

Notes

Offensive Speech and the FCC

The Federal Communications Commission, the Congress and the public have demonstrated increasing concern with what is loosely called obscene broadcasting. Three of the most controversial programs of this kind were carried over stations licensed to the Pacifica Foundation. Pacifica's Los Angeles station broadcast a poem, "Jehovah's Child," which began, "In Christ's name, kindness is sucking the cock/of a turned cheek—Jesus style—Jehovah would have bitten it off."¹ Controversy followed, as it did in two other publicized incidents.² As a result, many have urged that the Foundation be punished for airing these programs; complaints to the FCC allege sacrilege, pornography, obscenity, blasphemy and vulgarity.³ FCC Chairman

1. The poem was originally presented in an adult education English class at Los Angeles Valley College. The class's teacher and the poet involved, also a teacher, had been fired by the college for their activities; a vociferous controversy ensued. Station KPFK-FM, of which Pacifica is the licensee, broadcast a panel discussion of local critics to consider the poem and the issue of academic freedom that it raised. Throughout the day of the broadcast, listeners were warned that the poem would be read and discussed at 10:30 p.m., that many would find it offensive, and that the poem had been published and could be read in the Los Angeles Free Press issue of a month before. The entire poem was printed in a statement by Commissioner Robert E. Lee, dissenting from the grant of a construction permit for a Pacifica station in Houston. News Release Report No. 8593, *Broadcast Action*, October 31, 1969.

2. In New York, a black high school teacher read a poem dedicated to Albert Shanker, President of the United Federation of Teachers, that began "Hey Jew Boy, with that yamulka [sic] on your head. You pale faced Jew boy—I wish you were dead." The poem, entitled "Anti-Semitism," is published in Dan Sanders, 17 F.C.C. 2d 204, 15 P & F RADIO REG. 2d 1069 (1969). It was written by a young black student, and read by her teacher, Leslie Campbell, on WBAI-FM's Julius Lester Show. In San Francisco, a live broadcast of the Black Panther Conference on Fascism included a characterization of Richard Nixon as a "mother-fucker." "United Front Against Fascism" series, sponsored by the Black Panther Party, in Oakland Auditorium in August, 1969, broadcast on KPFA-FM on November 22, 1969.

3. The FCC reduces all complaints to writing and forwards them to the station licensee with a form letter which includes the following paragraph:

Since it is the practice of the Commission to associate complaints with its files on the licensees involved and to afford them the opportunity to comment thereon, it is requested that you submit a statement concerning the above matter.

The FCC does not screen the complaints before demanding an explanation; nor does it consider whether it has the power to remedy a complaint should the complaint be unanswerable. See Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 21 (1967).

During 1968-69, the Commission received about one complaint of obscenity or profanity every six weeks against all four of the Pacifica stations (WBAI-FM in New York, KPFK-FM in Los Angeles, KPFA-FM and KPFB-FM in Berkeley, California). Over a three month period during 1969, 147 complaints were filed against stations owned by or affiliated with CBS and NBC. Letter to Senator Pastore from Commissioner Kenneth Cox, December 23, 1969, printed in *Hearings on S. 2004 Before the Subcomm. on Communications of*

Dean Burch has recently warned that "obscene programming is a form of air pollution that could become as serious a problem as smog."⁴

Under the theory which currently justifies broadcast regulation, governmental power over this type of programming—which may be labelled quasi-obscene or offensive⁵—is virtually unlimited. Attempts to exercise this power raise important free speech questions which the current theory of regulation ignores. A governmental role may be appropriate in the broadcast industry, but it should be a carefully limited one. After delineating the failings of the current approach to governmental regulation, this Note suggests a set of First Amendment standards for determining the validity of FCC action in the area of offensive speech.

