Order Code RL32222

CRS Report for Congress

Regulation of Broadcast Indecency: Background and Legal Analysis

Updated March 5, 2004

Angie A. Welborn and Henry Cohen
Legislative Attorneys
American Law Division

Distributed by Penny Hill Press

http://pennyhill.com

Prepared for Members and Committees of Congress

Congressional Research Service

The FCC's Indecency Regulations: Background and Legal Analysis

Summary

Two recent events have placed increased attention on the FCC and its indecency regulations. The airing of the 2003 Golden Globe Awards and the subsequent ruling by the FCC's Enforcement Bureau, coupled with the controversy surrounding the 2004 Super Bowl half-time show, have brought broadcast indecency to the forefront of the congressional agenda. Bills have been introduced to increase the penalties imposed for broadcast indecency (H.R. 3717, S. 2056, S. 2147) and to prohibit the broadcast of certain words and phrases in any grammatical form (H.R. 3687). Resolutions have been introduced to express disapproval of the FCC Enforcement Bureau's decision regarding the Golden Globe Awards broadcast: H.Res. 482, H.Res. 500, and S. Res. 283, which the Senate passed on December 9, 2003. In addition, both the House and Senate have held or scheduled hearings on broadcast indecency. This report provides background on the two events in question, discusses the legal evolution of the FCC's indecency regulations, and provides an overview of how the current regulations have been applied. The final section of the report considers whether prohibiting the broadcast of "indecent" words regardless of context would violate the First Amendment.

Contents

Introduction 1
Background 1
Evolution of the FCC's Indecency Regulations 2
Current Regulations and Analysis 5
    Explicitness or Graphic Nature of Material 7
    Dwelling or Repetition of Potentially Offensive Material 7
    Pandering or Titillating Nature of Material 8
Recent Enforcement Actions 8
    Infinity Broadcasting 9
    Clear Channel Broadcasting 9
Congressional Response 10
Would prohibiting the broadcast of "indecent" words regardless of context violate the First Amendment? 12
    Broadcast media 16
    Strict scrutiny 18

Regulation of Broadcast Indecency: Background and Legal Analysis

Introduction

Two recent events have placed increased attention on the Federal Communications Commission (FCC) and its broadcast indecency regulations.[1] The airing of the 2003 Golden Globe Awards and the subsequent ruling of the FCC's Enforcement Bureau, coupled with the controversy surrounding the 2004 Super Bowl half-time show, have brought broadcast indecency to the forefront of the congressional agenda. Several bills have been introduced to increase the penalties imposed for broadcast indecency and prohibit the broadcast of certain words and phrases. In addition, both the House and Senate have scheduled hearings on broadcast indecency. This report provides background on the two events in question, discusses the legal evolution of the FCC's indecency regulations, and provides an overview of how the current regulations have been applied. The final section of the report considers whether prohibiting the broadcast of "indecent" words regardless of context would violate the First Amendment.[2]

Background

On January 19, 2003, a number of broadcast television stations in various parts of the country aired the Golden Globe Awards. During the awards, the performer Bono, in response to winning an award, uttered the phrase "this is really, really f[***]ing brilliant."[3] In response to this utterance, the FCC received over 230 complaints alleging that the program was obscene or indecent, and requesting that the

---

[1] The FCC's indecency regulations only apply to broadcast radio and television, and not to cable television. The distinction between broadcast and cable television arises in part from the fact that the rationale for regulation of broadcast media — the dual problems of spectrum scarcity and signal interference — do not apply in the context of cable. As a result, regulation of cable television is entitled to heightened First Amendment scrutiny. *See Turner Broadcasting v. Federal Communications Commission*, 512 U.S. 622 (1994). Cable television is also distinguished from broadcast television by the fact that cable involves a voluntary act whereby a subscriber affirmatively chooses to bring the material into his or home. *See Cruz v. Ferre*, 755 F.2d 1415 (1985).

[2] The final section of this report was written by Henry Cohen; the rest of the report was written by Angie A. Welborn.

[3] See *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C. Rcd. 19859 (2003).

Commission impose sanctions on the licensees for the broadcast of the material in question.[4]

The Enforcement Bureau of the FCC issued a Memorandum Opinion and Order on October 3, 2003, denying the complaints and finding that the broadcast of the Golden Globe Awards including Bono's utterance did not violate federal restrictions regarding the broadcast of obscene and indecent material.[5] The Bureau dismissed the complaints primarily because the language in question did not describe or depict sexual or excretory activities or organs. The Bureau noted that while "the word 'f[***]ing' may be crude and offensive," it "did not describe sexual or excretory organs or activities. Rather, the performer used the word 'f[***]ing' as an adjective or expletive to emphasize an exclamation."[6] The Bureau added that in similar circumstances it "found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the Commission's prohibition on indecent program content."[7]

The decision of the Enforcement Bureau was met with opposition from a number of organizations and Members of Congress, and an appeal was filed for review by the full Commission. FCC Chairman Michael K. Powell has asked the full Commission to overturn the Enforcement Bureau's ruling.[8]

On February 1, 2004, CBS aired Super Bowl XXXVIII, with a half-time show produced by the MTV network. The show included performers singing and dancing provocatively, and ended with the exposure of the breast of one female performer. The network received numerous complaints regarding the half-time performance and FCC Chairman Michael Powell initiated a formal investigation into the incident.[9]

Evolution of the FCC's Indecency Regulations

Under title 18 of the United States Code, it is unlawful to utter "any obscene, indecent, or profane language by means of radio communication."[10] Violators of this provision are subject to fines or imprisonment of up to two years. The Federal Communications Commission has the authority to enforce this provision by forfeiture or revocation of license.[11] The Commission's authority to regulate material that is indecent, but not obscene, was upheld by the Supreme Court in *Federal*

---

[4] *Id* at 2.

[5] *Id.*

[6] *Id* at 3.

[7] *Id.*

[8] *FCC Chairman Seeks Reversal on Profanity*, Washington Post, January 14, 2004, at E01.

[9] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243435A1.pdf.

[10] 18 U.S.C. § 1464. "Radio communication" includes broadcast television, as the term is "means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds." 47 U.S.C. § 153(33).

[11] 47 U.S.C. § 503(b).

