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DECENCY REDUX: THE CURIOUS HISTORY OF THE NEW FCC BROADCAST INDECENCY POLICY

John Crigler and William J. Byrnes*

O Lord what a row you're making
Molly Bloom1

This Article explores the question whether “indecent” speech can be regulated decently. Indecent speech is a term of art. It derives from title 18, section 1464, of the United States Code, which provides that: “Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.”2 The standard used by the Federal Communications Commission (FCC or Commission) in enforcing this statute was determined by, and for many years narrowly limited to, the facts of a comic routine considered by the United States Supreme Court in FCC v. Pacifica Foundation.3 In that case, the Supreme Court, in a plurality opinion, upheld an FCC ruling that George Carlin’s twelve-minute monologue, titled “Filthy Words,” broadcast at 2 p.m. when children were in the audience,4 was “patently offensive.” The Pacifica decision affirmed the Commission’s constitutional authority to “channel” the “repetitive, deliberate use”5 of words that referred to excretory or sexual activities or organs in an offensive—but non-obscene6—fashion. In the wake of this decision, the Commission adopted a

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4. Id. at 732.
5. Id. at 739.
6. Obscene matter is governed by the three prong standard set forth by the United States Supreme Court in Miller v. California, 413 U.S. 15, 24 (1973):
(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. (citations omitted).

Obscene matter is proscribed by 18 U.S.C. § 1464, whereas indecent matter is protected by
policy of regarding as actionably "indecent" only those broadcasts which repetitively used one or more of Carlin's "seven dirty words" before 10:00 p.m. For almost a decade, this simple standard was understood and generally followed by broadcasters.

In the fall of 1986, everything began to change, although perhaps no one—and certainly not the broadcasters who were the unwitting agents of the change—had any clear idea what form the changes would ultimately take. That answer still remains uncertain. Although an appropriations bill signed into law on October 1, 1988 and a resulting FCC regulation ban the broadcast of any "indecent" material at any hour of the day or night, the effectiveness of the ban has been stayed by the United States Court of

the first amendment and can be restricted or channelled only in order to limit children's access. See Public Notice, New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 2 FCC Rcd 2726 (released Apr. 29, 1987) [hereinafter Indecency Public Notice]. The test for indecent material is thus a version of the second prong of the Miller test. Prong one is irrelevant since "indecent" material need not appeal to prurient interests; and prong three is inapplicable since material could be indecent even if it possesses "serious literary, artistic, political or scientific value." See infra notes 46-72, 119-22 and accompanying text.

7. The seven words which George Carlin ironically proved you "definitely wouldn't say, ever" on the public airwaves were: Shit, fuck, piss, cunt, cocksucker, motherfucker and tits. See Pacifica Found., 438 U.S. at 751.

8. Since 1978, the Commission had followed an assumption, established in WGBH Educ. Found., 69 F.C.C.2d 1250 (1978), that indecent language would not be actionable if broadcast after 10:00 p.m.

9. No actions were taken against broadcast licensees between 1975 and 1987. See Infinity Broadcasting Corp., 3 FCC Rcd 930 (1987) [hereinafter Reconsideration Order]. Prior to the 1987 indecency initiative, the Federal Communications Commission (FCC or Commission) received approximately 20,000 indecency complaints annually. See infra note 90 and accompanying text.


12. Some 17 parties, comprised of the petitioners in Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (discussed infra notes 110-36 and accompanying text), joined by Pacifica and the ACLU, have petitioned for review of this action. See Petition for Review, Action for Children's Television v. FCC, No. 88-1916 (D.C. Cir. filed Dec. 30, 1988). The petitioners claim that twenty-four-hour enforcement constitutes an unconstitutional outright ban of indecent speech, as opposed to permissible "channelling", and that it is an overly restrictive means of promoting the government's interest in regulating exposure of children to indecent material. Id.; see also supra note 5 and accompanying text; infra notes 149, 188 and accompanying text.
Appeals for the District of Columbia Circuit until the court can consider the constitutionality of the ban.  

The legal gridlock that now exists is one indication of the controversial and far-reaching effects of the changes in the FCC's indecency policy. Standards which developed in the context of radio and applied only to seven particular words have not only been expanded to include an indefinite range of verbal suggestion and innuendo, but have been extended to other media as well. The generic definition of indecency includes "depictions" as well as descriptions, and the FCC has clearly indicated its intent to apply its indecency standards to televised images. The FCC has also exported its expanded definition of indecency to telephonic communications and used the indecency rationale to crack down on "dial-a-porn" services. The constitutionality of the regulation of indecency in the common carrier field is now before the Supreme Court in FCC v. Sable Communications, Inc.  


14. Indecency Public Notice, supra note 6, at 2726. On June 23, 1988, the Commission announced its intention to issue a Notice of Apparent Liability for a $2,000 forfeiture against KZKC-TV, Kansas City, Missouri, concluding that the station's broadcast of the film Private Lessons violated the new indecency standard. FCC News Release 2 (June 23, 1988). However, because the Commission never released the full text of its order, no "official" action was taken against KZKC. See MCI v. FCC, 515 F.2d 385 (D.C. Cir. 1975) (FCC action not official until final order released).  

Prior to issuance of the Commission's notice, the D.C. Circuit vacated and remanded two Commission actions regarding evening broadcasts. See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988). Because of resulting uncertainty over the propriety of the manner in which the FCC was implementing its new policy, the Commission stayed release of the KZKC Notice of Apparent Liability. See Order Staying Release of Notice of Apparent Liability, Kansas City Television, Ltd. (Debtor-in-Possession), FCC No. 88-274 (Aug. 5, 1988). Nevertheless, the FCC has made it clear that it does not intend to limit the reach of its new policy to radio broadcasts of "indecent" language. See also supra note 116.  

While sweeping changes in the regulation of speech inevitably raise broad constitutional and policy questions, they also raise humbler questions about how law is made and enforced. This Article supplements its discussion of the regulation of speech with glimpses of the administrative lawmaking process and the effects of that process: the political forces that influence the Commission's policy decisions and transmute established administrative procedures into hybrid forms; the exasperating difficulty a broadcaster encounters in translating vague, new standards into guidelines precise enough for its staff to determine whether a Bessie Smith song or a reading from Allen Ginsberg can be broadcast; and the anger a broadcaster such as Pacifica feels at being singled out for violating a new standard, adopted without notice or opportunity to comment.

Readers should be aware that the authors may be biased by their representation of the Pacifica Foundation (Pacifica) as its communications counsel. Pacifica is a non-profit foundation, formed in 1946 and currently the licensee of six noncommercial educational FM broadcast stations: KPFA and KPFB, Berkeley, California; KPFK, Los Angeles, California; KPFT, Houston, Texas; WBAI, New York, New York; and WPFW, Washington, D.C. Pacifica has a longstanding reputation for "provocative programming"...
and has frequently been attacked for broadcasting literary or political material which some listeners find objectionable.\(^\text{17}\) As it appeared that Pacifica II was in the making, the authors, in light of the Commission's history of singling out Pacifica for attack, often recalled the scene from the film Casablanca in which the Chief of Police, played by Claude Rains, strenuously professes mock indignation over the discovery of conduct of which he has long been aware and orders his men to "round up the usual suspects."\(^\text{18}\)

I. THE FCC DECISIONS: EMERGENCE OF A NEW INDECENCY POLICY

A. The Shift to a "Generic" Standard

In the fall of 1986, Pacifica, as licensee of KPFK-FM radio, Los Angeles, was advised by the Chief of the FCC's Mass Media Bureau that the FCC had received letters from citizens complaining of "obscene or indecent programming broadcast during the evening hours on Station KPFK-FM."\(^\text{19}\) The letter reminded Pacifica of the Commission's statutory authority to take action against licensees who engage in broadcasting obscene or indecent programming, but noted that the Commission had made no determination as to the merits of the complaints. The Bureau directed the Chairman of Pacifica to comment on the attached complaints within 30 days. The comments were to "include any information which [he] believe[d] may aid the Commission in determining whether the subject programming is 'obscene or indecent.'"\(^\text{20}\)

The complaint letters involved two separate broadcasts aired on KPFK-FM. The first broadcast contained excerpts from Jerker, a recent play by Robert Chesley being presented in Los Angeles at that time.\(^\text{21}\) A discussion of and readings from the play had been broadcast between 10:00 and 11:00 p.m. on "IMRU," a regularly scheduled program directed toward the gay population of Los Angeles.\(^\text{22}\) The broadcast was preceded by a warning that

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\(^{17}\) See, e.g., Pacifica Found., 1 Rad. Reg. (P&F) 747 (1964) (complaints regarding readings from the works of Edward Albee, Lawrence Ferlinghetti, Robert Creeley and others); Pacifica Found., 95 F.C.C.2d 750 (1983) (petition to deny application for renewal of WPFW license on grounds that the station was overly critical of U.S. government and broadcast offensive, vulgar and indecent programs).

\(^{18}\) Casablanca (Warner Brothers 1942).

\(^{19}\) Letter from James C. McKinney, Chief, Mass Media Bureau, FCC, to Jack O'Dell, Chairman, Pacifica Foundation, Inc. (Sept. 22, 1986).

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) The unpublished play Jerker was being performed at Celebration Theatre in Hollywood, California. It was subsequently performed at the Sanford Meisner Theater in New York. See N.Y. Times, Apr. 30, 1987, at C6, col. 5.
the program contained sensitive language. The play dramatized the reflections of a man dying from Acquired Immune Deficiency Syndrome (AIDS). Excerpts of these reflections read on the air contained bitter commentary on the immorality of the Vietnam war and graphic references to homosexual sex. The letter complaining of the broadcast expressed concern over the effect this material might have had if the complainant's children had heard the broadcast.

