastern Education Radio one hundred dollars over musician Jerry Garcia's use of the words "shit" and "fuck" although he used the words to emphasize a point and not in an "excretory" manner.²³ The FCC, noting that the case was one of first impression,²⁴ maintained that both Title 18, Section 1464 of the United States Code and the licensee's public-interest requirement mandated that the licensee (and more specifically, the interviewers) should have cautioned Garcia to not use objectionable language.²⁵ The licensee had failed to do so.²⁶ The FCC also noted that regardless of which requirement it applied to measure the behavior of the licensee, "the criteria for [its] action thus remains the same, in our view—namely, that the material be patently offensive and utterly without redeeming value."²⁷ However, because the material was broadcast over the public airwaves, the agency took the position that the standard could be less stringent for indecent and offensive material than it was for potentially obscene material available, for example, at the local bookstore.

Two years later, the FCC pounced on Sonderling Broadcasting for airing material that fit within the new popular "topless radio" format, fining Sonderling's Oak Park, Illinois station two thousand dollars.²⁸ "Topless radio" consisted generally of discus-

22. Brown & Candeub, *supra* n. 7, at 1484.

23. *Id.* The FCC's decision can be found at *In Re WUHY-FM*, 24 F.C.C.2d 408 (1970). Mr. Garcia was interviewed in his hotel room. *WUHY-FM*, 24 F.C.C.2d at 408. The interviewers taped the conversation and aired it the next night. *Id.* Mr. Garcia used phrases during the interview like "[shit] man" and "[p]olitical change is so [fucking] slow." *Id.*

24. *WUHY-FM*, 24 F.C.C.2d at 412.

25. *Id.* at 414. The Commission suggested the following:

[T]he station employees could have cautioned Mr. Garcia either at the outset or after the first few expressions to avoid using these "gratuitous" expressions; they did not do so. That the material was presented without obtaining the station manager's approval—contrary to station policy—does not absolve the licensee of responsibility.

Id.

26. *Id.* (describing the station's failure to caution Garcia to avoid further use of "gratuitous" expressions as "gross negligence on the part of the licensee with respect to its supervisory duties").

27. *Id.* The Commission noted that "in sensitive areas like this, the Commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor." *Id.* (citations omitted).

28. Brown & Candeub, *supra* n. 7, at 1484. The *Sonderling* opinion is available at *In re Sonderling Broad. Corp.*, 41 F.C.C.2d 777 (1973).

sions of rather explicit sexual topics between masters of ceremonies and callers.²⁹ In seeking reconsideration of the FCC's decision to fine Sonderling,³⁰ two advocacy groups argued that the ruling caused a "chilling effect" that deprived listeners of "exposure to speech and ideas about important issues, thereby abridging [complainants'] First Amendment rights to receive 'free speech by radio.'"³¹ However, the Commission determined that the ruling did not have the feared "chilling effect" even though Sonderling had eliminated its sex-talk show.³² It drew the distinction between offensive programming (which the FCC cannot prohibit from the airwaves) and "obscene and indecent" programming (against which the FCC may take action under Title 18, Section 1464 of the United States Code).³³ Sonderling's sex show fell into the latter category.³⁴ Further, the agency noted that the fact that children might have been in the audience was not the basis for its decision;³⁵ rather, it had acted because of the "pervasive and intrusive nature" of the show.³⁶

29. John C. Carlin, *The Rise and Fall of Topless Radio*, 26 J. Commun. 31, 31 (Winter 1976).

30. Sonderling maintained that it was not liable but nevertheless submitted to the fine. *Sonderling Broad. Corp.*, 41 F.C.C.2d at 779.

31. *Id.* at 780. The two advocacy groups were the Illinois Citizens Committee for Broadcasting and the Illinois Division of the American Civil Liberties Union. *Id.* at 777. The Petitioners offered the following examples of the "chilling effect":

(1) Sonderling's cancellation of its sex-talk program; (2) Storer Broadcasting Company's reported change in the format of the "Bill Balance Show," the most widely heard of the sex-talk programs, whereby "intimate topics" will be forbidden; and (3) the [National Association of Broadcasters] resolution of March 27 condemning and deploring "tasteless and vulgar program content."

Id. at 780.

32. *Id.* at 783.

33. *Id.* at 784.

34. *Id.* at 782. The Commission notes in its decision that we must be sensitive to allegations that our actions have forced licensees to abandon controversial programs which are not unlawful Our Notice to Sonderling was prompted not by the fact that WGLD-FM had a sex-talk show; many other stations also had such programs and have not been assessed. We acted against Sonderling solely because the station had broadcast obscene and indecent language

Id. at 784.

35. *Id.*

36. *Id.* The agency continued to note that since the program in question was broadcast during the afternoon hours, its content could not possibly have been expected to reach only adults. *Id.* That the offensive content could reach children served to aggravate the offense. *Id.*

The agency was clearly establishing a policy that offensive language and offensive content were impermissible during the afternoon hours even if children *were not* in the audience.³⁷ The FCC said the following about child listeners:

We went on to point out, however, that children were "in the audience during these afternoon hours," and we cited evidence which indicated that the program was "not intended solely for adults." From this, we concluded that "the presence of children in the broadcast audience makes this an *a fortiori* matter." The obvious intent of this reference to children was to convey the conclusion that this material was unlawful, and that it was even more clearly unlawful when presented to an audience which included children.³⁸

The FCC disclaimed any ability to determine whether the statute under which it made its determinations was constitutional.³⁹ But it did say that

[o]ur application of the statute in the *Sonderling* case was precisely in line with the then[-]relevant Supreme Court decisions on obscenity, as we read them . . . , and consistent with the limited Commission precedent [T]he Supreme Court has decided a series of cases which we believe reinforce our analysis.⁴⁰

Sonderling's refusal to challenge the FCC order in federal court ultimately proved to be devastating in terms of other broadcasters' abilities to challenge similar or more broadly aimed or-

37. *Id.*

38. *Id.* (emphasis in original).

39. *Id.* at 781. The Commission noted that Congress created the statute at issue, and that the Commission was not vested with the power "to set aside enactments of Congress." *Id.* The Commission did give its opinion that the statute was indeed constitutional, and it supported this conclusion with the fact that Congress had previously adopted the substance of Section 1464 numerous times in the past. *Id.* The Commission pointed out that the language

was adopted as part of the Radio Act of 1927 and again as part of the Communications Act of 1934, and it was reenacted in the 1948 revision of the Criminal Code. In 1960, Congress effectively reenacted the substance of 1464 when it incorporated the statute by reference in Section 503 of the Communications Act, the forfeiture statute.

Id. at n. 13.

40. *Id.* (citations omitted).

ders.⁴¹ The FCC had moved quite quickly from declaring indecent the “useless” expletives that Jerry Garcia had uttered⁴² to declaring indecent the content that Sonderling’s licensee broadcasted.⁴³ The stage was set for the next clash between the agency and a broadcaster. It was to be a battle to determine whether the FCC would consider indecent language protected if it was accompanied by serious analysis or whether even that context would fail to protect licensees from sanctions. The test came with a 1973 broadcast in which George Carlin’s monologue figured prominently.⁴⁴

III. THE BACKGROUND OF THE PACIFICA RULING

George Carlin was a satirist, and one of his methods was using occasionally shocking language to get a reaction from his audience. Before and after his *Seven Filthy Words* monologue, he had shown an interest in words—in society’s use, overuse, or misuse of them and in society’s reaction to them. Consider his analysis of the ever-popular invitation to board an airplane:

It starts at the gate: “We’d like to begin the **boarding process**.” Extra word. “Process.” Not necessary. Boarding is sufficient. “We’d like to begin the boarding.” Simple. Tells the story. People add extra words when they want things to sound more important than they really are. “Boarding process” sounds important. It isn’t. It’s just a group of people getting on an airplane.

To begin their boarding process, the airline announces they will **preboard** certain passengers. And I wonder, How can that be? How can people board before they board? This I gotta see. But before anything interesting can happen I’m told to get on the plane. “Sir, you can get on the plane now.” And I think for a moment. “*On* the plane? No, my friends, not me. I’m not getting *on* the plane; I’m getting *in* the plane! Let Evel Knievel get *on* the plane, I’ll be sitting inside in one of those little chairs. It seems less windy in there.”

41. *E.g. FCC v. Pacifica*, 438 U.S. 726.

42. *See supra* nn. 22–27 and accompanying text (discussing Jerry Garcia’s case).

43. *See generally Sonderling Broad. Corp.*, 41 F.C.C.2d 777 (discussing the “topless radio” broadcasts).

44. *See infra* nn. 49–65 and accompanying text (discussing the start of the controversy and ensuing judicial battle regarding George Carlin’s *Seven Filthy Words*).

Then they mention that it's a **nonstop flight**. Well, I must say I don't care for that sort of thing. Call me old-fashioned, but I insist that my flight stop. Preferably at an airport. Somehow those sudden cornfield stops interfere with the flow of my day. And just about at this point, they tell me the flight has been delayed because of a **change of equipment**. And deep down I'm thinking, "broken plane!"

Speaking of potential mishaps, here's a phrase that apparently the airlines simply made up: **near miss**. They say that if two planes almost collide it's a near miss. Bullshit, my friend. It's a near hit! A **collision** is a near miss.⁴⁵

Carlin introduced his *Seven Filthy Words* monologue and a variant, *Seven Words You Can Never Say on Television*, in the early 1970s and has since revised it several times.⁴⁶ He performed it before audiences in theaters and it is available on CD.⁴⁷ To some extent, one could plausibly accept his statement that his purpose in creating the *Seven Filthy Words* monologue was to determine, as he said, "the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time . . ." ⁴⁸ The "all the time" he speaks of includes using these words on the television or radio airwaves.

