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A HISTORICAL PERSPECTIVE ON THE PROTECTION OF CHILDREN FROM BROADCAST INDECENCY

Edythe Wise*

INTRODUCTION

In ruling on its landmark broadcast indecency case, the Federal Communications Commission (FCC or Commission) commented that "to avoid . . . overbreadth, it is important to make . . . explicit whom we are protecting and from what." The "what" is broadcast indecency, which was not clearly delineated until 1975 when the Commission defined it as "language that describes, in terms patently offensive as measured by contemporary communications standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." The Supreme Court upheld the FCC's definition and, therefore, settled the matter, absent future reconsideration by that body.

The Commission applies this definition narrowly. Nevertheless, complete certainty on what constitutes indecency is elusive. As one court explained, the definition of indecency is inherently, but not unconstitutionally, vague.*

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2. Id. In Pacifica, the court quoted with approval the Commission's statement that the concept of the word "indecent" is "intimately connected with the exposure of children to this language." Id. at 732. The Pacifica court continued by stating that indecent language is distinguishable from obscene language because it need not appeal to the prurient interest. Id. at 741.

3. In 1987, the Commission reworded the definition slightly by removing the references to children. This does not indicate that the focus had shifted away from children. Rather, it indicates the Commission's decision to consider separately "the nature of the material involved" — i.e. whether it is indecent — and the time a broadcast aired, which is pertinent to whether an indecent broadcast is actionable. Infinity Broadcasting Corp. of Pa., 3 F.C.C.R. 990, 936 n.6; Action for Children's Television v. FCC, 852 F.2d 1332, 1338 n.8 (D.C. Cir. 1988) [hereinafter ACT I].

4. See infra notes 50 & 126 and accompanying text.

5. ACT I, 852 F.3d at 1343.
Under the current enforcement standard, the Commission seeks to protect children. Accordingly, indecency is banned only when children are likely to be in the broadcast audience. The times when it can be broadcast (currently from ten o’clock p.m. to six o’clock a.m.) are known as the “safe harbor” hours. In contrast, during the early years of broadcast regulation, the Commission sought to protect the entire broadcast audience from obscenity/indecency/profanity. During that time, there was no articulated safe harbor, and acknowledgement of the need to balance the First Amendment rights of the broadcaster and the adult audience with the rights of parents and children was rare.

To say that the Commission administers indecency regulation so as to protect children, while respecting the rights of broadcasters and the adult audience, is not to say that indecency regulation’s issues have been resolved to everyone’s satisfaction. On the contrary, indecency regulation remains the subject of vigorous debate. Virtually every issue involved has been or is being appealed. The continuing challenges illustrate the conflicts inherent in the body of law involved. This Article traces the progress of indecency regulation while acknowledging the remaining controversy.

Controversy complicates the law of broadcast indecency because such regulation precipitates collisions of apparently conflicting constitutionally protected rights and compelling state interests. The Supreme Court has held that viewing or hearing indecent material, primarily a right of viewers and listeners, is protected by the First Amendment. The Court, however, has also upheld the right of parents to protect their children from influences the parents deem harmful; affirmed the right of privacy in one’s home; found


7. Wisconsin v. Yoder, 406 U.S. 205 (1972). Yoder involved members of the Old Order Amish religion and the Conservative Amish Mennonite Church who declined to send their children to school beyond the eighth grade. Id. at 207. Sending their children to school would violate the basic tenets of Amish life. Id. at 209. Citing the First and Fourteenth Amendments, the Supreme Court said that states cannot compel “children to attend formal high school to age 16.” Id. at 234 (footnote omitted).

8. Rowan v. United States Post Office Dept., 397 U.S. 728 (1970). Rowan involved the mailing of unsolicited advertisements that the recipients found to be offensive. Id. at 730. The Supreme Court affirmed the lower court’s opinion stating that the statute was not unconstitutionally vague, thereby affirming the right of residents to establish and maintain the sanctity of their homes. Id. at 740.
a compelling state interest in the welfare of our country’s youth; and upheld the government’s authority to regulate “the content of constitutionally protected speech . . . to promote a compelling interest if it chooses the least restrictive means to further [that] interest.”

Conflicting rights and interests do not create the only problem in this area. Part of the difficulty arises from the nature of broadcasting. Unlike the print and motion picture media, broadcasting does not provide a convenient means to protect children from indecency while simultaneously allowing adults access to it.

Beginning in 1927 with the establishment of the Federal Radio Commission until the present, the Commission has tread with increasing wariness through this legal mine field, seeking to avoid trampling on conflicting rights while advancing the compelling state interests involved in fulfilling its statutory mandate to enforce the prohibition against broadcast indecency. Case by case, the concept of indecency has developed from an amorphous generalization poorly differentiated from obscenity into a concept “intimately connected with the exposure of children to” inappropriate material. Likewise, the indecency enforcement standard has shifted from a focus on the general public interest (with a sporadic nod to special protection for children and unconsenting adults) to a focus on protecting children. To accomplish this by the least restrictive means possible, the Commission, in compliance with the courts, currently allows indecency to be broadcast only during the hours when children are least likely to see it.

9. Ginsberg v. New York, 390 U.S. 629, 640 (1968). In Ginsberg, a business operator was convicted of personally selling two “girlie” magazines to a 16-year-old boy. Id. at 631. The Supreme Court, recognizing prior authority, found that the state has an interest in protecting the welfare of children and safeguarding them from abuses which could prevent their “growth into free and independent well-developed men and citizens.” Id. at 640 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)). See also New York v. Ferber, 458 U.S. 747, 756-57 (1982) (finding that physical and psychological well-being of minor is compelling interest).

10. Sable, 492 U.S. at 126. For a discussion of the conflict between the First Amendment rights of purveyors of constitutionally protected material and the privacy rights of unwilling recipients, see Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) and cases cited therein.


hours are currently set at ten o'clock p.m. to six o'clock a.m. This approach differs considerably from the approach taken by the early Commission.

To put these events into historical perspective, the prohibition against broadcast indecency, which is substantially the same prohibition in effect today, was enacted two years before the stock market collapsed, marking the beginning of the Great Depression. The section prohibiting indecency also prohibited the Federal Communications Commission from censoring broadcasters. Apparently, the legislators who enacted the Radio Act did not consider this a conflict. Moreover, the courts, by and large, upheld this view, even under a standard that today would be considered too vague.

Section 29 was adopted, unchanged, into the 1934 Communications Act as section 326. Under this directive from Congress, the Commission strove over the years to resolve the First Amendment issues involved in a series of cases, the most famous of which, the "seven dirty words" case, was upheld by the Supreme Court in 1978.

During the journey toward greater specificity, the rationale for "who is protected from what" evolved through stages which can be

14. In 1988, the court noted that “parental authority is enhanced ... if the government permits programming at hours outside the workday hours common” to the particular communities under scrutiny. Action for Children’s Television v. FCC, 852 F.2d 1332, 1344 n.21. See also In re Pacifica Found., 556 F.2d 9, 36 (D.C. Cir. 1977) (Leventhal, J., dissenting) (“[F]or homes where parents really care about such matters there would be at least one parent in a position to monitor the material heard and seen [in the early evening].”). However, in ruling on § 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (1992), the court in 1995 extended the hours that indecent broadcasts are banned from eight o'clock p.m. to ten o'clock p.m. ACT III, 58 F.3d at 661. In so doing, it cited the difficulties even parents who are at home experience in monitoring children's listening and viewing access to indecent programming through, for example, a radio with earphones or a television in a child's room. Id. at 661.


