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A TWENTIETH-CENTURY SOAPBOX: THE RIGHT TO PURCHASE RADIO AND TELEVISION TIME

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Once upon a time there was a nation great in ideals and industrialization. It had businesses everywhere—and unsurpassed military might. Yet its greatest strength lay in its ideological foundation. This nation professed to be governed by the consent of its citizens. To ensure the successful functioning of this unique experiment in government, free education, libraries and full information were provided to all, so that this nation's two-hundred million governors, through wide-open debate, might govern themselves wisely. But as the years slipped by, the people spent more and more of their time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks, attending town meetings, and reading handbills on the streets. Meanwhile, the number and importance of crucial issues were growing, and the need for well informed governors became paramount. Thus it was that the great debate about the great debate began.

Everyone had his own theory of how to reverse this trend and return the democratic dialogue to the people, who were all at home watching their television sets. Some advocated letters, petitions, press conferences and picketing, but they had little success. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the televising of such activities it was usually possible to present a short message, however distorted, concerning the merits of the controversy that generated such outrageous conduct. Then a third group came along. It said, "Let us simply go to the broadcasters peacefully, ask them for the time to present our concerns—we will even pay them." But the broadcasters politely explained that there was no time available for the discussion of public issues—such as war, life and politics—because the time all had to be used for programs and announcements necessary to the very difficult but essential task of inducing consumers to buy useless, joyless, and sometimes harmful products. Yet these patient and patriotic students, businessmen, and Senators were not deterred. They continued to preach the doctrine of "working within the system." "The Government," they said, "will treat us

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fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the Federal Communications Commission . . .[1]

UNLIKE many parables, this one has a grounding in reality and an aftermath in fact. On August 5, 1970, the Federal Communications Commission announced two decisions that pose immensely significant questions concerning the application of first amendment speech freedoms in the broadcast media.[2] In both cases the Commission rejected the request of a national political organization that had sought to purchase radio and television airtime at existing commercial rates for the discussion of timely public issues, including the course and conduct of the Vietnam War.

This Article will explore the Commission's rationale in these two decisions—a rationale that appears to be fundamentally erroneous. By failing to apply established first amendment precedent to the forum of broadcasting, the Commission has erected an unconstitutional barrier against use of the broadcast spectrum to communicate protected political ideas.[3]

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[1] *See Hearings on S.J. Res. 209 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 155 (1970) (statement of Commissioner Johnson).

Senate Joint Resolution 209 was introduced on June 11, 1970, by Senator J. William Fulbright. It proposed that § 315 of the 1934 Communications Act, 47 U.S.C. § 315 (1964), be amended by the addition of a new subsection:

> (d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States, and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year.

S.J. RES. 209, 91st Cong., 2d Sess. (1970). Senator Fulbright's Resolution expired in the Senate Subcommittee on Communications upon the adjournment of the Ninety-first Congress, and it is not expected to be reintroduced during the Ninety-second Session.

[2] Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970), *appeal docketed*, No. 24,537, D.C. Cir., Aug. 13, 1970; *In re* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242 (1970), *appeal docketed*, No. 24,492, D.C. Cir., July 31, 1970. On March 9, 1971, both *Business Executives* and *Democratic National Committee* were argued, as separate cases, before the U.S. Court of Appeals for the District of Columbia, before Circuit Judges J. Skelly Wright, Carl McGowan and Spottswood W. Robinson III. Washington Post, Mar. 10, 1971, § C, at 2, col. 1.

[3] Commissioner Johnson issued dissenting opinions in these cases. This article constitutes, in part, a development of ideas contained in those opinions and in his testimony before the Subcommittee on Communications of the Senate Committee on Commerce,

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THE FCC VERSUS THE FIRST AMENDMENT

In the first decision, *Business Executives Move for Vietnam Peace*,[4] the Commission ruled that a Washington, D.C., radio station could legitimately refuse to sell one-minute segments of its "commercial" spot-announcement time to an anti-war group, the Business Executives Move for Vietnam Peace Organization (BEM). BEM proposed to use the airtime to urge the immediate withdrawal of American troops from Vietnam and other overseas military installations.[5] The radio station had denied BEM "access" to its facilities—which is freely made available to purveyors of beer, wine, soap, soup, and hand lotion—on the strength of a self-imposed policy barring the sale of spot-announcement time for the expression of "controversial" views. Although this station sold spot-announcement time to political candidates during election campaigns, often for the discussion of highly "controversial" issues, it nevertheless maintained that issues of the type presented by BEM required "a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." [6] In throwing its official support behind the radio station's decision the Commission stated that a broadcast licensee is not a "common carrier" under section 3(h) of the Communications Act;[7] therefore, it "is not required to open its doors to all persons seeking to use the station's facilities for whatever purpose." [8] In arriving at this result the majority reaffirmed a prior FCC opinion[9] holding that a licensee has the power to determine "the format for presentation

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Hearings on S.J. Res. 209 Before the Subcomm. on Communications of the Senate Comm. on Commerce, 91st Cong., 2d Sess. 155 (1970).

[4] 25 F.C.C.2d at 242 (1970).

[5] The following is the text of one of the spot announcements proposed by BEM:

> ANNOUNCER: Rear Admiral Arnold E. True has an urgent message for you.
> TRUE: Many people fear that if U.S. troops are withdrawn from Vietnam there will be a resulting blood bath. The President stated that fifty thousand were killed in North Vietnam when Ho Chi Minh took over, and that three thousand more were killed by the Vietcong in Hue. He did not mention, however, that General Abrams reports that a hundred and eighty-six thousand Vietnamese have been killed by Americans this year. This policy of remaining in Vietnam indicates that we are going to prevent Vietnamese from killing Vietnamese by staying there and killing them ourselves.
> ANNOUNCER: The preceding public service message was brought to you by BUSINESS EXECUTIVES MOVE FOR VIETNAM PEACE.

On file at *Virginia Law Review*.

[6] 25 F.C.C.2d 242 (1970).

[7] 47 U.S.C. § 153(h) (1964).

[8] 25 F.C.C.2d at 247.

[9] Letter to Mrs. Madolyn Murray, 40 F.C.C. 647 (1965).

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of controversial issues 'and all other facets of such programming.' " [10] The Commission concluded on a note of alarm with the observation that a contrary result "would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." [11]

In its second decision, *Democratic National Committee*,[12] the Commission dealt with a request by the Democratic National Committee (DNC) for a declaratory ruling that broadcasters "may not, as a general policy, refuse to sell time to responsible entities . . . for the solicitation of funds and for comment on public issues." [13] The DNC had sought to purchase airtime, in limited amounts and at current commercial rates, for short "spot announcements" soliciting funds for political purposes and for full-length programs presenting the party's views on important national issues of the day. Two of the three major networks initially rejected the DNC's request to purchase airtime for these purposes. However, upon reconsidering the request, the two networks partially reversed their policy and made time available for spot announcements soliciting funds. All three, however, steadfastly adhered to their general policy of refusing to sell airtime for the discussion of controversial issues.[14]

The Commission concurred in the networks' treatment of the sale of spot-announcement time to responsible entities—airtime made available only for the solicitation of funds and not for the discussion of controversial issues—adding that stations are not required to sell spot-announcement time to non-political parties for any purpose and flatly rejecting the request that licensees be required to sell limited amounts of programming time to anyone for any purpose.[15] Amplifying the note of alarm sounded in *Business Executives*, the majority in *Democratic National Committee* stated that the DNC's request, if granted, would overturn the present scheme of broadcasting in this country, in which views on all controversial issues are presented by the licensee as "spokesman" on behalf of the public.[16] The Commission also warned that the position advocated by the DNC would subject licensees to financial hardship, since they would be required under the "fairness

[10] 25 F.C.C.2d at 247.
[11] *Id.* at 248, *citing In re* Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970).
[12] 25 F.C.C.2d 216 (1970).
[13] *Id.* at 216.
[14] *Id.* at 228-29.
[15] *Id.* at 224-25.
[16] *Id.* at 228.

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doctrine" to afford free time to the proponents of the contrasting viewpoint,[17] and would permit the agenda of national debate to be determined by the affluent.[18]

Several puzzling aspects of these two decisions are immediately apparent. First, they seemingly reverse traditional first-amendment priorities. The first amendment has generally been understood to prefer "political" speech over "commercial" speech.[19] Yet the Commission's decisions leave broadcast stations free to accept commercial advertising and to reject political or controversial advertisements. Ironically, the only exception to this ruling involves political spot announcements designed to raise *money*—a close parallel to commercial advertising.

A second puzzling aspect of the Commission's decisions is their internal inconsistency. Stations may, on the one hand, refuse to accept political or "controversial" spot announcements; any other result, we are told, would seriously undermine the present system of American broadcasting.[20] Yet stations still must accept spot announcements soliciting funds for political causes—many of which are highly "controversial." This rationale becomes even more perplexing in light of the stations' acceptance of many "controversial" commercials in their normal course of business. Obvious examples of such "controversial" commercials are the political advertisements accepted by broadcasters during election campaigns.[21] Until recently, cigarette commercials were also thought to involve controversial issues of public importance.[22]

A third noteworthy aspect of the Commission's decisions lies in the majority's barely concealed fear that a contrary result might weaken the control licensees presently exercise over public discussion of contro-

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[17] *Id.* at 226.

[18] *Id.* at 225.

[19] *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); Pollak v. Public Util. Comm'n, 191 F.2d 450, 456-57 (D.C. Cir. 1951), *rev'd on other grounds*, 343 U.S. 451 (1952). *See generally* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 208-09; Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191 (1965).

[20] Democratic Nat'l Comm., 25 F.C.C.2d 228 (1970); Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 248 (1970).

[21] Indeed, even the art of political campaign commercials has itself become "controversial." *See, e.g.*, Bailey, *Political TV Ads An Anomaly*, Washington Post, Nov. 29, 1970, § B, at 2, col. 1.

[22] *See* Application of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967), *aff'd*, Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (cigarette commercials held to involve controversial issues of public importance and therefore opposing viewpoints must be presented under the fairness doctrine).

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versial issues. Under our current system of broadcasting, which the Commission has so zealously sought to protect, a broadcast licensee functions as a "trustee" for the public—a "mouthpiece," so to speak, for the expression of all views. Pursuant to the terms of this trust the licensee decides which issues are important, isolates the opposing viewpoints on those issues, and presents all views, either in his own words or through the quoted words of other individuals. BEM and DNC sought to circumvent this paternalistic system. Both organizations requested that they be permitted to buy time to present their own views, in their own way, through a format of their own choosing. Notwithstanding the Supreme Court's prior recognition in *Red Lion Broadcasting Co. v. FCC*[23] of a preference in this country for speech by individuals who are directly involved with current issues,[24] the Commission opted to perpetuate a system in which large broadcast corporations mediate between the authors of speech and their audience.

Many of the inconsistencies and errors in *Democratic National Committee* and *Business Executives* stem from the Commission's refusal to acknowledge the importance and applicability of first-amendment principles in the medium of broadcasting. The Commission's decisions in these two cases ignore a long line of judicial precedent guaranteeing individuals a "right of access" to forums generally open to the public for the expression of controversial political views. This precedent, discussed below,[25] stands for the proposition that a private or public entity which makes property under its possession or control accessible to the general public cannot entirely prevent the expression of controversial views in that forum or discriminate among the views that are expressed.

The *Business Executives* and *Democratic National Committee* opinions provide a convenient focus for an examination of this important area. In essence, these decisions raise the following four issues. First, are controversial spot announcements and longer program segments in the broadcast forum appropriate forms of "speech," deserving of first amendment protection? Second, does the rejection of programming by a privately owned radio or television station, licensed and supervised by the FCC, a public agency, and using the "public" airways in a fiduciary capacity for the public's benefit, constitute sufficient "state action" to bring the first amendment's proscriptions into operation? Third, are

[23] 395 U.S. 367 (1969).

[24] *Id.* at 392 n.18, *quoting* J. Mill, On Liberty 32 (R. McCallum ed. 1947).

[25] See text at notes 160-211 *infra*.

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spot announcements and longer program segments "appropriate" forms of speech, given the nature of the broadcast forum and its competing uses? And fourth, is a limited right of "paid access" for controversial views consistent with the scheme of broadcasting envisioned by Congress when it enacted the Communications Act of 1934?[26] This Article will offer an affirmative response to each of these four questions.

A Few First Amendment Fundamentals

We start with a few fundamentals. The first involves a basic concept of our Constitution, embodied in the first amendment, that our democratic form of government will endure only as long as its citizens and their elected representatives have the leisure to think, the right to speak, and the freedom to criticize their Government. As Justices Holmes and Brandeis understood the first amendment's guarantee of freedom of expression, "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"[27] and in a government of free men, "the deliberative forces should prevail over the arbitrary."[28] For this reason freedom of speech has been accorded a "preferred" position above all other constitutional rights;[29] only so long as speech remains free will other constitutionally protected liberties endure. Should freedom to speak out vanish, these other liberties would also perish, because the informed electorate necessary for the preservation of the other liberties would no longer exist.

The second fundamental is equally important. Freedom of speech is not an abstraction. It can flourish only through an appropriate *medium* in an appropriate *forum*—whether it be a public park, a school room, a town hall meeting, a soap box, a leaflet, a newspaper, a magazine, or a radio or television frequency. For this reason the first amendment protects not only the right to speak, but also the means used by a speaker to reach his audience—the media for conveying the thought or expres-

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[26] Ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1964)).

[27] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (conviction upheld under the Espionage Act for uttering language found to provoke and encourage resistance to the government in time of war).

[28] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (conviction under California Criminal Syndicalism Act for membership in Communist Labor Party held not to constitute a restraint on freedom of speech, assembly or association).

[29] *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946); Thomas v. Collins, 323 U.S. 516, 530 (1945).

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sion. As the Supreme Court of California stated in *Wollam v. City of Palm Springs*,[30]

> The right of free speech necessarily embodies the *means* used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely. The right to speak freely must encompass inherently the right to communicate. The right to speak one's views aloud, restricted by the ban that prevented anyone from listening, would frame a hollow right. Rather, *freedom of speech* entails communication; it contemplates effective communication.[31]

The Supreme Court of the United States has often recognized this principle. For example, in *Hague v. CIO*,[32] Mr. Justice Roberts made the statement, later taken as precedent by the Court in *Kunz v. New York*,[33] that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[34]

This right of access to "public forums" has been recognized in numerous other areas, including privately owned streets and sidewalks,[35] modern shopping centers,[36] public schools,[37] public bus[38] and railroad[39]

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30 59 Cal. 2d 276, 379 P.2d 481, 29 Cal. Rptr. 1 (1963) (ordinance prohibiting operation of sound amplifying equipment mounted on trucks unless the truck maintained a speed of at least 10 m.p.h. contravenes the first amendment).

31 *Id.* at 284; 379 P.2d at 486, 29 Cal. Rptr. at 6 (emphasis added); *see* Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

32 307 U.S. 496 (1939).

33 340 U.S. 290, 293 (1951).

34 307 U.S. at 515 (Roberts, J., separate opinion).

35 Marsh v. Alabama, 326 U.S. 501 (1946).

36 Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

37 Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

38 Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

39 *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

terminals, the grounds of a state capitol building,[40] and the confines of a public library.[41]

While the Court has not to date recognized a right of access to electronic forums, it has acknowledged the importance of the mass communications media as forums for speech. This applies both to the media of print[42] and broadcasting.[43] Indeed, sixty percent of all Americans report that television has become their most important source of news and information.[44] For this reason, perhaps, the Supreme Court has declared that "broadcasting is clearly a medium affected by a First Amendment interest. . . ." [45] The question we must consider is whether the first amendment equates the public forums of broadcasting with the "streets and parks" of *Hague v. CIO*, and whether rights of access to those media should be included among the basic "privileges, immunities, rights and liberties of citizens." [46] We must determine whether privately owned broadcast licensees have any more right to exclude citizens from their facilities than a privately owned "company town" [47] has a right to exclude citizens from its streets.

The third fundamental also deserves close attention. In any "limited access" medium, like broadcasting, in which not all can speak at once, or even speak at all, some rules of procedure are necessary for the preservation of good order. If speakers are to be heard, they must speak in order, await their turn, confine their remarks to a limited period of time, and stick to the topic for discussion. This need for procedural rules is no better illustrated than by one commentator's description of the classical town meeting:

> In the town meeting the people of a community assemble to discuss and to act upon matters of public interest—roads, schools, poor houses,

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[40] Edwards v. South Carolina, 372 U.S. 229 (1963).

[41] Brown v. Louisiana, 383 U.S. 131 (1966).

[42] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945); *accord*, Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969).

[43] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-90 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[44] Broadcasting Magazine, Nov. 2, 1970, at 48.

[45] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); *see* United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); *cf.* Superior Films v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring).

[46] Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., separate opinion).

[47] Marsh v. Alabama, 326 U.S. 501 (1946).

> health, external defense, and the like. . . . The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator is, or has been, chosen. He "calls the meeting to order." And the hush which follows that call is a clear indication that restrictions upon speech have been set up. . . . [N]o one shall speak unless "recognized by the chair." Also, debators must confine their remarks to "the question before the house." . . . The town meeting, as it seeks for freedom of discussion, would be wholly ineffectual unless speech were thus abridged.[48]

Procedural rules, in other words, may "suppress" the right of an individual to speak in order to maximize the opportunity of all citizens to speak. Although first-amendment attention has traditionally been focused on censorship of speech content, the application of procedural rules restricting access to the forums of public discussion has become increasingly a matter of concern. If a moderator, Speaker of the House, or radio-television licensee were to allow one speaker less time than another, or no time at all, then censorship as invidious as outright thought control would clearly exist. Can it be doubted that the first amendment *compels* the implementation of procedural rules governing access to limited-use forums so as to enable as many to speak and to be heard as is practicable?[49]

Unfortunately, the clear analogies to broadcasting that one can draw from the example of the town hall meeting have been ignored. Instead, we have permitted a system of broadcasting to develop in this country in which private broadcast licensees serve, not only as "moderators" for the electronic forums of communication, but also as all the "speakers" as well. It is as if the Speaker of the House called the meeting to order, chose the topic for discussion, alloted time to all sides, and then did all the talking himself. The groundskeeper in a public park is entitled to keep the crowds off the flowers; he is not entitled to keep everyone off all the soap boxes as well. Yet this is precisely what we have permitted in the "public parks" of broadcasting.

No one would deny the need for a "trustee" system in broadcasting; someone must maintain the costly temples of communication that house

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[48] A. MEIKLEJOHN, POLITICAL FREEDOM 24-25 (1960).

[49] The first "[a]mendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." Associated Press v. United States, 326 U.S. 1, 20 (1945).

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the elaborate radio and television equipment, the technical prerequisite to any speech at all. The existence of this "trustee" system should not be at issue here. The question is whether a broadcast licensee is required by the first amendment and his "fiduciary" position to sell reasonable portions of broadcast time at the prevailing commercial rates to responsible members of the public.

In a paradoxical way the broadcast industry itself has resolved this question. As the system now operates, immediate "access" is granted to one privileged class of applicants, the commercial peddlers of goods and services. Any person wishing to sell toothpaste or feminine deoderant spray, for example, has direct, personal, and instant access to the broadcast media. He can present his message in any form he wishes and at a time of his own choosing. No "trustee" argues the merits of his cause. He does it himself. Yet the Federal Communications Commission has denied this same right of access to persons who attempted to present programming and spot announcements dealing with issues of public importance, and who offered to pay the same rate as commercial advertisers pay.

This practice of the broadcast industry illustrates a fourth tenet of the first amendment. The Supreme Court has drawn a distinction between two types of speech. The first, political or social speech, is entitled to the fullest protection.[50] Indeed, the "central meaning of the first amendment" is that the citizen has a right to criticize those who govern.[51]

"Commercial" speech, however, has been viewed differently. In the quarter century since *Valentine v. Chrestensen*[52] "the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." [53] In *Valentine* the Court upheld a municipal ban on the distribution of commercial pamphlets on city streets. The Court observed simply that "the

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[50] *See, e.g.*, Kingsley Pictures Corp. v. Regents of the Univ. of the State of New York, 360 U.S. 684, 689 (1959) (first amendment protects expression of unconventional views on social issues); Stromberg v. California, 283 U.S. 359, 369 (1931) (maintenance of the opportunity for free political discussion is a basic tenet of the constitutional system).

[51] Kalven, *supra* note 19, at 208-09.

[52] 316 U.S. 52 (1942).

[53] *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967); *see, e.g.*, Ginzberg v. United States, 383 U.S. 463, 474 n.17 (1966); Pollak v. Public Util. Comm'n, 191 F.2d 450, 456-57 (D.C. Cir. 1951) (dictum), *rev'd on other grounds*, 343 U.S. 451 (1952). *See also* Note, *supra* note 19.

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Constitution imposes no analogous restraint on government as respects purely commercial advertising." [54]

Although the distinction between political and commercial speech is often an elusive one, it can perhaps be viewed as dividing speech into categories defined by the speaker's intent—speech intended to influence political and social decisions in the marketplace of ideas, and speech intended to influence private economic decisions in the marketplace of goods.[55] And while this distinction has been criticized,[56] perhaps with reason, justification for its continued application may be grounded on the premise that the dissemination of "false" political ideas will evoke discussion or controversy, which in turn will refute or highlight the falsity of the original statement. "False" commercial assertions, on the other hand, can be expected to breed only additional false claims as each competitor seeks to out-promise the other.[57]

Viewed in this light, the Federal Communications Commission has relegated political speech to a peculiarly inferior role. With the assistance of the Commission the broadcasting industry has built what is potentially the most efficient and effective "marketplace of ideas" ever conceived. But the industry finds it more profitable to use that marketplace only for the sale of products, not for the robust, wide-open debate of a free society. Our procedural rules of access to the broadcast forum are, therefore, seriously skewed. These rules offer a right of access only to hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health or the suffering of the poor must content himself with the beneficence of a corporate "trustee," appointed by the Government to speak for him.

The last first amendment fundamental concerns the importance of permitting individual groups or citizens to speak directly for themselves on issues that concern them. The Supreme Court recently emphasized this point in *Red Lion* by adopting the words of John Stuart Mill:

> Nor is it enough that he should hear the arguments of adversaries

[54] 316 U.S. at 54.

[55] *Compare* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door-to-door solicitation of contributions for religious literature protected), *and* Jamison v. Texas, 318 U.S. 413 (1943) (advertisement on back of religious handbill a protected form of speech), *with* Beard v. Alexandria, 341 U.S. 622 (1951) (conviction for door-to-door solicitation of commercial magazine subscriptions upheld).

[56] *See* Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (Douglas, J., concurring).

[57] *Developments in the Law*, *supra* note 53, at 1030.

> from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them.[58]

Even the Federal Communications Commission has acknowledged the importance of this principle. For example, the majority in *Democratic National Committee* stated that a broadcast licensee as public trustee must present representative views and voices on controversial issues, "some of [which] must be partisan." [59] However, the majority did not go so far as to find a right in any individual member of the public to present his own views, but concluded that a licensee could discharge his obligation by "devot[ing] a reasonable amount of time to public issues and to do so fairly." [60]

Notwithstanding the fact that the Commission in *Democratic National Committee* refused to accept the implications of its statement, the speech attempted in both *Business Executives* and *Democratic National Committee* reflected an effort by individual groups to speak directly for themselves through the media of radio and television. The fact that BEM and the DNC were willing to pay for the air time they sought should not invalidate the constitutional protection otherwise afforded their speech. The Supreme Court in *New York Times Co. v. Sullivan*[61] expressly emphasized the importance of paid editorials as a unique and valuable form of individual expression. Commenting on a paid editorial in the New York Times, the Court remarked:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in [Valentine v. Chrestensen, 316 U. S. 52 (1942)]. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern . . . . That . . . the advertisement [was paid for] is as immaterial . . . as is the fact that news-

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58 J. Mill, On Liberty 32 (1947), *quoted in* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 n.18 (1969). *See also* National Advisory Comm'n on Civil Disorders, Report to the President 383 (Bantam ed. 1968) (failure of the mass media to portray the plight of black Americans found in part to stem from refusals to allow them to speak for themselves).

59 25 F.C.C.2d at 222.

60 *Id.*

61 376 U.S. 254 (1964).

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> papers and books are sold. . . . Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. . . . The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." [62]

The implication that may be drawn by analogy from the Court's observation in *New York Times* is that the spot announcements and programming access requested by BEM and the DNC involve protected forms of political speech in the highly important forum of broadcasting. Yet the Federal Communications Commission, by rejecting the efforts of BEM and the DNC to reach an audience with their own views, chose instead to elevate "commercial" speech above "political" speech. The Commission left intact a system of broadcasting that gives all discretion over the presentation of controversial issues to federally licensed corporate "trustees." Before a case can be made, however, for the proposition that the first amendment requires a reversal of the Commission's precedents, it must first be shown that the Constitution protects individuals and groups against censorship by "privately" owned broadcast licensees.

State Action

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." Although the language of the amendment restrains only the national Government, the Supreme Court has extended its protection to action by the states as well.[63] A literal reading of the amendment would suggest that it does not prohibit cen-

[62] *Id.* at 266. The Court concluded that the advertisement, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection." *Id.* at 271; *accord*, Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Zucker v. Panitz, 299 F. Supp. 102, 104 (S.D.N.Y. 1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 54-55, 434, P.2d 982, 984-85, 64 Cal. Rptr. 430, 432-33 (1967). "[W]hen an advertisement is the medium for noncommercial expression, constitutional freedoms apply in spite of its commercial nature." Note, *Resolving the Free Speech-Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. Fla. L. Rev. 293, 309 & n.131 (1969).

[63] Gitlow v. New York, 268 U.S. 652, 666 (1925).

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sorship by *private* entities. And at least one court has ruled that the amendment does not prevent privately owned newspapers from rejecting requests to purchase advertising space.[64] Rejections of offers to purchase broadcasting time by broadcast licensees would, therefore, violate the first amendment only if the rejections constituted "state action" which deprives individuals of protected speech freedoms.

On first glance one might conclude that the refusal of a broadcast licensee to accept political spot announcements or programming is "private action" not subject to constitutional restraint. After all, most broadcast stations are privately owned businesses, controlled by an individual, a family, or a closely held corporation.[65] But, notwithstanding the cloak of private control, the actions of many nongovernmental persons and corporations have been found to satisfy the fourteenth amendment's state action requirement. In each of these cases the action of the private party was so "involved" with the state that the restraints of the Constitution were found to apply. To paraphrase the court in *Farmer v. Moses*,[66] the inquiry should be whether a broadcast licensee's action in rejecting offers to purchase spot announcement or programming time "are so impregnated with and supported by state . . . action as to place them within the ambit of the [First] Amendment, . . . even though [a licensee] . . . possess[es] certain indicia and aspects of 'private' ownership and dominion." [67]

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[64] Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. Ill. 1969), *aff'd*, No. 18,300 (7th Cir., Dec. 17, 1970). The lower court in *Chicago Joint Board* rejected the plaintiff's argument that the first amendment prohibits the action taken by the Chicago Tribune, stating that "while the [first and] Fourteenth Amendment[s] [afford] protection from state action as well as that from the national government, [they do] not protect against wrongs done by private persons." 307 F. Supp. at 425.

In affirming, the Seventh Circuit rejected as "unconvincing" a similar argument put forth by plaintiff-appellant, stating that "[t]he Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." No. 18,300 at 13.

[65] There seems little doubt, however, that the first amendment would clearly apply to broadcast stations controlled by public entities, such as state and local governments, public schools and universities, or publicly funded private education institutions. *Cf.* Trujillo v. Love, Civil No. C-2785 (D. Colo., Feb. 11, 1971) (school newspaper); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969) (school newspaper); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (school newspaper).

[66] 232 F. Supp. 154, 158 (S.D.N.Y. 1964) (grounds of World's Fair held to be equivalent in status to public property, and thus within the ambit of the fourteenth amendment, because the Fair Corporation's operations were found to be "impregnanted with and supported by city and state action").

[67] *Id.* at 158.

Although the Supreme Court itself views the creation of a precise state action formula as an "impossible task," [68] the facts and the theories of past state action decisions offer guidance in the present undertaking.

Public Property

The broadcast frequencies are a valuable and scarce resource belonging to the public. Although broadcast licensees are given the temporary use of this property for terminable three-year periods, ownership and ultimate control remain vested in the people of the United States. The proposition that the broadcast frequencies were intended to remain "public property" in spite of their temporary use by broadcast licensees is further supported by congressional enactment of the Communications Act of 1934. In section 301 of that Act Congress expressed a clear intention that the broadcast spectrum should remain public property:

> It is the purpose of this [Act] . . . to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, *but not the ownership thereof*, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.[69]

If the broadcast frequencies may be viewed as constituting "public property," then any licensee action taken with respect to such property should suffice to satisfy the "state action" requirement. The Supreme Court reached an analogous result in *Tucker v. Texas*.[70] There the Court held that control exercised by municipal officials over the property of a government-owned town constituted "state action."

Private Lessee of Public Property

It seems equally clear that a public entity cannot evade constitutional proscriptions by leasing its property to private individuals. Discrimination by private lessees with respect to public property has, for the purposes of the first amendment, unequivocally been deemed state action

[68] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), *citing* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

[69] 47 U.S.C. § 301 (1964) (emphasis added).

[70] 326 U.S. 517 (1946).

by the courts.[71] For example, the court in *Anderson v. Moses*[72] held that the refusal to serve a group of patrons of a private corporation operating a public restaurant under license from the New York City Commissioner of Parks, solely because of the unpopularity of their views, constituted action by "an instrumentality of the State and [as such] come[s] within the ambit of the protections afforded by the Fourteenth Amendment . . . ." [73]

Many of the decisions holding private lessees of public property subject to first amendment prohibitions have relied upon the analogous decision of the Court in *Burton v. Wilmington Parking Authority*.[74] In *Burton* the Court found the proscriptions of the fourteenth amendment applicable to a privately owned restaurant occupying space in a publicly owned building leased from the state. The management refused to serve Negro patrons. In finding the requisite state action the Court remarked:

> The land and building were publicly owned. As an entity, the building was dedicated to "public uses" . . . .
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> . . . [T]he obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn . . . . Specifically . . ., what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.[75]

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[71] *See, e.g.*, Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (city "leased" public advertising space on city buses to "private" advertising agency); Farmer v. Moses, 232 F. Supp. 154, 159 (S.D.N.Y. 1964) ("when a city or state leases public property [such that] . . . services . . . are actually performed by a 'private' lessee, the latter stands in the shoes of the government"); Anderson v. Moses, 185 F. Supp. 727, 733 (S.D.N.Y. 1960) ("private . . . concessionaire [operated] on public . . . property for the convenience and comfort of the public"); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969) (action by private advertising agency, pursuant to "contract" with city, in removing advertisements from municipal buses constituted state action); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (publicly owned advertising space on municipal buses "leased" to private advertising company).

[72] 185 F. Supp. 727 (S.D.N.Y. 1960).

[73] *Id.* at 733.

[74] 365 U.S. 715 (1961).

[75] *Id.* at 723-24, 726.

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As previously indicated, many other courts have reached identical conclusions under similar circumstances,[76] although in the public transportation cases the result was more easily achieved because of the power retained by the transit authority to disapprove advertisements found to be either objectionable or too controversial.[77]

An extension of the *Burton* rationale may be found in the Court's opinion in *Marsh v. Alabama*.[78] In *Marsh* the Court held that a privately owned "company town" serving a "public function" could not enlist the aid of the state to exclude from its sidewalks persons distributing religious literature. If, as in *Marsh*, the conduct of a private owner of private property serving a public function is subject to first amendment restraint, then surely conduct by a private *user* of *public* property is similarly governed.[79]

In applying these constitutional principles to broadcast licensees, it should be apparent that "[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."[80] To paraphrase the Court in *Burton*, surely we cannot assume that the Federal Government in leasing public property to private individuals intended the private lessees to operate the leased property free of obligations imposed by the Constitution, obligations that would be binding on the Government itself if it undertook to perform the identical task performed by the private lessee.

"Delegation" of State Power

Whenever a state "delegates" important aspects of its sovereignty to the use and control of a private entity, that entity, in exercising the

[76] See cases cited note 71 *supra*.

[77] *See* Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 441 (S.D.N.Y. 1967); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 64-65, 455 P.2d 350, 351 (1969); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 53-54, 434 P.2d 982, 984, 64 Cal. Rptr. 430, 432 (1967).

[78] 326 U.S. 501 (1946).

[79] *Cf.* Tanner v. Lloyd Corp., 308 F. Supp. 128, 130 (D. Ore. 1970) (privately owned shopping center found to be "the functional equivalent of a public business district"); Schwartz-Torrance Inv. Corp. v. Local 31, Bakery & Confectionery Workers', 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (privately owned shopping center found to possess a "public character").

[80] Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (Burger, J.) (responsible representatives of listening public held to have standing to contest license renewal), *noted in* 52 VA. L. REV. 1360 (1966).

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power delegated to it, is governed by the restraints of the Constitution. This theory of state action was recently reiterated by the Court in *Evans v. Newton.*[81] Commenting on the constitutional prohibition of "state-sponsored racial inequity," the Court stated that

> where a State delegates an aspect of the elective process to private groups, they become subject to the same restraints as the State. . . . That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.[82]

This same principle should apply in the sphere of radio and television broadcasting, because a broadcast licensee, like any other lessee, is empowered to exercise control over his broadcast frequency only by virtue of the terminable grant of power flowing from the Federal Government in the form of a three-year license. For this reason, whenever a broadcast licensee excludes individuals wishing to express their views through a publicly owned medium, it is, in effect, exercising a governmental power, because its ability to act in this manner stems solely from a power delegated by the Government.[83] Viewed in this light, any private action taken by a broadcast-licensee-trustee with respect to his trust "*res*" is imbued with the attributes of state action.

Involvement of a Regulatory Agency

Action by a purely private individual or entity may produce the requisite state action necessary to render the fourteenth amendment's proscriptions applicable if the entity or individual is subject to regulation by a regulatory body. In *Public Utilities Commission v. Pollak*[84] the Court addressed itself to the question whether action by a bus company, a "privately owned public utility corporation" regulated by a public utilities commission, was to be treated for purposes of the Con-

[81] 382 U.S. 296 (1966) (although state "delegated" its authority over public park to private trustees, discriminatory conduct of trustees was found to constitute state action).

[82] *Id.* at 299.

[83] *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (discrimination by private restaurant lessee occupying publicly owned building held to be state action); Smith v. Allwright, 321 U.S. 649, 660 (1944) ("state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State").

[84] 343 U.S. 451 (1952).

stitution as action by a governmental entity. In finding a nexus between the Federal Government and the bus company sufficient to render the latter's conduct state action, the Court specifically relied upon the fact that the bus company "operate[d] its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress." [85] The Court held that this relationship was sufficient to render action by the bus company action by the state. As authority for its holding the Court cited the following proposition from *American Communications Association v. Douds:*[86] "[W]hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." [87]

There can be little doubt that both the Congress and the Federal Communications Commission are substantially involved in many aspects of broadcasting. In accordance with the rationale of both the *Pollak* and *Douds* cases this involvement should comprehend the requisite relationship found to be controlling in *Pollak* and should render action by the licensee equivalent to action by the Federal Government. Indeed the Federal Communications Commission has acknowledged that discrimination by licensees may constitute improper state action. Although prefacing its comment with the remark that it "need not decide this point," the Commission stated that

> a substantial case has been made that because of the relationship of the Government of the United States to broadcast stations, the Commission has a constitutional duty to assure equal employment opportunity . . . . The contention [rests upon] such decisions as *Burton v. Wilmington Parking Authority* . . . .[88]

State Encouragement or Lack of Neutrality

Private conduct abridging individual rights has been held to constitute "state action" within the meaning of the fourteenth amendment where the state has either actively encouraged the individual discrim-

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[85] *Id.* at 462 (footnote omitted).

[86] 339 U.S. 382 (1950) (federal statutory requirement that labor organizations submit non-Communist affidavits, held constitutional).

[87] 343 U.S. at 462 n.8, *quoting* 339 U.S. at 401.

[88] Nondiscrimination Employment Practices of Broadcast Licensees, 18 F.C.C.2d 240, 241 & n.2 (1969).

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ination[89] or adopted a nonneutral stance with respect to discriminatory conduct.[90] An example of this type of state action is presented by the facts underlying the Court's decision in *Evans v. Newton*.[91] In that case a state court had permitted a municipality to transfer its control over a public park to private trustees who denied Negroes access to the facility. The transfer was made because the municipality itself could not constitutionally deny Negroes access to the park, a condition attached by the testator who had given the park to the municipality. The majority opinion in *Evans* barred discrimination by the private trustee on the ground that the park continued to be "municipal in nature," regardless of the fact that it had been transferred to "the private sector."[92]

Mr. Justice White, concurring in *Evans*, took the position that the racial condition in the trust should have been denied effect because of the state law that permitted private settlors to establish charitable trusts dedicating their property to the public for use as a park, while limiting the property's use "to the white race only."[93] Although state law did not *compel* a settlor to insert a racial restriction in his bequest, the law suggested that such action would be *valid*. Accordingly, Mr. Justice White found that the statute significantly "depart[ed] from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and . . . involve[d] the State in the private choice . . . ."[94] Finding that the statute encouraged discrimination, Mr. Justice White concluded that the state had so involved itself with the private-settlor's discriminatory conduct that his private action was, in effect, action by the state.[95]

The conduct of the state in *Evans* parallels FCC regulation of broadcast licensees. Section 3(h) of the Communications Act provides that licensees shall not be deemed to be "common carriers."[96] Although the Commission has for many years interpreted this provision in a manner consistent with a limited right of access for spot announcements on

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[89] Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va.), *rev'd & remanded per curiam*, 387 U.S. 423 (1967).

[90] Peterson v. City of Greenville, 373 U.S. 244 (1963).

[91] 382 U.S. 296 (1966).

[92] *Id.* at 301.

[93] *Id.* at 305 n.1, *quoting* Act of Aug. 23, 1905, No. 329, §§ 1, 2, [1905] Ga. Laws 117.

[94] *Id.* at 306.

[95] *Id.* at 306-07; *accord*, Reitman v. Mulkey, 387 U.S. 369 (1967).

[96] 47 U.S.C. § 153(h) (1964).

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controversial subjects,[97] it has recently reversed itself, declaring that licensees have discretion to close their doors to persons seeking to use the station's facilities.[98] This interpretation of the Act, which represents a clear reversal of prior Commission policy, can be analogized to the action of the California electorate in enacting Proposition 14, a constitutional amendment which provided that "[n]either the State nor any subdivision . . . thereof shall deny . . . the right of any person . . . to decline to sell, lease, or rent . . . property . . . as he, in his absolute discretion, chooses." [99] In affirming the judgment of the California Supreme Court that Proposition 14 violated the equal protection clause of the fourteenth amendment, the Court in *Reitman v. Mulkey*[100] observed that Proposition 14 made "[t]he right to discriminate . . . one of the basic policies of the State" by encouraging private individuals to practice racial discrimination in the housing market.[101] The Commission's reversal of its prior policy may be viewed as providing a similar "encouragement" of broadcast licensees to discriminate in their selection of advertisements and programming, permitting them to accept commercial advertisements and reject political ones.[102] This "encouragement" effect should suffice to bring the conduct of broadcast licensees within the ambit of the first amendment.

State Action Through Quasi-Judicial FCC Action

Where private parties have enlisted the aid of state tribunals to enforce *private* discriminatory practices, judicial action has been held to transform the purely private act of discrimination into discrimination by the state. This theory was first announced by the Court in *Shelley v. Kraemer*,[103] where the majority stated that "action of state courts and judicial officers in their official capacities is to be regarded as action of

[97] *See, e.g.*, Homer P. Rainey, 11 F.C.C. 898 (1947); Robert Harold Scott, 11 F.C.C. 372 (1946); United Broadcasting Co. (WHKC), 10 F.C.C. 515 (1945).

[98] *See, e.g.*, Letter to Washington Women's Strike for Peace, Nov. 22, 1965 (unpublished), *cited in* Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 246 n.6 (1970).

[99] CAL. CONST. art. I, § 26 (1964).

[100] 387 U.S. 369 (1967).

[101] *Id.* at 381.

[102] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-203 (1970) (Brennan, J., concurring in part & dissenting); Lombard v. Louisiana, 373 U.S. 267 (1963) (statements by Mayor and Superintendent of Police encouraging private discrimination found to constitute state action).

[103] 334 U.S. 1 (1948).

the State." [104] Attempting to delimit the scope of its holding, the Court went so far as to suggest that state action might not be found in those instances where a state tribunal merely "abstained from action, leaving private individuals free to impose such discriminations as they see fit." [105] Subsequent decisions, however, have blurred this distinction. For example, in *New York Times Co. v. Sullivan*[106] the Court stated that the species of state action in a given case may be irrelevant to the result: "The test is not the form in which state power has been applied but, *whatever the form*, whether such power has in fact been exercised." [107]

In a more recent case, *Edwards v. Habib*,[108] Judge Skelly Wright, speaking for the United States Court of Appeals for the District of Columbia, discussed in detail the current status of the *Shelley v. Kraemer* theory of state action. After reviewing recent precedent and other prevailing views, Judge Wright concluded:

> It has been suggested that there is state action, not only when an individual asserts a claim of right against a state, but also when he asserts a claim of right against the claims of right of other persons and the state resolves the conflict according to its policy of what is reasonable under the circumstances, *i.e.*, according to its law. Once this "state action" is established, the question then becomes simply "whether the particular state action in the particular circumstances, determining legal relations between private persons, is constitutional when tested against the various federal constitutional restrictions on state action."
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> . . . On this theory, if it would be unreasonable to prefer [a particular private person's] . . . interest[s], it would also be unconstitutional.[109]

Marsh v. Alabama[110] provides additional support for this view of state action. There, private owners sought to enlist the aid of the state's criminal process to exclude from their property individuals who sought to exercise first amendment rights. The Court balanced the competing

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[104] *Id.* at 14.

[105] *Id.* at 19.

[106] 376 U.S. 254 (1964).

[107] *Id.* at 265 (emphasis added).

[108] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[109] *Id.* at 695 (footnotes omitted), *quoting in part from* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957). For a list of other commentators discussing this view, see authorities cited at 397 F.2d at 695 n.23.

[110] 326 U.S. 501 (1946).

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interests. Not "[un]mindful of the fact that [first amendment freedoms] occupy a preferred position," Mr. Justice Black found that the scales of justice did not tip in favor of restricting such fundamental liberties and condemned the state court's "enforcement of such restraint by the application of a state [criminal trespass] statute." [111]

More recently, in *Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc.*[112] and *New York Times Co. v. Sullivan*[113] state courts were called upon to resolve essentially private disputes involving protected speech freedoms. In each case the state action requirement was satisfied in a technical sense, by a threatened application of state law: a criminal trespass statute in *Amalgamated Food Employees* and a libel law in *New York Times*. But the Court resolved the controversies by balancing the first amendment rights of the defendants against the plaintiffs' countervailing interests in property and reputation. If in *Amalgamated Food Employees*, therefore, the shopping center had employed private guards, not public police, to deny the defendants access to their sidewalks, it is probable that the Court would have struck the same balance, even in the absence of a prima facie trespass violation.[114]

Admittedly, there are factual distinctions between *Business Executives* and *Democratic National Committee* on the one hand, and *Marsh* and *Amalgamated Food Employees* on the other. For example, in both *Democratic National Committee* and *Business Executives* the petitioners did not attempt to enter the licensees' broadcasting facilities and transmit their message by "self-help" tactics. Nor were they ejected from broadcast facilities or subsequently prosecuted under state trespass laws. Instead, BEM and DNC came directly to the Federal Communications Commission seeking a legal declaration of their right of access to the broadcast media. By its own action, action just as effective as that taken against the union in the *Amalgamated Food Employees* case, the Commission, after conducting a hearing,[115] effectively ejected BEM and the DNC from *all* broadcast facilities and banished them to silence. By declaring the rights and liabilities of parties in these proceedings, the

[111] *Id.* at 509 (footnote omitted).

[112] 391 U.S. 308 (1968).

[113] 376 U.S. 254 (1964).

[114] *Cf.* Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970). The plaintiffs in *Tanner* instituted an action under 42 U.S.C. § 1983 (1964) and 28 U.S.C. § 2201 (1964) seeking a declaratory judgment that "they have the right to distibute handbills in the Mall of [defendant's] shopping center." The court, therefore, was not called upon to enforce state trespass laws against defendants seeking to speak on private property.

[115] *Cf.* Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

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Commission invoked the "full panoply of [federal] power,"[116] power not unlike that found to constitute state action in *Shelley v. Kraemer*.[117] The fact that BEM and the DNC were not subject to criminal prosecution, as were the Jehovah's Witnesses in *Marsh*, is of no constitutional significance. The FCC's exercise of adjudicatory power was in itself sufficient to render the restraints of the first amendment applicable to conduct of broadcast licensees.

