

FCC 75-200

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

<p>In the Matter of a CITIZEN'S COMPLAINT AGAINST PACIFICA FOUNDATION STATION WBAI (FM), NEW YORK, N.Y. Declaratory Order</p>	}	File No. BRH-13
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MEMORANDUM OPINION AND ORDER

(Adopted February 12, 1975; Released February 21, 1975)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING IN THE RESULT;  
COMMISSIONERS REID AND QUELLO CONCURRING AND ISSUING STATE-  
MENTS; COMMISSIONER ROBINSON CONCURRING AND ISSUING A  
STATEMENT IN WHICH COMMISSIONER HOOKS JOINS.

1. During the past several years, the Commission and the Congress have been receiving an increasing number of complaints concerning the use of indecent language on the public's airwaves. In 1970, the Commission focused on this problem in *Eastern Educational Radio (WUHY-FM)*, 24 FCC 2d 408 (1970) and issued a notice of apparent liability which held "indecent" the use of the words "fuck" and "shit" during a pre-recorded broadcast interview.<sup>1</sup>

2. Since that decision, the problem has not abated and the standards set forth apparently have failed to resolve the issue. Moreover, the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973) reformulated the definition of obscenity which had provided the basis for our definition of indecency in *WUHY*. Further, *Sonderling Corp.*, 27 RR 2d 285, *recon. denied* 41 FCC 2d 777 (1973) was affirmed sub. nom. *Illinois Citizens Committee for Broadcasting, et al. v. FCC*, D.C. Cir. No. 73-1652, decided November 20, 1974, and is the first judicial decision upholding the FCC's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.<sup>2</sup> In this declaratory order we consider a citizen's complaint about a broadcast which contained many of the words about which the public has complained. We review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of "indecent" language. This order does not deal with the somewhat different problem of "obscene"

<sup>1</sup>The Commission is empowered to impose sanctions on licensees who violate § 1464 of Title 18 of the United States Code which provides: "Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C.A. 1464.

<sup>2</sup>The Court upheld the Commission's finding of obscenity against a radio call-in show which, during hours when the audience could include children, had broadcast explicit discussions of ultimate sexual acts in a titillating context. Accordingly, it did not have to "reach the question of the constitutionality of [the Commission's] interpretation and application of term 'indecent.'" Slip Op. 10, n. 5. The Commission had defined "indecent" as material that is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. 24 FCC 2d at 412.

language which was discussed by the Commission in *Sonderling Corp., supra.*

## THE COMPLAINT

3. First, we consider the facts which give rise to this review. On December 3, 1973, the Commission received a complaint from a man in New York City stating that in the early afternoon of October 30, 1973, while driving in his car, he heard broadcast by Station WBAI (licensed to the Pacifica Foundation) the words "cocksucker," "fuck," "cunt," and "shit." He stated that "This was supposed to be part of a comedy monologue," that "Any child could have been turning the dial, and tuned in to that garbage," and that "Incidentally, my young son was with me when I heard the above . . ."

4. The cover of the record, which the licensee subsequently identified as having been played in part at approximately 2 p.m. on October 30, 1973, states that it was recorded live at the Circle Star Theatre, San Carlos, California. The segment of the record to which the complainant obviously referred was Cut 5 of Side 2, titled "Filthy Words" and ran 11 minutes and 45 seconds. A verbatim transcript of this material is attached hereto as an Appendix and is incorporated herein by reference.

5. Review of this recorded monologue reveals that it consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say . . ." Thereafter there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.

## PACIFICA'S RESPONSE

6. On December 10, 1973, the complaint was forwarded to WBAI (FM) with a request for its comments. After receipt of the licensee's initial response, dated January 7, 1974, the Commission, on March 26, 1974, requested that it forward a recording or complete script of the program in question. In response, the licensee stated that the complaint was based on the language used "in a satirical monologue broadcast during the course of a regularly scheduled live program, 'Lunchpail,' hosted by Paul Gorman, on October 30, 1973, at approximately 2:00 p.m." The licensee stated that "the monologue in question was from the album 'George Carlin, Occupation: FOOLE,' Little David Records"; that on October 30 the "Lunchpail" program "consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language," that the subject was also discussed with listeners who called in and that "Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society." The licensee continued as follows:

The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as

offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, [complainant] is the only person who has complained about either the program or the George Carlin monologue.