On October 30, 1973, Paul Gorman's 2:00 p.m. program, "Lunchpail," which broadcasted in New York City on WBAI-FM, discussed and analyzed society's attitude toward the use of lan-

45. George Carlin, *Airline Announcements: Part One*, in *Napalm & Silly Putty* 12–13 (1st ed., Hyperion 2001) (emphasis in original).

46. Commentators speculate that Carlin created the monologue in the wake of the *Sonderling* decision to test the FCC's indecency policy. See *Pacifica*, 438 U.S. at 730 (explaining that Carlin's monologue was part of a program that discussed contemporary society's attitude toward language).

47. George Carlin, *Occupation: Foole* (Atlantic Recording Corp. 2000) (originally recorded in 1973).

48. *Pacifica*, 438 U.S. at 751–755 (transcribing the *Seven Filthy Words* monologue). This transcript does not match the recording on the CD available from the Pacifica Foundation, which reproduces it with bleeps. FCC, *FTV 024: George Carlin, Pacifica, and the FCC* (Pacifica Radio Archives 2006) (CD) (copy on file with Author). What the CD seems to reproduce more closely matches the routine known as *Seven Words You Can Never Say on Television* from Carlin's 1972 CD, *Class Clown*. Carlin, *supra* n. 1. The Author spoke at length with Brian De Shozar of Pacifica on October 15, 2007. Telephone Interview with Brian De Shozar, Dir., Pacifica Archives (Oct. 15, 2007). He told her that the CD actually includes material from a live recording made at the Santa Monica Civic Auditorium in 1977. *Id.* Since no live recording seems to exist of the original 1973 broadcast, Pacifica Foundation reconstructed a broadcast using tapes available from its archives. *Id.*

guage.⁴⁹ As “an incisive satirical view of the subject under discussion,”⁵⁰ Gorman played a broadcast, which closely resembled Carlin’s monologue from the album *Occupation: Foole*.⁵¹ Immediately prior to the broadcast of the monologue, listeners were advised that it included language that some might regard as offensive and that those who might be offended should change stations and turn back in fifteen minutes.⁵²

Approximately one month after the broadcast, the FCC received a complaint from John H. Douglas, a man in New York City who heard Gorman’s October 30 program while driving in his car.⁵³ Douglas, a minister and a board member of Morality in Media,⁵⁴ complained that his “young son”⁵⁵ was with him and had

49. *In re Citizen’s Compl. against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, 95 (1975).

50. *Id.*

51. The content of this monologue seems to have been essentially equivalent to the *Seven Filthy Words* monologue although it may have crucially differed in some major respects. See *infra* nn. 90–91 and accompanying text (discussing differences between the monologues). The WBAI host played a portion of the *Occupation: Foole* album. *Pacifica Found. v. FCC*, 556 F.2d 9, 11 (D.C. Cir. 1976), *rev’d*, 438 U.S. 726 (1978). But in many instances, radio stations did not keep records of what they broadcast, so Pacifica reconstructed the broadcast. *Supra* n. 48. Comedians’ routines change often, so although the 1973 *Occupation: Foole* version of the monologue was broadcast that day, it differs from other versions of the same sketch—the words may change, but the nature of it stays the same.

52. Br. of Respt. at 3, *FCC v. Pacifica Found. Station*, 438 U.S. 726 (1973).

53. *Citizen’s Compl. against Pacifica*, 56 F.C.C.2d at 95.

54. Huston, *supra* n. 21, at 81 n. 45. Morality in Media is a lobbying organization founded in 1962 to protect children and the community by combating child pornography as well as other indecencies seen in various forms of media. Morality in Media, Inc., *Home Page*, <http://www.moralityinmedia.org> (accessed Apr. 27, 2008).

55. According to an article by Robert Corn-Revere, Douglas’ son was fifteen. Robert Corn-Revere, *New Age Comstockery: Exon vs. the Internet*, CATO Policy Analysis No. 232, <http://www.cato.org/pubs/pas/pa-232.html> (June 28, 1995). Mr. Corn-Revere was lead counsel for CBS in the recent case of *Fox Television Stations v. FCC* in the Second Circuit. See *Fox TV Station v. FCC*, 489 F.3d 444, 445 (2d Cir. 2007). According to William A. Huston, the boy’s age was twelve. Huston, *supra* n. 21, at 81 n. 45 (citing Ltr. from John H. Douglas to FCC Enforcement Bureau, *Letter of Complaint* (Nov. 28, 1973)). University of Texas Law Professor Lucas A. Powe suggested that Mr. Douglas’ description of his son as “young” rather than as a teenager (if, indeed, the son was a teenager) was part of Morality in Media’s agenda to draw the agency’s attention to what it considered the growing problem of indecency on the airwaves, which it thought the FCC was ignoring. Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* 186 (U. Cal. Press 1987). If Mr. Douglas’ son were indeed fifteen, he certainly must have already been exposed to four-letter words. *Id.* Powe hypothesized further that it is unlikely that Mr. Douglas, who certainly would not qualify as a typical Pacifica listener, actually heard the show of which he complained. *Id.* Powe noted finally that the FCC did not take immediate action on the complaint, waiting nearly a full year before commencing action. *Id.* at 186. This might

heard words such as “cocksucker,” “fuck,” “cunt,” “piss,” “mother-fucker,” and “shit” used on public airwaves.⁵⁶ Mr. Douglas stated that “[t]his was supposed to be part of a comedy monologue” and that “[a]ny child could have been turning the dial, and tuned in to that garbage.”⁵⁷

In response to Mr. Douglas’ complaint, the licensee stated the following:

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those “secret” manners and words which, when held before us for the first time, show us new images of ourselves. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding on the subject.⁵⁸

After receiving the licensee’s response, the FCC noted that the Communications Act, which “prohibited the [FCC] from engaging in censorship or interfering ‘with the right of free speech by means of radio communication,’” was originally under Section

indicate, according to Powe, that the agency was waiting for a resolution in the pending *Sonderling* case. *Id.* at 186–187 (discussing the case and “topless radio”). *Sonderling* did not appeal, but some Illinois citizens, concerned about the “chilling effect” of the sanction, filed suit on behalf of the station. *See id.* at 185 (citing *Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397 (1974)) (discussing a citizens’ group intervention to appeal the *Sonderling* decision).

56. *Citizen’s Compl. against Pacifica*, 56 F.C.C.2d at 95.

57. *Id.*

58. *Id.* at 96. In an interview on Pacifica’s *From the Vault* CD, Mr. Gorman seems to suggest that he did not originally intend to play the Carlin excerpt. FCC, *supra* n. 48.

326 and subsequently transferred to Section 1464 of Title 18 of the United States Code.⁵⁹

The following is part of Carlin's *Seven Filthy Words* monologue in which he critiqued the FCC's policy by using some of the words he thought the agency would ban.⁶⁰ He explained, admittedly using less elegant language than would an attorney, why he believed such a policy is flawed:

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [']cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. . . . Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever. . . . And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment. . . . The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.⁶¹ Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty

59. *Citizen's Compl. against Pacifica*, 56 F.C.C.2d at 96.

60. The following monologue is reproduced exactly as it was printed in the *Pacific* opinion.

61. Currently, the FCC restricts obscene material from radio and television broadcasts completely. FCC, *Obscenity, Indecency & Profanity, Frequently Asked Questions*, "What Is the Safe Harbor?," <http://www.fcc.gov/eb/oip/FAQ.html> (updated Apr. 27, 2007). However, from 10 p.m. through 6 a.m. radio and television stations may broadcast indecent material. *Id.* The FCC defines indecent speech as "material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." Lili Levi, *First Report: The FCC's Regulation of Indecency 2-3* (First Amend. Ctr. Aug. 6, 2007) (available at <http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.pdf>).

word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old [Anglo]-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. . . . I won the Grammy, man, for the comedy album. Isn't that groovy? . . . That's true. . . . [']cause (laughter) that's based on people liking it man. . . . Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. . . . The big one, the word fuck that's the one that hangs them up the most. [']Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, [']cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeah, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like

love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you have toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) . . . The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your ass. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh space travelers. Thank you man for tonight and thank you also. (clapping whistling)⁶²

In this monologue, Carlin pointed out that some words are on the list because they suggest certain behaviors as well as indecency. Others appear on the list, even if they are by themselves not inde-

62. *Pacifica*, 438 U.S. at 751–755. The transcript provided by the FCC is appended to the *Pacifica* opinion.

cent, because when compounded with other words they take on indecent meanings (the best example of this type of compound word is “motherfucker”). Still others appear even though they are generally accepted in other contexts—for example, in the workplace or used accidentally—which suggests that the indecency rules are not general standards, but instead are standards that a minority applies to the majority. Carlin also pointed out that some words cannot be spoken on the radio even though the words appear in great literature (the Bible, for example, uses the word “cock”).⁶³ He also noted that some words may or may not be acceptable depending upon how the word is being used and its meaning (the “ass” reference). But the objection to sexually suggestive language is odd, he said, since violence is so pervasive, and yet so many people seem not to object to it. Sports metaphors are particularly violent and quite prevalent on the radio. Yet those seem to offend people to a far lesser degree than the “dirty words.” His satirical suggestion that we replace the word “kill” with the word “fuck” only makes this point more clear.⁶⁴ Lawyers have made such literacy arguments with varying degrees of success, but none, the Author would suggest, as vividly as Carlin.⁶⁵

63. *E.g.* Mark 14:30 (King James) (using the word in the context of a chicken as follows: “And Jesus saith unto him, Verily I say unto thee, That this day, even in this night, before the cock crow twice, though shalt deny me thrice”).

64. *See* Christopher M. Fairman, *Fuck*, 28 *Cardozo L. Rev.* 1711 (2007) (discussing the treatment of the word “fuck” in legal jurisprudence).