The second complaint arose from the broadcast of a live program entitled "Shocktime U.S.A.," produced and performed by a local multi-media performance art company. One of the members of the company made unscripted remarks containing profanity, which the complaining listener found offensive.

The Commission did not limit its investigation to Pacifica. On September 22, 1986 and November 14, 1986, the FCC sent similar inquiries based on listener complaints to two other radio licensees, the Regents of the University of California, licensee of KCSB-FM, Santa Barbara, California, and Infinity Broadcasting Corporation, licensee of WYSP-FM, Philadelphia, Pennsylvania. The complaints against Infinity arose from several episodes of a regular 6:00 a.m. - 10:00 a.m. program featuring Howard Stern, a leading exponent of the "shock radio" format, which features provocative discussions of controversial topics and vituperative satire. Complaints focused on material involving references which were explicitly sexual or which contained sexual innuendo and double entendre.

The Commission's letter to the University of California Board of Regents targeted the lyrics of a song called "Makin' Bacon," played on Saturday night shortly after 10 p.m. during a student-run, progressive music radio program. As suggested by the colloquial meaning of the song's title, the song consists of an invitation to engage in various sexual activities. Like the

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24. On April 30, 1987, the New York Times reviewed the New York production of Jerker. Critic Stephen Holdern observed that the play's "gamy language" served "a poignant purpose by pointing out, more bluntly than any other play dealing with Acquired Immune Deficiency Syndrome, how the epidemic has threatened one of the fundamental reasons for an entire group's very existence — its freedom of erotic expression — and challenged its hard-won self-esteem." N.Y. Times, Apr. 30, 1987, at C6, col. 5.
26. Pacifica Found., 2 FCC Rcd at 2698. No action was taken with respect to this complaint.
27. See Regents of the Univ. of California, 2 FCC Rcd 2703 (1987).
29. Id.
30. Univ. of California, 2 FCC Rcd at 2703.
Stem material, the song contained some explicitly sexual references and others involving sexual innuendo.

By transmitting complaint letters to licensees with a request for submission of responsive comments, the Mass Media Bureau appeared to follow established Commission practice for investigating alleged violations of the indecency statute. In responding to the Bureau's letter, none of the licensees had any reason to assume that they were participating in anything other than a routine staff investigation. The Bureau's directive to include information helpful in determining if the broadcasts in question were obscene or indecent, gave no warning that the applicable indecency standards would not be those prescribed by the FCC's indecency policy as it then existed.

Not until well after the licensees had submitted their comments did it become apparent that the three inquiries were part of a concerted effort to change existing policy.

Although rumors abounded as the trade press reported news of the Commission's three ongoing investigations, the first solid indication of a change in the Commission's indecency policy came on April 16, 1987, when the

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31. The Commission's rules delegate to the Mass Media Bureau authority by which it "develops, recommends and administers" the Commission's established policies and programs, and investigates complaints. 47 C.F.R. § 0.61 (1987). While the Commission may also delegate authority to order sanctions, 47 U.S.C. § 155(c)(1),(4) (1982), any party aggrieved thereby may apply to the Commission for review, id. § 155(c)(4), and the order does not become final until affirmed by the Commission. Id. Section 1.80(a)(4) of the Commission's rules provides for the assessment of monetary forfeitures against any person found to have violated 18 U.S.C. § 1464 (1982). 47 C.F.R. § 1.80(a)(4). However, before this sanction can be imposed pursuant to a Mass Media Bureau investigation, the alleged violator is entitled to additional process. Id. § 1.80(d). A Notice of Apparent Liability must be issued, and the affected party afforded a reasonable period of time in which to show why a forfeiture penalty should not be imposed, or should be reduced or remitted. Id. § 1.80(f)(3). Following this opportunity, the Commission must issue an order requiring payment, or reducing or remitting the penalty. Id. § 1.80(f)(4). Investigation and subsequent sanction of licensees for violation of the Commission's indecency policy have generally followed this pattern during periods when such policies remain settled and relatively stable. See, e.g., Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P&F) 285, recon. denied, 41 F.C.C.2d 777 (1973), aff'd sub nom. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975); Eastern Educ. Radio, 24 F.C.C.2d 408 (1970). When instituting a change of course, the Commission has resorted to the "raised eyebrow" technique, in which it gives licensees informal hints of a policy change before liability is imposed. See Illinois Citizens Comm., 515 F.2d at 407-10 & n.1 (Bazelon, J., dissenting). If a broadcast licensee violates the indecency statute (18 U.S.C. § 1464), the FCC is empowered to revoke its operating authority, 47 U.S.C. § 312(a)(6), issue cease and desist orders, id. § 312(b)(2), and impose monetary fines, id. § 503(b)(1)(D).


34. The Commission's meeting on indecency came on the next to last day of the tenure of Chairman Mark Fowler—whose chairmanship had been distinguished by indefatigable reli-
Commission announced that it would issue Memorandum Opinions and Orders declaring that the three broadcasters, and one amateur radio operator, had broadcast indecent speech in violation of 18 U.S.C. § 1464. The FCC also announced that it was forwarding the tapes supplied by Pacifica to the U.S. Department of Justice "for its consideration as to whether a criminal prosecution [for broadcasting obscenity] pursuant to 18 U.S.C. Section 1464 [was] appropriate."

On April 29, 1988, the Commission issued the text of the orders to four individual licensees, as well as a Public Notice announcing that the new indecency policy would henceforth be applicable to all broadcasters. The Public Notice characterized the orders concerning Pacifica, the Board of Regents, Infinity, and the private radio licensee as declaratory rulings with binding precedential effect. In each instance, the Commission disposed of the licensee's comments as if they were formal legal arguments about the efficacy of the newly created standard rather than simply informational responses to which existing standards would be applied.

In the orders to the licensees and the related Public Notice, the Commission announced that it would no longer limit the definition of indecency to Carlin's "seven dirty words," but would thereafter apply the "generic" definition of indecency set forth in Pacifica. That definition included all "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Because this generic definition involves numerous subjective judgments as to what, at any given time, is

ance upon the decisions of the marketplace and avoidance of regulatory intervention. Television critic Tom Shales observed the irony in writing:

When the Federal Communications Commission declared last week that it was going to crack down on sexually explicit language in broadcasting, it was slapping itself on the wrist. Or shooting itself in the foot . . . . In an ironic way, the dirty-words decision last week is like the first coat of farewell tar-and-feathers for Fowler, who officially left office on Friday.


35. Indecency Public Notice, supra note 6, at 2726.
36. Pacifica Found., 2 FCC Rcd at 2701; see also Letter from Diane S. Killory, General Counsel, FCC, to William D. Weld, Assistant Attorney General, Criminal Division, U.S. Department of Justice (Apr. 30, 1987); infra note 110 and accompanying text.
37. Indecency Public Notice, supra note 6, at 2726.
38. Id. at 2727.
39. Pacifica Found., 2 FCC Rcd at 2698, Univ. of California, 2 FCC Rcd at 2703; Infinity Broadcasting, 2 FCC Rcd at 2704; Indecency Public Notice, supra note 6, at 2726.
40. Indecency Public Notice, supra note 6, at 2726.
"patently offensive" according to "community standards for the broadcast medium," it necessarily provides licensees with a murky standard of lawful conduct.

Anticipating constitutional objections, the Commission pointed out that it was following the nuisance rationale relied upon by the Supreme Court in *Pacifica*,1 rather than invoking its general authority to regulate the broadcast medium based on spectrum scarcity.2 Under the nuisance analysis, speech protected by the first amendment may be subject to reasonable time, place, and manner restrictions in order to advance a substantial government interest.3 The Commission asserted that its new indecency policy continued to "channel" the speech in question, rather than to prohibit it.4 A broadcast of definitionally indecent speech would be permissible so long as the broadcast occurred when there was no "reasonable risk" that children were in the audience.5

**B. Unanswered Questions: The Role of Context, Merit and the "Safe Harbor" Rule**

Although the Commission emphasized the importance of protecting the sensibilities of children, it did not define "children" or explain what it meant by "reasonable risk." It specified no time of day at which the risk of allowing the broadcast of indecent material would be deemed unreasonable.6 It alluded to, but did not explain, the significance of "context" and noted only that if a broadcaster went beyond the use of "expletives," context would be considered to determine whether the broadcast was "in fact" indecent.7 The language of the Orders seemed to suggest that context was relevant merely in determining whether innuendo or suggestion "in fact" referred to sexual or excretory activities.8

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2. Id.
5. Id.
6. Prior to the 1987 indecency initiative, the Commission followed an informal policy of permitting a broadcaster to air some of the words at issue in *Pacifica* at times after 10:00 p.m. *See supra* note 8 and accompanying text. In the 1987 Indecency Public Notice, the Commission indicated that it was rescinding this "safe harbor" exception, but did not clearly set forth the time at which it now considered it unlikely that children would be in the audience. *See* Indecency Public Notice, *supra* note 6, at 2726-27.
8. This suggestion also seemed borne out in the *University of California* and *Infinity* rulings where the Commission noted that innuendo could be "rendered explicit by surrounding explicit references that make the meaning of the entire discussion clear." Regents of the Univ.
1. Context, Merit, and the Bloomsday that Almost Wasn't

The Commission's decision to enforce a "generic" definition of indecency generally left broadcasters with perplexingly vague standards by which to assess proposed programming. Pacifica faced these uncertainties with some urgency. In a meeting with its communications counsel to translate the Commission's new policy into a set of guidelines sufficiently clear to be understood by the staff of Pacifica's stations and the scores of unpaid volunteers who serve as on-air announcers, the question arose as to whether the new policy would prohibit the "Bloomsday" reading from James Joyce's *Ulysses*, which had been broadcast for the past five years on WBAI-FM, Pacifica's station in New York. Bloomsday, June 16, 1904, marks the anniversary of the day upon which Stephen Daedalus and Leopold Bloom, the novel's protagonists, embark on their odyssey through the streets of Dublin. The event is celebrated by Joyce fans around the world by readings of the whole or parts of *Ulysses*. The question of "indecency" arises most sharply with regard to "Penelope," the last chapter of the book, which contains the vivid memories and reflections of Leopold Bloom's wife, Molly. Because of Molly's saucy humor and visceral lyricism, the chapter was usually read in its entirety.

