FCC v. PACIFICA FOUNDATION
SUPREME COURT OF THE UNITED STATES
438 U.S. 726
July 3, 1978

OPINION: Justice Stevens...**This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent, but not obscene**. A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording...indicates frequent laughter from the audience.

At about **2 o'clock in the afternoon** on Tuesday, October 30, 1973, a New York radio station, owned by Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his **young son**, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

...Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who "like Twain and Sahl before him, examines the language of ordinary people...Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words."

...The Commission did not impose formal sanctions, but it did state that the order [granting the complaint] would 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."

...Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. §1464, which forbids the use of "any **obscene, indecent, or profane language** by means of radio communications," and *47 U.S.C. §303* (g), which requires the Commission to "**encourage the larger and more effective use of radio in the public interest**."

The Commission characterized the language used in the Carlin monologue as **"patently offensive," though not necessarily obscene**, and expressed the opinion that it should be regulated by... *channeling* behavior more than actually prohibiting it...Applying these considerations to the language used in the monologue..., the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon)," and that the pre-recorded language, with these offensive words "repeated over and over" was "deliberately broadcast." In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by *18 U.S.C. §1464*."

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it."

...[T]he focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast.

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of *47 U.S.C. §326* and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of *18 U.S.C. §1464*...Section 29 of the Radio Act of 1927 provided:

> "Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation...shall be promulgated...by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."

The prohibition against censorship unequivocally denies the Commission any power to edit proposed

broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties [and, in fact, it has been held that the Commission has the]..."undoubted right" to take note of past program content when considering a licensee's renewal application is not censorship...**We conclude...that §326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting**.

The only other statutory question presented by this case is whether the **afternoon** broadcast of the "Filthy Words" monologue was **indecent** within the meaning of §1464...Pacifica does not quarrel with the conclusion that this afternoon broadcast was **patently offensive**. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of **prurient appeal**.

The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane"...[imply] that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality...

Because neither our prior decisions nor the language or history of §1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast...

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution...

[For example,] the government may forbid speech calculated to provoke a fight. *Chaplinsky*[1]...It may treat libels against private citizens more severely than libels against public officials. *Gertz v. Robert Welch, Inc.* Obscenity may be wholly prohibited. *Miller v. California*[2]...

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral

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[1]Case 1A-S-8 on this website.

[2]Case 1A-S-22 on this website.

standards. *Roth v. United States*[3]. **But the fact that society may find speech offensive is not a sufficient reason for suppressing it**. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content -- or even to the fact that it satirized contemporary attitudes about four-letter words -- First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Justice Murphy when he said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*.

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. *Hess v. Indiana*[4]. Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value"...vary with the circumstances. **Words that are commonplace in one setting are shocking in another...**In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." *Cohen v California*[5]. In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners...

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest,

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[3]Case 1A-S-10 on this website.

[4]Case 1A-S-25 on this website.

[5]Case 1A-S-20 on this website.

convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize (*Miami Herald Publishing Co. v. Tornillo*), it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*.

The reasons for these distinctions are complex, but two have relevance to the present case. **First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans.** Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept*[6]. **Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.** To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow...The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "placing telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "using obscene or profane language or language the natural consequence of which is to abuse the hearer or reader."

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*[7], that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting...

This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Justice Sutherland wrote, a "**nuisance may**

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[6]Case 1A-S-19 on this website.

[7]Case 1A-S-14 on this website.

be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.* We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene. The judgment of the Court of Appeals is reversed.

CONCURRENCE: Justice Powell...[Not Provided.]

DISSENT: Justice Brennan/Marshall...This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Both the opinion of my Brother Stevens and the opinion of my Brother Powell rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience. Dispassionate analysis, **removed from individual notions as to what is proper and what is not**, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications -- if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme -- that the Court today permits.

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many--including the FCC and this Court--might find offensive.

"The ability of government, consonant with the Constitution, 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. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California.* I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within the "substantial privacy interests" to which Mr. Justice Harlan referred in *Cohen*, and is entitled to the greatest solicitude. However, I believe that an individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. **Although an individual's decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-a-vis the communication he voluntarily admits into his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held**

insufficient to justify punishing Cohen for his offensive communication.

Interesting! What distinguishes *Cohen* from this case?

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner" (*Cohen v. California*), the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "the radio can be turned off," *Lehman v. Shaker Heights* -- and with a minimum of effort. As Chief Judge Bazelon aptly observed below, "having elected to receive public air waves, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in *Cohen* and *Erznoznik*[8]; he can avert his attention by changing channels or turning off the set." Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly to follow Justice Stevens' reliance on animal metaphors, "to burn the house to roast the pig." *Butler v. Michigan.*

...**Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. It thus ignores our recent admonition that "[speech] that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."**

I do not understand Justice Brennan's apparent willingness to put all minors in the same constitutional basket. One supposes he would "protect" the "right" of a 7 year old to consume indecent speech right along with his 14 year old brother or did he just forget the "young minors"?

The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of *Butler v. Michigan. Butler* involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." Although *Roth v. United States* had not yet been decided, it is at least arguable that the material the statute in *Butler* was designed to suppress could have been constitutionally denied to children.

[8]Case 1A-S-29 on this website.

Nevertheless, this Court found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society."...

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother Powell and my Brother Stevens both stress the **time honored right of a parent to raise his child as he sees fit -- a right this Court has consistently been vigilant to protect**. *Wisconsin v. Yoder*[9]*; Pierce v. Society of Sisters*[10].

Anyone remember *Bellotti v Baird*? It was decided in 1979, shortly after this July '78 ruling.

Yet this principle supports a result directly contrary to that reached by the Court. *Yoder* and *Pierce* hold that parents, *not* the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.

Is this off the deep end of reason? Look, any so-called "parent" who believes his 8 year old child should hear indecent speech can rent the Carlin monologue and play it any time he wishes. Does that mean that civilized society must risk the chance of their child's innocence being stolen prematurely simply because it is considered too inconvenient for those with minority views to be forced to rent indecency to play for their children or themselves?

Neither...the intrusive nature of radio [nor] the presence of children in the listening audience...can... support the FCC's disapproval of the Carlin monologue...Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry

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[9]Case 1A-R-17 on this website.

[10]Case 1A-R-2 on this website.

Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible. In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience."...To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother Powell is content to rely upon the judgment of the Commission while my Brother Stevens deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. **For my own part, even accepting that this case is limited to its facts, I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand...**

What do you think? Does the Constitution really require that our society "mature" to the point of our own downfall? After all, even as Rome was falling, I am reasonably confident they felt they had reached the pinnacle of "mature sophistication." Is that what free speech is all about?

DISSENT: Justice Stewart...[Not Provided.]