Communications Commission v. Pacifica Foundation.[12] In *Pacifica*, the Supreme Court affirmed the Commission's order regarding the airing of comedian George Carlin's "Filthy Words" monologue.[13] In that order, the Commission determined that the airing of the monologue, which contained certain words that "depicted sexual and excretory activities in a patently offensive manner," at a time "when children were undoubtedly in the audience" was indecent and prohibited by 18 U.S.C. § 1464.[14] Pursuant to the Court's decision, whether any such material is "patently offensive" is determined by "contemporary community standards for the broadcast medium."[15] The Court noted that indecency is "largely a function of context — it cannot be judged in the abstract."[16]

The Commission's order in the *Pacifica* case relied partially on a spectrum scarcity argument, *i.e.* that there is a scarcity of spectrum space so the government must license the use of such space in the public interest, and partially on "principles analogous to those found in the law of nuisance."[17] The Commission noted that public nuisance law generally aims to channel the offensive behavior rather than to prohibit it outright. For example, in the context of broadcast material, channeling would involve airing potentially offensive material at times when children are less likely to be in the audience. In 1987, the Commission rejected the spectrum scarcity argument as a sufficient basis for its regulation of broadcast indecency, but noted that it would continue to rely upon the validity of the public nuisance rationale, including channeling of potentially objectionable material.[18] However, in its 1987 order, the Commission also stated that channeling based on a specific time of day was no longer a sufficient means to ensure that children were not in the audience when indecent material aired and warned licensees that indecent material aired after 10 p.m. would be actionable.[19] The Commission further clarified its earlier *Pacifica* order, noting that indecent language was not strictly limited to the seven words at

---

[12] 438 U.S. 726 (1978).

[13] The United State Court of Appeals for the District of Columbia Circuit had reversed the Commission's order. *See* 556 F.2d 9 (D.C. Cir. 1977). The Commission appealed that decision to the Supreme Court. The Court granted certiorari and reversed the lower court's opinion.

[14] 438 U.S. at 732.

[15] *Id.*

[16] *Id* at 742.

[17] *Id.* at 731; *see, In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York,* 56 F.C.C.2d 94 (1975).

[18] *In the Matter of Pacifica Foundation, Inc. d/b/a Pacifica Radio Los Angeles, California,* 2 F.C.C. Rcd. 2698 (1987). Two other orders handed down the same day articulate the Commission's clarified indecency standard. *See also In the Matter of the Regents of the University of California,* 2 F.C.C. Rcd. 2703 (1987); *In the Matter of Infinity Broadcasting Corporation of Pennsylvania,* 2 F.C.C. Rcd. 2705 (1987).

[19] The Commission noted Arbitron ratings indicating that a number of children remain in the local audience well after 10 p.m. *See* 2 F.C.C. Rcd. 1698, ¶ 16.

issue in the original broadcast in question, and that repeated use of those words was not necessary to find that material in question was indecent.[20]

The Commission's 1987 orders were challenged by parties alleging that the Commission had changed its indecency standard and that the new standard was unconstitutional. In *Action for Children's Television v. Federal Communications Commission (ACT I)*, the United States Court of Appeals for the District of Columbia Circuit upheld the standard used by the Commission to determine whether broadcast material was indecent, but it vacated the Commission's order with respect to the channeling of indecent material for redetermination "after a full and fair hearing of the times at which indecent material may be broadcast."[21]

Following the court's decision in *Action for Children's Television (ACT I)*, a rider to the Commerce, Justice, State FY89 Appropriations Act required the FCC to promulgate regulations to ban indecent broadcasts 24 hours a day.[22] The Commission followed the congressional mandate and promulgated regulations prohibiting all broadcasts of indecent material.[23] The new regulations were challenged, and the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's order.[24] In so doing, the court noted that in *ACT I* it held that Commission "must identify some reasonable period of time during which indecent material may be broadcast," thus precluding a ban on such broadcasts at all times.[25]

In 1992, Congress enacted the Public Telecommunications Act of 1992, which required the FCC to promulgate regulations to prohibit the broadcasting of indecent material from 6 a.m. to midnight, except for broadcasts by public radio and television stations that go off the air at or before midnight, in which case such stations may broadcast indecent material beginning at 10 p.m.[26] The Commission promulgated regulations as mandated in the act.[27] The new regulations were challenged, and a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit subsequently vacated the Commission's order implementing the act and held the underlying statute unconstitutional.[28] In its order implementing the act, the FCC

---

[20] 2 F.C.C. Rcd. 2698, ¶¶ 12 and 15.

[21] 852 F.2d 1332, 1344 (1988).

[22] Pub. L. 100-459, § 608.

[23] *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency*, 4 F.C.C. Rcd. 457 (1988).

[24] *Action for Children's Television v. Federal Communications Commission (ACT II)*, 932 F.2d 1504 (1991), *cert. denied*, 503 U.S. 913 (1992).

[25] *Id* at 1509.

[26] Pub. L. 102-356, § 16, 47 U.S.C. § 303 note.

[27] *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 8 F.C.C. Rcd. 704 (1993).

[28] *Action for Children's Television v. Federal Communications Commission* , 11 F.3d 170 (continued...)

set forth three goals to justify the regulations: (1) ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts; (2) ensuring the well being of minors regardless of supervision; and (3) protecting the right of all members of the public to be free of indecent material in the privacy of their homes.[29] The court rejected the third justification as "insufficient to support a restriction on the broadcasting of constitutionally protected indecent material," but accepted the first two as compelling interests.[30] Despite the finding of compelling interests in the first two, the court found that both Congress and the FCC had failed "to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards."[31]

Following the decision of the three-judge panel, the Commission requested a rehearing *en banc*.[32] The case was reheard on October 19, 1994, and, on June 30, 1995, the full court of appeals held the statute unconstitutional insofar as it prohibited the broadcast of indecent material between the hours of 10 p.m. and midnight on non-public stations.[33] In so doing, the court held that while the channeling of indecent broadcasts between midnight and 6 a.m. "would not unduly burden the First Amendment," the distinction drawn by Congress between public and non-public broadcasters "bears no apparent relationship to the compelling government interests that [the restrictions] are intended to serve."[34] The court remanded the regulations to the FCC with instructions to modify the regulations to permit the broadcast of indecent material on all stations between 10 p.m and 6 a.m.