The fact that it was now unclear whether one of the monuments of English literature could be broadcast sharpened Pacifica's outraged sense that an expansive application of the indecency standard was transforming the Commission into an arbiter of taste and a suppressor of ideas and values with which it did not agree. Pacifica conveyed some sense of its outrage in a petition for declaratory ruling filed with the Commission on May 8, 1987. In that petition, Pacifica advised the Commission of a long-planned broadcast scheduled for June 16, 1987, at approximately 11:00 p.m. Pacifica also advised that WBAI would precede the reading with an appropriate warning and that the program would contain a salty list of words and phrases, which the Petition quoted.

Because the Commission had given no indication that it cared a whit about the merit of works that might be suppressed under its new policy, Pacifica did not divulge that the words and phrases would be

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49. Indecency Public Notice, *supra* note 6, at 2726.

50. See *Bloomsday Observance*, N.Y. Times, June 16, 1988, at C20, col. 5.

51. The list, culled from the Molly Bloom chapter of *Ulysses*, contained the following: "kissing my bottom," "frigging," "come three or four times with that tremendous big red brute of a thing," "spunk," "put it into me from behind . . . like the dogs do it," "wash in my piss," "titties," "fuck," "shit," "my hole is itching me," "lovely young cock," "fucked yes and damn well fucked too," "stick his tongue seven miles up my hole," "lick my shit." *Petition for Declaratory Ruling, Pacifica Found.*, FCC Ref. No. C5-574, at 3 (FCC, filed May 8, 1987).
taken from Joyce's *Ulysses*, or that the reading was part of the annual Bloomsday event, but merely noted that, in its view, the work to be broadcast had "substantial literary and cultural value." 52 By giving the Commission only what it professed to care about—dirty words—Pacifica hoped to dramatize the folly of pursuing such a simplistic approach.

Pacifica indicated that it would air the broadcast as planned unless the Commission acted to prevent it, and requested an expeditious ruling. In the following weeks, Pacifica twice supplemented its petition for a declaratory ruling with requests for expedited consideration. 53 It identified *Ulysses* as the source of the reading, provided the text of the Molly Bloom chapter in its entirety, and supplied the Commission with background information on Bloomsday as a unique cultural event and on WBAI's role in bringing that event to the public. 54 It insisted that the planned Bloomsday broadcast was ripe for Commission action, and urged clarification of indecency standards, because the standards in their present form were so vague as to apply to a substantial portion of the great works of modern or classic literature broadcast at any hour of the day or night. 55

Somewhat like Leopold Bloom, the Commission shot its head under the covers. 56 In a letter to Pacifica's counsel, dated June 5, 1987, the Mass Media Bureau declined to issue a declaratory ruling. 57 It noted that "[a]s a general matter because of the first amendment considerations that are involved, the Commission must be especially cautious in exercising its authority to issue declaratory rulings with respect to program content prior to broadcast." 58 The Bureau did, however, briefly review the recent indecency

52. *Id.*


54. *Id.* Among the actors due to perform on the program were Anne Meara, Fritz Weaver, Marian Seldes, John Rubinstein, Peggy Cass, Sue Lawless, and Roscoe Lee Browne. Past Bloomsday broadcasts had included such performers as Michael Moriarty, Barnard Hughes, Tammy Grimes, Maria Tucci, Amanda Plummer, and Marni Nixon. Previous Bloomsday broadcasts had drawn favorable comment in such articles as Holden, *Readings from Joyce Will Mark Bloomsday Anniversary Tomorrow. Yes!*, *N.Y. Times*, June 15, 1986, § 1, at 52, col. 1; *It's Bloomsday III. A Joycean Jamboree at Symphony Space*, *N.Y. Times*, June 15, 1984, at C1, col. 1.; and *Leopold Bloom Doffs His Derby For a Read-In*, *N.Y. Times*, June 14, 1985, at C1, col. 5.


56. *Id.* Among the actors due to perform on the program were Anne Meara, Fritz Weaver, Marian Seldes, John Rubinstein, Peggy Cass, Sue Lawless, and Roscoe Lee Browne. Past Bloomsday broadcasts had included such performers as Michael Moriarty, Barnard Hughes, Tammy Grimes, Maria Tucci, Amanda Plummer, and Marni Nixon. Previous Bloomsday broadcasts had drawn favorable comment in such articles as Holden, *Readings from Joyce Will Mark Bloomsday Anniversary Tomorrow. Yes!*, *N.Y. Times*, June 15, 1986, § 1, at 52, col. 1; *It's Bloomsday III. A Joycean Jamboree at Symphony Space*, *N.Y. Times*, June 15, 1984, at C1, col. 1.; and *Leopold Bloom Doffs His Derby For a Read-In*, *N.Y. Times*, June 14, 1985, at C1, col. 5.

57. *See J. Joyce, supra note 1, at 756, for Molly's derisive comments on Leopold's habit of sleeping with his head at the foot of the bed.*

58. *Id.*
rulings and discuss a few salient points. It emphasized that "context" was critical to a determination of indecency. In this regard, it quoted the famous case, *United States v. One Book Called Ulysses*, in which District Judge Woolsey declared that, "while many words [in the book could be] considered dirty, I have not found anything which I consider to be dirt for dirt's sake," and expressed the view that the *Ulysses* readings bore little similarity to the programming considered indecent in the Commission's April 1987 actions.59 The Bureau observed that "speech that is indecent must involve more than an isolated use of an offensive word",60 and noted that, although the Molly Bloom passage contained some of the words found to be indecent in *Pacifica*, this fact was not dispositive of the question whether the words were used in a "patently offensive" manner.61 Skimpy as these remarks were, they suggested, for the first time, that the Commission's notion of "context" might include such factors as literary or artistic merit, that some vestige of the requirement of "repetitive" rather than "isolated" usage still remained, and that the concept of what was "patently offensive" contained latent complexities.62

These hints as to the meaning of the new indecency standard did not answer the fundamental question of whether Pacifica could air excerpts from *Ulysses*, and Pacifica sought review by the full Commission of the staff's refusal to act.63 On June 16, 1987—Bloomsday—the Commission issued a one-page order denying review, and leaving Pacifica to make its own judgment as to whether to air *Ulysses*.64 WBAI broadcast the reading as planned

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59. *Id.* at 2 & n.3 (quoting United States v. One Book Called Ulysses, 5 F. Supp. 182, 183-84 (S.D.N.Y. 1933)).
60. *Id.* at 4.
61. *Id.*
62. The *Infinity* and *University of California* decisions suggested that the Commission would sanction indecent language even if it was not repetitive: "[R]epetitive use of specific sexual or excretory words or phrases is not an absolute requirement for a finding of indecency." *Infinity Broadcasting Corp.*, 2 FCC Rcd 2705, 2706 (1987); cf. *Regents of the Univ. of California*, 2 FCC Rcd 2703 (1987).
64. Memorandum Opinion and Order, Pacifica Found., FCC No. 87-215 (FCC, released June 16, 1987). No FCC action against Pacifica has occurred yet with regard to this program. However, the Commission did receive a complaint from a listener from Yonkers, New York regarding WBAI's June 16, 1987 broadcast. In responding, the Chief of the Mass Media Branch noted:

Assuming that the several sexual and excretory references identified in your complaint occurred in the context of a bona fide reading from the "Penelope" chapter from *ULYSSES*, we would not expect that the Commission would find such references, dispersed as they would have been throughout the three-hour reading of this work of literature, to be patently offensive.

Letter from Alex D. Felker, Chief, Mass Media Bureau, FCC, to Thomas Byrne, 2 & n.10 (Apr. 7, 1988). Although the complaint letter bore a date of July 7, 1987, curiously, the Com-
Pacifica also immediately appealed the Commission’s order denying review to the circuit court. This appeal complemented Pacifica’s appeal of the April 1987 actions with respect to *Jerker*. In each appeal, Pacifica averred that the Commission’s action violated the section of the Communications Act of 1934 which prohibits FCC censorship or interference with the right of free speech, contravened the first amendment, and constituted arbitrary and capricious agency action in violation of the Administrative Procedure Act.

On June 26, 1987, Pacifica moved to consolidate the two appeals. It alleged that the two cases arose out of closely related factual circumstances, and presented essentially the same issue: whether the Commission could lawfully apply its new indecency standard to suppress or chill the broadcast of works of modern literature.

2. The Quest for Clarification: The FCC Reconsideration Order

While Pacifica chose to take its appeals directly to the Court of Appeals, other parties requested the Commission to modify its indecency decisions. On June 1, 1987, the National Association of Broadcasters filed a Petition for Clarification and a consortium of some fourteen broadcasters and media representatives jointly filed a Petition for Reconsideration directed toward the April 29, 1987, Public Notice.

None of the petitioners contested the mission waited until April 7, 1988, to respond and thus make the letter available for public inspection. In the interim, Pacifica had relied upon the fact that no complaint had been brought to the attention of the Commission and informed the D.C. Circuit Court of its understanding. Motion for Voluntary Dismissal, Pacifica Found. v. FCC, Nos. 87-1194, 87-1264, at 3 n.2 (D.C. Cir. filed Jan. 11, 1988).