I. The "Public Interest Theory" of FCC Regulation and the First Amendment

The current extent of the government's role in regulating the broadcast media is an anomaly in a system of free expression.⁶ Government has traditionally been prohibited from interfering with expression of ideas because it might seek to mold public opinion in order to maintain and augment its own power. The prohibition is a strong one: even when those in power are convinced that substantial harm may result from allowing private parties to speak unmolested, their hands may be tied.⁷ As the Supreme Court recently demonstrated in *New York Times v. Sullivan*,⁸ even seditious libel, a form of speech traditionally abhorred by all governments, is protected.⁹ The prohibition on gov-

the Senate Commerce Comm., 91st Cong., 1st Sess., pt. 2, at 354 (1969) [hereinafter cited as *Hearings on S. 2004*].

4. San Francisco Chronicle, January 10, 1970, at 2, col. 5. Increased interest in offensive programming is also indicated by the Federal Communications Bar Association's panel discussion on "Sex, Dirty Words and Mass Media," held June 13, 1970 in Williamsburg, Virginia.

5. *Quasi-obscene or offensive*, as used herein, refers to speech which does not meet the judicial definition of obscenity.

6. For discussion of the background of the First Amendment, see Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); L. LEVY, *LEGACY OF SUPPRESSION* (1960).

7. Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461 (1953).

8. 376 US 254, 273, 276 (1964).

9. The Court did not simply, in the face of an awkward history, definitively put to rest the status of the Sedition Act. More important, it found in the controversy over seditious libel the clue to "the central meaning of the First Amendment." The choice of language was unusually apt. The Amendment has a "central meaning"—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase, "the censorial power" would be in the Government over the people

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ernmental regulation of the system of expression is justified by a market theory of communications. Private parties are conceived as vigorously competing with each other and with government in a "free market place" of ideas; those ideas with the greatest truth value should ultimately receive general public acceptance.

If the hypothesized market is to operate effectively, there must be easy access to the means of communication so that diverse viewpoints can be presented. But ownership of the effective means of communication—TV, radio, magazines and large circulation newspapers—is now closed to all but a few. The small private groups that control the broadcast media do not present the multitude of opinions that exist in America today.¹⁰ The vast majority of citizens are without access to the media and thus are effectively denied the opportunity to control the communication of their views. The free market of ideas in broadcasting is grossly imperfect.

The programming results of concentrated ownership are almost universally condemned, albeit for various reasons.¹¹ But critics unite in demanding that government do something. Thus, from the failure of the market in the broadcast media comes a "public interest theory" which provides government with an extraordinary role in the area of broadcast regulation.

The "public interest theory" has its origins in the language of the Communications Act of 1934.¹² Owing to technological scarcity of spec-

and not "in the people over the Government." This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. The theory of the freedom of speech clause was put right side up for the first time. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208.

10. See pp. 1351-53.

11. Some consider television bland and unstimulating. See, e.g., C. SOPRIN, SEVEN GLORIOUS DAYS, SEVEN FUN-FILLED NIGHTS (1969) (author watched TV in lonely N.Y. room for one week straight); N. MINOW, EQUAL TIME 52 (1964) ("you will see a vast wasteland"). See also THE MASON WILLIAMS F.C.C. RAPPORT (1969):

Network television wants to keep you stupid so you'll watch it Television is doing to your mind exactly what industry is doing to the land. Some people already think like New York City looks.

Id. at 100, 110.

Others criticize programming as violent and corrupt. See *Hearings on Review of Policy Matters of FCC and Inquiry Into Crime and Violence on Television and a Proposed Study Thereof By the Surgeon General Before the Subcommittee on Communications of the Senate Commerce Committee*, 91st Cong., 1st Sess., pt. 2, at 335-338 (Sen. Pastore), 358-359 (Sen. Pearson), 421-422 (Sen. Houtke) (1969). (Hereinafter cited as *Pastore Hearings on Violence*.) See also NATIONAL COMM'N. ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILLITY 80-82, 187-207 (1969) (Final Report).