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those “secret” manners and words which, when held before us for the first time, show us new images of ourselves.

His stories of childhood life on New York’s city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

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

In response to the Commission’s request for a recording or script of the program, the licensee, by letter dated April 3, 1974, stated that no recording of the program was made, “and since the program was done live and extemporaneously, no script was prepared in advance.”

#### DISCUSSION

7. At the outset we recognize that Congress in Section 326 of the Communications Act prohibited the Commission from engaging in censorship or interfering “with the right of free speech by means of radio communications.” But the prohibition against the broadcast of “obscene, indecent, or profane language” was originally included in Section 326. Later it was transferred to the criminal code, 18 U.S.C. 1464. Congress has clearly indicated that both the Department of Justice and the FCC are obliged to enforce section 1464.<sup>3</sup> This declaratory order is not intended to modify our previous decisions recognizing broadcasters’ broad discretion in the programming area. For example, in *Pacifica Foundation*, 36 FCC 147 (1964), licenses were renewed where provocative programming had offended some listeners. *Pacifica* had, however, taken “into account the nature of the broadcast medium when it scheduled such programming for the late evening hours (after 10 p.m., when the number of children in the listening audience is at a minimum).” 36 FCC at 149. See also *Anti-Defamation League*, 4 FCC 2d 190, affirmed 131 U.S. App. D.C. 146, 403 F. 2d 169 cert. denied 394 U.S. 930 (1969).

8. Congress, the Commission, and the Courts have recognized that the broadcast medium has special qualities which distinguish it from other modes of communication and expression. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). As we noted in *WUHY-FM*, *supra*:

... broadcasting is disseminated to the public (Section 3(o) of the Communications Act, 47 U.S.C. 153(o)) under circumstances where reception requires no

<sup>3</sup> Thus Congress has specifically empowered the FCC to (1) revoke a station’s license (2) issue a cease and desist order, or (3) impose a monetary forfeiture for a violation of Section 1464, 47 U.S.C. 312(a), 312(b), 503(b)(1)(E). The FCC can also (4) deny license renewal or (5) grant a short term renewal, 47 U.S.C. 307, 308.

activity of this [purchasing] nature. Thus it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is that by its very nature thousands of others not within the "intended" audience may also see or hear portions of the broadcast. Further, in that audience are very large numbers of children. 24 FCC 2d at 411. (Footnotes omitted).

The intrusive nature of broadcasting was also recognized in *Sonderling Broadcasting*:

[Broadcasting] is peculiarly a medium designed to be received and sampled by millions in their homes, cars, on outings or even as they walk the streets with transistor radio to the ear, without regard to age, background or degree of sophistication. A person will listen to some musical piece or portion of a talk show and decide to turn the dial to try something else. While many have loyalty to a particular station or stations, many others engage in this electronic smorgasbord sampling. That, together with its free access to the home, is a unique quality of radio, wholly unlike other media such as print or motion pictures. It takes a deliberate act to purchase and read a book, or seek admission to the theater. 27 RR 2d at 288.

See also, *Illinois Citizens, supra*, Slip. Op. 11, 15.

9. In view of these unique qualities, we believe that the broadcast medium is not subject to the same analysis that might be appropriate for other, less intrusive forms of expression. As the Supreme Court pointed out in *Burstyn v. Wilson*, 343 U.S. 495, 502-503 (1952), "each method [of expression] tends to present its own peculiar problems." And "the mode of dissemination" can be a relevant consideration, particularly when there is "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller v. California*, 413 U.S. at 18-19. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.<sup>4</sup>

10. There is authority for the proposition that the term "indecent" in Section 1464 is *not* subsumed by the concept of obscenity—that the two terms refer to two different things. See *United States v. Smith*, 467 F. 2d 1126 (7th Cir. 1972); *Tallman v. United States*, 465 F. 2d 282 (7th Cir. 1972); *Gagliardo v. United States*, 366 F. 2d 720 (9th Cir. 1966). But the term "indecent" has never been authoritatively construed by the Courts in connection with Section 1464. The Commission did offer a definition in *WUHY-FM, supra*, but relied substantially on the then existing definition of obscenity. In view of subsequent decisions (*Miller and Illinois Citizens, supra*), we are reformulating the concept of "indecent."