This disposition reflected a Commission view of the first amendment with a cast reminiscent of eighteenth century England. While the Commission would not deign to act in a manner which might be construed as a prior restraint, Letter from Alex D. Felker, Chief, Mass Media Bureau, FCC, to Thomas Byrne, 3, 5 (Apr. 7, 1988), it was clear that Pacifica would be forced to “bear the consequences of [its] own temerity” if the Commission later found the matter indecent. See 4 W. BLACKSTONE, COMMENTARIES *151-52.

None of the petitioners contested the
Commission's constitutional authority to channel indecent material to late night hours or asked the Commission to reconsider its rulings with respect to any of the three particular broadcasts it had found to be indecent. Instead, the petitioners complained that prospective application of the indecency standard would be unconstitutionally vague and overbroad. They urged adoption of the following revisions:

(1) provide more precise guidance as to the elements pertinent to whether material is patently offensive and violates "contemporary community standards for the broadcast medium"; (2) consider the literary, artistic, political or scientific value of programming in judging whether it is patently offensive and, thus, indecent; (3) exempt news and informational programming from a finding of indecency; (4) defer to reasonable good faith judgments made by licensees applying the requirements set forth by the Commission; (5) apply rulings prospectively, not sanctioning licensees until they have notice that particular material has been judged to be indecent; and (6) adopt a fixed time of day after which non-obscene, adult oriented programming may be aired, or articulate a similar bright line test.

With the exception of the request to establish a definite time after which indecent material could be aired, the Commission rejected the suggested revisions. As a concession to arguments that the new standards were hard to understand, the Commission offered a more detailed explanation of how it planned to apply its new indecency policy. The Commission identified factors to be considered by broadcasters in making the complex judgment as to whether a work was indecent, but stopped short of making that "editorial judgment for them." Broadcasters thus remained constantly at risk.

Taking up the theme advanced by the staff letter concerning the *Ulysses* broadcast, the Commission echoed the Supreme Court's statements in *Pacifica* that context encompassed a "host of variables." These included the "vulgar" or "shocking" nature of the words or picture, the "manner" in which the language or depictions were presented, an analysis of whether the offensive material was isolated or fleeting, a consideration of the medium's

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72. Id. at 931.
73. Id. at 932.
74. See supra notes 57-62 and accompanying text.
ability to separate adults from children, and a determination of whether children were present in the audience. The "merit" of a work was "simply one of many variables" and not a separate prong of the test for indecency. It was not entitled to any greater weight or attention than other variables.

The Commission also explained that the term "contemporary community standards" looked to the views of the "average" person, and that the relevant "community" was not the local community served by the broadcaster, but the nation as a whole. This approach forced broadcasters to determine contemporary community standards by somehow surmising the incumbent Commissioners' understanding of the view of the average viewer or listener. Although such a task might "not always be an easy one," the FCC left no room for error. The FCC would not consider a licensee's reasonableness in determining whether material was decent or indecent. The reasonableness of the broadcaster's judgment was relevant only to the severity of the sanction imposed. The Commission maintained that its orders had followed this approach by not imposing sanctions when licensees demonstrated a reasonable basis for believing that the programs broadcast were permissible under standards then existing.

As a footnote, the Commission conceded that its use of a case-by-case approach in determining when there was a reasonable risk that children might be in the audience amounted to an "effective ban," not merely a restriction upon protected speech. To avoid imposing an unconstitutional ban, the Commission revised its approach and stated its "current thinking" that the risk of exposing children to indecent material was minimized after midnight. The Commission thus implied, but did not promise, that it would take no action against any broadcaster who aired indecent material after midnight.

The Reconsideration Order, far from resolving all controversy, became the focal point of subsequent action. The Court of Appeals would find that the Reconsideration Order's channelling of indecent speech to hours after mid-
night arbitrary and capricious, while Congress would order the elimination of any safe harbor period.

II. BEHIND THE SCENES: THE UNDISCLOSED IMPETUS FOR THE INDECENCY INITIATIVE

For the eight years of the Reagan Presidency, the rallying cry of the FCC was "deregulation." The Commission devoted its efforts to the goals of simplifying or eliminating existing regulations and reducing the level of governmental intrusion into the editorial decisions of broadcasters. The institution of a complex and highly intrusive new indecency policy runs directly contrary to these goals. In order to understand this contradiction, it is necessary to look behind the abstractions of regulatory theory and examine events that, at the time, were often shrouded in secrecy. What has come to light was discovered, for the most part, only long after the events occurred, and largely through the FCC's partial and dilatory response to a Freedom of Information Act request made by Pacifica on May 22, 1987.

The picketing of the FCC's Washington offices to protest the renomination of Mark Fowler as Chairman of the FCC now seems to be the event which set the process in motion. In June 1986, Morality in Media picketed the FCC shortly after the President renominated Mr. Fowler. The picketing was accompanied by a letter-writing campaign in which, during 1986, anti-smut crusaders wrote hundreds of letters to the Senate Committee on Commerce, Science and Transportation opposing Mr. Fowler's renomination. The Reverend Donald Wildmon, Executive Director of the National Federation of Decency, urged the 320,000 subscribers to the group's magazine to oppose Mr. Fowler's renomination because he had done "nothing, zero, zilch" about indecency. For the years preceding the picketing,

85. Letter from William J. Byrnes, John M. Pelkey, and John P. Crigler, Counsel for Pacifica, to the Managing Director of FOIA Requests, FCC (May 22, 1987) [hereinafter FOIA Request]. No documents were provided in response to the request until May 3, 1988 at approximately the same time that Pacifica withdrew its judicial appeal.
87. FOIA Request, supra note 85, at 3; see also Jones, FCC Studies "Indecency" on Radio, N.Y. Times, Nov. 22, 1986, § 1, at 9, col. 4 (discussing relation of increase in indecency complaints to campaigns by organized groups).
88. Rev. Wildmon subsequently became an active opponent of distribution of the motion picture The Last Temptation of Christ. Rev. Wildmon called for a nationwide boycott for one year of any theater that showed the film and a boycott of all MCA output, including records, TV shows, books, toys and tours of the Universal Studios. He also advocated voting against the Democratic party because it had received funds from principals of MCA. Clergy Nail 'Christ' & Universal, Variety, Aug. 10, 1988, at 1, col. 2.
89. Davis, supra note 86 at 44, col. 2.
the FCC, according to its own estimate, had received approximately 20,000 complaints annually which alleged obscenity or indecency, but had taken no action against the broadcasters involved.

In early July 1986, Chairman Fowler met with Brad Curl of the National Decency Forum, who met thereafter with the FCC's General Counsel, Jack Smith. In a letter dated July 9, 1986, Mr. Curl advised the Chairman that, on the basis of their discussion, his organization would discontinue the planned picketing for the following week. The letter reflected his understanding that the FCC General Counsel would "cooperate on some decency actions and some further investigations of our point of view." He declared that: "I agree that the citizens have not been bringing you enough complaints and I will take action to publicize the need for more documented citizen complaints." Mr. Smith said he would be more than willing to cooperate on a few "send a message" cases.

On July 21, 1986, Brad Curl and Paul McGeady of Morality in Media had a further meeting with Chairman Fowler. On July 23, 1986, in a memo to the FCC, Morality in Media outlined the steps the FCC should take to crack down on "indecent" programming and provided a legal analysis of the basis for proceeding. Morality in Media passed along advice, given by the FCC's General Counsel, that its supporters make tapes or transcripts of broadcasts they found offensive. One of these supporters was Mary Keeley, a Philadelphia secretary, who taped a Howard Stern show aired on WYSP-FM, and mailed the tape to the FCC.

Meanwhile, a Mr. Nathan Post complained to the FCC about the song "Makin' Bacon" played over the University of California's station KCSB in Santa Barbara. However, not until he wrote the Parents Music Resource Center, made prominent by Tipper Gore's campaign to require labeling of rock lyrics, did any action develop. In a subsequent interview, Mr. Post exclaimed, "it shocked me when, kaboom! they took my letter to the White House and sent Patrick Buchanan to the FCC where he read them the riot

90. Id.
91. Letter from Brad Curl, National Director, Morality in Media, to Mark Fowler, Chairman, FCC, 1 (July 9, 1986).
92. Id. at 2. Mr. Curl ended his letter by declaring that: "If you can stand strong, you may have the important historic mission of keeping the onslaught of R-rated material off television until we can get a better pool of material in Hollywood. Stand Strong!" Id. at 3.
93. Letter from Paul J. McGeady, General Counsel, Morality in Media, to John B. Smith, General Counsel, FCC (July 23, 1986).
94. Davis, supra note 86, at 44, col. 2.
95. Id.
"act" in August 1986.97

On September 1, 1986, Larry Poland provided the FCC with a third potential test case by submitting his informal complaint against Pacifica station KPFK.98 A couple of weeks after receiving his letter, the FCC's General Counsel called to tell Mr. Poland that the FCC had decided to "take this one all the way to the Supreme Court" and that he was "going to be famous."99

The FCC's General Counsel not only helped potential complainants select appropriate targets for complaint, but warned them away from programs that did not present circumstances that the FCC believed would be suitable for making new law.100 On September 19, 1986, FCC General Counsel Jack Smith wrote Donald Wildmon regarding the possibility of filing a complaint against a broadcast of the film The Rose on Memphis television station WPTV: "Your letter drew considerable attention here, but as we discussed on the phone today I do not believe this presents the kind of air-tight case that you want to push at this time. We are inquiring into a couple of other cases which we think may be more clear violations. I think you should agree with our reasoning on this matter."101 Pressure from conservative lobbying groups continued after Chairman Fowler left office. On February 23, 1987, Brad Curl wrote the new FCC Chairman Dennis Patrick to say that "I hope you haven't taken our campaign for Jack Smith as a personal attack. We are simply concerned about ten years' absence of indecency and obscenity enforcement at the FCC."102