In a larger sense, the necessary "state action" may also be found in the FCC's action in renewing broadcast station licenses every three years. Broadcast licenses are granted for a three-year term, and they expire unless the Commission takes affirmative action to renew them. Every three years the Commission reviews the performance record of each station during the preceding three-year period. Thus, if a license is to be renewed, its renewal is based on that record and the station's promise of future performance. This action by the Commission is analogous to the actions taken by the Supreme Courts of Michigan and Missouri in *Shelley*.

In *Shelley* the United States Supreme Court was called upon to enforce a racially restrictive covenant and to eject a Negro tenant from property he recently purchased. The Court refused. It would not become a party to an action that turned a tenant into the street because of his race. Yet every three years the Federal Communications Commission is called upon to "inject" broadcast licensees back into their limited tenancies on the basis of their record. Presumably the records of many stations contain reference to instances where the licensee has rejected applicants, such as BEM and the DNC, who sought only to purchase air time. In such a case, by "injecting" licensees back into their tenancies, the FCC acts in precisely the same fashion as the Court would have acted in *Shelley*, had it enforced the restrictive covenant. The three-year renewal process, by analogy, constitutes state action under the *Shelley* rationale.

A number of commentators have argued that a state cannot tolerate private abridgement of preferred constitutional rights. Accordingly, they have suggested that whenever a state fails to enact curative legislation barring private discrimination, it implicates itself in the private discriminatory act.[118] The technical requirement of state action, so the

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[116] Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

[117] 334 U.S. 1 (1948).

[118] *See, e.g.*, Black, *Foreward: "State Action," Equal Protection, and California's*

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argument goes, is found, under the rationale of *Shelley v. Kraemer*, in any judicial resolution of controversies involving private discrimination not prohibited by state law. Since in theory the scope of *Shelley* is very broad, proponents of this view draw the line at the point where state prohibition of private discrimination would abridge countervailing individual rights to discriminate.[119]

This theory of state action has never been *expressly* applied to discriminatory "state action" infringing rights protected under the first amendment.[120] However, as the court of appeals in *Edwards v. Habib*[121] noted, *New York Times Co. v. Sullivan* extended the protection of the first amendment to a privately owned newspaper in a suit by a *private* individual,[122] indicating, by implication, that the theory has some vitality. The fact that neither Congress nor the State of Alabama had enacted a statute prohibiting libel was apparently thought to be irrelevant, since the Court found that the state court's adjudication of the rights of the two private parties constituted sufficient state action to render the fourteenth amendment applicable.[123]

Arguably, the Supreme Court of California adopted this position in

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Proposition 14, 81 HARV. L. REV. 69, 73-74 (1967); Henkin, *Shelley v. Kraemer, Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 481-85 (1962).

[119] *See, eg.*, Black, *supra* note 118, at 100-03. Even under this standard, state courts would still be free to enforce certain kinds of private discrimination, even though a state itself could not discriminate in a similar manner. A state court could, for example, "constitutionally probate a will leaving the deceased's property to the Catholic Church, even though the state could not constitutionally make a comparable disposition of its own funds." Edwards v. Habib, 397 F.2d 687, 692 n.13 (D.C. Cir. 1968) (dictum), *cert. denied*, 393 U.S. 1016 (1969). In addition, "[t]he state, through its police or courts, could aid an individual in his quest to keep Negroes from a dinner party in his home even though it could not keep Negroes from a courthouse cafeteria or even from a privately owned hotel solely on account of their race." *Id.* at 693 (dictum) (footnote omitted). Beyond a shadow of a doubt, state action would exist in both of these situations; however, the constitutionality or unconstitutionality of that action is based upon the balance struck between the rights of liberty, property or privacy, on the one hand, and freedom from racial discrimination on the other.

[120] One reason for this, perhaps, is the difference in the language of the first and fourteenth amendments. For example, section 5 of the fourteenth amendment gives Congress the power to "enforce" the provisions of that amendment, *see* Note, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 CALIF. L. REV. 293 (1967), whereas, the first amendment does not contain a similar provision expressly authorizing the Congress to "enforce" the proscriptions of that amendment.

[121] 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[122] *Id.* at 693-94.

[123] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

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In re Hoffman.[124] The petitioners in *Hoffman* had sought to distribute anti-war leaflets on the property of a privately owned railroad terminal. They were convicted of violating a municipal ordinance that prohibited loitering in transportation terminals. They sought a writ of habeas corpus. Citing *New York Times Co. v. Sullivan* and *Marsh v. Alabama*, the Supreme Court of California announced that "state action" within the meaning of the fourteenth amendment inhered in its own decision, regardless of the result, whenever it resolved the competing claims of private individuals:

> If the state curtails First Amendment freedoms to protect an interest that is nonexistent, whether claimed on behalf of the government or on behalf of a private individual, it violates the First and Fourteenth Amendments.[125]

The court's reference to the "curtailment" of first amendment freedoms by the state could only have contemplated the sanctions deriving from its own action in the case. In other words, the court was itself subject to first amendment restraint. Thus the critical question was whether the court could strike an appropriately weighted balance between the petitioners' freedom of speech and the rights of property and privacy protected by state criminal process. The balance was easily struck in *Hoffman*, for there the rights of property and privacy were found to be "nonexistent." When the owners of the railway terminal "opened up" their property to the general public for profit, they waived any right to "privacy" they might otherwise have had. Although the station owners could have reclaimed their right by closing the terminal to the public, they could not open it for some purposes and close it for others.

Many courts and legal scholars have emphasized the need for affirmative action by the government to ensure that the rights guaranteed by the first amendment will be preserved. For example, Mr. Justice Black, speaking for the majority in *Associated Press v. United States*,[126] stated:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to

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124 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

125 *Id.* at 850, 434 P.2d at 356, 64 Cal. Rptr. at 100.

126 326 U.S. 1 (1945) (application of the Sherman Act to AP by-laws and contracts restraining trade in news held not to abridge the first amendment).

> protect that freedom . . . . Surely a command that that government itself shall not impede the free flow of ideas does not afford nongovernment combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[127]

There is a need to enlarge the scope of legislative involvement in the sphere of first amendment freedoms, but there is similar need for judicial involvement as well. As Mr. Justice Fortas, in dissent, remarked in *Time, Inc. v. Hill*,[128] "[t]he courts may not and must not permit either public or private action that censors the press."[129] Affirmative judicial action to prevent censorship of speech or the press is entirely consistent with the constitutional guarantee contemplated by the authors of the first amendment: "a right of the people in a democracy to unrestricted information and presentation of views on government . . . ."[130]

State "Acquiescence"

Under all the theories of "state action" discussed in the preceding sections of this Article, the courts have struggled to find some connection between the private party, whose conduct was discriminatory, and the state. However, the courts have found state action to exist where government did not participate directly or affirmatively in private discrimination, but merely "acquiesced." In some cases the state "acquiesced" by relinquishing power to the private party, as in *Burton v. Wilmington Parking Authority*,[131] where the state leased a portion of its facilities

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[127] *Id.* at 20.

[128] 385 U.S. 374 (1967).

[129] *Id.* at 420 (Fortas, J., dissenting).

[130] Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97, 99 (Fla. Sup. Ct. 1966); *accord*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) ("Those [constitutional] guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."); State v. Buchanan, 250 Ore. 244, 249, 436 P.2d 729, 731, *cert. denied*, 392 U.S. 905 (1968) ("Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.").

[131] 365 U.S. 715 (1961).

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to a private entity. In other cases the state abdicated its power entirely, as in *Marsh v. Alabama*,[132] where the state failed to prevent discrimination by municipal entities under its licensing control. "Acquiescence" in an act of discrimination which the state would otherwise have the power to prevent transforms the private act into action by the state itself. Thus, if a state should refuse to enforce an individual's right to speak freely in a forum under its potential control, this refusal constitutes sufficient state action to render unconstitutional the discriminatory activities of the private parties who deny the individual the right to speak.

In *Marsh* Mr. Justice Black, writing for the majority, stated that the "mere acquiescence by the State in the [private party's] use of its property . . . would still have been performance of a public function. . . ." [133] There was no significance in the fact that the private act of discrimination occurred on premises held "by others than the public," where the state by its inaction was "*permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . ." [134] Thus the state's abdication of authority constituted state action, rendering unconstitutional the company town's discrimination, since the town was licensed by the state and performed a "public function" similar to that of any municipality.[135]

The Court reached a similar conclusion in *Burton v. Wilmington Parking Authority*,[136] finding the requisite "state action" in the private lessee's refusal to serve Negro patrons on premises leased from the state. As in *Marsh*, the Court characterized the element of governmental inaction as the necessary link between private discriminatory conduct and the constraints of the Constitution:

> [I]n its lease with [the restaurant] the [State Parking] Authority could have affirmatively required [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the

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[132] 326 U.S. 501 (1946).

[133] *Id.* at 507.

[134] *Id.* at 509 (emphasis added).

[135] Technically, "state action" was present in *Marsh*, since the state was called upon to enforce its criminal trespass laws. But the existence of this element should not be viewed as controlling, since, under the rationale of the majority in *Marsh*, the result would not have been different if the company town had attempted to exclude the Jehovah's Witnesses from the corporation's property by seeking injunctive relief. *See* Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970) (action to compel entry to shopping center).

[136] 365 U.S. 715 (1961).

> private enterprise as a consequence of state participation. But no State may effectively *abdicate* its responsibilities by either *ignoring* them or by merely *failing to discharge* them whatever the motive may be . . . . By its *inaction*, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.[137]

Several other decisions of the Court appear to be in accord with this view of state inaction.[138]

There are clear and direct analogies between the state inaction in *Marsh* and *Burton* and the role of the Congress and the Federal Communications Commission in the realm of broadcasting. For a limited period the Government has relinquished its rights in valuable public property to private broadcast licensees. Occasionally Congress has exercised its power over this property in order to prevent certain kinds of licensee censorship, stating, for example, in section 315(a) of the Communications Act that "licensee[s] shall have no power of censorship over the material broadcast under the provisions of this section." [139] Although the Congress has not enacted implementing legislation to bar other specific forms of licensee censorship, such an exercise of power would seem to be permissible under the Constitution.[140]

"Self-Enforcement" of the First Amendment

As indicated above, under the traditional "state action" theories the courts have sought to find some nexus between the power of government and the contested private conduct before they have invoked the restraints of the Constitution. The "self-enforcement" theory of the first amendment, however, rejects this approach. Here the assumption is that the first amendment, standing alone, prohibits all forms of both governmental and *private* censorship. This interpretation has its origin in the amendment's underlying purpose, the creation of a marketplace of ideas into which all thoughts and forms of expression can freely enter. The framers of the Constitution sought to achieve this goal by

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137 *Id.* at 725 (emphasis added).

138 *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

139 47 U.S.C. § 315(a) (1964).

140 *Cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

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restricting the powers of the government, the only source of censorship they foresaw. Since that time, however, private economic cartels have acquired monopolistic control over the newsprint and broadcast media. Today the great threat of censorship comes, not from the Government, but from the vested economic interests that restrict access to print and broadcast forums. If the first amendment may be construed to be "self-enforcing," operating to secure a free marketplace for all ideas in all media, this construction would have the salutary and necessary effect of barring censorship by government and private interests alike.[141]

Today the "marketplace of ideas" *is* the mass media. Yet there are very few ways one can gain access to the media for purposes of communicating noncommercial speech. One can either purchase a radio or television station, or produce peacefully or violently an event worthy of news coverage. If an individual is the subject of a personal commentary, he may be able to secure rebuttal time under the personal attack doctrine; or he may be able to solicit the aid of an editorial staff member who will present his views by "proxy." Lastly, he may pursue the most rational of the alternatives considered thus far: he may attempt to purchase air time.

In each of these instances, however, access to the media has been drastically curtailed. First of all, the Federal Communications Commission has made it difficult for an individual or group to acquire an existing radio or television station.[142] Secondly, peaceful demonstrations,

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141 Many commentators have voiced concern over the fact that the ideal of a "marketplace of ideas" has grown dim since the founding of this country some two centuries ago, largely because of the concentration of power over the media of mass communication. *See* R. Crossman, The Politics of Socialism 44 (1965); J. Fulbright, The Pentagon Propaganda Machine *passim* (1970). Other commentators have expressed concern because the mass communication industry is using "the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their expression." Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1646 (1967); *accord*, V. Key, Public Opinion and American Democracy 378-79 (1961). *See also* N. Johnson, How to Talk Back to Your Television Set *passim* (1970).

142 *See* Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 35 Fed. Reg. 822 (1970); Petition by BEST, 21 F.C.C.2d 355, *reconsideration denied*, 24 F.C.C.2d 383 (1970). Prior to the issuance of the 1970 Policy Statement, groups wishing to apply for the license of an existing station were assured a factual hearing, at which time they were given an opportunity to present their programming proposals and to compare them against the incumbent licensee's record. Although an applicant's chances for success were slim at best, this procedure gave groups with better programming ideas an opportunity to make them known. *See* WHDH, Inc., 16 F.C.C.2d

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even violent ones, soon fade in newsworthiness; and violent ones fade in credibility. Thus the second technique for gaining access to the media is viable only where those who rely upon it are willing, and able, to resort to tactics increasingly extreme.[143] The third means of obtaining access, the request for equal time, may prove to be ineffectual in individual cases, for the Federal Communications Commission has been reluctant to apply the fairness doctrine evenhandedly to all individuals or groups holding minority or dissenting views.[144] The fourth method, the presentation of one's views by "proxy," may also prove to be an ineffective means of capturing the largess of the airways. It may be difficult to obtain the sympathy of a radio or television station's editorial staff; and what is difficult in some communities may be impossible where only a few radio and television outlets are available.[145]

Thus only the fifth alternative, the purchase of airtime at the going commercial rate, offers individuals an opportunity to make their views known to the public. Although the framers of the first amendment did not write it with a view toward sanctifying the views of the owners of the print and broadcast forums, governmental inaction in failing to ensure that *all* citizens have a right of access to these forums has had this effect.

What is more, by failing to recognize a right of access in *Democratic National Committee* and *Business Executives*, the Commission by its own

1 (1969). The Policy Statement, however, provided that new applicants for existing stations would not be given a hearing if the incumbent licensee's programming was judged to substantially accord with community needs and interests. Once the incumbent passed a certain threshold of quality, determined by the FCC, it would be assured renewal, no matter how much better the competing applicant's proposals might be. STAFF OF SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 91st Cong., 2d Sess. ANALYSIS OF FCC's 1970 POLICY STATEMENT ON COMPARATIVE HEARINGS INVOLVING REGULAR RENEWAL APPLICANTS *passim* (1970).

143 *See* Von Hoffman, *Television Blackout*, Washington Post, Nov. 17, 1969, § D, at 1, col. 1 (television coverage of the largest political gathering in the history of the United States, the anti-Vietnam war moratorium on Nov. 15, 1969, was almost nonexistent).

144 *See, e.g.*, Friends of the Earth, 24 F.C.C.2d 743 (1970) (anti-pollution announcements); Letter to Mrs. Dorothy Healey, 24 F.C.C.2d 487 (1970) (attack on member of Communist Party for "unpatriotic" views); Letter to Mr. Donald A. Jelinek, 24 F.C.C.2d 156 (1970).

145 Mrs. Katherine Graham, owner of the Washington Post, a daily newspaper, and the Post-Newsweek Stations, including WTOP-AM-FM-TV in Washington, D.C., and WJXT-TV in Jacksonville, Fla., expressed her dismay over the "right of access to the press" on the part of people who are being unfairly treated. "I worry about this subject because I feel it where I sit . . . . People feel at a disadvantage now in this age of bigness. They think they have nowhere to go unless they know an editor, or know me." Goulden, *The Washington Post*, WASHINGTONIAN MAGAZINE, Oct. 1970, at 59, 88.

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action encouraged a frantic push toward more and more commercial advertising on the airways, to the exclusion of those who wish to make their views known to the public through purely political or social speech. In essence the FCC has abdicated control over the electronic forums of speech to monolithic commercial enterprises.

Private corporate censorship by radio and television licensees must be eliminated if dissent is to flourish in this country. If freedom of speech is to be preserved, the growing concentration of economic power over the media of mass communications must be halted.[146] Unless the Court adopts a new concept of state action to preserve first amendment speech freedoms, some nexus must be found between the power of the mass media, whose owners stand like Colossus astride the channels of communication, and a government-related entity.

Perhaps the basic solution to this problem lies in viewing the first amendment as "self-enforcing." Under this view, as noted above, the first amendment itself is interpreted as prohibiting censorship by the Government or by "private" entities holding life-and-death control over the media. Arbitrary, content-related restraint on communication, whether imposed by the Government or by private entities, would contravene the first amendment guarantee of free speech and freedom of the press.[147] Recognition of a limited right of noncommercial access for paid editorial announcements and programs, facilitated by this approach, would then contribute to the establishment of a true marketplace of ideas in the electronic media.[148]

Marsh v. Alabama[149] may perhaps be viewed as opening the wedge.

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[146] *See generally* Letter to Rep. Richard L. Ottinger [Judy Collins Incident], No. 70B-47876 (F.C.C., Apr. 20, 1970) (Cox & Johnson, Comm'rs, dissenting), in 18 P & F RADIO REG. 2D 1031 (1970); Johnson, *Public Channels & Private Censors*, THE NATION, Mar. 23, 1970, at 329.

[147] *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945). Speaking within the context of the mandate that licensees act in the "public interest," Mr. Justice White, writing for a unanimous Court in *Red Lion*, stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself *or a private licensee*." 395 U.S. at 390 (emphasis added).

[148] *See* Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *supra* note 141, at 1644-50; Gorlick, *Right to a Forum*, 71 DICK. L. REV. 273 (1967); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L. J. 931; Silver, *Free Speech on Private Property*, 19 CLEV. ST. L. REV. 372 (1970); Note, *supra* note 62, at 304; Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970).

[149] 326 U.S. 501 (1946).

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The Court's ultimate holding—that a private corporation may not abridge personal freedoms at will, but must operate within the restraints of the Constitution—is consistent with the view that the first amendment is "self enforcing." One commentator has stated this important principle with great perceptivity:

> The emerging principle appears to be that the corporation . . . is as subject to constitutional limitations which limit action as is the state itself. . . . The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree. This is new as a rule of law, but it is typically American in tradition. . . . The principle is logical because . . . the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. . . . Instead of nationalizing the enterprise, this doctrine "constitutionalizes" the operation.[150]

The "Public Interest" Standard

The Communications Act of 1934 embodies a comprehensive scheme for broadcast regulation.[151] It gives the Federal Communications Commission broad powers to license and regulate broadcast outlets with reference to the "public interest, convenience, and necessity."[152] This "public interest" standard has been upheld on numerous occasions as a valid regulatory device[153] and has been viewed as the *quid pro quo*

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150 Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942-43 (1952); *accord*, Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 661-66 (1958); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961).

151 47 U.S.C. §§ 151-609 (1964).

152 *See, e.g., id.* § 309(a). The 1934 Act gives the Commission the power to license stations, *id.* § 301, "classify stations," prescribe the nature of the services to be rendered by each class, "assign bands of frequencies" and "encourage the larger and more effective use of radio in the public interest," *id.* §§ 303(a), (b), (c), (g), grant license renewals, *id.* §§ 307(a), (d), revoke or modify licenses or construction permits, *id.* §§ 312, 316, preserve competition in broadcasting, *id.* § 314, ensure fairness in broadcasting, *id.* § 315, and protect "the right of free speech by means of radio communication," *id.* § 326.

153 *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

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for monopolistic use of this scarce public resource. "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." [154]

If broadcast licensees must conduct their activities in accordance with "public interest, convenience, and necessity," then surely the obligation imposes the further requirement that they operate in a manner consistent with the first amendment. Congress has authority to enforce the prohibitions of the fourteenth amendment through appropriate legislation.[155] Since the substantive content of that amendment incorporates first amendment prohibitions, Congress presumably has power to enforce the first amendment as well.[156] Indeed, such power may derive directly from the first amendment itself [157]

Possessed of this power, Congress could not have intended to exclude the prohibitions of the first amendment from the standards incorporated into the 1934 Communications Act.[158] If this assumption is warranted, the search for evidence of "state action" in the conduct of broadcast licensees is unnecessary: licensees are already subject to first amendment restraint by virtue of the operation of the "public interest" standard, understood in this light.

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[154] Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

[155] *See* Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Guest, 383 U.S. 745 (1966); Note, *supra* note 120.

[156] Section 5 of the fourteenth amendment gives Congress the power to enforce the provisions of that amendment through appropiate legislation. The fourteenth amendment has long been viewed as incorporating, and thus rendering applicable to the states, the first amendment's prohibition against censorship. *See* Fiske v. Kansas, 274 U.S. 380, 387 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925). Presumably, therefore, Congress has the power to "enforce" the first amendment against private censorship by equally appropriate legislation. *See* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[157] *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945). *See also* Hale v. FCC, 425 F.2d 556, 561-62 (D.C. Cir. 1970) (Tamm, J., concurring). In both *Red Lion* and *Associated Press* the Court described limitations on the power of "private" communications media to restrain freedom of speech and implied that the Congress possessed the power to ensure the preservation of first amendment freedoms. *See* 395 U.S. at 388-92; 326 U.S. at 19-20.

[158] Indeed, the FCC itself appears to have adopted this view at one time. For example, in United Broadcasting Co. (WHKC), 10 F.C.C. 515 (1945), the Commission observed that "[t]he spirit of the Communications Act of 1934 requires radio to be an instrument of free speech," and it warned against "any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast." *Id.* at 517-18.

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Summary

This discussion of "state action" should lay to rest the argument that broadcast licensees have the power to censor at will, unrestrained by the first amendment. Constitutionally, they must be treated as agents of the Government. They have no greater, or lesser, right to ban speech from *their* forum than do the groundskeepers of a public park. Thus in cases like *Democratic National Committee* and *Business Executives*, where a private party demands "access" to the mass media and offers to pay the going commercial rate, the only remaining inquiry concerns the reasonableness of the policies that limit access. A licensee may in certain instances find it necessary to impose "time, place and manner" restrictions on the availability of his facilities; but he is powerless to impose an absolute ban inconsistent with constitutional demands.[159]

THE "APPROPRIATENESS" OF THE SPEECH IN THE PARTICULAR FORUM

In recent years the courts have resolved a number of controversies involving attempts by private parties to exercise first amendment speech freedoms through utilization of public or private property—for example, public streets and parks, railroad and bus terminals, schools, and so forth. In these cases the courts first established the existence of "state action," if relevant. They then addressed two questions. First, was the property an appropriate forum for the communication of the speech involved? Second, did the person who owned or controlled the forum "discriminate" among individuals or particular points of view? The resolution of the first issue was held to depend on whether the property had traditionally been used as a forum for communication,[160] or whether the owner had "opened up" the property in such a way that free access and expression were not inconsistent with the property's normal use. On the other hand, the "reasonableness" of the restrictions imposed by the owner was generally held to be the determinative factor in the resolution of the second issue. The measure of reasonableness was, in turn, held to depend on whether the free exercise of speech conflicted with a right of the forum's owner—for example, his right to privacy, or his right to be free from unwarranted intrusions. But a restriction was "reasonable" only where the owner's right merited protection in the face of the speaker's conflicting claim. Thus, as the Supreme Court of

159 *Cf.* Hague v. CIO, 307 U.S. 496 (1939).

160 *See id.* at 514-17.

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California put it in *In re Hoffman*, "[i]f the state curtails First Amendment freedoms to protect an interest that is *nonexistent*, . . . it violates the First and Fourteenth Amendments." [161]

The doctrine may be stated thus: When private or public property is an appropriate forum for communication and is "opened up" to general use by the public, then the person exercising ownership or control over that property "waives" his traditional property rights to privacy and exclusivity of use and cannot discriminate among the views of individuals seeking to use his forum. If an owner of private property has entirely closed his property to the public (an unlikely circumstance in the realm of broadcasting), he may not then open it for the public use and selectively exclude specific persons or particular views, since by his conduct he has indicated that his interest in privacy is nonexistent and not worth preserving.

Existence of a "Forum"

The "streets and sidewalks" of a privately owned company town were held to be an open forum in *Marsh v. Alabama*.[162] In that case Jehovah's Witnesses sought to distribute religious literature on the streets of a company town and were prosecuted for criminal trespass at the insistance of the town's owners. In reversing their conviction the Court held that a privately owned town had no more right to discriminate against individual citizens seeking to exercise first amendment freedoms than a public municipality. The Court observed:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . .
>
> . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free.[163]

Although the Court acknowledged that the owners of the town could close its sidewalks to the public entirely,[164] it stated that once the town

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[161] 67 Cal. 2d 845, 850, 434 P.2d 353, 356, 64 Cal. Rptr. 97, 100 (1967) (emphasis added).

[162] 326 U.S. 501 (1946).

[163] *Id.* at 506, 507.

[164] *Id.* at 505 n.2.

had opened the sidewalks to the public, it could not discriminate against individuals on the basis of the views that they held.[165]

Several themes emerge from the portion of the Court's opinion quoted above. First, traditional channels of communication must be protected from censorship, whatever its source, public or private. In this regard it is interesting to note that the Court appears to have adopted a version of the "self-enforcement" theory of the first amendment.[166] A second theme concerns "waiver." Although a property owner may have certain rights in his property—rights to privacy or exclusivity of use—these are deemed to be waived, or "circumscribed," if the owner's actions with respect to his property are inconsistent with their existence. A person who opens his property to the public in order to sell goods and services, for example, cannot argue that he still retains a right of "privacy." Whatever right he may have had was relinquished voluntarily.

A third theme reflected in the majority opinion is that some forums are "appropriate" for the communication of ideas. In *Marsh*, for example, the Court found the sidewalks of the company town to be an "appropriate" forum. Persons wishing to speak in an appropriate forum may not have an unlimited right of access, since in certain instances the person who owns or controls the forum may close it entirely. Nevertheless, once he opens it to the public at large, the public's interest in the free speech outweighs the property rights retained. Thus, unlike a publicly owned facility that the state arguably could not close for the purpose of precluding speech,[167] the owners of the company town in *Marsh* could have closed their streets entirely.[168] But if they chose to open the streets, they were required to do so in a manner consistent with the first amendment.

Recent cases have reflected the *Marsh* analysis and have held that under certain circumstances private property "may, at least for First Amendment purposes, be treated as though it were publicly held." [169]

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[165] *Id.* at 507.

[166] See text at notes 141-150 *supra*, for a discussion of the "self-enforcement" theory of the first amendment.

[167] *Cf.* Griffin v. County School Board, 377 U.S. 218, 231 (1964) (public school closed to avoid mandate to desegregate held to be an unconstitutional purpose).

[168] 326 U.S. at 505 n.2.

[169] Local 590, Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 316 (1968); *see, e.g.*, Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970); *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969); *In re* Hoffman, 67 Cal. 2d

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Whenever property, publicly or privately owned, is "opened up" to the public for general use, regardless of whether that use directly involves speech activities, the facility cannot be operated to impair the exercise of speech freedoms, unless that exercise *directly* and *substantially* interferes with the facility's primary use. This proposition, as it applies to publicly owned facilities, was epitomized by the court in *Trujillo v. Love*:[170]

> The State is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech and are not justified by an overriding state interest.[171]

In the arena of broadcasting there can be little doubt that the frequencies allotted to the various radio and television licensees are "forums" created by the Government pursuant to the Communications Act of 1934.[172] Indeed, the expression of ideas, whether political, commercial, musical, or otherwise, appears to be the broadcast spectrum's exclusive purpose. Likewise, there is little question that radio and television stations have "opened up" their frequencies to the general public by making *commercial* advertising time widely available on a first-come, pay-as-you-go basis.

Viewing broadcast frequencies either as forums "opened up" by licensees to the general public[173] or as forums created by the Govern-

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845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); Schwartz-Torrance Inv. Corp. v. Local 31, Bakery & Confectionery Workers, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233, *cert. denied*, 380 U.S. 906 (1965); Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W.2d 785 (1963).

The existence of a "public forum" for the communication of views has been found by the courts in numerous other instances. *See, e.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (public school); Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal); Trujillo v. Love, Civil No. C-2785 (D. Colo., Feb. 16, 1971) (state college newspaper); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (public buses); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946) (public school buildings); People v. St. Clair, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968) (public subway platform).

170 Civil No. C-2785 (D. Colo., Feb. 16, 1971).

171 *Id.* at 9.

172 47 U.S.C. §§ 151-609 (1964).

173 In a number of recent cases the existence of a "public forum" for the communication of speech has been found in instances where the owner of private or public prop-

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ment and subject to restraints imposed by the sanction of the Federal Communications Commission,[174] it would appear that a broadcast licensee's action in accepting advertisements is subject to the constraints of the first amendment.

"Reasonable" Use of the Forum

The broadcast licensees should be permitted to retain sufficient power to enable them to reject programming if it fails to meet certain quality standards, is "obscene," [175] or is otherwise in violation of federal law.[176] It is equally clear, however, that broadcast licensees, as trustees for the public, do not possess an unrestricted right to monopolize the frequencies allotted to them by the Commission. Licensees must, in accordance with their role as trustees, marshal their available time to accommodate the competing interests seeking to employ it, and adopt some rational policy for allocating that time. The question, then, is whether recognition of the right of groups like BEM and DNC to purchase broadcast time would accord with a rational system of allocation.

If broadcast licensees fail to adopt a rational scheme for allocating their available time, the courts and the Federal Communications Commission must formulate guidelines that will assure "reasonable" access. Action by the Commission and the judiciary could ensure that the electronic media of the twentieth century will be as open to public use as were the soap boxes, public parks, and town hall meetings of the last century.[177] Granted, freedom of speech, "while fundamental in our democratic society, [does] not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time;" [178] nevertheless, "the people as a whole [do] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amend-

erty opened up his facility for the display of private commercial advertisements. *See, e.g.*, Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (public high school newspaper); Kissinger v. New York City Transit Authority, 274 F. Supp. 438 (S.D.N.Y. 1967) (public subway walls); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 P.2d 350 (1969) (public buses); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (public buses).

174 *Cf.* Trujillo v. Love, Civil No. C-2785, at 9 (D. Colo., Feb. 16, 1971).

175 18 U.S.C. § 1464 (1964).

176 *See, e.g.*, 18 U.S.C. § 1304 (1964) (gambling).

177 *Cf.* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 21-32.

178 Cox v. Louisiana, 379 U.S. 536, 554 (1965).

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ment."[179] This latter goal can only be achieved if *all* who seek access to the electronic media and wish to use it in a reasonable manner are accorded similar treatment by broadcast licensees.

The Federal Communications Commission and the judiciary have already begun to formulate the variants of the access doctrines that lie dormant in the Court's opinion in *Red Lion Broadcasting Co. v. FCC.*[180] For example, the fairness, personal attack, and equal time doctrines all curtail a licensee's discretion to reject programming. Similarly, the requirement that licensees ascertain community needs and interests and devote "some significant proportion of [their] programing [*sic*]" to satisfying these objectives[181] may also be viewed as limiting a broadcast licensee's discretion to reject proffered spot announcements and programming. Arguably, a broadcast licensee's discretion is further restricted when it invites an individual to participate in a televised discussion with network personnel. In that case the licensee opens up his forum to his invited guests; and it is conceivable that, except for obscene remarks or statements that do not measure up to quality standards, the licensee may under these circumstances relinquish his "right" to censor remarks with which he does not agree.[182]

Unlike the party who achieves access under the personal attack, equal time, or fairness doctrines, both BEM and the DNC were willing to pay the going commercial rate to purchase broadcast time. This fact alone should have provided the licensees with a sufficient inducement to accept the proffered spot announcements and programs. Had they granted access, licensees would not have been subjected to any financial burden.[183]

In several recent cases state and federal courts have decided controversies involving precisely the same issues as those considered by the Commission in *Business Executives* and *Democratic National Committee.* While the "forums" in question were not electronic, in each case a group like BEM or the DNC sought to purchase advertising facilities otherwise available for commercial use. The courts ruled decisively

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179 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

180 395 U.S. 367 (1969).

181 City of Camden, 18 F.C.C.2d 412, 421 (1969).

182 *See* Letter to Rep. Richard L. Ottinger [Judy Collins Incident], No. 70B-47876 (F.C.C., Apr. 20, 1970) (Cox & Johnson, Comm'rs, dissenting), in 18 P & F Radio Reg. 2d 1031 (1970).

183 *Cf.* Letter to Mr. Donald A. Jelinek [Complaint by San Francisco Women for Peace, The GI Ass'n, The Resistance], 24 F.C.C.2d 156, 168-69 (1970) (Johnson, Comm'r, dissenting) (free public service announcements impose no financial burden on licensee).

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that the owner of a facility open to the public could not accept commercial advertising and reject at the same time all political advertisements.

The seminal case, *Wirta v. Alameda-Contra Costa Transit District*,[184] was decided by the Supreme Court of California in 1967. An organization known as Women for Peace brought suit against a public transit district operating a municipal bus service and a private advertising company. The company leased the advertising space above the passengers' seats from the district and re-leased it to private commercial advertisers. Women for Peace had sought to lease advertising space in the district's buses at the standard rate for the purpose of communicating the following statement to the public:

> "Mankind must put an end to war or war will put an end to mankind."—President John F. Kennedy
>
> Write to President Johnson: Negotiate Vietnam.
> Women for Peace
> P. O. Box 944, Berkeley.[185]

The private advertising company had refused to accept the organization's advertisement on the ground that it conflicted with the district's advertising policy. The district had adopted a policy of accepting "only commercial advertising for the sale of goods and services, except that political advertising will be accepted in connection with and at the time of a duly called election being held within the boundaries of the District, and further subject to the conditions that . . . space be made equally available to opposing candidates or sides of a ballot measure." [186]

At the threshold, the California Supreme Court acknowledged that the content of the proffered advertisement was "undeniably protected by the First Amendment," despite its status as a paid message.[187] The court also recognized at the outset that the advertisement submitted by the Women for Peace could in no way have interfered with the district's primary function of providing transportation for the public.[188] Having thus narrowed the issue, the court characterized the case as one

[184] 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).
[185] *Id.* at 53, 434 P.2d at 984, 64 Cal. Rptr. at 432.
[186] *Id.*
[187] *Id.* at 54, 434 P.2d at 984-85, 64 Cal. Rptr. at 432-33, *citing* New York Times Co. v. Sullivan, 376 U.S. 254 (1963).
[188] *Id.* at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

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"in which a governmental agency has refused to accept an advertisement expressing ideas admittedly protected by the First Amendment for display in a forum which the agency has deemed suitable for the expression of ideas through the medium of paid advertisements." [189] The result was clear:

> [D]efendants, *having opened a forum* for the expression of ideas by providing facilities for advertisements on its buses, *cannot* for reasons of administrative convenience decline to accept advertisements expressings opinions and beliefs within the ambit of First Amendment protection.[190]

In the court's view the district's advertising policy ran afoul of the first amendment because it chose "between classes of ideas . . . sanctioning the expression of only these selected, and banning all others." The court found this effect to be "a most pervasive form of censorship." [191]

The court also denounced the district's policy because it afforded "total freedom of the forum to mercantile messages while banning the vast majority of opinions and beliefs extant which enjoy First Amendment protection because of their noncommercialism." [192] The perversity of elevating commercial speech above political speech led the court to remark that "in the totality of man's communicable knowledge, that which bears no relationship to material value preponderates." [193]

> A cigarette company is permitted to advertise the desirability of smoking its brand, but a cancer society is not entitled to caution by advertisements that cigarette smoking is injurious to health. A theater may advertise a motion picture that portrays sex and violence, but the Legion for Decency has no right to post a message calling for clean films. A lumber company may advertise its wood products, but a conservation group cannot implore citizens to write to the President or Governor about protecting our natural resources. An oil refinery may advertise its products, but a citizens' organization cannot demand enforcement of existing air pollution statutes. An insurance company may announce its available policies, but a senior citizens' club cannot plead for legislation to improve our social security program.[194]

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189 *Id.* at 55, 434 P.2d at 985, 64 Cal. Rptr. at 433.
190 *Id.* (emphasis added).
191 *Id.* at 56, 434 P.2d at 986, 64 Cal. Rptr. at 434.
192 *Id.* at 56-57, 434 P.2d at 986, 64 Cal. Rptr. at 434.
193 *Id.* at 57, 434 P.2d at 986, 64 Cal. Rptr. at 434.
194 *Id.* at 57-58, 434 P.2d at 986-87, 64 Cal. Rptr. at 434-35.

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Since the transit district had conclusively determined that advertising would not interfere with its primary function of providing public transportation, the court was not faced with the necessity of determining "whether public property must be made available as a forum for the exercise of First Amendment rights," [195] a determination similar to that made by the court in *In re Hoffman*, another recent case.[196] Since the transit district had not attempted to show that the presentation of political advertisements interfered with its legitimate functions, the court easily concluded that the refusal to accept political advertising was constitutionally impermissible. Had the transit district sought to contest the issue of interference, however, the test announced by the court in *Hoffman*—"not whether petitioners' use of the station was a railway use but whether it *interfered* with that use"—would undoubtedly have been held to be controlling.[197]

The relevance of *Wirta* should be readily apparent. The Federal Communications Commission's licensing of the airways to private licensees who re-lease portions of their frequency space to commercial advertisers is remarkably similar to the arrangements between the transit district and the private advertising company in *Wirta*. Further, like the advertising company, most broadcast licensees accept commercial advertising and reject most political advertisements. The single exception is that broadcast licensees do accept spot announcements by political candidates during general elections, an inroad into licensee discretion governed by the "equal time" provisions of the Communications Act.[198] Of course, this provision is not unlike the advertising policy contested in *Wirta*.

These striking parallels seem to dictate that broadcast licensees, for purposes of the first amendment, should be treated as agents of the state, as was the private advertising company in *Wirta*. Since there was no evidence in either *Business Executives* or *Democratic National Committee* to show that acceptance of the proffered advertisements would interfere with the normal functioning of the broadcast forum, one may conclude that these broadcast licensees had no more right to reject political advertising than did the advertising company in *Wirta*.

Subsequent decisions have followed this rationale. For example, the

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[195] *Id.* at 54, 434 P.2d at 985, 64 Cal. Rptr. at 433.

[196] 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967).

[197] *Id.* at 851, 434 P.2d at 356, 64 Cal. Rptr. at 100 (emphasis added).

[198] *See* 47 U.S.C. § 315(a) (1964).

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Washington, citing *Wirta* and *Kissinger*, ruled that "[o]nce a municipality or public body enters the field of advertising, . . . the law requires that a showing of a 'clear and present' danger must be made in order to limit such advertising without conflicting with guarantee [*sic*] of freedom of speech under the First and Fourteenth Amendments." [210] The court went on to characterize the city's action in rejecting the group's advertisement as a clear act of censorship in violation of the group's first and fourteenth amendment rights.

As these recent cases demonstrate, there is perhaps no greater evil than the discriminatory suppression of speech based on content. Yet this is precisely what the Federal Communications Commission has sanctioned by its decisions in *Business Executives* and *Democratic National Committee*. The Commission has thrown the weight of its authority behind licensee policies that permit broadcasters to accept commercial speech and reject political speech—or, at the very least, to pick and choose among varieties of political speech on the basis of "offensiveness." Absent a showing of a "compelling" justification,[211] the delegation by the Commission of power to discriminate cannot withstand constitutional scrutiny.

Application of the First Amendment to Broadcasting

Broadcast licensees, as well as the Federal Communications Commission, have argued that radio and television are unique and, therefore, that the traditional principles governing an individual's right of access to streets, parks, and other public forums should be inapplicable here.[212] A related argument is that spot announcements are too short to deal adequately with controversial issues.

In *Business Executives*, for example, the licensee argued that BEM's announcements "require a more in-depth analysis than can be provided in a 10, 20, 30, or 60 second announcement." [213] The logic of this reasoning seems faulty on several counts. First, broadcast licensees

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[210] *Id.* at 69, 455 P.2d at 354.

[211] *See* N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963) ("only a compelling state interest . . . can justify limiting First Amendment freedoms"); Thomas v. Collins, 323 U.S. 516, 530 (1945) ("any attempt to restrict [first amendment] liberties must be justified by clear public interest").

[212] *See* Democratic Nat'l Comm., 25 F.C.C.2d 216, 227 (1970), *appeal docketed*, No. 24,492, D.C. Cir., July 31, 1970.

[213] 25 F.C.C.2d 242, 251 (1970) (Johnson, Comm'r, dissenting), *appeal docketed*, No. 24,537, D.C. Cir., Aug. 13, 1970.

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find short spot announcements perfectly appropriate for presenting "controversial" issues in other areas. Prior to January 2, 1971,[214] for example, cigarette commercials were a case in point. Further, it cannot be denied that political campaign announcements are controversial; yet licensees have allowed them to be broadcast in short periods of time; and if short announcements are appropriate from politicians, they should be equally appropriate for the discussion of political issues.

It is worth noting the hypocrisy in this "inadequate time" argument. The Federal Communications Commission after all, has sealed off access to longer program segments as well. In *Business Executives* a majority of the Commission held that a licensee may refuse to sell one-minute spot announcements because the issue is too complex for the limited time available.[215] Yet in *Democratic National Committee* the same majority ruled that licensees could refuse to sell time to organizations wishing to purchase half-hour segments to discuss those same issues in greater detail.

In any event, it borders on arrogance for a broadcast licensee or the Commission to tell a person that *his* message will be superficial or misleading because *he* has chosen to present it in a 10-, 20-, 30-, or 60-second time slot. It is inconceivable that the Federal Communications Commission could sanction a licensee's rejection of a simple message like "End the War," when it permits manufacturers to advertise in 30-second time slots automobiles that pollute the air and endanger human life.[216]

A second argument often advanced by broadcast licensees is that if they are required to accept political advertising, they will be forced to limit the amount of time they can allot to commercial advertising.[217] This

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[214] All cigarette advertising was banned on radio and television after January 1, 1971. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 6, 84 Stat. 89.

[215] *See* 25 F.C.C.2d at 246.

[216] Similarly harsh and unjustifiable restrictions have been struck down in many other related cases. *See, e.g.*, Wolin v. Port Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (Port Authority prohibited distribution of leaflets in public bus terminal); Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970) (shopping center prohibited distribution of handbills); *In re* Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969) (supermarket prohibited distribution of handbills on store's parking lot); *In re* Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967) (railroad terminal prohibited distribution of handbills); Schwartz-Torrance Inv. Corp. v. Local 31, Bakery & Confectionery Workers, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965) (shopping center prohibited picketing); People v. St. Claire, 56 Misc. 2d 326, 288 N.Y.S.2d 388 (Crim. Ct. 1968) (transit authority prohibited distribution of handbills in subway stations).

[217] *See, e.g.*, Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 248 (1970) (Cox, Comm'r, concurring). "[I]f stations were required to carry *all* spots dealing with

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argument has previously been considered by various courts in other contexts and has been summarily rejected. For example, in *Kissinger v. New York City Transit Authority*[218] the district court envisioned the possibility of a reasonable accommodation between constitutional and economic demands:

> Defendants also argue that if they accept the posters for display, they will have to accept other posters relating to [political issues] . . . with the result that commercial advertising will become curtailed and the subways will become a political and ideological battlefield. Even if the Authority and the Advertising Company are required to accept the posters for display, however, it does not follow that others must be accepted . . . . [T]he Authority and the Advertising Company could impose reasonable regulations on the display of plaintiffs' posters and others of a similar nature as to the number to be displayed and the time and place for their display.[219]

Granting access to a broadcast licensee's facilities for a reasonable number of political advertisements will not transform the electronic media into a vast political battleground, although in many respects this result would be a desirable alternative to the existing commercial wasteland. Under this scheme both broadcast licensees and the Commission will retain the necessary power to adopt reasonable rules relating to the number of commercial and political advertisements that may be broadcast, thus ensuring that a reasonable mix of advertising will be presented to viewers and listeners.[220]

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controversial issues for which time was ordered, this might occupy much of the time which can be devoted to nonprogram matter and could, in time, impair the effectiveness of the broadcast media for advertising purposes." *Id.* (emphasis added). This statement misses the point, since BEM never contended that broadcast stations should carry "*all*" controversial non-commercial spot announcements that were tendered. BEM maintained only that the licensee could not *reject* them all. Moreover, a broadcast licensee must be permitted to strike a balance between commercial and non-commercial advertising, and reject some of each when demand exceeds the time available. *Accord*, Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 443 n.6 (S.D.N.Y. 1967); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 62, 434 P.2d 982, 990, 64 Cal. Rptr. 430, 438 (1967).

[218] 274 F. Supp. 438 (S.D.N.Y. 1967).