Current Regulations and Analysis

Following the decision in *ACT III*, the Commission modified its indecency regulations to prohibit the broadcast any material which is indecent on any day between 6 a.m. and 10 p.m.[35] The newly modified regulations became effective

---

[28] (...continued)
(1993).

[29] 8 F.C.C. Rcd. at 705 - 706.

[30] 11 F.3d at 171.

[31] *Id.*

[32] *Action for Children's Television v. Federal Communications Commission*, 15 F.3d 186 (1994).

[33] *Action for Children's Television v. Federal Communications Commission (ACT III)*, 58 F.3d 654 (1995), *cert. denied*, 516 U.S. 1043 (1996).

[34] 58 F.3d at 656.

[35] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 10 F.C.C. Rcd. 10558 (1995); 47 C.F.R. 73.3999(b). Subsection (b) prohibits the broadcast of material which is obscene without any reference to time of day. Broadcast obscenity will not be discussed in this report. For more information on obscenity, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes* and CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Recent Developments and Pending Issues*.

August 28, 1995.[36] These regulations have been enforced primarily with respect to radio broadcasts and thus have been applied to indecent language rather than to images.[37]

To determine whether broadcast material is in fact indecent, the Commission must make two fundamental determinations: (1) that the material alleged to be indecent falls within the subject matter scope of the definition of indecency — the material in question must describe or depict sexual or excretory organs or activities; and (2) that the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.[38] If the material in question does not fall within the subject matter scope of the indecency definition,[39] or if the broadcast occurred during the "safe harbor" hours (between 10 p.m. and 6 a.m.), the complaint is usually dismissed.[40] However, if the Commission determines that the complaint meets the subject matter requirements and was aired outside the "safe harbor" hours, the broadcast in question is evaluated for patent offensiveness.[41] The Commission notes that in determining whether material is patently offensive, the full context is very important, and that such determinations are highly fact-specific.

The Commission has identified three factors that have been significant in recent decisions in determining whether broadcast material is patently offensive:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[42]

An overview and analysis of cases addressing each of these factors follows.

---

[36] 60 FR 44439 (August 28, 1995).

[37] Enforcement actions based on televised broadcast indecency are rare. However, the Commission recently issued a *Notice of Apparent Liability* for the broadcast of indecent material during a televised morning news program. During the program, the show's hosts interviewed performers with a production entitled "Puppetry of the Penis," who appeared wearing capes but were otherwise nude. A performer's penis was exposed during the broadcast. *See In the Matter of Young Broadcasting of San Francisco, Inc.*, File No. EB-02-IH-0786 (January 27, 2004).

[38] *See In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089 (April 6, 2001). http://www.fcc.gov/eb/Orders/2001/fcc01090.html

[39] The Commission dismissed the complaint against broadcast licensees for airing the 2003 Golden Globe Awards, in which performer Bono uttered the phrase "this is really, really f[***]ing brilliant," due primarily to the fact that the language in question did not describe or depict sexual and excretory activities or organs. 18 F.C.C. Rcd. 19859 (2003). *See supra* regarding this case.

[40] *Id.*

[41] *Id.*

[42] *Id* at 5.

Explicitness or Graphic Nature of Material. Generally, the more explicit or graphic the description or depiction, the greater the likelihood that the material will be deemed patently offensive and therefore indecent. For example, the Commission imposed a forfeiture on a university radio station for airing a rap song that included a line depicting anal intercourse.[43] In that case, the Commission determined that the song described sexual activities in graphic terms that were patently offensive and therefore indecent. Since the song was broadcast in the mid-afternoon, there was a reasonable risk that children were in the audience, thus giving rise to the Commission's action.[44]

Broadcasts need not be as graphic as the song in the above case to give rise to the imposition of an FCC forfeiture. Broadcasts consisting of double entendres or innuendos may also be deemed indecent if the "sexual or excretory import is unmistakable."[45] The FCC issued a notice of apparent liability and imposed a forfeiture on several stations for airing a song that included the following lines: "I whipped out my Whopper and whispered, Hey, Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy."[46] The Commission determined that the material was indecent even though it used candy bar names to substitute for sexual activities. In one notice concerning the broadcast of the song, the Commission stated that "[w]hile the passages arguably consist of double entendre and indirect references, the language used in each passage was understandable and clearly capable of specific sexual meaning and, because of the context, the sexual import was inescapable."[47] The nature of the lyrics, coupled with the fact that the song aired between 6 a.m. and 10 a.m., gave rise to the imposition of a forfeiture.

Dwelling or Repetition of Potentially Offensive Material. Repetition of and persistent focus on a sexual or excretory activity could "exacerbate the potential offensiveness of broadcasts."[48] For example, the FCC issued a notice of apparent liability and imposed a forfeiture on a radio station that broadcast an extensive discussion of flatulence and defecation by radio personality "Bubba, the Love Sponge."[49] Though the broadcast did not contain any expletives, the Commission found that the material dwelt on excretory activities and therefore was patently offensive.

While repetition can increase the likelihood that references to sexual or excretory activities are deemed indecent, where such references have been made in

---

[43] *Notice of Apparent Liability, State University of New York*, 8 F.C.C. Rcd. 456 (1993).

[44] *Id.*

[45] *See* note 35, *supra*.

[46] *Notice of Apparent Liability, KGB Incorporated*, 7 F.C.C. Rcd. 3207 (1992). *See also Great American Television and Radio Company, Inc.*, 6 F.C.C. Rcd. 3692 (1990); *WIOD, Inc.*, 6 F.C.C. Rcd. 3704 (1989).

[47] 6 F.C.C. Rcd. 3692.

[48] *See* note 35, *supra*.