Even before Fowler left office, the first results of this pressure surfaced in

97. Id. at 6.
98. Letter from Larry W. Poland, President, Mastermedia International, Inc., to Mark Fowler, Chairman, FCC (Sept. 1, 1986).
100. At the time that the FCC was selecting the 1986 complaints against KPFK from the thousands filed against other licensees, Pacifica was arranging the first gavel-to-gavel radio coverage of the congressional Iran-Contra hearings, and was carrying other hearings and programming critical of the Administration policy in Nicaragua. This coincidence of events ironically illustrates FCC Chairman Dennis Patrick's observation: "No speaker whose speech is regulated by the government is truly free to criticize that government." Address by FCC Chairman Dennis Patrick: Broadcasting and the American Electoral Process: Informing a Democracy, delivered before the American Council of Young Political Leaders 10 (Nov. 24, 1988).
101. Letter from John B. Smith, General Counsel, FCC, to Donald E. Wildmon, Executive Director, National Federation for Decency (Sept. 19, 1986). Mr. Smith added: "If you have no objection, I would like to retain the tape you sent us so that we can have it as an exhibit as the pornography question evolves over the coming months." Id.
102. Letter from Brad Curl, National Director, Morality in Media, to Dennis Patrick, Chairman, FCC (Feb. 23, 1987).
the form of threatening hints and unofficial warnings. Chairman Fowler warned broadcasters: "Be careful what you put on the air because you could lose your license." He told the press that he was particularly troubled by one viewer's complaint that a television station had broadcast the film *Looking for Mr. Goodbar* without editing a rape scene.

After leaving his position as White House Communications Director, Patrick Buchanan wrote a public memorandum to the President in which he suggested that the FCC should "jerk" a license to help re-establish ties between the Republican party and the religious right.

In May 1987, in the immediate wake of the Commission's indecency orders, James McKinney, then Chief of the Mass Media Bureau, sternly warned noncommercial broadcasters attending a public radio conference that the penalties for a violation of the new indecency policy might include demerits at license renewal time or license revocation. He indicated that warnings were not required to impose harsher sanctions. Shortly thereafter, Commissioner James Quello declared to the trade press that the Molly Bloom passage which Pacifica had spotlighted was probably indecent. Although he admitted that he had never read the book, he stated that its swear words "are stuff you deck someone over" and expressed his amazement that *Ulysses* had made it as a "classic."

Meanwhile, the Reverend Donald Wildmon of the National Federation for Decency announced that his organization intended to urge the FCC to enforce its new policy, and say, with respect to the *Ulysses* broadcast, "Okay, prosecute . . . ."

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103. *Id.* Accompanying the letter were copies of previous Morality in Media correspondence with FCC Chairman Patrick and General Counsel Smith. The letter also requested a personal interview with Chairman Patrick in early March 1987. *Id.*


105. *Id.* Paul McGeady, writing to the General Counsel of the FCC, referred to a "*Looking for Mr. Goodbar*" letter. Letter from Paul J. McGeady, General Counsel, Morality in Media, to John B. Smith, General Counsel, FCC, 9 (July 23, 1986).

106. Mr. Buchanan wrote:

As even the National Council of Churches now backs the Administration's campaign against pornography and obscenity, the President should become more visibly involved; and demand of that toothless lion, the FCC, that it begin pulling the licenses of broadcasters who flagrantly abuse the privilege. A single license jerked would instantly depollute the airways of this garbage, which the Supreme Court has ruled is not protected speech.


109. *Id.*
III. Action for Children’s Television v. FCC: Searching for Safe Harbor in a Sea of Abstractions

Few of the facts described above—and, indeed, few facts of any sort—were before the D.C. Circuit as it deliberated upon the legality of the Commission’s indecency rulings. Pacifica, the party best suited to raise questions regarding the effect of the Commission’s new standards on works of artistic merit, had dismissed its appeals. Pacifica based its decision to withdraw on the expense of proceeding with the appeals, on the Department of Justice’s refusal to prosecute Pacifica on the obscenity charges referred by the Commission, and on the Commission’s assurance that the broadcast of Jerker was “reasonable” under the prevailing indecency standard and could not be the “basis for adverse action at renewal time.” The University of California did not appeal either the April 1987 order regarding its broadcast of “Makin’ Bacon” or the Reconsideration Order. Although Infinity Broadcasting joined Action for Children’s Television and the thirteen other petitioners in seeking review of the prospective effect of the Commission’s new enforcement standard, Infinity did not contest the decision regarding the Howard Stern program. Thus, none of the three factual situations in which the FCC applied its new standard were argued by the petitioners.

The FCC raised the issue of whether the three specific programs were “indecent as broadcast,” but only as an attempt to narrow the scope of the court’s review. The court rejected this approach on the ground that the Commission was not simply making three ad hoc applications of its indecency policy, but was establishing a new standard for the entire broadcast industry. After noting that the Reconsideration Order read “more nearly like the result of a notice and comment rulemaking than of an adjudicatory proceeding,” the court concluded that:

110. See Letter from Diane S. Killory, General Counsel, FCC, to William D. Weld, Assistant Attorney General, Criminal Division, U.S. Department of Justice (Apr. 30, 1987). The decision not to prosecute Pacifica was rendered in a letter to the FCC General Counsel from the Director of the Criminal Division of the National Obscenity Enforcement Unit of the United States Department of Justice (DOJ). Letter from H. Robert Showers to Diane S. Killory (July 15, 1987). Pacifica was not served with a copy of the letter, and learned of DOJ’s decision not to bring a criminal prosecution against it only through a July 15, 1987, DOJ news release that summarized Showers’ letter. Criminal Division, DOJ, Press Release No. 87-256 (July 15, 1987). According to the release, DOJ declined to prosecute KPFK because the station’s principals had no notice that the FCC was changing its indecency standard, thus making criminal intent difficult to prove beyond a reasonable doubt. Id. at 2.


114. Id. at 1337.
The agency has employed the informal adjudication format to promulgate a rule of general applicability. Certainly the FCC may choose the mode by which it proceeds (citations omitted). However, the agency may not resort to adjudication as a means of insulating a generic standard from judicial review.115

By focusing on the Commission's adoption of a standard of general applicability, the court was able to reach the question of whether that general standard met constitutional requirements, but doomed itself to a consideration of abstract principles devoid of almost any factual particularity.

Considered as a case which addresses the question of whether a new regulatory standard unlawfully abridges speech protected by the first amendment, the court's decision is remarkable in that it scrutinizes neither the specific speech affected nor the elements of the infringing regulation. One searches the decision in vain for a systematic analysis of the standard to be applied in determining whether specific words or images are indecent.

In abandoning an indecency policy limited to the repetitive use of seven words, the Commission had enormously expanded the scope of material that it could deem indecent. Under its new standard, all descriptions or depictions of "sexual or excretory activities or organs," including "innuendo or double entendre," were potentially indecent.116 Only the Commission's requirement that the references be "patently offensive as measured by contemporary standards for the broadcast medium" limited its power to channel such references to a restricted period of time. The petitioners argued that such a fuzzy standard was unconstitutionally vague.117

The court rejected this argument, not by analysis of any actual application of the standard, but on grounds that the definition of indecency espoused by the Commission was "virtually the same" as the definition reviewed in Pacifica.118 Because the remaining petitioners could not contest any new

115. Id. (citation omitted).
116. On June 23, 1988, the Commission made clear that its new indecency standards would apply to television as well as radio broadcasts. It decided to issue a notice of apparent liability against Kansas City Television Ltd., debtor-in-possession of television station KZKC(TV), Channel 62, Kansas City, Missouri, for the station's broadcast of Private Lessons, a movie that contained nudity and sexual matters presented, in the Commission's view, in a "pandering and titillating manner." See supra note 14 and accompanying text. The Commission's action not only illustrates its intent to apply indecency standards to visual images, but also its enormous discretion over the enforcement process. On December 2, 1986, a viewer complained that the same film had been shown on the New Orleans television station WNOL-TV and provided photographs from it and from other films. The Commission simply ignored the complaint letter. Letter from Pinckney A. Wood to John B. Smith, General Counsel, FCC (Dec. 2, 1987).
117. Action for Children's Television, 852 F.2d at 1338.
118. Id.
application of the standard, they raised no new questions. The court had no
occasion to examine the process by which the Commission actually deter-
mined the “context” of material, nor that by which it intuited the views of
the average American viewer or listener.

Even the question of whether “merit” redeemed a work from charges of
indecency was considered in the abstract. In an intervenor’s brief, the
ACLU argued that the indecency standard was unconstitutionally overbroad
because it could affect works of “serious merit.” It reasoned that works
should not be regarded as “indecent,” just as they were not regarded as “ob-
scene,” if they possessed “serious literary, artistic, political, or scientific
value.” The court rejected the argument for two reasons. The first was
that merit was a relevant, though not necessarily decisive factor under the
FCC’s standard. Merit did not immunize a work from the charge of indec-
cy, but was considered in determining whether the work was “patently
offensive.” The second and more fundamental ground was, ironically
enough, that indecent speech was protected by the first amendment. “Inde-
cent but not obscene material . . . qualifies for first amendment protection
whether or not it has serious merit.” The protected status of indecent
speech meant that it could not be suppressed and could be channelled only
to the extent necessary to assist parents in supervising what their children
heard or watched.