<sup>4</sup> "Possible negative effects on children are concerns unto themselves . . . So long as broadcasting is so all pervasive and can get into those homes where parental guidance is non-existent, it should take advantage of its opportunities. It should not shift its responsibilities. . . ." Quaal & Martin, *Broadcast Management* 57-60 (1968).

11. We believe that patently offensive language, such as that involved in the Carlin broadcast, should be governed by principles which are analogous to those found in cases relating to public nuisance, *Williams v. District of Columbia*, 136 U.S. App. D.C. 56, 419 F. 2d 638 (*en banc* 1969); *Von Sleichter v. United States*, 153 U.S. App. D.C. 169, 472 F. 2d 1244 (1972). Nuisance law generally speaks to *channeling* behavior more than actually prohibiting it. The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood. In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin v. Yoder*, 406 U.S. 206, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community 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.<sup>5</sup> Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience. In our view, indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest, *WUHY-FM*, 24 FCC 2d at 412, and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.<sup>6</sup>

12. When the number of children in the audience is reduced to a minimum, for example during the late evening hours, a different standard might conceivably be used. The definition of indecent would remain the same, i.e., language that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. However, we would also consider whether the material has serious literary, artistic, political or scientific value, as the licensee claims. *Miller v. California*, *supra*.

13. We recognize that *Cohen v. California*, 403 U.S. 16 (1971) held that an individual could not be punished for walking through a courthouse corridor wearing a jacket on which was written: "Fuck the draft." Significantly, Mr. Justice Harlan also observed in *Cohen* that "government may properly act in many situations to prohibit intru-

<sup>5</sup> Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and carefully schedules for late night broadcasts those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (emphasis added) 36 FCC at 149, n. 3. See also *WUHY-FM*, 24 FCC 2d at 411.

<sup>6</sup> There is ample authority for the proposition that material may be forbidden distribution among children, because it would be obscene as to them, even though the same material would not be obscene as to adults, and, accordingly, could not be forbidden to circulate among them. See *Ginsberg v. New York*, 390 U.S. 629 (1968). The "indecency" definition proposed herein adapts this idea of "variable obscenity" to the realities of both radio transmission and constitutional law.

sion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue." A decent respect for the right of those who want to be "free from unwanted expression in the confines of one's home" (403 U.S. at 22) dictates that if a licensee decides to broadcast under the circumstances specified in paragraph 12, above, he must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home. *Cf. Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970).

## CONCLUSION

14. Applying these considerations to the language used in the monologue broadcast by Pacifica's station WBAI, in New York, the Commission concludes that words such as "fuck," "shit," "piss," "mother-fucker," "cocksucker," "cunt" and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464. Accordingly, the licensee of WBAI-FM could have been the subject of administrative sanctions pursuant to the Communications Act of 1934, as amended. No sanctions will be imposed in connection with this controversy, which has been utilized to clarify the applicable standards. However, this order will be associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress. See footnote 3 above.

15. There are several reasons why we are issuing a declaratory order instead of a notice of apparent liability as we did in *WUHY-FM* and *Sonderling*. A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language." See 5 U.S.C. 554(e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

16. This order is issued not only pursuant to 18 U.S.C. 1464 but also in furtherance of our statutory obligation to promote the larger and more effective use of radio in the public interest. 47 USC 303(g). It is not intended to stifle robust, free debate on any of the controversial issues confronting our society. That debate can continue unabated. Prohibiting the broadcast of "filthy words" considered indecent particularly when children are in the audience will not force upon the general listening public debates and ideas which are "only fit for children." First, the number of words which fall within the definition of indecent

is clearly limited. Second, during the late evening hours such words conceivably might be broadcast, with sufficient warning to unconsenting adults provided the programs in which they are used have serious literary, artistic, political, or scientific value. In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes. *Programming Policy Statement*, 25 Fed. Reg. 7291, 20 Pike & Fischer 1901 (1960); *Stone v. FCC*, 151 U.S. App. D.C. 145, 466 F. 2d 316 (1972); *Yale Broadcasting Co. v. FCC*, 155 U.S. App. D.C. 390, 478 F. 2d 594, *cert. denied*, 414 U.S. 914 (1973). The Commission's failure to set forth its position could lead to widespread use of indecent language on the public's airwaves, a development which would (1) critically impair broadcasting as an effective mode of expression and communication, (2) ignore the rights of unwilling recipients, and (3) ignore the danger of exposure to children. We do not propose to abdicate our responsibility to the public interest.