[49] *Notice of Apparent Liability, Citicasters Co.*, 13 F.C.C. Rcd. 22004 (1998).

passing or are fleeting in nature, the Commission has found that the reference was not indecent even when profanity has been used. For example, the Commission determined that the following phrase — "The hell I did, I drove mother-f[***]er, oh." — uttered by an announcer during a radio morning show, was not indecent.[50] The Commission declined to take action regarding the broadcast because it contained only a "fleeting and isolated utterance . . . within the context of live and spontaneous programming."[51] Certain fleeting references may, however, be found indecent where other factors contribute to the broadcast's patent offensiveness. For example, the Commission has imposed forfeitures on stations for airing jokes that refer to sexual activities with children.[52]

Pandering or Titillating Nature of Material. In determining whether broadcast material is indecent, the Commission also looks to the purpose for which the material is being presented. Indecency findings generally involve material that is presented in a pandering or titillating nature, or material that is presented for the shock value of its language. For example, the Commission deemed a radio call-in survey about oral sex to be indecent based in part on the fact that the material was presented in a pandering and titillating manner.[53]

Whether a broadcast is presented in a pandering or titillating manner depends on the context in which the potentially indecent material is presented. Explicit images or graphic language does not necessarily mean that the broadcast is being presented in a pandering or titillating manner. For example, the Commission declined to impose a forfeiture on a television station for airing portions of a high school sex education class that included the use of "sex organ models to demonstrate the use of various birth control devices."[54] In dismissing the complaint, the Commission held that "[a]lthough the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating, or vulgar manner."[55]

Recent Enforcement Actions

Apart from the dismissal of the Golden Globe Awards complaint, the Commission has imposed forfeitures on a number of stations for broadcast indecency. We now discuss two of its recent actions.

---

[50] *L.M. Communications of South Carolina, Inc.*, 7 F.C.C. Rcd. 1595 (1992).

[51] *Id.*

[52] *See Notice of Apparent Liability, Temple Radio, Inc.*, 12 F.C.C. Rcd. 21828 (1997); *Notice of Apparent Liability, EZ New Orleans, Inc.*, 12 F.C.C. Rcd. 4147 (1997).

[53] *Notice of Apparent Liability, Rusk Corporation, Radio Station KLOL*, 5 F.C.C. Rcd. 6332 (1990).

[54] *In the Matter of Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co.*, 5 F.C.C. Rcd. 2971 (1990).

[55] *Id.*

Infinity Broadcasting. On October 2, 2003, the Commission issued a *Notice of Apparent Liability* to Infinity Broadcasting for airing portions of the "Opie & Anthony Show" during which the hosts conducted a contest entitled "Sex for Sam" which involved couples having sex in certain "risky" locations throughout New York City in an effort to win a trip.[56] The couples, accompanied by a station employee, were to have sex in as many of the designated locations as possible. They were assigned points based on the nature of the location and the activities in which they engaged. The station aired discussions between the hosts of the show and the station employee accompanying the couples which consisted of descriptions of the sexual activities of the participating couples and the locations in which they engaged in sexual activities. One discussion involved an description of a couple apparently engaging in sexual activities in St. Patrick's Cathedral.

The Commission determined that the broadcast made "graphic and explicit references to sexual and excretory organs and activity" despite the fact that colloquial terms, rather than explicit or graphic terms, were used in the descriptions. The Commission found that "[t]o the extent that the colloquial terms that the participants used to describe organs and activities could be described as innuendo rather than as direct references, they are nonetheless sufficient to render the material actionably indecent because the 'sexual [and] excretory import' of those references was 'unmistakable.'"[57] The Commission also found that the hosts of the show "dwelled at length on and referred repeatedly to sexual or excretory activities and organs," and that "the descriptions of sexual and excretory activity and organs were not in any way isolated and fleeting."[58]

Clear Channel Broadcasting. On January 27, 2004, the Commission issued a *Notice of Apparent Liability* to Clear Channel Broadcasting for repeated airings of the "Bubba, the Love Sponge" program which included indecent material.[59] The Commission found that all the broadcasts in question involved "conversations about such things as oral sex, penises, testicles, masturbation, intercourse, orgasms and breasts."[60] The Commission determined that each of the broadcasts in question contained "sufficiently graphic and explicit references," which were generally repeated throughout the broadcast in a pandering and titillating manner.

In one broadcast, the station aired a segment involving skits in which the voices of purported cartoon characters talk about drugs and sex.[61] The skits were inserted between advertisements for Cartoon Network's Friday-night cartoons. The Commission determined that "the use of cartoon characters in such a sexually explicit

---

[56] *In the Matter of Infinity Broadcasting, et. al.*, EB-02-IH-0685 (October 2, 2003).

[57] *Id* at 8.

[58] *Id* at 9. The Commission noted that the contest portion of the broadcast in question lasted over an hour and was reproduced in a 203-page transcript.

[59] *In the Matter of Clear Channel Broadcasting Licenses, Inc., et. al.*, File No. EB-02-IH-0261 (January 27, 2004).

[60] *Id* at 4.

[61] *Id* at 5.

manner during hours of the day when children are likely to be listening is shocking and makes this segment patently offensive."[62] The Commission also cited the "calculated and callous nature of the stations' decision to impose this predictably offensive material upon young, vulnerable listeners" as "weighing heavily" in its determination.[63]

Congressional Response

In response to the FCC's decision regarding the Golden Globe Awards broadcast, Representative Ose introduced legislation to amend section 1464 of title 18 to define "profane," as used in that section, to include any use of eight specific words or phrases, in any grammatical form.[64]

Legislation has also been introduced, by Representative Upton, to increase the FCC's penalties for broadcasting obscene, indecent, and profane language. H.R. 3717, 108th Congress, would increase the penalties to $275,000 for each violation or each day of a continuing violation, with the total amount assessed for any continuing violation not to exceed $3 million for any single act or failure to act.[65] The bill specifically mentions obscene, indecent, and profane language, but does not appear to impose the increased penalties for broadcast images that are deemed indecent. On February 9, 2004, Senator Brownback introduced S. 2056, 108th Congress, which is virtually identical to H.R. 3717.

On March 3, 2004, the House Committee on Energy and Commerce held a full-committee markup of H.R. 3717. The Committee approved an amendment in the nature of a substitute and ordered the bill to be reported to the full House. The amendment would increase the maximum penalty for the broadcast of indecent material to $500,000 for each violation with no aggregate maximum. Under the amendment, the increased forfeiture penalties could also be imposed on nonlicensees, such as individuals who utter obscene, indecent, or profane material. In determining the appropriate amount of the forfeiture, the bill directs the Commission to consider a number of factors, including whether the material in question was live or recorded, scripted or unscripted, and the size of the viewing audience. The Commission would be required to act on allegations of broadcast indecency within 180 days after the receipt of the allegation.

---

[62] *Id* at 6.