The court’s attention then fixed upon the guidelines that confined indecent
material to the safe harbor period. These guidelines pertained not to the
FCC’s constitutional authority to regulate indecency, but to the administra-
tive reasonableness with which it implemented that authority. Here, at
last, the court could review a specific finding - that indecent material should
be channelled to hours after midnight - and it bore down upon that find-
ing with analytic exuberance.

The court found the safe harbor period defective on a variety of grounds.
Because the underlying facts did not rationally support the time restrictions

119. See id. at 1339.
120. Id. see also supra note 6 and accompanying text.
121. Action for Children’s Television, 852 F.2d at 1339-40. Nearly 10 months after the
ULYSSES broadcast—but shortly before the FCC filed its brief with the Court of Appeals for
the District of Columbia circuit—the FCC’s Mass Media Bureau, in response to a listener
complaining of WBAI’s Bloomsday program, stated that the Commission would probably not
find a three-hour reading of the “Penelope” chapter “patently offensive” when the majority of
the reading occurred after midnight. Letter from Alex D. Felker, Chief, Mass Media Bureau,
FCC, to Thomas Byrne, 2 & n.10 (Apr. 7, 1988); see also supra note 64.
122. Action for Children’s Television, 852 F.2d at 1340.
123. Id. at 1340, 1343.
124. Id.
125. Id. at 1340-44.
imposed, the court found that the safe harbor period was arbitrary. The Commission cited population figures for the number of teenagers in the total radio audience for the markets in which the three broadcasts occurred, but made no finding concerning the teenage audience for the particular stations airing the objectionable material. No one had determined who was listening, or even who was likely to be listening, to the programs at issue.

The Commission purportedly designed its guidelines to protect children, but the age group which constituted “children” had not been defined. The Commission’s orders cited data regarding 12 to 17 year olds, but the court questioned why the Commission defined this as the relevant age group, if the Commission had previously maintained that the protected group should be children under 12. In addition, even assuming that 12 to 17 year olds should be protected, the Commission had not determined what percentage of that protected age group had to be exposed to indecent material before the risk of exposure became “unreasonable.” In the case involving the University of California station, for example, the Commission had pointed out that 1,200 children between the age of 12 and 17 were still in the market audience at the time “Makin’ Bacon” aired. Because the total population of 12 to 17 year olds in Santa Barbara County was 27,800, the potential audience for the program was only 4.3% of the class to be protected. Did exposure of little more than 4% of a protected class constitute an unreasonable risk? The Commission’s orders gave no answer.

Finally, the court found that the Commission failed to explain why the balancing of the competing interests at stake dictated midnight, rather than some earlier hour, as the beginning of the period in which indecent material could be aired. At oral argument, the Commission maintained that if the court found insufficient support for midnight as the beginning of a safe har-

126. Id. at 1341.
127. Id.
128. Id. at 1341-42.
129. Id. at 1341.
130. Id. at 1342.
131. Id. at 1343-44. According to the Commission, the competing interests were those of: (1) the government, which has a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; (3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene. Id. at 1343. At oral argument, Dianne Killory, FCC General Counsel, conceded that the Commission did “not propose to act in loco parentis and to deny children’s access contrary to parents’ wishes.” Id. The court therefore concluded that interests (1) and (2) coalesced and that the government’s role was “to facilitate parental supervision of children’s listening.” Id.
bor period, the court could simply strike down that part of the indecency standard and permit the FCC to define reasonable standards on a case-by-case basis. The court rejected this argument, and found that the case-by-case approach was a chilling alternative to the arbitrariness of a midnight safe harbor: "Facing the uncertainty generated by a less than precise definition of indecency plus the lack of a safe harbor for the broadcast of (possibly) indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated." In the court’s view, the Commission owed broadcasters a rule which balanced the government's interest in promoting parental supervision of children against the broadcaster's discretion in airing a range of programming for mature audiences. The balancing of these competing interests should then result in "a clearly stated position enabling broadcasters to comprehend what is expected of them and to conform their conduct to the legal requirement." Although acknowledging that it could not order the Commission to conduct a rulemaking proceeding, it nonetheless quoted with approval Commissioner Patricia Diaz Dennis' view that the FCC should issue "a memorandum notice of proposed rulemaking to establish guidelines" on which to base a channelling rule.

With these suggestions, the court vacated in part the rulings pertaining to Pacifica and the University of California, with instructions that the Commission redetermine, after a thorough hearing, the times at which indecent material might be broadcast.

**IV. Legislative Aftermath: Closing the Safe Harbor**

Well before the court's decision upholding the Commission's definition of "indecency," but invalidating its "safe harbor" provisions, legislative forces were at work to make sure that the FCC would take a tougher stand on indecency. In a curious way, these behind-the-scenes efforts backfired. Working in concert with Morality in Media, the National Federation of Decency, and the Parents Music Resource Center, the Commission had singled out three complaints from the thousands it received and used those com-

132. *Id.* at 1342.
133. *Id.* at 1342-43.
134. *Id.* at 1344.
135. *Id.* at 1343.
136. *Id.* at 1344. The court upheld the ruling with respect to Infinity Broadcasting on grounds that it could not distinguish Infinity's early morning program from the early afternoon broadcast considered in *Pacifica*.
137. See *supra* notes 85-109 and accompanying text.
plaints as a vehicle for expanding the definitional scope of indecency and for limiting the time of day during which indecent material could be aired. The appeasement, however, failed to appease. Conservative reaction focused not upon the expansion of the Commission's enforcement policy, but upon the "safe harbor" which had been created.

Senator Jesse Helms of North Carolina wrote to FCC Chairman Dennis Patrick, asking if the "safe harbor" provisions of the Commission's new indecency policy meant that material which the Commission had found to be indecent under its expanded definition could, nevertheless, be safely aired after midnight. The Chairman responded that it was "very unlikely . . . that the Commission would have found the licensees in violation of the indecency proscription had they aired the subject program after midnight." On April 7, 1988, Senator Helms wrote to the Heritage Foundation, a conservative lobbying organization, expressing his "grave concerns regarding the FCC's recent rulings," and posing three questions of law on which he requested assistance. These were:

First, is the "safe harbor" rule required as a result of the F.C.C. v. Pacifica Foundation decision?

Second, is the F.C.C. accurate when it stated that "Supreme Court precedent precluded it from banning non-obscene programming from the airwaves altogether"?

Third, can indecent material be banned for adults as well as children from public radio and television or does [Pacifica] prohibit such a ban?

On April 20, 1988, Bruce Fein, former General Counsel of the FCC and now president of a consulting firm, responded to Senator Helms and provided a detailed "Memorandum of Law Regarding FCC Prohibition of Obscene and 'Indecent' Broadcasts on Radio and Television." The gist of his response was that Pacifica provided "no definitive answer" to the question of whether indecent programming could be banned during all hours of the day, and that "formidable constitutional argument can be fashioned to support an absolute ban on indecent broadcasts." Mr. Fein urged that: "In these circumstances, the strong congressional custom is to enact a constitutionally uncertain law if it is thought to promote sound public policy, and make the

139. Id. (statement of Sen. Helms, quoting letter to Dennis Patrick, Chairman, FCC).
140. Id. at S9913. Senator Helms entered his letter and the responsive memorandum into the record. Id. at S9913-15.
141. Id.
142. Id.
federal judiciary the final arbiter regarding its validity.”

On July 26, 1988, Senator Helms acted on Mr. Fein’s advice by introducing an amendment to an appropriations bill for funding the FCC and other federal agencies. As subsequently amended by Senator Helms, the legislation provided that: “By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.”

For Senator Helms, the issues were quite simple. Although Jerker had extended runs in Los Angeles and New York and had been favorably reviewed by the New York Times for its treatment of issues such as AIDS, it was to Senator Helms simply a “sick, sick discussion between two homosexuals on how they perform their perversion.” To him, it was outrageous to assume that at midnight, or any other hour, such trash became acceptable. Because VCR recording machines and programmable tape decks enabled children to obtain “delayed access” to material no matter when it was broadcast, any effort to channel indecent material was futile. The simple fact was that, “Garbage is garbage, no matter what the time of day or night may be.”

Even adults who wanted access to indecent material had no right to obtain access through the public air waves. They could buy tapes and records, go to theaters or nightclubs, or watch cable television. If adults wanted trash, they could “go to another garbage dump.”

The Helms amendment “channelled” indecent material by consigning it entirely to non-broadcast media. The amendment spurned the idea, articulated in both Pacifica and Action for Children’s Television, that children’s access to indecent speech could be regulated, but that indecent speech could not itself be suppressed. The Senate adopted the Helms amendment with little discussion, and the President signed it into law on October 1, 1988.

On December 21, 1988, the FCC issued an order adopting a rule to “enforce the provisions of Section 1464 of the United States Criminal Code, 18

143. Id.
146. Id.
147. Id.
148. Id.
U.S.C. § 1464, on a twenty-four hour per day basis in accordance with Public Law No. 100-459.”

Because it viewed its task as "purely ministerial," the FCC allowed no public notice and comment period.

A group of petitioners, again headed by Action for Children's Television, immediately appealed the Commission's order and sought a stay of its effectiveness. The Motion for Stay argued that indecent speech was protected by the first amendment and therefore could not be banned. In opposing the Motion for Stay, the Commission did not dispute that indecent materials were entitled to first amendment protection, but contended that Congress had properly concluded that "the only effective way to prevent children from exposure to indecent materials broadcast over the public airwaves was to prohibit such transmissions at all times." The court granted the Motion for Stay without discussion, citing its earlier decision in Action for Children's Television v. FCC.