12. 47 U.S.C. §§ 301 *et seq.* (1964) include most of the statutes dealing with radio and television.

trum space for broadcasting, the FCC was authorized to license broadcasters in ways which promote the "public interest, convenience, and necessity."¹³ In making licensing decisions under the statute, the FCC can choose between competing applicants on the basis of programming;¹⁴ it may reject a sole applicant for a particular frequency if his program plans appear inadequate.¹⁵ The Commission thus uses its licensing authority to exercise a measure of control over broadcast programming. The test applied by the Commission—conformity to "the public interest"—has never been clearly defined. For example, Senator Pastore described "the public interest" as it affects programming in a colloquy with the members of the FCC who appeared before the Senate Sub-Committee on Communications, which he chairs:

The question is, are they [the programs] serving the public interest? . . . That is a mandate under the law and when you sit there and when you tell me you find it offensive; you find it obnoxious; you find it in bad taste; well, how then can you say you are serving the public interest and give the man a license?

What is in the public interest is the lifting up of morals and the spirits of our people . . . If we do things that are in the gutter and we use language that is gutter language and we talk about the deity in perversion, how in the name of Heaven can we say that we are serving the public interest.¹⁶

Pastore's remarks suggest that the term "public interest," as used in the broadcast setting, is a highly subjective concept, a repository for competing values, prejudices, and beliefs.

The "public interest theory" treats the First Amendment as an interesting parallel development in other media. The Commission has never said that the free speech clause does not apply to broadcast regulation.¹⁷ But since it believes that radio and TV—because of their special nature—must be regulated for the benefit of the whole public, the First Amendment rights of broadcasters are only one of many "factors" in a public interest finding and should not be accorded a preferred position as are the rights of communicators in other media.

13. 47 U.S.C. § 307 (1964). See 47 U.S.C. § 307(a) (d) and § 309(a), covering both the initial grant and subsequent renewals of broadcast licenses.

14. *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204 (D.C. Cir. 1956).

15. *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962).

16. *Hearings on S. 2004, supra*, note 4, at 373.

17. The Communications Act, 47 U.S.C. § 326 (1964) states:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

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These rights can, on occasion, be ignored, if they interfere with FCC efforts to "improve" broadcasting for the entire public.¹⁸

Operating under the "public interest theory," the government has established a variety of laws and regulations that directly or indirectly affect the *content* of broadcasting.¹⁹ Some of these rules affect incentive structures for broadcast ownership and hence influence who owners will be. Examples include taxes, zoning regulations, minimum wage laws and labor legislation. Other laws directly prohibit certain people from owning a particular broadcast facility. The anti-trust laws are one example;²⁰ so is the FCC's recently promulgated "one-to-a-customer" rule.²¹ It should be recognized that these laws, which affect who broadcast owners will be, also affect program content to a degree.

A pre-1965 FCC rule required broadcast applicants to include as part of their applications the percentage of programming that would be devoted to a number of different program categories.²² Renewal

18. See, e.g., cases cited in notes 31-38.

19. For description and comment on FCC program regulation, see *inter alia*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); *The FCC's Role in Television Programming Regulation—A Symposium*, 14 VILL. L. REV. 581 (1969); Comment, *Television Service and the FCC*, 46 TEXAS L. REV. 1100 (1968); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

20. The antitrust laws apply to broadcasting. *United States v. RCA*, 358 U.S. 334 (1959). Report on Chain Broadcasting, *quoted in National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

21. The rule provides that within five years present broadcast owners will be required to reduce holdings in a single community to one mass medium (newspaper, radio, UHF-TV). Several kinds of facilities are excepted, including UHF-TV. N.Y. Times, March 27, 1970, at p. 1, col. 7. For background, see Notice of Proposed Rule-making—Multiple Ownership, 12 F.C.C. 2d 912, 13 P. & F. RADIO REG. 2d 1526 (1968).