[63] *Id.*

[64] The FCC's indecency regulation, *supra* note 26, prescribes the 10 p.m. to 6 a.m. "safe harbor" for "indecent programming." No comparable regulation addresses profane programming. One might argue, therefore, that the ban on profane programming under 18 U.S.C. § 1464, as it exists now and as it would be amended by H.R. 3687, would apply around the clock. This reading of the statute, however, might render it unconstitutional (*see* note 24, *supra*), and a court might reject it for that reason. *See*, United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) ("a statute is to be construed where fairly possible so as to avoid substantial constitutional questions").

[65] H.R. 3717, 108th Cong.

In addition to the increased penalties, the legislation also provides additional nonmonetary penalties for the broadcast of indecent material. If the Commission determines that a licensee has broadcast obscene, indecent, or profane material, the Commission may require the licensee to broadcast public service announcements that serve the educational and informational needs of children, and such announcements may be required to reach an audience that is up to five times the size of the audience that is estimated to have been reached by the obscene, indecent, or profane material. The legislation also directs the Commission to take into consideration whether the broadcast of obscene, indecent, or profane material demonstrates a lack of character or other qualifications to operate a station. The broadcast of such material would also be considered a serious violation for purposes of license renewal determinations. Finally, if during the term of the license, a broadcast licensee is the subject of three or more proceedings regarding violations of indecency prohibitions, the Commission would be required to commence a proceeding to consider whether the license should be revoked.

Another Senate bill aimed at increasing penalties for broadcast indecency was introduced by Senator Miller on March 1, 2004. S. 2147 would allow the Commission to impose a forfeiture of "25 cents times the number of individuals who witnessed or heard the broadcast as determined by a viewership rating service selected by the Commission" for the broadcast of obscene, indecent, or profane language.[66] The forfeiture could be imposed on broadcast licensees, any applicant for a broadcast license, or any other company or individual that has participated in the broadcast, including producers, general managers, performers, and networks.

In addition, S. 1264, 108th Congress, the FCC Reauthorization Act of 2003, as reported by the Committee on Commerce on September 3, 2003 (prior to the FCC Enforcement Bureau's decision regarding the Golden Globe Awards broadcast), would, in section 11, require that "the broadcast of obscene or indecent matter from more than 1 individual during the same program" be considered separate violations, and that the FCC, unless it determined it not to be in the public interest, revoke the station license or construction permit of any broadcast station licensee or permittee that violates 18 U.S.C. § 1464.

Finally, resolutions have been introduced to express disapproval of the FCC Enforcement Bureau's decision regarding the Golden Globe Awards broadcast: H.Res. 482, H.Res. 500, and S. Res. 283, which the Senate passed on December 9, 2003.

---

[66] S. 2147, 108th Cong.

Would prohibiting the broadcast of "indecent" words regardless of context violate the First Amendment?

In 1978, in *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court upheld, against a First Amendment challenge, an action that FCC took against a radio station for broadcasting a recording of George Carlin's "Filthy Words" monologue at 2 p.m.[67] The Court has not decided a case on the issue of "indecent" speech on broadcast radio or television since then, but it did cite *Pacifica* with approval in 1997, when, in *Reno v. ACLU*, it contrasted regulation of the broadcast media with regulation of the Internet.[68] Nevertheless, the Court in *Reno* did not *hold* that *Pacifica* remains good law, and arguments have been made that the proliferation of cable television channels has rendered archaic *Pacifica*'s denial of full First Amendment rights to broadcast media.

Even if *Pacifica* remains valid in this respect, *Pacifica* did not hold that the First Amendment permits the ban either of an occasional expletive on broadcast media, or of programs that would not be likely to attract youthful audiences, even if such programs contain "indecent" language. On these points, Justice Stevens wrote for the Court in *Pacifica*:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction. . . . The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience. . . .[69]

In a footnote to the last sentence of this quotation, the Court added: "Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to

---

[67] 438 U.S. 726 (1978). The FCC's action was to issue "a declaratory order granting the complaint," and "state that the order would be 'associated with the station's license file,'" which means that the FCC could consider it when it came time for the station's license renewal. *Id.* at 730.

[68] 521 U.S. 844, 868 (1997) (noting that "the history of the extensive regulation of the broadcast medium" and "the scarcity of available frequencies" are factors "not present in cyberspace," and striking down parts of the Communications Decency Act of 1996). The Court also cited *Pacifica* with approval in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-814 (1998), and in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

[69] *Pacifica*, *supra* note 66, at 750. A federal court of appeals subsequently held unconstitutional a federal statute that banned "indecent" broadcasts 24 hours a day, but, in a later case, the same court upheld the present statute, 47 U.S.C. § 303 note, which bans "indecent" broadcasts from 6 a.m. to 10 p.m. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

command the attention of many children. . . ."[70] At the same time, Justice Stevens acknowledged that the Carlin monologue has political content: "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 objects, [however,] not to this point of view, but to the way in which it is expressed."[71] The Court commented: "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."[72]

There appears to be some tension between this comment and the Court's remark about Chaucer, as any attempt to censor Chaucer would presumably also be based not on its ideas but on the way its ideas are expressed. But, as noted above, the Court's remark about Chaucer was a footnote to its comment that "[t]he content of the program in which the language is used will also affect the composition of the audience. . . ." Therefore, the difference that Justice Stevens apparently perceived between Chaucer and Carlin was that, even if both have literary, artistic, or political value, only the latter would be likely to attract a youthful audience. Arguably, then, *Pacifica* would permit the censorship, during certain hours, of the broadcast even of works of art that are likely to attract a youthful audience.[73]

If so, this would be contrary to the Court's opposition, in other contexts, to the censorship of works of art. The Court has held that even "materials [that] depict or describe patently offensive 'hard core' sexual conduct," which would otherwise be obscene, may not be prohibited if they have "serious literary, artistic, political, or scientific value."[74] In addition, the "harmful to minors" statutes of the sort that the

---

[70] *Id.* at 750, n.29.

[71] *Id.* at 746 n.22. These two sentences and the text accompanying note 71, *infra*, although part of Justice Stevens' opinion, are in a part of the opinion (IV-B) joined by only two other justices. Every other quotation from *Pacifica* in this report was from a part of the opinion that a majority of the justices joined.

[72] *Id.* at 746.