Accordingly, IT IS ORDERED, that the complaint filed December 3, 1973, against Pacifica Foundation, licensee of Station WBAL, New York, New York, IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,  
VINCENT J. MULLINS, *Secretary*.

#### APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely would's say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words, were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock in the Bible. (laughter) And the first time you heard about a cock-fight, remember—What? Huh? Naw. It ain't that, are you stupid? man. (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted

it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middle-class home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling)

Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy. I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola. (laughter) you know that? (laughter) Always wondered how the Shinola people felt about that (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? (laughter) Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmur laughter) He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love. (laughter) we're really going to fuck, yeh, we're going to make love. Right? And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you. (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movie cliches would change a little bit. Madfuckers

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still on the loose. Stop me before I fuck again; Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a good one. (laughter) The additions to the list. I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. Ah, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your ass. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man; fellow, uh, space travelers. Thank you man for tonight and thank you also. (clapping, whistling)"

#### CONCURRENT STATEMENT OF COMMISSIONER CHARLOTTE T. REID

Today, the Commission takes what I feel to be an important and altogether necessary step in clarifying our position on the broadcasting of indecent language over the public's air waves. I therefore concur with the action of the Commission.

This practice, though engaged in by only a few careless broadcasters, has been a constant source of irritation over the past several years. Now, the formulation of the standards set forth in our Declaratory Order should serve as a signal to those few offending broadcasters that the Commission is fully cognizant of our public interest responsibilities in this sensitive area. I, for one, will not hesitate to enforce what I perceive to be the clear mandate of the public interest should this abhorrent practice continue.

While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p.m. or 2:00 a.m.

#### CONCURRING STATEMENT OF COMMISSIONER QUELLO

While I concur in the adoption of the document clarifying the Commission's position on the broadcasting of indecent language, I have serious reservations as to the extent of the standard enunciated. I concur in the action only because I recognize the need for an up-dated

standard in light of the Supreme Court's ruling in *Miller v. California*, 413 U.S. 15 (1973).

I agree wholeheartedly with the conclusion that the words listed in Paragraph 14 ". . . are words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." However, I depart from the majority in its view that such words are less offensive when children are at a minimum in the audience. Garbage is garbage. And under no stretch of the imagination can I conceive of such words being broadcast in the context of serious literary, artistic, political, or scientific value. Under contemporary community standards anywhere in this country, I believe such words are reprehensive no matter what the broadcast hour.

I would emphasize that I am not here espousing a prudish critique of the use of words of this nature. I do criticize the broadcast of such words so that they may intrude into the privacy of the home via the unsuspecting listener's radio set.

I am concerned that our new standard for indecent language is adulterated to the extent that it becomes an invitation to a few broadcasters to seize on the late evening hours as a showcase for similar types of garbage programming under the guise of literary, artistic, political, or scientific value. They will note that the audience is composed of a minimum of children, and their pre-program *caveats* will be considered to be sufficient warning for the unsuspecting listener. Then this Commission will sooner or later be faced with judging the content of such programming on the merits under the standard adopted today.

I must reiterate that I have concurred in the adoption of the new standard on broadcasting of indecent language only for the reason that there must be a line drawn somewhere as to what this Commission will permit to be broadcast. Recognizing the pitfalls inherent in the approach we have taken, I concur in the decision—with trepidation.

CONCURRING STATEMENT OF COMMISSIONER GLEN O. ROBINSON IN  
WHICH COMMISSIONER BENJAMIN L. HOOKS JOINS

On reading George Carlin's monologue, my first instinct was to affirm his opinion that these were indeed words "you couldn't say on the public . . . airwaves." Reflection pushed me to the opposite extreme: proper respect for the principles of free speech and of non-interference by government in matters of public decency and decorum commands us to reject Carlin's opinion and accept that of Pacifica. On still further reflection, I am led to conclude, along with my colleagues, that even a rigorous respect for the principles of free speech and government non-intervention permits some accommodation to the demands of decency. I think it must be emphasized, however, just how limited is the scope of that accommodation. Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid "indecent" language over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of

governmental restraint in matters of public decorum. Today's decision accordingly gives a narrow meaning to the term "indecent," tying the definition essentially to that which is deemed inappropriate for children without parental supervision. I concur in that determination (subject to some reservations) for reasons which call for elaboration.