65. *See* John Crigler, *In re KBOO Foundation, Response to Notice of Apparent Liability for Forfeiture*, http://www.gsblaw.com/resource/pub_result.asp?ID=172614792001 (July 6, 2001) (attaching Sarah Jones’ song *Your Revolution* to the brief filed on behalf of the radio station to show that the context of the song could change the meaning). The FCC told Portland, Oregon radio station KBOO that it was in violation of FCC rules against indecency for playing Jones’ song. *Id.* Lawyers for the station argued that the piece was a critique of society, that the FCC could not reasonably divorce its lyrics from the music, and that the FCC should consider the airing of the song in the context of the program, an argument which had failed in *Pacifica*. *Id.* In addition, attorney John Crigler noted that the FCC failed to consider the context in which Jones used the allegedly impermissible words. *Id.* Crigler further argued that

[w]hen indecency, “which is largely a function of context,” [*Pacifica*, 438 U.S. at 742] is stripped of any thoughtful consideration of context, enforcement of the Commission’s indecency standard becomes prohibited censorship The Commission imposes fines not because a broadcaster unreasonably concluded that material satisfies indecency standards, but solely because the material contains “sexual references” that are “similar” to references in prior Commission rulings. Sealed off from any vital considerations of context[—]the views of the artist, the audience, the station, the programmer and local educators[—]Commission rulings thus mechanically perpetuate themselves. “Offensiveness” is measured not by reference to “contemporary”

In the FCC ruling on the complaint, Commissioner Glen Robinson's concurring statement, which Commissioner Benjamin Hooks joined, illustrates the kind of thinking that Carlin criticized.⁶⁶ Robinson wrote in his concurrence that

[o]n reading George Carlin's monologue, my first instinct was to affirm his opinion that these were indeed words "you couldn't say on the public . . . airwaves." Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of noninterference by government in matters of public decency and decorum commands us to reject Carlin's opinion and accept that of Pacifica. On still further reflection, I am led to conclude, along with my colleagues, that even a rigorous respect for the principles of free speech and government non-intervention permits some accommodation to the demands of decency.⁶⁷

Commissioner Robinson continued,

I initially had some difficulty with the idea that "literary, artistic, political[,] or scientific value" could constitute a defense to allegedly indecent language at one time of the day but not at another. I have concurred in this rule, however, because I understand it simply to carry forward an aspect of the "nuisance" idea⁶⁸

In the same breath, Commissioner Robinson asserted that indecency "is not a property of language, but arises when dirty words are uttered at inappropriate times or in inappropriate circumstances."⁶⁹ If he did *not* think that indecency was a "property

standards but by rulings that indicate only what has offended FCC officials in the past. "Standards for the broadcast medium" are, in fact, not standards at all, for the Commission rejects all proffered evidence concerning such standards and bases its rulings solely on *its* views of offensiveness and *its* view of merit. To punish a station for the broadcast of officially disfavored subject matter is the essence of governmental censorship.

Id. (emphasis in original). Jones also filed suit against the FCC; although a court dismissed the suit, the agency reversed itself and found that the broadcast of the song was not indecent. *In re KBOO Foundation, Memorandum Opinion and Order*. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-469A1.pdf (Feb. 20, 2003).

66. *Citizen's Compl. against Pacifica*, 56 F.C.C.2d at 103.

67. *Id.*

68. *Id.* at 108 n. 9.

69. *Id.*

of language," he could have referred to the words in question simply as "words" and not as "dirty words." He could have discussed uttering them in "certain circumstances," rather than in "inappropriate circumstances." The pejorative word "inappropriate" indicates the degree to which the Commissioner was disinclined to find in Pacifica's favor:

Demonstrating that children are not unsupervised in the audience because of the late hour changes the context, and correlatively it changes the balance to be struck among the competing values, and whether particular language ought to be regarded as illegal or not.

On the issue of artistic value as a defense, one further point should be mentioned. Pacifica's comparison of Carlin with Mark Twain strikes me personally as being a bit jejuene. But no one should suppose that an author must be a giant of letters in order to receive protection for works which have "serious literary [or] artistic . . . value." The Constitution protects lesser literary lights as well as those with the artistic candlepower of Mark Twain. If I were called on to do so, I would find that Carlin's monologue, if it were broadcast at an appropriate hour and accompanied by suitable warning, was distinguished by sufficient literary value to avoid being "indecent" within the meaning of the statute.⁷⁰

The balancing test proposed here still rests on the notion that Carlin's speech is a "nuisance" that must be channeled to a more appropriate time of day because its literary value is less than that of the "giant of letters" to whom the Commissioner here compares its author.⁷¹ The suggestion is still that whatever "literacy value" Carlin's monologue contains shines forth only from behind the

70. *Id.* (alteration in original).

71. *Id.* That the FCC Commissioners were not as sympathetic to Carlin's viewpoint as the majority of the District of Columbia Circuit is obvious from the following excerpt of the Commission's majority opinion:

Carlin's use of the "dirty words" was designed in part to demonstrate that they have acquired many popular meanings, apart from their literal meanings. For example, the phrase "I'm shit-faced" has nothing to do with an excretory activity or organ. It means, "I am drunk." The irony of the *Order* is that non-"obnoxious" synonyms for the dirty words (such as "feces" for "shit") are not banned even though such synonyms are only understood in their literal, "obnoxious sense."

Pacifica Found., 556 F.2d at 23 n. 17 (Brazelon, J., concurring) (emphasis in original).

barricade of an “appropriate hour” and a “suitable warning.” All in all, even though Robinson suggested that he was making no value judgments, value judgments were clearly at play.

Pacifica successfully appealed the unfavorable ruling to the United States Court of Appeals for the District of Columbia Circuit.⁷² The FCC subsequently appealed the case to the Supreme Court.

In eventually upholding the FCC’s initial ruling and reversing the District of Columbia Circuit, the Supreme Court applied a similar balancing test⁷³ and recognized that Carlin’s speech as broadcasted on Gorman’s “Lunchpail” program was “vulgar, offensive, and shocking.”⁷⁴ The Court seemed to recognize that whatever social value came from Pacifica’s broadcast that afternoon was “clearly outweighed by the social interest in order and morality.”⁷⁵ This balance suggests that speech from something of a proportionately higher “social interest” might be protected at 2:00 p.m. even if it contained the same type of language as Carlin’s monologue.⁷⁶

The Court then clarified the narrowness of its holding by stating that “[t]his case does not involve a two-way radio conversation between a cab driver and a dispatcher[] or a telecast of an Elizabethan comedy.”⁷⁷ Notice the differences in the types of speech here. The two-way conversation might not normally be accessible to children. Both its purpose and its method of communication would tend to ensure that children are not in the audience. The Elizabethan comedy, like the Pacifica broadcast that afternoon, might easily be accessible to children.⁷⁸ However, the

72. *Id.* at 10.

73. *See id.* at 750 (listing the following variables to be considered in evaluating the context of the broadcast: time of day, program content, and type of broadcast media).

74. *Id.* at 747.

75. *Id.* at 746.

76. *See id.* at 750 (distinguishing Carlin’s monologue from an Elizabethan comedy).

77. *Id.*

78. Youth-oriented Shakespeare festivals can be found throughout the United States and England. *E.g.* Folger Shakespeare Lib., *Children’s Shakespeare Festival*, <http://www.folger.edu/template.cfm?cid=607> (accessed June 13, 2008); U. Pitt., *Department of Theatre Arts, Shakespeare-in-the-Schools, About Us*, <http://www.play.pitt.edu/sits/about.html> (updated Oct. 24, 2007); Shakespeare Schs. Festival, *Shakespeare Schools Festival, Festival History*, <http://www.ssf.uk.com/aboutus/festivalhistory> (accessed June 13, 2008).

Court automatically seems to assume that the dramatic work has more value than Carlin's satire.⁷⁹

Both the FCC ruling and the Supreme Court opinion sidestep (although they certainly do not miss) Carlin's point in the monologue, which was that there was no list specifying words that the government forbade broadcasters, or anyone else, to say. The modern speaker is not on notice. In other words, a broadcaster proceeded at its own risk when using controversial language because there was no government list specifying what language could and could not result in a sanction. It was only after the broadcaster used the controversial words (and a listener subsequently filed a complaint) that the FCC provided a ruling that the language was unacceptable.⁸⁰ Carlin's list has both a satirical and a practical purpose. He meant to poke fun at the FCC, but he also wanted to assist others by pointing out what words are dangerous and that the danger lies in perceptions that change over time. The word that is considered filthy and unacceptable today could be considered acceptable tomorrow.⁸¹

The Supreme Court's majority opinion does not confront the First Amendment defense seriously, but instead frames the issue as one in which it is required to "decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene."⁸² The FCC defended its rationale by linking

the concept of "indecent" . . . [to] the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the

79. See *Pacifica*, 438 U.S. at 750 (distinguishing Carlin's monologue from a telecast Elizabethan comedy without any support for that distinction).

80. See *supra* nn. 15-44 and accompanying text (describing cases prior to *Pacifica* where the FCC sanctioned radio stations for "indecent" double entendres and "topless radio" programs).

81. A word's unacceptability lies as much in the context in which one speaks as in the word itself. Thus, the bawdy words that are now acceptable when spoken by an actor in an Elizabethan comedy are acceptable precisely because a modern audience *does not* understand them. For more about the Elizabethan comedy, see *Pacifica*, 438 U.S. at 750 (discussing the Elizabethan comedy compared with Carlin's monologue). If the audience does not understand the language, as in the Elizabethan comedy example, why should the words be more acceptable than when the audience does understand them, as in the Carlin monologue example?

