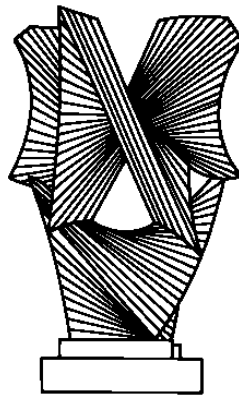


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## THE STORY OF FCC V. PARIFICA FOUNDATION (AND ITS SECOND LIFE)

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## The Story of *FCC v. Pacifica Foundation* (and Its Second Life)

Adam M. Samaha\*

*This chapter provides a back story to FCC v. Pacifica Foundation – the so-called seven dirty words case, which upheld the Commission's authority to regulate broadcast indecency. The history of broadcast indecency regulation is briefly reviewed, along with the emergence of countercultural radio in the 1960s and 1970s. The chapter then turns to George Carlin and his personal transformation, Pacifica radio and its turbulent times, and the complaint of a Morality in Media board member that instigated FCC proceedings. The litigation history of the case is likewise investigated. This research provides insight into why the Department of Justice switched sides when the case reached the Supreme Court, and it identifies Justice Stevens as the likely swing voter. Apparently he was wrestling with issues of statutory interpretation. The chapter includes new interviews with several participants in the controversy, as well as some original archival research. The chapter closes with a few thoughts on the path of indecency regulation since the Pacifica case. It points up the relationship between constraint and creativity; and it suggests that technological change making the broadcast medium less important also makes broadcast regulation less problematic. The “just change the channel” argument, so rhetorically effective against indecency regulation in the past, is now switching sides.*

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\* Professor of Law, The University of Chicago Law School. This chapter was drafted for *First Amendment Stories* (Richard Garnett & Andrew Koppelman eds., forthcoming). I thank the reference librarians at the University of Chicago Law School, and Margaret Schilt in particular, for indefatigable efforts to obtain archival material and secondary sources for this project. I also thank workshop participants at the University of Chicago Law School for their attention to an earlier draft. Adam Barber, Hanna Chung, and Dan Roberts provided excellent research assistance. Mistakes are mine.

*This is a puritanical country . . . so you'll always have censorship.*

—George Carlin

*Just change the channel.*

—Popular phrase

To most people who teach and study *FCC v. Pacifica Foundation*,<sup>1</sup> which upheld the Commission's authority to regulate broadcast indecency, the decision probably seems ridiculous. Many view the result as too queasy about the word choices of social critics, and too comfortable with government regulators protecting mainstream audiences. Given a questionable evidentiary basis for the FCC's child-protection mission, moreover, the principal function of the regulatory apparatus might be mollifying self-appointed representatives of polite society.

Furthermore, the decision has an archaic quality. The 1973 radio broadcast of George Carlin's *Filthy Words* routine rebuked by the FCC in 1975 and reviewed by the Supreme Court in 1978 is tame compared to readily accessible content in 2010. Originally, Carlin played with seven words on stage and on a vinyl album. Now, wherever internet access exists, he can be watched reading a list of over two-hundred filthy words from a long scroll.<sup>2</sup> We cannot be confident, if ever we were, that the FCC can seriously affect the supply of indecent content, the demand for it, or the unwitting exposure to it.

My own longstanding sympathies are with these views. As a child in the 1970s, I had access to a version of the Carlin routine that drew the FCC response in *Pacifica*. It was a cut on an album in my parents' collection, and my brother and I had much of the routine memorized before either of us was ten years old. I have not been able to see my early interaction with Carlin's routine as injurious. Quite the opposite. Many of my colleagues surely feel the same way about the value of such content.

Nevertheless, the origins and outgrowths of *Pacifica* are worth another look. The Supreme Court's work in that case incorporated large-scale and persistently clashing societal forces. The 1970s might have been an acutely dramatic period of social convulsion and exhaustion,<sup>3</sup> but similar episodes

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<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> See <http://www.youtube.com/watch?v=1WeAgC-cXIY>.

<sup>3</sup> See Stephanie A. Slocum-Schaffer, *America in the Seventies* 199-200 (2003); see also Christopher Booker, *The Seventies* 3-18 (1980) (finding a dead-ended culture); Arlene Skolnick, *Embattled Paradise* 4 (1991) (observing a spread of nostalgia); Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 Sup. Ct. Rev. 225, 250 (characterizing the Court as "abiding by the wishes of a society tired of antiwar protests and the Watergate furor").

will recur. So, too, there always will be an avant-garde coupled with a reactionary culture. They depend on each other. And, oddly enough, the technological changes that make *Pacifica* seem dated could turn the tables on the case's critics.

The following chapter provides a background to *Pacifica* and some observations about its aftermath. The story is complicated. It involves brash content providers, conservative social movements, and shifting agency priorities, along with arguably manufactured controversies, backfiring lawyer strategies, and a surprise swing voter on the Supreme Court. Not all of the story can be told here. But I do hope to offer insight into the continuing and perhaps ironic significance of the case.

### *Decency Regulation, Indecent Broadcasts, and the 1970s*

Precisely which sights and sounds will trigger an adverse FCC response has never been clear for any extended period of time. This instability is partly a function of hazy legal texts and customary enforcement discretion. It is also a function of changing social norms and market forces, which help shape the politics and policy of indecency regulation.

Flexibility was embedded in the system from the beginning. “[T]he power of censorship” over radio always has been denied to the FCC.<sup>4</sup> But for an equally long time, federal statutes have forbidden anyone from “utter[ing] any obscene, indecent, or profane language by means of radio communication.”<sup>5</sup> Those terms are not further defined. The appropriate response to whatever counts as a violation is also fairly open-ended. Theoretically, the Justice Department may pursue criminal punishment. More important, the FCC has an array of civil options ranging from investigation to cease-and-desist orders, fines, short-term license renewals, license renewal denials, and license revocations.<sup>6</sup> The scheme allows the government's stance on broadcast indecency to relax and stiffen across administrations. And it has.<sup>7</sup>

In fact, federal officials were developing related ideas before the broadcast statutes referred to “indecency.” After the Radio Act of 1912

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<sup>4</sup> 47 U.S.C. § 326 (2006); see Radio Act of 1927, § 29, 44 Stat. 1172. For an argument that this provision refers only to prior restraints, see *Pacifica*, 438 U.S. at 735-37.

<sup>5</sup> 18 U.S.C. § 1464 (2006); see Radio Act of 1927, § 29, 44 Stat. 1173; see also Communications Act of 1934, § 326, 48 Stat. 1091.

<sup>6</sup> See, e.g., 47 U.S.C. §§ 307-308, 312(a)(6) & (b)(2), 503(b)(1)(D)-(b)(2) (2006).

<sup>7</sup> See Kenneth C. Creech, *Electronic Media Law and Regulation* 8-9, 172-200 (5th ed. 2007); see also Marjorie Heins, *Not in Front of the Children* 89-131 (2001); Lucas A. Powe, *American Broadcasting and the First Amendment* 162-90 (1987); Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. Rev. 1463, 1470-98 (2005); R. Wilfred Tremblay, *FCC v. Pacifica Foundation*, in *Free Speech on Trial* 218 (Richard A. Parker ed. 2003).

prescribed transmitter licensing,<sup>8</sup> the Secretary of Commerce published a set of regulations. It was not obvious that he had this authority,<sup>9</sup> but among the regulations was a ban on transmissions “containing profane or obscene words or language.”<sup>10</sup> Under this regulation, an amateur radio operator was warned for saying “go to hell” to another amateur.<sup>11</sup> A second complaint involved a sailor referring to oral sex with prostitutes, and a third tackled the phrase “damn liar.”<sup>12</sup>

In contrast, large-scale radio operations were not attracting official concern. They were not communicating like sailors. These stations were influenced by mainstream social norms and market discipline—and possibly a desire to avoid the kind of government censorship applicable to motion pictures at the time.<sup>13</sup> Whatever the reasons, the 1927 statutory ban on “obscene, indecent, or profane language” in radio happened during an era of fairly modest broadcast content. A more pressing issue in the 1920s was crowded, not dirty, airwaves.<sup>14</sup> Indeed self-regulation constrained most broadcast content for generations. Networks wanted affiliate stations to abide by program standards established over the years by the National Association of Broadcasters (NAB), and these standards largely kept stations clear of FCC and congressional ire.<sup>15</sup>

But radio was different from television. A large number of radio stations in each area made experiments and niche marketing more likely.<sup>16</sup> Some nonprofit stations operated independently from the NAB and without the same incentives of advertiser-financing. By 1970, there had been an outbreak of outliers in radio content. And at least two distinct genres were prompting FCC concern.