#### I. CONSTITUTIONAL BACKGROUND

The majority's opinion ably examines most of the pertinent constitutional precedent, but it does not offer all of the background which I think is helpful in placing this decision in the larger context of constitutional jurisprudence. For the moment we may fudge the distinction, if any, between the "obscene" and the "indecent." There is no significant jurisprudence explaining the meaning of the latter term. However, the difficulties that have arisen in connection with obscenity regulation fairly display the problems one runs into where laws seek to control matters that go to the injury of intangibles, like people's sensibilities, rather than palpable damage.<sup>1</sup>

For obscenity regulation, modern times begin with *Roth v. United States*, 354 U.S. 467 (1957), which held that whether a work was obscene must turn on "whether to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to a prurient interest." In *Roth*, the Court declined the opportunity to hold that certain kinds of speech relative to the anal or genital taboos were "special" in some sense, and subject to reasonable regulation. Instead, it held that obscene speech was not constitutionally protected at all, and could accordingly be suppressed. This false dichotomy burdens the law of obscenity to this day. By insisting that sexually frank speech belonged to one domain and protected speech to another, the Court made it necessary to decide in case after case the hard question, whether a book was obscene (and thus suppressable) rather than the easy one, whether many people would be offended by it (and thus subject it to reasonable regulation but not suppression). What Lockhart and McClure call "the core problem"—what constitutes obscenity—has never been satisfactorily unraveled.<sup>2</sup>

Succeeding cases showed a marked tendency to confine the obscenity definition so as to narrow the class of books and magazines which could be suppressed by government power. In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), the Court, reviewing the Post Office's seizure of a number of magazines which featured pictures of naked men, was asked to consider whether the "prurient interest" part of the *Roth* test referred to the prurient interest of the special audience at whom the magazines were targeted (homosexuals), or that of an average member of the community. Instead of answering that question, the Court asked another: observing that these pictures "could not be deemed so offensive on their face as to affront current community standards of decency," and assuming, *arguendo*, that pictures of naked men do arouse the prurient interest of certain parts of the

<sup>1</sup> Where the gist of the offense is more "sin" than "crime" see Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963).

<sup>2</sup> Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?* 7 Utah L. Rev. 289 (1961).

population, could Congress have intended the incitement of prurience, *simpliciter*, to be a crime? Said Mr. Justice Harlan for the Court: ". . . one would not have to travel far even among the acknowledged masterpieces [in literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose. . . ." Since *Manual Enterprises*, the idea of "patent offensiveness" has always been a part of the definition of obscenity. In *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), the Court was asked to consider the case of a book designed to appeal to a prurient interest in sex, whose language patently exceeded the standards of candor existing in most communities, but which nevertheless possessed considerable artistic and literary merit. The plurality of the Supreme Court held that unless such a work was "utterly without redeeming social value," it could not be held obscene. *Miller v. California*, 413 U.S. 15 (1973) essentially restated and reiterated the main themes of obscenity doctrine as they have been unfolding since 1957. Its chief modification of what went before is to hold that the government need not prove material utterly bereft of redeeming social value, merely that it is without "serious literary, artistic, political or scientific value."<sup>3</sup> 413 U.S. at 24.

Contemporaneous with the unfolding of obscenity doctrine, a different branch of first amendment doctrine developed, which held in narrow check the right of a citizen to insulate himself from the constitutionally protected speech of others. Mr. Justice Black, dissenting in *Breard v. City of Alexandria*, 341 U.S. 662 (1951), observed that "The constitutional sanctuary for the press must necessarily include liberty to publish and circulate." How far that corollary of free speech extends has never been clear, and is not clear now. In *Martin v. City of Struthers*, 319 U.S. 141, an ordinance forbidding anyone from ringing a doorbell to deliver a handbill was struck down in the instance of a religious handbill. A city ordinance forbidding the use of sound trucks except to disseminate items of public concern was struck down in *Saia v. New York*, 334 U.S. 558 (1948).<sup>4</sup> In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the State's attempt to punish a number of noisy but peaceable demonstrators was held unlawful.<sup>5</sup> In *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Court threw out an anti-blockbusting injunction, saying: ". . . so long as the means are peaceful, the communication need not meet standards of acceptability." 402 U.S. at 419. In *Cohen v. California*, 403 U.S. 15 (1971), a jacket bearing the legend "Fuck the Draft" was held protected speech.