[219] *Id.* at 443 n.6. *See also* Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

[220] For example, a licensee could adopt a policy agreeing to fill up to 50% of its commercial air time with political announcements on controversial issues. Such a plan would at least place political speech on a "parity" with commercial speech. Only if

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Since this approach accords with the dictates of the first amendment and is reasonable as well, it is not surprising that the Commission itself adopted a similar approach in previous decisions. A case in point was *United Broadcasting Co. (WHKC)*.[221] In that case the UAW lodged a complaint with the Federal Communications Commission challenging the Commission's renewal of WHKC's license on the ground that the licensee had refused to sell the union airtime for purposes of soliciting members and discussing controversial issues. After considering the UAW's charges, the Commission designated the station's license renewal for a hearing, to determine whether WHKC had endeavored "to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues and for the solicitation of memberships for nonprofit organizations." [222] The Commission characterized the requirement that broadcast licensees provide balanced programming as a "duty" imposed by the statutory mandate, requiring that they operate "in the public interest, convenience, and necessity." [223]

During the course of the hearing evidence was adduced to show that the station's policies were governed by the Code of the National Association of Broadcasters, a voluntary code formulated by the National Association of Broadcasters having no legal effect on the Association's membership. The Code, designed " 'to formulate basic standards' for the guidance of broadcasters," provides that "no time shall be sold for the presentation of public controversial issues, with the exception of political broadcasts . . . ; and that solicitation of memberships in organizations, whether on paid or free time, should not be permitted except for charitable organizations, such as the American Red Cross . . . ." [224] After the hearing both the UAW and WHKC filed a joint motion requesting that the renewal proceedings in the instant case be dismissed. During the intervening period WHKC had adopted a new policy which the UAW acknowledged to be in accordance with "the duties of a licensee under the Communications Act of 1934 with respect to the

demand for political advertising time should exceed the 50% allotted for it would the licensee have to demonstrate why his selection of 50% was a reasonable limitation, taking into consideration the preferred status of political speech under the first amendment.

[221] 10 F.C.C. 515 (1945).

[222] *Id.* at 517.

[223] *Id.*

[224] *Id.* at 516.

availability of time for discussion of issues of public importance . . . ." [225] WHKC's new statement of policy provided that:

> (a) . . . Station WHKC [will] . . . consider each request for time solely on its individual merits without discriminations and without prejudice because of the identity of the personality of the individual, corporation, or organization desiring such time.
> (b) Requests . . . will . . . be considered in the light of the contribution which their use of time would make toward a well-balanced program schedule . . . .
> (c) Station WHKC will make time available, primarily on a sustaining basis, *but also on a commercial basis*, for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof . . . . [T]here will be *no discrimination between business concerns and nonprofit organizations* . . . . Nonprofit organizations will have the right to purchase time for solicitation of memberships.
> . . .
> (f) The station will see that its broadcasts on controversial issues . . . maintain a fair balance among the various points of view . . . , both sustaining and commercial alike.[226]

On the basis of this new statement of policy, characterized as "fair and nondiscriminatory . . . [when] appl[ied] to the presentation of controversial public issues," the Commission granted the joint motion and dismissed the proceedings. In taking this action the Commission stated that:

> The Commission . . . is of the opinion that the operation of any station under the *extreme principles that no time shall be sold for the discussion of controversial public issues* and that only charitable organizations and certain commercial interests may solicit memberships is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulations. . . . The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public inter-

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[225] *Id.* at 517.
[226] *Id.* at 516-17 (emphasis added).

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> est and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a *strict rule against the sale of time for any programs of the type mentioned.*[227]

In *United Broadcasting* the Commission not only ruled that a refusal by a broadcast licensee to sell airtime to interested groups for the discussion of controversial issues would violate the 1934 Communications Act, but also labeled the requirement that licensees make such time available a "dut[y] of a licensee, under the statutory mandate . . . [that they] operate in the public interest, convenience, and necessity." [228] The request made by the petitioners in *Business Executives* and *Democratic National Committee* was no different than that made by the labor union in *United Broadcasting*. Yet a majority of the Federal Communications Commission refused to honor that request, notwithstanding the prior decision that a strict rule against all sales of air time for the discussion of controversial public issues would be "extreme." Not only has the viewing and listening public been denied exposure to the healthy activities of debate and dissent, the electronic media have regressed to a barren state, all as a result of the majority's refusal to follow the lead set by the Commission some twenty-five years ago in *United Broadcasting*.

The reasoning that led to this result reflects a fear that recognition of a limited right of access would permit those with strong financial resources to pre-empt normal programming time and distort the presentation of issues. A majority of the Commission adopted the view that grants of direct access to BEM and the DNC would establish a precedent that would permit the wealthy to dictate the agenda of national debate.[229] But the views of the wealthy already set the agenda for national debate, and a partial system of "access for purchase" presents nothing more than a scheme for opening a closed system to partial dissent. A long range answer to the majority's fear is based on a faith in the ideal of the marketplace. False *commercial* ideas, such as the notion that modern cars are safe or do not pollute the air, are unlikely to generate opposing claims. At best they merely goad competing manufacturers into more and extravagant exaggerations. On the other hand, the dissemination of false or one-sided *political* ideas serves a very

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[227] *Id.* at 518 (emphasis added) (citations omitted). *See also* Homer P. Rainey, 11 F.C.C. 898 (1947); Robert Harold Scott, 11 F.C.C. 372 (1946).

[228] 10 F.C.C. at 517.

[229] Democratic Nat'l Comm., 25 F.C.C.2d 216, 225 (1970).

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useful purpose. Expression of political opinion in this country usually leads to argument and debate, not silent acquiescence; to vigorous opposition, not passive acceptance.[230] And vigorous and open debate is always healthy.[231] In any event, the majority's fear that the broadcast media will be dominated by the affluent is not only exaggerated but unfounded. Newspapers and magazines often accept political advertisements that state the views of particular groups on various ballot propositions or on international trade issues. The wall space of buses, train stations, and subway platforms also exhibits abundant and varied political comment. Yet this phenomenon has not resulted in a preponderance of affluent views. To the contrary, it is generally the poor, the disenfranchised minorities, who feel that they can reach the oblivious masses only through the medium of political announcements.[232] These announcements may very well become the "penny press" for this century's poor. If in the print media an imbalance favoring the views of the wealthy has not developed to date, it is highly unlikely that an imbalance will ever develop in radio and television. In any event, the licensee can use its discretionary powers under the fairness doctrine to balance the views of the wealthy by presenting countervailing positions.

Another argument advanced by the majority in *Democratic National Committee* was that there are only a limited number of broadcast frequencies; and therefore, some "trustee" must of necessity exercise complete control over all broadcast programming. According to the majority, any system of broadcasting which has the effect of granting even partial control over programming to individual groups outside the broadcast "establishment" engenders chaos.[233] This argument, however, rather clearly begs the question. The fact that a trustee or "gatekeeper" must control some of the broadcast time to preserve order does

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230 *See Developments in the Law*, *supra* note 53, at 1030.

231 John Stuart Mill recognized this principle over 100 years ago, and the passing century has not proven him wrong:

> [T]he peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

J. Mill, On Liberty, *quoted in* Buckley v. Meng, 35 Misc. 2d 467, 474, 230 N.Y.S.2d 924, 932 (Sup. Ct. 1962).

232 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring).

233 *See* Democratic Nat'l Comm., 25 F.C.C.2d 216, 221-25 (1970).

not mean that he must control *all* of it. A broadcaster could, for example, allot up to fifty percent of his advertising time to political announcements without relinquishing his otherwise complete control over programming. Or a broadcaster could agree to relinquish up to five or ten percent of his normal programming time and still retain complete control over the remaining ninety percent. The real issue is not whether broadcast licensees must exercise complete control over all programming in order to avoid chaos, but whether our present system of broadcasting can function effectively with a system of *partial* access, with control over the vast majority of airtime remaining in the networks and individual licensees. There is no obvious reason why such a system would not function effectively.

Again, the Commission's fears in this regard seem exaggerated. Most broadcast licensees already devote much of their broadcast day to programming designed by others. Radio stations, for example, regularly turn over up to eighteen minutes, or thirty percent, of every broadcasting hour to the pre-packaged presentations of commercial sponsors. Network affiliated television stations abdicate their authority to the three national networks for large portions of their broadcast day. These network affiliates are in fact programmed by long distance from New York—the ultimate in absentee landlordism. Finally, many television stations sell an entire hour or more of their normal programming time to sponsors like Xerox and National Geographic for widely-heralded specials. In light of these broadcasting practices, the Commission's rather frantic reliance on a system of complete "trustee" control seems excessive.

For the purpose of implementing any scheme of access to the broadcast media, it is imperative that a distinction be drawn between commercial time and programming time. In radio, for example, the upper limit for commercials is approximately eighteen minutes an hour. Television generally sets aside six to eight minutes an hour for advertising. Granting groups like BEM access to the "commercial" time segment for spot announcements would in no way affect a broadcaster's normal programming, since it would only diminish the amount of time otherwise available for the sponsors of commercial products. On balance, this hardly seems much of a loss. In the hierarchy of constitutional values political speech occupies a far more important and preferred position than commercial speech.

At a minimum broadcast licensees should make at least fifty percent

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of their commercial time available to individual citizens or groups wishing to purchase airtime to make their political views known to the public. Should demand for political announcements exceed the time allotted to them, a rational system of allocation could be devised.[234] But the important point is that *some* time must be made available for the expression of minority veiwpoints. If, for example, the ghetto residents of our major cities wish to purchase spot time to decry the rat-infested, disease-ridden slums in which they are forced to live, they should be permitted to do so. Similarly, if the Daughters of the American Revolution wish to purchase an announcement to show their support for the war in Vietnam, they too must be accorded an opportunity to express their viewpoint. All individuals or groups, regardless of the subject matter of their proffered advertisement, must be accorded, within reason, the same opportunity to make their views known to the listening or viewing public. In short, the values of the first amendment are far too precious to bar *all* political speech from the most powerful media of communication known to man.

The allocation of programming time to groups like BEM and the DNC, on the other hand, poses special problems, because one-half hour of programming time would be lost for each half hour purchased. Since radio and television stations should arguably provide a substantial amount of entertainment programming—music, talk, entertainment, and the like—the amount of airtime that a broadcast licensee could make available for political programming might have to be limited. Even with this factor taken into consideration, however, it would not disrupt a broadcast licensee's normal programming to require that he make available for purchase by interested individuals or groups at least five percent of his prime-time programming space. Such a plan would only require licensees to release six hours of their prime broadcasting time per month to individuals or groups seeking direct access to the public.[235] Under this scheme individual licensees would still retain the "right" to reject programming for technical imperfections or for violations of appli-

[234] A system of rationing access for political spot announcements would impose no greater burden than that presently borne by licensees under the fairness doctrine in picking and choosing between the numerous controversial issues which that doctrine obliges them to cover.

[235] This calculation is computed on the basis of four hours of prime time every day (7:00 p.m. to 11:00 p.m.) and a thirty-day month. *Hearings on S.J. Res. 209*, *supra* note 3, at 158 (statement of Commissioner Johnson proposing that licensees be required to sell at least 5% of their prime time for political programming).

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cable law. They could not, however, reject all political programming. At most they could only place "reasonable" limits on the amount of time available for purchase.

The Regulatory Scheme of the 1934 Communications Act

In both *Business Executives* and *Democratic National Committee* the majority placed substantial emphasis on section 3(h) of the 1934 Communications Act in arriving at its conclusion that a broadcast licensee "is not required to open its doors to all persons seeking to use the station's facilities . . . ." [236] That section provides, in a rather uninformative fashion, that:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .; *but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.*[237]

A majority of the Federal Communications Commission has seized upon the general language in section 3(h) to bolster its argument that broadcast licensees have the unrestricted power to reject all requests to purchase spot announcement or programming time submitted by politically-oriented groups. According to the Commission, if a licensee were deemed to be a common carrier, "the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt." [238] The soundness of this argument may be doubted on several counts.

In the first place, the Commission has itself rejected this very argument in its prior decisions. For example, in *United Broadcasting Co. (WHKC)* [239] the Commission specifically stated that section 3 (h) in no way interfered with the "duty" of a licensee to make available for purchase reasonable amounts of broadcast time to individuals or groups wishing to express their views on vital issues of public concern. Although it recognized that as a result of "the physical limitations on the amount of spectrum space available for . . . broadcasting" [240] not every

[236] Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 247 (1970); *accord,* Democratic Nat'l Comm., 25 F.C.C.2d 216, 223 (1970).

[237] 47 U.S.C. § 153(h) (1964) (emphasis added).

[238] Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242, 248 (1970).

[239] 10 F.C.C. 515 (1945), discussed in the text at notes 221-28 *supra.*

[240] *Id.* at 517.

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individual or group desiring to use a licensee's facilities could be accommodated, the Commission stated, with respect to section 3(h) of the Act, that:

> Under section 3(h) . . . , broadcast stations are expressly declared not to be common carriers. These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community *and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.* The spirit of the [Act] requires [broadcasting] to be an instrument of free speech, subject only to the general statutory provisions imposing upon the licensee the responsibility of operating its station in the public interest.[241]

It is difficult to conceive why a majority of the Federal Communications Commission now finds this interpretation of section 3(h) of the 1934 Communications Act to be unpersuasive.

Second, it seems clear, at least from the portion of the opinion quoted above, that Congress did not intend to confer a power on licensees that would permit them to reject advertisements merely because they are noncommercial or concerned with controversial issues.[242] Rather, it would appear that Congress' sole motive in enacting section 3(h) was to ensure that the detailed and complicated "Common Carrier" provisions contained in Title II of the 1934 Act would be inapplicable to the realm of broadcasting. *In Office of Communication of the United Church of Christ v. FCC*,[243] the circuit court for the District of Columbia arguably underscored this view:

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[241] *Id.* at 517-18 (emphasis added).

[242] The courts have also rejected a literal reading of section 3(h). *See, e.g.*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

In Local 880, Retail Store Employees Union v. FCC, No. 22,605 (D.C. Cir., Oct. 27, 1970), the court dealt briefly with the Commission's reliance on McIntire v. William Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), a case often cited for the proposition that section 3(h) permits broadcasters to reject all tenders of spot announcements or programming. The court remarked:

> [T]he Commission further held that "WERO's refusal to accept additional ads from Local 880 . . . was, for the reasons advanced by the Station, within the proper limits of its discretion," citing *McIntire v. William Penn* . . . . Since *McIntire* merely held that regulation of program content was within the province of the Commission rather than the district courts, the citation can hardly be regarded as illuminating.

No. 22,605 at 15 n.49.

[243] 359 F.2d 994 (D.C. Cir. 1966).

> The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency.[244]

Since granting groups who wish to purchase airtime a right of reasonable access would not only be consistent with the principles enunciated by the Commission itself in *United Broadcasting*, but would in no way bring Title II's "Common Carrier" provisions into play, it is difficult to perceive how granting such groups a reasonable right of access would "be chaotic" or bring about a "wholly different broadcasting scheme" than that envisioned by Congress. Moreover, under this scheme a licensee would *not* be required to accept every noncommercial advertiser seeking to purchase airtime. As previously noted, there are many ways in which broadcast licensees could allocate their "commercial" time to grant noncommercial advertisers a reasonable right of access without accepting everyone who seeks airtime.[245] "[C]ompetent management should be able to meet such problems in the public interest . . . ." [246]

A third flaw in the majority's reasoning is that the Commission itself on several occasions has acted to limit licensee discretion in accepting or rejecting an individual's request to use broadcast facilities. For example, in *Letter to Nicholas Zapple*[247] the Commission ruled that when a spokesman for a political candidate uses a broadcaster's facilities, the licensee, even though the equal time requirements of section 315(a) of the Communications Act are inapplicable, may not refuse the opposing candidate's request for an equal opportunity to make his views known. On another occasion the Commission ruled that under certain circumstances the fairness doctrine requires a broadcast licensee to broadcast the statements of a particular person concerning a particular issue, where "[t]here is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked." [248] At the very least, these rulings by the Commission should be viewed as standing for the

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244 *Id.* at 1003.

245 See text at note 233 *supra*.

246 United Broadcasting Co. (WHKC), 10 F.C.C. 515, 518 (1945).

247 No. 70-598 (F.C.C., June 3, 1970).

248 Amendment of Part 73 of the Rules Relating to Procedures in the Event of a Personal Attack, 12 F.C.C.2d 250, 253 (1968) (amendment made to the personal attack doctrine at the insistence of the networks to exclude its application from bona fide news, news interviews, on the spot coverage of news events, including commentary and analysis).

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proposition that section 3(h) of the Act is not violated when a licensee is required to accept programming offered by a specific person.

Finally, the substantive provisions of section 3(h) must be construed in a manner consistent with both the first amendment and the "public interest" criterion of the 1934 Act; this the majority in *Business Executives* and *Democratic National Committee* failed to do. A "common carrier" is generally regarded as a business entity that must accept all customers without hesitation, at rates that are usually established or approved by a public utilities commission. The telephone company is the most familiar example of a "common carrier." It cannot refuse to install a telephone upon request, and its rates are carefully regulated by a public agency. As previously indicated, however, an access for purchase system would not require a licensee to accept *all* proferred spot announcements or tenders of programming, nor would such a scheme limit the rates that broadcasters may charge for the use of their frequencies. To this extent, then, a system of access-for-purchase would be perfectly consistent with the common carrier concept embodied in section 3(h) of the 1934 Act. Thus a finding that either the first amendment or the public interest standard requires licensees to accept a reasonable amount of political programming would not have the effect of transforming them into common carriers.

Conclusion

The questions presented in *Business Executives* and *Democratic National Committee* have implications far beyond the realm of speech. In a real sense the consequences of the Commission's action in these cases pose a serious challenge to our system of checks and balances, the separation of governmental powers. The President, for instance, is customarily granted direct, immediate, and vivid access to more than sixty million television homes on all three networks during prime evening time. Yet groups representing portions of the voting public, such as BEM, or even national party organizations such as the DNC, have been denied the opportunity to purchase time to reply to the President. The constitutional dilemma presented by the Commission's refusal is no less severe than that which would arise if, by some bizarre turn of events, the President but not the Congress gained access to computers, telephones, telegraphs, typewriters, printing presses and Xerox machines. Our tri-partite scheme of Government will suffer stress if the legislative

branch and their electors, the people, are denied a right of access to the mass media, while the President receives it freely.

A system of access for purchase, although far from perfect, offers some promise for correcting the imbalances that now inhere in the broadcast system. And unlike the fairness doctrine, which often imposes a duty on the broadcasting industry to make time available to individuals or groups free of charge,[249] a scheme of access for purchase would pay its own way. Furthermore, even if broadcast licensees were required to make a certain amount of their normal programming time available for purchase, the bulk of all newscasts, documentary, entertainment, and other normal programming would not be affected. Such a scheme could only have the effect of "opening up" the forum of the air to the fresh breeze of dissent.

Unlike a system structured by the fairness doctrine, a system of access for purchase would be self-enforcing. No governmental agency would be called upon in the first instance to determine whether a particular issue is controversial or a matter of vital public concern and, subsequently, to decide whether the licensee or a particular individual should present the issue to the public. Instead, individuals or groups possessing the necessary funds would determine for themselves which issues are of public importance and who the spokesman will be. In this way the public would be informed immediately of issues of vital public concern, avoiding thereby the many years of delay involved in a fairness doctrine controversy. And, unlike our present system of broadcasting, an access for purchase system would ensure that the views reaching the public would not be molded by the consensus committees of the corporate broadcasting establishment.

There are some who vigorously object to this scheme. They take the position, as did the majority in *Business Executives* and *Democratic National Party*, that a right of access for purchase would permit the agenda of national debate to be set by the wealthy. But this is presently the case. Most television programming already consists of format entertainment, carefully designed by the merchandisers of our land to market the merchandise they wish to peddle to the unsuspecting public. Further to the extent that a station or network elects to provide programming that offends large, influential corporations, the pressure of financial censorship is brought to bear.[250]

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[249] *See* Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

[250] *See generally* Johnson, *Freedom to Create: The Implications of Anti Trust Policy*

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In contrast, a system of access for purchase would offer the possibility of providing concerned members of the public with at least a small portion of a licensee's broadcast day. Such a system would ensure that some of the viewpoints broadcast over the electronic media would originate from the public itself, from individuals in all walks of life, holding various views and persuasions. If this modest degree of profitable public participation is anathema to the broadcasters, the very fact of their opposition should warn the country that the dangerous and unrestrained power possessed by the broadcast industry is even greater than we had imagined.

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for Television Programming Content, 8 OSGOODE HALL L.J. 11 (1970); Johnson, *Public Channels & Private Censors*, THE NATION, Mar. 23, 1970, at 329.

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II. The Applicability of Constitutional Standards to Broadcasting

A. Current Constitutional Standards for Morally Offensive Material

The effects of FCC action for the regime of free expression can be fully appreciated only by contrast with prevailing constitutional standards surrounding morally offensive expression. First amendment doctrine in this area has been addressed mainly to the problem of "obscenity." In *Roth v. United States*,[39] the Supreme Court held that obscenity — material "the dominant theme of [which] . . . taken as a whole appeals to prurient interest [in sex]" [40] — is expression unprotected by the first amendment. The Court said that "[a]ll ideas having even the slightest redeeming social importance" are generally protected by the first amendment,[41] but obscenity is without such importance.[42] The decision left unclear, however, whether constitutional protection could be denied to an expressive work if one of several themes appealed to a prurient interest in sex.[43] Thus in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*,[44] Mr. Justice Brennan [45] elaborated on *Roth* by placing greater emphasis on the context in which questionable material appears. Under *Memoirs*, in order to deny protection, "three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." [46]

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[39] 354 U.S. 476 (1957).

[40] 354 U.S. at 489.

[41] 354 U.S. at 484. *See also* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[42] 354 U.S. at 484.

[43] *Id.* at 507 (Harlan, J., dissenting).

[44] 383 U.S. 413 (1966).

[45] Mr. Justice Brennan announced the decision of the Court in an opinion joined by Chief Justice Warren and Justice Fortas.

[46] 383 U.S. at 418.

The importance of the inclusion of the social value test in the *Memoirs* trilogy represents a subtle but important shift in constitutional analysis. Under *Roth*, material was obscene if it appealed to one's prurient interest in sex. If it was found obscene, it was outside first amendment protection because obscene expression is ipso facto without socially redeeming purpose. Under the analysis suggested by Mr. Justice Brennan in Jacobellis v. Ohio, 378 U.S. 184 (1964), and reaching full flower in *Memoirs*, the lack of social value is no longer simply a way of

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Far less judicial attention has been given to "profanity" and "indecency," the other kinds of offensive language barred from the air by section 1464. Recently, in *Williams v. District of Columbia*,[47] the Court of Appeals for the District of Columbia Circuit refused to sustain a conviction under a statute prohibiting the use in a public street of "profane language, indecent and obscene words." In harmony with the Supreme Court's treatment of obscenity, Judge McGowan emphasized the context in which words are spoken; particular language cannot be denied first amendment protection per se. He quoted from *Terminiello v. Chicago*,[48] where the Court said:

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects. . . . [It] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[49]

The court held that allegedly profane, obscene, or indecent language is privileged unless it threatens a breach of the peace. A breach of the peace could be effected either because the language created a "substantial risk of provoking violence" or because it was "under 'contemporary community standards' so grossly offensive" to those who overheard it "as to amount to a nuisance." [50]

Apparently, then, prohibitions on profane or indecent expression must be restricted to certain contexts. For the most part, a prohibition that turns on the risk of provoking violence is obviously inapplicable to broadcasting.[51] The problem of offense

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describing or *characterizing* obscene expression. Rather, it is now a *standard* or *criterion* to be included with other inputs in determining whether expression is in fact obscene. *See* Stein v. Batchelor, 300 F. Supp. 602, 608 (N.D. Tex.) (three-judge court), *prob. juris. noted sub nom.* Dyson v. Stein 396 U.S. 954 (1969) (No. 565, 1969 Term; renumbered No. 41, 1970 Term); *cf.* Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185, 190, 201 (1970); Haimbaugh, *Obscenity: An End to Weighing*, 21 S. CAR. L. REV. 357 (1969).

[47] 419 F.2d 638 (D.C. Cir. 1969) (en banc).

[48] 337 U.S. 1 (1949).

[49] 419 F.2d at 645 n.18, *quoting* 337 U.S. at 4.

[50] 419 F.2d at 646.

[51] Of course, one can imagine a case where a speaker over the broadcast media might, for example, incite members of the audience to riot. This situation, however, could not generally be said to be the result of "morally offensive" expression. Perhaps the rare exception where the latter expression created a risk of provoking violence would be a case where a moral insult or slur is so strong that it may provoke a later retaliation even after a cooling period. Even with this case, however, we have essentially left the realm of "morally offensive" expression and are

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to broadcast listeners or viewers, however, is a real one. Yet it is most unlikely that expression could be suppressed solely because it offended certain recipients.[52] While Judge McGowan's "gross offense" test finds a parallel in the "patent offensiveness" prong of the *Memoirs* trilogy, surely the "lack of redeeming social value" element must be an implied term in his treatment of language of this nature. In the first place, much language of clear importance, such as the political rhetoric of the right or left, may be "grossly offensive" to many persons. Nevertheless, it would be unthinkable that the first amendment would permit censorship of language designed to influence peacefully the course of government, language which has inherent social value. Similarly, profane or "indecent" expression, just as obscene expression, may be employed — for example, via social realism or shock effect — to encourage consideration of moral issues.

Although the "prurient interest in sex" test is almost by definition limited to obscenity, its focus on the theme of expression taken as a whole demonstrates the need to examine any expressive work in its entire context. That is, certain isolated words may be offensive to some persons and by themselves appear to have no redeeming social value. But if the speaker is conveying content of social value, to limit his use of words may be to seriously restrict his vehicle for communication. As long as expression is constitutionally protected because it adds to the range of social, moral, or political ideas which the first amendment promotes,[53] a speaker's choice of words should not result in forfeiture of that protection.[54]

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dealing with other and potentially overriding interests, as in the case of "fighting words." *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[52] *See* Engdahl, *supra* note 46, at 231.

[53] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[54] *See* Grove Press v. Christenberry, 276 F.2d 433, 438 (2d Cir. 1960); *cf.* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 58, 60–61 (1970).

The view asserted in text would bar the FCC from deciding that certain words are worthless per se, as in Warren J. Currence, 34 F.C.C. 761 (1963). *Cf.* Commonwealth v. Gude, 255 N.E.2d 599, 600 (Mass. 1970).

A hard case was recently presented in Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F RADIO REG. 2D 860 (1970). There WUHY-FM, a noncommercial station in Philadelphia, featured an interview with Jerry Garcia, the leader of "The Grateful Dead" musical group. The FCC fined the station pursuant to section 503(b)(1)(A), (B) and (E) of the Communications Act, finding that the presentation of the program, in which Garcia used "indecent" language, violated section 1464 and the "public interest" standard. The FCC's opinion (excluding the more detailed appendix) lumps together examples of this language so that one might argue that the allegedly worthless and offensive language dominated the material and precluded any possibility of social value. This conclusion, however, seems much weaker on a closer examination of the broadcast. Both Commissioners Cox and Johnson, dissenting in separate opinions, stressed that the program of-

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While profanity is a concept which relates to particular words or short combinations of words, indecency may well refer to the entire content of an expressive act. Taken at face meaning, "indecency" seems to suggest mere offensiveness or unseemliness.[55] But in recent decisions, this kind of expression has apparently been taken under the wings of "obscenity" or "profanity." [56] Expression not susceptible to these categories may be offensive to some persons, but surely it cannot be suppressed without a showing of worthlessness or substantive harm.[57] For example, the dramatic portrayal of violence in various media may be offensive to many persons [58] and thus might be termed "indecent," though its message may be of great social importance.

B. The Unique Characteristics of the Broadcast Media

As the FCC's actions have demonstrated, the Commission generally does not limit its regulation of morally offensive programming to established constitutional standards applicable to

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fered much more than the use of words such as "shit" and "fuck." Garcia had used such words in discussing his views on ecology, philosophy, music, and interpersonal relations. Discussion of these issues is clearly of public importance generally. Furthermore, as Commissioner Cox emphasized, we need to know the views of the young on society and its ills. And prohibiting a discussion because of the mere use of certain words, without regard to the content or essence of the expression, may result in stifling the expression of those who regularly employ such words. One must question whether it is appropriate to try to protect the sensibilities of one group or subculture at the expense of denying the expression of another. As long as the expression is of social import, and there is no evidence of harm beyond offense, the answer under the first amendment must be in the negative.

[55] The imprecision of the word "indecent" probably makes it unconstitutionally vague and overbroad unless it is so defined as to set off a recognizable category of expression as unprotected. *See* Stein v. Batchelor, 300 F. Supp. 602, 608 (N.D. Tex.) (three-judge court), *prob. juris. noted sub nom.* Dyson v. Stein, 396 U.S. 954 (1969) (No. 565, 1969 Term, renumbered No. 41, 1970 Term); *cf.* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) (statute governing exposure of offensive expression to minors must be narrowly drawn); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870, *rev'g per curiam*, 177 Kan. 728, 282 P.2d 412 (1955); Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966) ("indecency" under section 1464 must be judged against constitutional standards); Katz, *Privacy & Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203, 207. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[56] *See, e.g.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418 n.6 (1966).

[57] *See* Stein v. Batchelor, 300 F. Supp. 602, 608 (N.D. Tex.) (three-judge court), *prob. juris. noted sub nom.* Dyson v. Stein, 396 U.S. 954 (1969) (No. 565, 1969 Term; renumbered No. 41, 1970 Term); *cf.* Associated Press v. United States, 326 U.S. 1, 20 (1945).

[58] *See, e.g.*, Oliver R. Grace, 18 P & F RADIO REG. 2D 1071 (FCC 1970).

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obscenity, nor does it generally engage in a constitutional analysis of allegedly profane or indecent speech.[59] The usual justification for the FCC's "public interest" approach to this regulation is the uniqueness of the broadcast media. Since the number of operable frequencies is physically limited, it is primarily argued that offensiveness of programming must be considered as part of an overall judgment as to how the broadcast licenses should best be distributed, in order to protect listeners from misuse or waste of the scarce resources. In *FCC v. Pottsville Broadcasting Co.*,[60] the Supreme Court upheld the power of the FCC to employ broad public interest criteria in reviewing station performance because of the "complicated factors" present in broadcasting. Elaborating in *National Broadcasting Co. v. United States*,[61] the Court said that the Commission, because of the unique nature of the industry, may deal with more than the technical and engineering aspects of broadcasting — the "traffic regulation;" in addition, it has "the burden of determining the composition of that traffic" on the air.[62]

These broadly stated holdings, however, did not establish that the FCC may regulate "offensive" or "vulgar" programming without regard to constitutional standards. The issues presented in *Pottsville* and *NBC* involved aspects of competition and control in the radio industry;[63] the decisions reflected concern lest a powerful medium of limited access be dominated by a very small number of persons or organizations. The scope of Commission review was necessarily defined broadly, because the field was new and the problems unknown.[64] Suppression of constitutionally pro-

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[59] *See* pp. 664–69 *supra*.

[60] 309 U.S. 134 (1940).

[61] 319 U.S. 190 (1943).

[62] *Id.* at 216; *see* Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974, 975 (1970).

[63] In *Pottsville*, the FCC had denied a license application where it found that the applicant was financially disqualified and did not sufficiently represent local interests. The Court gave implicit credence to this latter finding in describing the motivation for the Communications Act:

> Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses.

309 U.S. at 137.

At issue in *NBC* were certain "chain regulations" restricting network control over local programming. The Court concluded that these regulations were justified by substantial evidence that network control maintained broadcasting service at a level below that possible under a system of free competition. 391 U.S. at 218.

[64] Congress desired "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); *see* Caldwell, *The Standard of Public Interest,*

tected speech is a distant step from fears about concentration of control in the developing communications media.[65] In fact, Mr. Justice Frankfurter hinted in *NBC* that suppression of political, economic, or social expression in granting licenses would not be justified by the "public interest" standard.[66]

The same constitutional end — encouraging a broad range of opinions and experiences[67] — both justifies regulation of media control and suggests non-regulation (except in accordance with constitutional standards) of program content. This need for program diversity is bluntly reflected in the Commission's policy of examining station performance to see if licensees are offering the public a variety of programming, including news, entertainment, and public service.[68] It is inconsistent with this desired variety that material may be kept off the air simply because it offends some persons.

The view that special regulation is justified because of the industry's physical boundaries is further undercut by an analysis of when and how the fact of scarce broadcasting resources affects the character of program content. The number of stations in a particular locale may be a function of local economic demand rather than technological limits on the frequency spectrum. In *Palmetto*, for example, the FCC complained that the broadcast of the "vulgar" material was an intolerable waste of the only operating facilities in the area. No evidence, however, established that the reason for the local monopoly was airwave scarcity. Rather, competitors were probably deterred from entering the market by their assessment that the popularity of the existing station would preclude their capturing a sufficient audience to succeed financially. The only valid criticism of a broadcast monopoly based on economic realities is that the competition for the available market will result in presentation of only the most

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Convenience or Necessity As Used in the Radio Act of 1927, 1 AIR L. REV. 295, 296 (1930).

[65] *See* Robinson, *supra* note 38, at 143–44.

[66] 319 U.S. at 226.

[67] *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Note, *supra* note 32.

[68] *See 1960 Programming Report* 1913.

In an area where many stations serve the public, as is the case with radio in many metropolitan areas, the Commission need not require each station to divide up its day among various kinds of programming. If the goal is to assure an overall wide variety of radio programming, it can be accomplished more efficiently by letting individual stations specialize and cater to certain kinds of interests. *See* Jaffe, *Program Control*, 14 VILL. L. REV. 619, 620 (1969): "As more and more outlets become operational . . . it should become less and less necessary to look upon any one station as an all-purpose communications medium." *See also* Note, *supra* note 32, at 884.

popular views.[69] If this popular programming were not presented, a new entrant could eventually capture the market by offering it. The Commission may be unwilling to trust a monopolist to present different kinds of programming so as to serve a wider audience, and may thus demand that he diversify his programming.[70] But the fact of a monopoly can never justify narrowing permissible expression by coercing the *exclusion* of material that may offend some members of the community.

Many localities are, of course, served by so many stations that the physical limitation on frequencies becomes the relevant barrier to entry. In large metropolitan areas, for example, the maximum number of VHF and a large number of UHF television frequencies are often in use, and the full spectrum of radio frequencies is normally filled. In this situation, it may be impossible for someone to enter the market in an attempt to satisfy an unmet consumer demand.[71] Where all frequencies are allocated, the regulatory concern should be that too many stations will attempt to capture the large market of the majority,[72] with the result that the tastes and interests of minority audiences are too likely to go unsatisfied.[73] Even here, however, if the frequency spectrum is filled, one of the stations may find it profitable to pick off a minority audience. This is especially likely in the case of radio in metropolitan areas, where costs are sufficiently low and stations sufficiently numerous that a station may profitably cater to a specific, homogeneous audience.[74]

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[69] *See* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 704–05 (1964).

[70] The FCC, in evaluating whether station performance is in the public interest, considers whether a station presents a "balanced program" — a schedule presenting different types of material in order to provide service to the varied "tastes, needs, and desires of the public." *1960 Programming Report* 1912–13. This policy is justified as promoting diversity and thereby serving minority interests; however, when a concomitant rule develops that no part of the audience should be morally offended, the potential breadth of "balanced" programming is severly restricted. *Cf.* Marks, *supra* note 62, at 983–84. The demands of those persons whose values, tastes, or interests do not coincide with the dominant view of morality are then not met. Nor is a broadcaster free to instruct and enlighten the public, *see* Note, *supra* note 69, at 701–05, by examining differences between contrasting moralities.

[71] While it may still be possible even in metropolitan areas for a new entrant to break into UHF, UHF stations have not generally been able to achieve the financial stability necessary to induce strong, quality competition in serving the public. *See* Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1824–25 (1970). Nevertheless, UHF does help by providing some marginal programming that would not otherwise be broadcast.

[72] *Cf.* D. LACY, FREEDOM AND COMMUNICATIONS 80 (1961).

[73] *See* Note, *supra* note 32, at 864.

[74] *Id.* at 884.

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Whether or not the market structure will permit such diversification, a full frequency spectrum does not support the asserted need for suppressing morally offensive material. If some material is offensive to most persons, many — if not too many — of the stations will avoid such material for commercial reasons alone. If the number of those persons who may be offended by certain material is substantial but less than that required to influence programming through commercial pressure, the regulatory response again should be to encourage or perhaps require diversity [75] of material, in order to serve that sub-audience, rather than to exclude the offending material; even this regulation may be unnecessary if certain stations will cater to this particular audience.

Thus, the FCC's regulatory powers over program content are best directed toward counteracting the possible narrowing effects of limited access to broadcast frequencies, whatever its cause. Moreover, those effects — which vary both with economic demand and with the particular frequency spectrum, whether radio, UHF TV, or VHF TV — may be altered by further technological change. As developments in UHF and cable TV and in satellite communications open up present and potential broadcasting facilities,[76] the need for regulation to foster diversity of programming by a station should decrease and the number of specializing stations serving particular needs or tastes will probably grow. And, concomitantly, this expanding ability to serve

[75] For example, by demanding diversity in control of various media in an area, *see* WHDH, Inc., 16 F.C.C.2d 1, 15 P & F RADIO REG. 2D 411 (1969), *aff'd sub. nom.* Greater Boston Television Corp. v. FCC, 39 U.S.L.W. 2273 (D.C. Cir., Nov. 13, 1970); *cf.* Note, *Conflicts of Interest in News Broadcasting*, 69 COLUM. L. REV. 881, 887–95 (1969); by favoring owner-managers who will be more sensitive to needs of the community, *see* Jaffe, *WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693, 1696 (1969); by requiring that applicants secure reasonable knowledge of the community and its varying tastes and needs, *see* Oliver R. Grace, 18 P & F RADIO REG. 2D 1071, 1073 (FCC 1970); *1960 Programming Report* 1915; by encouraging diversity and not censorship through denial of renewal for what is *not* broadcast, rather than because of what is broadcast, *see* Marks, *supra* note 62, at 993; and by fostering new broadcasting outlets, *e.g.*, noncommercial stations and CATV program origination. *See generally* Note, *supra* note 32, at 891–901.

[76] Professor Turner summarized the status of the physical limitation argument:

> Although a severe bottleneck to entry in local markets has resulted from the physical limitations of the usable frequency spectrum, that factor should rapidly diminish in significance with the growth of cable and UHF television, and in any event it has not prevented major population areas from attracting several — today as many as nine — different over-the-air television stations alone. Moreover, coming developments in satellite transmission may further open up local television areas to multiple entry and diversity.

Turner, *The Role of Antitrust Policy in the Communications Industry*, 13 ANTITRUST BULL. 873, 874 (1968).

a broad continuum of sub-audiences makes suppression of material even more unwise, since the consequence of expansion is to provide areas of choice for listeners and viewers.

Proponents of administrative, public interest regulation of broadcast programming argue further, however, that radio and television, coming directly into the home and occupying so much time of such a large audience, are too pervasive to be allowed to present material offensive to many potential recipients.[77] The incredible reach of television and radio, however, should lead to the opposite conclusion. If the broadcast media are our most influential forums and if most persons rely on them as their principal source of information and entertainment, then broadcasters should not be forced to reinforce one moral, intellectual, or social viewpoint.[78] The essence of the first amendment is wide and free exchange of ideas. That protection seems meaningless if content regulation — enforcement of a moral norm as to what or how material may be presented — becomes justified as soon as a substantial audience becomes attracted. Instead, the freedom to discuss moral issues or present different lifestyles seems especially essential when persons are most susceptible to manipulation or influence. Furthermore, large segments of the population, including the poor, residents of rural areas, and shut-ins may lack the opportunity or means to use motion pictures or the theatre to supplement the broadcasting media.[79] To preclude the broadcast of expression protected in other media or forums is to deny totally the availability of this material to a sizable audience.

Currently the most widely accepted argument[80] for especially

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[77] *See, e.g.*, *Hearings* 345–46 (testimony of Commissioner R.E. Lee); NBC Television Program *Meet the Press*, January 25, 1970, at 4 (Merkle Press transcript) (statement of FCC Chairman Burch); *cf.* Eastern Educational Radio, 24 F.C.C.2d 408, 410–12, 18 P & F RADIO REG. 2D 860, 864–65 (1970).

[78] *Cf.* Z. CHAFEE, *supra* note 1, at 546.

Moral behavior and values vary with particular cultures, generations, economic and educational differences, and along numerous other lines. That the ability of radio and television to reach these different groups should argue for restriction of the media to material regarded under dominant views as "decent" or "non-offensive" reflects a most questionable assumption that these media should be predominantly a vehicle for the enjoyment of the one large group sharing that dominant morality. Such an assumption is also made when language styles appropriate for the media are dictated by the FCC, rather than by a station's audience or commercial needs. *See* Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F RADIO REG. 2D 860 (1970).

[79] *Cf.* Karalexis v. Byrne, 306 F. Supp. 1363, 1367 (D. Mass. 1969) (three-judge court), *prob. juris noted*, 397 U.S. 984 (1970) (No. 1149, 1969 Term; renumbered No. 83, 1970 Term) (protecting right to view obscene film in home but not in movie theatre would discriminate against poor).

[80] *See, e.g.*, FCC Public Notice, Address by FCC Chairman Burch Before the Biz Brothers of the San Francisco Bay Area, Jan. 30, 1970.

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rigorous regulation of expression on radio and television is that the broadcast media are so pervasive or intrusive that morally offensive material, whether or not constitutionally protected, should be suppressed or deterred in order to avoid exposing it to children [81] or to adults who may not want to receive it.[82] On the first score, parents and the state are said to have a legitimate interest in the development of children, and thus in the materials to which they have access. Without evidence to support an affirmative governmental interest in protecting children from exposure to morally offensive material,[83] the state's role is largely justified as one of protecting and supporting the freedom of parents to raise and educate their children as they deem best,[84] though the Supreme Court has allowed legislatures some leeway to reflect statutorily an "independent interest in the well-being of . . . youth." [85] In the area of morally offensive expression, the Court has upheld state prohibition on distribution to minors of printed material which would be protected, if distributed to adults, under the *Roth-Memoirs* est.[86]

Generally, proponents of more restrictive FCC regulation of expression reason from this doctrine that much offensive material protected as to adults should be kept off the air because of the

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[81] *Cf.* Ginsberg v. New York, 390 U.S. 629 (1968).

[82] *Cf.* Ginzburg v. United States, 383 U.S. 463, 470 (1966).

[83] No empirical evidence exists that sexual stimuli, for example, have any effect on overt behavior, or on behavior and mental health in the long run. *See* Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and The Empirical Evidence*, 46 MINN. L. REV. 1009, 1034 (1962). *See also* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27, 52 (1970).

One commentator has argued that suppression of material as immoral can have an unhealthy effect:

> An equally serious objection to the treatment of obscenity as a largely legal problem arises from the distorting effect this has on any discussion of sexual morality. Concentration on what is forbidden, according to such arbitrary and variable rules, distracts attention from what is permitted . . . it is the native environment of the neurotic.

Larrabee, *The Cultural Context of Sex Censorship*, 20 LAW & CONTEMP. PROBS. 672, 681 (1955).

[84] *See* H. CLOR, OBSCENITY AND PUBLIC MORALITY 84 (1969); 21 VAND. L. REV. 844, 848 (1968).

Whether the prevention of the exposure of this material to children is desirable or not, it is undoubtedly true that government control of youth access to obscenity satisfies deep psychological needs of many parents even it is is not based on an accurate reflection of the psychic development of minors. Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153, 193–94. *See also* Cairns, Paul & Wishner, *supra* note 83, at 1040: "Obscenity also seems to be an outrage to some people. . . . [T]he strength of these feelings — especially among parents — must be accommodated as a matter of *Realpolitik*."

[85] Ginsberg v. New York, 390 U.S. 629, 640–43 (1968).

[86] Ginsberg v. New York, 390 U.S. 629 (1968).

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ease with which children can watch and listen. Children, because of their lesser maturity, are said to form a more captive audience, less able to turn off a program. And since the young constitute such a large segment of the viewing audience, special standards and regulation are supposedly compelled.[87]

Although the Supreme Court has supported the application of controls on the distribution to children of morally offensive material otherwise protected by the first amendment, it has, on the other hand, continually emphasized that the constitutional right of *adults* to receive expressive materials may not consequently be submerged. In *Butler v. Michigan*,[88] the Court held unconstitutional a state law which prohibited the sale of any books containing immoral language or pictures "tending to the corruption of the morals of youth." The Court found that the statute, designed presumably to protect children, denied adults access to constitutionally protected materials, and concluded:[89]

> The incidence of this enactment is *to reduce the adult population . . . to reading only what is fit for children.* It thereby arbitrarily curtails one of those liberties of the individual, . . . that history has attested as [one of] the indispensable conditions for the maintenance and progress of a free society.

Such a quarantine on general distribution would in the *Butler* context "burn the house to roast the pig;"[90] only a scheme limited to cutting off the availability of such material to children could be approved.