[73] There also appears to be some tension between, on the one hand, Justice Stevens' distinction in *Pacifica* between a point of view and the way in which it is expressed, and, on the other hand, the Court's statement in *Cohen v. California* "that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. 15, 26 (1971) (upholding the First Amendment right, in the corridor of a courthouse, to wear a jacket bearing the words "F[***] the Draft"). Arguably, Carlin's use of "indecent" words not only served an emotive purpose, but served to indicate the precise words to whose censorship he was objecting. Yet *Pacifica* was decided after *Cohen*, which suggests that *Cohen* does not lessen the precedential value of *Pacifica*.

[74] Miller v. California, 413 U.S. 15, 27, 24 (1973). In addition, in striking down parts of the

(continued...)

Supreme Court upheld in *Ginsberg v. New York* generally define "harmful to minors" to parallel the Supreme Court's definition of "obscenity," and thus prohibit distributing to minors only material that lacks serious value for minors.[75] This suggests that, if the FCC or Congress prohibited the broadcast during certain hours of "indecent" words regardless of context, the Court might be troubled by the prohibition's application to works with serious value, even though *Pacifica* allowed the censorship of Carlin's monologue, despite its apparently having serious value.

Yet, as noted, Justice Stevens' expressed a distinction in *Pacifica* between a point of view and the way in which it is expressed, and, though a majority of the justices did not join the part of the opinion that drew this distinction, a majority of the justices, by concurring in *Pacifica*'s holding, indicated that the political (or literary or artistic) content of Carlin's monologue did not prevent its censorship during certain hours on broadcast radio and television. Therefore, it appears that, in deciding the constitutionality of an FCC or a congressional action prohibiting the broadcasting, during certain hours, of material with "indecent" words, the Court might be troubled by its application to works with serious value only if those works would, like Chaucer's, not likely attract a substantial youthful audience.

In sum, the Court did not hold that the FCC could prohibit an occasional expletive, and did not hold that the FCC could prohibit offensive words in programs — even prime-time programs — that children would be unlikely to watch or listen to. The Court did not hold that the FCC could *not* take these actions, as the question whether it could was not before the Court. But the Court's language quoted above renders *Pacifica* of uncertain precedential value in deciding whether a ban, during certain hours, on the broadcast of "indecent" words regardless of context would be constitutional.

In the "Filthy Words" monologue, as the Supreme Court described it, George Carlin "began by referring to his thoughts about 'the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever.' He proceeded to list those words and repeat them over and over in a variety of colloquialisms." The FCC, at the time, used essentially the same standard for "indecent" that it uses today: "[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary

---

[74] (...continued)
Communications Decency Act of 1996, the Court expressed concern that the statute may "extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Reno v. ACLU*, *supra* note 67, 521 U.S. at 878. And, in striking down a federal statute that prohibited child pornography that was produced without the use of an actual child, the Court expressed concern that the statute "prohibits speech despite its serious literary, artistic, political, or scientific value." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002). In neither of these cases, however, did the Court state that its holding turned on the statute's application to works of serious value.

[75] 390 U.S. 629 (1968).

community standards for the broadcast medium, sexual or excretory activities and organs. . . ."[76]

Most of Carlin's uses of the "filthy words," it appears from reading his monologue, which is included as an appendix to the Court's opinion, seem designed to show the words' multiple uses, apart from describing sexual or excretory activities or organs. Nevertheless, "the Commission concluded that certain words depicted sexual or excretory activities in a patently offensive manner. . . ."[77] Therefore, one might argue that, even if, under *Pacifica*, the First Amendment does not protect, during certain hours, the use on broadcast media of words that depict sexual or excretory activities in a patently offensive manner, it nevertheless might protect the use of those same words "as an adjective or expletive to emphasize an exclamation" (to quote the FCC's opinion in the Bono case).

A counterargument might be that, in *Pacifica*, the Court noted that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[78] This suggests the possibility that the Court would have ruled the same way in *Pacifica* if the FCC had defined "indecent" loosely enough to include the use of a patently offensive word "as an adjective or expletive to emphasize an exclamation." But this is speculative, as the Court did not so rule. Further, as noted above, Court emphasized the narrowness of its holding, noting that it had "not decided that an occasional expletive . . . would justify any sanction. . . ."

On what basis did the Court in *Pacifica* find that the FCC's action did not violate the First Amendment? In Part IV-C of opinion, which was joined by a majority of the justices, Justice Stevens wrote:

> [O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367.
>
> The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept.*, 397 U.S. 728. . . . To say that one may avoid further offense by turning

---

[76] *Pacifica*, *supra* note 66, at 731-732.

[77] *Id.* at 732 (distinguishing "indecent" from "obscene" and "profane" in 18 U.S.C. § 1464).

[78] *Id.* at 740.

> 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.
>
> Second, broadcasting is uniquely accessible to children, even those too young to read. . . . Bookstores and motion picture theaters . . . may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. . . .[79]

In sum, the Court held that, on broadcast radio and television, during certain times of day, certain material may be prohibited because (1) it is patently offensive and indecent, and (2) it threatens the well-being of minors and their parents' authority in their own household. This raises the question of the extent to which the Court continues to allow the government (1) to treat broadcast media differently from other media, and (2) to censor speech on the ground that it is patently offensive and indecent, or threatens the well-being of minors and their parents' authority in their own household.

Broadcast media. In *Red Lion Broadcasting Co. v. FCC*, which the Court cited in the above quotation from *Pacifica*, the Court upheld the FCC's "fairness doctrine," which "imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."[80] The reason that the Court upheld the imposition of the fairness doctrine on broadcast media, though it would not uphold its imposition on print media, is that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[81] "Licenses to broadcast," the Court added, "do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three years. 47 U.S.C. § 307(d). The statute mandates the issuance of licenses if the 'public convenience, interest, or necessity will be served thereby.' 47 U.S.C. § 307(a)."[82]

The Court in *Red Lion* then noted:

> It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest . . . this condition no longer prevails so that continuing control is not justified. To this there are several answers. Scarcity is not entirely a thing of the past.[83]

---

[79] *Id.* at 748-750.

[80] 395 U.S. 367, 369 (1969).

[81] *Id.* at 388.

[82] *Id.* at 394.

[83] *Id.* at 396.