<sup>3</sup> *Miller* also answered a question long vexing to obscenity doctrine: the community standards to be applied in connection with the ascertainment of prurience were those of the local, not national, community. See 413 U.S. at 31-33. In connection with broadcasting, the relevant community has special significance. It is safe to assume that the standards of a national community would be applicable to a national broadcast, but we need not consider that issue here, in the context of a local FM radio station.

<sup>4</sup> *Cf. Kovacs v. Cooper*, 336 U.S. 77 (1949), where the Court upheld an ordinance that banned the use of sound trucks outright. In his concurring opinion, Justice Frankfurter opined that *Kovacs* and *Saia* were irreconcilable. But he was mistaken. Taken together, the two cases say that where sound trucks are allowed at all, their reasonable use as a medium of communication may be a constitutional right.

<sup>5</sup> *Compare Adderly v. Florida*, 385 U.S. 39 (1966).

Thus, one of the consequences of speech being protected by the First Amendment is that people do not have an unlimited right to avoid exposure to it. In this way, the trend in obscenity doctrine toward carving down the amount of material without the protection of the First Amendment, together with the limited insulation people are entitled to receive from protected speech, work together like scissors-blades on the sensibilities of a great many citizens.<sup>6</sup>

## II. POLICY CONSIDERATIONS

As the Commission's opinion recognizes, this is essentially a case of first impression. Although *Eastern Educational Radio (WUHY-FM)*; 24 FCC 2d 408 (1970) did rest squarely on a finding that certain coarse language uttered in an interview was indecent under 18 USC 1464, circumstances have changed since that case was decided. In the first place, our definition of "indecent" in *WUHY* tracked the *Roth-Memoirs* definition of obscenity then in force; since that time, *Miller v. California* and its companion cases redefined obscenity; and obviously it is now necessary for us to consider whether and in what way the definition of indecency should also be changed. In the second place, the Court of Appeals in *Illinois Citizens Broadcasting v. FCC*, — F. 2d — (D.C. Cir. 1974) reserved the definition of "indecency" with a studied explicitness (Slip Op. at p. 10, n. 14) that commands the conclusion that the legal meaning of the term is still very much an open question. It is against this background that the Commission must act.

Although indecent broadcast material is clearly prohibited by 18 USC 1464, as the Commission recognizes, the Supreme Court's recent decision in *United States v. Twelve 200-Foot Reels of Film*, 413 U.S. 123, 130, n. 7 (1973) sheds doubt on whether the term indecent can be given a meaning independent of the meaning of "obscene." The Court there spoke to 19 USC 1305(a) and 18 USC 1462, which prohibits the interstate transportation of "indecent," "lewd," "lascivious," "filthy," or "immoral" materials. The Court held that if it were necessary to do so in order to avoid problems of unconstitutional vagueness and overbreadth, these terms would be limited to patently offensive representations or descriptions of specific "hard-core" sexual conduct of a type deemed to be obscene in the *Miller* decision. But 18 USC 1464, which deals with radio communications, is distinguishable from the provisions of the Code dealing with transportation which the Court construed in *Twelve 200-Foot Reels*. Maybe it is a distinction without a difference but I think our duty requires us generally to assume the constitutionality of the statute if we can find a rational basis for doing so.

<sup>6</sup> It is vital that it be recognized that the public use of certain words relating to sex and excretion are taboo, in the sense given to that term by Freud: "Taboo is a Polynesian word . . . [which] means uncanny, dangerous, forbidden and unclean. The opposite word for taboo is designated in Polynesian by the word *noa* and signifies something ordinary and generally accessible. Thus, something like the concept of reserve inheres in taboo; taboo expresses itself essentially in prohibitions and restrictions. Our combination of 'holy dread' would often express the meaning of taboo."

"The taboo restrictions are often different from religious or moral prohibitions. They are not traced to the commandment of a god but really they themselves impose their own prohibitions; they are differentiated from moral prohibitions by failing to be included in a system which declares abstinences in general to be necessary and gives reasons for this necessity. The taboo prohibitions lack all justification and are of unknown origin." S. Freud, *Totem and Taboo*, 31, 32 (A. Brill trans. 1918).