18. FCC v. Pacifica Found., 438 U.S. 726, 738-40 (1978). In Pacifica, the Supreme Court upheld the Commission’s determination that George Carlin’s “Filthy Words” monologue, broadcast at two in the afternoon, was indecent but not obscene. Id. at 741.
roughly categorized into periods according to the group receiving protection:

(1) "The Public,"
(2) "The Public," especially children and unconsenting adults,
(3) Ambiguous
(4) Children and, possibly, unconsenting adults,
(5) Parents and their rights to protect their children,\(^\text{19}\)
(7) Children\(^\text{20}\)

The path the Commission followed over the decades, with some detours, was toward narrowing the protected group and refining indecency's definition. It came progressively closer to arriving at the least restrictive means to apply section 1464.

THE 1920s AND 1930s

In resolving early indecency and other First Amendment cases, the Commission consulted non-broadcast cases, usually those involving obscenity, indecency or profanity. Since no precedent was directly on point, the Commission's task was to determine the applicability of such case law to content regulation of broadcasting.

In *Trinity Methodist Church v. FCC*, a 1932 free speech case, the Commission, claiming that a station's programming was not in the public interest, refused to renew the station license.\(^\text{21}\) The issue was not indecency. Rather, the programming at issue consisted of a minister's broadcast attacks on, among others, the Catholic Church, judges and the Board of Health. In upholding the Commission's decision, the court drew a sharp line between broadcast speech and speech in general, stating that the licensee's First Amendment rights were not violated.\(^\text{22}\) The minister could continue to make the statements involved; he simply could not broad-

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\(^{19}\) In response to Congressional action, the Commission proposed to enlarge the category to include the welfare of all children and the privacy rights of unconsenting adults. *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992), *vacated set for rehe'g. en banc*, 15 F.3d 186 (D.C. Cir. 1994). Initially, the court did not uphold this approach. On rehearing, the court continued to focus on assisting parents to supervise their children, but also stated that the government's compelling interest in protecting the country's children provides an independent ground. *ACT III*, 58 F.3d 654, 656 (D.C. Cir. 1995). The court did not reach the question of unconsenting adults.

\(^{20}\) Id.


\(^{22}\) Id. at 851. The court noted that the Radio Act of 1927, 47 U.S.C. § 81, specifically allows the regulation of interstate commerce and that radio communication, broadcast speech, constitutes interstate commerce. Id.
cast them. The court stated that refusing to renew a license of one who has broadcasted defamatory and untrue matter does not deny free speech, it simply applies the regulatory power of Congress. According to the court, since the Commission is required to grant licenses in the public interest, it is obligated to consider the station's conduct as a licensee. The D.C. Circuit predicted that if broadcasting such as that of Trinity Methodist Church is allowed, "then this great science, instead of a boon, will become a scourge . . . ." Although it did not emphasize the protection of children, the court did mention the Commission's ability to take action against broadcasts that "offend youth and innocence by the free use of words suggestive of sexual immorality . . . ."

Turning our attention to an early attempt to differentiate the terms "indecency/obscenity/profanity," we find a 1931 case brought under a charge of obscenity, indecency and profanity but resulting in a conviction for profanity alone. Because the language at issue did not arouse lewd or lascivious thoughts, the court did not find it indecent or obscene. Focusing on references to "God," however, the court found the defendant guilty of profanity. The court, thus, differentiated between profanity and obscenity/indecency. Although it is not clear from the opinion whether the court considered obscenity and indecency separate concepts, apparently it did not. It is virtually certain that none of the participants in this case had a modern concept of indecency as "intimately connected with the exposure of children to [patently offensive sexual or] excretory activities and organs . . . ."

In 1932, however, the Supreme Court provided some support for regarding indecency as an individual, definable category, sepa-

23. Id. The minister's broadcast statements could be regulated. See supra note 21.
24. Id. See supra note 21.
25. Trinity Methodist, 62 F.2d at 852.
26. Id. at 853.
27. Id. The court also mentions the Commission's ability to take action against broadcasts that obstruct the administration of justice, offend the religious sensibilities of thousands or inspire political distrust and civic discord. Id.
28. Duncan v. United States, 48 F.2d 128 (9th Cir. 1931).
29. Id. at 132. The court stated that "while the language used . . . is vulgar, scurrilous, and indecent in the popular sense of the term, it is not obscene or indecent within the meaning of those terms as universally applied in the administration of the criminal law with reference to the use of obscene and indecent language." Id.
30. Id. at 134.
31. Id. at 133.
rate from obscenity and uniquely applicable to broadcasting. In *United States v. Limehouse*,\(^3\text{3}\) which dealt with the postal service rather than broadcasting, the Court held the word “filthy,” added by amendment to the postal obscenity law, was a separate category from obscene, lewd or lascivious.\(^3\text{4}\) The Court defined it as plainly related to sexual matters “coarse, vulgar, disgusting, indecent” and relied heavily on the phraseology and position of the word “filthy” in the statute.\(^3\text{5}\) The broadcast obscenity, indecency, and profanity prohibition lacked similar alternate grounds for distinction. The decision nevertheless allowed for an interpretation that “obscene” and “indecent” differ in meaning just as the court made clear in *Duncan* that the definition of “profanity” differs from that of “obscenity” and “indecency.”\(^3\text{6}\) The Commission, however, did not focus on the distinction between obscenity and indecency in broadcasting until the 1970s.

Meanwhile, late in 1937, shortly before Hitler and his troops marched into Austria and Orson Welles terrified the radio audience with “War of the Worlds,” NBC made news by broadcasting an Adam and Eve skit with Mae West and Don Ameche along with a conversation between Mae West and Charlie McCarthy.\(^3\text{7}\) The Commission, under pressure from Congress, wrote a letter reprimanding NBC for programming “far below the minimum standards.”\(^3\text{8}\) It left indecency and obscenity undefined and did not rely on the presence of children in the audience. The Commission, however, did mention NBC’s “moral responsibility for the effect upon listeners of all classes and ages,” and noted that the network’s broadcasts reached “men, women, and children of all ages.” NBC assured the Commission that in the future it would exercise more caution and the Commission took no further action. One congressman, castigating the Commission as a “letter-writing” and “do nothing” agency, joined the *Washington Merry-Go-Round*, which alluded to NBC’s alleged “cooperative friends on the Commission,” in criticizing the Commission’s Chairman for not imposing a more severe sanction.\(^3\text{9}\)

\(^{33}\) 285 U.S. 424 (1932). O.B. Limehouse was indicted for unlawfully depositing a filthy letter in a post office. *Id.* at 425-26.

\(^{34}\) *Id.* at 426.

\(^{35}\) The Supreme Court in *Limehouse* stated statute, 18 U.S.C.A. § 334, made it illegal to mail “every obscene, lewd, or lascivious, and every filthy, book... or other publication of an indecent character.” *Id.* at 425.

\(^{36}\) *Duncan v. United States*, 48 F.2d 128, 133 (9th cir. 1931).