22. *Commission Policy on Programming*, 20 P & F RADIO REG. 1901, 1913 (1960). Program balance is discussed in the articles and notes cited *supra*, note 19. The pre-1965 categories were entertainment, education, religion, agriculture, news, discussion, talk (including sports) and other. In 1965 the FCC eliminated all but the following three program categories for applications and renewals: news, public affairs and other programming excluding entertainment and sports. The Commission's current stated policy is that the applicant inform himself of the needs and interests of the listeners through such means as interviews and surveys. From the information gathered, the broadcaster is to formulate some programming that will contribute to community betterment. The broadcaster is not however required to formulate his programming according to community programming preferences. There is some confusion among broadcasters about what kind of information they should obtain from the surveys and interviews and what use they are required to make of the information derived.

License applicants are asked to submit proposals showing the percentage of planned programming in various categories, and licensees are required to maintain program logs from which they prepare a "composite week" of broadcasting to be submitted with their renewal application. Although the FCC does not formally enforce a fixed standard of balance, it is evident that certain classifications are looked upon with more approval than others. To assure success on license applications and renewals, broadcasters in general conform to the FCC "approved" standards of balance.

A related policy was recently announced; television stations are now required to air one prime time hour (7 to 11 p.m.) of non-network produced material each night. N.Y. Times, May 8, 1970, at p. 1, col. 1. This effort to stimulate diversity of program source was not mentioned in the text because some Commissioners began predicting revision of the rule as

applications required a breakdown of the percentage of programming actually devoted to each of these categories in a composite week. This requirement resulted in most broadcasters devoting similar amounts of broadcasting time to each of the named categories to meet their conception of what the Commission wanted. Here the government was in effect choosing minimum time for news, agriculture and religion rather than, for example, athletics, classical music, movies, and quiz shows. Through this so-called program balance, the FCC was imposing its viewpoint by limiting the private owner's choice of program categories.

Another FCC rule requires that equal air time be offered to each political candidate.²³ This amounts to direct interference with program content. The government requires a particular response—provision of time for opposing candidates—after the broadcaster allows one candidate to appear on the air.²⁴

A similar rule, but one of much greater significance for program content, is the fairness doctrine, which imposes an obligation on the broadcaster to present “contrasting responsible points of view” on “controversial issues” of “public importance.”²⁵ The duty is not to grant equal time to all opposing viewpoints, but to insure “fair treatment” to the various sides “over a reasonable period of time.” When it is necessary to grant time under the fairness doctrine, the station must give those representing opposing views free time if they are unwilling to pay for it.²⁶

soon as the rule was announced. The new rule is the product of a rule-making proceeding which has been conducted intermittently since 1965. See *Proposed FCC Reg.* 30 FED. REG. 4065 (1965) and 34 FED. REG. 14,470 (1969).

23. 47 U.S.C. § 315(a) (1964).

24. See Robinson, *supra* note 19, at 128-131; Singer, *The FCC and Equal Time: Never-Neverland Revisited*, 27 MD. L. REV. 221 (1967); Note, *Radio and Television Appearances of Candidates for Offices*, 69 YALE L.J. 805 (1960).

The statute does not require that candidates be allowed air time, but only that they be treated equally. John B. Crommelin, 19 P & F RADIO REG. 1392 (1960). But see N.Y. Times, March 20, 1970, at p. 7, col. 1, reporting that the Senate Commerce Committee approved fixed low rates for candidates and abolished equal time for Presidential elections. The purpose of this amendment to § 315(a) is to encourage free debates for Presidential candidates and to cut costs for other candidates.

25. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 2 P & F RADIO REG. 2d 1901 (1964). The statutory authority for the fairness doctrine is 47 U.S.C. § 315(a). *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). For a description of the fairness doctrine, see *Fairness Doctrine, Staff Report for the Subcomm. on Communications, Senate Commerce Committee*, 90th Cong., 2nd Sess. (1968). For comments, compare Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964) and Barrow, *The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CINN. L. REV. 447 (1968), in Robinson, *supra* note 19, at 131-136, and Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719 (1964).