Radio and television, however, do not readily yield to an analysis that for constitutional purposes separates children from the adult audience. Magazine and book sellers can be prohibited from selling to those under a certain age, and movie theaters

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[87] *See, e.g.*, Eastern Educational Radio, 24 F.C.C.2d 408, 411 n.6, 18 P & F Radio Reg. 2d 860, 864 n.6 (1970); Mile High Stations, Inc., 28 F.C.C. 795, 796, 20 P & F Radio Reg. 345, 346 (1960); *1960 Programming Report* 1906; *cf.* Kalven, *supra* note 38, at 35.

[88] 352 U.S. 380 (1957).

[89] *Id.* at 383–84 (emphasis added).

[90] *Id.* at 383.

In Jacobellis v. Ohio, 378 U.S. 184 (1964), Mr. Justice Brennan announced the judgment of the Court and reaffirmed the unconstitutionality of indiscriminately suppressing protected material in order to prevent distribution of material deemed harmful to children. Dealing with the exhibition of a motion picture, the Justice framed the issue in terms of the audience at which the film and statute were directed:

> Since the present conviction is based upon exhibition of the film to the public at large and not upon its exhibition to children, the judgment must be reviewed under the strict standard applicable in determining the scope of the expression that is protected by the Constitution.

Id. at 195.

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can admit "adults only." [91] The broadcast media, however, enter directly into the home. Parents cannot check continually on what their children are watching, and may neither want nor bother to do so even if they could.[92] Consequently, the adult and child audiences are not easily segregated.

Nevertheless, means are not totally lacking to exercise some control over the exposure to children of material thought improper for them. Reasonable controls over scheduling, promotion, and the general context of the presentation of material provide tools for partial segregation of the audience without total suppression of the material.[93] When possible, programs likely to morally offend some persons may be broadcast late in the evening; warnings may be given both preceding and during the program; and promotions both on the broadcast media and elsewhere may be restricted to a solely informational role so as to avoid sensationalist exploitation. Obviously, scheduling, warnings, and the like will not prevent all children from exposure to some questionable programming. But the numbers that are the subject of legitimate government concern can be significantly narrowed. Although some persons may complain that those most susceptible are not small children but young adolescents who are more mobile and who generally are awake during the later evening hours, a system of scheduling and warnings will at least let parents know when such material will be on the air and the presentation will occur when most parents are at home and have discretion to exercise some control over the activities of their children. Furthermore, as children grow older and consequently both freer from parental control and more exposed to the world at large, the state interest in supporting parental censorship of material reach-

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[91] The Court in *Butler* noted that Michigan had another more limited statute "specifically designed to protect its children against obscene matter 'tending to the corruption of the morals of youth.'" 352 U.S. at 383.

[92] *See* p. 684 *infra*.

[93] Commissioner Cox, concurring in the recent approval of Pacifica's application for the Houston construction permit, *see* pp. 668–69 *supra*, stressed that the poem read in Los Angeles was presented, because of controversial language and theme, at 10:30 p.m. on a discussion program normally broadcast at 10.30 a.m. The station announced in the morning that the program was being rescheduled so that children would be less likely to listen, since some material "might be considered by some to be offensive . . . ." When presented, the reading was preceded by a warning that some persons might find the language "blasphemous or obscene," and thus those who would be easily offended should turn off the radio and those with children present should either turn off the program or have the children leave. FCC Public Notice Report No. 8593, *supra* note 26 (concurring statement of Commissioner Cox at 1–2). *Cf.* Cox, *The FCC's Role in TV Programming Regulation*, 14 VILL. L. REV. 590, 595 (implicitly condemning scheduling of violent programming on Saturday morning television, prime time for child viewing).

ing their children is weakened.[94] Finally, a system regulating the context of presentation rather than content would reflect a "variable obscenity standard,"[95] deterring broadcasters from directing offensive material toward minors specifically, while widening the opportunities for adults to have access to more divergent and controversial discussion and presentations.

Some parents, of course, might not care whether their children listen to or watch questionable material. Others, moreover, may affirmatively welcome the presentation of more explicitly provocative material on television and radio. Such a presentation may help overcome inhibitions and open up sensitive yet important issues of human behavior to family discussion.[96] For these parents, contextual regulations suffice to satisfy their interest in raising their offspring as they wish. They allow individual, concerned parents to evaluate the level of maturity of their child. In the absence of demonstrated harm from exposure to morally offensive expression, any state interest in deterring, as to this class of children, programming content otherwise protected by the first amendment should therefore be subordinated to the interest of parents in deciding what expression they and their children should receive.[97] Only the problem of children whose parents cannot supervise their activities at night, though they would wish to do so, remains. Against this potential interest, however, must be balanced the first amendment guarantee to the adult members of society, who employ — whether through inertia, desire, or necessity — the broadcast media as their primary source of information, entertainment, ideas, and education.

The interest of adults in avoiding their own exposure to morally offensive material also does not provide a justification for prohibiting morally offensive programming. An adult's interest is solely personal. Without evidence of social harm from exposure, the state has little interest in sheltering him from expression unless it is both patently offensive and lacking in social value. Thus, the simple answer to adult programming complaints

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[94] *Cf.* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (Aldrich, C. J.) (censorship of material with offensive language studied by high school students is inappropriate). *See also* Rowan v. United States Post Office Dep't, 397 U.S. 728, 741 (1970) (Brennan & Douglas, JJ., concurring in part).

[95] Krislov, *supra* note 84, at 176.

[96] *Cf.* THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 48 (1970).

[97] *Cf.* Stanley v. Georgia, 394 U.S. 557, 564–67 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Z. CHAFEE, *supra* note 1, at 543–44:

> [W]e might even go back to *laissez-faire* and trust sensible parents to keep their children at home from mature films. As for the children of foolish parents, they know so much already that it doubtful . . . [the film] could make them any worse.

is that the adult himself may turn a dial and avoid material which offends his moral sensibilities. A moment's offense may have to be endured by some persons,[98] but that is a small social cost necessarily borne in order to assure the availability of expression protected by the first amendment.[99] Furthermore, the same contextual steps which may be taken to allow segregation of adult and child audiences may, if the potential listener or viewer is concerned and alert, enable adults to avoid even momentary offense. For the adult who may wish to avoid this kind of programming but who, once exposed, cannot emotionally resist the temptation to continue to receive it,[100] these suggested controls may help him, like the concerned parent, to head off the problem before it arises.

In view of the importance of free adult expression and the availability of means to give adults some control over reception of morally offensive material, the FCC should not be permitted to coerce suppression of programming which meets prevailing constitutional standards.[101] The first amendment protects against attempts to curb an "uninhibited, robust and wide-open" interchange of thought and ideas.[102] Because of the importance of broadcast media as sources of expression and communication to a vast number of Americans, programming should not be judged in terms of its acceptability to a consensus audience, but by whether it is patently offensive and has no social worth for the adult public that is most active in and responsible for the direction of the society. This conclusion may require reoriented expectations from some persons accustomed to bland programming, though those persons undoubtedly will remain quite able to find such material. Nevertheless, the Pacifica controversies have demonstrated that the achievement of quality and social importance in programming [103] may necessarily bring with it expression that morally offends some persons by challenging lifestyles and accepted concepts of value and taste. Thus, FCC content reg-

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[98] *See Hearings* 357–58.

[99] *Id.* at 358 (testimony of Commissioner Cox); *cf.* Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd mem.*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968).

[100] *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 122–23 (1970).

[101] *Cf. id.* at 121 (noncontent regulation rather than prohibition of speech provides an accommodation of both desire for individual privacy and right of free expression).

[102] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[103] *See* Pacifica Foundation, 36 F.C.C. 147, 149, 1 P & F RADIO REG. 2D 747, 750 (1964); Jack Straw Mem'l Foundation, 21 F.C.C.2d 833, 838, 840, 18 P & F RADIO REG. 2D 414, 419, 422 (1970) (dissenting statement of Commissioner Cox); *Hearings* 362 (testimony of Commissioner Cox).

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ulation should be restricted to prevailing constitutional standards for public communication. Further control should be limited to regulating the context of presentation — through such methods as scheduling, promotional controls, and warnings — so as to best delineate between adult and child audiences and between willing and unwilling adult recipients.[104] Direct or indirect suppression of morally offensive though constitutionally protected material would emasculate the public's first amendment "right . . . to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which . . . may not constitutionally be abridged either by Congress or by the FCC." [105] It is no answer that because of the vagueness of FCC standards, "[t]he present regulatory process directly affects only the marginal licensee whose programming is patently below the norm," [106] for the concern here *is* with the broadcaster whose programming does significantly deviate or would deviate from popular morality but for fear of losing his license. Moreover, the vague standards may affect far more than the "marginal licensee," since many broadcasters will shy away from the imprecise boundaries of "good taste" for fear of incurring FCC disapproval.

C. The Constitutional Boundaries for Broadcast Media Regulation

If FCC content regulation is to be limited to prevailing constitutional standards, the principles relevant to the broadcast media must be determined from the confusing movements of constitutional doctrine dealing with morally offensive expression. Although the sexually oriented "prurient interest" prong of the *Memoirs* test seems to offer little meaning for "profanity" and

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[104] Cairns, Paul, and Wishner, finding no effects on overt or long-run behavior from sexual stimuli, would condemn only commercial distribution which is "either intentionally aimed at youth . . . or which is carried on with reckless disregard of the quality of the audience whose patronage is solicited." Cairns, Paul & Wishner, *supra* note 83, at 1040–41.

Lockhart and McClure, also students of the empirical evidence, reach similar conclusions: while regulation may reflect a variable standard which differentiates between audiences, the Supreme Court might well invalidate statutes which, because of the fear of "peripheral audiences of adolescents," effectuate the reduction of "adult reading material to a level suitable for adolescents." Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85–86 (1960).

[105] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

[106] Note, *supra* note 69, at 716. *See also* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 398, 5 P & F RADIO REG. 2D 1901, 1912 (1965) (FCC disregards broadcast record that is "within the bounds of average performance . . . . since average future preformance is expected").

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"indecency," and at times seems even inapt as to obscenity,[107] the requirements that material in order to be unprotected have no social value and be patently offensive to the audience are meaningful in the context of the broadcast media. Yet a further and most important question in view of recent developments in "obscenity law" is whether even these criteria are applicable, or whether all expression is to be protected whether or not it is, in current constitutional terms, obscene or otherwise worthless expression — in short, whether a first amendment test with any utility has survived.

Until recently, the Court generally avoided any discussion of what governmental interests may support obscenity laws.[108] *Roth* had emphasized that expression which is obscene in constitutional terms is unprotected by the first amendment, but, in the absence of evidence of social or personal harm resulting from such material, there was little clue as to what affirmative reason supported suppressive governmental action. The implication was that since there was nothing to be said in favor of such expression, abridgement could be based on a mere suspicion of harm or simply a legislative dislike. In *Redrup v. New York*,[109] however, the Court hinted at a quasi-nuisance theory that would justify anti-obscenity laws only when they are directed toward prohibiting expression that would invade the personal province of those not desiring it. In a per curiam reversal of a conviction for the sale of allegedly obscene publications, the Court, although also finding the material not obscene, noted that [110]

> [i]n none of the cases was there a claim that the statutes in question reflected a specific and limited state concern for juveniles . . . . In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. . . . And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg* . . . .

The first two stated concerns suggest that there is a legitimate state interest in combating even obscene material only when the material creates a kind of nuisance,[111] either by intruding upon the sensibilities of adult recipients who do not want to receive the

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[107] *See* Gaylin, Book Review, *The Prickly Problems of Pornography*, 77 YALE L.J. 579, 582–83 (1968).

[108] *See* Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966).

[109] 386 U.S. 767 (1967) (per curiam).

[110] *Id.* at 769.

[111] *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 324–25 (1968); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 153 (1969).

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material or by reaching children whose parents have an interest in avoiding such exposure. The third interest noted — that of preventing pandering — is less explainable on this basis. In *Ginzburg v. United States*,[112] the Court held that evidence of pandering in the distribution of materials was relevant to a determination of obscenity. In the course of the opinion, however, the Court noted that "the deliberate representation of petitioners' publications as erotically arousing . . . would tend to force public confrontation with the potentially offensive aspects of the work." [113] In the retrospective light cast by the *Redrup* dictum, it seems likely that the *Ginzburg* Court was bothered by the purpose of the panderer in attracting an audience that might normally prefer to avoid obscene material; by the greater likelihood from pandering that this purpose would be accomplished; and by the possibility that the mere act of pandering, drawing attention to aspects of expression that are most offensive and lacking in social value (though the material taken as a whole may be borderline [114]), should be prohibited on the basis of its intrusion upon the sensibilities of unwilling adults or its exposure to children.

In *Stanley v. Georgia*,[115] the Court, holding that a person's mere possession in his own home of even concededly obscene material could not constitutionally be made a crime, gave substance to its previous implications. Mr. Justice Marshall declared that "the right to control the moral content of a person's thoughts . . . . is wholly inconsistent with the philosophy of the First Amendment;" [116] thus, the state could not override constitutional protection and prohibit "mere possession of obscene matter on the ground that it *may* lead to antisocial conduct. . . . ." [117] Since the Court asserted that *Roth* was unimpaired,[118] it was obliged to discuss what valid interests could justify suppression of worthless material. It emphasized that *Roth* and subsequent cases had dealt with the public distribution of obscenity; in that context there was a danger that obscene material might "fall into the hands of children" or "intrude upon the sensibilities or privacy of the general public." [119] Thus, the Court implied that obscenity

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[112] 383 U.S. 463 (1966).

[113] *Id.* at 470.

[114] In *Ginzburg*, the Court assumed for purposes of its decision that the materials in question were not facially obscene; the pandering context was therefore the determinative factor. *Id.* at 465-66.

[115] 394 U.S. 557 (1969).

[116] *Id.* at 565-66.

[117] *Id.* at 567 (emphasis supplied).

[118] *Id.* at 568.

[119] *Id.* at 567.

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laws designed to prevent those dangers from arising could be upheld.

Regulation of obscenity has thus moved from the *Roth-Memoirs* focus on solely the quality of material to a position which incorporates to some extent the interests of willing recipients of the material. It appears that worthless material may be suppressed only if its distribution constitutes a quasi-nuisance; for example, it may contravene the legitimate interests of the public if it intrudes upon the sensibilities of unwilling adult recipients or is directed toward children whose parents might oppose their seeing it. Similarly, pandering may be constitutionally prohibited only if it increases the likelihood that children or unwilling adults will confront obscene material, or if the pandering preys upon children and upon adults indiscriminately and itself is so offensive and lacking in any social value that it may be denied protection. Since the harm, however, is not one inflicted on society because of demonstrated dangers, but rather one felt by the unwilling adult or parent whose interests are subverted, the state would have no interest in interfering with the receipt of the hardest-core pornography by a willing adult.

Whether the Supreme Court will pursue this course arguably augured by *Stanley* cannot be predicted with full assurance. *Stanley*, of course, dealt only with one's possession of obscenity in the privacy of his own home, a fact not without importance.[120] Nevertheless, it seems difficult to limit a privacy notion to the physical limits of the home, as long as activities or behavior do not trench on the legitimate interests of others. Similarly, if one can *possess* obscene materials, it is difficult to deny a right to *receive* as well, as long as the act of distribution or communication also avoids any invasion of the sensibilities of others.[121]

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[120] *See, e.g.*, United States v. Melvin, 419 F.2d 136, 139 (4th Cir. 1969); United States v. Ten Erotic Paintings, 311 F. Supp. 884, 886 (D. Md. 1970); State v. Reese, 222 So. 2d 732, 736 (Fla. 1969).

[121] *See* United States v. 37 Photographs, 309 F. Supp. 36 (C.D. Cal. 1970) (three-judge court), *prob. juris. noted*, 39 U.S.L.W. 3146 (U.S., Oct. 13, 1970); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969) (three-judge court), *prob. juris. noted*, 397 U.S. 985 (1970) (No. 1149, 1969 Term; renumbered No. 83, 1970 Term); H. PACKER, *supra* note 111, at 324; Katz, *supra* note 55, at 212–213; *cf.* Stanley v. Georgia, 394 U.S. 557, 564–65 (1969); Note, *supra* note 32, at 871. *But see* Copland v. O'Connor, 306 F. Supp. 375 (N.D. Cal. 1969).

The *Stanley* Court did imply that the right to receive obscene material may be limited. But the Court said that *Roth* and its progeny justified encroachment of first amendment freedoms only for such important interests as the "regulation of commercial distribution of obscene material." 394 U.S. at 563–64. That first amendment protection, otherwise in force as to even obscene materials, may be subordinated in order to regulate distribution of obscene materials, however, is not by itself a very accurate statement of earlier cases. In *Ginzburg*, for example,

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Moreover, the Court, by noting in *Redrup* the absence of certain specific intrusions on others, gave credence to the notion that the government may not interfere as long as expression or distribution is a private matter between willing adults.[122]

Even if morally offensive material must now be found to be intrusive upon a captive audience before it can be governmentally deterred, the constitutional standard formulated in *Memoirs* has certainly not evaporated. If the *Memoirs* test were irrelevant, expression which would have been regarded under *Roth* or *Memoirs* as constitutionally protected whatever the circumstances of distribution could now be suppressed if found to be seriously offensive to the relevant audience. Since important and contro-

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the material in question was very questionably obscene, if that. The Court, however, found that in "close cases evidence of pandering may be probative with respect to the nature of the material . . ." 383 U.S. at 474. Nowhere in *Ginzburg* did the Court give up the specific *Roth* holding that material was not protected if it was obscene and thus worthless. Thus, while certain distribution methods (*e.g.*, those which emphasize the offensive and perhaps worthless qualities of the material) were held capable of subjecting material to prohibition, clearly obscene materials could also be prohibited in the absence of distribution. Now that *Stanley* has hinted that the latter prohibition is unconstitutional when the material is subject solely to the personal use of an adult the mere fact of a commercial distribution may be irrelevant. That this kind of distribution of borderline materials may allow the state to treat them as obscene adds nothing when obscene material is free from prohibition. The test after *Stanley* for whether material may be prohibited, then, seems not to be whether there is a distribution as opposed to mere possession, but whether the distribution or possession intrudes on unwilling adults or subverts parental interests in preventing exposure to children. A commercial distribution that is not intrusive in this way should not provide legitimate cause for prohibition. *See* Karalexis v. Byrne, *supra*, at 1366. Furthermore, *Stanley* has served to emphasize that the pandering in *Ginzburg* was cause for state action not simply because it clarified the character of the material; it supplied the additional requisite that the worthless and patently offensive aspects of the material be flaunted indiscriminately before the general public. *See* Katz, *supra* note 55, at 207; Krislov, *supra* note 84, at 193.

[122] *See* Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), *prob. juris. noted*, 397 U.S. 985 (1970) (No. 1149, 1963 Term; renumbered No. 83, 1970 Term). *See also* United States v. 37 Photographs, 309 F. Supp 36 (C.D. Cal. 1970) (three-judge court), *prob. juris. noted*, 39 U.S.L.W. 3146 (U.S., Oct. 13, 1970); THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970). *But see* United States v. Melvin 419 F.2d 136, 139 (4th Cir. 1969); Copland v. O'Connor, 306 F. Supp. 375 (N.D. Cal. 1969). In *Karalexis*, a three-judge federal district court has extended the *Stanley* privacy theory to motion pictures when the audience was limited to willing adults. The court, while assuming the film, *I Am Curious (Yellow)*, was obscene, granted a preliminary injunction against prosecution for exhibition. Circuit Judge Aldrich found that the viewing public was sufficiently aware of the possible offensiveness of the film, that the film was "not advertised in any pandering manner," and "that the theatre [was] policed, so that no minors [were] permitted to enter." 306 F. Supp. at 1365. Thus, the court felt it could conclude, "equally with *Stanley*" that the motion picture avoided the dangers involved in more open "public distribution." *Id.* at 1366.

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versial ideas are often seriously offensive ones to large numbers of persons, the likely meaning of the changing law is that the *Memoirs* test of what content is obscene is invoked to permit suppression only if such material also is either offensive to an unwilling audience or an invasion of parental interests. In short, both intrusion — or exposure-to-children — and a finding of obscenity (or at least a finding that the material is worthless and morally offensive) would have to coalesce to justify content regulation.

Should this development receive Supreme Court approval, one must ask whether the broadcast media could be deterred from presenting socially worthless *and* patently offensive programming, or whether all content regulation is to be constitutionally infirm on the theory that it would preclude the receipt of "protected" expression by adults. Of course, since *Stanley* involved personal possession of obscene material in the home, there was no imminent threat of exposure to children or unwilling adults. The Court's reliance on *Griswold v. Connecticut* [123] emphasized the importance to the decision of this element of personal choice. Radio and television broadcasts by contrast are directed indiscriminately toward the public at large. They easily enter homes, automobiles, places of work, and public accommodations. While an affirmative step is necessary to obtain literature or see a motion picture, broadcast programming is more likely to confront a shifting audience not exercising this same kind of volition.

Nevertheless, if all expression were fully protected by the first amendment, to hold the line [124] at the case of an adult who affirmatively seeks and acquires obscene materials would be unacceptable. Such a limit would restrict adults to broadcast expression deemed appropriate for children or easily-offended adults, and thus again would run into the *Butler* prohibition of overbroad suppression; less restrictive contextual regulations would have to suffice.

Yet this conclusion need not follow. The misconception in extending a "right to broadcast" to cover any expression whatever is the assumption that *Roth* is dead [125] — that all expression is now speech "protected" by the first amendment unless it intrudes on a "fully captive audience" or invades the legitimate province of parents.

A different analysis seems better to reflect the Court's inten-

[123] 381 U.S. 479 (1965), *cited* at 394 U.S. at 564.

[124] *Cf.* Engdahl, *supra* note 46, at 220 n.178.

[125] *See* Note, *Obscenity from Stanley to Karalexis: A Back Door Approach to First Amendment Protection*, 23 VAND. L. REV. 369, 381–82 (1970); *cf.* Engdahl, *supra* note 46, at 219; Katz, *supra* note 55, at 210–11, 217.

tion in *Stanley* while still allowing room for development. By this interpretation, material judged obscene by constitutional standards is still unprotected under *Roth-Memoirs*. But a lack of protection is not equivalent to an authorization to the government to suppress or prosecute under any circumstances.[126] In effect, the Court indicated that obscenity, while unprotected if legitimately attacked, does not by its mere existence call for a governmental response. Thus, an adult can possess it in his own home. And perhaps he will be allowed to attend an obscene motion picture or purchase a pornographic magazine. All these actions are proper because they involve personal, private choices that do not give others any legitimate concern.[127] There is no constitutional interest in promoting the availability of patently offensive and socially valueless expression. Nevertheless, as long as receipt of the expression is a personal, voluntary matter, the government has no reason to interfere.

If, however, obscene material is publicly pandered or broadcast over the air, citizens not seeking the material or desiring to prevent exposure to their children have a legitimate concern. And obscenity, being socially valueless and thus lacking first amendment protection, has nothing in its favor to balance against any gross offense to a relevant audience. That members of the shifting audience have to put up with a serious intrusion on their sensibilities or that children whose parents would object may be exposed is thus sufficient to bar the material. Even if this exposure is limited by various contextual controls, there is no longer any constitutional interest opposing the objections; protection extends only to a realm of solely personal, private choices — not to the material.[128]

Still protected under the first amendment, either by this theory or if the *Stanley* privacy sphere is not enlarged beyond the confines of the home, is the presentation of expression which has social value or is not patently offensive; only material not meeting these standards should be barred from the broadcast media. Yet by whose standards should this test be applied to radio and television programming? A "variable obscenity" framework that looks to the moral standards of the particular relevant audience

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[126] *Cf.* Katz, *supra* note 55, at 214 (desirability of requiring government to produce a victim). *See also* H. PACKER, *supra* note 111, at 325 (nuisance approach that requires some offense to or intrusion on a complainant "forces a sharper focus on the reality and gravity of the threatened offensiveness . . . . law enforcement officers would no longer have a roving commission to stamp out the unorthodox and the avant garde").

[127] *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965); THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 53–55 (1970).

[128] *Cf. The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 153–54 (1969).

seems appropriate.[129] Although the test should not allow all material thought by any single individual to have social value, nevertheless where different stations or programming attract a specific audience that may be defined or classified by a particular set of values, it seems proper to consider programming at least with reference to the average man of that audience. Otherwise, the result tends toward a rather unresponsive consensus of expression and values, and represents a perversion of first amendment purposes.

A variable standard determined by a particular audience is justified mainly for purposes of evaluating radio programming. Radio stations are sufficiently numerous, and have correspondingly lower economies of scale, that they can attempt to appeal to specific audiences that are separable from a mass audience, by ethnic, cultural, developmental, or educational characteristics. The variable standard would tend to be more static with regard to television, at least for the present, since most commercial stations must attempt to attract a mass audience. In any case, if the particular relevant audience finds social value, no justification appears for overruling such a finding because of the view of an abstract "average man," a Commission member, or a law enforcement official. This freedom is especially important for stations that try to serve minority interests. The FCC theoretically recognizes service to minority groups as one of the relevant criteria of the public interest standard.[130] Yet in *WREC Broadcasting Service*,[131] after a radio station had argued that its broadcast of certain allegedly vulgar songs was part of its fulfillment "as an outlet for local self-expression" in that it "must program not only to majority tastes,"[132] the Commission without offering a constitutional judgment said that a radio licensee was not free to pander to any taste. It found the station's attitude to reflect adversely on its judgment and sense of responsibility, and awarded the license to a competing applicant. The implication that no programming should deviate from some majority moral norm is especially troubling in the context of a metropolitan area served by many stations. In that setting there are obvious advantages in allowing certain stations to broadcast specially for certain groups expression which is perhaps not available on larger

[129] The Court laid groundwork for the approach offered in text in Mishkin v. New York, 383 U.S. 502, 508–09 (1966), by holding that the relevent audience for application of the "prurient interest" test was that to which the material was primarily addressed rather than some abstract "average" man.

[130] *1960 Programming Report* 1913.

[131] 19 F.C.C. 1082, 10 P & F Radio Reg. 1323 (1955).

[132] *Id.* at 1113, 10 P & F Radio Reg. at 1357–58.

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stations more interested in reaching a diverse audience. If it is possible to make significant distinctions between audiences, the public interest should not preclude a station from inquiring into the tastes and values of the hypothetical member of its audience [133] — whether he be an intellectual, a blue collar worker, or a member of a certain ethnic or racial group — and then programming material found by its audience to have socially redeeming value.

III. The Regulatory Approach of the FCC and Its Consequences for Programming Standards

If prevailing first amendment standards apply substantively to FCC content regulation of morally offensive programming, the Commission's procedures must be reviewed and modified to the degree necessary to secure constitutional protection for broadcasters. The Commission's indirect "public interest" approach has tended to utilize pressure upon stations to deter morally controversial programming while avoiding any direct invocation of the available statutory penalties for obscenity, profanity, or indecency [134] which would presumably test judicially the limits of substantive regulation. If a challenge to a public interest determination did wind up in the courts, the Commission might manage with its discretion to find grounds for support other than the moral character of the programming,[135] or might simply argue that the station's performance was generally such that another applicant could better meet the needs and tastes of the community.

The FCC's assertion that its actions do not run afoul of the

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[133] *Cf.* Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 64.

[134] *But see* Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F Radio Reg. 2d 860 (1970).

Although *Eastern Educational Radio* apparently will not result in judicial consideration of the Commission's standards, it is significant beyond the mere fact that the FCC encouraged an appeal to the courts; in addition, the FCC decided the case in part in terms of its construction of the section 1464 statutory prohibition on "indecent" expression (though the Commission relied alternatively on a violation of the public interest standard).

[135] *See, e.g.*, Jack Straw Mem'l Foundation, 21 F.C.C.2d 833, 18 P & F Radio Reg. 2d 414, *reconsidered and aff'd*, 24 F.C.C.2d 266, 19 P & F Radio Reg. 2d 611 (1970) (failure to comply with policies adopted voluntarily by station); Palmetto Broadcasting Co., 33 F.C.C. 250, 23 P & F Radio Reg. 483 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964) (misrepresentations to Commission by licensee); FCC Public Notice No. 8593, *supra* note 26 (attempt of Commissioner R. E. Lee to find Pacifica financially unqualified).

section 326 ban on censorship because they do not constitute prior restraints seems misguided in view of the enormous impact of FCC action upon the entire industry. The fear of Commission discretion to refuse to renew a license exceeds most advantages that a licensee might obtain by challenging a Commission position. Furthermore, while a system of prior restraints could at least demonstrate the kinds of material that are taboo, the broad public interest standard as invoked against offensive programming provides few guidelines for action. A licensee must suppress borderline material, or even programming with only slight possibility of instigating an FCC response, for fear of losing the right to conduct his business.[136] Consequently, the licensee cannot adequately or efficiently balance the social interest in a wide range of social, political, and moral expression against his private costs — possible entrepreneurial demise — risked by stepping too close to the shadowy line.

The FCC's present power and discretion effectively to establish and to enforce administrative standards for morally offensive material seem very likely to violate prevailing constitutional requirements.[137] In *Bantam Books v. Sullivan*,[138] a Rhode Island commission notified book distributors that certain books had been declared objectionable for sale to youth. The notices asked for cooperation in stopping circulation, and reminded the distributors of the commission's duty to recommend prosecution of purveyors of the material. The Supreme Court held this procedure unconstitutional for lack of required safeguards, since the result was that distributors stopped circulation rather than risk the possibility of criminal prosecution. By this response, some concededly nonobscene books were suppressed. The Court pointed out that although obscenity is unprotected speech, the test is so complex that rigorous safeguards are required to ensure that constitutionally protected expression is not curtailed.[139]

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[136] *Cf.* Note, *supra* note 55, at 865.

[137] *Cf.* Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969):

> [T]here is high risk that [public interest rulings relating to specific program content] will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.

See also National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 208 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970): "[T]he Commission must be cautious in the manner in which it acts; regulations which are vague and overbroad create a risk of chilling free speech . . . ."

[138] 372 U.S. 58 (1963).

[139] *Id.* at 65–66; *see* Freedman v. Maryland, 380 U.S. 51, 57–58 (1965); Marcus v. Search Warrant, 367 U.S. 717, 731 (1961); Monaghan, *First Amendment*

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FCC regulation under the broad public interest standard lacks any such safeguards. First, the great value of the broadcasting license at stake normally restrains a licensee from vigorously asserting first amendment rights when he would thereby risk a denial of renewal on grounds that do not adequately assure strict constitutional review. The inhibition is especially likely since the burden is on the licensee to show that he can best serve the community.[140] Second, the Commission's approach of judging material by nonspecific standards of offense, indecency, and public interest creates a further risk that constitutionally protected expression will be suppressed. Although the FCC does not object to specific material in advance of its broadcast, past Commission responses to offensive programming serve to achieve the same inhibition, and, by their vagueness, jeopardize an even wider range of expression.[141] Nor is it a sufficient answer that generally the FCC simply encourages good taste broadcasting, without the use of penalties, by passing along letters or limiting a license renewal to one year in order to more carefully consider a station's programming. In *Bantam Books*, the Court responded to the state agency's defense that its actions constituted mere exhortation by finding that the record demonstrated an intent, through informal sanction, to suppress, and the consequent achievement of that end.[142] In the broadcast media as well, the effect of letters, limited renewals, and the like is to achieve indirect censorship by the industry itself.[143] The threat of future criminal proceedings was not easily ignored by book distributors, although they might have withstood a small number of prosecutions. A loss of a broadcast license renewal and consequently a profitable business is still less easily risked by the broadcaster. In spite of section 326, therefore, one finds in present media regulation, as in the *Bantam Books* situation, an administrative censorial system having the constitutional infirmities found in a system of prior restraints[144] — suppression, in the absence of

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"Due Process," 83 HARV. L. REV. 518, 519, 551 (1970); *cf.* A Quantity of Books v. Kansas, 378 U.S. 205, 213 (1964).

[140] *Cf.* Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[141] *See* Note, *supra* note 55, at 872.

[142] 372 U.S. at 66–68.

[143] *See* Jack Straw Mem'l Foundation, 24 F.C.C. 2d 266, 268–69, 19 P & F RADIO REG. 2D 611, 613 (1970) (dissenting opinion of Commissioner Johnson); S. MCCLELLAN, *supra* note 34, at 14–16.

[144] The argument that the FCC does not engage in "censorship" since it does not impose "prior restraints" on specific programming obscures the larger meaning of prior restraints. *Subsequent* punishment of protected speech is of course also barred by the first amendment. *See* Marks, *supra* note 62, at 988. Prior restraints are barred as one obvious form of unconstitutional censorship because

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clear standards, of expression whose constitutional status will generally not be judicially determined.[145]

The effective control over morally offensive programming by the FCC raises a further and related problem. An administrative agency, directed by political appointees with terms of limited duration, is likely to be subject to pressures from the executive and legislative branches.[146] In light of that political cast and the agency's assumed responsibility for evaluating programming, the Commission is apt to be less responsive than a court to constitutionally protected interests of free expression.[147] Since the

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they generally constitute an arbitrary limitation on speech without a judicial determination of whether the expression is protected; thus, the risk arises that protected as well as unprotected expression may be infringed. *See* M. SHAPIRO, FREEDOM OF SPEECH 154 (1966).

The central import of the judicial prohibition on prior restraints is that a judicial determination of the constitutional status of expression must either precede or immediately follow any governmental interference with expression. *See* Monaghan, *supra* note 139, at 532; *cf.* Reed Enterprises v. Clark, 278 F. Supp. 372, 381 (D. D.C. 1967) (three-judge court), *aff'd per curiam*, 390 U.S. 457 (1968). Regardless of whether restraints are prior, the crucial determination must be whether the Commission's practices, powers, and discretion together have a discouraging or "chilling" effect on expression. *See* Smith v. California, 361 U.S. 147, 153–54 (1959); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 827–28 (1969).

[145] *See* Freedman v. Maryland, 380 U.S. 51 (1965); M. SHAPIRO, *supra* note 144, at 155; Caldwell, *Censorship of Radio Programs*, 1 J. RADIO LAW 441, 442, 470 (1931); Comment, *Indirect Censorship of Radio Programs*, 40 YALE L.J. 967, 968 (1931).

The assurance of judicial determination or superintendence is lacking for radio and television licensees who cannot attain a successful result by simply defending specific programming in court as nonobscene, but must affirmatively prove that their overall programming best serves the public interest despite offense to some in the audience. In short, the Commission's undertaking extends beyond a determination of the constitutionality of specific material; any degree of offense tends to remain as a minus or black mark that places a licensee in a disadvantageous comparative position.

Mr. Justice Brennan has questioned whether the boundaries of morally offensive expression may ever be determined in the first instance in other than a judicial forum. Manual Enterprises v. Day, 370 U.S. 478, 497–98 (1962) (Brennan, J., concurring); *see* Monaghan, *supra* note 139, at 520. *See also* Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (per curiam) (requirement of prompt judicial decision as to alleged obscenity).

[146] *See, e.g., Hearings* 372 (statement of Senator Gurney); Note, *supra* note 32, at 883.

[147] *See* Freedman v. Maryland, 380 U.S. 51, 57–58 (1965); *cf.* Note, *supra* note 55, at 876.

Administrative agencies are institutionally different from courts; whatever the proceedings, Commissioners lack the personal independence granted federal judges by life tenure, and their limited terms and the more political basis for appointment deprive them of the judicial insulation that leads itself to taking a "long view."

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burden is on the licensee to persuade the FCC that his programming is in the public interest, the Commission essentially sits in judgment over what programming passes muster while it also has the task of promoting and furthering its own notions of what programming may best serve the public.

It seems most doubtful, then, that the Commission's procedures in regulating programming display "the necessary sensitivity to freedom of expression."[148] The standard of the public interest is vague,[149] and applicable to an overly broad [150] range of expression when left to the extensive discretion of the Commission.[151] The potential arbitrariness and the consequent uncertainty flow from unconstitutional procedures. These procedures are not justifiable as necessary corollaries of the application of administrative expertise to diverse fact situations, because the consequence is a deterrent effect on privileged behavior — expression protected by the first amendment.[152] Consequently, the effec-

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See Monaghan, *supra* note 139, at 522–23. *See also* Krislov, *supra* note 84, at 192–93.

[148] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[149] *Cf.* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682–85 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963).

[150] *Cf.* Freedman v. Maryland, 380 U.S. 51, 56 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69–70 (1963).

In *Bantam Books*, the Court noted that although the agency's supposed concern was limited to the availability of the offensive material to children, the resulting overly broad suppression would deprive the adult population of expression protected by the first amendment. *Id.* at 71. *See* Butler v. Michigan, 352 U.S. 380 (1957); p. 682 *supra*.

[151] *See* Note, *supra* note 55, at 872, 921; Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 828 (1969); *cf.* Note, *Governmental Regulation of the Program Content of Television Broadcasting*, 19 GEO. WASH. L. REV. 312, 333 (1951).

As the Supreme Court said in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504–05 (1952) (voiding statute prohibiting "sacrilegious" movies):

> [T]he censor is set adrift upon a boundless sea . . . . Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority.

[152] *See* Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

Regulation of program content might be acceptable if the standards for suppression had reference to a clearly determinate rule of privilege. This is arguably the case when a statute bans "obscenity," since the Supreme Court has developed a rule of privilege against which persons can test or at least evaluate intended expression, *see* Note, *supra* note 55, at 884. Even this test arguably falls short of supplying the necessary clarity. *Id.* at 885–86. The public interest standard provides no realistic guidelines at all — a licensee must simply guess at what the Commission might find offensive enough to conclude that the station is not serving the community satisfactorily. And there is no clear notion of how the

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tive prohibition of morally offensive programming on radio and television should be removed from the Commission's broad power to judge whether the performance of a licensee is in the public interest. Contextual regulation may be justified in the interest of giving members of the audience more control over what they choose to see.[153] Also, regulation to promote diversity of expression and access to these media may be justified [154] to reach and serve many sub-audiences and to avoid dominance of the airways by a limited range of social, moral, and political expression.

But determinations that programming is inappropriate for broadcast because of moral offensiveness should be reflected only in direct action that may be effectively tested in the courts. For example, the Commission may determine that section 1464 has been violated, and may exercise its statutory authority to impose a fine. This course was recently taken by the FCC, although the Commission's invitation to appeal the sanction to the courts was not accepted by the station.[155] If the expression is thought by the Commission to be particularly egregious, or if the station has committed frequent violations which are upheld in the courts, the FCC may exercise its far more drastic power of license revocation. While this sanction provides less flexibility, it also will at least provide a basis for a court determination, in the context of particular material, of the programming standards to be applied by the Commission. A decision in the courts in a particular case will give stations some indication of what they may safely broadcast. Such a decision, moreover, would hopefully open the media to a full range of privileged expression.

Commission will define this community. Moreover, the corresponding unlikelihood of judicial review and the placing of the burden on the licensee result in procedural overbreadth, *see id.* at 924, which lessens the possibility that the overbreadth and vagueness in the substantive standards may be removed by the courts through case-by-case adjudication.

[153] *See* pp. 683–65 *supra*.

[154] One may fruitfully compare *remedial* regulations, such as those designed to broaden the range of expression on the broadcast media, with *censorial* regulations, which prohibit certain kinds of expression. The first amendment overbreadth problems are not so severe with the former, since the effect is generally to further the exchange of ideas sought to be protected by the first amendment. The latter regulations, however, by excluding certain expression from that exchange, raise fears that the part excluded will not be precisely limited to unprotected expression. *See* Note, *supra* note 55, at 918–20.

[155] *See* Eastern Educational Radio, 24 F.C.C.2d 408, 18 P & F RADIO REG. 2D 860 (1970). The amount of the fine — only $100 — perhaps discouraged the station from seeking judicial review.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COHEN *v.* CALIFORNIA

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 299. Argued February 22, 1971—Decided June 7, 1971

Appellant was convicted of violating that part of Cal. Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct," for wearing a jacket bearing the words "Fuck the Draft" in a corridor of the Los Angeles Courthouse. The Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and affirmed the conviction. *Held:* Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. Pp. 8–12.

1 Cal. App. 3d 94, 81 Cal. Rptr. 503, reversed.

HARLAN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACK, J., joined, and in which WHITE, J., joined in part.

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SUPREME COURT OF THE UNITED STATES

No. 299.—October Term, 1970

Paul Robert Cohen, Appellant, *v.* State of California. } On Appeal From the Court of Appeal of California, Second Appellate District.

[June 7, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, . . . by . . . offensive conduct . . . ."[1] He was given 30 days' imprisonment. The

[1] The statute provides in full:

"Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court."

facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

> "On April 26, 1968 the defendant was observed in the Los Angeles County Courthouse in the corridor outside of Division 20 of the Municipal Court wearing a jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.
>
> "The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest." 1 Cal. App. 3d 94, 97–98; 81 Cal. Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element because, on the facts of this case, "[i]t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket." 1 Cal. App. 3d, at 99–100, 81 Cal. Rptr., at 506. The California Supreme Court declined review by a divided vote.[2] We brought the case here,

[2] The suggestion has been made that, in light of the supervening opinion of the California Supreme Court in *In re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727 (1970), is it "not at all certain that the California Court of Appeal's construction of § 415 is now the authorita-

postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U. S. 904. We now reverse.

The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U. S. C. § 1257 (2); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921).

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech," cf. *Stromberg* v. *California*, 283 U. S. 359

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tive California construction." *Post*, at —— (BLACKMUN, J., dissenting). In the course of the *Bushman* opinion, Chief Justice Traynor stated:

"[One] may . . . be guilty of disturbing the peace through 'offensive' conduct [within the meaning of § 415] if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence. (*People* v. *Cohen* (1969), 1 Cal. App. 3d 94, 101, 81 Cal. Rptr. 503.)" 463 P. 2d, at 730.

We perceive no difference of substance between the *Bushman* construction and that of the Court of Appeals, particularly in light of the *Bushman* court's approving citation of *Cohen*.

(1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. *United States* v. *O'Brien*, 391 U. S. 367 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. *Yates* v. *United States*, 354 U. S. 298 (1957).

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would

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have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U. S. 229, 236–237, and n. 11 (1963). Cf. *Adderly* v. *Florida*, 385 U. S. 39 (1966). No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[3]

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. *Roth* v. *United States*, 354 U. S. 476 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent re-

[3] It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18–19.

action. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." *Cantwell* v. *Connecticut*, 310 U. S. 296, 309 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. *Feiner* v. *New York*, 340 U. S. 315 (1951); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, *e. g.*, *Organization For a Better Austin v. Keefe*, — U. S. — (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, *e. g.*, *Rowan* v. *Postmaster General*, 397 U. S. 728 (1970), we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.*, at 738. The ability of government, consonant with the Constitution, to shut off discourse solely to protect

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others from hearing it is, in other words, 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.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Cf. *Keefe, supra.* Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person." Cf. *Edwards* v. *South Carolina, supra.*[4]

[4] In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing "the peace or quiet . . . by loud or unusual noise" and using "vulgar, profane or indecent language within the presence or hearing

II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U. S. 503, 508 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent

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of women or children, in a loud and boisterous manner." See n. 1 *supra*. This second quoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the "offensive conduct" portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

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and lawless, the States may more appropriately effectuate that censorship themselves. Cf. *Ashton* v. *Kentucky*, 384 U. S. 195, 200 (1966); *Cox* v. *Louisiana*, 379 U. S. 536, 550–551 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic.[5] We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our

[5] The *amici* urge, with some force, that this issue is not properly before us since the statute, as construed, punishes only conduct that might cause others to react violently. However, because the opinion below appears to erect a virtually irrebuttable presumption that use of this word will produce such results, the statute as thus construed appears to impose, in effect, a flat ban on the public utterance of this word. With the case in this posture, it does not seem inappropriate to inquire whether any other rationale might properly support this result. While we think it clear, for the reasons expressed above, that no statute which merely proscribes "offensive conduct" and has been construed as broadly as this one was below can subsequently be justified in this Court as discriminating between conduct that occurs in different places or that offends only certain persons, it is not so unreasonable to seek to justify its full broad sweep on an alternate rationale such as this. Because it is not so patently clear that acceptance of the justification presently under consideration would render the statute overbroad or unconstitutionally vague, and because the answer to appellee's argument seems quite clear, we do not pass on the contention that this claim is not presented on this record.

conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (concurring opinion of Brandeis, J.).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacaphony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters* v. *New York*, 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization For a Better Austin* v. *Keefe*, — U. S. —, — (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction.

First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner* v. *United States*, 322 U. S. 665, 675 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing

ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

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SUPREME COURT OF THE UNITED STATES

No. 299.—October Term, 1970

Paul Robert Cohen, Appellant, *v.* State of California. | On Appeal From the Court of Appeal of California, Second Appellate District.

[June 7, 1971]

Mr. Justice Blackmun, with whom The Chief Justice and Mr. Justice Black join.

I dissent, and I do so for two reasons:

1. Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street* v. *New York*, 394 U. S. 576 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 555 (1963); *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d, at 100, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.