\(^{39}\) *Id.*
Although, during this period, the Commission focused neither on children nor on the rights of parents to protect them from indecency, two non-broadcast cases were available as precedent for channeling indecency to hours when unsupervised children were not in the audience. *Euclid v. Amber Realty Co.*, later cited in *Pacifica Foundation*, presaged the Commission's later-channeling concept, which was based on the "nuisance" line of cases, stating, "[a] nuisance may be merely the right thing in the wrong place, — like a pig in the parlor instead of the barnyard."40 Another case, *Pierce v. Society of Sisters*, affirmed parents' right to choose to send their children to parochial or private schools.41 *Pierce* thus established a parental right in controlling the children's upbringing.42

**THE 1940s**

The end of the 1930s and the beginning of the 1940s saw several important events in the protection of children as well as a change in placement of the indecency/obscenity/profanity prohibition. In 1938, Congress passed the Fair Labor Standards Act, which, among other things, prohibited oppressive child (under age 16) labor and regulated the work of sixteen to eighteen year-olds.43 In 1944, the Supreme Court, in *Prince v. Massachusetts*, found a compelling state interest in the protection of children.44 In 1948, Congress moved the prohibition against obscenity, indecency and profanity to the criminal code, thus requiring enforcement by both

40. 272 U.S. 365, 388 (1926). Thus, indecent broadcasts may be acceptable in some contexts and intolerable in others. *Id.*

41. 268 U.S. 510, 534 (1925). The Court stated that the Nebraska Compulsory Education Act of 1922 "unreasonably interfer[ed] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

42. *Id.* at 535. The Court noted that the state has no authority to demand that children of the state be educated only through public schools. *Id.* Rather, the Court said, "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*

43. 29 U.S.C. §§ 206-07, 212 (1995). Section 212 specifically discusses child labor and was apparently meant to ensure that commerce is free from child labor. *Id.* § 212.

44. 321 U.S. 158, 170 (1944). Sarah Prince, a Jehovah's Witness and mother of two children, took her children with her to distribute pamphlets at night to pedestrians on a street in downtown Brockton, Massachusetts. *Id.* at 161-62. The Court stated that various situations, in particular propagandizing religious or political matters, create difficult circumstances for adults and are "wholly inappropriate for children, especially of tender years, to face." *Id.* at 170. The Court further noted that the state has the authority to "control the conduct of children [and that authority] reaches beyond the scope of its authority over adults . . . ." *Id.*
the Justice Department and the Commission. The 1940s also witnessed expansion of categories of speech subject to governmental prohibition. In *Chaplinsky v. New Hampshire*, the "fighting words" case, the Supreme Court placed language that by its "very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace" in the same category with indecent and obscene materials.

**The 1950s**

During the era of McCarthyism and the Korean conflict, the growth of television altered American popular culture. Along with the recognition of television's power to affect children came efforts to protect them from inappropriate programming.

One such effort was made by the National Association of Broadcasters (NAB), a trade association, which in 1952 developed a Television Code for self-regulation intended to meet children's special needs. 

"Early versions . . . forbade offensive language, vulgarity, illicit sexual relations, sex crimes, [and] abnormalities during any time period when children comprised a substantial segment of the viewing audience." While the Code was in effect, the NAB responded to congressional concerns by revising it where appropriate, giving its members greater guidance on violence or sexually oriented programming.

The most important obscenity ruling from the 1950s, however, was the landmark case of *Roth v. United States*. Although the

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46. 315 U.S. 568, 572 (1942). In *Chaplinsky*, Walter Chaplinsky, a Jehovah's Witness, was distributing literature and denouncing other religions on a public street on a busy Saturday afternoon. *Id.* at 570. Chaplinsky's words eventually created a disturbance to which the city marshall responded. *Id.* Chaplinsky addressed the marshall with offensive words, violating a state statute. *Id.* at 569. The Supreme Court affirmed the conviction. *Id.* at 568.
47. United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982). The Television Code sponsored by the NAB provided broadcasters with guidelines for meeting their statutory obligations to serve the public interest. *Id.* at 152-53. All television stations were eligible to subscribe, with subscribers being permitted to display the "NAB Television Seal of Good Practice." *Id.* at 153.
48. NAB TV Code, 95 F.C.C. 2d 700, 702 (1983). The Code existed until 1983 when its advertising limitations caused antitrust problems. See United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982). The government charged that three types of advertising limitations violated antitrust laws: those which (1) "limit[ed] the amount of commercial material which may be broadcast each hour," (2) "set a maximum limit on the number of commercial interruptions per program as well as on the number of consecutive announcements per interruption" and (3) "prohibit[ed] the advertising of two or more products or services" in a single commercial less than 60-seconds in length. *Id.* at 153-54.
49. 354 U.S. 476 (1957). *Roth* is a consolidated case involving two separate violations of a federal obscenity statute. *Id.* at 479. In one case, Samuel Roth was
Supreme Court had long assumed that the Constitution does not protect obscenity, it was not until Roth that it squarely faced the question. In holding that obscenity is not protected, the Court noted that although obscenity statutes need not be perfect, they must be applied narrowly.50 As the Commission would later point out, however, the more narrowly the courts rule in finding obscenity, the more explicit material falls into the classification of indecency. Consequently, the Commission is faced with the task of simultaneously preventing it from reaching children while not unduly restricting adult access to it.51

As an apparent result of stations’ adherence to the NAB code, there were few Commission indecency prosecutions in the 1950s. Nevertheless, in 1959, the Commission, in accord with the courts’ emphasis on the well-being of youth, acknowledged the special importance of protecting children from indecency. It stopped short, however, of proclaiming it as the primary reason for indecency regulation. The case in question involved an “announcer” at station KIMN, Denver, Colorado, who made some unauthorized remarks containing allegedly offensive speech, sexual innuendo and offensive sound effects.52 The announcer spoke of flushing pajamas down the toilet (with sound effects of a toilet flushing) and inflating “cheaters” with helium.53 The closest the announcer came to uttering a traditional “four letter word” was when he spoke of “the guy who goosed the ghost and got a handful of sheet.”54

In December 1959, the Commission initiated a revocation proceeding against KIMN based on the broadcast,55 but stayed further convicted of mailing obscene circulars, advertisements as well as an obscene book. Id. at 480. In the other case, David Alberts was convicted for “keeping for sale obscene and indecent books and with writing, composing and publishing an obscene advertisement of them . . . .” Id.

50. Regarding the precision of various state and federal statues prohibiting obscenity, the Court required that “the language [convey] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .” Id. at 491 (citing United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). The Court felt that the tailoring of the language in question was adequate to establish “boundaries sufficiently distinct for judges and juries to fairly administer the law . . . .” Id.


52. Mile High Stations, 28 F.C.C. 795 (1960). Although the Commission found that the incidents were unauthorized, it did not excuse the station’s failure to insure compliance with policy. Id. at 797.