82. *Id.* at 729. Note that this is the opening sentence of Justice Stevens' majority opinion. *Id.*

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.⁸³

Rather than limit the construction of Section 1464 to obscene language, as Pacifica urged, the Court accepted the FCC's interpretation.⁸⁴ Thus, the Court accepted the distinction between "indecent" and "obscenity," noting that, as used in the statute, the terms are disjunctive.⁸⁵ Consequently, it did not accept Pacifica's notion that "prurient appeal" need be a component of indecent language.⁸⁶ While "prurient appeal" is a component of the obscenity test, in the Court's view it is not part of the FCC's indecency regime.⁸⁷ Finally, the Court rejected Pacifica's constitutional argument that the FCC's order was overbroad⁸⁸ and that Carlin's monologue was not obscene.⁸⁹

To address Pacifica's argument that the monologue was not obscene, the question of the actual content of Carlin's monologue might have been important if the routine *Seven Words You Can Never Say on Television* had been broadcast. Instead, WBAI chose to broadcast the routine *Seven Filthy Words* from the LP *Occupation: Foole*, released in 1973,⁹⁰ instead of the routine *Seven Words You Can Never Say on Television*, released in 1972.⁹¹ Carlin's message in these two routines is essentially the same. The introductions to the routines, however, differ.

83. *Id.* at 731–732 (quoting *Citizen's Compl. against Pacifica*, 56 F.C.C.2d at 98) (citation omitted).

84. *Id.* at 741. There was no basis for disagreeing with the FCC's conclusion that the broadcast involved "indecent" language. *Id.*

85. *Id.* at 740; see *supra* nn. 7–10 and accompanying text (describing the statutory history of the terms "obscenity" and "indecent").

86. *Id.*

87. *Id.*

88. *Pacifica*, 438 U.S. at 742. The Court rejected the argument that the order was overbroad because it "was issued in a specific factual context" and that the Court's review is limited to "this particular broadcast." *Id.*

89. See *id.* at 742, 744–751 (identifying Pacifica's argument and describing the reasons for rejecting it). First, the Court noted that offensive content was not entitled to absolute constitutional protection and that its context must be considered. *Id.* at 747–748. The Court went on to justify the FCC's ability to regulate the "undisputed[ly] . . . 'vulgar,' 'offensive,' and 'shocking'" monologue on the grounds that broadcasting is "uniquely pervasive . . . in the lives of all Americans" and is "uniquely accessible to children . . ." *Id.* at 748–749.

90. *Citizen's Compl. against Pacifica*, 56 F.C.C.2d at 95.

91. Carlin, *supra* n. 1.

The following is the Author's transcript of the introduction to the *Seven Words You Can Never Say on Television* routine. It differs considerably from the FCC-provided transcript,⁹² and it includes commentary that might have lifted Carlin's broadcast from the "unredeeming" into, perhaps, the redeemable.

I wanna tell you something about words that I think is important. I love, as I say, they're my work, they're my play, they're my passion. Words are all we have really. We have thoughts, but thoughts are fluid . . . and then we assign a word to a thought and we're stuck with that word, for that thought, so be careful with words. I like to think, yeah the same words, you know, that hurt can heal, it's a, it's a matter of how you pick them. There are some people that aren't into all the words, there are some people who would have you not use certain words . . . yeah, there are four hundred thousand words in the English language and there are seven of 'em ya can't say on television. What a ratio that is. Three hundred and ninety-nine thousand nine hundred and ninety three to seven. They must really be bad. They'd have to be OUTRAGEOUS to be separated from a group that large. All of you over here—you seven—bad words. That's what they told us they were, remember. That's a BAD WORD. No bad words. Bad thoughts, bad intentions, and words. You know the seven, don't you, that you can't say on television—shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the heavy seven. Those are the ones that'll infect your soul, curve your spine and keep the country from winning the war. Shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Wow. And tits doesn't even belong on the list, you know. Man. That's such a friendly sounding word. Sounds like a nickname.⁹³

These differences, however, may be moot. Even if WBAI had broadcast the *Seven Words You Can Never Say on Television* routine, one cannot be certain that the FCC would not have still

92. See *supra* nn. 60–62 and accompanying text (quoting the FCC-provided transcript of *Seven Filthy Words*).

93. Carlin, *supra* n. 1. Pacifica Foundation provides this CD as a representation of the original broadcast years later. It bleeps the words apparently because after the Supreme Court decided the case, licensees were prohibited from broadcasting them. Note, however, that one may purchase the George Carlin CDs and thus can obtain the recorded uncensored monologues.

found the list of words offensive simply because the FCC probably still would have received at least one complaint and it would very likely have acted upon that complaint. Since the words in the list are the same, Carlin's explanation—the words represent protected thoughts, they are few in number, and they are not “outrageous”—would not have been likely to head off the FCC's action.

Nevertheless, by limiting its review to whether the agency could “proscribe this particular broadcast,” the Court sidestepped the question of constitutionality.⁹⁴ Evaluating the approach in a fact-specific way is “appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context—it cannot be adequately judged in the abstract.”⁹⁵ The problem with this approach is that, with regard to the content of Carlin's monologue, context matters a great deal. And context was part of Carlin's point. He linked form to content, and both to context.

The Court said its approach was not inconsistent with the approach it took in *Red Lion Broadcast Company v. FCC*,⁹⁶ where it held the FCC could impose the fairness doctrine on broadcasters.⁹⁷ The fairness doctrine required that broadcasters discussing public issues give each side of the issue fair treatment.⁹⁸ The *Red Lion* Court made its ruling despite criticism that forcing broadcasters to present fair coverage of an issue would cause some broadcasters to stop airing discussions of important social issues.⁹⁹ The *Pacifica* Court noted that, like *Red Lion*, its decision

may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references

94. *Pacifica*, 438 U.S. at 742.

95. *Id.*

96. 395 U.S. 367 (1969).

97. *Id.* at 369.

98. *Id.* Broadcasters challenged this rule, arguing that the First Amendment protected their right to “use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency.” *Id.* at 386. The Court rejected that argument, holding that the scarcity of broadcast frequencies required the government to protect access to those frequencies. *Id.* at 400–401. The FCC abandoned the fairness doctrine in 1987, however, after determining that it was no longer in the public interest. See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) (upholding the FCC's decision to discard the fairness doctrine).

99. *Pacifica*, 438 U.S. at 743.

While some of these references may be protected, they surely lie at the periphery of First Amendment concern. . . . The danger dismissed so summarily in *Red Lion* . . . was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort."¹⁰⁰

But this is exactly what *Pacifica* does, assuming that what the FCC's rule does is chill only patently offensive references that have little or no social value¹⁰¹ based on the majority's assessment of the worth of Carlin's monologue.¹⁰² Since Carlin's monologue is the proxy for all these "patently offensive references,"¹⁰³ it is important to further examine the Court's analysis of the monologue.

The opinion continued to explain that if the government has "any power to restrict the public broadcast" of this kind of language, "this was an appropriate occasion for its exercise."¹⁰⁴ Although Carlin's monologue was speech and "the Commission's objections to the broadcast were based in part on its content,"¹⁰⁵ the majority accepted the FCC's proposition that such objections are not fatal to regulation under the First Amendment. In fact, the Court accepted that, *in other contexts*, this monologue would be protected.¹⁰⁶ Why not in this context? Because it was delivered over the regulated airwaves,¹⁰⁷ because it entered homes unin-

100. *Id.* at 743-744 (citations omitted).

101. *See id.* at 743 (stating that "[a]t most . . . the Commission's definition of indecency will deter only the broadcasting of patently offensive references"). The Court's support for this conclusion is that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication." *Id.* at 743 n. 18.

102. *See id.* at 743 (declining to protect "patently offensive sexual and excretory speech"); *id.* at 750-751 (analogizing the monologue to a "pig").

103. *Id.* at 743.

104. *Id.* at 744.

105. *Id.*

106. *Pacifica*, 438 U.S. at 746.

107. *Id.* at 748. The Court noted that the FCC may deny a broadcaster its license if it "would serve 'the public interest, convenience, and necessity.'" *Id.* (citing *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)). This is in contrast, the Court reasoned, with licensing other types of speakers, which requires "laws that carefully define and narrow official discretion . . ." *Id.* (construing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958)).

vited,¹⁰⁸ and because it was (and is) “uniquely pervasive,”¹⁰⁹ answered the Court. Anyone with a license to broadcast over a publicly regulated radio frequency has a responsibility to listeners.¹¹⁰ Consequently,

[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.¹¹¹

For the Court, *Pacifica*’s argument that form and content are necessarily intertwined is untenable:

If there were any 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. But that is simply not this case.¹¹²

The Court continued:

The monologue does present a point of view; it attempts to show that the words it uses are “harmless” and that our attitudes toward them are “essentially silly.” The Commission

108. *See id.* at 748–749 (analogizing unexpected radio content to a physical blow or an obscene phone call). The Court suggested that broadcasters cannot use warnings to protect its audience from exposure to unexpected program content because listeners frequently tune in and out of programs that are already in progress. *Id.* at 748. The Court also rejected the idea that a listener unexpectedly exposed to obscene content can address the situation by turning off the radio. *Id.* This, the Court reasoned, would be like telling an assault victim that her remedy is to run away after receiving the initial blow. *Id.* at 748–749. The Court noted that “[o]ne may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.” *Id.* at 749 (citation omitted).

109. *Id.* at 748. The Court’s justification can be found in the text accompanying *infra* note 113.

110. *See generally In re Compls. against Various Broad. Licenses regarding the Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4994 (1994) [hereinafter *Golden Globe Awards*] (Adelstein, Commr., issuing separate statement) (concluding that “[b]roadcasters . . . bear much of the responsibility to keep our airwaves decent” and that they are “stewards of the public airwaves”).

111. *Pacifica*, 438 U.S. at 748 (citing *Rowan v. U.S. Post Off. Dept.*, 397 U.S. 728, 738 (1970)).

112. *Id.* at 746 (citation omitted).

objects, not to this point of view, but to the way in which it is expressed. 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.¹¹³

But satire is *precisely* this case. Carlin *was* critiquing contemporary attitudes about four-letter words. The question of whether they should receive First Amendment protection is exactly what is at issue here. It deserves more consideration than it in fact receives.