2. I am not at all certain that the California Court of Appeal's construction of § 415 is now the authoritative California construction. The Court of Appeal filed its opinion on October 22, 1969. The Supreme Court of California declined review by a four-to-three vote on December 17. See 1 Cal. App. 3d, at 104. A month later, on January 27, 1970, the State Supreme Court in another case construed § 415, evidently for the first time. *In re Bushman*, 1 Cal. 3d 767, 463 P. 2d 727. Chief Justice Traynor, who was among the dissenters to his

court's refusal to take Cohen's case, wrote the majority opinion. He held that § 415 "is not unconstitutionally vague and overbroad" and further said:

> ". . . [T]hat part of Penal Code section 415 in question here makes punishable only wilful and malicious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature.
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> ". . . [It] does not make criminal any nonviolent act unless the act incites or threatens to incite others to violence. . . ." 1 Cal 3d, at 773, 463 P. 2d, at 731.

Cohen was cited in *Bushman,* 1 Cal. 3d, at 773, 463 P. 2d, at 730, but I am not convinced that its description there and *Cohen* itself are completely consistent with the "clear and present danger" standard enunciated in *Bushman.* Inasmuch as this Court does not dismiss this case, it ought to be remanded to the California Court of Appeal for reconsideration in the light of the subsequently rendered decision by the State's highest tribunal in *Bushman.*

MR. JUSTICE WHITE concurs in Paragraph 2 of MR. JUSTICE BLACKMUN'S dissenting opinion.

PALMETTO B/CASTING CO.

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In re Applications of	)	
	)	
E. G.Robinson, Jr., tra	)	
PALMETTO B/CASTING CO.	)	
(WDKD)	)	Docket No. 13985
Kingstree, South Carolina	)	File No. BR-2320
	)	
For Renewal of License	)	Docket No. 13986
and	)	File No. BL-7852
For License to Cover	)	
Construction Permit	)	

[¶53:24] Misrepresentation as ground for denial of renewal.

Misrepresentations by a licensee and statements calculated to deceive the Commission form sufficient grounds for denial of license renewal. Misrepresentations and false statements of a licensee, in and of themselves, were sufficient grounds for denial of renewal where there had been extensive misrepresentations during the investigatory stages and a continuing pattern of purposeful attempts to deceive the Commission during the hearing stage.

[¶53:24] Failure of licensee to exercise control over station operations.

Licensee had not exercised the appropriate degree of control and supervision over programming expected of a licensee and commensurate with his responsibility where the licensee was either ignorant of indecent and vulgar material broadcast over the station over a long period of time, or was aware of it and failed to do anything about it. Were this the only issue, a short-term renewal might be granted, but when considered in context with findings that the station had broadcast indecent and vulgar matter and had not adequately met the needs of the area and populations served, the licensee's failure to maintain effective control of the station had consequences extremely adverse to the public interest and was one factor leading to a denial of license renewal.

[¶10:307, ¶53:24] Commission's authority where obscene and indecent material has been broadcast.

The Commission has authority to find material broadcast over a radio station to have been "obscene, indecent or profane" in violation of 18 USC §1464, and to take that into account in its determination as to

whether or not to renew the station license. However, that question was not required to be decided where the case had been heard on issue as to whether the material broadcast was "coarse, vulgar, suggestive and susceptible of indecent, double meaning," terms which cannot be equated with "obscene" or "indecent."

[¶10:307, ¶10:309, ¶10:326, ¶53:24] Authority of Commission to consider programming.

The Commission in discharging its licensing functions may take into account under the public interest standard, activities which may also be violations of federal laws. The Commission must find that public interest would be served by a grant before it can grant or renew a license. It may, in passing on a renewal application, review the station's overall operation, including its programming record, in order to determine whether renewal is in the public interest. This is not censorship in violation of Section 326 of the First Amendment. Certainly the Commission may consider, in passing on a renewal application, whether the station has carried extensive amounts of coarse, vulgar, suggestive, double-meaning programming. The Commission may not, however, decide on the basis of its own taste or preference for what it believes should be broadcast, whether material is vulgar, suggestive, coarse or susceptible of indecent double meaning. Renewal cannot be denied on programming issues where the matter is a close one, susceptible to reasonable interpretation either way. The Commission can act only where the record evidence establishes a patently offensive course of broadcasts — where, by any standards, however reasonably weighted for the licensee, the broadcasts are obviously offensive or patently vulgar. Such a finding is made where material broadcast is, on its face, coarse, vulgar, suggestive and of indecent double meaning, and was broadcast during a substantial portion of the broadcast day over a period of many years. Denial of renewal is justified on this ground in itself.

[¶53:24] Over-commercialization.

A finding that programming of a station was frequently saturated with commercial announcements, leading to the conclusion that the licensee tailored his operation more to the convenience of his advertisers than to the need of the public, standing alone might have resulted in a short-term renewal, but when considered along with other issues is an additional reason for denying renewal.

[¶53:24] Discretion as to renewal of license.

Renewal of license will not be granted where the licensee has been guilty of misrepresentation and attempts to deceive the Commission, has failed to maintain proper control of station operations, has permitted the broadcast of vulgar, coarse and suggestive material and has allowed over-commercialization of the station. The licensee's unfitness to be a licensee is clearly established and the fact that the Commission did not revoke or fail to renew licenses of network stations or licensees that broadcast "rigged" quiz shows is not a reason for granting renewal in this case. That the station is the only one in the community is also not controlling. Other persons are free to apply for a construction permit and the Commission would expedite action on any such applications.

Appearances

Harry J. Daly, Lenore Ehrig, and R. E. Harrell, on behalf of Palmetto Broadcasting Company (WDKD); and P. W. Valicenti, and Donald L. Rushford, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

By the Commission: (Commissioner Cross not participating).

1. This proceeding requires determinations to be made on the applications of E. G. Robinson, Jr., tra Palmetto Broadcasting Company (WDKD) for renewal of the license of Station WDKD, Kingstree, South Carolina, and for a license to cover construction permit for a change in that station's antenna system.

2. On May 11, 1960, the Commission wrote Robinson that it had received complaints that certain programs broadcast from Station WDKD by one Charlie Walker allegedly contained vulgar, suggestive material susceptible of double meanings with indecent connotations, and that tape recordings of some of these programs were in the Commission's possession. After replies from and on behalf of Robinson had been received, the Commission designated the subject applications for hearing.

3. The hearing order cites correspondence and information concerning the Charlie Walker programs and statements made by the licensee with respect thereto and states that it appears that the licensee had misrepresented the facts or lacked candor and that he had not exercised reasonable control and supervision over programming. The issues, as finally amended, are:

"1. To determine whether in its written or oral statements to the Commission with respect to the above matters, the licensee

misrepresented facts to the Commission and/or was lacking in candor;

"2. To determine whether the licensee maintained adequate control or supervision of programming material broadcast over his station during the period of his most recent license renewal;

"3. To determine whether the licensee permitted programming material to be broadcast over Station WDKD on the Charlie Walker show, particularly during the period between January 1, 1960 and April 30, 1960, which program material was coarse, vulgar, suggestive, and susceptible of indecent, double meaning;

"4. To determine the manner in which the programming broadcast by the licensee, during the period of his most recent license renewal has met the needs of the areas and populations served by the station;

"5. To determine whether in light of the evidence adduced with respect to the foregoing issues, the licensee possesses the requisite qualifications to be a licensee of the Commission;

"6. To determine whether in light of the evidence adduced with respect to the foregoing issues, a grant of the above-captioned applications would serve the public interest, convenience or necessity."

4. Hearing Examiner Thomas H. Donahue in his Initial Decision released on December 12, 1961, concluded that (1) the licensee did misrepresent facts to the Commission and was lacking in candor; (2) that he failed to exercise adequate control over the station's programming; (3) that obscene, coarse, vulgar and suggestive material susceptible of indecent double meaning was broadcast by Walker over the station; and (4) that in many areas of community broadcast needs, the station had failed to fulfill its responsibility. He concluded that Robinson lacked the qualifications to be a licensee and that the applications should be denied.

5. Exceptions to the Initial Decision were filed and oral argument thereon was held before the Commission en banc on June 8, 1962. WDKD opposes the Initial Decision and the result therein obtained. The Commission's Broadcast Bureau supports the ultimate conclusion and is in substantial agreement with the findings but excepts to certain aspects of the Initial Decision. Our rulings on the exceptions appear in the Appendix to this Decision.

6. The findings have been examined in light of the exceptions and we find them substantially complete and accurate; 1/ accordingly, they are adopted subject

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1/ Indeed, WDKD points out at page 19 of its Brief in Support of Exceptions that very few exceptions have been taken to the Examiner's findings upon the ground of inaccuracy, and that most of the exceptions are based upon his failure to make additional and more complete findings.

to the modifications contained in this Decision and the Appendix. The conclusions also have been reviewed in light of the exceptions and while we are in accord with the ultimate result proposed, some comment is warranted regarding questions of law raised by the parties with respect to the treatment of matters required to be dealt with under the issues.

7. There is controversy over the scope and interrelation of Issues 1, 2 and 3 regarding evidence of the Charlie Walker programs that is admissible thereunder. Issue 1 contemplates Robinson's representations and explanations in correspondence, his renewal application and testimony with respect to his knowledge of the objectionable content of the Charlie Walker programs. It imposes no limitation on the inquiry pursuant thereto as to the dates on which such broadcasts occurred. Pertinent to Issue 2 are matters concerning Robinson's control over programming during the period of his most recent license renewal (December 1, 1957 to December 1, 1960). Issue 3 relates to whether material of the type described therein was broadcast by Walker with particular emphasis on the period between January 1, 1960 and April 30, 1960. Evidence as to the substance of the Walker programs throughout the most recent license renewal is relevant to Issue 2 as reflecting on Robinson's exercise of control over programming. Evidence of Walker's programs in so far as it bears on the question of Robinson's knowledge of the nature thereof (Issue 1) is not confined to the period set forth in Issue 3, nor to the most recent license renewal.

8. WDKD's exceptions to the effect that it was not proved that Robinson practiced deceit on the Commission regarding his awareness of the matters in controversy are not well taken. As a threshold determination to Issue 1, it appears conclusive from the record that the material quoted in Findings 26, 32 and 38 was in fact broadcast by Walker between October 27, 1959 and April 25, 1960 and that comparable material had been broadcast preceding that period.

9. Robinson's response (through his counsel) to the Commission's May 11 letter was a denial of knowledge of having broadcast any vulgar or suggestive programs. After excerpts from tapes of the Charlie Walker shows were reported to him in a letter of June 8, 1960 by his counsel, Robinson wrote the Commission on June 10, 1960 that "I was not acquainted with the nature of the statements made by Charlie Walker and the show on the air at my radio station." (Emphasis added) 2/ In the ensuing hearing he admitted having

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2/ The contention by WDKD that this denial of knowledge related exclusively to the eight items excerpted in counsel's June 8 letter is not persuasive. The quoted language plainly indicates Robinson was not restricting his disclaimer to those eight items but rather to Walker's performance in general. If it was in fact Robinson's intention to limit his denial to just those few items then it constituted a lack of candor on his part since, as he later admitted in testimony, he did know of other questionable material broadcast by Walker about which he was prompted to admonish him on numerous occasions. In light of the Commission's inquiry there existed a duty to disclose such matters as he knew of in this respect.

occasionally heard Walker relate dubious items and use misnomers for cities and towns in the locale (in his opinion, the material did not justify his doing something about it). However, he persisted in denying that he had heard numerous other vulgar and suggestive stories and remarks proven on the record to have been made, or that he had received complaints regarding the program from persons who testified that they made or relayed such complaints to him.

10. The record fully corroborates the conclusion that Robinson lacked candor and misrepresented facts with respect to his knowledge and notice of the broadcast material in question. The record shows that over a considerable period of time he had been made aware of such material through criticisms and complaints directly received by him or conveyed to him by employees and acquaintances. Moreover, circumstances brought out on the record suggest that he knew first-hand more about the coarseness and suggestiveness of Walker's material than he professed to the Commission in his correspondence. 3/

11. The Initial Decision indicates that Robinson's lack of candor included matters in addition to those encompassed in Issue 1. In this connection it is noted that he misrepresented facts under Issue 2 (pertaining to his control over the operation) such as the managing and staff arrangements and assignments, the frequency and regularity with which staff meetings were held, the circulation among employees and posting of a policy statement to assure against recurrence of Walker-type broadcast material, and, under Issue 4 (pertaining to programming) facts regarding the number and frequency of commercial spot announcements and overall program content.

12. Regarding the question of credibility as between Robinson and other witnesses who testified against him, the Examiner, who observed the demeanor of the witnesses, stated that he had "no reasonable basis to doubt the veracity of those whose testimony was at odds with that given by Robinson. He does have cause to doubt that on the stand Robinson testified to the whole truth." On the basis of the record, we agree that Robinson knew the true character of the broadcasts and that his denials thereof were purposeful misrepresentations and false statements.

13. Misrepresentations by a licensee and statements calculated to deceive the Commission form sufficient grounds for denial of an application for renewal of license. Balboa Radio Corp., 6 RR 649 (1953); Capitol Broadcasting Co., 29 FCC 677, 20 RR 979 (1960). This holding is independent of any

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3/ Robinson himself testified that even prior to receipt of the Commission's May 11 letter he had conferred with Walker and warned him on at least ten occasions about his programs. He also admitted having heard Walker use at least three times the suggestive term "let it all hang out." Additionally, the record overwhelmingly establishes that Walker's programs had a general community reputation for vulgarity, suggestiveness, filth and coarseness. It is inconceivable that so many persons in the small town of Kingstree (approximately 3,847 population) and surroundings could know about this but Robinson did not.

determination under Issue 3 as to the exact nature or effect of Walker's utterances or the consequences attaching to the licensee as a result thereof, since as the Supreme Court has stated, "[t]he fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." (FCC v. WOKO, 329 U.S. 223 (1939); see also FCC v. Broadcasting Service Organization, Inc., 84 U.S. App. D.C. 152, 171 F.(2d) 1007 [4 RR 2093] (1948), cert. den. 337 U.S. 901 (1949) and Eleven-Ten Broadcasting Corporation, 32 FCC 706 [22 RR 699] (1962)). We find that in the circumstances of this case, the licensee's misrepresentations and false statements, in and of themselves, constitute grounds for denial of WDKD's application for renewal of license. The Commission cannot tolerate extensive misrepresentations such as occurred here during the investigatory stages; when to this there is added the continuing pattern of Robinson's purposeful attempts to deceive the Commission during the hearing stage, there emerges a clear-cut case for the application of the WOKO principle. And, in so holding we wish to make clear our disagreement with the Examiner that Issue 3 is "pivotal"; as we have found, Issue 1 is just as important to the public interest judgment to be made here.

14. The record amply demonstrates that during the last renewal period Robinson did not exercise the appropriate degree of control and supervision over programming expected of a licensee and commensurate with his responsibility. For had he done so, and done so properly, Walker could not have continued for such a protracted period to broadcast his material undetected by Robinson, as Robinson would have us believe. The laxity of the licensee is supported by his very claim that he was unfamiliar with the vulgarity of the Walker shows. The lack of control and supervision clearly proven on the record dictates that Issue 2 also must be answered, as the Examiner did, adversely to WDKD. To the extent that Robinson pleads ignorance of the true character of the material broadcast by Charlie Walker (although the record as a whole indicates otherwise and we have so found to the contrary - see paragraphs 11, 13) the Commission's statements in Mile High Stations, 28 FCC 795, 20 RR 345 (1960) are especially pertinent:

> "Maintaining ultimate control over programming constitutes a most fundamental licensee obligation; and a licensee's unfamiliarity with its program content reflects an indifference tantamount in effect to abdication of control."

Thus, accepting, arguendo, Robinson's plea of ignorance for the purposes of this issue, Robinson clearly did not exercise proper control over WDKD's programming.

15. We note that the Examiner found nothing advanced at the hearing acceptable to relieve Robinson of responsibility for programming. The fact of a serious automobile accident involving Robinson in November, 1957 and the incapacitation and confinement for recuperation which followed for approximately a year are urged upon us as having prevented him from exercising diligent and attentive control. By his own testimony, however, Robinson listened to the Charlie Walker program during that time and he was visited by and communicated almost daily in the hospital with the

employee he claims was second in charge to him at the station. (It was also shortly before his release from the hospital that a complaint was made to him about the programs). Effective control could have been utilized under these circumstances if Robinson were so disposed. Moreover, his incapacitation did not exist for the entire duration of the renewal period and certainly not during the time in which the evidence irrefutably indicated coarse, suggestive and vulgar material was broadcast (October 1959 through April 1960). We view in the same vein the contention that impaired hearing caused by the accident prevented Robinson from overhearing and monitoring Walker's programs over the studio loud-speaker adjacent to his office. By his own testimony (Tr. 225) he could hear that speaker "very well."

16. The Commission regards maintaining control over programming as a most fundamental obligation of the licensee. Robinson's failure to meet that fundamental obligation raises, therefore, a most serious question as to whether his renewal application should be granted. Were this issue considered by itself, it may be that a short-term renewal might be appropriate in the particular circumstances of this case. But when this issue is considered together with Issues 3 and 4, we find that the consequences of Robinson's failure to maintain proper control over programming were extremely adverse to the public interest. Accordingly, we hold that upon the basis of the record as a whole, including the facts showing the consequences of Robinson's failure, renewal should be denied.

17. We turn now to Issue 3. WDKD argues regarding Issue 3 that since 18 U.S.C. §1464 makes the broadcast of obscene and indecent material a crime 4/ and since only the courts may adjudicate criminal conduct, the Commission would exceed its authority were it to find the material in issue "obscene" or "indecent." On the other hand, were we to avoid determinations thereon but still deny the applications on the basis of impropriety of the material in terms other than "obscene" or "indecent" we would be, according to WDKD, " . . . straying into the area which the courts have held to be clearly marked off-limits by the First Amendment."

18. The Examiner rejected WDKD's arguments and concluded that the material was "obscene and indecent and [certainly] coarse, vulgar, suggestive and susceptible of indecent double meaning." He did not make any distinction for the purposes of this proceeding between the adjectives used in Issue 3 and those used in 18 U.S.C. §1464.

19. WDKD is wrong in its assertion that the Commission cannot find the material in issue to violate Section 1464 of Title 18 and to take that into account in its determination as to whether or not to renew. FCC v. American Broadcasting Co., 347 U.S. 284, 289, n. 7 [10 RR 2030, 2033-34], clearly

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4/ That section provides that "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

establishes the authority to do so. 5/ The Communications Act itself imposes upon the Commission several obligations with respect to this specific section of the Criminal Code. See Sections 312(a), (b); Section 503(b)(1)(E). But while we have the authority to base our decision on Section 1464, the short answer to this entire question is that the question of violation of this section is not encompassed within Issue 3. The issue has been drawn not in terms of violation of Section 1464 or of the statutory language ("obscene, indecent or profane") but rather in different terms — "coarse, vulgar, suggestive, and susceptible of indecent, double meaning." We do not think these terms can be equated with the statutory "obscene" or "indecent." See note 7, infra.

20. We turn now to WDKD's second argument (see paragraph 17). Before dealing with the essence of that argument, we shall discuss several pertinent principles which we believe are now well established. First, there is no question but that the Commission, in discharging its licensing functions, may take into account under the public interest standard activities which may also be violations of Federal laws. See National Broadcasting Co. v. United States, 319 U.S. 190, 223; Mansfield Journal Co. v. FCC, 180 F.(2d) 28 [5 RR 2074e] (C.A.D.C.). Second, there is no question but that the Commission is charged with the responsibility of insuring that a broadcast licensee's operation is in the public interest. It can grant permits and renewals only upon a finding that the public interest would be served by the grant. Sections 309(a), 307(d). Accordingly, both the Commission and its predecessor have, at the time of renewal, reviewed the station's overall operation, including its programming record, in order to determine whether a renewal is in the public interest. See Report and Statement of Policy Re: Commission En Banc Programming Inquiry, supra. Such review is called for by the statute and its legislative history and is supported by all the judicial pronouncements. 6/ A denial of renewal of license upon the grounds that the applicant's overall past programming has not been in the public interest, if supported by the record of the case, is not

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5/ The Commission's rule in that case was based on 18 U.S.C. §1304 (the radio lottery statute). The Court there stated (n. 7): "The 'public interest, convenience, or necessity' standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding. In any event, the standard is sufficiently broad to permit the Commission to consider the applicant's past or proposed violation of a federal criminal statute especially designed to bar certain conduct by operators of radio and television stations." Cf., also Southern S.S. Co. v. NLRB, 316 U.S. 31, 47.

6/ See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190; Regents of the University System of Georgia v. Carroll, 338 U.S. 586, 598 [5 RR 2083]; Farmers Educational and Cooperative Union v. WDAY, Inc., 360 U.S. 525, 534-5 [18 RR 2135]; Bay State Beacon, Inc. v. FCC, 84 U.S. App.D.C. 216, 217, 171 F.(2d) 826, 827 [4 RR 2109]; Johnston Broadcasting Co. v. FCC, 85 U.S.App.D.C. 40, 48, 175 F.(2d) 351, 359 [4 RR 2138]; Independent Broadcasting Co. v. FCC, 89 U.S.App.D.C. 396, 193 F.(2d) 900 [7 RR 2066], cert. den. 344 U.S. 837; Wrather-Alvarez Broadcasting, Inc. v. FCC, 101 U.S.App.D.C. 324, 329, 248 F.(2d) 646, 651 [15 RR 2108].

censorship in violation of Section 326 or of the First Amendment. See KFKB Broadcasting Assn. Inc. v. FRC, 60 App.D.C. 79, 47 F.2d 670; Trinity Methodist Church, South v. FRC, 61 App.D.C. 311, 62 F.(2d) 850, cert. den., 284 U.S. 685, 288 U.S. 599.

21. With this as background, we consider WDKD's argument that at the time of renewal, the Commission may not constitutionally consider whether the station has carried extensive amounts of coarse, vulgar, suggestive, double-meaning programming. If this argument is correct, a station could present, for 75% or 80% of its broadcast day, entertainment which consists of records interspersed with the type of smut set out in the Examiner's Initial Decision (paragraph 38); and it would nevertheless be no concern of the Commission at the time of renewal. Inasmuch as record-disc jockey type of entertainment is so popular and widespread on radio, the argument comes down to this: Radio could become predominantly a purveyor of smut and patent vulgarity — yet unless the matter broadcast reached the level of obscenity under 18 U.S.C. §1464, 7/ the Commission even though charged to issue licenses only when it is in the public interest, would be powerless to prevent this perversion or misuse of a valuable national resource. The housewife, the teen-ager, the young child — all — would simply be subjected to the great possibility of hearing such patently offensive programming whenever they turn the dial. It would truly be an oddity that this Commission could deny a permit to an applicant who chose to "plug into" the network (and thus not to serve the local needs of his area) 8/ and yet would have to grant a permit to one who proposed to broadcast, for a large part of the day, programming of the type described in paragraph 38.

22. We do not slough aside the argument advanced here by WDKD. On the contrary, we recognize the great importance of the First Amendment and censorship (Section 326) considerations here. Programming Statement of July 29, 1960, supra; United States v. Paramount Pictures, 334 U.S. 131, 166; Superior Films, Inc. v. Department of Education of State of Ohio, 346 U.S. 587, 589. But this does not mean that the Commission has no authority to act under the public interest standard. Rather, it means that the Commission cannot substitute its taste for that of the broadcaster or his public — that it cannot set itself up as a national arbiter of taste. Such wholly improper action by the Commission would be disastrous to our system of broadcasting and would not be tolerated by the courts or by the Congress. Turning to the specific issue before us, this means that we cannot decide that some pattern of broadcasts is "vulgar," "suggestive," "coarse," and "susceptible of indecent, double meaning"

7/ The legal considerations applicable to 18 U.S.C. §1464 are not clear, because of the dearth of court decisions dealing with this section. See Report and Statement Re: Commission En Banc Programming Inquiry, 25 F.R. 7291, 20 Pike & Fischer R.R. 1901, 1905-06; cf. Burstyn v. Wilson, 343 U.S. 495, 502, 503 ("Each method [of communication] tends to present its own peculiar problems"); Manual Enterprises, Inc. v. Day, U.S. , decided June 25, 1962.

8/ Simmons v. FCC, 83 U.S.App.D.C. 262, 169 F.(2d) 670 [4 RR 2023], cert. den. 354 U.S. 846.

on the basis of our own taste or preference for what we believe should be broadcast. What we must find is that the broadcasts in question are flagrantly offensive — that by any standard, however reasonably weighted for the licensee, taking into account the record evidence, the broadcasts are obviously offensive or patently vulgar. In short, the licensee necessarily and properly has wide discretion in choosing every type of programming to be broadcast to meet the needs and interests of the public in his area. Programming Statement of July 29, 1960. It follows that in dealing with the issue before us, we cannot act to deny renewal where the matter is a close one, susceptible to reasonable interpretation either way. We can only act where the record evidence establishes a patently offensive course of broadcasts. It is, we think, incorrect to say that in so acting under the public interest standard, the Commission poses any danger to free expression in the broadcasting field. Our whole history establishes that this is not so — that we have acted with great circumspection in this sensitive area, and that where the drastic action of denial of renewal has been used, it has been because the situation itself was a drastic or flagrant one. In the circumstances, we think that the greater danger to broadcasting would be in our failure to protect the public interest; and we note that there is evidence in the record by local broadcasters which would support that conclusion (paragraphs 34-35, Initial Decision).

23. Clearly, this case presents that flagrant situation calling for drastic administrative action. The material broadcast, examples of which are set out in paragraph 38 of the Initial Decision (and see also paragraphs 28, 32; FCC Exhibit 2), is not "buffoonery and attempted bucolic badinage," as WDKD claims. We find that such material, on its face, is coarse, vulgar, suggestive and of indecent double meaning. By any standards, it is flagrantly and patently offensive in the context of the broadcast field (see paragraph 21), and thus contrary to the public interest. In this connection, we have also taken into account the testimony of the witnesses who heard the broadcasts. 9/ We further note the evidence showing that the Charlie Walker program was on the air for a substantial portion of the broadcast day (25%) over a lengthy period of time (1949-1952; 1954 to June 1960), and that this type of flagrant vulgarity was heard outside the period between January 1, 1960 and April 30, 1960; in short, the record reasonably establishes, and we so find, that this was the manner in which the station was operated for a substantial period of its broadcast day over many years. Thus, we are not saying that a single off-color joke or program suffices to taint an entire operation. That question is clearly not presented by the record before us. We are saying that this licensee's devotion of so substantial a portion of broadcast time to the type of programming set forth in the Examiner's Initial Decision is inconsistent with the public interest and, indeed, represents an intolerable waste of the only operating broadcast facilities in the community — facilities which were granted to this licensee to meet the needs and interests of the Kingstree area. In the circumstances, on this issue alone (No. 3), we find that a denial of the application for renewal of license is called for.

9/ WDKD's contention that contemporary community standards of Kingstree were not offended as evidenced by the general acceptance of the Walker programs throughout the area is inaccurate. The record herein indicates no general acceptance of the Walker fare. On the contrary, the preponderance of testimony shows the programs were unacceptable.

24. As to Issue 4, it is sufficient to say that from the record, and as the Examiner found, WDKD's programming was frequently saturated with commercial announcements. The conclusion is compelling that Robinson tailored his operation more to the convenience of his advertiers than to the need of the public. Standing alone, this issue, on the facts of this case, might have resulted only in a short-term renewal of license. As it is, our conclusion on Issue 4 bolsters the ultimate conclusion we reach that a grant of renewal would not be in the public interest.

25. In sum, we find that on Issue 1 (misrepresentation), standing alone, WDKD's license cannot be renewed. So also, renewal must be denied on Issue 3, in and of itself. When to the public interest conclusions on these issues, there is added the unfavorable resolution to WDKD of Issues 2 and 4, the case is one overwhelmingly calling for denial of renewal. We thus disagree with the Examiner that the matter of renewal is a close one and should be resolved against WDKD in order to set an example to the industry. In our judgment, the facts of this case and the public interest judgment to be made in this case clearly call for the result we have reached.

26. Finally, we find unconvincing WDKD's plea for leniency on the grounds that there was no revocation of licenses of the network stations and licensees that broadcast "rigged" quiz shows, and upon the alleged reformation of Robinson as a consequence of this hearing. Without detailing the differences in the facts of the "rigged" quiz show situations vis-à-vis the present situation, the short answer is that, as stated, the record here is unfavorable to Robinson on every issue. Further, Robinson's improper activities as to representations to the Commission (Issue 1) continued during the very hearing itself. His unfitness as a licensee of the Commission is, we think, unqualifiedly established on this record. It is concluded, therefore, that Robinson failed to sustain his burden of proof under the Act and that renewal of the license of Station WDKD would not serve the public interest, convenience and necessity.

27. We recognize that WDKD is the sole operating radio facility in Kingstree but we certainly will not assume, however, that grants to Mr. Robinson is the only means by which local radio service can be brought to Kingstree. And, in the circumstances, we would of course expedite action or utilize other appropriate procedures to bring early service to Kingstree. In any event, however, the result we have reached in this proceeding is required by our judgment of the over-all public interest.

28. Accordingly, it is ordered, this 25th day of July, 1962, that the applications of E. G. Robinson, Jr., d/b/a Palmetto Broadcasting Company for renewal of the license of Station WDKD, Kingstree, South Carolina, and for a license to cover construction permit, are denied; and it is further ordered, that in order to enable E. G. Robinson, Jr., d/b/a Palmetto Broadcasting Company to wind up his affairs, he is authorized to operate Station WDKD until September 25, 1962.

Released: July 26, 1962

PACIFICA FOUNDATION

FCC 64-43
45386

In re Applications of	)	
	)	
PACIFICA FOUNDATION	)	
	)	
For Initial License of	)	
Station KPFK,	)	File No. BLED-374
(noncommercial educational FM), at	)	
Los Angeles, California	)	
	)	
For Renewal of Licenses of	)	
Stations KPFA-FM and KPFB	)	File Nos. BRH-723
(educational FM), at	)	BRED-115
Berkeley, California, and	)	BRH- 13
Station WBAI-FM,	)	
New York, New York	)	
	)	
Consent to Transfer of Control	)	File No. BTC-4284

Adopted: January 22, 1964
Released: January 22, 1964

[¶10:307, ¶53:24] Programming; objectionable matter; responsibilities of licensee and Commission.

The Commission, in reviewing the overall performance of an applicant for renewal of license, is not concerned with individual programs, except to the extent that the recognized exceptions to censorship apply (obscenity, profanity, indecency, programs inciting to riots, programs designed toward or inducing commission of crime, lotteries, etc.). Matters essentially of licensee taste or judgment are not a concern of the Commission at any time. A few isolated instances of possibly objectionable programming over a four-year period do not raise any substantial question at renewal time. Only if a substantial pattern of operation inconsistent with the public interest is shown will the Commission take action. Pacifica Foundation, 1 RR 2d 747 [1964].

[¶10:303, ¶10:307, ¶10:326, ¶53:24] No censorship of "provocative programming."

The Commission may not, through its licensing power, rule off the airwaves programming which some listeners find offensive. Were this the case, only the wholly inoffensive, the bland, could be broadcast. It is within the discretion of the licensee to determine what type of programming it should

broadcast. The licensee's judgment in this freedom of speech area is entitled to very great weight and the Commission, under the public interest standard, will take action against the licensee at renewal time only where the facts of the particular case, established in a hearing record, flagrantly call for such action. The Commission is charged under the Act with "promoting the larger and more effective use of radio in the public interest," and must avoid inhibiting broadcast licensees' efforts at experimenting or diversifying their programming. Pacifica Foundation, 1 RR 2d 747 [1964].

[¶10:307, ¶10:308, ¶10:309, ¶53:24] Right to inquire into Communist affiliations.

It is relevant and important for the Commission to determine in appropriate cases whether applicants, or the principals of applicants, for a broadcast license or radio operator license, are members of the Communist Party or of organizations which advocate or teach the overthrow of the Government by force or violence. However, no basis for further inquiry into such matters was found in the present case. Pacifica Foundation, 1 RR 2d 747 [1964].

[¶10:310, ¶53:24] Unauthorized transfer of control.

Where control of a licensee had been vested in Executive Members, who elected a Committee of Directors who in turn elected officers and controlled the licensee's activities, a change in by-laws abolishing the Executive Membership and the Committee of Directors and vesting control in a Board of Directors who elected officers, amounted to a transfer of control, even though it may have been true that the Directors had controlled the licensee even before the change. However, failure to file an application for approval of transfer of control was excusable, and there was no attempt to conceal or misrepresent facts. Renewal of license and approval of transfer of control were therefore granted. Pacifica Foundation, 1 RR 2d 747 [1964].

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioner Lee concurring and issuing a statement).

1. The Commission has before it for consideration the above pending applications of the listed broadcast stations licensed to Pacifica Foundation. There are three aspects to our consideration: (a) certain programming issues

raised by complaints; (b) issues of possible Communist Party affiliation of principals of Pacifica; and (c) a question of possible unauthorized transfer of control. We shall consider each in turn.

2. The Programming Issues. The principal complaints are concerned with five programs: (i) a December 12, 1959 broadcast over KPFA, at 10 p.m., of certain poems by Lawrence Ferlinghetti (read by the poet himself); (ii) The Zoo Story, a recording of the Edward Albee play broadcast over KPFK at 11 p.m., January 13, 1963; (iii) Live and Let Live, a program broadcast over KPFK at 10:15 p.m. on January 15, 1963, in which eight homosexuals discussed their attitudes and problems; (iv) a program broadcast over KPFA at 7:15 p.m. on January 28, 1963, in which the poem, Ballad of the Despairing Husband, was read by the author Robert Creeley; and (v) The Kid, a program broadcast at 11 p.m. on January 8, 1963, over KPFA, which consisted of readings by Edward Pomerantz from his unfinished novel of the same name. The complaints charge that these programs were offensive or "filthy" in nature, thus raising the type of issue we recently considered in Palmetto Broadcasting Co., 33 FCC 250 [23 RR 483], 34 FCC 101 [23 RR 486]. We shall consider the above five matters in determining whether, on an overall basis, the licensee's programming met the public interest standard laid down in the Communications Act. 1/ Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Pike & Fischer RR 1901.

3. When the Commission receives complaints of the general nature here involved, its usual practice is to refer them to the licensee so as to afford the latter an opportunity to comment. When the Commission reviews, on an overall basis, the station's operation at the time of renewal, it thus has before it a complete file, containing all the sides of any matter which may have arisen during the license period. Specifically, with respect to the programming issue in this case, the Commission, barring the exceptions noted in the Programming Statement (supra, at page 1909), is not concerned with individual programs – nor is it at any time concerned with matters essentially of licensee taste or judgment. Cf. Palmetto Broadcasting Co., supra, paragraph 22. As shown by the cited case, its very limited concern in this type of case is whether, upon the overall examination, some substantial pattern of operation inconsistent with the public interest standard clearly and patently emerges. Unlike Palmetto where there was such a substantial pattern (id. at paragraph 23; see paragraph 7, infra), here we are dealing with a few isolated programs, presented over a four-year period. It would thus appear that there is no substantial problem, on an overall basis, warranting further inquiry. 2/ While this would normally conclude the matter,

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1/ The Commission may also enforce the standard of Section 1464 of Title 18 (dealing with "obscene, indecent, or profane language"). See Sections 312(a), (b); Section 503(b)(1)(E). In our view, enforcement proceedings under Section 1464 are not warranted, and therefore, no further consideration need be given this section.

2/ While, for reasons developed in this opinion, it is unnecessary to detail the showings here, we have examined the licensee's overall showings as to its stations' operations and find that those operations did serve the needs and interests of the licensee's areas. Programming Statement, supra, at pages 1913-16. In this connection, we have also taken into account the showing made in the letter of April 16, 1963.

we have determined to treat the issues raised by Pacifica's response to the complaints, because we think it would serve a useful purpose, both to the industry and the public. We shall therefore turn to a more detailed consideration of the issues raised by the complaints as to these five programs. Because of Pacifica's different response to the complaints as to (i) and (iv), paragraph 2 above, we shall treat these two broadcasts separately (see paragraphs 6-7, infra).

4. There is, we think, no question but that the broadcasts of the programs, The Zoo Story, Live and Let Live, and The Kid, lay well within the licensee's judgment under the public interest standard. The situation here stands on an entirely different footing than Palmetto, supra, where the licensee had devoted a substantial period of his broadcast day to material which we found to be patently offensive – however much we weighted that standard in the licensee's favor – and as to which programming the licensee himself never asserted that it was not offensive or vulgar, or that it served the needs of his area or had any redeeming features. In this case, Pacifica has stated its judgment that the three above-cited programs served the public interests and specifically, the needs and interests of its listening public. Thus, it has pointed out that in its judgment, The Zoo Story is a "serious work of drama" by an eminent and "provocative playwright" – that it is "an honest and courageous play" which Americans "who do not live near Broadway ought to have the opportunity to hear and experience . . . " Similarly, as to The Kid, Pacifica states, with supporting authority, that Mr. Pomerantz is an author who has obtained notable recognition for his writings and whose readings from his unfinished novel were fully in the public interest as a serious work meriting the attention of its listeners; Pacifica further states that prior to broadcast, the tape was auditioned by one of its employees who edited out two phrases because they did not meet Pacifica's broadcast standards of good taste; and that while "certain minor swear words are used, . . . these fit well within the context of the material being read and conform to the standards of acceptability of reasonably intelligent listeners." Finally, as to the program, Live and Let Live, Pacifica states that "so long as the program is handled in good taste, there is no reason why subjects like homosexuality should not be discussed on the air"; and that it "conscientiously believes that the American people will be better off as a result of hearing a constructive discussion of the problem rather than leaving the subject to ignorance and silence."

5. We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera. No such drastic curtailment can be countenanced under the Constitution, the Communications Act, or the Commission's policy, which has consistently sought to insure "the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" (Editorializing Report, 13 FCC 1246, 1248 [25 RR 1901]). In saying this, we do not mean to indicate that those who have complained about the foregoing programs are in the wrong as to the worth of these programs and should listen to them. This is a matter

solely for determination by the individual listeners. Our function, we stress, is not to pass on the merits of the program – to commend or to frown. Rather, as we stated (paragraph 3), it is the very limited one of assaying, at the time of renewal, whether the licensee's programming, on an overall basis, has been in the public interest and, in the context of this issue, whether he has made programming judgments reasonably related to the public interest. This does not pose a close question in the case: Pacifica's judgments as to the above programs clearly fall within the very great discretion which the Act wisely vests in the licensee. In this connection, we also note that Pacifica took 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). 3/

6. As to the Ferlinghetti and Creeley programs, the licensee asserts that in both instances, some passages did not measure up to "Pacifica's own standards of good taste." Thus, it states that it did not carefully screen the Ferlinghetti tape to see if it met its standards "because it relied upon Mr. Ferlinghetti's national reputation and also upon the fact that the tape came to it from a reputable FM station." It acknowledges that this was a mistake in its procedures and states that "in the future Pacifica will make its own review of all broadcasts . . . " With respect to the Creeley passage (i.e., the poem, Ballad of a Despairing Husband), 4/ Pacifica again states that in its judgment it should not have been broadcast. It "does not excuse the broadcast of the poem in question" but it does explain how the poem "slipped by" KPFA's Drama and Literature Editor who auditioned the tape. It pointed out that prior to the offending poem, Mr. Creeley, who "has a rather flat, monotonous voice," read 18 other perfectly acceptable poems – and that the station's editor was so lulled thereby that he did not catch the few offensive words on the 19th poem. It also points out that each of the nine poems which followed was again perfectly acceptable, and that before re-broadcasting the poem on its Los Angeles station, it deleted the objectionable verse.

7. In view of the foregoing, we find no impediment to renewal on this score. We are dealing with two isolated errors in the licensee's application of its own standards – one in 1959 and the other in 1963. The explanations given for these two errors are credible. Therefore, even assuming arguendo, that the broadcasts were inconsistent with the public interest standard, it is clear that no unfavorable action upon the renewal applications is called for. The

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3/ Pacifica states 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."

4/ The program containing this passage was a taped recording of Mr. Creeley's readings of selections from his poetry to students at the University of California. KPFA broadcasts many such poetry readings at the University, which are recorded by a University employee for the school's archives (and made available to the station).

standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him where his overall record demonstrates a reasonable effort to serve the needs and interests of his community (see note 2, supra). Here again, this case contrasts sharply with Palmetto where instead of two isolated instances, years apart, we found that the patently offensive material was broadcast for a substantial period of the station's broadcast day for many years. See paragraph 3, supra.

8. We find, therefore, that the programming matters raised with respect to the Pacifica renewals pose no bar to a grant of renewal. 5/ Our holding, as is true of all such holdings in this sensitive area, is necessarily based on, and limited to, the facts of the particular case. But we have tried to stress here, as in Palmetto, an underlying policy – that the licensee's judgment in this freedom of speech area is entitled to very great weight and that the Commission, under the public interest standard, will take action against the licensee at the time of renewal only where the facts of the particular case, established in a hearing record, flagrantly call for such action. We have done so because we are charged under the Act with "promoting the larger and more effective use of radio in the public interest" (Section 303(g)), and obviously, in the discharge of that responsibility, must take every precaution to avoid inhibiting broadcast licensees' efforts at experimenting or diversifying their programming. Such diversity of programming has been the goal of many Commission policies (e.g., multiple ownership, development of UHF, the fairness doctrine). Clearly, the Commission must remain faithful to that goal in discharging its functions in the actual area of programming itself.

9. Communist Party Affiliation Issue. Under the public interest standard, it is relevant and important for the Commission to determine in certain cases whether its applicants, or the principals of its applicants, for broadcast licenses or radio operator licenses, are members of the Communist Party or of organizations which advocate or teach the overthrow of the Government by force or violence. Sections 307(a), 307(d), 308(b), 309, 47 USC §§307(a), 307(d), 308(b), 309; Borrow v. FCC, 285 F2d 666, 669 (CA DC), [20 RR 2013], cert. den., 366 US 904; Cronan v. FCC, 285 F2d 288, [20 RR 2119], (CA DC), cert. den., 366 US 904; Blumenthal v. FCC, 318 F2d 276 [25 RR 2019] (CA DC), cert. den., 373 US 951; cf. Beilan v. Board of Education, 357 US 399, 405; Adler v. Board of Education, 342 US 485, 493; Garner v. Los Angeles Board, 341 US 716, 720; Speiser v. Randall, 357 US 513, 527. The Commission therefore has followed a policy of inquiring as to Communist Party membership in those radio licensing

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5/ One other programming aspect deserves emphasis. Complaint has also been made concerning Pacifica's presentation of "far-left" programming. Pacifica has stated that it follows a policy of presenting programs covering the widest range of the political or controversial issue spectrum – from the members of the Communist Party on the left to members of the John Birch Society on the right. Again, we point out that such a policy (which must, of course, be carried out consistently with the requirements of the fairness doctrine) is within the licensee's area of programming judgment.

situations where it has information making such inquiry appropriate. Because of information coming to the Commission's attention from several sources, the Commission requested information from Pacifica Foundation on this score. On the basis of information obtained from Government sources, the Foundation, and our own inquiry, we do not find any evidence warranting further inquiry into the qualifications in this respect of Pacifica Foundation.

10. The Unauthorized Transfer of Control. Until September 30, 1961, control of Pacifica was vested in Executive Members, who elected a Committee of Directors, who in turn elected officers and controlled the Foundation's activities. On September 30, 1961, the Executive Membership and the Committee of Directors were abolished. In their place, Pacifica is controlled – pursuant to its by-laws – by a Board of Directors, which elects officers and controls the Foundation's activities. The new by-laws which accomplished this result were appropriately reported to the Commission at the time they were adopted. However, no application for consent to a transfer of control was then filed.

11. This matter was brought to Pacifica's attention by a letter of February 7, 1963. The licensee's response of April 26, 1963 takes the position that no transfer of actual control had in fact taken place. However, in the event that the Commission deemed an application for consent to transfer of control to be necessary, Pacifica simultaneously filed such an application (BTC-4284). Pacifica argues that in actual practice, control had been in the so-called Committee of Directors, and that this practice had been formalized in an amendment to the by-laws of October 20, 1960, which read, in relevant part:

> "Except as hereinafter provided, the powers of this corporation shall be exercised, its property controlled, and its affairs conducted by a Committee of Directors which shall consist of twenty-one Executive Members of this corporation."

The new Board of Directors, elected on September 30, 1961, was identical with the then existing Committee of Directors, and the officers of the Foundation likewise remained the same.