Broadcast communications are sufficiently different from other forms of communications to justify a degree of regulation not tolerable for other media. A number of possibly relevant differences can be identified: limitations on the radio spectrum which in general terms permit greater government scrutiny of the use to which the electronic media are put;<sup>7</sup> the fact that these media enter the privacy of the home<sup>8</sup> are two prominent differences. I could not say that these differences *compel*, either as a matter of precedent or principle, a different standard of decency for broadcast than for other communications; however, I think that they may support moderately greater public demands from the former than from the latter.

Accordingly, I join the Commission's decision that we may proscribe "indecent" programming over the broadcast media—but absolutely crucial to my concurrence is the limited context in which this principle operates. Today's decision does carry us one step beyond *Sonderling*, which dealt with "obscene" material. But it is not, I think, a long step beyond. The concern there was similar to the basic concern here. Despite efforts to put the case for obscenity regulation on grounds of its direct influence on sexual (particularly sexually violent) behavior, a consideration which would be absent here, I do not think that the case for governmental intervention of a limited sort can be confined to that fear. The deeper concern about obscenity lies in apprehensions about its subtle, indirect and long-term effects on public attitudes and social mores. So it is with "indecentcy." While I would not have the government in the business of enforcing morals and good taste, whether in the name of preventing "indecentcy" or "obscenity," it seems to me legitimate that there be a limited regulation of offensive speech which is purveyed widely, publicly, and indiscriminately in such a manner that it cannot be avoided without significantly inconveniencing people or infringing on their right to choose what they will see and hear. In short, to adopt the Commission's language, I think we can regulate offensive speech to the extent it constitutes a public nuisance.

### III. THE PUBLIC INTEREST IN POLICING DECENCY

None of us supposes that invoking the nuisance concept is a talisman with which we can waive off all difficulties in approaching the task of controlling such speech. The reference to nuisance is meant to be more

<sup>7</sup> Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, (1969) with *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). I am not sure that the condition of spectrum scarcity is pertinent here where the form of regulation is not directed at securing balance in speech or fuller expression of ideas. Perhaps an argument could be made that the condition of spectrum scarcity does compound the "Gresham's Law" phenomenon which the Commission relied on, in part, in *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). But I would look on that argument with caution, for it could imply a more ambitious form of program "quality control" than is acceptable. See *Red Lion*, *supra*, 395 U.S. at 389. See generally, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967).

<sup>8</sup> See *Sonderling Broadcasting Corp.*, 27 R.R. 2d 285 (1973). It is not clear, however, which way this consideration cuts. The fact that the communication is received in private lessens the aspect of the offense that goes to public outrage; moreover, people have special rights to receive communications in their own homes even if these might be prohibited in any other context. See *Stanley v. Georgia*, 394 U.S. 557 (1969). At the same time, however, the intrusion of offensive matter into the home under circumstances where it is not expected and cannot always be monitored by adults is a matter of legitimate concern.

atmospheric than substantive. The governing idea is that "indecent" is not an inherent attribute of words themselves; it is rather a matter of context and conduct.<sup>9</sup> Compare, *Ginzburg v. United States*, 383 U.S. 463 (1966).

I acknowledge that the logic of this "nuisance" test of obscenity or indecency could carry us much further into the realm of censorship than would be proper. But I also think that the attempt to accommodate the powerful sensibilities that attach to free speech on the one hand, and modesty on the other, is worth the effort. I do not think either interest deserves to be slighted. Yet, in the nature of things, it is easy to get carried away by the momentum of a single principle on either side of the dispute, and to fail to appreciate the validity of the impulses that are inconsistent with it. Some students of government regulation of decency have gone quite far in constructing a broad rationale for government intervention not merely as a means of curbing a "nuisance" in the narrow sense of that term, but more broadly as a means of maintaining some kind of general standard of quality in public manners. Irving Kristol, for example, has recently attempted to construct a case for "liberal censorship" along such lines:

[N]o society can be utterly indifferent to the ways its citizens publicly entertain themselves. Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering of animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles. And the question we face with regard to pornography and obscenity is whether . . . they can or will brutalize and debase our citizenry. We are, after all, not dealing with one passing incident—one book, or one play, or one movie. We are dealing with a general tendency that is suffusing our entire culture.