In much satire, as well as in parody, form is linked to content, but that fact does not preclude its protection under the First Amendment.¹¹⁴ To dismiss the First Amendment argument so quickly without examining it more closely gives weight to the suspicion that the Court simply does not want to recognize the legitimacy of opposition to the FCC's indecency policy or to the notion that the point of view and the way it is expressed in this particular case cannot be divorced.

IV. CRITICISM OF THE PACIFICA DECISION

Justice Stevens, writing for the Court, stated that “[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.”¹¹⁵ Justice Stevens is, of course, correct. If one's sole purpose is to express thought, what the FCC terms “decent” language may be perfectly adequate. But the difference in image and impact between “decent” and “indecent” language may be the difference between a clinical description and a vivid and visceral one or between a piece of me-

113. *Id.* at 746 n. 22 (internal cross-reference omitted).

114. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–581 (1994) (reasoning that parody necessarily mimics the content of another work and that “parody often shades into satire”); Jordan M. Blanke, *Victor's Little Secret: Supreme Court Decision Means More Protection for Trademark Parody*, 13 *Fordham Intell. Prop., Media & Ent. L.J.* 1053, 1060 (2003) (concluding that “[p]arody is a form of expression that is clearly and staunchly protected by the First Amendment” (citation omitted)).

115. *Pacifica*, 438 U.S. at 743 n. 18.

diocre writing and a work of great literature. A good deal of Chaucerian or Shakespearean language is, if presented as written, indecent.¹¹⁶ Yet, according to the Court, Shakespearean language might not be relegated to the “safe harbor” period deemed appropriate for Carlin’s monologue.¹¹⁷

Why not? After *Pacifica*, the difference turns on whether the FCC believes the play and its author are more worthy of family-hour broadcast, on context as well as on language itself.

Now, the suggestion that form has no effect on content is an interesting one, and it is one apparently with which many commentators do not quarrel. But they should. The majority is limiting its opinion to *this case*.¹¹⁸ And in *this case*, under *these facts*, the Court should have made a different decision, giving First Amendment protection to *this speech*. Satirists like Carlin rely on both form and content to deliver their message.¹¹⁹ If the Court limits First Amendment protection of the content, it also seriously limits the message. If it also limits protection of the form (through channeling, for example), it cripples that message even more severely. In Carlin’s case, ironically, the Court may have anointed him a more prescient First Amendment scholar than anyone could have predicted. Not only does the Court allow the FCC to prohibit the occasional “Jerry Garcia” adjectival use of expletives¹²⁰ and the extended “Charlie Walker” content-based use of

116. *E.g. id.* at 750 n. 29 (quoting “[a]nd prively he caughte hire by the queynte” from Geoffrey Chaucer’s Miller’s Tale, from *The Canterbury Tales*, Chaucer’s Complete Works 58 (Cambridge 1933)); *infra* n. 122 (discussing Shakespeare’s phrase “the beast with two backs”). Thomas Bowdler made a career of excising objectionable passages from Shakespeare and other classics in order not to offend the sensibilities of a sensitive age. 4 *Ency. Americana* 362 (Grolier 2001). His name gave us the new verb, “bowdlerize.” *Id.*

117. *See id.* at 750 (distinguishing the Carlin monologue from an Elizabethan comedy); *id.* at 733 (noting the FCC’s claim that it intended only to “channel [this type of language] to times of day when children most likely would not be exposed to it” (citation omitted)).

118. *See Pacifica*, 438 U.S. at 742 (stating that the Court’s review “is limited to the question whether the Commission has the authority to proscribe this particular broadcast”).

119. *See Pacifica*, 438 U.S. at 730 (stating that Carlin uses words to satirize the contemporary views concerning the offensive nature of obscenities, exposing those views as “harmless” and “essentially silly”).

120. *See id.* at 741 n. 16 (citing *WUHY-FM*, 24 F.C.C.2d at 412). In *WUHY-FM*, the FCC imposed liability upon a radio station for Jerry Garcia’s repeated use of profanity on air. 24 F.C.C.2d at 409, 415. The Court concluded that “debate does not require that persons being interviewed . . . on talk programs have the right to . . . use ‘f----g,’ or ‘mother f----g’ as gratuitous adjectives throughout their speech. This fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people.”

suggestive material,¹²¹ but now, after *Pacifica*, it allows the FCC to channel the repeated use of “indecent language” to a more appropriate hour, reasoning that it deserves less First Amendment protection than an Elizabethan comedy.¹²²

Justices Brennan, Stewart, White, and Marshall dissented in *Pacifica*.¹²³ Justice Brennan wrote the following:

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.¹²⁴

At the time of the decision, court-watchers were split. Commentator George Will applauded the majority for recognizing that Carlin's use of indecent language added nothing to his commen-

Id. at 415 (alterations in original).

121. See generally *Pacifica*, 438 U.S. at 741 n. 16 (citing *Robinson v. FCC*, 334 F.2d at 535 (discussing the use of indecent material in various mediums, such as radio, television, and magazines). In *Robinson*, the appellate court affirmed the FCC's decision not to renew the license of a radio station when the station manager attempted to mislead the FCC as to his knowledge of “vulgar and suggestive” comments made on-air by host Charlie Walker. 334 F.2d at 534–536. Note that the court's decision was specifically limited to the station manager's dishonesty. *Id.* at 536.

122. See *supra* n. 117 and accompanying text (comparing Carlin to Shakespeare). Perhaps the suggestion is that if the word is indecent but most of the audience is sufficiently ignorant to miss the meaning, the FCC will deem it acceptable. Note that Elizabethan comedies contain a great deal of raunchy language. Shakespeare is, after all, the man who invented the phrase “the beast with two backs.” Eric Partridge, *Shakespeare's Bawdy* 144 (3d ed., Routledge 1990) (explaining that the phrase, used in *Othello*, refers to the act of sexual intercourse). That much of the Bard's language goes over the heads of today's audiences may be the reason that it could so easily get a family-hour-broadcast slot.

123. See e.g. *Pacifica*, 438 U.S. at 778–780 (Stewart, J., dissenting) (arguing that the legislative record does not support the majority's conclusion that “indecent” and “obscene” are distinct); *id.* at 762, 777 (Brennan & Marshall, JJ., dissenting); *infra* n. 124 and accompanying text (quoting Justice Brennan).

124. *Pacifica*, 438 U.S. at 766 (Brennan, J., dissenting).

tary.¹²⁵ Writer Nicholas von Hoffman objected that the decision “wasn’t an intelligent one.”¹²⁶ He pointed out that

studies show that next to no children listen to any radio station at that hour on a weekday for the reason that they are locked up in school taking sex[-]education courses where presumably Carlin’s Anglo-Saxon terminology is replaced with Latin cognates on whose acceptability for broadcasting neither the commission nor our nine most exalted jurists have yet to rule.¹²⁷

Just as the dissent does in *Pacifica*, a fair number of scholars have criticized the decision for various reasons. In his book *The First Amendment, Democracy, and Romance*,¹²⁸ Steven Shiffrin wrote that

[m]ost people with any [F]irst [A]mendment bones in their bodies are troubled by the *Pacifica* case. . . . [The] case produces heat precisely because Carlin’s speech is considered by many to be precisely what the first amendment is *supposed* to protect. Carlin is attacking conventions; assaulting the prescribed orthodoxy; mocking the stuffed shirts; Carlin is the prototypical dissenter.¹²⁹

Professor Laurence Tribe commented that “the strangest thing about the Court’s decision was that no one could reasonably suppose that children were listening to the radio station at 2 o’clock in the afternoon.”¹³⁰

125. George F. Will, *Is There a ‘Periphery’ on the First Amendment?* Wash. Post B7 (July 9, 1978).

126. Nicholas von Hoffman, *Seven Dirty Words: A Cute Form of Censorship*, Wash. Post E3 (July 29, 1978).

127. *Id.*

128. Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* (Harvard U. Press 1990).

129. *Id.* at 80.

130. Laurence H. Tribe, *American Constitutional Law* 937 (2d ed., Found. Press 1988) (citations omitted). Tribe reasoned as follows:

WBAI, the broadcast station involved, is listener-supported, carries no ads, does not play “top forty” records, and directs its programming at a distinctly adult, left-to-radical, upper-middle-class audience. In addition, studies show that virtually no children listen to any radio station whatsoever at that time on a weekday for the reason that most children are then in school. Nor is it probable that any significant number of adults were offended by Carlin’s monologue. Certainly WBAI’s regular listeners were unlikely to be scandalized; in any case, the station prefaced the broad-

Anne Coughlin, a professor at the University of Virginia School of Law, echoed Carlin's point with regard to the discussion of pornography and raised another point even more directly as follows:

How do scholars speak about that of which it is forbidden to speak? This question occupies a margin of the debate over the regulation of pornography since, whatever else it may be, pornography always has been unspeakable. Pornography is a way of representing sex that is enabled by and parasitical on cultural norms forbidding us to represent sex that way. Porn is delivered through many media, including art, photography, and cinematography, but it continues to find a home in prose too. Hence the dilemma for scholars and the critical question for this [e]ssay: with what language and through which methods may we present the forbidden without representing it?¹³¹

cast with warnings of the sensitive language to come. That left at risk the radio listeners who, turning the dials, stumbled briefly onto the offensive program. The number of such accidents had to be miniscule, much smaller than the number of WBAI listeners who enjoyed Mr. Carlin's satire. Indeed, the record showed that only one person complained—an unidentified citizen who, while driving in his car with his son, tuned into WBAI, heard Carlin's monologue, and apparently chose to turn no further. Given the facts, that the Court did not hold the FCC's order unconstitutional suggests something else was afoot.

Id.