One genre deployed outsider forms of expression. A key case involved Jerry Garcia of *The Grateful Dead*. During a recorded interview, Garcia repeatedly used words inappropriate for polite society in statements such

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<sup>8</sup> See Pub. L. No. 62-264, 37 Stat. 302.

<sup>9</sup> For a subsequent rejection of the Secretary’s regulatory authority, see *United States v. Zenith Radio Corp.*, 12 F.2d 614, 617-18 (N.D. Ill. 1926).

<sup>10</sup> Milagros Rivera-Sanchez, *The Origins of the Ban on “Obscene, Indecent, or Profane” Language of the Radio Act of 1927*, 149 *Journalism & Mass Communication Monographs* 1, 7 (1995) (quoting *Radio Communication Laws of the United States* § 4 (1914)).

<sup>11</sup> See *id.* at 8.

<sup>12</sup> See *id.* at 8-9.

<sup>13</sup> See *id.* at 10-15.

<sup>14</sup> See Creech, *supra* note 7, at 61-64. For an exceptional FCC warning involving Mae West on NBC radio in 1937, see Brown & Candeub, *supra* note 7, at 1480-82.

<sup>15</sup> See Bruce A. Linton, *Self-Regulation in Broadcasting* 8-21 (1967); Dwight L. Teeter, Jr. & Bill Loving, *Law of Mass Communications* 745 (11th ed. 2004).

<sup>16</sup> See Powe, *supra* note 7, at 165.

as “S--t, man,” and, “Political change is so f---g slow.”<sup>17</sup> The interview was broadcast during *Cycle II*, a program with volunteer hosts airing Sundays at 10 p.m. on a noncommercial radio station in Philadelphia. *Cycle II* explored artistic movements and aimed to draw college students and disaffecteds. But four FCC commissioners expressed concern about a threatening trend of freestyle language in radio, which they claimed was particularly invasive and accessible to children. “[I]t conveys no thought . . . to use ‘f---g’ as an adjective throughout the speech,” they asserted, and added that such language might drive many listeners away from radio.<sup>18</sup>

The Commission also presented a definition of broadcast indecency, adapted from then-prevailing Supreme Court precedent on obscenity. It meant content (1) “patently offensive” according to contemporary community standards and (2) “utterly without redeeming social value” – but not necessarily prurient or sexually appealing.<sup>19</sup> This was broad enough to reach Garcia’s non-erotic word choices. But the FCC added hints of restraint. The majority announced that “doubtful or close cases are clearly to be resolved in the licensee’s favor”; they stated an apparent liability of only \$100 for the licensee, which had blamed its volunteers for going rogue; and they claimed to welcome judicial review of their indecency standard.<sup>20</sup> No appeal was recorded, however. A small fine imposed on a nonprofit organization likely ensured that outcome.

A second genre incorporated explicit sex talk. The key case here involved the *Femme Forum* call-in show on an Oak Park, Illinois station,<sup>21</sup> which aired weekdays from 10 a.m. to 3 p.m. and attracted a large audience. One episode included female callers discussing their techniques for oral sex with men. After investigating this and other “topless radio” programs, the FCC issued a notice of apparent liability in the amount of \$2,000. The Commission concluded that certain *Femme Forum* broadcasts were both obscene and indecent, and again “urge[d] judicial consideration of our action.”<sup>22</sup>

This possibility was nearly lost when the licensee paid the fine, but a citizens group and the Illinois ACLU took up the slack. They turned to the D.C. Circuit, which affirmed in an opinion by Judge Leventhal. Bracketing the FCC’s indecency rationale,<sup>23</sup> he wedged these relatively popular

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<sup>17</sup> *In re* WUHY-FM, 24 F.C.C.2d 408, at \*2 ¶¶ 2-3 (1970).

<sup>18</sup> *Id.* at \*2-\*3 ¶¶ 7-8.

<sup>19</sup> *Id.* at \*4 ¶ 10 (distinguishing *Memoirs v. Massachusetts*, 383 U.S. 413 (1965)). Two commissioners dissented; one did not participate.

<sup>20</sup> *Id.* at \*5-\*6 ¶¶ 14 & 16.

<sup>21</sup> *See In re* Sonderling Broadcasting Corp., 27 R.R.2d 285 (1973).

<sup>22</sup> *In re* Apparent Liability of Station WGLD-FM, 41 F.C.C.2d 919, at \*2 (1973).

<sup>23</sup> *See Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 403 n.14 (D.C.

broadcasts into the revised obscenity doctrine from *Miller v. California*.<sup>24</sup> That route might have seemed comfortable given the sexual content, although it is unclear how shameful or offensive these broadcasts were to mainstream audiences. Leventhal also highlighted the early hours of broadcast and potential child access, while claiming that the host had pandered to the audience's sexual appetites.<sup>25</sup>

Whatever their preference for self-regulation, industry representatives backed the FCC on topless radio. The NAB condemned sexually oriented call-in shows on the same day that the FCC inquiry became public, suggesting before-the-fact communications. The next day, the FCC Chairman told an NAB conference that he approved of the organization's resolution, and he indicated that the industry would have to restrain itself to prevent further government intervention.<sup>26</sup> It seems that the industry had a greater financial stake in preserving violence on television than counterculture or sexuality on radio.<sup>27</sup>

### *Carlin, Pacifica, and a Complaint*

During the early 1970s, George Carlin was entering the first genre of FCC concern more than the second. He personified a transition from mainstream mass entertainment to a diverse content universe in which outsider expression was more available.<sup>28</sup> Carlin attended Catholic schools and was a young Air Force enlistee. But, after two courts martial and an early discharge, he was discovered as a standup comic by Lenny Bruce and Mort Sahl. Carlin spent the 1960s building a lucrative and fairly clean-cut comedy career. He made numerous appearances on popular television programs such as *The Merv Griffin Show* and *The Tonight Show* with stock characters including the by-the-book "Indian Sergeant" and the mildly subversive "Hippie-Dippie Weatherman."<sup>29</sup>

Simultaneously, however, a vibrant counterculture emerged around him. Carlin became dissatisfied with his act and his role in the entertainment business. "I felt like a traitor to my generation."<sup>30</sup> Although

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Cir. 1974).

<sup>24</sup> 413 U.S. 15, 24-25 (1973) (including prurience, offensiveness, and lack of serious value).

<sup>25</sup> See *Illinois Citizens Comm.*, 515 F.2d at 404-06 (relying on *Ginzburg v. United States*, 383 U.S. 463 (1966)).

<sup>26</sup> See *id.* at 400; David K. Shipler, *Sexually Explicit Radio Shows Wilt Under Criticism by FCC*, N.Y. Times, Apr. 24, 1973, at 1, 84.

<sup>27</sup> See Powe, *supra* note 7, at 163-65 (contrasting sex with violence).

<sup>28</sup> See George Carlin with Tony Hendra, *Last Words* (2009); Sam Merrill, *Interview: George Carlin*, Playboy, Jan. 1982, at 69.

<sup>29</sup> See Carlin, *supra* note 28, at 109-114, 122-24.

<sup>30</sup> *Id.* at 140.

government policy might have affected some of these boundaries, the most obvious constraints were cultural and economic. Carlin attributed his break from mainstream comedy to adverse employer reactions. An *Ed Sullivan Show* producer told Carlin that he could use one of two jokes that the producer thought worrisome.<sup>31</sup> In 1969, Carlin was suspended from a high-paying run at the Frontier Hotel in Las Vegas for a joke that began, "I got no ass."<sup>32</sup> In 1970, the Frontier outright fired him for saying "I don't say shit. Down the street Buddy Hackett says shit, Redd Foxx says shit. I don't say shit. I smoke a little of it, but I don't say it."<sup>33</sup> Between those conflicts with proprietors assuaging audiences filled with golfers and salesmen, Carlin performed at the Copacabana in New York by describing the ceiling while lying down onstage and by saying things like, "Please fire me."<sup>34</sup>

Indeed Carlin was artistically liberated by being fired at the Frontier. He told his wife, "They did the job for me. . . . If all I ever do the rest of my life is I can fill up coffeehouses six days a week, I'll be happy with that."<sup>35</sup> There also is evidence that Carlin's artistic progress depended on the boundaries that he was pushing. Mainstream lines inspired him. During Carlin's suspension at the Frontier, he told a reporter, "The way my act is growing the censorship has given it direction instead of it being vanilla custard. It gives me many more chances to test the willingness of an audience."<sup>36</sup> Carlin was soon wearing his hair long, playing universities, and dropping acid, which he called "a profound turning point" in which "all the conflict that had been tormenting me between the alternative values and straight values began to resolve."<sup>37</sup> His transformation was marked by a Grammy award-winning album, *FM & AM*, released in early 1972. The title referred to the more progressive and the more tame radio formats, as well as Carlin's new and old selves. The famous *Seven Words You Can Never Say on Television* routine came later that year on the *Class Clown* album. That album showed Carlin in his new form and at his new peak.