12. Although the September 30, 1961 revision in the by-laws does appear to have been only the formal recognition of a development in the actual control of Pacifica which had occurred over a period of years, and although there may well be merit in Pacifica's contention that changes in the composition of its Executive Membership (or, for that matter, of its present Board of Directors) should not be regarded as transfers of control, the September 30, 1961 revision in the by-laws did transfer legal control. Prior to that date, the Executive Membership elected directors, who elected officers. After that date, the directors themselves have elected new directors, as well as officers. The fact that the legal control vested in the Executive Members did not, in practice, amount to actual control, does not mean that its existence can be ignored – any more than the legal control of a 51% stockholder in a commercial corporation can be ignored because he fails to exercise it. See ABC-Paramount Merger Case, 8 Pike & Fischer RR 541, 619; Press-Union Publishing Co., Inc., 7 Pike & Fischer RR 83, 96; Universal Carloading Co. v. Railroad Retirement Board, 71 F Supp 369.

13. On the other hand, it is clear that Pacifica did not seek to conceal or misrepresent any facts concerning those who control its affairs, and that the failure to file involved was an excusable one. We therefore grant the pending application for transfer of control.

14. Conclusion. In view of the foregoing, it is ordered, this 22nd day of January, 1964, that the above-entitled applications of Pacifica Foundation are granted as serving the public interest, convenience and necessity.

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur in the action of the Commission in granting the several applications of Pacifica Foundation. However, I feel constrained to comment on at least one program coming to our attention insofar as it may or may not reflect these stations' program policies.

Having listened carefully and painfully to a 1-1/2 hour tape recording of a program involving self-professed homosexuals, I am convinced that the program was designed to be, and succeeded in being, contributory to nothing but sensationalism. The airing of a program dealing with sexual aberrations is not to my mind per se a violation of good taste nor contrary to the public interest. When these subjects are discussed by physicians and sociologists, it is conceivable that the public could benefit. But a panel of eight homosexuals discussing their experiences and past history does not approach the treatment of a delicate subject one could expect by a responsible broadcaster. A microphone in a bordello, during slack hours, could give us similar information on a related subject. Such programs, obviously designed to be lurid and to stir the public curiosity, have little place on the air.

I do not hold myself to be either a moralist or a judge of taste. Least of all do I have a clear understanding of what may constitute obscenity in broadcasting.

Obscenity & Profanity

FCC 70-346

46098 V-64

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)
)
WUHY-FM)
Eastern Education Radio)
)
4548 Market Street)
Philadelphia, Pennsylvania)

Adopted: April 1, 1970 ; Released: April 3, 1970

NOTICE OF APPARENT LIABILITY

By the Commission: Chairman Burch concurred; Commissioner Cox concurred in part and dissented in part; Commissioner Johnson dissented. (Statements by all three will be issued later). Commissioner H. Rex Lee absent.

1. This constitutes Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

2. The facts. Noncommercial educational radio station WUHY-FM is licensed to Eastern Education Radio, Philadelphia, Pennsylvania. On January 4, 1970, WUHY-FM broadcast its weekly program "Cycle II" from 10:00 P.M. to 11:00 P.M. 1/ This broadcast featured an interview with one Jerry Garcia, leader and member of "The Grateful Dead", a California rock and roll musical group. The interview was recorded on tape in Mr. Garcia's hotel room in New York City on Saturday afternoon, January 3, 1970. The interview was conducted by Messrs. Steve Hill and David Stupplebeen, who are both architects in the Philadelphia area, and who have been engaged from time to time on a volunteer basis by WUHY-FM to assist in programming. Mr. Robert J. Bielecki, a full-time staff engineer for WUHY-FM, was in charge of the production as a volunteer producer; Mr. Bielecki had been allowed supervision of "Cycle II" since its inception in November of 1969. Hill and Stupplebeen returned to Philadelphia Sunday afternoon about 4:00 P.M. (January 4, 1970) with the tape of the recorded interview. Hill spent the next three or four hours editing the tape; i.e., allowing for musical selections. Mr. Bielecki, who was engaged in routine engineering duties at the time, listened to portions of the tape from time to time. Neither Hill, Bielecki, nor Stupplebeen discussed the tape with Mr. Nathan Shaw, the station manager, nor did they seek his clearance in any way; Mr. Shaw, though not at the station, could have been reached at home.

1/ The licensee states that this is a one-hour, weekly broadcast which is "underground" in its orientation and "is concerned with the avant-garde movement in music, publications, art, film, personalities, and other forms of social and artistic experimentation." It is designed to reach youthful persons (e.g., the large college population in Philadelphia and "so-called 'alienated' segments of the new generation" -- p. 1, WUHY Letter of February 12, 1970). "Cycle II" is the successor program to a similar program entitled "Feed."

3. During the interview, about 50 minutes in length, broadcast on January 4, 1970, Mr. Garcia expressed his views on ecology, music, philosophy, and interpersonal relations. See Appendix A for the example comments on these subjects, as set forth in the licensee's letter of February 12, 1970. His comments were frequently interspersed with the words "fuck" and "shit", used as adjectives, or simply as an introductory expletive or substitute for the phrase, et cetera. Examples are:

> "Shit man.
> I must answer the phone 900 fuckin' times a day, man.
> Right, and it sucks it right fucking out of ya, man.
> That kind of shit.
> It's fuckin' rotten man. Every fuckin' year.
> ... this shit.
> ... and all that shit - all that shit.
> ... and shit like that.
> ... so fucking long.
> Everybody knows everybody so fucking well that ....
> Shit.
> Shit. I gotta get down there, man.
> All that shit.
> Readily available every fucking where.
> Any of that shit either.
> Political change is so fucking slow."

4. At the conclusion of the Garcia interview, Mr. Hill presented a person known as "Crazy Max", whose real name is not known to the licensee. "Crazy Max" had been a visitor to the station, and he told Hill, while listening to the Garcia interview, that if there were time left in the program he wanted to make some remarks about computers and society. There was a short period left, and "Crazy Max" delivered his message,which also used the word "fuck." The licensee states that Mr. Hill did not know what "Crazy Max" was going to say in detail, or how he was going to say it. It adds that "Crazy Max" will not be allowed access to the microphone again.

5. In its letter of February 12, 1970, written in response to the Commission's request for comments on the January 4th broadcast, 2/ the licensee further states:

> The licensee has a standing policy, known to all personnel including Mr. Bielecki, that all taped program material which contains controversial subject

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2/ While the licensee states that it received no complaints concerning this January 4th broadcast (nor, we note, did the Commission), the Commission had received several complaints concerning this 10:00 P.M. slot on WUHY-FM (directed to the similar "Feed" program, which "Cycle II" succeeded in November, 1969); it therefore did monitor the broadcast, and specifically that of January 4th.

matter or language must be reviewed by Mr. Nathan Shaw, the station manager of WUHY-FM. Mr. Bielecki, the producer of this program, did not bring the program to Mr. Shaw's attention. Neither Mr. Shaw nor any other person in the station management heard or reviewed the program before it was aired. Mr. Bielecki has been removed as a producer because of this infraction of station policy. "Cycle II" has been suspended as a program pending licensee review of this entire matter. Internal procedures to insure against a similar incident are being strengthened.

6. Discussion - policy. The issue in this case is not whether WUHY-FM may present the views of Mr. Garcia or "Crazy Max" on ecology, society, computers, and so on. Clearly that decision is a matter solely within the judgment of the licensee. See Section 326 of the Communications Act of 1934, as amended. Further, we stress, as we have before, the licensee's right to present provocative or unpopular programming which may offend some listeners. In re Renewal of Pacifica, 36 FCC 147, 149 (1964). It would markedly disserve the public interest, were the airwaves restricted only to inoffensive, bland material. Cf. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969). Further, the issue here does not involve presentation of a work of art or on-the-spot coverage of a bona fide news event. 3/ Rather the narrow issue is whether the licensee may present previously taped interview or talk shows where the persons intersperse or begin their speech with expressions like, "Shit, man . . . ", ". . . and shit like that", or ". . . 900 fuckin' times", ". . . right fucking out of ya", etc.

3/ In this connection, we note the licensee's apt statement of policy (pp. 5-6, Letter of February 12, 1970):

> The question whether to air a program which contains controversial subject matter or language is among the most difficult a licensee is called upon to resolve. In determining whether to air any program which contains material or language which is potentially offensive or disagreeable to some listeners, licensee balances a number of considerations: The subject matter of the program; its value or relevance to the segment of listeners to which it is directed; whether the program is a work of art; whether it is a recognized classic; and whether the potentially offensive language or material is essential to the integrity of the presentation. Licensee also takes into account such factors as the time of the broadcast, the likelihood that children may be in the audience, and the necessity for appropriate cautionary announcements to listeners in advance of potentially disagreeable programming.

7. We believe that if we have the authority, we have a duty to act to prevent the widespread use on broadcast outlets of such expressions in the above circumstances. For, the speech involved has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the "public interest in the larger and more effective use of radio" (Section 303(g)). As to the first point, it conveys no thought to begin some speech with "Shit, man. . . ", or to use "fucking" as an adjective throughout the speech. We recognize that such speech is frequently used in some settings, but it is not employed in public ones. Persons who might use it without thought in a home, job or barracks setting generally avoid its usage when on a public conveyance, elevator, when testifying in court, etc. Similarly, its use can be avoided on radio without stifling in the slightest any thought which the person wishes to convey. In this connection, we note that stations have presented thousands of persons from all walks of life in talk or interview shows, without broadcasting language of the nature here involved. However much a person may like to talk this way, he has no right to do so in public arenas, and broadcasters can clearly insist that in talk shows, persons observe the requirement of eschewing such language.

8. This brings us to the second part of the analysis -- the consequence to the public interest. First, if WUHY can broadcast an interview with Mr. Garcia where he begins sentences with "Shit, man . . .", or uses "fucking" before word after word, just because he likes to talk that way, so also can any other person on radio. Newscasters or disc jockeys could use the same expressions, as could persons, whether moderators or participants, on talk shows, on the ground that this is the way they talk and it adds flavor or emphasis to their speech. 4/ But the consequences of any such widespread practice would be to undermine the usefulness of radio to millions of others. For, these expressions are patently offensive to millions of listeners. And here it is crucial to bear in mind the difference between radio and other media. Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public (Section 3(o) of the Communications Act, 47 U.S.C. 153(o)) under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station

4/ To give but one further example, suppose a disc jockey or a moderator on a talk show, for sensational or shock purposes aimed at particular audiences, began using expressions such as "Listen to this mother fucking. record [or person]." There is no question but that such use of this vulgar term for an incestuous son is utterly without redeeming social value and, on radio, taking into account its nature (see above paragraph), patently offensive. See discussion, par. 10, infra.

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. 5/ Further, in that audience are very large numbers of children. 6/ Were this type of programming (e.g., the WUHY interview with the above described language) to become widespread, it would drastically affect the use of radio by millions of people. No one could every know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program. In light of the foregoing considerations we note also that it is not a question of what a majority of licensees might do but whether such material is broadcast to a significant extent by any significant number of broadcasters. In short, in our judgment, increased use along the lines of this WUHY broadcast might well correspondingly diminish the use for millions of people. It is one thing to say, as we properly did in Pacifica, that no segment, however large its size, may rule out the presentation of unpopular views or of language in a work of art which offends some people; and

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5 / In a very real sense, the situation here is the very opposite of Stanley v. Georgia, 394 U.S. 557 (1969), which involved the private possession or use of obscene material.

6 / For example, the following tables point up the children's audience in the evening hours for radio and television:

Average Quarter-Hour Radio Audience of Teen-Agers (12-17 Years) as a Percentage of all Teen-Agers in Metro Area, 1969.

Time	Los Angeles	New York City	Washington, D.C.
8:00 - 9:00 PM	16.5	16.6	14.1
9:00 - 10:00 PM	14.8	16.9	14.5
10:00 - 11:00 PM	10.5	13.8	14.1
11:00 - 12:00 M	4.8	6.5	10.9

Children (2-17 Years) Viewing TV as a Percentage of Total Persons Viewing Based on N.Y. and Los Angeles Survey Feb.-Mar.'69

Time Period			Children as % of Total 2-6 Yrs	6-11 Yrs	11-17 Yrs	Children Total
Sun.	- Sat.	7:30 - 9 PM	5%	13%	12%	30%
Sun.	- Sat.	9:00 -11 PM	1	5	13	19
Average Prime Time:						
Sun.	- Sat.	7:30 -11 PM	3	10	13	26
Mon.	- Fri.	11:30 PM - 1 AM	1/2%	1/2%	5	6

it is quite another thing to say that WUHY has the right to broadcast an interview in which Mr. Garcia begins many sentences with, "Shit, man ...", an expression which conveys no thought, has no redeeming social value, and in the context of broadcasting,7/ drastically curtails the usefulness of the medium for millions of people.

9. For the foregoing reasons, and specifically to prevent any emerging trend in the broadcast field which would be inconsistent with the "larger and more effective use of radio", we conclude that we have a duty to act, if we have the authority to act. We turn now to the issue of our authority.

10. Discussion - Law (Authority). There are two aspects of this issue. First, there is the question of the applicability of 18 U.S.C. 1464, which makes it a criminal offense to "utter any obscene, indecent, or profane language by means of radio communication." This standard, we note, is incorporated in the Communications Act. See Sections 312(a)(6) and 503(b)(1)(E), 47 U.S.C. 312(a)(6); 503 (b)(1)(E). The licensee urges that the broadcast was not obscene "because it did not have a dominant appeal to prurience or sexual matters" (Letter, p.5). We agree, and thus find that the broadcast would not necessarily come within the standard laid down in Memoirs v. Massachusetts, 383 U.S. 413, 418 (1965); see also Jacobelli v. Ohio, 378 U.S. 184, 191 (1963); Roth v. United States, 354 U.S. 476 (1956). However, we believe that the statutory term, "indecent", should be applicable, and that, in the broadcast field, the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. The Court has made clear that different rules are appropriate for different media of expression in view of their varying natures. "Each method tends to present its own peculiar problems." Burstyn v. Wilson, 343 U.S. 495, 502-503 (1951). We have set forth in par. 8, supra, the reasons for applicability of the above standard in defining what is indecent in the broadcast field. We think that the factors set out in par. 8 are cogent, powerful considerations for the different standard in this markedly different field.

7/ We stress that our analysis is limited to broadcasting because of its unique nature of dissemination into millions of homes. The difference is pointed up by this very document. It is perfectly proper, in the analysis here, to use the pertinent expressions of Mr. Garcia. There is no other way to deal intelligently with the subject. But in any event, it takes a conscious act by someone interested in the subject to obtain this document and study its content.

11. There is no precedent, judicial or administrative, for this case. There have been few opinions construing 18 U.S.C. 1464 (e.g., Duncan v. U.S., 48 F. 2d 128 (C.C.A. Or. 1931), certiorari denied 283 U.S. 863; Gagliardo v. U.S., 366 F. 2d 720 (1966)), and none in the broadcast field here involved. The issue whether the term, "indecent", has a meaning different from "obscene" in Section 1464 was raised in Gagliardo (366 F. 2d at pp. 725-26) but not resolved. Support for giving it a different meaning is indicated by U.S. v. Limehouse, 285 U.S. 424 (1932) which held that the word "filthy" which was added to the postal obscenity law by amendment, now 18 U.S.C. §1461, meant something other than "obscene, lewd, or lascivious", and permitted a prosecution of the sender of a letter which "plainly related to sexual matters" and was "coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term." However, in line with the principle set out above in Burstyn, the matter is one of first impression, and can only be definitively settled by the courts. We hold as we do, since otherwise there is nothing to prevent the development of the trend which we described in par. 8, from becoming a reality.

12. The licensee argues that the program was not indecent, because its basic subject matters ". . . are obviously decent"; "the challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia"; and "the realistic portrayal of such an interview cannot be deemed 'indecent' because the subject incidentally used strong or salty language." (Letter, p. 5). We disagree with this approach in the broadcast field. Were it followed, any newscaster or talk moderator could intersperse his broadcast with these expressions, or indeed a disc jockey could speak of his records and related views with phrases like, "Shit, man . . ., listen to this mother fucker", on the ground that his overall broadcast was clearly decent, and that this manner of presentation reflected the "personality and life style" of the speaker, who was only "telling it like it is." The licensee itself notes that the language in question "was not essential to the presentation of the subject matter . . ." but rather was ". . . essentially gratuitous." We think that is the precise point here -- namely, that the language is "gratuitous" -- i.e., "unwarranted or [having] no reason for its existence" (Websters Collegiate Dictionary, Fifth Ed., p. 435). There is no valid basis in these circumstances for permitting its widespread use in the broadcast field, with the detrimental consequences described in par. 8, supra.

13. The matter could also be approached under the public interest standard of the Communications Act. Broadcast licensees must operate in the public interest (Section 315(a)), and the Commission does have authority to act to insure such operation. Red Lion Broadcasting Co., Inc. v. F.C.C. 395 U.S. 367, 380 (1969). This does not mean, of course, that the Commission could properly assess program

after program, stating that one was consistent with the public interest and another was not. That would be flagrant censorship. See Section 326 of the Communications Act, 47 U.S.C. 326; Banzhaf v. F.C.C., 132 U.S. App. D.C. 14, 27; 405 F. 2d 1082, 1095 (1968), certiorari denied, 395 U.S. 973 (1969). However, we believe that we can act under the public interest criterion in this narrow area against those who present programming such as is involved in this case. The standard for such action under the public interest criterion is the same as previously discussed -- namely, that the material is patently offensive by contemporary community standards and utterly without redeeming social value. These were the standards employed in Palmetto Broadcasting Co., 33 FCC 483; 34 FCC 101 (1963), affirmed on other grounds, E.G. Robinson, Jr. v. F.C.C., 118 U.S. App. D.C. 144, 344 F. 2d 534 (1964), certiorari denied, 379 U.S. 843, where the Commission denied the application for renewal of a licensee which, inter alia, had presented smut during a substantial period of the broadcasting day. 8/

14. In sum, we hold that we have the authority to act here under Section 1464 (i.e. 503(b)(1)(E)) or under the public interest standard (Section 503(b)(1)(A)(B) -- for failure to operate in the public interest as set forth in the license or to observe the requirement of Section 315(a) to operate in the public interest). Cf. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 376, n. 5. However, whether under Section 1464 or the public interest standard, the criteria for Commission action thus remains the same, in our view -- namely, that the material be patently offensive and utterly without redeeming value. Finally, as we stressed before in sensitive areas like this (Report and Order on Personal Attack Rules, 8 FCC 2d 721, 725 (1968)), the Commission can appropriately act only in clear-cut, flagrant cases; doubtful or close cases are clearly to be resolved in the licensee's favor.

15. Discussion - Application of the above principles to this case. In view of the foregoing, little further discussion is needed on this aspect. We believe that the presentation of the Garcia material quoted in par. 3 falls clearly within the two above criteria, 9/ and hence may be the subject of a forfeiture under Section 503(b)(1)(A)(B) and (E). We further find that the presentation was "willful" (503(b)(1)(A)(B)).

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8 / The Commission there found the programming patently offensive by contemporary community standards and no evidence that it " . . . in some way served the needs and interests of the area."

9 / There does not appear to be any factual dispute. However, the licensee has the opportunity to advance any pertinent factual considerations in response to this Notice and may of course obtain a trial de novo of the matter in the district court. See Section 504(a).

We note that the material was taped. Further the station employees could have cautioned Mr. Garcia either at the outset or after the first few expressions to avoid using these "gratuitous" expressions; they did not do so. 10/ That the material was presented without obtaining the station manager's approval -- contrary to station policy -- does not absolve the licensee of responsibility. See KWK, Inc., 34 FCC 2d 1039, affirmed 119 U.S. App.D.C. 144, 337, F. 2d 540 (1964). Indeed, in light of the facts here, there would appear to have been gross negligence on the part of the licensee with respect to its supervisory duties.

16. We turn now to the question of the appropriate sanction. The licensee points out that this is one isolated occurrence, and that therefore the Palmetto decision is inapposite. We agree that there is no question of revocation or denial of license on the basis of the matter before us, even without taking into account the overall record of the station, as described in the licensee's letter, pp. 6-8. See also In re Renewal of Pacifica, 36 FCC 147 (1964). Rather, the issue in this case is whether to impose a forfeiture (since one of the reasons for the forfeiture provision is that it can be imposed for the isolated occurrence, such as an isolated lottery, etc.). On this issue, we note that, in view of the fact that this is largely a case of first impression, particularly as to the Section 1464 aspect, we could appropriately forego the forfeiture and simply act prospectively in this field. See, Taft Broadcasting Co., 18 FCC 2d 186; Bob Jones University, 18 FCC 2d 8; WBRE-TV, Inc., 18 FCC 2d 96. However, were we to do so, we would prevent any review of our action and in this sensitive field we have always sought to insure such reviewability. See Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 376, n. 5. We believe that a most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment. Thus, while we think that our action is fully consistent with the law, there should clearly be the avenue of court review in a case of this nature (see Section 504(a)). Indeed, we would welcome such review, since only in that way can the pertinent standards be definitively determined. Accordingly, in light of that consideration, the new ground which we break with this decision, and the overall record of this noncommercial educational licensee, we propose to assess a forfeiture of only $100.00.

Conclusion

17. We conclude this discussion as we began it. We propose no change from our commitment to promoting robust, wide-open debate. Red Lion Broadcasting Co. v. F.C.C., supra; Pacifica Foundation, supra. Simply stated, our position -- limited to the facts of this case -- is that such debate does not require that persons being interviewed or station employees on talk programs have the right to begin their speech with, "Shit, man . . . ", or use "fucking", or "mother fucking" as

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10/ Indeed, one of the station participants stated at the outset of the interview, "We are going to do a lot of illegal things before this is over."

gratuitous adjectives throughout their speech. This fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people. Indeed, significantly, in this case, under the licensee's policy (which was by-passed by its volunteer employees), Mr. Garcia's views would have been presented without the gratuitous expressions, but with them, the public would never have heard his views.

18. In view of the foregoing, we determine that, pursuant to Section 503(b)(1)(A),(B),(E) of the Communications Act of 1934, as amended, Eastern Education Radio has incurred an apparent liability of one hundred dollars ($100).

19. Eastern Education Radio is hereby notified that it has the opportunity to file with the Commission, within thirty (30) days of the date of the receipt of this Notice, a statement in writing as to why it should not be held liable, or, if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and any other information which Eastern Education Radio may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve Eastern Education Radio of liability, or to justify either reduction or remission of the amount of liability. If it is unable to find that Eastern Education Radio should be relieved or liability, the Commission will issue an Order of Forfeiture and the forfeiture will be payable to the Treasurer of the United States.

20. If Eastern Education Radio does not file, within thirty (30) days of the date of receipt of this Notice, either a statement of non-liability or a statement setting forth facts and reasons why the forfeiture should be of a lesser amount, the Commission will enter an Order of Forfeiture in the amount of one hundred dollars ($100.00).

21. In accordance with our established procedures, we also state that if Eastern Education Radio does not wish to file a statement which denies liability and, in addition, it does not wish to await the issuance of an Order, if may, within thirty (30) days of the date of the receipt of this Notice, make payment of the forfeiture by mailing to the Commission a check, or similar instrument, in the amount of one hundred dollars ($100) drawn payable to the Treasurer of the United States.

BY DIRECTION OF THE COMMISSION

Ben F.Waple
Secretary

Appendix A

Excerpts from licensee's letter of February 12, 1970:

". . . During the interview, Mr. Garcia expressed his views on ecology, music, philosophy, and interpersonal relations. [footnote omitted] Some of Mr. Garcia's comments on these subjects are set forth below:

> The problem essentially ...the basic problem is how can you live on the planet earth without wreckin' it, right?
>
> * * *
>
> ....like you know a couple of weeks ago the thing was in the paper that the headline was in the paper that there was no more clean air in the United States, period. Yeah, and it's like uh that kind of stuff is all of a sudden comin' up real fast. You know, and it's like it looks like that's the most important thing going on and that nothing else is as important as that as far as I know, that is the most important thing.
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> * * *
>
> For example, like uh I have friends who I've known since like they started college, you know, and like now it's eight years later and you know, and they're all Ph.Ds - stuff like that. It's just coming out in those terms, uh, I know quite a few of these people who have switched their major in the last year to Ecology and that kind of shit, because it's like really important right. It's a big emergency going on. Okay, so - and their approach to it is generally to get together on the level of bodies of influence -- that is to say, governmental shit, you know, things like that business and so forth, and stuff like that.
>
> * * *
>
> But the big thing is that it's really super, you know -- it's ..it's..it definitely looks bad outside, man. When you fly over New York, it looks fuckin' rotten, man, but it's like that way every fuckin' where, man, you know, and

like I'm from San Francisco, man, and there wasn't like five or six years ago when it was like the sky was blue, crystal clear, you know; you know and that whole thing that you hardly ever see any more, man -- you know you just hardly ever see it any more.

* * *

What I'd really love to do would be live on a perfect, peaceful earth and devote all my time to music. But I can't do it man, because you just can't do that. You know, I mean it's a ... there's a more important thing going on, that's all.

* * *

Politics is a form and music is a form and they're both ways of dealing with people, man. When you play music with people, though, you're not attacking them, you know. It isn't, it's not a competition between the two of you or the four of you or the seven of you, or however many of you. There are - it's like a cooperative effort which gets everybody high, so like that's and that's of course the thing that's really a great trip about music. It's really a great thing. It's really a good trip, right, and uh so like the things that that I've wanted to see happen and lots of other people you know it's like some way of getting people together to do things but having it be like music and not like business and not like politics, you know, uh just because that's a uh high watermark in a way. I mean it seems like people should be able to do that.

* * *

If you get together with four or five people and produce something that's greater than yourself you know, and that also doesn't only reflect your attitude, but it's like a little closer to the center because it has to do with more perceptions than your own and like for a plan to work, I think, it has to be approached on those kinds of levels and those kind of terms because uh it won't work if uh this is a planet full of people, each of whom is in a universe of his own. Everybody has to agree to give a little, and so forth, and so on."

STATEMENT OF COMMISSIONER KENNETH A. COX,
CONCURRING IN PART AND DISSENTING IN PART

I agree with a good deal that is said in the Notice of Apparent Liability, but do not agree with the result reached.

I agree that broadcasting differs in significant respects from books, magazines, motion pictures and other means of communications. I agree that this may lead the courts to apply different standards in determining the degree of control which government may exercise over the content of broadcast programming. And I agree that it would be well to get this matter resolved by the courts in the near future. But I do not agree that the problem is as great as the majority say it is, or that it is likely to become endemic. I do not agree that the licensee of WUHY-FM was grossly negligent in this case or merits any more than a warning because of this incident. And I am afraid that this precedent may cause licensees not to carry programming they would otherwise have broadcast, out of fear that someone will be offended, will complain to the Commission, and the latter will find the broadcast improper. It should be noted that Cycle II has been suspended, so that whatever of value it had to offer will no longer be available to WUHY's audience.

At least the majority are now listing the words, and the usage of those words, which they regard as contrary to the public interest. I think that is desirable, although I am sure that broadcasters are going to worry about other words which they feel may be added to the list later on. And I applaud the majority for indicating that licensees will not be punished for presenting works of art or on-the-spot coverage of bona fide news events which may contain these words or others like them. I am glad they restrict their action to gratuitous use of words in circumstances where the offensive language has no redeeming social value.

However, I do not think the broadcast here involved posed a problem so serious as to justify the imposition of a sanction for the mere utterance of words. This weekly series was intended as an "underground" program dealing "with the avant-garde movement in music, publications, art, film, personalities, and other forms of social and artistic experimentation." It was presented between 10 and 11 P. M. on Sunday night, and was designed to appeal to the large college population in Philadelphia and to alienated segments of the new generation. It seems clear that a program with such a purpose -- a perfectly valid one, I'm sure everyone would agree -- would be different in approach and content from programs aimed at children, or women 30 to 40 years of age, or professional men, or adults generally. And it seems likely, in view of the widespread ferment among young people and their rejection of many of the standards of their parents' generation, that not only the ideas discussed but the language used to express them will sometimes be offensive to the older generation. But people who do not like the ideas or the language do not need to listen to programs of this kind. WUHY received no complaints about the broadcast here in question, nor did the Commission. However, we had received earlier

complaints about the 10 to 11 P. M. time period and were monitoring the station on the night of January 4, 1970. So far as I can tell, my colleagues are the only people who have encountered this program who are greatly disturbed by it.

I agree that the language complained of is offensive to many and that it was gratuitous -- that Mr. Garcia could have expressed the same ideas without using this language. However, I think it magnifies the impact of the words to set them out starkly, as the majority do in Paragraph 3 of the Notice, alone and out of context. I have not read the full transcript of the broadcast, and doubt if my colleagues have, but certainly a reading of the seven paragraphs quoted in the licensee's response gives a different perspective of the matter. While one might wish that Mr. Garcia had been able to express himself without using words which many people find offensive, it would appear that he was not trying to shock or titillate the audience. Apparently this is the way he talks -- and I guess a lot of others in his generation do so, too. I find such poverty of expression depressing, and am afraid it may impair clarity of thought. My concern is not limited to the words which trouble the majority. In the seven paragraphs quoted by the licensee, Mr. Garcia uses only four words cited by the majority. But he uses the word "like" in an improper and redundant way sixteen times, and uses "man" as a word of emphasis seven times. These patterns of speech seem common among today's young. But I expect our language will survive -- as it has withstood the slang and fads of generation after generation.

WUHY decided that it wanted to let Mr. Garcia communicate his views in a number of important areas to the station's audience --a decision which no one questions. At least the station was trying to do something more than play records and read wire news. Assuming the propriety of the station's program judgment, how could it have achieved its desired result without getting into trouble with the Commission? The majority suggest, in Paragraph 7, that while Mr. Garcia may talk this way in many other places, he should have been told that he cannot do so on radio. However, while I have had very limited contact with people of his age and background, I am of the impression that such an approach might not have been productive. I think one of the reasons for their use of such language is that it is intended to show disrespect for the standards of their elders, which they regard as outmoded, without real basis, and "irrelevant." It might have been difficult for Mr. Garcia to change his habits of speech without interfering with the flow of his ideas -- or he might simply have refused to give the interview at all on those terms. Admittedly this is speculative, but there is no way to explore these possibilities without making some assumptions -- and I think mine are not unreasonable.

The only other alternative would have been to delete the offending language. The licensee, in its response to the Commission's letter of inquiry, argued persuasively that the Garcia interview was neither obscene nor profane. I am glad that the majority agree that it was not obscene, and while they do not address themselves to the issue of profanity, they

certainly make no claim that the language was profane. Instead, they hold that the language was indecent, within the meaning of 18 U.S.C. 1434, which makes it a crime to "utter any obscene, indecent, or profane language by means of radio communication." The licensee argued to the contrary in its letter:

> ". . . Nor was the program indecent simply because certain language not normally heard in polite circles, was uttered. The basic subject matters of the program -- ecology, philosophy, music -- are obviously decent. The challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia. In this sense, the interview was in the nature of a documentary. The realistic protrayal of such an interview cannot be deemed 'indecent' because the subject incidentally used strong or salty language. . . ."

I think this position has a good deal of merit. In addition, I think that the word "indecent" in the statute may not have a clear enough meaning to satisfy the constitutional requirement that criminal statutes must put the public on notice of just precisely what conduct will constitute a violation.

Having made this contention, the licensee nonetheless said that it would not have aired the program had it been submitted for review by the station manager, as required by established station procedures. It went on to say:

> "Licensee would not have aired the Jerry Garcia interview because the questioned language was not essential to the presentation of the subject matter and its potential for offense was not outweighed by considerations of subject matter or artistic integrity. While the program had value in terms of subject matter and in depicting the total personality of Jerry Garcia, licensee does not believe that these values were sufficient to warrant airing the program, at least without deletion of the offending and essentially gratuitous passages. 3/
>
> 3/ Licensee does not believe that editing and deletion are an automatically acceptable solution to this kind of problem. Such deletions often damage the entire program. Moreover, they do not protect the sensibilities of the listener. Indeed such censorship may be more distracting than the deleted language itself."

A licensee is responsible for everything broadcast over its station. WUHY therefore very properly has adopted a policy that all taped program material containing "controversial subject matter or language" must be reviewed by the station manager. If those who produced and broadcast the Garcia interview had followed that procedure and the licensee had decided not to use the interview, or to do so only after deleting the language here in issue, that would have represented a licensee's efforts to discharge its responsibilities in the exercise of its own judgment. What we have here is quite a different thing. The majority are exercising government power in the area of speech. They have imposed a sanction -- though admittedly a nominal one -- for a single broadcast 1/ containing what they, but not the licensee, regard as indecent matter. This action, binding on all licensees, is obviously far different from letting licensees make their own judgments -- even if many of them would conclude, with the majority, that language of this kind should not be broadcast.

I'm afraid it has taken me a long time to get around to discussing an idea mentioned in the first sentence of the third paragraph back -- the possible deletion of the offensive words. I think the licensee has pointed out some problems with this procedure in the footnote to the last quotation above. It says that bleeping out words may disrupt the program, and that it may not be too difficult for those who dislike such language to tell what was said despite the deletion -- indeed, that this may actually emphasize the fact that language which the licensee apparently regards as improper had been used. It seems to me that WUHY -- when put on notice that the Commission on its own motion is challenging the broadcast -- is saying that it would not have broadcast the Garcia interview at all. I think that most licensees who may consider presenting similar programming in the future -- that is taped material involving statements by blacks, students, or those who have dropped out of our society -- will decide that if the use of words which may offend the Commission is interspersed too regularly throughout the tape to make deletion feasible, the safe course will be just not to broadcast the program. While I hold no brief for flooding the air with the views of members of these groups, I think it may be dangerous if we do not understand what they are trying to say -- even if it sometimes involves the monotonous use of four letter words. Some of their complaints are probably well founded, and even if they are not, I think we need to know what troubles them and what they are talking about doing about these matters. It may be that using radio and television to help bridge the generation gap would be an example of "the larger and more effective use of radio" which the majority are so eager to preserve. If, instead, we

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1/ It is important to keep in mind that we are dealing with a single incident, within the doctrine of In re Renewal of Pacifica, 36 FCC 147, rather than with a substantial pattern of coarse, vulgar, or suggestive material such as was involved in Palmetto Broadcasting Corporation, 34 FCC 101. In the last sentence of Paragraph 15, the majority find the licensee guilty of gross negligence with respect to its supervisory duties. (continued)

narrow our concept of the use of radio in order to protect the sensibilities of those who seem more concerned with suppressing words and pictures they find offensive than with solving the problems that are tearing our society apart, I think we may find that the majority are wrong in stating -- in Paragraph 7 --that we can exorcise these words from radio "without stifling in the slightest any thought which the person wishes to convey." One safe course for the timid will be simply to avoid interviewing people who can be expected to use troublesome language, or inviting them to participate in panels, or asking them to comment on current developments. This may be "safe" for the licensee but I'm not sure it will be safe for our society.

This brings me, at last, to my principal problem with the majority's decision, which is that I think they are exaggerating this problem out of all proportion. It is true that in recent months we have been receiving more complaints about the broadcast of allegedly obscene, indecent, or profane matter, but most of these involve matters outside the ambit of this ruling. That is, they deal with claims that certain records contain cryptic references to the use of drugs, that others are sexually suggestive, that the skits and blackouts on the Rowan and Martin Laugh-In are similarly suggestive, that the costumes on many variety programs are indecent, that the dances are too sensuous, that the performers are too free with each other, etc. But I think I could count on the fingers of both hands the complaints that have come to my notice which involve the gratuitous use of four letter words in situations comparable to the one in this case. This has simply not been a problem.

Nor do I agree that if we do not punish WUHY for this broadcast, there is going to be such "widespread use" of the offending words as to "drastically affect the use of radio by millions of people," because "very substantial numbers would either curtail using radio or would restrict

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1/ (continued)
I think this is an unfair effort to bolster the action here, and that this conclusion is without basis in the record before us. The licensee adopted appropriate procedures for review of programming, and there is no suggestion in the majority's opinion -- nor was any offered during our discussion of this matter -- that it has knowingly permitted disregard of its policies. So far as we know, this is the first time an employee of WUHY has failed to present a questionable program for review. So far as we know, the licensee has taken steps regularly to remind its staff of this requirement. There is no pattern of laxity or open disregard for paper policies such as we have found in other cases where we have ruled that licensees had been guilty of failure to enforce policies essential to the discharge of their responsibilities. The majority are saying that a licensee whose sound policies to detect objectionable matter are disregarded in a single case, resulting in the broadcast of language which the majority regard as indecent, can be subjected to a forfeiture. The reference to "gross negligence" is sheer window dressing.

their use to but a few channels." I just do not believe there are many broadcasters waiting eagerly to flood the country with such language on an around the clock basis in the event we were to impose no sanction here. Indeed, if the Commission had not decided to make a test case of this incident, I doubt if many people would ever have heard of it. Actually, if the majority's theory is right, they are running a rather serious risk. If the courts do not sustain their action, that would be a signal to the industry that it could freely engage in the "widespread use" of four letter words which the majority fear they are anxious to embark upon. But I don't think many of our licensees have any desire to follow such a course, nor do I believe that there is any great audience to be won by such tactics. I think most broadcasters have too high a regard for their profession and its responsibilities to fall into the patterns the majority envisage in Paragraphs 7 through 9.

Similarly, I think there is a great and clear difference between presenting an occasional late night program featuring people not on the staff of the station who use offensive language and employing newscasters and disc jockeys and allowing them to use similar expressions all day long. It is one thing to permit certain elements in society to use such language on the air so that interested members of the public can find out how they think about various problems. It is quite different to turn the operation of a station over to people who talk that way. I think this, like the more generalized claim that we are about to be inundated with indecent language, is a figment of the majority's imagination designed to justify the intrusion of governmental power into this sensitive area.

I have studied broadcasting for some time, and while I think we may expect to hear strong language on the air somewhat more often in the future as a reflection of our troubled times, I simply do not believe there is any likelihood that licensees will broadcast indecent language to such an extent that they will drive millions of listeners away from radio entirely. Broadcasters make money by attracting audiences. They have developed a number of ways to win the attention of differing segments of the total audience. I do not think that four letter words are likely to become the format of the future, since I doubt if even people who use such language themselves would regard it as enhancing a station's service.

Finally, I think it should be noted that the majority have held that someone involved in this broadcast violated a criminal statute. This means that such person or persons can be prosecuted and subjected to rather severe penalties. However, I do not think this is likely

to happen because I suspect that the United States Attorney in Philadelphia has more important matters to occupy his time and that of his staff. (See my dissent in the Commission's letter addressed to Jack Straw Memorial Foundation, dated January 21, 1970, FCC 70-93). I submit that the same thing should be true of the Federal Communications Commission.

"Indecent" Language (WUHY-FM)

[In re Notice of Apparent Liability, issued to WUHY-FM, Eastern Education Radio, Philadelphia, Pennsylvania.]

Preliminary Dissenting Opinion of Commissioner Nicholas Johnson

"Oaths are but words, and words but wind."

-- Samuel Butler, Hudibras (1664)

What this Commission condemns today are not words, but a culture--a lifestyle it fears because it does not understand. Most of the people in this country are under 28 years of age; over 56 million students are in our colleges and schools. Many of them will "smile" when they learn that the Federal Communications Commission, an agency of their government, has punished a radio station for broadcasting the words of Jerry Garcia, the leader of what the FCC calls a "rock and roll musical group." To call The Grateful Dead a "rock and roll musical group" is like calling the Los Angeles Philharmonic a "jug band." And that about shows "where this Commission's at."

Today the Commission simply ignores decades of First Amendment law, carefully fashioned by the Supreme Court into the recognized concepts of "vagueness" and "overbreadth," see, e.g., Zwickler v. Koota, 389 U.S. 241, 249-50 (1967), and punishes a broadcaster for speech it describes as "indecent"--without so much as attempting a definition of that uncertain term. What the Commission tells the broadcaster he cannot say is anyone's guess--and therein lies the constitutional deficiency.

Today the Commission turns its back on Supreme Court precedent, see, e.g., Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968), citing Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1954), as well as recent federal court precedent, see, e. g., Williams v. District of Columbia, No. 20,927 (D. C. Cir., June 20, 1969) (en banc), which invalidated statutes with similarly vague descriptions of allegedly "indecent" speech.

Today the Commission decides that certain forms of speech and expression are "patently offensive by contemporary community standards"--although neither the station nor the FCC received a single complaint about the broadcast in question, and the FCC conducted not a single survey among the relevant population groups in Philadelphia, nor compiled a single word of testimony on contemporary community standards, nor attempted even to define the relevant "community" in question.

I am aware that there are members of the public who are offended by some of what they hear or see on radio or television. I too am offended by much of what I hear or see on radio or television--though more often for what it fails to do than what it does. I am sympathetic to the outrage of any minority group--Black or Puritan --that feels its values are not honored by the society of which it is a part. (What the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor, or the blacks may not.) There are scenes, subjects and words used on television which I would not use personally as a guest on camera. The words

used here fall in that category. But I do not believe I sit here as an FCC Commissioner to enforce my moral standards upon the nation. Yet four other Commissioners do precisely that.

Furthermore, when we do go after broadcasters, I find it pathetic that we always seem to pick upon the small, community service stations like a KPFK, WBAI, KRAB, and now WUHY-FM. See, e.g., Pacifica Foundation (KPFK-FM), 36 F.C.C. 147 (1964); United Federation of Teachers (WBAI-FM), 17 F.C.C.2d 204 (1969); Jack Straw Memorial Foundation (KRAB-FM), FCC 70-93, (released Jan. 21, 1970). It is ironic to me that of the public complaints about broadcasters' "taste" received in my office, there are probably a hundred or more about network television for every one about stations of this kind. Surely if anyone were genuinely concerned about the impact of broadcasting upon the moral values of this nation--and that impact has been considerable--he ought to consider the ABC, CBS and NBC television networks before picking on little educational FM radio stations that can scarcely afford the postage to answer our letters, let alone hire lawyers. We have plenty of complaints around this Commission involving the networks. Why are they being ignored? I shan't engage in speculation.

Today this Commission acts against a station that broadcasts 77 hours a week of locally-originated fine music, public and cultural affairs, and community-oriented programming. Ironically, the Commission censures language broadcast by the station that received one of the Corporation for Public Broadcasting's first program grants for its experimental program in

participatory democracy, "Free Speech." In 1969 alone, WUHY-FM received two "major" Armstrong Awards, one of the highest achievements in radio, two awards from Sigma Delta Chi, a professional journalism group, and the Corporation for Public Broadcasting's "Public Criteria" award--the only such award given to a Philadelphia station. I do not believe it a coincidence that this Commission has often moved against the programming of innovative and experimental stations (such as KPFK, WBAI and KRAB). I do not see how licensees (particularly ones that rely on the help of talented volunteers) can develop new and creative programming concepts without approaching the line that separates the orthodox from the unconventional and controversial. I believe today's decision will deter the few innovative stations that do exist from approaching that line.

Today the Commission rules that the speech in question has "no redeeming social value," although Professor Ashley Montagu, a leading authority on the subject, believes that such speech "serves clearly definable social as well as personal purposes." A. Montagu, The Anatomy of Swearing 1 (1967).

Today the Commission declares that a four-letter word "conveys no thought"--and proceeds to punish a broadcaster for speech which apparently conveys so much thought that it must be banned.

Today the Commission punishes a licensee for speech in order to encourage the courts to do our work for us--forgetting that the First Amendment binds this agency as well as the courts. I do not believe

any governmental body can stifle free speech merely to produce a "test case." We cannot, constitutionally, abdicate our responsibilities to the courts. Yet today this is what we have done.

I believe it is our responsibility to adopt precise and clear guidelines for the broadcasting industry to follow in this murky area, if we are to wade into it at all--the wisdom of which I seriously question. I believe no governmental agency can punish for the content of speech by invoking statutory prohibitions which are so broad, sweeping, vague, and potentially all-encompassing that no man can foretell when, why, or with what force the Commission will strike.

In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952), the Supreme Court held that the First Amendment protected motion pictures as well as normal speech. There, the Court invalidated a New York statute banning "sacrilegious" films. The Court said:

> This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies . . . . [I]t is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . .

If the term, "sacrilegious," is subject to the dangers of sweeping all-inclusive interpretations, what then of "indecent"? The FCC has not

attempted even a "broad and all-inclusive definition" of "indecent," as the New York courts did of "sacrilegious." Rather, the FCC has cast itself adrift upon the "boundless sea" of a search for "indecency" without compass or polestar for guidance. We have only the obscure charts of the orthodox (presumably represented by a majority of Commissioners) to guide us on our way.

Groups in this country interested in civil liberties and speech freedoms should understand that the Commission today enters a new and untested area of federal censorship--censorship over the words, thoughts and ideas that can be conveyed over the most powerful medium of communication known to man: the broadcasting medium. To my knowledge, there are no judicial precedents, no law review articles, no FCC decisions, and no scholarly thinking that even attempt to define the standards of permissible free speech for the broadcasting medium. Should this case be appealed, therefore, these questions may be posed. All those who hold speech freedoms dear should participate. It will be regrettable if the Federal Communications Bar Association, like the big broadcasting industry generally, once again proves itself to be more interested in profitable speech than free speech. We will be waiting to see if they vigorously enter an amicus appearance in this case.