With the plethora of cable channels today, has spectrum scarcity now become a thing of the past? In *Turner Broadcasting System, Inc. v. FCC*, the Court held that the scarcity rationale does not apply to cable television:

> [C]able television does not suffer from the inherent limitations that characterize the broadcast medium . . . [S]oon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to use the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of a more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation."[84]

One might argue that, if the scarcity rationale does not apply to cable television, then it should not apply to broadcast television either, because a person who because of scarcity cannot start a broadcast channel can start a cable channel.[85] But the Court has not ruled on the question; in *Turner* it wrote: "Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here."[86]

In 1987, however, the FCC abolished the fairness doctrine, on First Amendment grounds, noting that technological developments and advancements in the telecommunications marketplace have provided a basis for the Supreme Court to reconsider its holding in *Red Lion*. The FCC's decision was upheld by the U.S. Court of Appeals for the District of Columbia, and the Supreme Court declined to review the case.[87] The court of appeals did not rule on constitutional grounds, but rather concluded "that the FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion, and [we] are convinced that it would have acted on that finding to terminate the doctrine even in the absence of its belief that the doctrine was no longer constitutional."[88]

Thus, *Red Lion* has not been overruled, but the advent of widespread cable television may weaken the scarcity rationale, and thus may weaken *Red Lion* as a

---

[84] 512 U.S. 622, 639 (1994).

[85] In the court of appeals decision upholding the current statute that bans "indecent" broadcasts from 6 a.m. to 10 p.m., a dissenting judge wrote of "the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators. No one disputes that cable exhibits more and worse indecency than does broadcast. And cable television is certainly pervasive in our country." Action for Children's Television v. FCC, *supra* note 68, 58 F.3d at 671 (emphasis in original) (Edwards, C.J., dissenting).

[86] *Id.* at 638 (citation omitted).

[87] Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[88] *Id.* at 669. In *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993) (en banc), the court of appeals held that Congress had not codified the fairness doctrine and that the FCC's decision to eliminate it was a reasonable interpretation of the statutory requirement that licensees operate in the public interest.

precedent, which in turn may weaken *Pacifica* as a precedent, as *Pacifica* relied in part on *Red Lion*. Yet, even if *Red Lion* no longer provides a strong basis for distinguishing broadcast television from cable television, other bases for distinguishing them have been offered. In *Community Television v. Wilkinson*, a federal district court held that *Pacifica* does not apply to cable television because of several differences between cable and broadcasting.[89] For one, "[i]n the cable medium, the physical scarcity that justifies content regulation in broadcasting is not present."[90] For another, as a subscriber medium, "cable TV is not an intruder but an invitee whose invitation can be carefully circumscribed."[91] In *Pacifica*, as noted above, the Court compared broadcast media to an intruder. This rationale may still stand as a basis for applying *Pacifica* to restrictions on broadcast media. As noted, however, if the Court continues to apply *Pacifica* to restrictions on broadcast media, this does not necessarily mean that it would uphold a ban on the broadcast of "indecent" language regardless of context, as *Pacifica* did not hold "that an occasional expletive . . . would justify any sanction. . . ."

Strict scrutiny. We now consider the analysis that the Court might apply if it chooses not to apply *Pacifica* in deciding the constitutionality of a ban on the broadcast of "indecent" language regardless of context. The Court in *Pacifica*, as noted, offered two reasons why the FCC could prohibit offensive speech on broadcast media: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home. . . . Second, broadcasting is uniquely accessible to children, even those too young to read," and the government has an interest in the "well-being of its youth"and "in supporting 'parents' claim to authority in their own household.'"[92] The first of these reasons apparently refers to adults as well as to children.

Ordinarily, when the government restricts speech, including "indecent" speech, on the basis of its content, the restriction, if challenged, will be found constitutional only if it satisfies "strict scrutiny."[93] This means that the government must prove that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[94] The Court in *Pacifica* did not apply this test or any weaker First Amendment test, and did not explain why it did not. Its

---

[89] 611 F. Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987) (striking down Utah Cable Television Programming Decency Act). The court of appeals did not discuss the constitutional issue beyond stating that it agreed with the district court's reasons for its holding. 800 F.2d at 991. A summary affirmance by the Supreme Court, as in this case, is "an affirmance of the judgment only," and does not indicate approval of the reasoning of the court below. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

[90] *Id.* at 1112.

[91] *Id.* at 1113.

[92] *See*, note 78, *supra*.

[93] Sable Communications of California v. Federal Communications Commission, 492 U.S. 115 (1989); Action for Children's Television v. FCC, *supra* note 68, 932 F.2d at 1509.

[94] *Id.* at 126.

reason presumably was that the FCC's action restricted speech only on broadcast media. If, however, the Court were not to apply *Pacifica* in determining the constitutionality of a ban, during certain hours, on the broadcast of "indecent" language regardless of context, then it would apparently apply strict scrutiny.

If the Court were to apply strict scrutiny in making this determination, it seems unlikely that it would find the first reason cited in *Pacifica* — sparing citizens, including adults, from patently offensive or indecent words — to constitute a compelling governmental interest. The Court has held that the government may not prohibit the use of offensive words unless they "fall within [a] relatively few categories of instances," such as obscenity, fighting words, or words "thrust upon unwilling or unsuspecting viewers."[95]

If the Court were to apply strict scrutiny in determining the constitutionality of a ban, during certain hours, on the broadcast of "indecent" language regardless of context, it also might not find the second reason cited in *Pacifica* — protecting minors from patently offensive and indecent words and "supporting 'parents' claim to authority in their own household'" — to constitute a compelling governmental interest. When the Court considers the constitutionality of a restriction on speech, it ordinarily — even when the speech lacks full First Amendment protection and the court applies less than strict scrutiny — requires the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[96] With respect to restrictions designed to deny minors access to sexually explicit material, by contrast, the courts appear to assume, without requiring evidence, that such material is harmful to minors, or to consider it "obscene as to minors," even if it is not obscene as to adults, and therefore not entitled to First Amendment protection with respect to minors, whether it is harmful to them or not.[97] A word used as a mere adjective or expletive,

---

[95] Cohen v. California, *supra* note 72, 403 U.S. at 19, 21. Under *Pacifica*, broadcast media do thrust words upon unwilling or unsuspecting viewers, but, if a court were to apply strict scrutiny to a ban on the broadcast of "indecent" language regardless of context, then it would not be following *Pacifica*.