Pacifica, for its part, was not in the business of sexually explicit content. Pacifica was the first listener-supported, advertising-free model for radio that lasted. The foundation was organized in 1946 by conscientious

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<sup>31</sup> One involved George Wallace, the other Muhammad Ali's refusal to serve in Vietnam. See Archive of American Television, *Interview with George Carlin* 02:09-05:11 (Dec. 17, 2007) (part 4), available at <http://www.emmytvlegends.org/interviews/people/george-carlin>.

<sup>32</sup> Carlin, *supra* note 28, at 141-42.

<sup>33</sup> *Id.* at 146.

<sup>34</sup> *Id.* at 143.

<sup>35</sup> *Interview, supra* note 31, at 08:07-08:35.

<sup>36</sup> Carlin, *supra* note 28, at 146.

<sup>37</sup> *Id.* at 142; see Merrill, *supra* note 28, at 72.



objectors, and Alexander Meiklejohn helped draft its bylaws.<sup>38</sup> In the early 1960s, Pacifica had been investigated for Communist sympathizing,<sup>39</sup> not sexuality. True, an FCC licensing proceeding scrutinized Pacifica broadcasts of gay men discussing homosexuality and a reading of Edward Albee's *Zoo Story*;<sup>40</sup> and later some congressmen were outraged by a program on academic freedom that included a poem depicting Jesus being fellated on the cross.<sup>41</sup> But the threats to Pacifica's license did not involve the topless-radio genre, which developed later.

Instead, by 1970, Pacifica's signature was format innovation, community building, and protest instigation on the radical left.<sup>42</sup> With original news, music, dramas, poetry, call-in shows, and freeform formats, Pacifica's staff experimented with radio's communicative capacity. In 1967, for example, a Pacifica host prompted three-thousand listeners to meet at Kennedy Airport after midnight to gaze at airplanes and the Calder mobile.<sup>43</sup> In 1970, Pacifica hosts staged an around-the-clock, beginning-to-end reading of Tolstoy's *War and Peace* for four days.<sup>44</sup> These broadcasts came from WBAI-FM in New York City, and its operations were consistent with Pacifica's anti-normal norms. By 1973, WBAI had moved its operations into a deconsecrated church.

Among WBAI's programs was *Lunch Pail*, a live afternoon show with audience participation hosted by Paul Gorman. Gorman had degrees from Yale and Oxford, and had worked as a speechwriter for Eugene McCarthy's 1968 presidential campaign.<sup>45</sup> Apparently no recording of the Tuesday, October 30, 1973 edition of *Lunch Pail* exists. But Gorman later described the episode as an investigation into the power of language and how words lose integrity during political debate.<sup>46</sup> He recalled reading from George Orwell essays, and analyzing phrases such as "extermination with extreme prejudice" and "off the pigs."<sup>47</sup>

When the on-air discussion turned to "dirty words," Gorman paused to play Carlin's *Filthy Words* routine from the *Occupation: Foole* album.<sup>48</sup> This

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<sup>38</sup> See Jeff Land, *Active Radio: Pacifica's Brash Experiment* 2-6, 94 (1999).

<sup>39</sup> See Matthew Lasar, *Pacifica Radio: The Rise of an Alternative Network* 190-213 (1999).

<sup>40</sup> See *id.* at 203-04 (discussing *In re Pacifica Found.*, 36 F.C.C. 147 (1964)).

<sup>41</sup> See Land, *supra* note 38, at 104-06; see also *id.* at 100-01.

<sup>42</sup> See *id.* at 101-04, 113-32; Lasar, *supra* note 39, at 191.

<sup>43</sup> See Land, *supra* note 42, at 118.

<sup>44</sup> See [http://www.democracynow.org/2005/12/6/leo\\_tolstoys\\_war\\_and\\_peace\\_a](http://www.democracynow.org/2005/12/6/leo_tolstoys_war_and_peace_a).

<sup>45</sup> See <http://www.noahalliance.org/speakers.htm#gorman>.

<sup>46</sup> See *From the Vault: Pacifica Radio Remembers George Carlin* 3:51-4:28 (Pacifica Radio Archives, June 27, 2008) (rebroadcasting a 1978 interview with Gorman).

<sup>47</sup> *Id.* at 4:28-6:29.

<sup>48</sup> See *id.* at 6:29-8:15.

cut was actually a cocaine-addled version of the classic *Seven Words* routine from the *Class Clown* album,<sup>49</sup> but *Foole* was a recent release and both routines explored similar ideas. With little detail, Pacifica told the FCC that the episode addressed “contemporary society’s attitudes toward language,” that *Filthy Words* was included “as an incisive satirical view of the subject under discussion,” and that “Carlin is a significant social satirist . . . in the tradition of Mark Twain and Mort Sahl.”<sup>50</sup> Pacifica did indicate that WBAI listeners were warned immediately before the routine that it might be offensive and that concerned listeners should change the station for fifteen minutes.<sup>51</sup>

Carlin’s routine was not sexy—indeed it had a law-like logic—but it was provocative. He was asking which of the 400,000 words in the English language were strictly prohibited from the airwaves regardless of context. “All I want is a list,” Carlin later said.<sup>52</sup> The matter is complicated because many words are frowned on only when used to deliver a certain message and not otherwise (“prick,” for example). The seven words that Carlin identified for acontextual prohibition must then be considered uniquely terrible. But of course Carlin denied that there was a category of bad words: “Bad thoughts, bad intentions, but no bad words.”<sup>53</sup> Even a word on Carlin’s list can lead “a double life,” referring to love in one instance and deployed to hurt someone in another.<sup>54</sup> When Gorman broadcasted the routine, he was partly enacting Carlin’s sentiment and partly testing whether Carlin was right about the list.

As for the only person who filed a complaint about the *Lunch Pail* broadcast, he was not part of WBAI’s target market. In his letter to the FCC, John Douglas wrote that he tuned to WBAI while in his car and heard the *Filthy Words* routine.<sup>55</sup> He called the monologue “garbage,”<sup>56</sup> and mentioned that his “young son” was with him.<sup>57</sup> Douglas later acknowledged that his son was fifteen-years old at the time.<sup>58</sup> Apparently

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<sup>49</sup> Carlin later reported that he sobered up for *Class Clown* but that he returned to cocaine during *Foole*. See Merrill, *supra* note 28, at 73 (“You can hear how sick I am.”).

<sup>50</sup> *In re Citizen’s Complaint Against Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, at \*2-\*3 ¶ 6 (1975).

<sup>51</sup> See *id.* at \*2 ¶ 6.

<sup>52</sup> Merrill, *supra* note 28, at 92.

<sup>53</sup> Carlin, *supra* note 28, at 162.

<sup>54</sup> *Id.* at 162.

<sup>55</sup> See Pacifica Foundation Collection, Letter from John H. Douglas to FCC, Nov. 28, 1973 (Wis. Historical Soc’y, M87-309, box 6).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (quoted in Pacifica, 438 U.S. at 730).