53. Id. at 798 (describing nature of complained of remarks).

54. Id. The announcer, who was subsequently discharged, characterized the remarks as attempts at humor. Id. at 796.

proceedings to consider a petition for reconsideration.\(^5\) In 1960, it replaced the revocation proceeding with a cease and desist order. Commission Chairman Frederick W. Ford dissented over the Commission's failure to revoke the license. The Commission, imposing the lesser sanction, alluded to the protection of children, finding it deplorable "[t]hat the remarks in question, which would have been offensive in any context, occurred on programs in which young people participated . . . ."\(^5\)

**The 1960s**

The rebellious and eventful 1960s (the assassination of President Kennedy, the Beatles, mini-skirts, the "credibility gap," Vietnam on the televised news, "Hair" on Broadway, and "Who's Afraid of Virginia Woolf" at the movies) brought change to indecency/obscenity law as well as to American culture in general. Early in the decade, a 1962 Supreme Court case, *Manual Enterprises v. Dey*,\(^5\) provided an early use of the term "patent offensiveness," which the Court defined as "so offensive on [its] face as to affront current community standards of decency . . . ."\(^5\) The Court used patent offensiveness as a synonym of indecency, stating, "[t]hese magazines cannot be deemed so offensive on their face as to affront current community standards of decency — a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'"\(^5\) The Court stated that materials that are not patently offensive could not legally be held obscene.\(^5\)

Of even more significance, in *Ginsberg v. New York*,\(^6\) the Supreme Court upheld a state statute prohibiting the sale to minors

57. Mile High Stations, 28 F.C.C. 795, 796 (1960). The Commission remarked that although the Communications Act of 1934 affords licensees wide discretion in program form and content, it did not believe that the Act was a sanction for remarks such as used by the announcer. *Id.*
59. *Id.* at 482. This case involved the mailing of magazines primarily containing photographs of semi-nude to totally nude models. *Id.* at 480-81. Parcels of the magazines were detained by the post office awaiting determination as to whether they were considered "unmailable." *Id.* at 481.
60. *Id.* at 482. For a further discussion of obscenity, *see also* Roth v. United States, 354 U.S. 476 (1957) (noting that federal and state obscenity statutes not constitutionally offensive); Smith v. California, 361 U.S. 147 (1959) (noting that state ordinance requiring scienter for selling of obscene materials and imposing strict criminal liability unconstitutional).
62. 390 U.S. 629 (1968). For further discussion of this case, *see supra* note 9 and accompanying text.
of sexual material deemed obscene to children. The Court stated that "a child — like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." This concept of First Amendment protected materials acceptable for adults but not for children strengthened the Commission's basis for concentrating the indecency prohibition on the protection of children from otherwise protected materials. Applying this standard to broadcasting, however, where indecency cannot be kept from children and simultaneously provided to adults, makes such channeling difficult.

Ginsberg is also notable for a discussion of the potential harm to children of permitting them access to pornography. The Court acknowledged that numerous studies have failed to prove or disprove harm to children from exposure to such material. Writing for the majority, Justice Brennan noted that Dr. Willard M. Gaylin, of Columbia University's Psychoanalytic Clinic, reported that some psychiatrists believe exposure to legalized pornography can be harmful during the period while youths are developing sensuality and control. The Court quoted Dr. Gaylin as explaining the view of psychiatrists on permitting children access to pornography:

The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved . . . [t]o openly permit [it] implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval — another potent influence on the developing ego.

63. The Court defined minors as individuals age 17 and younger. Ginsberg, 390 U.S. at 650.
64. Id. at 649-50 (Stewart, J., concurring). Justice Stewart also stated that because children are not adults and do not have the capabilities that are concurrent with adult stature, they can constitutionally be deprived of other rights such as the right to marry and the right to vote, "deprivations that would be constitutionally intolerable for adults." Id. at 650 (Stewart, J., concurring).
65. Id. at 639-43.
68. Id. at 642-43 (quoting Willard M. Gaylin, M.D., The Prickly Problems of Pornography, 77 Yale L.J. 579, 592-93 (1967)).
On the other hand, the Court recognized the lack of proof of indecency's harm to children, but pointed out that such a connection "had not been disproved either." 69

Assuming that broadcast indecency harms children, the Commission spoke of the need to protect "children and . . . the emotionally immature" from four letter words "and sexual description." 70 It also ruled on several cases, issuing a final ruling in KIMN, and, in 1962, denying the renewal application of Palmetto Broadcasting. 71

Although the Commission had multiple grounds (misrepresentation, loss of control of station, and indecent broadcasts) for denying Palmetto's license renewal, it stated that it could have justified revoking the license on the programming issue alone. 72 It claimed that Palmetto violated the public interest standard by wasting the spectrum on such programming. 73 Thus, the Commission deviated from the path toward narrowing Commission indecency involvement to protecting children. Its reasoning evidences remnants, still existing in the 1960s, of the Commission's identification of the general public, not specifically children, as the group to be protected.

In some ways, however, Palmetto looked forward rather than back. Foreshadowing the Commission's ruling in 1987 that innuendo made explicit by content is actionable, 74 the Commission found that the Charlie Walker Show contained sexual innuendo as well as coarse and vulgar language susceptible of double meaning. 75 Leaning toward a recognition of indecency as separate from obscenity, the Commission characterized the programming at issue as

69. Id. at 641-42. The D.C. Circuit in Action for Children's Television v. FCC cited Ginsberg for the proposition that the government need not provide "a scientific demonstration of psychological harm . . . to establish the constitutionality of measures protecting minors from exposure to indecent speech." ACT III, 58 F.3d 654, 661-62 (D.C. Cir. 1995).


72. Palmetto, 33 F.C.C. at 254. The Commission stated that it regarded maintenance of "control over programming as a most fundamental obligation of the licensee." Id. Failure on the part of the licensee to maintain proper control over programming was "extremely adverse to the public interest." Id. at 255.

73. Id. at 258. The Commission stated "that this licensee's devotion of so substantial a portion of broadcast time to [this] type of programming . . . is inconsistent with the public interest, and, indeed, represents an intolerable waste of the only operating broadcast facilities in the community." Id.


75. Palmetto, 33 F.C.C. at 257.
not violative of section 1464.\textsuperscript{76} Rather the Commission found the programming unacceptable for broadcast because it was flagrantly and patently offensive.\textsuperscript{77} Thus, the Commission implicitly used a combined "nuisance/privacy" and "public interest" standard for finding such programming unacceptable. The Commission mentioned the "housewife, the teenager, [and] the young child" as those who might be improperly subjected to the programming.\textsuperscript{78}

Despite the apparent indecency activism indicated by the previous cases, the Commission, in the 1964 \textit{Pacifica} case, rejected allegations of indecency based on a Pacifica broadcast of Edward Albee's \textit{The Zoo Story}, a discussion entitled \textit{Live and Let Live} conducted by eight homosexuals, poems by Laurence Ferlinghetti, a reading by author Robert Creeley and a reading by author Edward Pomerantz.\textsuperscript{79} The Commission, seemingly moving into a channeling concept for protection of children, commended Pacifica for "[t]aking into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after ten o'clock p.m., when the number of children in the listening audience is at a minimum)."\textsuperscript{80} The Commission noted, however, that Pacifica acknowledged procedural errors resulting in the airing of offensive words in two programs. Nevertheless, it gave unconditional full-term renewals to stations that had carried the programs.