131. Anne Coughlin, *Representing the Forbidden*, 90 Cal. L. Rev. 2143, 2143 (2002) (citations omitted). Since the Court's 2002 decision in *Ashcroft*, which held that a law regulating virtual child pornography was overbroad and unconstitutional, one way to "present the forbidden without representing it" is by virtual recreation. *Id.* at 2143 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)). In *Ashcroft*, the Court examined the Child Pornography Act of 1996, which attempted to limit a form of pornography that was neither obscene nor child pornography under the Court's existing caselaw. 535 U.S. at 239; see also *Miller v. Cal.*, 413 U.S. 15, 24 (1973) (summarizing the obscenity standard); *N.Y. v. Ferber*, 458 U.S. 747, 756–766 (1982) (describing the child-pornography standard). The *Ashcroft* Court noted that the Act prohibited not only computer-generated images of children engaging in sexual acts but also "images that appear to depict a minor engaging in sexually explicit activity[.]" which would chill speech that is rich in literary, artistic, political, or scientific value. 535 U.S. at 246. The law prohibited speech that recorded no crime or created any victims in its production. *Id.* at 250. Thus, in some situations, the First Amendment protects artificial pornography to a greater extent than it does real pornography.

V. AFTER PACIFICA

Let us move from the *Pacifica* decision, which incorporates the determination that the public airwaves are a public trust¹³² and that “indecent words,” whatever those words might be, when spoken in the middle of the afternoon constitute a nuisance¹³³ should be channeled to a more appropriate hour. Let us assume this is true because those “indecent words” came into the home and imposed on unwitting and unprepared listeners, and there was nothing in the listeners’ powers to prevent the “indecent words” from reaching them.¹³⁴

Even if all of this is true, the subsequent history of the indecency rationale suggests that, with the development of technology, the changes in attitudes towards speech, and the FCC’s apparent inability to apply the indecency standard uniformly, the time has come for the Court to re-examine and perhaps abandon *Pacifica*.

Once the Court handed down its opinion in *Pacifica*, the FCC seemed to consider carefully its next move. The *Pacifica* Court, by explicitly discussing the narrowness of its holding and emphasizing that “a host of variables” (including time of day, program content, and transmission medium) play into a nuisance determination,¹³⁵ indirectly cautioned the FCC to apply *Pacifica* with care. For many years, the agency did so.¹³⁶ The FCC (and its licensees as well) seemed to understand that the decision meant the words that Carlin identified were indeed the words one could not say on

132. See generally *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (reasoning that “given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public”); *Red Lion*, 395 U.S. at 376 (holding that “broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government”); Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 Mich. Telecommun. & Tech. L. Rev. 285 (2004) (discussing the need to apply the public-trust doctrine to the electromagnetic spectrum to guarantee its efficient use).

133. See *Pacifica*, 438 U.S. at 750 (noting that “the [FCC’s] decision rested entirely on a nuisance rationale”).

134. See *supra* n. 108 and accompanying text (discussing the inability of a listener to erase what has been heard).

135. *Pacifica*, 438 U.S. at 750.

136. Brown & Candeub, *supra* n. 7, at 1486 (enforcing the rule based on a conservative reading of the *Pacifica* holding).

radio or television.¹³⁷ For the next decade or so, the agency, under the leadership of Reagan-appointee Mark Fowler, moved sluggishly against licensees despite the regular receipt of indecency complaints.¹³⁸

By the mid-1980s, however, a number of lobbying groups, dissatisfied with the Reagan administration's agenda as it pertained to indecency, moved to ratchet up the attack, and by 1987, the FCC had issued rulings against several licensees.¹³⁹ For years the unstated assumption had been that "only material that closely resembled the George Carlin monologue would satisfy the indecency [standard] . . ."¹⁴⁰ Broadcasters may not have liked the standard *Pacifica* created, but at least they had figured out its parameters; now, those parameters seemed to be changing as the FCC undertook a much more aggressive stance on indecency. But since the Court had expressly cautioned against such an expansive definition of indecency,¹⁴¹ the question became whether the FCC's newest actions could pass constitutional muster.¹⁴² By 1987, the National Association of Broadcasters had requested

137. *Id.* (conservatively reading that the "seven dirty words" could not be spoken before 10:00 p.m. and that "indecency" was not broader than these "seven dirty words").

138. *Id.* at 1486-1487 (referring to the "hands-off regulation" fostered by appointee Mark Fowler, who did not want to involve the FCC in any kind of broadcast-content regulation); see also John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 Cath. U. L. Rev. 329, 329-337 (1989) (discussing the history of the indecency regime).

139. Brown & Candeub, *supra* n. 7, at 1488. After the FCC and Fowler received a lot of pressure from conservative groups like the National Decency Forum and Morality in Media, the FCC brought three indecency actions within a matter of four months. *Id.*

140. *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 930 (1987).

141. *Pacifica*, 428 U.S. at 743.

142. The Court examined the FCC's actions more thoroughly as follows:

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. The danger dismissed so summarily in *Red Lion*, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

Pacifica 428 U.S. at 743 (quoting *Broadrick v. Okla.*, 413 U.S. 601, 613 (1973)) (internal citations omitted).

clarification,¹⁴³ and the FCC officially established a “safe harbor” period during which indecent material could be broadcasted (this period generally ran from midnight to 6:00 a.m.).¹⁴⁴ A flurry of litigation followed;¹⁴⁵ it did not end until the District of Columbia Circuit accepted the “support for parental supervision of children” and the “concern for children’s well-being” rationales as sufficient to allow Congress to narrowly limit licensees’ broadcasting of indecent material in *Action for Children’s Television v. FCC*,¹⁴⁶ the third of the so-called “ACT” cases.¹⁴⁷ Important in the District of Columbia Circuit’s decision were studies showing that a substantially smaller number of children were in the audience after midnight as opposed to during the daytime hours,¹⁴⁸ and the fact that adults, although burdened by the restrictions, could either stay up late or find an alternative source to satisfy their tastes (perhaps by renting a video).¹⁴⁹

The majority examined an exception to Congress’s promulgated rule in the case, Section 16(a) of the Public Telecommunications Act of 1992,¹⁵⁰ and pointed out that while commercial broad-

143. *In re Infinity*, 3 F.C.C.R. at 931–933 (requesting clarification of the phrase “contemporary community standards for the broadcast medium,” and of the term “patently offensive,” as these terms are used in the definition of indecency).

144. *Action for Children’s TV v. FCC*, 11 F.3d 170, 173 (D.C. Cir. 1993), *vacated*, 15 F.3d 186 (D.C. Cir. 1994).

145. *See id.* (discussing the FCC’s broader enforcement by the establishment of a safe harbor from midnight to 6:00 a.m. and broadening the term to indecency rather than just “filthy words”).

146. *Action for Children’s TV v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

147. *Id.* at 660.

148. *Id.* at 665. The court noted the following:

It is apparent, then, that of the approximately 20.2 million teenagers and 36.3 million children under [the age of twelve] in the United States, a significant percentage watch broadcast television or listen to radio from as early as 6:00 a.m. to as late as 11:30 p.m.; and in the case of teenagers, even later. We conclude that there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast between 6:00 a.m. and midnight.

Id. (citations omitted).

149. *Id.* at 666. In concluding that the FCC regulations have taken into account the First Amendment rights of adults wishing to view or listen to “indecent broadcasts” relegated to the midnight-to-6:00 a.m. timeslot, the Court stated that

[w]hile the numbers of adults watching television and listening to the radio after midnight are admittedly small, they are not insignificant. Furthermore, as we have noted above, adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors.

Id.

150. The Public Telecommunications Act is available at Title 47 of the United States

casters could broadcast indecent materials only between the hours of midnight and 6:00 a.m., public broadcasters were permitted to broadcast the same indecent materials from 10:00 p.m. to 6:00 a.m.¹⁵¹ After noting there was no compelling interest for advancing such a distinction, the Court found the Act was unconstitutional to the extent it prohibited the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight.¹⁵² Thus, the safe harbor reverted to the current 10:00 p.m.-to-6:00 a.m. period.¹⁵³

The decision resulted in a passionate dissent from Judge Edwards, who pointed out that if indecency is truly harmful to children, perhaps the Court would have been better off focusing its efforts on cable operators, who the judge called "the real culprits" as opposed to the broadcasters.¹⁵⁴

Judge Edwards noted the availability of filtering technology,¹⁵⁵ a point which Pacifica had made in its brief to the Supreme Court in 1978.¹⁵⁶ Filtering technology might not have been a powerful tool in 1978, but by 1995 it was far more effective.¹⁵⁷ In the 1990s, moreover, content-advisory systems began appearing on television as broadcasters began signaling to viewers which pro-

Code.

151. *Id.* at 656. This original "exception" to the midnight-to-6:00 a.m. rule permitted "public radio and television stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m." *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 672 (Edwards, C.J., dissenting). The majority emphasized that traditional broadcast media is subject to more stringent regulation than cable media, stating that "[u]nlike cable subscribers, who are offered such options as 'pay-per-view' channels, broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material." *Id.* at 660 (majority).