<sup>58</sup> See *WBAI Ruling: Supreme Court Saves the Worst for Last*, Broadcasting, July 10, 1978, at 20 (inset).

the two were returning from a road trip to Yale, which was a college prospect for Douglas's son.<sup>59</sup> Douglas was living in Long Island, working for CBS, and, on the side, a dedicated defender of decency. He had joined a campaign to eliminate sexually explicit movie theaters from Times Square,<sup>60</sup> and he was a national planning board member of Morality in Media (MIM).<sup>61</sup> Nor was this Douglas's first encounter with WBAI. "I was listening to Pacifica constantly," he now recalls, "to see how far they would pull the curtain back."<sup>62</sup> Although Douglas says that he appreciated Carlin's "clever wordplay" and "laughed out loud" while listening to the *Filthy Words* routine, he did not appreciate WBAI's "smart-alecky" on-air provocations.<sup>63</sup>

Douglas's connection to MIM was significant and not really concealed; the organization was carbon-copied on Douglas's complaint.<sup>64</sup> MIM had been founded in the 1960s by three clergymen to restrict access to pornography.<sup>65</sup> In 1978, the organization claimed 50,000 members.<sup>66</sup> The FCC tends to rely on third-party complaints, and groups such as MIM can quickly generate a wave of them.<sup>67</sup> Douglas characterizes MIM as "the vehicle" for complaining to the FCC at that time, but he maintains that he took the initiative and drafted the Pacifica complaint.<sup>68</sup> Regardless, neither Douglas's nor the organization's commitment to keeping broadcasts safe for social conservatives can be questioned.

### *The Commission Seizes an Opportunity*

The *Pacifica* proceedings were used by the FCC as a convenient platform for developing a new test for indecency. Indeed the controversy was, in some respects, manufactured. It was the result of a radio station seeking to consolidate its supporters, non-listeners seeking to make an example of the station, and an agency seeking vehicles for a more

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<sup>59</sup> See Telephone Interview with John Douglas, June 22, 2010.

<sup>60</sup> See Tom Jicha, *Boca Man Blew the Whistle on Carlin*, S. Fla. Sun-Sentinel, June 30, 2008, at E1.

<sup>61</sup> See *WBAI Ruling*, *supra* note 58, at 20 (inset).

<sup>62</sup> Douglas Interview, *supra* note 59.

<sup>63</sup> *Id.* For speculation that Douglas did not actually hear the WBAI broadcast, see Powe, *supra* note 7, at 186.

<sup>64</sup> See Douglas Letter, *supra* note 57.

<sup>65</sup> See Steve Schwalm, *Conservative Spotlight: Morality in Media*, Human Events, Sept. 27, 1996, at 19.

<sup>66</sup> See Brief of Morality in Media as Amicus Curiae 2, *FCC v. Pacifica Found.*, No. 77-528, Feb. 22, 1978.

<sup>67</sup> See Todd Shields, *Activists Dominate Content Complaints*, Mediaweek, Dec. 6, 2004, at 4.

<sup>68</sup> See Douglas Interview, *supra* note 59.

aggressive policy. Yet the clash of cultural visions was not less well represented because of any synthetic quality to this particular dispute. The larger conflict was quite real.

The FCC's broad agenda was palpable. The agency received Douglas's complaint on December 3, 1973, but did not issue its declaratory order until February 21, 1975.<sup>69</sup> The FCC was completing a transition of its own under President Nixon. The last of President Johnson's appointees left the Commission during the month that the *Pacifica* complaint was filed.<sup>70</sup> Moreover, the Commission was tallying an increasing number of complaints regarding obscene, indecent, or profane broadcasts in the early 1970s. The FCC's declared mission in the *Pacifica* matter was to deal with indecency complaints received by the Commission and by Congress, in view of recent judicial decisions.<sup>71</sup> The idea was to update the *Cycle II* decision—to confront a phenomenon spanning multiple genres through common-law-like rulemaking, and thereby “clarify the standards which will be utilized in considering the public's complaints about the broadcast of ‘indecent’ language.”<sup>72</sup>

In the end, the FCC offered a rationale and guidance but no simple rule. The agency did not follow Carlin and present a list of verboten words. Nor was the FCC's standard as simple as its old *Cycle II* test (patently offensive plus no redeeming social value). The declaratory order's logic again differentiated broadcast as an intrusive medium accessible to children,<sup>73</sup> but the order also looked to nuisance law and its emphasis on channeling rather than prohibiting conduct.<sup>74</sup> Although § 1464 mentions neither children nor timing, the order declared:

[T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, [(1)] in terms patently offensive as measured by contemporary community standards for the broadcast medium, [(2)] sexual or excretory activities and organs, [(3)] at times of the day when there is a reasonable risk that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are

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<sup>69</sup> See *Pacifica*, 56 F.C.C.2d 94, at \*1 ¶ 3.

<sup>70</sup> See FCC, *Commissioners from 1934 to Present* (Feb. 22, 2010), <http://www.fcc.gov/commissioners/commish-list.html>.

<sup>71</sup> See *Pacifica*, 56 F.C.C.2d 94, at \*1 ¶¶ 1–2 (citing *Miller and Illinois Citizens Committee*).

<sup>72</sup> *Id.* at \*1 ¶ 2.

<sup>73</sup> See *id.* at \*3 ¶¶ 8–9 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and previous FCC decisions).

<sup>74</sup> See *id.* at \*4 ¶ 11. As the Supreme Court's majority would later do, the FCC's majority appended a transcript of the *Filthy Words* routine.

indecent within the meaning of the statute and have no place on radio when children are in the audience.<sup>75</sup>

Hence the *Miller* test for obscenity would not govern broadcast indecency. An appeal to prurient interests would be unnecessary, and claims of serious value would be irrelevant whenever children “may be” listening.<sup>76</sup> Furthermore, the FCC did not seem committed to judging broadcast content as a whole (however that might be done in a round-the-clock audio medium). Nor did the FCC compile evidence about children’s listening habits on October afternoons, or the harm that might occur to sensitive audiences from experiencing Carlin’s routine.

That said, the order included intimations of moderation. It noted *Lunch Pail’s* timing, the likelihood of a child audience, and repetition of Carlin’s seven words in prerecorded content. The FCC then “h[eld] that the language as broadcast was indecent.”<sup>77</sup> The order also left open the possibility that a routine like Carlin’s might be lawfully broadcast late at night. Assuming the audience was adequately warned, “we would also consider whether the material has serious literary, artistic, political or scientific value.”<sup>78</sup> In addition, the FCC appeared to treat WBAI’s broadcast gently. It was held indecent but no formal penalty was imposed; the order was placed in the station’s license file.<sup>79</sup> The agency’s priority was announcing a revised standard for indecency.

Two commissioners would have held that the language in question was inappropriate for broadcast at any hour. “Garbage is garbage,” one of them wrote.<sup>80</sup> Two others were a notch less statist than the majority. They explained that the case was difficult for them, and they assured readers that they would treat nighttime broadcasts more leniently.<sup>81</sup> But even these commissioners warned of a coarsening culture. They observed doctrinal trends making it more difficult for sensitive audiences to insulate themselves.<sup>82</sup> “[P]ublic use of certain words relating to sex and excretion are taboo,” they added, quoting Freud for the proposition that “taboo

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<sup>75</sup> *Id.* at \*4-\*5 ¶ 11 (citations omitted).

<sup>76</sup> *Id.* at \*5 ¶ 14.

<sup>77</sup> *Id.*; see also *In re “Petition for Clarification or Reconsideration” of a Citizen’s Complaint Against Pacifica Found.*, 59 F.C.C.2d 892, \*2 ¶¶ 4-5 & n.1 (1976) (regarding live news reports).

<sup>78</sup> *Pacifica*, 56 F.C.C.2d 94, at \*5 ¶ 13.

<sup>79</sup> See *id.*

<sup>80</sup> *Id.* at \*8 (concurring statement of Commissioner Quello); see also *id.* (concurring statement of Commissioner Reid).

<sup>81</sup> See *id.* at \*9 (concurring statement of Commissioner Robinson, joined by Commissioner Hooks).

<sup>82</sup> See *id.* at \*9-\*11.

prohibitions lack all justification and are of unknown origin.”<sup>83</sup> An awkward foundation for modern administrative action, but telling nonetheless.