The following year, however, when the originating station, KFPA, was due for renewal, the Commission declined to renew for the full term, but granted instead a short term renewal. In support of its decision, the Commission cited complaints about KFPA's programming and its admission that it had not always used the supervisory policies and procedures on which the Commission had relied in granting the previous renewal.\textsuperscript{81}

In a 1969 case that would prove significant in the 1970 Commission rulings, the United States Court of Appeals for the District of Columbia Circuit ruled that the utterance of indecent or obscene words amounted to disorderly conduct, punishable under title 22, section 1107 of the D.C. Code, if the words either created a threat of violence or were "under 'contemporary community stan-
A HISTORICAL PERSPECTIVE

The 1970s

In the seventies, Congress banned the broadcast of cigarette advertising; Watergate eclipsed all else in the news and the Vietnam cease fire was signed. Substantial changes occurred in the broadcast indecency/obscenity area as well. The Supreme Court adopted the definitions of obscenity and indecency still used today. The 1970 Commission decisions reflected the Supreme Court's increased specificity as well as the country's cultural changes. These decisions brought greater clarity to indecency law than had existed in decades. Of greatest importance was the identification of the protection of children as the rationale for indecency regulation.

As the 1970s began, complaints of indecency inundated the Commission, Congress and broadcasters despite the continued existence of the NAB Code. The decade commenced with two Commission cases that had begun in the late 1960s. In one, In re Jack Straw Memorial Foundation, the Commission issued a short term renewal for indecency.\(^{83}\) The majority decision was less significant than the dissents, which indicated that some of the Commissioners were adopting a more analytical approach to indecency regulation. Recognizing the need that context and standards be as objective as possible, Commissioner Nicholas Johnson, in dissent, pointed out that the Commission was dealing with an isolated instance and neither got a transcript of the program nor attempted to apply the statute. Commissioner Kenneth A. Cox, who also dissented, opined that the term "indecency" was so vague it was unconstitutional.

The other carry-over from the 1960s, In re WUHY-FM, concerned an interview with Jerry Garcia of the Grateful Dead.\(^{84}\) Mr. Garcia presented his views on ecology, philosophy, and other non-objectionable topics, but, apparently through habit, interspersed his conversation with expletives. The Commission received no complaints on this broadcast. Because of previous complaints about the same program, however, they happened to be monitoring the interview.

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83. In re Jack Straw Memorial Found., 21 F.C.C.2d 833 (1970). The renewal was contingent upon the station's taking appropriate steps to implement stated procedures in selecting material for broadcast. Id. at 834.
The Commission used the broadcast as a test case. In the course of its decision, the Commission touched upon many of the issues relating to the importance of the protection of children, but did not narrow the rationale to their protection. Rather, it spoke of its duty to "prevent the widespread use on broadcast outlets of such expressions . . . ."85 If newscasters, disc jockeys and other broadcasters talked this way, reasoned the Commission, such programming would undermine the usefulness of radio to the millions of people who considered such speech "patently offensive."86 The Commission noted the passive nature of broadcasting, in which one is vulnerable to encountering offensive broadcast containing objectionable language while dialing from station to station.87 It compared broadcast with literature, which one must acquire and read.88 Not unmindful of youth, the Commission added that "in [the broadcast] audience [there]are very large numbers of children . . . No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions . . . ."89

The Commission agreed with the defense that the material was not obscene under the Roth obscenity test,90 in that it lacked "dominant appeal to prurience or sexual matters."91 Citing United States v. Limehouse,92 the Commission considered indecency as separate from obscenity and defined indecency as: "‘patently offensive . . . and utterly without redeeming social value.’ "93 The Commission imposed a $100 fine so that, on appeal, the court would review and determine the standards for judging broadcast indecency.94 The licensee, however, did not contest the forfeiture.

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85. Id. at 410. The Commission stated this duty was triggered under the circumstances of the facts of this particular case. Id.
86. Id. at 410-11.
87. Id. at 411.
88. Id.
89. WUHY-FM, 24 F.C.C.2d, at 411. The Commission stressed "it is crucial to bear in mind the difference between radio and other media." Id. (emphasis omitted).
90. 354 U.S. 476 (1956). For a discussion of Roth, see supra note 49.
92. 285 U.S. 424 (1932). In Limehouse, the Supreme Court held unmailable matter included "filthy" letters and writings deposited in a post office. Id. The Supreme Court found that Congress intended to add "the filthy" as a new class of unmailable matter. Id.
93. WUHY-FM, 24 F.C.C.2d at 413.
94. Id. at 415.
The Commission's view of whom it should protect from indecency was, at this point, ambiguous. On the one hand, it had identified the millions of people who would curtail use of broadcasting rather than hear or view indecency as the group needing protection. In a sense, this amounted to a need to protect broadcasting itself, which would lose its audience. On the other hand, it mentioned children and the rights of parents to protect them. It seemed, though, that the Commission regarded parents and children as simply a special part of the larger group.

Commissioner Cox, in a concurrence/dissent, pointed out that the broadcast was between ten o'clock p.m. and eleven o'clock p.m., its audience was primarily college students and nobody had complained about the broadcast. He disagreed that failure to prosecute indecency would drive away millions of listeners.

In a blistering dissent, Commissioner Nicholas Johnson accused his fellow commissioners of imposing their moral values on the nation. He said that the Commission actually was condemning "a lifestyle it fears because it does not understand." He complained that the indecency definition was vague and questioned how a program about which the Commission received no complaints could be considered "patently offensive." Meanwhile, early in the 1970s, the Supreme Court made statements addressing captive audiences, especially in the home. For example, in 1970, in *Rowan v. United States Post Office Department*, the Court upheld a federal law allowing individuals to have the Post Office remove their names from the mailing lists of those who had sent them objectionable material. The Court rejected the claim that a vendor has a right to send messages to those recipients who do not want

95. *Id.* at 411.
96. *Id.*
97. *Id.* at 418 (Cox, Comm'r, concurring and dissenting).
98. *WUHY-FM*, 24 F.C.C.2d at 421 (Cox, Comm'r, concurring and dissenting).
99. *Id.* at 423 (Johnson, Comm'r, dissenting).
100. *Id.* at 422 (Johnson, Comm'r, dissenting).
them. As stated in *Pacifica*, the *Rowan* Court ruled that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."

In 1971, the Supreme Court, in *Cohen v. California*, announced that, "[t]he ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." It did not find a strong enough invasion of privacy and reversed a conviction for walking the corridors of a courthouse wearing a shirt bearing the message "Fuck the Draft."

The following year, the Supreme Court decided a case that seems only peripherally related to the subject at hand, but is actually critical to the narrowing of the Commission's and the Court's focus to unsupervised children in the 1980s and 1990s. In *Wisconsin v. Yoder*, the Supreme Court permitted Amish parents to curtail their children's education at a younger age than state law permitted. Parental rights were extended even to generally unaccepted child rearing practices. The Court upheld parents' rights to shield their children from influences the parents consider harmful. Also in 1972, the United States Court of Appeals for the District of Columbia Circuit applied the law of nuisance to the utterance of coarse or indecent language.