26. The fairness doctrine and the personal attack rules were validated in *Red Lion v. FCC*, 395 U.S. 367 (1969), discussed *infra* pp. 1354-57.

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Finally, the Commission, in many cases, punishes the licensee for broadcasting a particular program. Some acts are forbidden by statute, such as presenting gambling information,²⁷ perpetrating fraud,²⁸ and broadcasting obscenity.²⁹ Other acts are penalized³⁰ because their broadcast violated "the public interest"; dirty poems,³¹ suggestive songs,³² tasteless jokes,³³ defamation,³⁴ unethical practice of medi-

27. 18 U.S.C. § 1304 (1964). *See, e.g.* Broadcast of Horse Racing Information, 2 P & F RADIO REG. 2d 1609 (1964); Community Broadcast Service, Inc. 13 P & F RADIO REG. 179 (1955); WRBL Radio Station, 2 F.C.C. 687 (1936). This anti-gambling statute does not reach give-away programs, FCC v. American Broadcasting Co., 347 U.S. 284 (1954), but such programs can be regulated under the public interest standard. *See* KWK Radio Inc., 34 FCC 1039, 25 P & F RADIO REG. 577 (1963). *Cf.*, Melody Music, Inc. 2 F.C.C. 2d 958, 6 P & F RADIO REG. 2d 973 (1966), *rev'd on other grounds* 345 F.2d 730 (D.C. Cir. 1965), and Eleven Ten Broadcasting, 32 F.C.C. 706, 22 P & F RADIO REG. 699 (1962). *See generally* Note, *Federal Communications Commission: Control of "Deceptive Programming,"* 103 U. PA. L. REV. 868 (1960).

28. 18 U.S.C. § 1343 (1964) (fraud by wire, radio or television). *See* Commercial Advertising Standards, 1 P & F RADIO REG. 2d 1606 (1964). The FTC has primary regulatory responsibility for the content of television and radio advertising. *See generally* Comment, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1019-27, 1063-1101 (1967); Note, *Illusion or Deception: The Use of "Props" and "Mock-ups" in Television Advertising*, 72 YALE L.J. 145 (1962).

29. 18 U.S.C. § 1464 (1964) provides: "Whosoever 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."

The Commission believes that it has original jurisdiction to determine violations of this statute. *See* Eastern Education Radio, 18 P & F RADIO REG. 2d 860 (1970); Palmetto Broadcasting Co., 33 F.C.C. 259, 23 P & F RADIO REG. 483 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir., 1964), *cert. denied* 379 U.S. 843 (1964). *Cf.* FCC v. American Broadcasting Co., 347 U.S. 284, 289 & n.7 (1954).

A violation of § 1464 is subject to a wide range of FCC sanctions. The Commission may revoke a broadcast license for violation of § 1464, 47 U.S.C. § 312(a) (1964), and the Commission may issue a cease and desist order for such violations, 47 U.S.C. § 312(b) (1964). The Commission also has authority to suspend the "license of any operator" who transmits "superfluous radio communications or signals or communications containing profane or obscene words, language or meaning . . ." 47 U.S.C. § 303(m)(D) (1964). The FCC can establish forfeiture liability of up to \$10,000 for violations of § 1464, 47 U.S.C. § 503(b)(1)(E) (1964), but these forfeitures cannot be taken into account in any other proceeding (such as license renewal) until the forfeiture is paid, or liability is confirmed by a United States District Court. 47 U.S.C. § 504(c) (1964). Most important of all is the Commission's authority to refuse to renew the broadcast license, on the grounds that a licensee who violates the obscenity statute is not serving the public interest. 47 U.S.C. § 307(d) (1964).