Unlike the licensees in the *Cycle II* and *Femme Forum* controversies, Pacifica turned to the courts. An appeal was actually a debatable move. Pacifica had other troubles. Former board member Ralph Engleman explains that “Pacifica experienced a far-reaching crisis—organizational, political, and fiscal—as the new left became fragmented and went into eclipse in the mid-1970s.”<sup>84</sup> Pacifica’s Berkeley station shut down for a month in 1974 when a faction went on strike for racial diversity in staffing and programming. WBAI’s listener subscriptions fell from 30,000 in 1972 to 17,000 in 1977, when WBAI endured a debilitating strike of its own. This time the struggle included a program director’s attempt to mandate more race-minority-oriented programming.<sup>85</sup>

But there were strong reasons to resist FCC authority. Historian Matthew Lasar notes that this indecency proceeding was “[o]ne of the few moments during the 1970s when Pacifica spoke with one voice on the national scene.”<sup>86</sup> WBAI’s station manager at the time, Larry Josephson, agrees that an appeal unified Pacifica. He saw the proceedings as a test case that the FCC and Morality in Media were eager to pursue, and “we were happy to take them on.”<sup>87</sup> Josephson says that people at Pacifica were confident of victory. “We were righteous, or self-righteous.”<sup>88</sup> On a practical level, Pacifica benefited financially when its attorneys forgave part of their fee.<sup>89</sup> The FCC also helped brighten the worst-case scenario. According to Josephson, the agency promised not to revoke Pacifica’s license as retaliation for an appeal.<sup>90</sup> Nor is it difficult to imagine that high-profile resistance to the FCC would usefully distinguish Pacifica stations. Pacifica had a niche audience to reach and galvanize, even as the 1970s descended into disco. Missions like these can be accomplished even if—perhaps especially if—the missionaries lose in court. Pacifica did publicize its legal battle and solicited donations to finance it.<sup>91</sup>

The D.C. Circuit reversed the FCC’s order. Two judges focused on the

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<sup>83</sup> *Id.* at \*11 n.12 (quoting S. Freud, *Totem and Taboo* 31–32 (A. Brill trans. 1918)).

<sup>84</sup> Ralph Engelman, *Public Radio and Television in America* 69 (1996).

<sup>85</sup> *See id.* at 70–72; *see also* Land, *supra* note 38, at 121–32.

<sup>86</sup> Matthew Lasar, *Uneasy Listening: Pacifica Radio’s Civil War* 161 (2005).

<sup>87</sup> Telephone Interview with Larry Josephson, June 11, 2010.

<sup>88</sup> *Id.*

<sup>89</sup> *See* Jeff Demas, *Seven Dirty Words: Did They Help Define Indecency?*, 20 *Communications & Law* 39, 44 (1998).

<sup>90</sup> *See* Josephson Interview, *supra* note 87.

<sup>91</sup> *See* Printed Circuit: Newsletter of the Pacifica Foundation, Sept. 1978, at 13–19.

Commission's new standard for indecency. Judge Tamm concluded that the statutory prohibition on FCC censorship precluded the agency from imposing what he characterized as a broadcast ban on seven offensive words whenever children are in the audience.<sup>92</sup> He faulted the agency for not limiting its ruling to works lacking serious value, for not specifying the age of children in need of protection, and for not trusting listener self-help plus market discipline.<sup>93</sup> Chief Judge Bazelon disagreed that the censorship provision prevented the FCC from regulating indecency, but he concluded that § 1464 could validly cover only obscenity under the *Miller* test.<sup>94</sup> Listeners can change the station, Bazelon argued, and the agency had pushed its authority over children too far at the expense of receptive adults.

For Judge Leventhal, however, it was the FCC's action that had been read too broadly. His dissent concentrated, perhaps artificially, on the Commission's case-specific judgment. He highlighted the line in the order stating that the agency was acting against the language "as broadcast."<sup>95</sup> Leventhal then emphasized the regulatory interest in protecting children from indecent language and any implicit approval that comes from failing to brand it inappropriate.<sup>96</sup>

#### *Inside the Supreme Court*

The matter almost ended right there. FCC lawyers reportedly advised against seeking certiorari.<sup>97</sup> And it seems that some commissioners expected a loss in the Supreme Court.<sup>98</sup> When the FCC sought certiorari anyway, the Justice Department walked away.<sup>99</sup> As well, the memorandum for the justices participating in the "cert pool" had recommended that the petition be denied. Just four justices voted to grant the FCC's petition (Chief Justice Burger and Justices White, Rehnquist, and Stevens), although two others voted to join three (Justices Blackmun and Powell).<sup>100</sup>

An FCC victory was never a safe bet, even after certiorari was granted. Mainstream media finally came to Pacifica's defense when the case reached

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<sup>92</sup> See *Pacifica Found. v. FCC*, 556 F.2d 9, 10 (D.C. Cir. 1977).

<sup>93</sup> See *id.* at 14-18.

<sup>94</sup> See *id.* at 20-30.

<sup>95</sup> See *id.* at 31-32.

<sup>96</sup> See *id.* at 32-34, 37 & n.18.

<sup>97</sup> See *WBAI Ruling*, *supra* note 58, at 20.

<sup>98</sup> See Demas, *supra* note 89, at 42.

<sup>99</sup> A Justice Department attorney signed on to the FCC's brief in the D.C. Circuit, see *Pacifica*, 556 F.2d at 10, but the Solicitor General did not support the certiorari petition.

<sup>100</sup> See Papers of Justice Lewis F. Powell [hereinafter Powell Papers], Docket Sheet on Certiorari for *FCC v. Pacifica Found.*, No. 77-528, Jan. 6, 1978. Only Justice White voted to grant certiorari and then to affirm.

the Supreme Court,<sup>101</sup> and the Justice Department switched sides. While it had simply refrained from endorsing the FCC's certiorari petition, the Department took the extraordinary step of briefing the case and participating in oral argument in support of Pacifica. Even the government was divided over the case.

Of course amici and law clerk positions are not the only determinants of judicial behavior. The author of the pool memorandum, James Alt, was clerking for Justice Powell. In an annotation for his boss, Alt opined that the FCC's order "was overbroad and showed a startling insensitivity to the interests of everyone except children."<sup>102</sup> But at the petition stage, Justice Powell already agreed with Judge Leventhal.<sup>103</sup> Powell's notes on the pool memo state, "TV & Radio should not have the latitude of the *Miller* standard & FCC was addressing an urgent need."<sup>104</sup> Powell did not specify the urgency that he saw. But the FCC's petition appendix was an order involving a college radio host who had discussed incestuous oral sex with a mother and her three-year-old son.<sup>105</sup> Regardless, Powell's position seems not to have changed before judgment. This despite another attempt at persuasion by Alt in his bench memorandum.<sup>106</sup>

A similar generational divide occurred in the chambers of Justice Blackmun. His law clerk on the case, Ruth Glushien (now Wedgwood), likewise recommended that the FCC's petition be denied and later recommended affirmance.<sup>107</sup> After the proposed majority opinion circulated, Glushien argued that "emphatic rough language can at times be used conscientiously by an artist in portraying certain ethos and ways of life."<sup>108</sup> Although Blackmun and Powell would join only part of Justice Stevens' lead opinion, we cannot confirm that their votes were ever in play. Others, including Chief Justice Burger, seemed even more locked in. "Well, I'm not an expert," he said of the Carlin routine during oral argument, "but

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<sup>101</sup> See *Pacifica*, 438 U.S. at 729 n.\*; *Pacifica*, 556 F.2d at 10 (noting participation of one amicus).

<sup>102</sup> Powell Papers, Preliminary Memo for FCC v. Pacifica Found., Dec. 13, 1977, at 10.

<sup>103</sup> See Docket Sheet, *supra* note 100 (handwritten notation).

<sup>104</sup> Preliminary Memo, *supra* note 102, at 1.

<sup>105</sup> In the spirit of specters, Pacifica's merits brief appendix collected possibly "indecent" words in the Bible, literature, print journalism, and the Nixon tapes.

<sup>106</sup> See Powell Papers, Bench Memo for FCC v. Pacifica Found., Apr. 17, 1978, at 3-5.

<sup>107</sup> See Papers of Justice Harry A. Blackmun [hereinafter Blackmun Papers], Preliminary Memo for FCC v. Pacifica Found., No. 77-528, Dec. 13, 1977, at 10 (handwritten annotation of Dec. 15, 1977); *id.*, Bench Memo for FCC v. Pacifica Found., Apr. 17, 1978, at 2-3, 19.