In 1973, the Supreme Court decided *Miller v. California* and gave us the current definition of obscenity:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a

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104. *Id.*
106. *Pacifica*, 438 U.S. at 748. The Supreme Court, in *Pacifica*, applied this reasoning to broadcasting, explaining "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected content." *Id.*
107. *Cohen v. California*, 403 U.S. 15, 21 (1971). The Court stated that a broader view than this would empower the majority to silence the minority on the basis of personal preference. *Id.*
108. *Id.* at 22.
110. Von Schleicher v. United States, 472 F.2d 1244 (D.C. Cir. 1972). The court found a police officer had probable cause to make a disorderly conduct arrest of a defendant, who, within earshot of pedestrians, shouted "fuck" and ran from the police. Subsequently, the policemen, after catching and arresting the suspect, found heroin. *Id.*
whole, appeals to the prurient interest,\textsuperscript{112} (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.\textsuperscript{113}

Indecency became identifiable as something separate from obscenity.

In 1975, in \textit{Illinois Citizens Committee for Broadcasting v. FCC},\textsuperscript{114} which was an appeal of the Commission’s decision in \textit{In re Sonderling Broadcasting, Corp.},\textsuperscript{115} the court of appeals emphasized the significance of the likelihood of children’s presence in the audience to the existence of a violation.\textsuperscript{116} The Commission had fined Sonderling $2,000 for broadcast of a program, Femme Forum, from ten o’clock a.m. to three o’clock p.m.\textsuperscript{117} The program in question gave “repeated and explicit descriptions of the techniques of oral sex.”\textsuperscript{118}

Although the licensee did not contest the forfeiture, a public interest group did. Consequently, the court of appeals handled the case.\textsuperscript{119} Had the licensee refused to pay the forfeiture, it would have been entitled to a trial \textit{de novo}. The court, however, finding the material obscene under \textit{Miller},\textsuperscript{120} did not discuss the Commission’s treatment of indecency, but did mention the likelihood of children’s presence in the audience.\textsuperscript{121}

The preceding cases created a foundation for narrowing the focus of indecency regulation to children. The right of privacy in the home, the ability of parents to protect their children from objectionable material, the rights of broadcasters and their audiences

\begin{footnotes}
\item[113.] \textit{Id.} at 24. The Supreme Court rejected the test of “utterly without redeeming social value” as a constitutional standard. \textit{Id.}
\item[114.] 515 F.2d 397 (D.C. Cir. 1975).
\item[115.] 41 F.C.C.2d 777 (1973), \textit{aff’d sub nom.} Illinois Citizens Comm. for Broadcasters v. FCC, 515 F.2d 397 (D.C. Cir. 1975) (Commission denied Application for Remission of Forfeiture and Petition for Reconsideration, except to extent it is a clarification).
\item[117.] \textit{Id.} at 400.
\item[118.] \textit{Id.} at 401.
\item[119.] \textit{Id.} at 400.
\item[120.] \textit{Illinois Citizens Committee for Broadcasting}, 515 F.2d at 405 (citing \textit{Miller v. California}, 413 U.S. 15, 24 (1973)).
\item[121.] \textit{Id.} The Commission had ruled the program indecent and obscene. \textit{Id.} at 403-04 n.14.
\end{footnotes}
to free speech, and a broadening of the concept of "nuisance" as applicable to language all coalesced to form the basis for the most precise indecency ruling up to that time. This ruling came in response to a complaint describing a situation not unlike those the Commission had faced before.

Early on a Sunday afternoon in 1973, a man and his son, while traveling in a car, heard a George Carlin routine entitled "Filthy Words." The man complained to the Commission and started the most significant case in broadcast indecency history. In 1975, the Commission issued a declaratory ruling that the Carlin routine, which, as its title suggests, discussed various "taboo" words describing sexual or excretory organs or activities, was indecent.122

In its ruling, the Commission crystallized many of the concepts that it had left unclear in earlier rulings. It was in this case that it stated: "to avoid error of overbreadth it is important to be explicit as to "whom we are protecting and from what."123 The Commission also said, "[t]he concept of indecency is intimately connected with the exposure of children to language that [is indecent]."124 It stated further that the material need not appeal to the prurient interest to be indecent and that it cannot be rescued by merit when children are in the audience. It defined indecency, and clarified the difference between obscenity and indecency.125 Thus, the Commission did not have to meet the Miller standard for obscenity.126 Although it alluded to the desirability of warnings for consenting adults, it focused on children as the protected group. In contrast with most Commission indecency cases, it attempted to explain why children should be protected from such material, claiming that indecency "has the effect of debasing and brutalizing human beings."127

The Commission said that indecency should be regulated by principles analogous to the law of nuisance where the "law generally speaks to channeling behavior rather than actually prohibiting

123. Id. at 98.
124. Id.
125. Pacifica, 56 F.C.C.2d 94 (1975). For a further discussion and definition of indecency, see supra note 2 and accompanying text.
126. Id. When the case was appealed to the Supreme Court, Pacifica argued, unsuccessfully, that Hamling v. United States, 418 U.S. 87 (1974), indicates that "indecency" and "obscenity" in § 1461 are synonyms. FCC v. Pacifica Found., 438 U.S. 726, 739-40 (1978). In Hamling, the Supreme Court, in interpreting the postal statute, 18 U.S.C. § 1461, held the words "obscene, lewd, lascivious, indecent, filthy or vile" all mean "obscene." Hamling, 418 U.S. 87.
127. Pacifica, 56 F.C.C.2d at 98.
it."128 Commissioners Glen O. Robinson and Benjamin L. Hooks, in concurrence, said, "the governing idea is that 'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and content."129

Shortly before, as well as during the pendency of the Pacifica case, several other indecency related events occurred. With one exception, these did not arise from cases. In 1975, the Commission dealt with indecency complaints about the University of Pennsylvania's station, WXPN. Its ruling, however, turned on the licensee's loss of control of the station, which in turn engendered the complained of programming.130

Meanwhile, pressure from other branches of government and the public influenced the importance accorded indecent broadcasts. In 1972, the Surgeon General reported that television programming has an effect on "certain members of society."131 In 1974, despite the NAB Code, the Commission received nearly 25,000 complaints of sexually oriented or violent programming.132 Broadcasters were also concerned with the number of complaints they received. In June 1974, Congress, after five consecutive years of concern about the effect of violence and "questionable" material on children, "directed the Commission 'to submit a report to the (appropriate) Committee by December 31, 1974, outlining the specific, positive actions taken or planned by the Commission to protect children from excessive violence and obscenity.' "133

In response to Congress' direction, the Commission released a Report on the Broadcast of Violent, Indecent, and Obscene Material, in which the Commission discussed childhood exposure to violence and indecent programming.134 The Commission reported on studies of appropriate programming for children and concluded that it

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128. Id. (emphasis omitted).
129. Id. at 108 (Robinson, Comm'r, concurring) (stating majority's reference to nuisance is atmospheric, not substantive).
130. Trustees of the Univ. of Pa., 57 F.C.C.2d 782 (1975); WXPN, 57 F.C.C.2d 793 (1976) (applying for renewal of license).
133. Id. at 702-03.
could not prohibit violence because it is too difficult to define. As examples, it cited the scene in *Peter Pan* where the crocodile eats Captain Hook and the scene in *Snow White* where the witch poisons the heroine. Although it reported several studies showing harm to children from viewing violent material, it assumed harm from indecency. It expressed its intention to enforce the law against obscenity and indecency, but also expressed its concern about sexually oriented programming that does not rise to the level of obscenity or indecency. The Commission reported to Congress that its Chairman, Richard Wiley, had met with broadcasting industry heads, who agreed to self-regulate.