30. Since the licensee must come to the Commission every three years to have his license renewed, *penalize* must be considered in the broad sense of any FCC action which makes renewal less likely, or the license less secure. Thus a cease and desist order, or a renewal for one year only, are penalties.

31. Pacifica Foundation, 36 F.C.C. 147, 1 P & F RADIO REG. 2d 747 (1964). Although the licenses were renewed, they were subsequently limited to one year's duration. 6 P & F RADIO REG. 2d 570 (1965).

32. WREC Broadcast Service, 10 P & F RADIO REG. 1323, 1351 (1955); Tampa Times Co., 10 P & F RADIO REG. 77, 121, 134 (1955).

33. 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. 1964), *cert. denied*, 379 U.S. 843 (1964) (*see pp.* 1359-60 for discussion of this case); Mile High Stations, 28 F.C.C. 795, 20 P & F RADIO REG. 345 (1960).

34. Relevant cases are those involving religious or racial prejudice. The Federal Radio Commission held such material defamatory in Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). *Cf.* Schaeffer Radio Co. (FRC, Docket No. 5228, May 29, 1930). The Commission now treats charges of group libel

cine,³⁵ conflict of interest,³⁶ and rigged quiz shows³⁷ have all met with FCC disapproval.³⁸

These various regulations of content seem to raise First Amendment issues. Senator Pastore, and many members of the FCC, would simply assert that each regulation is in the public interest and resolve any issue in that fashion. But other officials, lawyers, and academics have attempted to justify the unusual treatment accorded the First Amendment in broadcasting as opposed to other media. They have articulated a much more sophisticated version of the "public interest theory." This version isolates four distinct features of radio and TV that do not exist in other media and uses them as justification: (1) the airwaves are publicly owned, (2) use of the airwaves is a privilege, which can be withdrawn if the broadcaster fails to serve the public interest, (3) the technical scarcity of spectrum space requires government control of access to radio and TV, and (4) radio and TV are so uniquely powerful that unfettered control by a few private parties poses a threat to the system of expression rather than guaranteeing its efficiency.³⁹

None of these propositions by itself explains why the First Amendment should not receive full consideration in broadcasting. Public ownership of the air-waves should be an argument for more, not less, free expression, expression unfettered by private censorship or governmental suppression.⁴⁰

and defamation as issues to which the fairness doctrine applies. See cases cited in note 91 *infra*.

35. WSCB, Inc., 2 FCC 293 (1936); KFKB Broadcasting Assoc. v. FCC, 47 F.2d 670 (D.C. Cir. 1931).

36. National Broadcasting Co. 14 F.C.C. 2d 713, 14 P & F RADIO REG. 2d 113 (1968) (Chet Huntley's editorials on the Wholesome Meat Act of 1967); Gross Telecasting, Inc. 14 F.C.C. 2d 239, 13 P & F RADIO REG. 2d 1067 (1968); Crowell-Collier Broadcasting Corp., 14 F.C.C. 2d 358, 8 P & F RADIO REG. 2d 1080 (1966).

37. KWK Radio, Inc. 34 F.C.C. 1039, 25 P & F RADIO REG. 577 (1963); Eleven Ten Broadcasting, 32 F.C.C. 706, 22 P & F RADIO REG. 699 (1962). *Cf.* Melody Music, Inc. 2 F.C.C. 2d 958, 6 P & F RADIO REG. 2d 973 (1964), *rev'd* 345 F.2d 730 (D.C. Cir. 1965).