An anonymous poet has written:

Oh perish the use of the four-letter words
Whose meanings are never obscure;
The Angles and Saxons, those bawdy old birds,

Were vulgar, obscene and impure.
But cherish the use of the weaseling phrase
That never says quite what you mean.
You had better be known for your hypocrite ways
Than vulgar, impure and obscene.
Let your morals be loose as an alderman's vest
If your language is always obscure.
Today, not the act, but the word is the test
Of vulgar, obscene and impure.

Whatever else may be said about the words we censor today, their meanings are not "obscure." I cannot say as much for the majority's standards for "indecency."

In 1601, William Shakespeare wrote in Twelfth Night (III, iv), "Nay, let me alone for swearing." Most of the fresh and vital cultures in our country, not the least of which are the young, have learned this lesson. This Commission has not.

I regret the double standard that causes many significant matters to languish in FCC files for years, while rushing other, more questionable matters to decision within days. It is extraordinary that the majority would choose to act on an issue of this consequence without even taking the time to read, let alone carefully consider, the full dissenting and concurring opinions of all Commissioners in this case. I may, nevertheless, take the time to prepare such a fuller opinion in the future for the record. Meanwhile, I feel it useful to put forward at least these views today, as the majority announces its decision. I dissent.

V-90

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC 70-93
40480

January 21, 1970

IN REPLY REFER TO:
3300

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jack Straw Memorial Foundation
Radio Station KRAB-FM
9029 Roosevelt Way, N.E.
Seattle, WASH 98115

Gentlemen:

This refers to the pending renewal application of station KRAB-FM, Seattle, Washington.

During the past license period the Commission has received complaints from the public alleging that on occasions profane, indecent or obscene language has been broadcast by your station. In response to a Commission request you have furnished statements pertaining to your policy regarding the broadcast of such material and specific comments regarding KRAB's broadcast of a program presented by Reverend Sawyer. With respect to the Reverend Sawyer program, you state that the entire tape had not been auditioned prior to broadcast and when, during the broadcast, it became clear that the language used was contrary to your station's policy regarding material which you consider suitable broadcasting, the program was terminated.

In view of the foregoing background, we shall focus on the Reverend Sawyer matter as illustrative of the issue before the Commission. We have reviewed the pertinent portion of the Reverend Sawyer program in light of your explanatory statements and policy. We note initially that the critical consideration is not whether or not action under 18 USC 1464 is warranted. For, in any event, there is the issue of whether KRAB-FM is exercising proper supervision of its operations and specifically is following its stated policies in this area.

Thus, your station policy eschews the broadcast of "sensationalism for its own sake" and requires that speakers "observe the common sense strictures against obscenity and libel." Your procedures require that "material which raises questions as to its merit for broadcast because of some social, moral, aesthetic or scatological outspokenness" be referred by the Program Director to the Station Manager for audition and a determination as to whether the material should be broadcast in its entirety, in an edited version or not at all.

Any material "which inspires /the/ concern" of the Station Manager as to its "appropriateness for broadcast" is to be reviewed by the Board of Directors. You report that under this system, one or two programs per month are eliminated for "obscenity, obscurantism, sensationalism, or simple boorishness." Portions of the Reverend Sawyer program were clearly contrary to your stated policy as demonstrated by KRAB's removal of the Sawyer broadcast from the air before completion. However, while we believe that in this instance there could have been a more appropriate exercise of proper licensee control in the form of compliance with your own procedures, there is no indication of any overall pattern of failure in this area of licensee responsibility.

In view of the foregoing the Commission has renewed Station KRAB-FM's license for the period ending February 1, 1971. It is expected that appropriate steps will be taken by the licensee to assure implementation of stated procedures regarding the selection of broadcast material consistent with the standards which you have set forth.

Commissioners Cox and Johnson dissenting and issuing statements.

BY DIRECTION OF THE COMMISSION

Ben F. Waple
Secretary

cc:
Michael H. Bader, Esquire

DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I dissent to the majority's action in granting only a one-year renewal for KRAB-FM. I know of nothing in the station's record that would justify imposition of this sanction.

Despite a vague reference to "complaints from the public alleging that on occasions profane, indecent or obscene language has been broadcast," the majority comment on only one program. This was the broadcast of a portion of a 30-hour "autobiographical novel for tape" prepared by a Reverend Paul Sawyer which was aired over the station in August 1967. The Commission does not have a transcript of the program, so we have no idea of the context in which the language complained of was used. We have simply been advised that three so-called four letter words were used -- apparently several times. They are words that I do not use, and which many people find highly offensive. However, it seems clear that, under existing precedents, the words as used were neither obscene nor profane. Many people might regard them as indecent -- that being the third category of language prohibited by 18 USC 1464. However, that term is so indefinite that I believe it is probably unconstitutionally vague.

However, the majority do not contend that the broadcast violated 18 USC 1464 -- and typically the Department of Justice has not regarded this kind of usage as justifying a prosecution under the statute. Rather, my colleagues proceed on the ground that this single broadcast violated the licensee's announced policy requiring such material to be referred to the station manager for audition -- and, in certain cases, to the Board of Directors as well. The licensee concedes that the entire Sawyer tape had not been pre-auditioned, and that when, during broadcast, it became clear that some of the language was contrary to station policy, the program was terminated.

I think some detail as to this single incident is necessary in order to understand what is involved here. As I understand the situation, the facts are as follows. It was suggested to Lorenzo Milam, then president of the licensee of KRAB, that the station broadcast the taped program submitted by Rev. Sawyer, the minister of the Lake Forest Park Unitarian Church, which is located in a northern suburb of Seattle. Mr. Milam auditioned portions of the tape and found the contents and the method of presentation interesting. He did not hear any objectional language in the portions which he played. The program was therefore scheduled for broadcast beginning at 10 A. M. on Saturday, August 5, 1967. Mr. Milam does not go to the station on Saturdays until after noon, but was listening to the station at home. Rev. Sawyer was at the studio to ride gain on his tape recorder, which was being used to play his tape, and the station was attended by a young woman employee. After the program had proceeded for awhile Mr. Milam heard some language which he considered objectionable. He called the station and asked either the employee in charge or Rev. Sawyer to be careful to prevent

any further instances of that kind. However, he again heard language of the kind which had concerned him and so called the station a second time. He talked to Rev. Sawyer and asked him to see to it that no more such language was broadcast. Not being sure that the matter would be corrected, he then drove to the station. After discussing the matter with Rev. Sawyer and the employee in charge, it was agreed to terminate the broadcast. He and Rev. Sawyer then went on the air and discussed the tapes which had been on the air. It appears that the program was broadcast for about two and a half hours. As a result of the presentation of this program, the Commission received one complaint. The matter was investigated by an Assistant United States Attorney in Seattle. He concluded, with the concurrence of his superior, that there was no basis for prosecuting any of the parties involved in the incident.

It is Mr. Milam's position that the broadcast was not obscene or indecent, but that it was inconsistent with the station's program standards. It seems to me that any deviation from the station's policies was so slight that it should not result in the sanction imposed here.

It is desirable, of course, that licensees observe the policies they have adopted to insure service in the public interest. We have, on occasion, imposed sanctions against some who have been so lax in their supervision of staff members that extensive violations of station policy, of our rules, or of the law have occurred. But we have always exercised great care in the area of speech, indicating that we would act only where a consistent pattern of programming contrary to the public interest was involved. Palmetto Broadcasting Co., 33 FCC 250, at 257-8 (1962); Pacifica Foundation, 36 FCC 147, at 150 (1964).

In this case there is no such pattern, since the majority rest their action on a single program. There have been other complaints against KRAB, but the majority apparently do not regard them as of sufficient significance to be considered here -- a conclusion with which I agree. I think the imposition of a sanction for one departure is not only without precedent, and in my judgment highly arbitrary, but is also likely to exert a chilling effect on licensees' freedom in programming their stations -- a result the courts have sought to protect against and one which should be of grave concern to all who believe that our democracy requires the maximum possible freedom of expression.

I believe that this represents a shift in the Commission's position -- one that troubles me greatly. In 1964, we granted renewals of license for KPFA-KPFB, KPFK, and WBAI, stations licensed to the Pacifica Foundation which, like KRAB, are subscriber supported rather than commercially operated. We had had those stations on deferred renewal for many months while we -- and a Senate Committee -- investigated a number of matters. These included complaints of a number of instances in which four letter or allegedly obscene words were broadcast. The Commission discussed these matters at length and found that they would not bar grant of a full term renewal. As to this question, we said:

> "We recognize that as shown by the complaints here, such provocative programming as here involved may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves. Were this the case, only the wholly inoffensive, the bland, could gain access to the radio microphone or TV camera." (36 F.C.C. 147, at 149)

In 1965 the licenses for Pacifica's California stations expired. Again, the Commission had received a number of complaints about language broadcast by the stations. Our staff recommended regular renewals. However, because Pacifica had failed fully to conform to its programming policies, the Commission granted one year renewals -- with Chairman Henry, Commissioner Loevinger and I dissenting and voting for full term renewals.

On March 27, 1967, after reviewing the operations of KPFA-KPFB and KPFK during their short renewal period, the Commission granted the stations regular renewals.

On February 28, 1969, we again considered applications for renewal of the licenses of Pacifica's three California stations. Again there were allegations that obscene, profane, or indecent language had been used in programming presented by the stations. The Commission considered these complaints and then, after quoting the portion of our January, 1964, decision set forth above, said:

> "6. We believe that the reasoning of our January, 1964 decision as quoted above is equally applicable in our consideration of the instant applications. There can be no doubt that the stations provide a unique and well received programming for a sizable segment of the population of the areas they are licensed to serve. Viewing the complaints against the overall performance of the applicant during the renewal period, we find in the listeners' complaints no impediment to a grant of the applications."

This action was taken by a vote of 5 to 2, with Commissioners Bartley and Robert E. Lee dissenting.

I think the action with respect to KRAB is inconsistent with this line of rulings with respect to the very similar operations of the Pacifica stations. The only time we gave Pacifica a one year renewal -- which I considered improper -- we had complaints with respect to five programs, not just one as is the case here. Furthermore, our staff obtained tapes of the broadcasts and summarized them for us -- whereas in this case we don't have a tape or transcript and so do not know the context in which the words complained of were used.

Since joining the Commission, Chairman Burch has expressed particular concern about the broadcast of obscene or indecent language. However, in an appearance on "Meet the Press" on January 25, 1970, the following colloquy took place:

> "Miss Drew: You have made it clear one of your priorities is going to be dealing with the matter of obscenity. How do you deal with obscenity without getting into censorship?
>
> Mr. Burch: You will have probably some shady areas that will be rather difficult but it seems to me, I still think there are certain words that have no redeeming social value. I think there are certain instances of conduct which would fall into that category.
>
> * * *
>
> Miss Drew: How would these rules work? Would you have a list of words that would be forbidden or would you have -- would it be desirable for stations to tape programs ahead of time so they could be sure nothing would go wrong, or would there be certain groups that would be inadvisable for a station to put on because they are more likely than others to use an obscenity? How do you envision these rules?
>
> Mr. Burch: I don't envision it as an easy rule to apply and I am not sure it will ever end up as a rule. We had an experience of trying to draft a statement of these words that would be acceptable and those words that would be unacceptable and, aside from it being the most obscene document probably that has ever been put together by a government agency, it was not intelligible because obviously language has to be considered in connection with the events and the acts that are taking place."
>
> * * * (emphasis supplied)

On January 30, 1970, in a speech before the Big Brothers of the San Francisco Bay Area, he recognized that:

> ". . . under the guiding criteria, obscene or indecent programming is not only patently offensive by contemporary community standards but also without redeeming social value." (Emphasis supplied.)

And, again, he said that:

> "Obscene programming is material which, taken as a whole, appeals to a prurient interest in sex." (Emphasis supplied.)

He also stated that, "The airwaves shouldn't be given over to a steady diet of bland, inoffensive material," even though " controversial programming is bound to offend some," and that a pattern of smut should be treated differently than isolated occurrences.

Thus it seems to me that the Chairman has recognized that language which offends some may be broadcast without the licensee incurring any penalty (1) if, considered in context, it does not appeal to prurient interest in sex or has redeeming social value, or (2) if the broadcast is an isolated occurrence rather than part of a pattern of such programming. But the majority have clearly assessed a penalty here for a single broadcast, and have done so without considering the context in which the language was used and without being able to determine whether the program, as a whole, appealed to prurient interest or had offsetting redeeming social value.

I think this departure from precedent and from recently announced principles makes this action arbitrary and capricious. It is also arbitrary because it requires observance of an undefined standard -- indeed, a non-existent standard, so far as I know. It is clear that the majority will impose a sanction for the use of the three words involved here -- at least if all three are used. Of course the licensee of KRAB did not know this when it inadvertently permitted their use over the air. And what is more, other licensees do not know even now what the "dangerous" words are because the majority have not listed them -- and I'm not going to do their work of compiling a list of forbidden words for them. And no one -- probably not even the majority -- knows what other words will bring down the Commission's wrath upon a licensee who permits their broadcast -- regardless of frequency, context, social value, or even knowledge by the licensee that they were to be used. If a list of all the words which either offend the majority -- or which they think will offend too many of the public -- were ever published as banned from the air, that would clearly be prior censorship prohibited by Section 326

of the Communications Act, as well as the First Amendment. But failure to publish the list may have even more chilling effect upon broadcast programming, because licensees may avoid the use of many, many more words out of fear that they may be on the Commission's secret list. Licensees may reject recorded, taped, or filmed program matter even though they think it has social value. Or they may avoid coverage of on-the-spot news in the course of which participants might use language the broadcasters think may bring Commission retaliation. Or licensees may exclude from discussion, interview, or other live programming individuals or groups they fear may use proscribed language which might not be excised through the use of a tape-delay device. I do not think any of these "voluntary" restraints would be in the public interest.

There is a third element of arbitrariness in this case -- the majority apparently have a double standard when it comes to protecting the public from language which may offend some, or many, of them. Thus far they have imposed sanctions only against the licensees of KRAB and KPFA-KPFB and KPFK, non-commercial stations which broadcast very substantial cultural and informational services for audiences which support the stations through voluntary subscriber fees. They are now considering broadcasts by non-commercial educational stations. I certainly do not favor extension of this kind of action to commercial stations -- at least in situations such as we have thus far considered. But if we are going to apply such a policy to non-commercial stations, simple logic and fairness would require that it be extended to the national networks and other commercial facilities.

We have received far more complaints, for example, about matters in the Smothers Brothers Comedy Hour and the Rowan and Martin Laugh-In than have ever been lodged against KRAB or the Pacifica stations. They did not involve four letter words, but did deal with language or video matter which certain members of the public deemed obscene, indecent, or profane. But I do not recall that we ever directed an inquiry to CBS or NBC. ABC once initiated a series entitled "Turn On" which was cancelled after one episode because of a flood of complaints that it was offensive -- but the Commission did nothing.

Commissioner Robert E. Lee recently observed an incident on the Johnny Carson show which so offended him that he called the Washington V.P. of NBC. But he was satisfied with a report that some minor employee had been transferred to another assignment -- though higher ranking officials of the network must have known more about this matter than Lorenzo Milam did about the language broadcast by KRAB. Of course, NBC customarily "bleeps out" the kind of language which has gotten KRAB and the Pacifica stations into trouble. However, it is often still possible to discern what was said. While the network's effort to "do the right thing" satisfies some, others still complain -- as Commissioner Lee did. But the Commission did not penalize NBC. And, of course, the Smothers, Rowan & Martin, and Carson shows have all involved <u>patterns</u> of material that some have found offensive, rather than the limited incidents at KRAB and the Pacifica stations.

On the CBS evening news on January 5, 1970, Walter Cronkite presented two bits of filmed news coverage containing what many people regarded as profanity. One minister in Detroit forwarded a petition signed by 598 people in his area alone protesting this broadcast. I know of no action -- taken or planned -- against CBS.

I want to make it clear, once again, that I do not believe any action is required in any of these cases. But I do not think the government of the United States should ignore complaints against rich and powerful commercial broadcasters and pick only on small, non-commercial broadcasters. If there is, in truth, a dangerously growing use of obscene, indecent or profane matter on radio and television requiring the course the majority are charting here, then they should press this effort all across broadcasting. At least this would require commercial broadcasters -- who have never come to the defense of KRAB and the Pacifica stations in their efforts to preserve the right to present a broad range of material not found on many other stations -- to face up to the issue. They have heretofore claimed First Amendment protection for their asserted right to present their views over their facilities without presenting the opposing viewpoint in accordance with our Fairness Doctrine and for the broadcast of cigarette commercials and lottery information -- all of which positions have been rejected by the Supreme Court. More constructively, in my opinion, they have defended the right -- largely at the network level -- to present news, commentary, convention coverage, and documentaries without review by government as to truth or adequacy of the contents of such broadcasts. The Commission has honored these claims, subject only to observance of the Fairness Doctrine and inquiry in cases of substantial allegations of rigging or staging of purported news events. I think the networks and the profitable and powerful stations should recognize that if they allow the Commission to interfere with the freedom of small, unconventional stations -- on an infrequent basis and in the context of material having redeeming social value -- to broadcast language that offends some, then those in our society who think that all must conform to their standards will be encouraged to seek further restrictions on broadcast programming. Their next target will quite probably be -- if it isn't already -- what they regard as sexually suggestive or provocative material, whether in dialogue, costume, dance or other form. And they are likely to push on to attack matter which offends their sense of propriety as to morals, political opinion, behavior, etc. Of course the majority will assure us that they would not countenance any such extension of the doctrine implicit in their action here, but if those they apparently think they are serving are to be assured that under no circumstances will they or their children be exposed to the broadcast of single words they regard as offensive, isn't it logical to expect this constituency to demand "protection" against the presentation of "offensive" ideas or the depiction of "offensive" conduct. After all, the impact of ideas and the force of example are much greater than the consequences of hearing an occasional four letter word. And it is discouraging, after our nearly 200 years of democracy, that so many are so ready to silence or suppress

that of which they disapprove. I do not expect any rush of commercial broadcasters to the defense of those in their industry whom they probably regard as trouble makers, but it would be encouraging to see the National Association of Broadcasters come forward instead of leaving the defense of the perimeters of freedom to the American Civil Liberties Union. I can understand the hesitancy of the industry's leaders -- they are worried about estranging a substantial part of their audience, not to mention powerful members of Congress who have spoken out on this issue. But I think the stakes in this struggle may be more important for broadcasting than most of those matters which engage the attention of the NAB.

For that matter, it is not easy for me to defend four letter words. I find them offensive in most situations, and certainly do not seek the removal of all barriers to their use in broadcasting. I would be prepared to consider serious sanctions against a station whose operations revealed a pattern of substantial, repeated use of patently offensive language in contexts involving no redeeming social value. Cf. Palmetto Broadcasting Co., 33 FCC 250 (1962). I might, in some circumstances, support lesser penalties for even isolated use of such language without reason or justification. But when dedicated broadcasters who try to use radio to bring a wider than ordinary range of information and entertainment to their audiences occasionally broadcast such language because in their judgment it is important in the context of the programming -- or inadvertently permit its use under circumstances where their policies would normally require its deletion -- I do not think it serves the public interest to penalize them. Indeed, I think to do so violates the Act and the Constitution.

KRAB and the Pacifica stations are supported directly by portions of their audiences who pay subscription fees to keep them in operation -- while the rest of the public can, if they wish, listen from time to time. The Commission was questioned last December by the Senate Subcommittee on Communications about the broadcast of a poem on Pacifica's Los Angeles station and the grant to Pacifica of a construction permit for a new station in Houston. Pacifica has broadcast a tape of that hearing over at least two of its stations since then, and I have received a number of letters from regular listeners to those stations. These are not sensation seekers who tune in hoping to hear salacious or smutty material, but mature people who clearly value the educational, cultural, and other programming these stations present. Many of them listen very little to other stations, and indicate that these stations mean a great deal to them. They note the occasional broadcast of language which they recognize offends some who hear it, but contend that they are more offended by the conditions which lead to the occasional use of such language in records, poems, plays, discussions and news coverage presented over the air than by the words themselves. They do not contend that others should listen to matter the latter find offensive, but do object to attempts to interfere with the freedom of the stations to continue to broadcast programming which they value and want to continue to receive.

KRAB-FM

[Letter to Jack Straw Memorial Foundation,
Radio Station KRAB-FM, Seattle, Washington]

Dissenting Opinion of Commissioner Nicholas Johnson

I fully support Commissioner Cox's detailed and thoughtful dissenting statement in this case. I, too, believe the majority's decision to give KRAB a short-term, one-year license renewal as a punishment for the thoughts, ideas and forms of expression used by Reverend Paul Sawyer on one of KRAB's programs is misguided and inconsistent with those fundamental principles of free speech on which our society is based. I shall have more to say at a later date about FCC censorship of allegedly "indecent" thoughts and language over the broadcast medium in general, and about this specific case in particular. I think it important, however, that the public understand a few brief but important facets of this case.

First, it should be made clear that the Commission today punishes a broadcaster for the content of his programming--not because he violated any public, well-defined Commission rule or statute of Congress, but because, in the broadcaster's and not the FCC's opinion, he violated his station's own internal policy. Presumably if a station had an internal policy against criticism of the government and one of its announcers accidently violated that policy, the precedent established

by the majority would seem to indicate a one-year renewal for the offending station.

Second, although Congress has given the Commission the authority to impose sanctions for the broadcast of "obscene, profane or indecent" language (18 U.S.C. 1464), the Commission has not even attempted to apply that statute or determine whether the words or thoughts expressed over KRAB violate those statutory guidelines. In fact, the Commission never obtained a transcript of the offending program. It has no way of knowing whether or not the speech in question occurred in a socially redeeming context. Apparently the majority's position is that certain words are per se so offensive that any consideration of the context in which they were spoken is irrelevant.

Third, the incident involved was an isolated one. Due to the length of the program (30 hours), only portions of it were auditioned by the manager, Mr. Lorenzo Milam, before broadcast. The tape was removed from the air shortly after Mr. Milam heard the offending words. The majority does not contend that the incidents complained of have occurred repeatedly, or that the language in question falls outside the protection of the Constitution or FCC rules. To penalize a licensee for an isolated incident (even if it did violate our rules, which apparently it did not), is a marked departure from established Commission policy. In Pacifica Foundation, 36 F.C.C. 147, 148 (1964), we said that in matters of this sort we were "not concerned with individual programs."

Rather, our "very limited concern" was whether, "upon the overall examination, some substantial pattern of operation inconsistent with the public-interest standard clearly and patently emerges." We refused to take punitive action for "a few isolated programs." Our position was clear:

> The standard of public interest is not so rigid that an honest mistake or error on the part of a licensee results in drastic action against him where his overall record demonstrates a reasonable effort to serve the needs and interests of his community. (36 F.C.C. at 150.)

The majority does not even consider whether the incident involved an "honest mistake or error," as the facts clearly indicate. And KRAB's "overall record" is clearly superior to most other comparable stations.

Fourth, the public should know that KRAB is not some marginal operation which pumps out aural drivel and profit-maximizes with high rates of commercialization. KRAB-FM is a non-commercial station supported by contributions from its listeners. It devotes over 95% of its broadcast day to the performing arts, public affairs, news, and general educational programming. How many other stations can boast of such a record? Within recent years, this Commission has renewed the licenses of a station broadcasting 33 minutes of commercials an hour, a station that broadcast no news, and a station that defrauded advertisers out of thousands of dollars. Today the majority punishes a non-commercial station for a portion of a single program, broadcast in its attempt to provide its listeners with unconventional programming--and ignores one of the more outstanding broadcast records in the country.

Fifth, the Commission makes reference to "complaints from the public" concerning the programming of KRAB. Yet a quick check of the FCC "Complaints File" on KRAB shows far more support than criticism. Here is a sampling of a few comments: "fine and unusual broadcasting record of KRAB-FM," "no comparable radio programming," "urbane, sophisticated and intellectually provocative," "programming is of extraordinary interest," "you need the freedom to broadcast important and controversial programs . . . ." I do not believe any station can broadcast provocative and challenging programming without pushing at the borders of the "conventional." When that happens, there will always be some who will be offended. There will always be those who would like to silence others--to blank out the ideas and thoughts they present.

That is not the American way. This Commission simply cannot respond to such pressure.

V-104

Obscenity

FCC 70-665
49384

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The renewal of the license of	)	File No. BRH-1430
Station KRAB-FM,	)	
Seattle, Washington	)	

ORDER

Adopted: June 24, 1970 ; Released: July 7, 1970

By the Commission: Commissioner Bartley dissenting; Commissioner Cox not participating; Commissioner Johnson dissenting and issuing a statement.

1. The Commission has considered the Petition for Reconsideration, filed on March 20, 1970, by the Jack Straw Memorial Foundation, licensee of station KRAB-FM, Seattle, Washington, seeking reconsideration of the short-term renewal granted KRAB-FM by Commission action of January 21, 1970 (21 FCC 2d 833). We remain of the view that in all the circumstances, it would be appropriate to review the operation of this station at an early date to determine whether it is acting effectively to discharge its own policies. We have acted here, on this issue of licensee responsibility, based on the particular facts of the case and in order to make clear the importance of licensee responsibility to the industry generally. We stress that this is the issue, and there is no intent or aim to take any of the improper "chilling" actions claimed by petitioner. See Notice of Apparent Liability issued to WUHY-FM (FCC 70-346, released April 3, 1970).

2. We note, however, that there are substantial issues of fact in the circumstances of this case. Therefore, if petitioner wishes, we shall afford it a hearing on these facts and thus on the ultimate question whether a short-term renewal is called for. We recognize the difficulty in completing the hearing process prior to the filing of the application for a full renewal (in November 1970). However, we believe that it is the only appropriate way to proceed in the circumstances. The statutory scheme permits short-term renewals but at the same time, hearing is appropriate before a sanction is imposed in a situation involving substantial issues of fact (other than in the forfeiture situation where there can be a trial de novo before the court). Accordingly, we offer the hearing and of course on an expedited basis. Petitioner shall reply in ten days whether a hearing is requested; if not, the petition for reconsideration shall be deemed denied.

*

BY DIRECTION OF THE COMMISSION

Ben F. Waple
Secretary

*Dissenting statement of Commissioner Johnson attached.

KRAB-FM (Petition for Reconsideration)

[In re petition for reconsideration of the short-term renewal of KRAB-FM, Seattle, Washington.]

Dissenting Opinion of Commissioner Nicholas Johnson

On January 21, 1970, the Commission (Commissioner Cox and I dissenting) issued KRAB-FM a short-term, one-year renewal as a penalty for allegedly violating its own policies. Jack Straw Memorial Foundation [KRAB-FM], 21 F. C. C. 2d 833, 18 P & F Radio Reg. 2d 414 (1970). KRAB-FM has petitioned for reconsideration, asking us to grant it a full-term renewal. The Columbia Broadcasting System (CBS) has filed an "amicus" petition in support of KRAB-FM's petition, also asking that we grant KRAB-FM a full-term renewal. The Commission has denied both petitions. I adhere to the reasons stated in my original opinion, see Jack Straw Memorial Foundation, supra 21 F. C. C. 2d at 841; see also In re WUHY-FM (Phila., Pa.), FCC 70-346, released April 3, 1970 (Notice of Apparent Liability), and accordingly dissent.

I think it significant that the majority has not addressed any of the arguments advanced in KRAB-FM's Petition for Reconsideration, nor have they attempted even to acknowledge the illuminating and cogent reasoning advanced by CBS. I believe this avoidance speaks for itself. The majority clings to the "escape clause" unfortunately used so often by those who are unable to justify their exercise

of arbitrary power in intellectual terms: "When unable to reply, do not reply." The majority's silence is commendation enough for the efforts of all petitioners. I have often urged larger broadcasters to fight for First Amendment interests, both before this Commission and in the courts, see, e.g., Columbia Broadcasting System (WBBM-TV), 18 F. C. C. 2d 124, 142, 155-56 (1969) (dissenting opinion); United Federation of Teachers [WBAI-FM], 17 F. C. C. 2d 204, 210, 218-19 (1969) (separate opinion), and therefore commend CBS and its counsel for its able and persuasive pleading. Important battles are often fought in small and seemingly insignificant arenas. Yet the freedoms of speech and the press will be preserved in this country only by constant vigilance, by the people and the media alike. Perhaps other broadcasters will realize how importantly their own interests are bound up in this and similar cases, and act with equal courage should this case be taken up on appeal.

As KRAB-FM and CBS point out, the Commission has not even attempted to argue that KRAB-FM has violated any federal statute or Commission rule--such as 18 U. S. C. 1464, which prohibits the broadcast of "obscene, profane or indecent" language. Why? I can only assume that the majority is as aware as everyone else--including the U. S. Department of Justice--that no legal case for violation of such a statute exists. Apparently undaunted, however, by any felt need to operate within a framework of law,

the majority persists in meting out punishments nevertheless--apparently espousing the maxim that "where there's a will, there's a way." In a triumph of will over law, that "way" is found in punishing a licensee, not for a violation of law, but for an alleged violation of internal station policy. What the majority holds is that if licensees adopt policies which are "stricter" than existing law, then we will enforce those policies as if they were law. Not only is this a blatantly improper delegation of legal authority; it clearly constitutes illegal "state action" under all the obvious tests. See, e.g., Barrows v. Jackson, 346 U. S. 249 (1953); Shelly v. Kraemer, 334 U.S. 1 (1948). This Commission can no more enforce a rule adopted by a licensee in violation of the First Amendment than it can enact one.

I also find the majority's internal logic somewhat puzzling. The licensee is punished for an alleged violation of its own internal policy. Clearly, however, if the station had never adopted such a policy, the Commission would have had no reason for a sanction of any kind. Is the Commission suggesting that stations not adopt policies at all? How would we treat alleged violations of "unwritten" policies, established through patterns of operation? Must a station now act at its peril in deviating from even unwritten policies in the future, even if it wishes to change its policy; or must that station formally "amend" its policies before broadcast? Would the majority's collective mind

be cased had KRAB-FM rescinded its policy a few minutes before broadcast? And, if so, would the majority entertain an argument that the broadcast of the program in question itself constituted a recession-in-fact of that policy? As CBS points out, if Mr. Milam had not acted promptly to take the program off the air, the majority would have difficulty finding a contrary to the station's policy. Is the lesson, therefore, that it is better to leave material on the air and later argue it was consistent with the station's internal policy? The point is simply that licensees are left with no guidelines at all in this important area, and this confusion can only "chill" any attempts to present controversial programming.

KRAB-FM's policy eschews "obscenity, obscurantism sensationalism, or simple boorishness." The broadcast was clearly not obscene, and the majority has not undertaken to prove that it was--nor even that it was obscurantist, sensational, or boorish, and for obvious reasons. I imagine the courts would make short work of any Commission attempt to punish a licensee for "boorish" programming, a standard that might easily eliminate over 90% of most commercial broadcasts. Again, the Commission's action seems to indicate that a licensee is better off with no policies, lest he be penalized for less than strict adherence--even though others who have set no goals for themselves could broadcast the same material without penalty.

The critical issue here is the probable chilling effect of the majority's action on licensees who wish to present experimental, innovative or controversial programming. The majority attempts to alleviate such fears by stressing that the only issue involved is "licensee responsibility," and that "there is no intent to aim or take any of the improper 'chilling' actions claimed by petitioner." Yet actions speak louder than words, and the confusion spread by the majority's inept handiwork will do more to deter timid broadcasters from even feeble attempts at experimentation and innovation than the majority's false reassurances can hope to overcome. Supreme Court Justice Brennan, dissenting in Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967), explained that to give important speech freedoms "the necessary 'breathing space to survive,' . . . the Court has . . . molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise." The Commission majority refuses to heed or even listen. Acting beyond the restraint of law, it has "unbridled" whatever "discretion" it may have remaining and has let loose a doctrine which seems infinite in its capacity for vagueness and overbreadth.

V-110

The seeds planted by the majority in its January 21, 1970 order have already begun to bear fruit. One announcer was recently fired from a Washington, D.C. station in part because she broadcast a satirical recording containing the word "masturbation." See Quicksilver Times, April 3-13, 1970, p. 5. Did it violate the station's internal policies? Who knows. Would it have violated KRAB-FM's? Who knows. And when in doubt, too many licensees react in typical fashion: cancel the show, fire the announcer, and perhaps the FCC will be forgiving. This is the stuff of oppression. This Commission should have no part of it.

Covington & Burling

K-111

NEWS

Federal Communications Commission
1919 M Street, NW.
Washington, D.C. 20554
Public Notice

50946

Short Term Renewals
Petition for Reconsideration

Report No. 9155 BROADCAST ACTION June 26, 1970 - B

obscenity

JACK STRAW MEMORIAL FOUNDATION OFFERED EXPEDITED HEARING ON SHORT-TERM LICENSE RENEWAL FOR KRAB-FM, SEATTLE, WASHINGTON

In response to a petition by the Jack Straw Memorial Foundation, licensee of KRAB-FM, Seattle, Washington, seeking reconsideration of the Commission's January 21, 1970, decision (21 FCC 2d 833) granting the station a short-term renewal ending February 1, 1971, the FCC has offered to hold a hearing on an expedited basis to determine whether a short-term renewal is called for (BRH-1430).

The one-year renewal was ordered by the Commission on grounds that the licensee had failed to comply with its own procedures to prevent the broadcast of offensive material. The Commission noted however, that these were "substantial issues of fact in the circumstances" of the case.

Jack Straw Memorial Foundation has ten days in which to notify the Commission whether it requests a hearing, otherwise the petition for reconsideration will be considered as denied.

Action by the Commission June 24, 1970, by Order. Commissioners Burch (Chairman), Robert E. Lee, H. Rex Lee and Wells, with Commissioners Bartley and Johnson dissenting and Commissioner Cox not participating.

- FCC -

E-112

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 70-873
51874

In re application of	)	
	)	
THE JACK STRAW MEMORIAL FOUNDATION	)	Docket No. 18943
	)	File No. BRH-1430
	)	File No. BSCA-801
For Renewal of the license of	)	
Station KRAB-FM	)	
Seattle, Washington	)	

O R D E R

Adopted: August 7, 1970 ; Released: August 19, 1970

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Johnson concurring in the result.

1. The Commission has before it a letter from The Jack Straw Memorial Foundation, licensee of station KRAB-FM, Seattle, Washington, dated July 17, 1970, in response to our Order adopted June 24, 1970, released July 7, 1970 (FCC 70-665) in the above-captioned matter. Our Order denied reconsideration of the short term renewal granted KRAB-FM by Commission action of January 21, 1970 (21 FCC 2d 883), but stated that if the licensee wished, we would afford it a hearing on certain factual questions, "and thus on the ultimate question whether a short-term renewal is called for." The letter from the licensee requests such a hearing, and this order grants that request.

2. In our grant of short term renewal, we focused on an August 1967 broadcast by Reverend Sawyer as illustrative of the issue before the Commission, i.e., the issue of whether the licensee had demonstrated appropriate responsibility in carrying out its policies concerning the material broadcast over its facilities. The handling of the Sawyer broadcast will therefore be examined in a full evidentiary hearing. The handling of the March 9 and March 10, 1969 broadcasts of a discussion with members of the San Francisco Mime Theatre, which included remarks concerning Chairman Mao and an alleged incident between police and Oakland Black Panthers, will also be explored to the extent relevant to the issue designated for hearing. Should the Broadcast Bureau intend to rely upon any other broadcast relevant to the designated issue, it shall give timely notice to the licensee.

3. Accordingly, IT IS ORDERED, That pursuant to Sections 307(d) and 309(e) of the Communications Act of 1934, as amended, the application

for renewal of license of Radio Station KRAB-FM is designated for hearing at a time and place to be specified in a subsequent Order upon the following issues:

(1) To determine whether KRAB-FM has exercised proper licensee responsibility in effectuating its policy regarding the suitability of material for broadcast. 1/

(2) Whether in light of issue (1), the public interest would be served by a one year or a full three year renewal of the license of KRAB-FM.

4. IT IS FURTHER ORDERED, That, as stated in our Order adopted June 24, 1970, the hearing shall be carried out on an expedited basis.

5. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the applicant herein, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issue specified in this Order.

6. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the hearing within the time and manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 1.594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION *

Ben F. Waple
Secretary

* See attached Dissenting Statement of Commissioner Robert T. Bartley.

1/ We note that this issue differs from that suggested by KRAB-FM. We believe our formulation is more appropriate.

DISSENTING STATEMENT
OF
COMMISSIONER ROBERT T BARTLEY

I dissent to the form of the hearing.

I would have the hearing on the threshold issue of whether the license should, or should not, be renewed

IV-115

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

B
FCC 70R-356

56701

In re application of	)	
	)	
THE JACK STRAW MEMORIAL FOUNDATION	)	Docket No. 18943
	)	File No. BRH-1430
For Renewal of the license of	)	File No. BSCA-801
Station KRAB-FM	)	
Seattle, Washington	)	

MEMORANDUM OPINION AND ORDER

Adopted October 19, 1970 ; Released: October 21, 1970

By the Review Board:

1. This proceeding involves the renewal application of The Jack Straw Memorial Foundation (Jack Straw), the licensee of Station KRAB-FM, Seattle, Washington. The Commission, by letter dated January 21, 1970 (FCC 70-93), imposed upon Jack Straw the sanction of a short-term license renewal. The basis for this action was an alleged violation by the licensee of its own internal station policy in connection with the broadcast in August, 1967 of a portion of a thirty hour "autobiographical novel for tape" by the Reverend Paul Sawyer. On March 20, 1970, Jack Straw petitioned for reconsideration and by Order, released July 7, 1970 (FCC 70-655), the Commission granted reconsideration to the extent of offering a hearing on the facts at issue. On August 19, 1970, the Commission designated the proceeding for hearing (FCC 70-873, 35 FR 13353, published August 25, 1970) upon the following issues:

1. To determine whether KRAB-FM has exercised proper licensee responsibility in effectuating its policy regarding the suitability of material for broadcast.

2. Whether in light of issue (1), the public interest would be served by a one year or a full three year renewal of the license of KRAB-FM.

2. Presently before the Review Board is a motion to clarify and enlarge issues, filed September 9, 1970, by Jack Straw, an opposition thereto, filed by the Broadcast Bureau on September 23, 1970, and a reply, filed October 1, 1970, by Jack Straw. In support of its request for clarification, petitioner first points out that Issue No. 1 designated by the Commission is not limited to the circumstances surrounding Reverend Sawyer's

broadcast; that the Commission stated that certain other broadcasts of March 9 and March 10, 1969, "will also be explored to the extent relevant to the issues designated for hearing"; and that the Commission invited the Broadcast Bureau to explore still other broadcasts "relevant to the designated issues" upon appropriate notice to the licensee. Jack Straw argues that it "will be placed in an untenable position" if it is not afforded, through clarification of the issues, an opportunity similar to that given to the Broadcast Bureau to focus on specific programs which it deems relevant to the issues, "including a presentation, in general, concerning the policy of the Jack Straw Memorial Foundation and the programming presented in effectuation of said policy." In the alternative, the licensee requests addition of the following issue:

> To determine the nature of the unique, substantial and diverse programming service rendered to the public within the area served by Station KRAB.

In support of this alternate request, Jack Straw contends that the Commission "has, on several occasions, enlarged issues to include a programming issue that permits a licensee to make a showing as to its past record in mitigating any adverse findings which may be made under existing issues." Petitioner concedes that this case is unique in that it involves a question of whether a licensee has followed its own internal procedures and policies, but argues that the fundamental rationale underlying the addition of past programming issues in cases involving violation of Commission Rules is nonetheless equally applicable here.

3. In opposition, 1/ the Broadcast Bureau contends that the designation order in this proceeding calls for a narrow inquiry into "whether the licensee has exercised proper responsibility in effectuating its policy regarding suitable broadcast material"; and argues that, under these circumstances, it is not necessary or desirable to expand the size of the hearing in the manner suggested by petitioner. The Bureau maintains that Jack Straw will not be placed in an untenable position if its motion is denied, because "regardless of the outcome of the hearing, its license will be renewed", and the Broadcast Bureau is required to give timely notice of which broadcasts will be the subject of inquiry. 2/ Finally, the Bureau contends that the answer to Jack Straw's point that the Commission has on

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1/ The Broadcast Bureau states that it is treating Jack Straw's petition as one to enlarge issues, since a clarification request must be taken to the Hearing Examiner in the first instance, a step which the licensee has not taken. However, even if the petition is considered a request for clarification, the Bureau asserts that its position is that clarification as requested herein is not warranted under the circumstances.

2/ The Broadcast Bureau states that it intends "to limit our inquiry into the several instances where KRAB has broadcast obscene and indecent language."

other occasions enlarged issues in the manner requested here is that the Commission did not choose to add one here because of "the limited nature of the inquiry as well as the ultimate limited disposition of the proceeding."

4. The programming inquiry requested by the licensee will be granted insofar as it contemplates an enlargement of the issues. The Review Board has held in other cases involving renewal hearings that, although the Commission is not required to consider evidence of the type sought to be introduced by Jack Straw, "the public interest is better served if a licensee is permitted to make a showing as to its past record in mitigation of adverse findings under existing issues." TransAmerica Broadcasting Corp., FCC 69R-452, 17 RR 2d 833; Wagoner Radio Company, 12 FCC 2d 978, 13 RR 2d 114 (1968). Although the cited cases involved inquiries concerning alleged violations of Commission Rules, not, as here, violations of the licensee's own internal procedures, and although the licensees in those cases faced possible denial of their applications, not the less drastic sanction of short-term renewals, we agree with Jack Straw's contention that the basic rationale for permitting a programming inquiry is still applicable to the present situation. However, we have also held that the addition of a special issue is a prerequisite to the programming inquiry sought by petitioner, Wagoner Radio Company, supra. Therefore, Jack Straw's request for clarification of the issues will be denied, but its alternative request for an added issue will be granted. 3/

5. ACCORDINGLY, IT IS ORDERED, That the Motion to Clarify and Enlarge Issues, filed September 9, 1970, by The Jack Straw Memorial Foundation, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

6. IT IS FURTHER ORDERED, That the issues in this proceeding are enlarged by the addition of the following issue:

> To determine whether the programming of KRAB-FM has been meritorious, particularly with regard to public service programs.

3/ The wording of the issue requested by the petitioner is somewhat broader than that framed in past cases. The Board finds no basis for broadening the inquiry here, and we will therefore specify the same issue as we have in other, similar cases.

7. IT IS FURTHER ORDERED, That the burdens of proceeding and proof under the issue added herein SHALL BE on The Jack Straw Memorial Foundation.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

IV-119

THE JACK STRAW MEMORIAL FOUNDATION

FCC 71D-13
65393

In re Application of	)	
	)	
THE JACK STRAW MEMORIAL FOUNDATION	)	Docket No. 18943 File No. BRH-1430 File No. BRSCA-801
	)	
For Renewal of the License of Station KRAB-FM Seattle, Washington	)	

Issued: March 22, 1971
Released: March 25, 1971
Effective: May 14, 1971

[¶10:326, ¶53:24(R)] Obscene or indecent language in programming.

Licensee was entitled to a full term renewal of its license where it had a policy of avoiding programming which contained obscene, indecent or offensive language, and on a few occasions broadcast programs that included some language offensive to some people. The intent was not to give offense, to pander, to sensationalize, to shock, or to break down community standards. The licensee was to be given credit for a real desire not to debase community standards of taste and decency. The programming of the station was, in total, outstanding and meritorious. Jack Straw Memorial Foundation, 21 RR 2d 505 [Init. Dec., 1971].

Appearances

Michael H. Bader, Esq., (Haley Bader & Potts), on behalf of The Jack Straw Memorial Foundation; and Walter C. Miller, Esq., on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

Introduction

1. KRAB-FM is a non-commercial educational broadcast station operating on 107.7 mHz, Channel 299 at Seattle, Washington. It is licensed to The Jack Straw Memorial Foundation. An application for renewal of KRAB's license was filed by the licensee on November 4, 1968.

2. In a letter to the licensee dated January 21, 1970, the Commission granted a short-term renewal of KRAB's license. In its letter, the Commission said that it had received complaints from the public that profane, indecent or obscene language had been broadcast during the past license period. Referring to the station's stated policy against broadcasting obscene and libelous material, the Commission concluded that in broadcasting a program presented

by Reverend Paul Sawyer, KRAB had violated its own programming policy. Commissioners Cox and Johnson issued statements dissenting from the views expressed in the Commissioner's letter and from the action granting the applicant a short-term rather than a full term renewal (21 FCC 2d 833 [18 RR 2d 414]).