Kristol, *The Case for Liberal Censorship*, in *Where Do You Draw the Line?* 47 (1974). Kristol's argument for "liberal censorship" is similar to the provocative argument of James Fitzjames Stephen a century ago, and of Lord Devlin, in our own time, defending the role of the State in enforcing moral behavior. J. Stephen, *Liberty, Equality, Fraternity* (2d Ed. 1874); P. Devlin, *The Enforcement of Morals* (1968). This is hardly the occasion to examine the pros and cons of the Stephen-Devlin-Kristol thesis.<sup>10</sup> But it is the occasion to state that the

<sup>9</sup> I initially had some difficulty with the idea that "literary, artistic, political or scientific value" could constitute a defense to allegedly indecent language at one time of the day but not at another. I have concurred in this rule, however, because I understand it simply to carry forward an aspect of the "nuisance" idea—that is, that "indecent" is not a property of language, but arises when dirty words are uttered at inappropriate times or in inappropriate circumstances. Demonstrating that children are not unsupervised in the audience because of the late hour changes the context, and correlatively it changes the balance to be struck among the competing values, and whether particular language ought to be regarded as illegal or not.

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

<sup>10</sup> The classic case against the thesis is, of course, John Stuart Mill's, *On Liberty* (1859), the target of Stephen's (and to a lesser degree Devlin's) attack. For a concise but penetrating modern defense of Mill and a critique of Stephen's and Devlin's arguments, see H.L.A. Hart, *Law, Liberty and Morality* (1963).

legal enforcement of manners is an activity of government with a breathtakingly narrow scope in a free society.<sup>11</sup> And it is an activity that I could not countenance this Commission engaging in. Neither the Communications Act nor 18 USC 1464 invests the FCC with a general power to establish canons of acceptable decency or good taste in programming. We cannot make the claim that Lord Mansfield made for his tribunal:

Whatever is *contra bonos mores et decorum* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.

*Jones v. Randall* (1774), quoted in Hart, *supra*, p. 7. However the matter stood in 18th century England—or indeed 20th century England<sup>12</sup>—I trust no one doubts that things are different in the United States today.

Nothing herein is inconsistent with a rejection of any claim to be the “general censor” and guardian of the public morals in regard to broadcast communications. What we assert is a special power to protect the young—or, more precisely, people's views about what sort of material it is proper to expose to the young—a purpose which even hard-bitten libertarians do not find entirely uncongenial.<sup>13</sup> Even here there is obviously need for caution, lest in our proper concern for protecting children of impressionable age from language to which they ought not to be exposed, we also undertake to regulate the tastes of adults. I am, however, satisfied that we can take reasonable measures short of censorship to channel programming where, as here, it is not adequately controlled to avoid casual listening by children. The principal means by which this can be achieved is to insist that programming of a kind whose broadcast to children would be thought inappropriate be confined to hours of the evening in which children would not ordinarily be exposed to the material—or at least not without the supervision of a parent. Short of an all-out ban on indecent or offensive programming during daytime hours we can also insist that suitable measures be taken to warn adults that possibly offensive programming is about to be presented. Beyond such modest controls, however, I would not proceed.

#### IV. CONCLUSION

On the premise advanced by Justice Holmes that “all rights tend to declare themselves absolute to their logical extreme,” *Hudson Water*

<sup>11</sup> Which is not to deny that moral considerations may align with and provide some support for laws whose aim is utilitarian protection of individuals or society, a point well developed by Hart, *supra*.

<sup>12</sup> Mansfield's dictum has taken on new life as a result of the House of Lords' decision in *Shaw v. Director of Public Prosecutions*, 2 All Eng. Rep. 446 (1961). The opinion of Lord Simonds is particularly noteworthy in this respect: “When Lord Mansfield speaking long after the Star Chamber had been abolished said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain, since no one can foresee every way in which the wickedness of man may disrupt the order of society.”

<sup>13</sup> Even Mill, second to none in advocating a limited role for government, granted it broader role in regard to minors—those not “in the maturity of their faculties.” *On Liberty*, reprinted in *Utilitarianism, Liberty and Representative Government*, p. 96 (Everyman ed. 1951). He also granted such a role to government in cases of “backward” societies, *Ibid.* I hope we do not qualify for that exception.

*Co. v. McCarter*, 209 U.S. 349, 355 (1908), there is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by *tour de force*. This agency, in my view, has the power to compel that coexistence in the limited scale we undertake today. I assent to it because I recognize that the only possible way to take a mediate position on issues like obscenity or indecency is to avoid dogmatism and its meretricious handmaiden, the Ringing Phrase, and to split the difference, as sensibly as can be, between the contending ideas.

56 F.C.C. 2d