V. OUT TO SEA IN A SIEVE: A CRITIQUE OF THE NEW INDECENCY POLICY

The process set in motion by the Commission's April 1987 orders constitutes a paradigm of bad lawmaking. Bad administrative law provoked impoverished judicial review and a legislative response acknowledged even by its proponents to be of dubious constitutional validity.

The Commission never gave a compelling explanation of why a change in the indecency standard was desirable. It explained that it was departing from its former policy because the policy produced "anomalous" or "arbitrary" results and was "unduly narrow as a matter of law." But this explanation rang hollow. At the very least, the explanation amounted to little more than an intuitive sense that the Pacifica standard was too lenient

151. See Indecency Enforcement Rule, supra note 11.
152. Id. at 52,426.
157. See supra note 143 and accompanying text.
159. Reconsideration Order, 3 FCC Rcd at 930.
because it allowed broadcasters to avoid a seven-word taboo, and to broadcast material which the Commission, under pressure from conservative special interest groups, now found offensive.\textsuperscript{160}

The Commission made no inquiry into what, if any, harm flowed from the theoretically "anomalous" results possible under the \textit{Pacifica} standard. In fact, as the court of appeals pointed out, the Commission was so indifferent to the interest which it purported to protect that it neither defined the interest clearly nor determined whether the interest to be protected had actually been exposed to harm.\textsuperscript{161} No attempt was made to discover whether "children" of any specified age group were listening to any of the radio broadcasts which were the subject of its orders, and if so, whether they were listening with or without parental supervision or consent.\textsuperscript{162}

The Commission not only presumed that some actual harm would flow from the theoretical anomalies it suddenly discovered in its decade-old indecency standard, but presumed that it possessed the authority to correct those anomalies by dramatically enlarging the scope of its enforcement policy. Although the narrowness of the plurality opinion in \textit{Pacifica}, and subsequent Supreme Court cases construing it suggested that the policy approved in \textit{Pacifica} might establish an outer limit to the Commission's constitutional authority to regulate indecency,\textsuperscript{163} the Commission did not ponder or discuss the limits of its authority.

The broadcasters who were the subject of the FCC's orders had no notice that the Commission was contemplating a revision of the \textit{Pacifica} standard that would strain or exceed constitutional bounds.\textsuperscript{164} The petitioners who challenged the prospective effect of the \textit{Reconsideration Order} conceded the Commission's authority to change its policy, as long as it provided a clear standard for future enforcement.\textsuperscript{165} Thus, neither the FCC nor the court ever directly considered whether the Commission could cast off the anchor of the seven dirty words and embark on wider and darker seas.

Although the Commission expressly acknowledged "the difficulty and the sensitivity" of formulating a new indecency standard,\textsuperscript{166} its decision to formulate that standard through adjudicatory rather than rulemaking procedures drastically curtailed thoughtful comment or the collection of any data pertinent to a new standard. The principal flaws noted by the court—the

\begin{itemize}
\item \textsuperscript{160} See \textit{id.} at 931.
\item \textsuperscript{161} \textit{Action for Children's Television}, 852 F.2d at 1342-44.
\item \textsuperscript{162} \textit{Id.} at 1341-42.
\item \textsuperscript{164} See supra notes 31-39 and accompanying text.
\item \textsuperscript{165} \textit{See Action for Children's Television}, 852 F.2d at 1338.
\item \textsuperscript{166} \textit{Reconsideration Order}, 3 FCC Rcd 930, 931 (1987).
\end{itemize}
Commission's hazy sense of the interest it was protecting and its failure to articulate and carefully weigh other competing interests—might have been corrected if the Commission had chosen rulemaking rather than adjudicatory procedures.

The adjudicatory mode also highlighted the punitive aspect of the Commission's actions. By selecting three complaints from the thousands it received each year, the Commission appeared to be more intent on finding suitable targets for its indignation than on articulating a "sensitive" modification of a "difficult" matter of policy. The enforcement actions against Pacifica and another noncommercial broadcaster also fostered reinforced suspicions that the Commission simply sought to "round up the usual suspects" for a ceremonial display of its wrath. These suspicions were reinforced by the fact that the first television licensee subjected to the new indecency standard was bankrupt. It did not take a cynic to surmise that the Commission had selected broadcasters who might be unable or unlikely to challenge its "warnings." Questions about how the Commission selected the broadcasters it warned became even more troubling as additional information surfaced. The fact that the General Counsel of the FCC actively advised prospective complainants about appropriate targets for complaint does not inspire confidence in the even-handedness of the Commission's adjudicatory process or in the neutrality of a supposedly "content neutral" policy.

167. Action for Children's Television, 852 F.2d at 1342-44.


169. Although the licensee in the KZKC-TV case, discussed supra at notes 14, 116 and accompanying text, vowed to fight the ruling against it, its financial ability to do so was questionable because it had filed for Chapter 11 bankruptcy protection. See FCC Fines KZKC-TV for Indecency, Broadcasting, June 27, 1988, at 36, 37.

170. The fact that the "warning" had a delayed impact further decreased the likelihood of a challenge. The Commission refrained from levying a monetary fine, but its action still created the possibility of the threat of a challenge to the renewal of the affected broadcaster's license upon expiration of the current license term. The Commission recognized that threat by explicitly removing it. See Reconsideration Order, 3 FCC Rcd at 934 n.48; see also supra text accompanying note 111.

171. The court rejected the Commission's argument that "channelling" constituted a time, place and manner restriction on speech: "Time, place and manner regulations must be content-neutral (citation omitted). Channelling, however, is a content-based regulation of speech." Action for Children's Television v. FCC, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) (citing
Choice of a less secretive and less vindictive method of policymaking might have minimized the inconsistencies inherent in such an ad hoc approach and helped the Commission formulate a more unified theory of the first amendment values at stake. Instead, goaded by political pressure and by the red flag of provocative programs, the Commission simply charged.

By focusing narrowly upon the question of whether its indecency policy should be enlarged so as to encompass the three particular broadcasts cited, the Commission blinded itself to larger, more bothersome conceptual questions. For example, it did not explore the basis for imposing restrictions unique to broadcast speech in light of its disavowal of the rationale that the broadcast spectrum was a scarce public resource. Nor did it inquire into the question of whether its approach to indecency was consistent with its approach to other forms of content regulation, such as the Fairness Doctrine.

In *Syracuse Peace Council*, the Commission found the Fairness Doctrine unconstitutional on grounds that it chilled speech and that it was not narrowly tailored to achieve a substantial government interest. In reaching that conclusion, the Commission expressed its belief that:

> [T]he role of the electronic press in our society is the same as that of the printed press. Both are sources of information and viewpoint. Accordingly, the reasons for proscribing government intru-

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172. Despite the FCC's argument to the contrary, see *Reconsideration Order*, 3 FCC Rcd at 930 n.11, the Supreme Court's decision in *Pacifica* rests explicitly on the premise, articulated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-87 (1969), that the broadcast medium enjoys less first amendment protection than the print media. *See* FCC v. *Pacifica Found.*, 438 U.S. 726, 748 (1978). The Commission has repudiated the scarcity rationale as the predicate for indecency regulation. *See*, e.g., *Reconsideration Order*, 3 FCC Rcd at 930 n.11; *Pacifica Found.* 2 FCC Rcd 2698, 2699 (1987). It has also challenged the continuing validity of *Red Lion*. *See*, e.g., *Syracuse Peace Council*, 2 FCC Rcd 5043, 5057 (1987), *aff’d on nonconstitutional grounds*, 867 F.2d 654 (D.C. Cir. 1989). However, in doing so, the Commission left unanswered fundamental questions as to how it could justify more stringent content regulations on programs transmitted by broadcast media than on programs transmitted by cable systems. Federal courts that have considered the question consistently have regarded attempts to regulate "indecent" speech on cable television as unconstitutional. *See* *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

173. The Fairness Doctrine required broadcasters: (1) to cover vitally important controversial issues of interest in their communities; and (2) to provide a reasonable opportunity for the presentation of contrasting viewpoints on those controversial issues of public importance that are covered. *Syracuse Peace Council*, 2 FCC Rcd at 5058, n.1.

174. *Id.* at 5043.
sion into the editorial discretion of print journalists provide the same basis for proscribing such interference into the editorial discretion of broadcast journalists. The First Amendment was adopted to protect the people not from journalists, but from government. It gives the people the right to receive ideals that are unfettered by government interference. We fail to see how that right changes when individuals choose to receive ideas from the electronic media instead of the print media.\textsuperscript{175}

The Commission's indecency rulings evidenced little of this rhetoric and few of these considerations. The Commission did not discuss or apparently appreciate the potential chilling effect of its expanded policy; nor weigh the increased governmental intrusion into the editorial discretion of broadcasters that the policy would bring about. The Commission failed to observe that it was imposing restrictions upon electronic media which could not be imposed on print media; and haphazardly emphasized factors that seemed to distinguish broadcasting from the print media. Among these factors were the "isolated or fleeting" nature of broadcast material\textsuperscript{176} and the inability of the broadcast medium to separate children from adults.

Even more remarkably, the Commission purported to establish "contemporary community standards," unique to the broadcast media, based upon "the views of the average broadcast viewer or listener." Applying these standards, the Commission would determine whether material was offensive "for broadcasting generally."\textsuperscript{177} The expansion of regulatory restrictions unique to broadcast speech seemed squarely at odds with the tenet that broadcast speech should be subject to no more governmental interference than any other form of speech.

Behind the niceties of definition and the abstract discussion of "anomalies" which the old indecency policy might produce was the cruder question of power. Did broadcasters have too much and the Commission too little power over what could and could not be broadcast? The new indecency policy answered this question in the affirmative and attempted to shift the balance of power between the regulator and the regulated.\textsuperscript{178} The Commis-

\textsuperscript{175} Id.