[96] *Turner Broadcasting*, *supra* note 83, 512 U.S. at 664 (incidental restriction on speech). *See also*, Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) (restriction on campaign contributions). In all three of these cases, the government had restricted less-than-fully protected speech, so the Court did not apply strict scrutiny. Because offensive words are apparently entitled to full First Amendment protection (except under *Pacifica* and in the instances cited in the text accompanying note 94, *supra*), it seems all the more likely that the Court, if it applied strict scrutiny instead of *Pacifica* to a challenge to a ban on the broadcast of "indecent" words regardless of context, would require the government to demonstrate that harms it recites are real and that the ban would alleviate these harms in a direct and material way.

[97] Interactive Digital Software Association v. St. Louis County, Missouri, 329 F.3d 954, 959 (8th Cir. 2003). The Supreme Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, *supra* note 92, 492 U.S. at 126. The Court has also upheld a state law banning the

(continued...)

however, does not constitute sexually oriented material. Therefore, if a court applied strict scrutiny to decide the constitutionality of a ban, during certain hours, on the broadcast of "indecent" words regardless of context, then, in determining the presence of a compelling interest, the court might require the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." This could

---

[97] (...continued)
distribution to minors of "so-called 'girlie' magazines" even as it acknowledged that "[i]t is very doubtful that this finding [that such magazines are "a basic factor in impairing the ethical and moral development of our youth"] expresses an accepted scientific fact." Ginsberg v. New York, *supra* note 74, 390 U.S. at 631, 641. "To sustain state power to exclude [such material from minors]," the Court wrote, "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641. *Ginsberg* thus "invokes the much less exacting 'rational basis' standard of review," rather than strict scrutiny. *Interactive Digital Software Association, supra,* 329 F.3d at 959.

A federal district court wrote:

> We are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest. We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved.

Playboy Entertainment Group, Inc. v. United States, 30 F. Supp.2d 702, 716 (D. Del. 1998); *aff'd*, 529 U.S. 803 (2000). ("Signal bleed" refers to the audio or visual portions of cable television programs that non-subscribers to a cable channel may be able to hear or see despite the fact that the programs have been "scrambled" to prevent the non-subscribers from hearing or seeing them.) The district court therefore found that the statute served a compelling governmental interest, though it held it unconstitutional because it found that the statute did not constitute the least restrictive means to advance the interest. The Supreme Court affirmed on the same ground, apparently assuming the existence of a compelling governmental interest, but finding a less restrictive means that could have been used.

In another case, a federal court of appeals, upholding the current statute that bans "indecent" broadcasts from 6 a.m. to 10 p.m., noted "that the Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would 'impair[ ] [their] *ethical and moral* development. . . . Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC., *supra* note 68, 58 F.3d at 662 (brackets and italics supplied by the court). A dissenting judge in the case noted that, "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful — indeed, the nature of the alleged 'harm' is never explained." *Id.* at 671 (D.C. Cir. 1995) (Edwards, C.J., dissenting).

raise the question, not raised in *Pacifica*, of whether hearing such words is harmful to minors. More precisely, it might raise the question of whether hearing such words on broadcast radio and television is harmful to minors, even in light of the opportunities for minors to hear such words elsewhere. If the government failed to prove that hearing certain words on broadcast radio or television is harmful to minors, then a court would not find a compelling interest in censoring those words and might strike down the law.

It might still uphold the law, however, if it found that the law served the government's interest "in supporting 'parents' claim to authority in their own household,'" and that this is a compelling interest independent from the interest in protecting the well-being of minors. In *Ginsberg v. New York*, the Court referred to the state's interest in the well-being of its youth as "independent" from its interest in supporting "parents' claim to authority in their own household to direct the rearing of their children."[98] The holding in *Ginsberg*, however, did not turn on whether these interests are independent, and one might argue that they are not, because the government's interest in supporting parents lies in supporting them in protecting their children from harmful influences. If "indecent" words are not a harmful influence, then, arguably, the government has no interest, sufficient to override the First Amendment, in supporting parents in their efforts to prevent their children's access to them. It has also been argued that "a law that effectively *bans* all indecent programming . . . does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my . . . television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming."[99]

If the government could persuade a court that a ban, during certain hours, on the broadcast of "indecent" words regardless of context serves a compelling interest — either in protecting the well-being of minors or in supporting parents' claim to authority — the government would then have to prove that the ban was the least restrictive means to advance that interest. This might raise questions such as whether it is necessary to prohibit particular words on weekdays during school hours, solely to protect pre-school children and children who are home sick some days. In response to this question, the government could note that the broadcast in *Pacifica* was at 2 p.m. on a Tuesday, but was nevertheless considered a "time[ ] of the day when there is a reasonable risk that children may be in the audience."[100] More significantly, however, a court might find a ban too restrictive because it would prohibit the broadcast, between certain hours, of material, including works of art and other material with serious value, that would not attract substantial numbers of youthful viewers or listeners.

---

[98] *Ginsberg*, *supra* note 74, 390 at 640, 639. *See also*, Action for Children's Television v. FCC, *supra* note 68, 58 F.3d at 661.

[99] Action for Children's Television v. FCC, *supra* note 68, 58 F.3d at 670 (emphasis in original) (Edwards, C.J., dissenting).

[100] *Pacifica*, *supra* note 66, 438 U.S. at 732.

In conclusion, it appears that, if a court were to apply strict scrutiny to determine the constitutionality of a ban on the broadcast of "indecent" language regardless of context, then it might require the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." This would mean that the government would have to demonstrate a compelling governmental interest, such as that hearing "indecent" words on broadcast radio and television is harmful to minors, despite the likelihood that minors hear such words elsewhere, or that banning "indecent" words is necessary to support parents' authority in their own household. If the government could not demonstrate a compelling governmental interest, then the court might find the ban unconstitutional. Even if the government could demonstrate a compelling interest, a court might find the ban unconstitutional if it applied to material with serious value, at least if such material would not attract substantial numbers of youthful viewers or listeners.

Whether a court would apply strict scrutiny would depend upon whether, in light of the proliferation of cable television, it finds *Red Lion* to continue to permit government regulation of the content of speech on broadcast radio and television. If a court does find that *Red Lion* continues to permit government regulation of the content of speech on broadcast radio and television, then the court would be faced with questions that *Pacifica* did not decide: whether, on broadcast radio and television during hours when children are likely to be in the audience, the government may prohibit an "indecent" word used as an occasional expletive, or in material that would not attract substantial numbers of youthful viewers or listeners.