38. Another large area which the FCC investigates is alleged slanting, distorting or managing of news. Recent examples include National Broadcasting Co., 20 F.C.C. 2d 644, 17 P & F RADIO REG. 2d 1089 (1969) (NBC eavesdropped on a private meeting at the Democratic National Convention in 1968); Columbia Broadcasting System, 17 P & F RADIO REG. 2d 843 (1969) (CBS documentary on the Poor People's Campaign); CBS Program "Hunger in America," 20 F.C.C. 2d 143, 17 P & F RADIO REG. 2d 674 (1969) (CBS documentary); WBBM-TV 18 F.C.C. 2d 124, 16 P & F RADIO REG. 2d 207 (1969) (staged pot party for documentary on university life); Chronicle Broadcasting Co., 16 F.C.C. 2d 882, 15 P & F RADIO REG. 2d 993 (1969) (slanting of news to further interests of parent company); complaints of mislabeling of news film against WPIX in New York, N.Y. Times, October 24, 1969, at p. 95, col. 1.

39. These features are discussed critically in Robinson, *supra* note 19, at 151-156.

40. Comment, *Television, Service and the FCC*, 46 TEXAS L. REV. 1100, 1190 (1968). See Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 713 (1964).

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Similarly, calling the broadcaster's position a privilege rather than a right, asserting that he is in a preferred economic position because of government largesse, or designating him a "trustee" of the public are convenient phrases to use once one has decided that broadcasters have limited First Amendment rights.

The third argument, that technical scarcity necessitates government licensing of broadcast facilities, does not compel the conclusion that program content may be regulated. In fact, the most obvious argument is directly to the contrary: where a degree of control is necessitated in the exercise of administrative licensing power, the courts should scrutinize such licensing activities with particular care to ensure that they are not used to override First Amendment values.

The final argument—that radio and TV have a uniquely powerful impact and that media owners operate in an imperfect competitive market—is the central pillar of the "public interest theory," as has been suggested; it has provided a rationale for government regulation which has been widely endorsed for the nearly forty years of FCC history. Broadcasting, according to this argument, is the most influential medium for communicating ideas and shaping consciousness that has ever existed. Its message is dramatic and immediate;⁴¹ virtually everyone has access to a television and radio.⁴² Political elections are won and lost on television; a "media blackout," or even poor coverage, makes election to important offices virtually impossible for the victim.⁴³ Radio and TV are also the prime instruments for manipulating consumer demand.⁴⁴

In the United States this power over politicians, consumer items and many other aspects of life rests with a few station owners and network officials who decide what is to be shown or heard and what is to be suppressed.⁴⁵ With a few exceptions, the small controlling group pur-

41. A. HOFFMAN, *REVOLUTION FOR THE HELL OF IT* 79-80 (paper ed., 1968); H. M. McLuhan, *UNDERSTANDING MEDIA* 268-294 (paper ed., 1964); Kelly, *Second Edition/Who Owns the Air?*, *THE CENTER MAGAZINE*, Volume III No. 2, 27 (1970).

42. Ninety-five per cent of all the households in the United States have a TV set; about one quarter have more than one. *TELEVISION FACTBOOK 72-a* (1969).

43. See generally J. MCGUINNESS, *THE SELLING OF THE PRESIDENT, 1968* (1969); T. WHITE, *THE MAKING OF A PRESIDENT-1968, 196-197* (1969); T. WHITE, *THE MAKING OF A PRESIDENT-1960, 279-95* (1961).

44. See, e.g., J. K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 377 (1967).

45. The following statement is typical of this criticism:
Far from being an expression of majority desire, as the networks say, television programs are the imposition of a social minority on the majority, the minority consisting of the fifty top advertisers, the three networks, and a dozen advertising agencies. It is what they think public taste is and demands that governs the nature of broadcasting.