3. KRAB filed a petition on March 20, 1970, asking that the Commission reconsider its action and grant a full 3 year renewal of its license. In response to this petition the Commission reconsidered its earlier action to the extent of offering the applicant a hearing as to whether or not it was entitled to a full-term rather than a short-term renewal (FCC 70-655, July 7, 1970). KRAB accepted the Commission's offer of a hearing and its application for renewal was thereupon designated for hearing upon the following issues: (FCC 70-873, August 19, 1970).

> "(1) to determine whether KRAB-FM has exercised proper licensee responsibility in effectuating its policy regarding the suitability of material for broadcast; and
>
> "(2) Whether in the light of issue (1), the public interest would be served by a one year or a full three-year renewal of the license of KRAB-FM." 1/

4. In its Order of Designation, the Commission also directed that the hearing examine into KRAB's handling of the Reverend Paul Sawyer broadcast, which took place in August 1967, and programs broadcast on March 9 and 10, 1969, which involved discussions with members of the San Francisco Mime Theatre. The Broadcast Bureau was also directed to give timely notice to the applicant if it intended to rely upon any other broadcasts relevant to the issues designated for the hearing.

5. On September 9, 1970, KRAB filed a Motion to Clarify and Enlarge Issues. In that Motion the applicant, among other things, requested the addition of a meritorious program issue. This request was granted and the following issue was added to the proceeding:

> "to determine whether the programming of KRAB-FM has been meritorious, particularly with regard to public service programs." (26 FCC 2d 97 [20 RR 2d 492])

A prehearing conference was held in Washington, D. C., on September 23, 1970. 2/ At that conference, the Broadcast Bureau gave written notice that

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1/ Commissioner Bartley dissented to the form of the hearing. He would have had the hearing deal with the issue of whether the license should be renewed at all. Commissioner Johnson concurred in the result.

2/ After the prehearing conference the Hearing Examiner originally designated had to withdraw from the proceeding. Examiner Ernest Nash was designated, with the consent of all parties, by Order of the Chief Hearing Examiner. (FCC 70M-1418, October 15, 1970)

it intended to rely upon a number of other programs during the course of the hearing. In this notification the Broadcast Bureau detailed the alleged obscenities which had been broadcast and gave the names of the complainants who had brought attention to these programs. As listed in the Broadcast Bureau's notification, the following programs were added to those specified by the Commission: Two programs in which the principal speaker was the Reverend James Bevel and which were broadcast during December 1967; a program with Dave Wertz broadcast 9:30 to 10:30 p.m., October 1, 1968; a program entitled "Murder at Kent State" broadcast 5:30 to 6:00 p.m., August 10, 1970.

6. Hearings were held in Seattle, Washington, on November 12, 13 and 16, 1970, and the record was closed on November 16, 1970.

Findings of Fact

1. The Jack Straw Memorial Foundation is a non-profit educational corporation organized under the laws of the State of Washington. It is the licensee of KRAB in Seattle and KBOO in Portland, Oregon. A Board of Trustees consisting of 11 members, nine of whom live in the Seattle area, are responsible for the formulation of the policies under which KRAB is operated. These policies have taken the form of written resolutions, oral understandings, or statements published in the KRAB program guides.

2. KRAB operates as a "free forum broadcast station" designed to encourage free and complete public expression. Its basic policies regarding program suitability were originally formulated by Lorenzo W. Milam who was the founder of KRAB and owned the station until he transferred it to The Jack Straw Memorial Foundation. These policies were largely oral understandings until they were reduced to writing and formally adopted by the Board of Trustees after the Commission had raised questions regarding the suitability of the content of certain programs which KRAB had broadcast.

3. KRAB is listener supported. It receives its funds in the form of contributions from listeners and has been the recipient of grants from various foundations. It operates on an annual budget of about $14,000. Most of the regular employees of the station receive little or no pay for their work. A good deal of the work needed to run the station is performed by volunteers from among its listening audience.

4. KRAB's policies as to determining whether or not a program is suitable for broadcast were related to the Commission in a transmittal made November 21, 1967, as follows:

> "The station will not avoid programs because of their unusualness or outspokenness. The primary criteria of broadcast standard is fairness: that the station should provide a great deal of time to speakers, writers, and thinkers from a wide variety of viewpoints. It is crucial that their material be well thought-out, meaningful, and insightful; there should be no sensationalism for its own sake.

"In the case of material which raises questions as to its merit for broadcast because of some social, moral, aesthetic, or scatological outspokenness, the material shall be referred by the Program Director to the Station Manager for audition and judgment as to whether it should be broadcast entire, elided, or not at all.

"If the program inspires concern on the behalf of the Station Manager as its appropriateness for broadcast, the program shall be auditioned and passed on by the Board of Directors meeting as a whole, or by those directors appointed by the board to judge the material.

"This simple procedure has worked well in the past with, perhaps, one or two programs a month being eliminated by the Station Manager or the Board or a Committee of the Board for obscenity, obscurantism, sensationalism, or simple boorishness. It relies on the judgment and good taste of the station staff, integrated with that of the Board – both with respect to programs presented and those referred to higher authority."

These standards or policies are the same ones which are in effect now and which were in effect during the broadcast of the programs which resulted in this proceeding.

5. Central to the effectuation of policies regarding programming suitability are the trustees of The Jack Straw Memorial Foundation and a group consisting of five regular employees of KRAB who audition programs for suitability. Two of these employees, the station manager Gregory Palmer, and the music director of the station, Robert L. Friede, are also trustees. The programs are pre-auditioned for suitability by Michael Wiater, the program director; Bill Seymour, the production manager; and Jane Reynolds, the production assistant as well as Friede and Palmer. Before going into the procedures which are followed, let us briefly sketch the backgrounds of these trustees and employees.

Trustees

(1) Jonathan Gallant is President of the Foundation and was one of its founding members. Professor Gallant teaches genetics at the University of Washington; has a PhD from Johns Hopkins University; and holds a Simon Guggenheim fellowship. He has appeared on a number of music, interview and commentary programs on KRAB.

(2) Byron D. Coney is a lawyer specializing in real estate and mortgage banking. He is a graduate of the University of Washington and of Harvard Law School. Mr. Coney has been secretary of The Jack Straw Memorial Foundation for three years and a Trustee since 1965. He has been a frequent participant in KRAB programs since 1963.

(3) David Calhoun is a native of Missoula, Montana; an honor graduate of The College of Pudget Sound; manager of station KBOO, Portland, Oregon; a

one time student at the University of Washington Medical School; a graduate student of literature; and a student of the organ and harpsichord. He began as a volunteer at KRAB in 1965.

(4) David A. Roland is an electrical engineer with degrees from the Universities of California and Washington. He holds a first-class radio telephone operator's license, has worked at KRAB as a volunteer, and has been a Trustee since April, 1970.

(5) John W. Prothero is a research scientist at the University of Washington Medical School and holds a PhD in biophysics. He is a commentator on KRAB; a writer on scientific and social topics; an outdoors enthusiast; and a devotee of the performing arts.

(6) Gary Margason is a former student at San Jose State College and the University of California where he studied chemical engineering, physics, and sociology. He was one of the organizers of TheJack Straw Memorial Foundation and has served as a Trustee since 1962. He was manager of KRAB from April 1969 to January 1970. He is presently an employee of the Burke Museum and Genetics Laboratory at the University of Washington.

(7) Michael C. Duffy is a high school English teacher and a graduate of the University of Washington. He has produced and presented a series entitled Classic Jazz since 1963 and he has been a Trustee since 1969.

(8) Helen H. Norton is a housewife with interests in painting, studying and community affairs. Her community associations include President of a PTA program director and religious education instructor for a Unitarian Fellowship and volunteer work for organizations such as Head Start, ACLU, Inter-Racial Dialogue and KRAB. She has been a Trustee since May, 1970.

(9) Nancy Keith is a graduate of Washington State University, a journalist and a sometime volunteer worker at KRAB. Between 1964-1967 she was program director. She has been a Trustee since 1965.

(10) Robert L. Friede is a graduate of Dartmouth College with a degree of anthropology. His interests lie in the field of ethno-musicology. He has been music director of KRAB since 1968 dealing chiefly with jazz, blues and rock and roll. He has sought to bring to the listeners something of the music and cultures of societies from all over the word. He was elected Treasurer and Trustee in May 1970.

(11) Gregory L. Palmer is a native of Seattle who attended the University of Washington. He is the present manager of KRAB.

Employees

(1) Michael Wiater is program director. He is a poet and an artist whose paintings have been exhibited. He has been with the English Department of the University of Washington for a number of years and is a graduate student of English. He serves as KRAB's liaison with the University community.

(2) Bill Seymour is production manager at KRAB. He was a student at Antioch College and he has had training and experience in the technical aspects of broadcasting. He auditions programs mainly with a view toward determining the technical quality of the recordings.

(3) Jane Reynolds is a student at Antioch College. She works at KRAB as part of the work-study program of her college. Her employment at KRAB is temporary. She generally auditions programs in her special fields of interest, Women's Liberation and Social Welfare. Because of her youth, she is 18 years old, Palmer post-auditions most of her work. 3/

6. Palmer has been station manager since January 1970. Preceding him in that post were Lorenzo Milam, who founded the station and served as manager until March 1968; Chuck Reinsh, who served as manager for a short period beginning in March 1968; and Gary Margason, who succeeded Reinsh and was manager until Palmer took over the job.

7. Each of the employees who audition programs uses his or her judgment as to whether or not a program is suitable for broadcast. Each has developed expertise in certain fields and reviews programs in his field of expertness. Besides obscenity, the auditioners look for such other matters which would affect suitability for broadcast as advocacy of law violation, boorishness, and obscurantism. If any of the four employees should have a question regarding the suitability of any material for broadcast it is discussed with Palmer, the station manager, and any problems Palmer may have as to suitability for broadcast he discusses with the Board of Trustees.

8. Palmer has a general knowledge of what is to be considered obscene so far as broadcasting is concerned. In his view, a stricter standard should apply to broadcasting than is applicable to literature or other media. He relates his standard of what constitutes obscenity to the standards of the community rather than his personal view as to what may be considered obscene. Particular standards are developed in discussions among the employees responsible for auditioning programs and among the Board of Trustees.

9. As a matter of station policy, if anyone of four particular words or their derivations should be used in a program proposed for broadcast, reference must be made to the station manager for his decision as to whether these words are to be deleted from the program before broadcast. According to Palmer, in editing programs for suitability, 99 percent of the time when something is deleted for obscenity, it is apt to be one of these words or one of their derivations. It is not the policy of KRAB to exclude these words from all programs broadcast regardless of the context in which the words are used. Palmer has never been confronted with a situation in which an entire program had to be rejected because it was obscene. From time to time it has been found that certain words or expressions had to be deleted before broadcast in particular cases.

3/ Friede is 30, Palmer is 24, Seymour is 25 and Wiater is also 25 years old.

10. Palmer keeps abreast of current decisions and pronouncements of the Federal Communications Commission. He receives such material from the station's communications counsel. He is the principal liaison between the personnel who operate the station and the Board of Trustees.

11. A number of programs were edited and changes were made for suitability before broadcast. Palmer deleted two words from a tape entitled "The Army on Trial" because he felt that in the context in which they were used they were obscene. "Running the Bulls in Blue", a documentary produced by KRAB, was edited but mainly because of obscurities, such as crowds moving from one place to another, rather than for the deletion of obscenities. A commentary by Selma Waldman dealing with the Women's Liberation Movement contained some talk about the words men use to describe women. After a discussion with Selma Waldman, Palmer, apparently with her agreement, deleted two of the words from the broadcast. Following is a list of some other programs which were edited to remove obscentities before being broadcast over KRAB.

Comedy of Lenny Bruce

Women of the Seventies: Rights, Roles and Risks, local panel discussion

William Kunstler Speaking at the University of Washington

Stanley Crouch: Ain't no Ambulances for no Nigguhs Tonight Flying Dutchman recording

A Night in Santa Rita, Flying Dutchman recording

Pregnancy: Love it or Leave it, local panel discussion

Son of Earth Day, tape from Pacifica

The New York Panther 21 Manifesto, from Radio Free People

Vamping on the Panthers, local documentary

Commentary by Doug Miranda

12. From time to time Palmer has referred questions regarding the suitability of programming for broadcast to the Board of Trustees. For example, it became known that a group called the Seattle Liberation Front would hold a demonstration. He knew where it was going to take place and there was conveyed to Palmer the anticipation of a possibility that there would be violence. It was thought that this demonstration was important enough that the program dealing with it be broadcast live, if possible. This matter was discussed with the Board of Trustees at a meeting because of the expectation that a program dealing with the demonstration might result in the broadcast of words or expressions inconsistent with the station's standards of suitability. After consideration and discussion it was decided to broadcast the program without editing even though the tape recorders might very well pick up words or expressions not considered suitable for broadcast under the

station's usual standards. There was no evidence presented at the hearing to indicate that the program did involve broadcast of any offensive words.

13. Another example of a matter of obscenity discussed with the Board of Trustees by Palmer was a proposal to remove one of the taboo words from the station's list of four. This was proposed because Friede had heard the particular word in a broadcast of a national educational television program. There was some feeling that there was no longer a need to continue the taboo against this particular word. This matter was tabled by the Board of Trustees after discussion. KRAB continues to have four taboo words. Broadcast of any of these may be permitted only after special consideration by the station manager or by the station manager in consultation with the Board of Trustees.

14. Two programs were specified for particular consideration in this proceeding by the Commission in the Order of Designation and consistent with that Order the Broadcast Bureau designated three more programs for special consideration. These programs were the broadcast by the Reverend Paul Sawyer; the interview with a member of the San Francisco Mime Theatre; the talk given by the Reverend James Bevel; the record entitled "Murder at Kent State"; and the bluegrass program hosted by Dave Wertz. These programs were alleged to have violated the station's policies in that obscenities were permitted to be broadcast. These programs and the circumstances under which they were broadcast were as follows:

Paul Sawyer Broadcast

15. At the time of the broadcast mentioned by the Commission's Order, Reverend Paul Sawyer was Minister of the Lake Forest Park Unitarian Church located in a suburb just north of Seattle. Lorenzo Milam was manager of KRAB at that time. He had come to know Sawyer through a mutual interest in sound and sound techniques. Sawyer had been a participant in some programs on KRAB and hosted a regular program dealing with sound effects.

16. Milam found out that Sawyer had been preparing a tape recorded autobiography. By the time Milam found out about it, the autobiography was about 30 hours in length. Milam listened to portions of this tape, thought it was interesting, and thought that it would be worth broadcasting on KRAB as an "autobiographic marathon". Nancy Keith and one or two other employees at KRAB listened to parts of the Sawyer autobiography. Neither Nancy Keith nor Milam recalled hearing any objectionable language in the portions of the tape which they heard. In discussing the Sawyer autobiography, some of the station personnel expressed a view that it should not be broadcast because it was dull. Nevertheless, the decision was made to go ahead with the broadcast.

17. Broadcast of the taped autobiography took place on August 5, 1967. Miss Keith was on duty at the station. Sawyer was there to handle the playing of the tape because of problems with the quality of the sound. Milam was at home. At about 9:00 a.m., he turned on the radio to listen to KRAB while eating his breakfast.

18. As Milam describes it, soon after he started listening to the autobiography, he heard a word which frightened him. Apparently, the autobiography included some descriptions of Sawyer's intimate relations with his wife.

Obscenity frightens Milam, and he recognizes obscene words by the emotional response he has toward hearing them, characterized by sweating and coldness of his hands. Milam could not remember the exact word or words spoken which caused this emotional response while he was listening to the Sawyer tape. He conceded that the actual words were probably those related by the Broadcast Bureau in their Bill of Particulars or their equivalent.

19. Milam called the station and talked to Miss Keith. Miss Keith had already heard what had upset Milam and she was also quite upset. Milam told Miss Keith to talk to Sawyer. She did and Sawyer apologized saying that there would be nothing more like that on the tape. Broadcast of the tape continued but more language frightening to Milam and upsetting to Miss Keith came out. Milam called the station again and talked to Sawyer. He told Sawyer that he was threatening the station's license and he didn't want him messing around like that. Seemingly, Sawyer didn't have the same concern over the use of obscene words that Milam had, but he did give assurance that nothing else obscene was on the tape.

20. Sawyer was permitted to continue to broadcast the autobiography, but obscene words continued. This time, Milam got into his car and drove to the studio. He took the Sawyer program off the air and substituted a program of Indian music in its place.

San Francisco Mime Theatre

21. A group known as the San Francisco Mime Theatre presented some performances in Seattle about the middle of February 1969. P. J. Doyle, of the Adult Education Department of the Seattle Public Library System, attended these performances and was favorably impressed with the group. Doyle, however, was annoyed with what we considered to be an excessive use of the four-letter Anglo-Saxon verb denoting the act of sexual intercourse. Doyle's job with the library sytem calls upon him to use radio. He is not a professional librarian, having been a book dealer prior to coming with the library system about five or six years ago. Doyle broadcasts a regular weekly program over KRAB dealing with new book acquisitions or with books in the library's collection which have a bearing on outstanding current events. Doyle's programs are productions of the Seattle Public Library.

22. He made arrangements to interview an actor, Joseph Lamuto, who was a member of the San Francisco Mime Theatre company. Lamuto and Doyle met at the KRAB studio where the interview was taped. Although station personnel were present during the interview, it was not supervised or auditioned, as such, by a member of the station's staff.

23. Generally, the interview dealt with the Mime company's performance, but a small portion of the interview, a transcript of which is included in the record, consisted of a discussion of the consequences of using the four-letter Anglo-Saxon verb previously described. In the transcript of the interview, Doyle assures Lamuto that it is all right to say the verb and it is used about four or five times. Among other things, Lamuto illustrated his argument that people over react to this word by referring to a poem by Lawrence Ferlinghetti in which this verb is used about 20 or 25 times in such a way that

it loses its usual affect, according to Lamuto. In this short discussion, Lamuto and Doyle dealt with the word and its use. It was not a discussion of the act it described and the word was not used as epithet or expletive.

24. This interview was broadcast about two weeks after it had been taped. Prior to broadcast the tape was not auditioned by KRAB personnel nor was it edited by KRAB. Doyle had had discussions with Miss Keith regarding the standards of suitability which KRAB applied to its programs. He was aware of these standards. He considered his interview with Lamuto to have been a serious discussion about the use of the English language which had backfired. He was concerned that a program produced by the city library should get KRAB into trouble. Books which contain "four-letter words" are on the open shelves in the Seattle Public Library. Included among these are the poems of Lawrence Ferlinghetti. These books may be taken out by any holder of an adult card and an adult card may be obtained by anyone 12 years of age or older. Doyle still broadcasts his weekly program over KRAB. When he comes to words such as the one that caused problems in his interview he substitutes a "blank" and feels foolish for having to do so.

Dave Wertz

25. Dave Wertz describes himself as an amateur expert on bluegrass music. He had a program on KRAB which consisted of bluegrass music and pertinent accompanying commentary. Wertz tried to imitate the style of such well known programs of bluegrass as Nashville's Grand Ole Opry and Richmond's Old Dominion Barn Dance. Between broadcasts of music selections, Dave Wertz would tell what he called "corn country jokes".

26. When Wertz came to work for KRAB it was made clear to him that he was not to use any obscenity on the air. His type of joke does not contemplate the use of obscene words. He had no recollection of what he may have said on his broadcast of October 1968, but he had been told that someone had called to complain about the program. He may have told a few of his country stories. An example which he gave is the one about "the hillbilly whose bathroom caught on fire but fortunately the flames didn't reach the house."

Murder at Kent State

27. "Murder at Kent State" is a recording produced under the Flying Dutchman label. KRAB played three records under this label during 1970. Two of these records, after preview, were edited for obscenity and a number of words were removed before the records were broadcast. "Murder at Kent State" was also previewed before broadcast, but the same or similar words spoken on this record were not deleted prior to broadcast.

28. "Murder at Kent State" is a reading of a series of articles by Pete Hamill which appeared in the New York Post. These articles describe the incident which occurred at Kent State University in which a number of students were killed during a confrontation with the Ohio National Guard.

29. Before it was broadcast, this record was auditioned by the station manager, the program director and some of the Trustees of KRAB. The record

took a total of 46 minutes to play and included about a half-dozen obscenities including an epithet directed at the Vice President of the United States.

30. KRAB played the record on August 10, 1970, several months after the incident which it describes had occurred. In playing the record without deleting the obscene or indecent language, KRAB's management was moved by the consideration that any editing would adversely affect the emotional impact of the record. It was thought that the record was newsworthy and important, particularly to the university community at the University of Washington, which was a considerable proportion of KRAB's regular audience. Since the University station had returned to broadcasting programming which did not include matters of current relevancy to the student body and faculty, KRAB felt it had an obligation to fill a void by giving the university community a program such as that represented by the recording "Murder at Kent State."

Reverend James Bevel

31. On December 9, 1967, KRAB broadcast the tape recording of a talk by Reverend James Bevel given at the University of California, Berkeley. This tape had come to KRAB from the Pacifica Foundation and the box in which it had been forwarded indicated that some deletions from the tape had been made. There were complaints to the FCC about this broadcast and the station was visited by an inspector from the Commission. This inspector asked for and was given the tape for copying. The tape was returned to KRAB. A previously scheduled broadcast of the tape for December 26, 1967 was cancelled. At that time, Lorenzo Milam, who was station manager, was out of town. Before the broadcast of December 9, 1967, the tape had been auditioned by an employee of KRAB.

32. A meeting of the Board of Trustees was held on January 2, 1968, to discuss what to do about rebroadcast of Bevel's talk. It was the unanimous decision of the Board to rebroadcast Bevel's talk, but to preface the rebroadcast with a statement by Milam describing the events which had taken place since the tape was played on December 9, 1967.

33. A transcript of the tape and a transcript of Milam's introduction were received at the hearing. An offer that the tape of these talks also be included with the record was rejected, but the Examiner did listen to the tape. Bevel's talk is largely a rambling discourse directed at what is apparently a predominately white student audience whom he considers to consist of radicals. Bevel uses certain expressions which may be described as well-known slang or vulgar references to virility; or common blasphemies or abstruse expressions which sound like they ought to be somebody's obscenity. 4/ These are all listed by the Broadcast Bureau under the heading of alleged obscenities including a reference to academic "pimps to freak you off". This last quoted set of words, if it is an obscenity, is a contribution to the Examiner's education in an area where he had thought life had foreclosed all possibility of novelty.

4/ Words used were "balls" and "Goddamn".

34. Milam in his introductory remarks unleashed a somewhat candid though not entirely novel evaluation of a broadcaster's feelings toward the FCC. Probably, the best way to make findings as to the tenor of the talks given by Milam and Bevel would be to quote a representative portion of each presentation. Milam's introductory statement was much shorter than Bevel's talk, but it does give an insight into the licensee's attitude which motivated it in broadcasting Bevel's talk without deletions for obscenity. Milam had the following to say:

> "The FCC has responsibilities to exercise care in the power of licensing of broadcast stations. The Communications Act of 1934 specifically states that the FCC shall in no way indulge in censorship of programs. The creators of that government body were wisely concerned that freedom of speech through broadcasting should in no way be curtailed. This is where the issue has been joined with Reverend James Bevel and KRAB and the local official of the FCC. In the month that we've had to stew over this event we've come to feel that this confiscation of tape was a case pure and simple, of censorship. Censorship of the cruelest form, for it created in us a deep sense of fear over the future of KRAB, the disposition of our valuable licensing and all the deep questions of government control. We've decided to rebroadcast the James Bevel tape. We've done so fully aware of the dangers to our permit, our broadcast license. We, and now I'm speaking for the Board of Directors of the Jack Straw Memorial Foundation which is the parent corporation of KRAB, have met and discussed at great length the possible consequences of the act of rebroadcasting of this material and we've decided that we must replay it.
>
> "The FCC in it's rules has very wisely demanded that broadcast licensees should have full responsibility for the material they broadcast. They, the broadcasters alone must act on behalf of the public interest, convenience and necessity. No one else can be responsible and if the broadcaster fails in this duty he's subject to the revocation of his license. We here at KRAB feel that we would be sabotaging the public interest, convenience and necessity if we didn't play the James Bevel tape at this time. For despite his strong language, a language that is an integral part of his message, James Bevel is trying to tell us something important, trying to express a crucial view of Negro-white relations in this country. KRAB has always been a forum for the dispossessed, we've opened this frequency at 107.7 megacycles in Seattle to hundreds of different viewpoints about hundreds of different subjects. We've done this not because we agree with any one speaker, we couldn't conceivably do so, but because the miracle of free speech in this country lends itself to knowledge and understanding of so many disparate viewpoints, even those which may be offensive to us. For by understanding the hundred voices of antagonism one can and does become an active, knowing and thinking part of the democratic system. James Bevel doesn't speak for KRAB, none does really, but James Bevel is a representative of an important and sometimes frightening new force in America. By failing to play this talk KRAB would be doing a

disservice to its listeners denying them acknowledge of the important forces around them. We would be saying, in effect, that the license of KRAB is more important than freedom of speech and freedom of knowledge. We simply cannot as responsible broadcasters ignore this duty, we'd be foolish not to play the words of James Bevel."

35. Bevel spoke for about an hour. His choice of language was not such as one would expect to hear from a pulpit. His ideas were expressed in a stream of consciousness form with little attention to the niceties of rhetorical organization. To get an idea of what Bevel spoke about and how he expressed himself, it is best that we let his own words speak for him. A fair sample of what he had to say and the choice of language he made is the following:

"Man is a love animal and love is an energy just like oxygen that man needs in order to act rational and when a man can inhale and breathe into his body love energy he acts rational, natural and truthful, that's why you hear the brothers saying 'acting natural'. To be natural is to consume love energy that is present in the universe and there's only one thing that can stop man from consuming and acting rational and that is if man begins to fear anything he lose the capacity to love, himself, that's the nature of the problem. Lot of folks want to argue with the chancellor, and a lot of folks want to argue with the administration, and a lot of folks want to argue with LBJ and a lot of folks here want to argue with their mommas and their daddys and very few people here are prepared to say that the reason that the administration function as it does is that it's fearful, and very few of us here are prepared to say the reason we are here today is that we afraid that if we don't pick up a piece of paper we can't have protein. Most of us can't say that, but the realities are that we are here not because we are wise and not because we are in the pursuit of education but because we afraid not to be here. Fear, fear is a disease it's a sickness, for fear does not allow man to perceive the universe as it is because it locks man out of himself, and in the past, if you ever studied literature. A lot of you jive folks studied literature and didn't even known what the hell you was doing. In class if we study literature of the past, men who live at another period when the energy was in another form, you read a story in the old testament about Adam being locked out of the Garden of Eden, man being locked out of himself, because he feared something, and when man is locked out of himself, and when he begin to fear he acts the same way, he starts hating folks. You see I get tired of walking around in this country listening to city jitterbug fascists, who call themselves radicals pretending that they're any different from the Administration, when they know damn well they're driven by fear just like the Administration, but you see fear makes man hate, what it does is make man project his contempt for himself on to other folks, and why we pretending that its the Administration that is holding up our freedom, and like we want to pretend like Reagan is holding up our freedom, and we want to pretend

like Johnson is holding up our freedom, and the realities are that we hold up our own freedom because we afraid to pick up our own nuts 5/ and say I'm a man here in the universe and I ain't going no goddam place, that's why we don't have freedom!"

Programming and Program Policy

36. KRAB does not avoid programs because they are unusual or outspoken. Its musical programs cover a broad range from jazz to classical. Its policy in music programming is to avoid music which is broadcast by other stations in the area. Programs of oriental, preclassical western and other types of unusual music are broadcast. KRAB also programs jazz, blues, rock, bluegrass, renaissance and baroque as well as music from foreign countries such as, Japan, Norway, Sweden, New Zealand, Korea and others.

37. KRAB broadcasts a substantial number of political programs and discussion programs not ordinarily heard on radio. In a recent primary election, more than 20 candidates were each given a half hour of time to present their views in their own way. Some candidates spoke for the half hour, others received calls from listeners, and others were interviewed. A recent referendum dealing with the State's abortion laws lead KRAB to broadcast a two hour discussion moderated by a member of the staff with panelists representing both sides of the question. Religious programs have included interviews with clergymen who "speak in tongues"; the "1970 Annual Gymanfa Ganu", a Welch religious program; an interview with the Hare Krishna sect; as well as interviews with religious personages and presentation of religious programs not ordinarily heard in the Seattle area.

38. KRAB submitted 31 pages listing by title and participants its public service programs of note. Ordinarily, such lists do not tell us much about a station's programming. In this instance, however, some idea of the range of subject matter and variety of personages heard over KRAB are apparent. The following is a selection taken from KRAB's public service programming exhibit:

Picketing in Bellingham. In March, 40 picketers protesting the war in Viet Nam were arrested and booked for disturbing the peace. A program of interviews and comments.

Should Communists be Expelled From University Faculties? Debate between Fred Schwartz of Christian Anti-Communist Crusade and Otis Hood, Chairman of Communist Party of Massachusetts.

Has the Court Usurped the Powers of Congress, Robert M. Hutchins

The Changing Meaning of the Organization, Dr. Harry Levinson, address on industrial management and the psychological meaning of the organization of work.

5/ There was no claim of obscenity regarding this usage.

THE JACK STRAW MEMORIAL FOUNDATION

Euthanasia, local, panel discussion.

The Will of Zeus, Stringfellow Barr discusses his book and compares the political problems of classical Greece and contemporary America.

Gold and the Gold Situation, panel discussion, Dr. Ernest Patty, former Pres., University of Alaska, and Pres. and Mgr. of some gold mining operations, Edward McMillan, from NB of C, Dr. Frederick B. Exner from KRAB, and John McFalls, stock consultant, local.

Peace Keeping Under the Rule of Law, panel discussion on national sovereignty and the world community, Justice Earl Warren, Kenzo Takayanagi, Chairman of the Japanese Cabinet Commission on the Constitution, Senator J. William Fulbright, others.

Jacques Cousteau, producer of World without Sun, lecture in Washington, D. C., on exploitation by man of natural resources.

Production vs. Reproduction, the Population Problems in the U. S. and in Calif., panel discussion, Marriner Eccles, moderator, Alice Leopold, Lewis Heilbron, Dr. Karl Brandt, others.

Trip to Djakarta, Beverly Axelrod on her meeting with Vietnamese women.

Academic Freedom, Arthur Flemming, President of Univ. of Ore. and former Sec. of Health, Ed., and Welfare, address, at EWSC at Cheney.

Young Americans for Freedom, Jack Cox, YAF State chairman for Calif. address on government errors.

A Peek at Pike, documentary on Pike Street Market.

Emmett McLoughlin: Catholicism and Free Masonry in America.

Political Conditions in South Africa, sociology Prof. Pierre van den Bergh.

Traffic in Narcotics, Detective Chet Sprinkle of Seattle Police Narcotics Bureau.

Dr. Gatch and the Diet of Worms, Southern physician on poverty conditions.

39. As earlier stated, KRAB receives its funds from its listeners and from various foundations. It has received money for various purposes from such organizations as the Jaffe Foundation of Philadelphia, which is administered by Ambassador Walter Annenberg; the James E. Merrill Trust of New York; the Gerber Foundation; and others, including:

> "$10,000 from Seattle's PONCHO. PONCHO is a fund raising organization for the arts in Seattle. It made a lump sum allocation to KRAB to extend its operations. PONCHO representatives made the grant to KRAB because it 'performed a very valuable and unique function as an open forum radio station through which arts needs, as well as all kinds of other social needs, local, regional needs, could be explored and examined.'

"$7,500 from the Corporation for Public Broadcasting. KRAB was one of 73 out of the more than 400 non-commercial radio stations in the United States to receive CPB awards. The funds were used principally for program improvement, i.e., morning show, program director, two correspondents, and general efforts to encourage news programs, documentaries, and similar programs.

"$1,200 from the Washington State Arts Commission. Part of a matching fund award from the National Endowment for the Arts."

40. There were about 25 witnesses who were neither employees nor trustees of KRAB. They appeared to testify to the usefulness and excellence of KRAB's programming. These witnesses were either regular listeners to KRAB or individuals who had used the broadcast facilities either as participants in programs or on behalf of public institutions which they represented. A few witnesses had heard some of the five programs which were given particular consideration in these proceedings. There were no witnesses who appeared to support a view adverse to the station. Some of the testimony given in support of the station's usefulness to the community is given in the succeeding paragraphs.

41. Robert N. Kerr is a mechanical engineer, age 49 and a graduate of Oklahoma State University. He and his wife heard the Bevel broadcast and thought that it contained an important message for the white community. Neither he nor his wife were offended by any words used by Bevel. Kerr knew the Reverend Paul Sawyer and attended his church as well as other religious services at which Sawyer had officiated. Kerr had never heard Sawyer use obscene language or say anything that might be considered sensational. Kerr thinks Sawyer to be a person who is providing a bridge to the youth or avante garde culture. Kerr did not hear Sawyer's August 5, 1967, broadcast. However, he had heard Sawyer on other KRAB programs and never heard him broadcast anything obscene or sensational.

42. Robert M. Sprenger is a graduate student at the University of Washington where he works as a research assistant. He holds degrees in philosophy and chemistry from the University of Puget Sound. Sprenger and his wife, who is a social case worker, heard the Bevel broadcast. Neither of them was offended by anything Bevel said. Sprenger had worked as an announcer at KRAB and he was aware of the station's policies regarding program suitability.

43. Peggy L. Golberg is a housewife and mother of four children ranging in age from 12 to 23. She heard both the Sawyer and Bevel broadcasts. She remembers that she found Bevel's talk to be interesting but that she was bored by Sawyer. She does not recall hearing any language which she considered offensive. She encourages her children to listen to KRAB and she thinks the Bevel broadcast was meritorious and worth having in the Seattle area.

44. Robert W. Means is an air traffic controller who has resided in the Seattle area since he matriculated at the University of Washington in 1930. He and his wife listen to KRAB regularly. He also tapes programs for broadcast over the station. Events that he has taped have included a Ralph Nader

press conference, a speech by John Howard Griffin, a speech by the former Chief of the Cuban Air Force, and a community meeting where people discussed their concern about nuclear waste material. Means had the following to say about KRAB:

> "One value of KRAB to the community is in the broadcasting of such diverse material as this: – some of its inspirational, some of it frightening; all of it relevant in some way to the enormous, complicated, unresolved problems of our challenged society. It has been a minor but important function of the station to open up for public discussion such edgy questions as abortion reform, treatment of criminals and the insane, white-collar crime, changing forms of religious experience, and the like.
>
> "Of equal or greater value to me are the programs of ethnic music, book and movie reviews, commentaries from abroad or from a foreign point of view, far-ranging expeditions into American folk music, systematic explorations of the classical music catalog, and the many and varied humor programs. KRAB has been of inestimable value, putting Seattle into the forefront of American intellectual experience. This has not been accomplished by being comfortable, complacent and conformist."

45. Father John D. Lynch is Pastor of Saint Stephens Catholic Church. Prior to going to Saint Stephens, Father Lynch was the assistant at Saint James Cathedral in charge of radio and television programs for about 11 years. He had a regular commentary program on KRAB for three years. He was free to discuss any subject and he would speak in such areas as theology, civil rights and communism. He also participated as a panelist in panel discussions on such subjects as birth control and the Bricker amendment.

46. John Steward Edwards is a native of New Zealand and a professor of zoology at the University of Washington. He is a frequent listener to KRAB and finds that for him and his colleagues it forms a significant part of their intellectual input. He has, from time to time, heard "four-letter words" used on KRAB, but has never been offended by any such language. In that connection he expressed the following point of view:

> "I have heard them from time to time, yes, and if you are interested in my response to it, I would say that the response to the words as used more as epithets or as what everybody knows is used in common, everyday life, these words I find less offensive than say the kind of innuendoes, for example, on the Johnny Carson Show or on some of the popular television programs. In fact, last evening there was just such an example of what I considered an obscene innuendo on the Johnny Carson Show. I have never heard anything of that type on KRAB, although specific Anglo-Saxon four-letter words have been used mainly as epithets, which one finds used in journalism. Any reader of the New Republic or Harper's magazine will find these frequently, and I would imagine that the average listener to KRAB is more like the reader of a journal that carries these words without question these days."

47. Robert J. Block is an investment banker and real estate broker. He is a listener and has been an unsuccessful candidate for office. As a candidate, he has been offered and has used the facilities at KRAB. He has also participated in discussion programs on the station. He has never heard any program on KRAB which offended him. As he put it:

> "I think that their programming has been stimulating and highly useful in the rather plastic society in which we live. Nothing they have ever done has certainly offended my sensibilities."

48. Edward J. Devine was public relations assistant to the Mayor and Deputy Mayor of the city of Seattle. KRAB volunteered its facilities to cover city events. City officials were invited to appear and did appear from time to time on KRAB. Hearings of the city council were covered sometimes verbatim and broadcasts were made of events such as a Youth for Decency rally, open housing discussion, and discussion of school issues.

49. Maxine Cushing Gray is associate editor of Argus, a regional publication emphasizing politics and the arts. She listens to KRAB and she finds KRAB responsive to providing time for discussions involving the native Indian population and their problems. According to Mrs. Gray, other Seattle stations have given little if any, time to the problems of our "native Americans".

50. Matthew Hackman is a mathematician and a member of the faculty of the University of Washington. He listens to KRAB regularly and has never heard anything offensive broadcast.

51. Fred Cordova is the director of public information for Seattle University. Seattle University is a private institution conducted by the Jesuit Fathers. It has an enrollment of over 3,000 students. Cordova has been an occasional listener to KRAB. KRAB has given coverage to campus events at Seattle University such as appearances by Mortimer Adler and Barry Goldwater; a symposium for Filipino-American youth and a symposium on Indian problems. He gave the following evaluation of the usefulness of KRAB to Seattle:

> "For a station like KRAB I think it is quite a necessity, if I must do a little bit of editorializing here, I think it is quite a necessity here in our city. Our media, especially in radio, is quite commercial, regardless of whether it is AM or FM, and KRAB is the only station that I know of here in the Pacific Northwest where it deviates from a normal type of programming, radio type of scheduling, and it allows, I think, good free thought on controversial as well as other urban issues that have to be aired."

52. Elsie B. Martinez is a postal clerk and a music school graduate. She listens to KRAB and has never heard anything offensive broadcast. She said,

> "I can turn on KRAB and I get all sorts of ethnic music, I get Bach and Scarlotti, harpsichord, get all sorts of beautiful classical music, and then I get the latest rock and roll and everything. It is very pleasant to listen to."

53. Bruce Jeffery Jones is a high school sophomore who listens regularly to KRAB as do his parents. His father is employed by the Girl Scouts and his mother is a housewife. He studies propaganda techniques at school. He listens to KRAB for its political programs, commentaries and documentaries. His listening to KRAB helps him contribute to discussion at school. He also listens to rock and roll and jazz programs. He has never heard any "four-letter words" on KRAB.

54. Mark Chaet is a student at the University of Washington studying English literature and music. He holds a third-class operator's license from the FCC. He listens to KRAB and has never heard any obscenity.

55. Marcia Bayless is a high school student who holds an FCC third-class operator's license. She finds KRAB to be educational and tapes of KRAB programs have been used in her school. She listens to the programs of bluegrass, jazz and classical music.

56. Robert James Bidleman is a systems analyst and Vice President of the Seattle Jazz Society. He and a good portion of the membership of the Jazz Society listen to KRAB. They can pick up jazz programming on KRAB on a continuing basis at least five days a week. No other station in the Seattle area provides as much jazz programming. He cited specific jazz programs regularly broadcast by KRAB and some of the uncommon jazz renditions heard.

57. According to William Dunlop, an assistant professor of English at the University of Washington, KRAB has the best film reviews in the area. He is particularly interested in the discussion programs which KRAB has on opera. He finds their opera reviews to be better than those of any other station.

58. Jack W. Crouse teaches art at Olympic College, a two year community college located at Bremerton. He is a listener and subscriber to KRAB. He appreciates the honesty and candor which he finds on KRAB. He is the father of three children ranging in age from 14 to 20, all of whom listen to KRAB. He has heard ". . . what are conventionally called obscene words" broadcast on KRAB. He himself has never heard anything that he considered obscene, expressing the view that "obscenities are all in the minds of people, I think, and I can take virtually anything."

59. Other witnesses appeared and gave testimony supporting the views detailed above. All witnesses gave strong support for the useful and unique qualities of the station's programming.

Conclusions

1. KRAB is non-commercial, listener supported and it broadcasts a variety of programs of outstanding quality. Its programming is of a type not usually heard on radio and its appeal is directed to an audience of people with a high degree of intellectual curiosity. KRAB provides its audience with a broadcast service which is attractive and uniquely appealing. As a matter of policy, KRAB is committed to providing the Seattle area with unusual, stimulating and extraordinary programs. KRAB's programming is meritorious and the station does render an outstanding broadcast service to the area which it serves.

2. KRAB is directed by a Board of Trustees who are above average in their educational backgrounds and who represent a variety of tastes. This group is responsible for setting station policy and for exercising overall supervision over programming. It is actively involved in carrying out its duties. In order to bring its audience the type of unusual programming that its policies call for, KRAB experiments with the unique and gives time to an extraordinary variety of programs. In doing so, KRAB sometimes falls short of the expectations of its management, its audience or the licensing authority to which it is accountable for its franchise. Thus it is that this proceeding, to determine whether or not KRAB's license should be renewed for a short term of one year or a full three-year period, came about. A few of KRAB's programs involved the broadcast of words or expressions described as obscene.

3. It is not KRAB's policy to use obscene or indecent language in its broadcasts for the sensational or shock effect that such language might have. This licensee eschews obscenity, profanity, and indecency. Its procedures for clearing programs for broadcast are designed to avoid material which would give offense to the community. This proceeding was instituted because KRAB did broadcast some programs which did give offense to some members of the community in which its programs are heard. We are directed, therefore, to determine whether in broadcasting certain programs specified by the Commission and the Broadcast Bureau, KRAB violated its own standards. This determination must be made, however, in the context of standards laid down by the Commission.

4. Our most current applicable source as to the Commission's policy regarding broadcast of such offensive material is the analysis in the Notice of Apparent Liability, In re WUHY-FM, FCC 70-346 [18 RR 2d 860], April 3, 1970. In its discussion in that notice, the Commission renewed its commitment to the right of licensees,

> ". . . to present provocative or unpopular programming which may offend some listeners. In re Renewal of Pacifica, 36 FCC 147, 149 [1 RR 2d 747] (1964). It would markedly disserve the public interest, were the airwaves restricted only to inoffensive, bland material. Cf. Red Lion Broadcasting Co., Inc., v. FCC, 395 US 367 [16 RR 2d 2029] (1969)."

5. Taking up the matter of obscene language, the Commission did prescribe standards to guide in determining the permissible and impermissible areas. In setting these guide lines, the Commission did recognize the difficulties which arise in trying to steer a course between the censorship which the law forbids the Commission to exercise and the indecent or obscene language which the law forbids the licensee to broadcast. After relating some of the obscene and offensive language which had been broadcast by WUHY, the Commission observed that:

> "8. . . . these expressions are patently offensive to millions of listeners. And here it is crucial to bear in mind the difference between radio and other media. Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the public (Section 3(o) of the

Communications Act, 47 USC §153(o)) under circumstances where reception requires no activity of this 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. Were this type of programming (e.g., the WUHY interview with the above described language) to become widespread, it would drastically affect the use of radio by millions of people. 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 serving no purpose but to shock, to pander to sensationalism. Very substantial numbers would either curtail using radio or would restrict their use to but a few channels or frequencies, abandoning the present practice of turning the dial to find some appealing program. In light of the foregoing considerations we note also that it is not a question of what a majority of licensees might do but whether such material is broadcast to a significant extent by any significant number of broadcasters. In short, in our judgment, increased use along the lines of this WUHY broadcast might well correspondingly diminish the use for millions of people. It is one thing to say, as we properly did in Pacifica, that no segment, however large its size, may rule out the presentation of unpopular views or of language in a work of art which offends some people; and it is quite another thing to say that WUHY has the right to broadcast an interview in which Mr. Garcia begins may sentences with, [blank], an expression which conveys no thought, has no redeeming social value, and in the context of broadcasting, drastically curtails the usefulness of the medium for millions of people." (Footnotes omitted.)

6. Going on to the standards to be followed, the Commission concluded that for broadcasting,

"10. . . .we believe that the statutory term, 'indecent', should be applicable, and that, in the broadcast field, the standard for its applicability should be that the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value. The Court has made clear that different rules are appropriate for different media of expression in view of their varying natures. 'Each method tends to present its own peculiar problems.' Burstyn v. Wilson, 343 US 495, 502-503 (1951). We have set forth in par. 8, supra, the reasons for applicability of the above standard in defining what is indecent in the broadcast field. We think that the factors set out in par. 8 are cogent, powerful considerations for the different standard in this markedly different field."

7. A person could be a regular listener to KRAB and not hear any obscene or indecent language broadcast. The most that can be said is that a regular