<sup>108</sup> *Id.*, Memorandum from RNG to HAB, June 18, 1978, at 1-2.



if that's artistic, deliver me."<sup>109</sup>

If there was a swing voter in *Pacifica*, it probably was Justice Stevens. Then the newest member of the Court, Stevens had been nominated by President Ford during the nation's attempt to recover from a dark episode in its constitutional history. In addition to his judicial craftsmanship, he was considered a moderate who would not start a political firestorm if nominated.<sup>110</sup> Available sources indicate that Stevens struggled with *Pacifica* as late as the end of the Court's conference after oral argument. Justice Powell's conference notes mark Stevens' position as "tentative,"<sup>111</sup> and characterize the judgment as "Reverse 5-4 (tentative)."<sup>112</sup> Similarly, Justice Blackmun's conference notes record that Stevens told his colleagues that he had "flipflopped & may do so again."<sup>113</sup>

Justice Stevens' doubts were not about constitutional issues, however, not directly. "It was a statutory case, primarily," Stevens said recently, "It was then and it is now."<sup>114</sup> At conference, he apparently was convinced that broadcasting was a special regulatory category subject to nuisance-like restrictions.<sup>115</sup> Instead, Stevens' doubts involved the FCC's statutory authority. The conference notes of Blackmun and Powell indicate that Stevens was wrestling with the scope of § 1464.<sup>116</sup>

A critical issue was whether the term "indecent" should be interpreted differently from "obscene."<sup>117</sup> Simplistic textualism might dictate an affirmative answer. But this result was not obviously consistent with the Court's previous interpretation of § 1464's neighbors. Section 1461 regarding mailings and 1462 regarding importation used "obscene" together with words such as "indecent" and "filthy" – yet the Court had bundled those terms together under the concept of obscenity as defined in *Miller*.<sup>118</sup> No good common-law judge could ignore this precedent. While

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<sup>109</sup> See Transcript of Oral Argument in *FCC v. Pacifica Found.*, Apr. 18, 1978, reprinted in 101 *Landmark Briefs and Arguments of the Supreme Court* 675, 688 (Philip B. Kurland & Gerhard Casper eds. 1979) (Supp.).

<sup>110</sup> See Bill Barnhart & Gene Schlickman, *John Paul Stevens: An Independent Life* 184–97 (2010).

<sup>111</sup> Powell Papers, Conference Notes for *FCC v. Pacifica Found.*, Apr. 21, 1978, at 3.

<sup>112</sup> *Id.* at 1.

<sup>113</sup> Blackmun Papers, Conference Notes for *FCC v. Pacifica Found.*, Apr. 21, 1978, at 2.

<sup>114</sup> Interview with John Paul Stevens, June 25, 2010.

<sup>115</sup> See Conference Notes, *supra* note 111, at 3.

<sup>116</sup> See *id.*; Conference Notes, *supra* note 113, at 2.

<sup>117</sup> See *id.*

<sup>118</sup> See *Hamling v. United States*, 418 U.S. 87, 110–16 (1974) (resolving a vagueness challenge to § 1461); *United States v. 12 200-ft. Reels*, 413 U.S. 123, 130 n.7 (1973) (noting the Court's plan to limit § 1462); see also *Marks v. United States*, 430 U.S. 188, 190 (1977)

small-c conservative values might have made the FCC's position attractive during the post-1960s hangover, similar values left the agency's victory uncertain in the chambers of Justice Stevens.

To the extent that constitutional doubt affected him, it might have been the possibility of criminal penalties under § 1464. In 1977, Stevens had dissented in *Smith v. United States*,<sup>119</sup> arguing that criminal penalties were an inappropriate response to sexual content.<sup>120</sup> He might, then, have resisted the notion that § 1464 both extended beyond obscenity and allowed criminal prosecution. Perhaps something had to give.

We cannot know with certainty how Stevens reached his judgment. Law clerks were probably not the reason, however. His clerk on the case, Stewart Baker, cannot recall any "burning desire" to reverse.<sup>121</sup> True, the Stevens clerks for that Term were all parents.<sup>122</sup> But Justice Stevens is known as an independent thinker and not for following his clerks. Stevens later identified a different factor in the outcome: lawyer strategy.

The FCC's posture was notably humble. At oral argument, Joseph Marino reiterated that his client welcomed judicial participation in defining broadcast indecency.<sup>123</sup> And he spun the FCC's order as had Judge Leventhal: a narrow judgment sensitive to extreme language, time of day, repetition, and prerecorded content.<sup>124</sup> Pivoting to the FCC's general test for indecency, Marino noted that the Commission adopted part of the Court's *Miller* test on offensiveness. True, Marino relied on the concept of taboo words,<sup>125</sup> and the idea that broadcasters are "public trustees subject to a higher standard of conduct than the morals of the marketplace."<sup>126</sup> And after being pressed by Justice Stevens, Marino ultimately concluded that the term "indecent" in § 1464 should be interpreted the same for civil and criminal actions.<sup>127</sup> This must have troubled Stevens. Overall, however, the Commission portrayed its order as measured and deferential to judicial opinion.

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(interpreting § 1465).

<sup>119</sup> 431 U.S. 291 (1977).

<sup>120</sup> *See id.* at 316–21.

<sup>121</sup> Telephone Interview with Stewart Baker, June 11, 2010.

<sup>122</sup> *See id.*

<sup>123</sup> *See* Transcript, *supra* note 109, at 677.

<sup>124</sup> *See id.* at 678–79; Brief for FCC 26–28, *FCC v. Pacifica Found.*, No. 77-528, Feb. 1978.

<sup>125</sup> *See* Transcript, *supra* note 109, at 678, 680.

<sup>126</sup> Brief for FCC, *supra* note 124, at 38.

<sup>127</sup> *See* Transcript, *supra* note 109, at 681, 683. Voices are distinguishable at [http://www.oyez.org/sites/default/files/audio/cases/1977/77-528\\_19780418-lq-argument.mp3](http://www.oyez.org/sites/default/files/audio/cases/1977/77-528_19780418-lq-argument.mp3).

Counsel for Pacifica, Harry Plotkin, was more assertive. He argued against any special test for broadcasting when it came to indecency.<sup>128</sup> Justice Rehnquist asked whether the FCC had authority to sanction a station for repeatedly broadcasting a single “four-letter word” for an hour. Plotkin responded that there was no authority to stop this broadcast.<sup>129</sup> This answer could not have appealed to a wavering Justice Stevens, who was disconcerted by a broad reading of § 1464 and yet open to some broadcast regulation of indecent content. Fifteen years later, Stevens remarked, “the result might have been different if the broadcaster had simply contended that the particular order was erroneous because the evidence of actual or probable offense to the listening audience was so meager.”<sup>130</sup>

The position of the Justice Department was more nuanced than Pacifica’s. Louis Claiborne of the Solicitor General’s Office contended that the FCC’s order could not be narrowed in the way supposed by Judge Leventhal.<sup>131</sup> But Claiborne also argued for independent meaning in the statutory term “indecency” while emphasizing context, such as whether a broadcaster was targeting young children or trying to shock the audience.<sup>132</sup> He conceded that a broadcaster indeed could be rebuked for attempting to “jam the airwaves by the use of four-letter words strung out indefinitely.”<sup>133</sup>

But the Department was seemingly distracted by its changing loyalties. When Claiborne took the podium at oral argument, Justice Rehnquist questioned the interest of the executive branch in a narrow interpretation of a criminal statute.<sup>134</sup> And in response to Justice Powell, Claiborne called his Department’s reversal after the D.C. Circuit decision “an embarrassment.” He added that, below, the case had been handled by the antitrust division.<sup>135</sup> A simpler explanation is that the political guard had changed: the FCC first moved against Pacifica under Nixon, Pacifica appealed under Ford, and the Department defected under Carter.

Claiborne is no longer alive to explain. But Jerome Feit, who worked

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<sup>128</sup> See Transcript, *supra* note 109, at 690-91; Brief for Pacifica 13, FCC v. Pacifica Found., No. 77-528, Mar. 1978.

<sup>129</sup> See Transcript, *supra* note 109, at 691. Plotkin did suggest that the FCC could act if a station failed to provide well-rounded programming. See *id.* at 692.

<sup>130</sup> John Paul Stevens, *The Freedom of Speech*, 102 Yale L.J. 1293, 1307 (1993).

<sup>131</sup> See Transcript of Oral Argument in FCC v. Pacifica Found., Apr. 19, 1978, reprinted in *Landmark Briefs*, *supra* note 109, at 695, 703-04.

<sup>132</sup> See Brief for the United States 40-41, FCC v. Pacifica Found., No. 77-528, Mar. 1978.

<sup>133</sup> Transcript, *supra* note 131, at 706.

<sup>134</sup> See *id.* at 697-98; see also *id.* at 699 (Burger, C.J.) (stressing FCC independence).

<sup>135</sup> *Id.* at 701.

with Claiborne on the case, points to personnel. He claims that the Solicitor General's Office was "more liberal" than the rest of the Department during the 1970s.<sup>136</sup> Regardless, Feit recalls Claiborne working to soften the criminal division's position during extended negotiations over the brief's wording. Claiborne was an independent character not averse to "playing games,"<sup>137</sup> and he apparently was committed to a restrained use of § 1464. Perhaps, then, the Department's position changed partly because a new mix of personnel became involved as the case moved up the appellate court hierarchy. The intra-agency tension at the final stages nearly produced a winning legal position, but the Department could get little credit for clarity and none for consistency.