\textsuperscript{176} The test the Commission appeared to apply was whether a child who randomly tuned into a station would be induced by unsuitable material to continue listening. See Reconsideration Order, 3 FCC Red 930, 932 (1987) (quoting Pacifica, 438 U.S. at 750).

\textsuperscript{177} Id. at 933; see also supra notes 78-82 and accompanying text.

\textsuperscript{178} The Commission did not limit its new assertion of authority over the content of communications to a revision of its broadcast indecency policy. In a decision involving subscription television (STV), the Commission also asserted new authority to consider obscenity allegations in the first instance rather than to defer to the decision of a local court. See Video 44, 3 FCC Red 757, 758-59, mandamus denied sub nom., Monroe Communications, Inc., 840
sion abandoned a limited, clearly understood restriction on protected speech and replaced it with a more expansive, less precise policy and that appeared far more vulnerable to abuse in enforcement. "Indecency" was transformal from a known set of verbal taboos which any broadcaster could identify and easily avoid, into an elaborate set of guidelines, involving a host of variables, that yielded widely disparate results depending on the subjective judgments of the interpreter. The new standard allowed the broadcaster no discretion. It was constantly at risk in determining whether material was or was not indecent. The Commission, by contrast, acquired enormous discretion under the new standard. It could act on selected complaints or warehouse them until it chose to act.\(^{179}\) It could dismiss complaints when it wished to appear reasonable, or threaten license revocation when it wished to appear stern. At all times, it reserved for itself the final judgment as to what the nation as a whole would find offensive. Editorial authority that had once resided in the individual broadcaster now resided in five politically appointed Commissioners charged with enforcing a standard that they could manipulate to obtain virtually any result desired.

Perhaps the court of appeals cannot be faulted for undertaking a narrow review of the Commission's decision, or for avoiding constitutional issues that lay in the thick shadow of the Supreme Court's \textit{Pacifica} decision. These decisions, as well as the D.C. Circuit's deference to an agency's choice of whether to resort to a rulemaking or adjudicatory mode of action are founded on well-established tenets of judicial restraint.\(^{180}\) The court may, however, be faulted for its eagerness to reach the issues which it regarded as within its competence. A disturbing ambiguity about the issues under review runs throughout the court's opinion. In the ordering clauses of its opinion, the court remands the April 1987 orders concerning \textit{Pacifica} and

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\(^{179}\) Before the D.C. Circuit issued its opinion, the FCC supplemented its brief with copies of five letters, each dated April 7, 1988, in which the Chief of the Mass Media Bureau dismissed complaints against five broadcast stations for airing indecent material. \textit{See Brief for Respondent at app., Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (No. 88-1064)}\). While these attachments seemed designed to illustrate the restraint with which the Commission would proceed in enforcing the new policy, they also illustrated the enormous discretion the FCC exercised over the complaint process. For example, one of the complaints concerned the \textit{Ulysses} broadcast that was the subject of \textit{Pacifica}'s petition for declaratory ruling before the Commission. \textit{See supra} notes 64, 121 and accompanying text. The Bureau held the complaint, dated July 7, 1987, for almost a year before responding. \textit{See supra} note 64.

\(^{180}\) \textit{SEC v. Chenery Corp.}, 332 U.S. 194, 203 (1947) (agency has discretion to select adjudication or rulemaking as a policymaking mechanism); \textit{Meredith Corp. v. FCC}, 809 F.2d 863, 872 (D.C. Cir. 1987) (federal courts, as a matter of judicial restraint, traditionally seek to avoid premature adjudication of constitutional questions).
the University of California for "a full and fair hearing." Remarkably, neither of the orders remanded had been appealed and neither Pacifica nor the University of California was a party to the case. The University of California filed no petition for review, and Pacifica withdrew the petitions it had filed. The remaining petitioners before the court traced their action not to any of the three orders regarding individual broadcasters, but to the more generalized Public Notice issued on the same day. Their petitions for review were based solely on the prospective effect of the new indecency policy, and sought to distance themselves from the facts of the KPFK, KCSB and WYSP broadcasts as much as possible. Under these circumstances, one might expect the court to have asked whether it had before it a "case or controversy" sufficiently grounded in fact to warrant appellate review. The court never asked that question. Perhaps the court glided past the threshold questions of standing and ripeness because it was impressed with the importance of the issues presented, or because it wished to redress the arbitrariness it found in the Commission's safe harbor guidelines.

Whatever the reason, the court's tacit resolution of these threshold issues had a subtle but deleterious effect on its decision. By accepting the petitioners' pretense that they spoke for all parties immediately injured by the Commission's rulings, the court greatly simplified the nature of the case. The petitioners were respected members of the communications establishment and had a genuine interest in protecting first amendment freedoms of the media. But, with the exception of Infinity Broadcasting, the petitioners had not been stung with "warnings" from the FCC; nor were they likely to drift far enough from the mainstream to broadcast a play concerned with the life-and-death issues of the homosexual community or the raunchy music which many college students enjoy. Despite their good intentions, the petitioners were poorly suited to raise the key questions of whether broadcasters who were not part of the communications establishment nonetheless had a right to speak and whether people who could not be counted among "average" viewers or listeners had a reciprocal right to hear. Only petitioners who could show how the new standard applied to the tough facts of a particular case could raise those questions, which would cut to the quick of the first amendment. Without those facts, the court transformed the constitutional

181. See Action for Children's Television, 852 F.2d at 1334.
182. See supra text accompanying notes 97-98.
183. See supra note 137-38 and accompanying text.
aspect of the case into a sterile exercise in *stare decisis*. The only constitutional questions the court considered were abstract questions of vagueness and overbreadth, and it answered those questions abstractly, without reference to a single word or image that could even remotely offend the average viewer or listener.

The logical neatness of the court's conclusion will offer small comfort to the next broadcast station sanctioned under the Commission's indecency policy. That station will face a Commission now confident of its authority to regulate anything that fits its broad definition of indecency, and a circuit court that can only refer definitional challenges to the Supreme Court. Such relief will be well beyond the economic means of the broadcasters most likely to be sanctioned by the Commission. The voices the FCC will silence are the voices of those stations—the student-run station playing music offensive to an older generation, or the noncommercial station devoted to countercultural politics and the arts—which the court merely pretended to hear.

In ordering the Commission to issue regulations banning indecent programming aired at any time of day, Congress, of course, made no pretense about its willingness to silence speech or speakers which it found offensive. The Helms amendment is an undisguised assertion of power. It does not direct the Commission to consider any issues, collect any data, or exercise any expertise.\(^7\) Nor does it attempt to channel to appropriate hours broadcasts suitable only for an adult audience.\(^8\) Instead, the amendment directs the Commission, on pain of losing the funds necessary for operation, to ban the broadcast of all indecent speech.

The statute displays a similar lack of respect for the courts. It does not recognize that, in the unambiguous view of the circuit court, indecent speech is nonetheless "speech" which can be subjected to precisely-drawn restrictions, but which cannot be suppressed, even when it lacks merit or when the government believes there are valid reasons for suppressing it.\(^9\) The amendment wholly ignores the circuit court's decision to vacate portions of

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\(^7\) As the Commission noted, "[t]he directive of the appropriations language affords us no discretion." Indecency Enforcement Rule, *supra* note 11, at 52,426. Because it viewed its function as "purely ministerial", the FCC promulgated a rule without notice and opportunity for public comment. In doing so, it noted that "[n]o purpose would be served by affording the public an opportunity to comment on this rule before its promulgation." Indecency Enforcement Rule, *supra* note 11, at 52,426.

\(^8\) The legislative history touches upon the channelling concept only by suggesting that indecent speech could be "channelled" to non-broadcast media such as cable television. See 134 CONG. REC. S9911, S9912 (daily ed. July 26, 1988) (statement of Sen. Helms). The ban mandated by the statute makes a mockery of channelling by prohibiting any broadcast of indecent speech at any time. See *supra* note 12.

\(^9\) See Action for Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988).
the Commission's indecency policy for its failure to implement rational restrictions on indecent speech. Instead, it openly invites the courts to strike down the congressionally-imposed indecency ban if they dare.\textsuperscript{190} The statute casts Congress in the role of defender of the "decent, moral values" of the country\textsuperscript{191}, a role few congressmen can afford to reject—especially in an election year.

The Helms amendment's total disregard for the judiciary, and the swaggering display of power it exerts over a federal agency are not its most disturbing aspects. The various branches of the government involved can thrash these abuses out among themselves. Far more disturbing is the statute's attempt to silence the voices that "millions of Americans"\textsuperscript{192} may not want to hear. The power the statute exercises is thus not the moral power claimed by its proponents, nor even the economic power to impose a "constitutionally uncertain law"\textsuperscript{193} on those financially unable to challenge the validity of the law in the federal court system. It is the power to impoverish speech itself. If upheld, the law will flatly prohibit varieties of expression which range from the suggestive patter of an FM morning man to the modern artist's "extravagant excursions into forbidden territory."\textsuperscript{194}

\textsuperscript{190} 134 Cong. Rec. S9911, S9913 (daily ed. July 26, 1988) (letter from Bruce Fein to Sen. Helms); see, e.g., News America, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988) (invalidating on equal protection grounds congressional appropriations amendment which precluded the FCC from using funds to extend current grants of temporary waivers of the newspaper/broadcast cross-ownership ban).


\textsuperscript{192} Id.

\textsuperscript{193} Id. at S9913.

\textsuperscript{194} Joyce uses this phrase to describe his own works. See R. ELLMANN, FOUR DUBLINERS 82 (1988).