155. *Id.* at 683 (Edwards, C.J., dissenting). Judge Edwards noted that in the original FCC *Enforcement Order*, there was no discussion of alternative means of preventing children from observing "indecent broadcasts." *Id.* at 682. However, Judge Edwards highlighted that "at oral argument, counsel for the FCC assured the court that blocking technology, in which a chip placed in television sets prevents certain shows from being transmitted, is available." *Id.* at 683. Also, "[i]n the *Alliance* case heard on the same day as [*Action for Children's TV*], the Commission presented another alternative, a segregate-and-scramble scheme of indecent programming on cable's leased access channels." *Id.*

156. Br. for Respt. at 49, *Pacifica*, 438 U.S. 726.

157. *Id.*

grams contained violence, objectionable language, or explicit sexual content.¹⁵⁸

Under the Clinton administration, the FCC pursued relatively few indecency complaints except for the most egregious offenses (not surprisingly, shock-jock Howard Stern was often the culprit in these cases).¹⁵⁹ However, during the George H.W. Bush administration, those inclined to bring indecency complaints found that they met with a far more sympathetic FCC. Beginning with an incident at a movie awards show, the FCC signaled that it once again wished to expand its definition of indecency beyond Carlin's seven dirty words all the way to single uses of objectionable language. In other words, it was now cracking down on accidental uses of profanity on the airwaves, those slip-ups known as "fleeting expletives."¹⁶⁰

The trouble began at the 2003 Golden Globe Awards, where musician Bono took the stage and said "this is really, really, fucking brilliant."¹⁶¹ NBC failed to prevent the speech from reaching the air. In response, the FCC issued its infamous *Golden Globes* order and began enforcing a strict rule that imposed monetary penalties on broadcasters who allowed a fleeting expletive to reach the airwaves.¹⁶² Although the FCC Enforcement Bureau ruled that Bono's use of "fuck" was not indecent, the FCC re-

158. Jim Abbott, *When Will Shows Carry Rating Labels?* Orlando Sentinel A6 (Dec. 9, 1996). Because of "pressure from Congress, President Clinton and the Federal Communications Commission, the [television] industry began devising the voluntary system in February [1996]." *Id.*

159. See *Infinity Broadcasting Pays \$1 Million as Part of Settlement Resolving Indecency Complaints*, 1995 FCC LEXIS 7304 (Nov. 8, 1995) (discussing the indecent programming on "The Howard Stern Show").

160. *Fox TV Stations*, 489 F.3d at 446-447.

161. *Id.* at 451. A complaint was filed with the FCC by the Parents Television Council arguing "the material was obscene and indecent under FCC regulations." *Id.* According to its Web site, the Parents Television Council's mission statement is

to promote and restore responsibility and decency to the entertainment industry in answer to America's demand for positive, family-oriented television programming.

The PTC does this by fostering changes in TV programming to make the early hours of prime time family-friendly and suitable for viewers of all ages.

Parents Television Council, *Frequently Asked Questions*, "What Is the PTC's Mission?" <http://www.parentstv.org/PTC/faqs/main.asp#What%20is%20the%20PTCs%20mission> (accessed June 13, 2008).

162. *Fox*, 489 F.3d at 452. The court explained that "NBC, along with several other parties including Fox, filed petitions for reconsideration of the *Golden Globes* order, raising statutory and constitutional challenges to the new policy." *Id.* However, "[t]hese petitions have been pending for more than two years without any action by the FCC." *Id.*

versed not only the Bureau, but also its own long-established policy. The agency cast its net all the way back to a 1931 ruling, *Duncan v. United States*,¹⁶³ to find precedent.¹⁶⁴ It also dredged up another appellate court decision, *Tallman v. United States*,¹⁶⁵ which, frankly, does not seem to apply.¹⁶⁶ In any event, broadcasters were thereafter on notice¹⁶⁷ that fleeting and isolated use of an expletive (in other words, rather than repeated and intentional use of the kind seen in Carlin's monologue) was sufficient for the agency to impose sanctions.¹⁶⁸

The tension between the FCC's restraint after *Pacifica* and its newly formulated policy on fleeting expletives came to a head shortly after the *Golden Globes* order was issued, and it was not well-received. In *Fox Television Stations v. FCC*,¹⁶⁹ the Second Circuit found a strange anomaly in the FCC's application of its new policy. While the FCC would impose a sanction on an entertainer who used an expletive fleetingly at an awards ceremony,¹⁷⁰ a news program in which an interviewee uttered an expletive,¹⁷¹ or a station that broadcasts a movie with the expletives intact, would not be sanctioned.¹⁷² That inconsistency proved to be a major problem.

163. 48 F.2d 128 (9th Cir. 1931).

164. See *id.* at 134 (holding that the defendant had used the word "damned" and had used the expression "by God" on the radio and that this speech was profane, though not indecent).

165. 465 F.2d 282 (7th Cir. 1972).

166. See *id.* at 287 (upholding the conviction of petitioner, who was tried for broadcasting obscenities under Title 18, Section 1464 of the United States Code and appealed that conviction). The petitioner claimed the trial judge should have instructed the jury on the meaning of "indecent" and "profane[.]" but the appellate court found no error for failure to instruct the jury on the meaning of these words because the case was tried solely as an obscenity case. *Id.* at 286.

167. The FCC decided not to sanction NBC for the incident because it "necessarily did not have the requisite notice to justify a penalty[.]" further illustrating the abrupt policy change this decision brought. *Fox*, 489 F.3d at 452.

168. *Id.* at 447.

169. 489 F.3d 444.

170. *Id.* at 455-456. The court noted that "there is no question that the FCC has changed its policy. As outlined in detail above, prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime." *Id.* at 455.

171. *Id.* at 458.

172. *Id.* at 458-459. The FCC relied on the "first blow" theory detailed in the Supreme Court's *Pacifica* case when rationalizing their recent attack on "fleeting expletives." *Id.* at 457. In that case, the Supreme Court supported the FCC's regulation of broadcast media because such material enters "the privacy of the home uninvited and without warning." *Id.*

Fox arose after the FCC issued its 2006 Omnibus Order, which concluded that several television broadcasts were indecent and profane.¹⁷³ These broadcasts included the following:

- A 2002 Fox broadcast of the *Billboard Music Awards* in which Cher stated, "People have been telling me I'm on the way out every year, right? So fuck 'em."¹⁷⁴
- A 2003 Fox broadcast of the *Billboard Music Awards* in which Nicole Richie, one of the presenters on the show, stated, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."¹⁷⁵
- Various episodes of ABC's *NYPD Blue* in which characters used expletives including "bullshit," "dick," and "dick-head."¹⁷⁶
- An episode of CBS's *The Early Show*, in which an interviewee, a contestant on the hit reality show *Survivor*, referred to a fellow contestant as a "bullshitter."¹⁷⁷

In the Omnibus Order, the FCC cited *Golden Globes* for the principle that expletives need not be repeated for a finding of indecency.¹⁷⁸ Prior to the court's decision in *Fox*, the FCC issued a re-

The Supreme Court "rejected the argument that the audience could simply tune-out: 'To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.'" *Id.* at 457-458. The present court, however, rejected this argument as support for the recent change in FCC policy, noting that "the 'first blow' theory bears no rational connection to the Commission's actual policy regarding fleeting expletives." *Id.* at 458.

173. *Id.* at 452 (discussing *Compls. regarding Various TV Broads. between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R 2664 (2006), the case which issued the order). Through that Omnibus Order, "the FCC intended to 'provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard.'" *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* The court explained that "[i]n finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globes* that any use of the word 'fuck' is presumptively indecent and profane. The Commission then concluded that any use of the word 'shit' was also presumptively indecent and profane." *Id.* (citations omitted).

178. *Id.* at 453. The court discussed the prior filings of Fox, CBS, and ABC, explaining that "Fox and CBS filed a petition for review of the Omnibus Order in this court (the Sec-

mand order,¹⁷⁹ reversing parts of its Omnibus Order as it applied to *The Early Show* because it occurred in the context of a “*bona fide* news interview.”¹⁸⁰ The broadcasters contended that the FCC had made a 180-degree turn regarding its treatment of “fleeting expletives” and had done so without any explanation whatsoever.¹⁸¹

The Second Circuit began by noting that it was evident that the FCC had drastically changed its policy in regards to “fleeting expletives”;¹⁸² after all, from the time of *Pacifica* until the period before *Golden Globes*, the agency had consistently found that fleeting expletives did not violate indecency standards.¹⁸³ The agency did an about-face in *Golden Globes*, announcing it would no longer follow its past policies regarding fleeting expletives.¹⁸⁴ The Second Circuit pointed out that this kind of impromptu change in policy does not pass administrative muster because it did not provide a reasoned analysis explaining the change.¹⁸⁵ The FCC had failed to inform licensees of the new policy in advance

ond Circuit). ABC filed a petition for review in the D.C. Circuit, which was then transferred to this court and consolidated with the petition for review filed by Fox and CBS.” *Id.*

179. *Id.* The Supreme Court, “[o]n September 7, 2006, . . . granted the FCC’s request for remand and stayed the enforcement of the Omnibus Order. The Commission was given sixty days to issue a final or appealable order, at which time the pending appeal would be automatically reinstated.” *Id.*

180. *Id.* at 454 (emphasis in original). The ruling against NYPD Blue was also dismissed because the complainant watched the program in a region where the show was broadcast within the “safe harbor” period after 10 p.m. *Id.* at 453 n. 5. The FCC, in the Remand Order, “reaffirmed its finding that the 2002 and 2003 Billboard Music Award programs were indecent and profane.” *Id.* at 453.

181. *Id.* at 454. Other arguments against the FCC Remand Order included the following:

(2) The FCC’s “community standards” analysis is arbitrary and meaningless; (3) The FCC’s indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC’s definition of “profane” is contrary to law; (5) the FCC’s indecency regime is unconstitutionally vague; (6) the FCC’s indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC’s indecency regime is an impermissible content-based regulation of speech that violates the First Amendment.

Id. The court agreed with the first argument, and as a result did not address any of the other arguments. *Id.*

182. *Id.*

183. *Id.* at 455. The court lists several FCC rulings supporting the previous “fleeting expletives” policy. *Id.*

184. *Id.* at 456.