### *The Court Reaches Judgment*

As a member of the tentative majority, Chief Justice Burger had authority to assign drafting duties for the majority opinion. The job went to Justice Stevens. However he resolved his doubts about the statutes, the elements of his opinion are now quite public.

First, Stevens concluded that the FCC's declaratory order ought to be taken narrowly as an adjudication on the Carlin routine as broadcast by WBAI.<sup>138</sup> This was Leventhal's take, and it undercut an overbreadth or vagueness critique of the agency's new test for indecency. Second, Stevens interpreted the statutes so that indecent broadcasting had a different meaning from obscene broadcasting. This was the issue on which he had struggled. Relying on legislative history, Stevens noted that the civil and criminal penalties provisions used to be separate from § 1464, and he suggested that a criminal prosecution might be impermissible. "[T]he validity of the civil sanctions is not linked to the validity of the criminal penalty."<sup>139</sup> This civil/criminal separation must have made him more comfortable with an independent meaning for "indecent." Third, Stevens concluded that the FCC had not violated the First Amendment by finding Pacifica's broadcast indecent. He contended that broadcasting is a special context in which the interests of child welfare and unwilling audiences justify efforts to channel indecent content into certain timeslots.<sup>140</sup>

Stevens also defended the constitutional holding with the idea that sexually explicit content is covered by the First Amendment yet has less constitutional value than, for example, political messages.<sup>141</sup> On this point

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<sup>136</sup> Telephone Interview with Jerome Feit, June 21, 2010.

<sup>137</sup> *Id.*

<sup>138</sup> *See Pacifca*, 438 U.S. at 734-35.

<sup>139</sup> *Id.* at 739 n.13 (noting severability provisions); *see also id.* at 750.

<sup>140</sup> *See id.* at 748-51.

<sup>141</sup> *See id.* at 742-48 (plurality).

he was unable to achieve a majority. Justices Powell and Blackmun peeled away, contending in a concurrence that such overt judicial evaluation of speech content was inappropriate.<sup>142</sup> As a matter of free speech theory, this disagreement has generated lasting attention. As a practical matter, its relevance is debatable. How Powell and Blackmun sided with the FCC without implicitly estimating the constitutional value of the broadcast's content is less than obvious. At a minimum they ratified the agency's authority to rank order some language choices when broadcast, and those rankings will affect speech content. In any event, this constitutional disagreement did not demonstrably jeopardize the FCC's victory. Nor was this a new battle. Justice Stevens likewise ended up with a plurality opinion in 1976 when he used his multi-value speech analysis to uphold zoning of brick-and-mortar adult theaters.<sup>143</sup>

Justice Brennan's dissent best reflects the sentiments of a younger generation to which broadcasters like Pacifica were geared. He characterized the Court's ruling as "another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."<sup>144</sup> If Brennan's opinion was meant to persuade his colleagues, however, it was unsuccessful. It changed no votes. And Justice Powell wrote across the top of Brennan's first draft, "This is 'garbage!'"<sup>145</sup> Powell then wrote a snide note to Blackmun: "Perhaps you will not wish to be associated with an opinion said to display 'acute ethnocentric myopia,' 'a sad insensitivity,' and 'a naive innocence of reality'."<sup>146</sup> Blackmun attributed Brennan's strong language to end-of-Term tensions—"things would not be so strident if the present circulations were making their rounds in October or November"<sup>147</sup>—and was similarly unmoved.

Based on the surviving records, the argument that nearly flipped the result was adopted by Justice Stewart. He offered a simple, three-page dissent on statutory grounds built on precedent, constitutional doubt, and the rule of lenity.<sup>148</sup> It was this set of conservative values that almost carried

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<sup>142</sup> See *id.* at 761-62.

<sup>143</sup> See *Young v. American Mini Theatres*, 427 U.S. 50, 70-71 (1976) (plurality); *id.* at 73 n.1 (Powell, J., concurring).

<sup>144</sup> *Pacifica*, 438 U.S. at 777.

<sup>145</sup> Powell Papers, Mr. Justice Brennan, 1st Draft of Dissenting Opinion in *FCC v. Pacifica Found.*, June 24, 1978, at 1. A note, probably from Alt's co-clerk Robert Comfort, describes the Brennan dissent as "the poorest, most self-impeaching piece of drivel from their Chambers yet!" *Id.*, Note from Bob Re: Brennan's Draft, June 24, 1978.

<sup>146</sup> Draft, *supra* note 145, at 1.

<sup>147</sup> Powell Papers, Correspondence from Harry A. Blackmun Re: *FCC v. Pacifica Found.*, June 26, 1978.

<sup>148</sup> See *Pacifica*, 438 U.S. at 777-80 & n.8.

the day on a Court leaning, without yet surging, to the right. Stewart's dissent was joined by Brennan, White, and Marshall. Brennan's dissent was joined by Marshall alone.

### *Afterward*

Shortly thereafter, John Douglas and George Carlin debated the case on NBC's *Today* show.<sup>149</sup> Carlin explained that his words were not themselves indecent but only symbols, while Douglas compared hearing the words to an assault. But there were no especially hard feelings; the *Pacifica* dispute served the purposes of both men in the end. Douglas and his conservative compatriots preserved the ability to demand FCC action, while Carlin and his countercultural comrades made a point about the rigidities of American culture and government. After their debate, Carlin thanked Douglas for helping Carlin become "a footnote to history"; when Carlin died in 2008, Douglas called Carlin "the funniest comedian of his generation."<sup>150</sup>

Douglas might have mellowed over time but others took his place. Although he continued to criticize WBAI's decision to broadcast *Filthy Words*, Douglas disassociated with Morality in Media when "the bluenoses took over."<sup>151</sup> That organization's dues-paying membership has fallen to 14,000.<sup>152</sup> Nevertheless, other groups have arisen to monitor broadcast content. The Parents Television Council, for example, was founded in 1995 and claims over one million members.<sup>153</sup> Outsider broadcasting survived, too, albeit in modified form. Larry Josephson produces marathon readings of *Ulysses*, with the "indecent" portions segregated into late-night hours.<sup>154</sup> Paul Gorman hosted *Lunch Pail* for nearly thirty years before moving on to work with religious organizations on environmental causes.<sup>155</sup> *Pacifica* experienced additional turmoil after the case, but its network is still operating. Today WBAI's slogan is "Your Peace and Justice Community Radio Station" and it claims to have 200,000 listeners.<sup>156</sup> In fact, both the curious and the conservative can listen to WBAI live on its website.<sup>157</sup>

Carlin made a more dramatic technological change during his lifetime.

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<sup>149</sup> See *WBAI Ruling*, *supra* note 58, at 20 (inset).

<sup>150</sup> Jicha, *supra* note 60. A review of *Billboard Magazine* album rankings does not reveal an apparent bump for Carlin attributable to *Pacifica*, however.

<sup>151</sup> *Id.*

<sup>152</sup> See *Morality in Media*, in *Encyclopedia of Associations* (46th ed. 2008).

<sup>153</sup> See <http://www.parentstv.org/PTC/aboutus/main.asp>.

<sup>154</sup> See Interview, *supra* note 87.

<sup>155</sup> See [http://www.nrpe.org/whatisthepartnership/pgorman\\_retires.htm](http://www.nrpe.org/whatisthepartnership/pgorman_retires.htm).

<sup>156</sup> Glenn Collins, *The Station that Dared to Defend Carlin's "7 Words" Looks Back*, N.Y. Times, June 25, 2008.

<sup>157</sup> See <http://stream.wbai.org>.