Chairman Wiley urged self-regulation because of his concerns that government action to regulate sexually-oriented or violent program content would violate the First Amendment as well as section 326 of the Communications Act. On April 8, 1975, the broadcasters cooperated by adopting a Family Viewing Amendment to the NAB Code. The amendment provided, in essence, that the first hour of prime time would contain no programming unsuitable for viewing by the entire family. Complaints by program suppliers, however, led to charges that the Commission had violated the First Amendment. The controversy reached the courts, which initially found that the Chairman had coerced the networks into adopting the Family Viewing Amendment and thus had violated the First Amendment and the Administrative Procedure Act. On appeal the court concluded that the issues were properly under the jurisdiction of the regulatory agency involved, and remanded the question to the Commission. The Commission found that the Chairman had acted properly.

135. *Id.* at 419.
136. *Id.* at 419 n.5.
137. *Id.* at 418.
138. *Id.* at 424-25.
140. *Id.* at 420.
142. *Id.* at 1072. The Family Viewing Amendment provides that: Entertainment programming inappropriate for viewing by a general audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program is deemed inappropriate for such an audience, advisories should be used to alert viewers.

*Id.* (citing NAB, the Television Code 2-3 (18th ed. June 1975)).
143. *Id.*
144. *Id.*
At about the same time, concerned with what it viewed as lack of clarity in the indecency/obscenity/profanity statute it was responsible to enforce, the Commission attempted to clarify indecency standards through new legislation. It proposed to the 94th Congress that it amend the Communications Act to (1) include a new obscenity/indecency section applicable to both broadcast and cable, (2) delete the profanity prohibition and (3) rescind section 1464. The Commission claimed that increasing numbers of complaints of section 1464 violations had led it to examine the existing statute and, as a result, find deficiencies.

The purpose of the proposed section was to remedy these deficiencies in part by clarifying the term “indecency,” the legislative status of which the Commission described as unclear. The Commission also proposed to redraft the language to make clear that restrictions apply to one who disseminates as well as to one who “utters” indecency, and to actions as well as speech.

Citing Ginsberg and Yoder for authority that the protection of children from morally offensive material is more important than the protection of unconsenting adults, the Commission proposed a “variable standard that reflects this difference.” Consequently, the Commission recommended that indecent material be banned only during those times that children are most likely to be in the audience.

The Commission offered several bases in support of these restrictions: making broadcasting a privilege; scarcity of broadcast frequencies; a federal interest in broadcasting because of government regulation of the spectrum; and the intrusive nature of broadcasting. It pointed out that while intending to reach one group, a broadcaster reaches all groups. Congress did not adopt the proposed legislation, leaving the Commission to continue case by case resolution of those issues the legislation was designed to clarify.

146. Id.
149. 122 CONG. REC. 33,363 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376 (1969)). With increased information outlets, this factor has decreased in importance.
150. Id.
151. Id. at 33,364.
Then, in 1977, the court of appeals struck down the Commission's *Pacifica* ruling.\(^{152}\) The Supreme Court, however, reversed, upheld the Commission and reaffirmed *Ginsberg*.\(^{153}\) The Court stated: "[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans."\(^{154}\) It spoke of "the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."\(^{155}\) Continuing, the Supreme Court stated "broadcasting is uniquely accessible to children, even those too young to read."\(^{156}\) It upheld the Commission's definition of indecency.\(^{157}\) The Court also held censorship goes to prior restraint, not to finding a violation after the broadcast.\(^{158}\) Nonetheless, it emphasized the narrowness of its ruling.\(^{159}\)

**The 1980s**

Heeding the Supreme Court's warning that *Pacifica* is a narrow ruling, the Commission, despite many complaints, interpreted the case so narrowly that it found no broadcaster in violation again until the late 1980s.

Then, in 1987, the Commission once more became active in indecency enforcement. Its rulings immediately made clear that its primary focus was on children. In April of 1987, the Commission, in issuing several declaratory rulings, announced a new enforcement standard: It would use the actual definition affirmed by the Supreme Court instead of limiting its enforcement efforts to the *Pacifica* "seven dirty words."\(^{160}\) Also, it warned that, although it had previously considered indecent broadcasts after ten o'clock p.m.

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154. *Pacifica*, 438 U.S. at 748. The Supreme Court noted that material broadcast over the airwaves enters into the privacy of the home. *Id.*
158. *Id.* at 735.
159. *Id.* at 750.
permissible, it now believed that after ten o’clock p.m., there was still a reasonable risk of children in the audience in the markets before it.\textsuperscript{161} In one of the cases involving station WYSP, the Commission extended its enforcement beyond the explicit “dirty words” to innuendo made explicit by context.\textsuperscript{162} In December 1987, the Commission reaffirmed its ruling.\textsuperscript{163}

On appeal, in \textit{Action for Children’s Television v. FCC (ACT I)} in 1988, the United States Court of Appeals for the D.C. Circuit noted that the Commission stated as its purpose in indecency enforcement enabling “parents to decide effectively what [indecent] material . . . their children will see or hear.”\textsuperscript{164} Consequently, it remanded two of the cases, involving broadcasts aired after ten o’clock p.m., to the Commission for development of a full record on the channelling aspect with sensitivity to the constitutional protection of indecent material and its objective of assisting parents.\textsuperscript{165} It upheld, however, the indecency definition and affirmed a case involving the Howard Stern show, which aired from six o’clock a.m. to ten o’clock a.m.\textsuperscript{166}

In the aftermath of \textit{ACT I}, Congress made a series of attempts to eliminate or, failing that, minimize the “safe harbor” (hours indecency is permitted). In 1988, before the Commission could act on the \textit{ACT I} remand, Congress enacted a twenty-four hour ban.\textsuperscript{167} Its sponsor, Senator Jesse Helms, emphasized that a total ban on broadcast indecency is necessary because children have access to radios and televisions at all hours.\textsuperscript{168} He argued further that the presence of video cassette players and tape recorders enable children to record indecent programming at night and replay it during the day.\textsuperscript{169} However, he also expressed the opinion that adults who abhor such programming should not be forced to have it in their homes either.\textsuperscript{170}

the definition approved by the Supreme Court, but kept the concept that indecency is actionable when children are in the audience. \textit{Id.}

\textsuperscript{161} \textit{Pacifica Found., Inc.}, 2 F.C.C.R. at 2699.

\textsuperscript{162} \textit{Infinity Broadcasting Corp.}, 2 F.C.C.R. 2705 (1987).

\textsuperscript{163} \textit{Infinity}, 3 F.C.C.R. 930 (1987). \textit{See supra note 74.}


\textsuperscript{165} \textit{Id.} at 1334.

\textsuperscript{166} \textit{Id.}


\textsuperscript{168} 134 CONG. REC. S9912-13 (daily ed. July 26, 1988).

\textsuperscript{169} \textit{Id.} at S9912.