185. *Id.* at 462. Agencies, like the FCC, “are of course free to revise their rules and policies. Such a change, however, must provide a reasoned analysis for departing from prior precedent.” *Id.* at 456 (citations omitted).

and with sufficient specificity so that they could understand the policy.¹⁸⁶

In dicta, the Second Circuit pointed out that the subjective nature of the policy probably would not pass constitutional muster.¹⁸⁷ For example, the Academy-Award winning *Saving Private Ryan*, riddled with expletives, garnered complaints from viewers when ABC ran it in 2004.¹⁸⁸ The FCC found the expletives so necessary and essential to the film (it claimed that deleting the expletives “would have altered the nature of the artistic work and diminished the power, realism[,] and immediacy of the film experience for viewers”) that it declined to sanction ABC for the broadcast.¹⁸⁹ Yet occasional or singular expletives spoken in other shows were not so protected. The Second Circuit pronounced itself mystified by this contradiction.¹⁹⁰ This kind of subjective analysis on the part of the FCC was what gave rise to George Carlin’s monologue back in the 1970s.

Consider the way expletives were used in *Saving Private Ryan*. When the soldiers in the movie cursed, they did not intend in any sense to give the words any literal meaning or provide any description of sexual or excretory activities. Rather, they used the expletives as Jerry Garcia once did¹⁹¹ and as Bono did at the *Golden Globe Awards*.¹⁹² Even President Bush once used an expletive “in a manner that no reasonable person would believe referenced ‘sexual or excretory organs or activities.’”¹⁹³

186. For more on the Second Circuit’s rejection of the FCC policy, see Christine A. Corcos, *Small Curses, Big Problems*, 30 Leg. Times No. 29 (July 16, 2007).

187. *Fox*, 489 F.3d at 462.

188. *In re Compls. against Various TV Licensees regarding Their Broad. on Nov. 11, 2004, of the ABC TV Network’s Presentation of the Film “Saving Private Ryan”*, 20 F.C.C.R. 4507, 4512–4513 (2005).

189. *Id.* at 4512–4513.

190. *Fox*, 489 F.3d at 462. On March 17, 2008, the Supreme Court granted certiorari on the case. John Eggerton, *Supreme Court Agrees to Hear Fleeting-Profanity Case*, Broadcasting Cable, <http://www.broadcastingcable.com/article/CA541006.html> (Mar. 17, 2008).

191. *Supra* nn. 22–27 and accompanying text.

192. *Fox*, 489 F.3d at 451.

193. *Id.* at 459. During a discussion with a former British Prime Minister at a Group of Eight Summit in 2006, President Bush remarked that “the United Nations needed to ‘get Syria to get Hezbollah to stop doing this shit[.]’” *Id.* An open microphone caught his linguistic faux pas. Brooks Boliek, *Bush Slip-up Trips up Indecency Law*, Hollywood Reporter (July 18, 2006).

Would a serious commentary on the Elizabethan comedy discussed in *Pacifica*,¹⁹⁴ broadcast over the licensed airwaves earn an FCC sanction under the “fleeting expletives” regime? Certainly, a licensee might think twice about broadcasting such a documentary or a documentary that traced the evolution of the meanings of bawdy words—for example, those words used in that Elizabethan comedy—even though its intent might be to educate the public on changing meanings. Perhaps such a licensee might prefer to keep such documentaries unaired, and the audience in ignorance.

VI. CONCLUSION

When George Carlin created his famous monologue, he did so not only to poke fun at the FCC but also to force us to consider why we react as we do to certain words. He delivered his monologue to a live audience, not over the airwaves, but he intended his comments not just for governmental officials but for those who appoint them and for those who elect those who appoint them. Indecent and offensive language was with us in 1973, in 1978, and it is with us now. If one objects to it, the reaction to it can be to use the tools now available at one’s disposal, including those that were not available in 1978 (or at least not readily available), such as effective filtering technology, V-Chips, and ratings systems. These tools put more power in the hands of the adults who may not want their impressionable children hearing indecent language or content; at the same time, these tools also allow willing adults to hear that language or content.¹⁹⁵ Thus, viewers who consistently object to radio or television content can force broadcasters to change that content without turning to the FCC or to the courts.¹⁹⁶

194. 438 U.S. at 750.

195. *Fox*, 489 F.3d at 465–466.

196. See *Brown & Candeub*, *supra* n. 7, at 1501 (discussing the case of Terri Rakolta, who successfully objected to an episode of the Fox comedy series *Married with Children* and obtained the withdrawal of one advertiser). In some cases, TV itself parodies this process. In the episode “But First a Word from Our Sponsor” (first broadcast March 19, 1990) of the CBS comedy series *Murphy Brown*, news reporter Murphy Brown confronts an advertiser whom she fears is ready to pull out of sponsoring the program *FYI* because of controversial material (sex education for children) and opposition from a parents’ lobbying group. *Murphy Brown*, “But First a Word from Our Sponsor” (CBS March 19, 1990) (TV series). She discovers that the sponsor regards support for the program as nothing more than a good business decision. *Id.*

The Don Imus case can be illustrative here.¹⁹⁷ As you might recall, Imus was the controversial radio host who was fired from CBS Radio and MSNBC after referring to members of the Rutgers University women's basketball team in a derogatory manner in 2007.¹⁹⁸ Listeners who dislike speech because they consider it indecent or objectionable can "vote with their ears" by turning off their radios or their televisions and by boycotting advertisers who sponsor the programming. Imus lost several major sponsors in the wake of his remarks about the women's team.¹⁹⁹ In the wake of the Imus incident, some artists in other entertainment fields that were known for using the kind of language Imus was criticized for using eventually were forced into abjuring it.²⁰⁰ Public disapproval and threats of a severe drop-off in sales pushed media magnates like Russell Simmons to join the bandwagon of those demanding that hip-hop and rap artists downplay or abandon lyrics that emphasize violence and gender discrimination.²⁰¹ The following illustrated this change:

On Monday hip-hop mogul Russell Simmons, who just two weeks ago was arguing for the rights of rappers to express themselves as artists, did a seeming about-face and called for the voluntary banning of "bitch," "ho[,]," and the N-word from the lexicon as "extreme curse words." He called for a coalition of industry executives to "recommend guidelines for lyrical and visual standards."²⁰²

Unlike George Carlin, whose monologue resulted in a Supreme Court decision that to this day forces licensees to channel indecent speech into "safe harbor" periods, Imus did not leave the

197. Teresa Wiltz & Darragh Johnson, *The Imus Test: Rap Lyrics Undergo Examination*, Wash. Post C1 (April 25, 2007).

198. Sarah McBride, *Imus Signs Deal with Citadel to Return to Radio*, Wall St. J. B4 (Nov. 2, 2007).

199. *Id.* (discussing how advertisers dropped both the radio and television shows).

200. See Wiltz & Johnson, *supra* n. 197 (explaining how the use of this language is becoming less accepted).

201. *Id.*

202. *Id.* Whether the criticism from people such as Al Sharpton really had more impact than criticism from within CBS and MSNBC is, perhaps, open to question. See AP, *Imus' Settlement Means He Could Return to Air*, <http://www.msnbc.msn.com/id/20263533/> (updated Aug. 14, 2007) (referring to Sharpton's protests); but see McBride, *supra* n. 198 (discussing Sharpton's new view that he is ready to see Imus back on the air, as long as Imus is essentially controlled).

air because the FCC ruled his words were a nuisance. He left because the outcries from the public essentially forced management into firing him.²⁰³

As a mature society, we can and must come to terms with our notions about offensive speech because it has not and will not go away. We confront it in the public square,²⁰⁴ on the Internet,²⁰⁵ on CDs, on DVDs, on premium cable,²⁰⁶ in theaters, and on movie screens, where apart from obscenity laws the government currently does not restrict it.²⁰⁷ People like Lenny Bruce, Richard Pryor, Dave Chappelle, George Carlin, and Don Imus force us to face our fear of words and the ideas they represent.

In 1973, George Carlin, high school drop-out and constitutional law scholar, told us, apparently correctly, that he had determined the seven words that no one was allowed to utter on the public airwaves. Thirty-five years later, he may still be correct.²⁰⁸ To paraphrase what Winston Churchill said in another context, we may have not yet seen what has become, in the Author's opinion, an ill-advised indecency rationale. We may not even have seen the beginning of the end. But we may, perhaps, have seen the end of the beginning.²⁰⁹

..

203. See Wiltz & Johnson, *supra* n. 197 (noting that Sharpton called for Imus' ouster).

204. See generally *Cohen v. Cal.*, 403 U.S. 15 (1971) (holding that a state could not make a public display of a four-letter expletive a criminal offense).

205. See generally *ACLU v. Reno*, 521 U.S. 844 (1997) (holding that content-based blanket restrictions on speech on the Internet violated the protections of the First Amendment).

206. Recently, some in Congress and at the FCC have indicated they will try to invoke the 70/70 rule in order to extend indecency rules to hitherto unregulated cable. See Stephen Labaton, *F.C.C. Chief Seeks Votes to Tighten Cable Rules*, N.Y. Times C1 (Nov. 26, 2007) (noting that the FCC is having a difficult time garnering enough support to invoke the 70/70 rule). The 70/70 rule means that "the agency may adopt rules necessary to promote 'diversity of information sources' once the [C]ommission concludes that cable television is available to at least seventy percent of American households, and at least seventy percent of those households actually subscribe to a cable service." *Id.*

207. See generally *Miller*, 413 U.S. at 24 (establishing the Miller test to determine whether material is obscene).

208. Several of the "seven words" would likely be deemed as either obscene or indecent. Broadcasters can air the indecent ones on television between 10 p.m. and 6 a.m.; the obscene ones, however, are still forbidden. FCC, *supra* n. 61.

209. "Now this is not the end. It is not even the beginning of the end. But it is, perhaps the end of the beginning." Churchill Ctr., *Speeches and Quotes*, "The End of the Beginning", <http://www.winstonchurchill.org/i4a/pages/index.cfm?pageid=388>; (accessed June 13, 2008); see also Christine A. Corcos, *Small Curses, Big Problems*, *supra* n. 186 (discussing the FCC's thoughts on fining for the use of expletives).