A cocaine addiction nearly destroyed his career.<sup>158</sup> But the 1980s brought another surge of acclaim and commercial success in a new medium. Carlin did a series of specials for HBO without the constraints of FCC regulation. He called cable television “tailor-made for any comedian who wanted freedom of expression,” and he experienced no conflict with HBO over language.<sup>159</sup> Carlin thus was a forerunner for shock-jock Howard Stern, who jumped from broadcast to satellite radio in 2005.<sup>160</sup>

As for the FCC’s role in controlling indecency, *Pacifica* foretold little. The decision ratified Commission authority without specifically defining its boundaries or mandating its exercise, and so the FCC could continue its long-term vacillation over risqué content. Within days of the Court’s decision, commissioners sent calming messages to mainstream broadcasters who had raised the specter of content regulation beyond Carlin’s list.<sup>161</sup> “The particular set of circumstances in the *Pacifica* case is about as likely to occur again as Halley’s comet,” remarked the recently appointed chairman.<sup>162</sup>

President Carter’s appointees were filling the FCC when *Pacifica* was decided, and some commissioners reportedly were displeased by the agency’s legal victory.<sup>163</sup> During most of the Reagan administration, moreover, the FCC’s attitude was similarly laissez-faire.<sup>164</sup> Numerous complaints were filed but the Commission did not formally penalize anyone for indecency for nearly a decade.<sup>165</sup> In 1987, the Commission described its post-*Pacifica* indecency practice as disapproving only “the repeated use, for shock value, of words similar or identical to those satirized in the Carlin ‘Filthy Words’ monologue” if broadcast before 10 p.m.<sup>166</sup>

The law and politics of broadcast indecency have changed more than once since then. The FCC returned to the scene in 1987 by recommitting itself to the *Pacifica* standard for indecency.<sup>167</sup> The D.C. Circuit upheld the revived standard, although the court demanded that the Commission be

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<sup>158</sup> See Merrill, *supra* note 28, at 70–73.

<sup>159</sup> Interview, *supra* note 31, at 20:40–21:05 (chapter 6).

<sup>160</sup> See Ana Marie Cox, *Howard Stern and the Satellite Wars*, *Wired*, Mar. 2005.

<sup>161</sup> See *WBAI Ruling*, *supra* note 58, at 21.

<sup>162</sup> *Which Way the Wind Blows at the FCC After WBAI*, *Broadcasting*, July 24, 1978, at 31.

<sup>163</sup> See Demas, *supra* note 89, at 52.

<sup>164</sup> See Heins, *supra* note 7, at 109–13.

<sup>165</sup> See *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 ¶ 4 (1987).

<sup>166</sup> *Id.*

<sup>167</sup> See *id.* at ¶¶ 5–6.

more precise and thoughtful with respect to timing.<sup>168</sup> Congress blanched and required a twenty-four hour indecency ban, which the D.C. Circuit promptly invalidated.<sup>169</sup> Congress then enacted two timing provisions: one that prohibited broadcast indecency from 6 a.m. until 12 a.m., and another that stopped two hours earlier for public stations leaving the air by midnight. The D.C. Circuit again pushed back. It ordered the FCC to adopt a 10 p.m. until 6 a.m. safe harbor for all broadcasters.<sup>170</sup>

The tug of war over timing ended, or paused, but there were other movements. During the Clinton administration, substantial fines were imposed annually for broadcast indecency. However, the primary target was one show: Howard Stern's. FCC fines escalated during George W. Bush's presidency, nearly reaching eight-million dollars in 2004. This peak year was accompanied by more than one-million FCC complaints. But a single episode drove these numbers: a Super Bowl halftime show in which Janet Jackson's breast was revealed.<sup>171</sup> Arguably the larger development was the Commission's announcement that it could enforce § 1464 against "fleeting expletives" – nonliteral uses occurring once in a broadcast.<sup>172</sup> This new stance withstood an administrative law challenge in *FCC v. Fox Television Stations*,<sup>173</sup> and so Commission authority to waffle was again preserved.

Equally important, FCC authority over indecency has not been extended to other mass media. One holdup has been statutory. Congress has not sent the FCC after indecency in new media such as satellite and internet communications. Another barrier is judicial review. The Supreme Court's aging tolerance for government management in the broadcasting context never carried over to other media. The Court made this fairly clear with respect to newspapers before *Pacifica* was decided,<sup>174</sup> and Justice Stevens did the same for the internet in *Reno v. ACLU*.<sup>175</sup>

These developments suggest two angles for reevaluating *Pacifica* in

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<sup>168</sup> See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988).

<sup>169</sup> See *id.*, 932 F.2d 1504, 1509–10 (D.C. Cir. 1991).

<sup>170</sup> See *id.*, 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc); accord 47 C.F.R. § 73.3999(b).

<sup>171</sup> See *Brown & Candeub*, *supra* note 7, at 1492–95.

<sup>172</sup> See *In re Complaints Against Various Broadcast Licensees*, 19 FCC Rcd. 4975, 4981–82 (2004).

<sup>173</sup> 129 S.Ct. 1800, 1819 (2009) (holding that the change was neither arbitrary nor capricious). Justice Stevens was among the four dissenters. On remand, the Second Circuit held unconstitutionally vague the FCC's 2001 restatement of its indecency policy. See *Fox Television Stations v. FCC*, No. 06-1760-ag, slip op. at 8–10, 22–37 (2d Cir., July 13, 2010) (emphasizing increasing fines while intimating that the FCC's pre-1987 policy is sustainable). The ultimate outcome of this litigation remains to be seen.

<sup>174</sup> See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

<sup>175</sup> 521 U.S. 824, 868–70 (1997).



light of its backstory. The first involves the odd relationship between constraint and creativity, which the case history helps illustrate. A healthy system of free speech partly depends on constraint, and aspects of this idea are uncontroversial.<sup>176</sup> Effective communication itself requires the restrictive conventions of language. Words without limits have no communicative power. And a ready list of dirty words, however arbitrary or evolving, facilitates the expression of intensity and disdain. Our society always will have such a list. Just as clearly, regulation sometimes increases the impact of each speaker's expression through coordination. Everyone talking at once means that no one gets heard; the application to overcrowded bandwidths is self-evident.

But *Pacifica* should incite more radical notions. Perhaps certain exceptionally valuable speech requires repressive force. It does seem that censorship, like profanity, is one source of poetry. Carlin's career was restarted and his creativity inflamed by friction with conservative broadcasting norms that arose from economic, cultural, and political influences. The resulting social commentary was no less impressive than the innovations of filmmakers who artistically navigated censorship codes. Unfortunately we have to wonder whether we are better off because Martin Luther King was jailed in Birmingham, if only because he gave us a letter of incalculable value. Moreover, conflict between artist and censor reveals the character of mainstream commitments. Gorman's program and the FCC's response highlighted the shape of and the elusive rationales for a long tradition of language taboos. The avant-garde and the cultural rearguard, to an important degree, depend on each other. All-encompassing mainstream censorship would threaten this creative tension, of course, but that is not a plausible near-term risk.

Second, and less radically, *Pacifica's* limited reach exemplifies another oddity: jurisdictionally underinclusive regulation can enhance choice. Technological advances make FCC authority over broadcast indecency much less significant. If WBAI cannot broadcast *Filthy Words* during daytime hours, people can find substitutes on *YouTube* and its successors. The FCC might seem incapacitated, but its sustained jurisdiction over indecency in only one domain effectively promotes audience choice. Like it or not, there is a large audience for mainstream material that the FCC will never jeopardize. True, broadcasters might produce similar content for normal audiences even if there were no indecency regulation (think *HBO Family*). But FCC oversight adds a modest guarantee that one segment of mass media will stay faithful to ordinary or conservative sensibilities. Those with more progressive or abnormal tastes can migrate elsewhere, while broadcasting networks maintain a distinctive character with Commission

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<sup>176</sup> Cf. Stephen Holmes, *Passions and Constraint* (1995) (relating certain constraints to productivity and freedom).

oversight built into their brands.<sup>177</sup>

The “just change the channel” argument, so rhetorically effective against indecency regulation, is switching sides. Now the argument might support such regulation, considering the plunging cost to freaks searching for what we consider quality content. A fair question for a complaining party in 1978 was whether changing the radio station was inadequate protection for mainstream tastes. A fair question for advocates of deregulation in 2010 is whether preservation of indecency constraints on an increasingly narrow strip of communications technology is seriously problematic. It is easier than ever before to exit broadcast into less-regulated content providers, if you so choose. This is not to say that the resulting system is ideal, or that there really is something special about broadcasting, or that the FCC cannot be captured by extreme social conservatives, or that audience and content-provider migration across media is frictionless or free. It is to say that the preexisting path of indecency regulation and technological innovation makes it possible for *Pacifica* to have a second life better than its first.

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<sup>177</sup> Cf. Lee Bollinger, *Freedom of the Press and Public Access*, 75 Mich. L. Rev. 1 (1976) (assessing the virtues of access regulation in broadcast but not print).

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