\textsuperscript{170} \textit{Id.}
Included in the legislative history is an opinion letter from Bruce Fein, a former General Counsel for the Commission.\textsuperscript{171} In the letter, Mr. Fein expressed his belief that a twenty-four hour ban to protect children from indecency would not violate the Constitution.\textsuperscript{172} Citing children’s access to radios, televisions and recording devices, he claimed that a total ban on broadcast indecency could be considered necessary.\textsuperscript{173} Regarding adults’ rights to indecent programming, he stated that those who want to avail themselves of indecent material can do so in theaters, nightclubs or record and tape stores.\textsuperscript{174} He also noted that Congress customarily passes constitutionally uncertain laws on public policy grounds and allows the judiciary to rule on whether they pass Constitutional muster.\textsuperscript{175} Neither providing support for nor closing the door on Senator Helms' belief that adults should not have to be exposed to such material, he pointed out that the Court in \textit{Pacifica} had “left for another day” the determination of whether the Commission could enforce a ban on indecent broadcasts when no children were in the audience.\textsuperscript{176}

The twenty-four hour ban became law,\textsuperscript{177} but was appealed and stayed. Then, in 1989, the Supreme Court, in a case involving indecency by telephone, restated the government’s compelling interest in protecting children from indecent material.\textsuperscript{178} Consequently, the Commission requested remand either to develop a twenty-four hour ban or to set channeling hours in light of the Supreme Court’s decision in \textit{Sable}.

\textbf{The 1990s}

In 1990, the Commission issued a report on its investigation of whether a twenty-four hour ban on indecency is warranted.\textsuperscript{179} It found that available data indicate that unsupervised children are in

\begin{itemize}
\item \textsuperscript{171} Id. at S9913 (citing letter from Bruce Fein to Senator Helms).
\item \textsuperscript{172} Id.
\item \textsuperscript{173} 134 CONG. REC. S9913 (daily ed. July 26, 1988).
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Id. (citing \textit{Pacifica}, 438 U.S. at 750 n.28).
\item \textsuperscript{178} Sable Communications v. FCC, 492 U.S. 115, 126 (1989). Specifically, the Supreme Court found that “the Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages . . . .” \textit{Id}.
\end{itemize}
the audience at all hours. It also found that children from age two until seventeen watch an average of twenty-six hours of television per week, and that up to fifty percent have their own television sets, while each household has an average of over five radios. Consequently it found a twenty-four hour ban to be necessary.

Addressing the definition of "children," an historically uncertain area, the Commission surveyed federal and state statutes on indecent materials. It also reviewed Supreme Court cases that found a compelling state interest in protecting minors from indecency. As a result of its research, it defined "children" as age seventeen or under. Despite the Commission's study, in 1991, the United States Court of Appeals for the District of Columbia Circuit invalidated the twenty-four hour ban.

In 1992, Congress enacted the "Byrd Amendment," prohibiting broadcast indecency from six o'clock a.m. to midnight (six o'clock a.m. to ten o'clock p.m. for public broadcasters that go off the air before midnight). Its sponsor, Senator Byrd, cited the findings of the 1990 Report with approval, apparently concurring with the Commission's definition of children. In 1993, the Commission issued a rule implementing the Byrd Amendment. The D.C. Circuit, however, initially rejected the Byrd Amendment, but, later, vacated the decision and set the case for rehearing en banc. Meanwhile, the Commission continued to prohibit the broadcast of indecency between six o'clock a.m. and eight o'clock p.m. in accordance with ACT I.

Upon rehearing, the court widened those channeling hours to six o'clock a.m. to ten o'clock p.m., primarily because of the difficulty parents face in limiting the programs to which their children are exposed even when the parents are at home. The court stated further that it would not be unconstitutional to extend the indecency prohibition to midnight if the ban were applied equally

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180. Id. at 5297.
181. Id. at 5302.
182. Id. at 5309. The Commission concluded that the 24 hour ban "is the most narrowly tailored means of protecting children from indecent material." Id. at 5301.
183. Id. at 5301.
189. ACT III, 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc).
to public and commercial broadcasters. However, since Congress had ended the ban at midnight for commercial broadcasters and at ten o'clock p.m. for public broadcasters, the court set the hour at ten o'clock p.m. for both. Although the court focused on the rights of parents to protect their children from indecency, it commented that the government’s own compelling interest in protecting children provided an alternate ground.

During the 1990s, the Commission evidenced concern with protecting children from other material, inappropriate even if not indecent. It issued a ruling in one case involving graphic pictures of aborted fetuses run in political “uses” during the day. The Commission, while declining to find such programming indecent, advised licensees that, even though broadcasters are not permitted to censor such advertising, it would permit them to confine the advertisements to periods when children are not likely to be in the audience.

Congress, in the 1990s, has also taken steps beyond the indecency prohibition to minimize television’s potential harm and to maximize its benefits to children. To help parents limit children’s exposure to violent programming without infringing upon the First Amendment rights of the rest of the audience, it is considering several alternatives, including use of a “v” chip, which would allow parents to block violent programming. In 1990, to improve the educational benefits of television programming for children and to protect them from excessive advertising, Congress passed the Children’s Television Act. The Act protects children twelve and under from over-commercialization and requires educational programming for those age sixteen and under. In enacting the Children’s Television Act, Congress stated that “children are this

190. Id. at 667.
191. Id. at 669-70.
192. Id. at 663.
193. Section 315 of the Communications Act of 1934, as amended, prohibits broadcasters from censoring political advertising involving an appearance of candidate.
194. See Letter to Messrs. Pepper and Gastfreund, 7 F.C.C.R. 5599 (1992) and Letter to Daniel Becker 7 F.C.C.R. 7282 (1992), aff’d, 9 F.C.C.R. 7638 (1994) (appeal pending 95-1048 D.C. Cir.). It is important to note that the broadcasters did not have the option of refusing to accept such advertising. Under § 312(a)(7) of the Communications Act of 1934, as amended, broadcasters are required to allow federal candidates “reasonable access” to air time.
196. Id.
nation's most valuable resource, and we need to pay special attention to their needs." 197

Studies done both by Congress, in adopting the Children's Television Act, and by the Commission, in promulgating rules to enforce it, have demonstrated the powerful effect the broadcast media have on our youth. The findings indicate that market forces, acting alone, cannot prevent the deleterious effects of television and replace them with positive programming. 198 Although beyond the scope of this Article, these studies reinforce the current focus on children as a group warranting protection beyond that given the adult audience.

CONCLUSION

Much has changed since Congress adopted the obscenity/indecency/profanity prohibition still in effect today. Even greater changes are likely in the future. 199 Although there are still subjects of controversy, current recognition of the importance of defining indecency and narrowly identifying the group to be protected has considerably improved the Commission's ability to enforce section 1464 in a manner that is the least restrictive possible and that balances the right of privacy in the home, the compelling national interest in the welfare of youth, and parents' rights to protect their children with the First Amendment rights of the adult audience and broadcasters. 200

199. The internet presents challenges requiring a radically different approach to controlling children's access to pornography. One possibility is the use of technology. As Commission Chairman Reed E. Hundt remarked at the Symposium sponsored by Annenberg Washington Program and The Children's Partnership on May 25, 1995, a new technology, Surfwatch, uses "keywords and a database of blocked sites" to "filter Internet pornography from children."
200. The views expressed in this Article are solely the Author's and do not reflect those of the Federal Communications Commission.