A. KENDRICK, *PRIME TIME: THE LIFE OF EDWARD R. MURROW* 12-13 (1969).

sues its self-interest, very narrowly conceived; it regards the public as a collection of consumers to be exploited in the most profitable way.⁴⁶ Program content is therefore shaped by this small group's view of the tastes of a majority of the viewing public. As Nicholas Johnson has put it, the ideas and life-styles advocated by television are those which appeal to "Americans fortunate enough to be native-born-white-Anglo-Saxon-Protestant-suburban-dwelling-middle-class-and-over-thirty."⁴⁷

Given the concentration of ownership, many ideas are never broadcast, because a network official decides they are not newsworthy or lack audience appeal or are simply inflammatory.⁴⁸ Private censorship may occur even if a controversial figure is given broadcast time, as when Joan Baez's criticism of the draft became a bleep, or when singer Judy Collins' critical remarks on the Chicago conspiracy trial were censored from ABC's Dick Cavett Show.⁴⁹

The problems of broadcasting, according to this fourth argument justifying regulation, are similar to those which plague other major American industries. Many important activities, like air transportation, the manufacture of automobiles, the exchange of securities or banking, take place in markets controlled by a small group of owners

46. On the relationship between advertising and programming, see Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633, 633-644 (1966); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1660-61 (1967).

47. Dan Sanders, 17 F.C.C. 2d 204, 211, 15 P & F RADIO REG. 2d 1096, 1102(b) (1969) (Commissioner Johnson's concurring opinion).

48. Vice-President Agnew, in a speech which attracted nationwide attention, said:

We cannot measure this power and influence by traditional democratic standards for these men can create national issues overnight. They can make or break—by their coverage and commentary—a Moratorium on the war. They can elevate men from local obscurity to national prominence within a week. They can reward some politicians with national exposure and ignore others. For millions of Americans, the network reporter who covers a continuing issue, like ABM or civil rights, becomes in effect, the presiding judge in a national trial by jury.

A raised eyebrow, an inflection of the voice, a caustic remark dropped in the middle of a broadcast can raise doubts in a million minds about the veracity of a public official or the wisdom of a government policy.

One Federal Communications Commissioner considers the power of the networks to equal that of local, state and federal governments combined. Certainly, it represents a concentration of power over American public opinion unknown in history.

By way of conclusion, let me say that every elected leader in the United States depends on these men of the media. Whether what I have said to you tonight will be heard and seen at all by the nation is not my decision; it is not your decision; it is their decision.

From a speech given in Des Moines, Iowa, November 13, 1969. *Washington Post*, November 14, 1969, at p. 23, col. 1.

49. *N.Y. Times*, Feb. 11, 1970, at p. 95, col. 1. Miss Collins later complained to the FCC, but the Commission announced that such censorship was within the network's discretion. *N.Y. Times*, March 31, 1970, at p. 83, col. 1.

who are potentially (or actually) irresponsible. Since the 1930's the standard response to these situations has been two-fold: to use anti-trust laws to break up the concentrated control and to establish a governmental "watchdog" agency to protect against abuses. For broadcasting, the antitrust laws have proven insufficient to atomize private power over radio and TV.⁵⁰

Therefore, the second part of the New Deal solution—a "watchdog" agency—is necessary to regulate broadcasting practices and to prevent the abuses caused by the lack of a competitive market. Government, representing *all* the people, has no narrow or selfish interest to protect, so it can be trusted to insure that broadcasting operates in the public interest.⁵¹ Should government itself abuse its power, it can be chastened through the electoral process.

The basic problem with the sophisticated version of the "public interest theory" is its misplaced confidence in the neutrality of a governmental agency. Government generally is unlikely to be detached with regard to expression.⁵² Rather, the "government" is an enormous

50. The basic problem is that three networks dominate broadcasting. They control program production and distribution, own the richest stations, and provide the programs for the mass audiences. For statistics see Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221, 274-277 (1970); for description of network operations, see Blake and Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 YALE L.J. 1339, 1340-76 (1965); B. RUCKER, *THE FIRST FREEDOM* 140-57 (1968); and Goldin, *The Television Overlords*, ATLANTIC July, 1969, at 87.

A less important, but still serious, problem, is interlocking multiple media ownership. See B. RUCKER, *THE FIRST FREEDOM* 188-200 (1968); Johnson, *The Media Barons and the Public Interest*, ATLANTIC (June 1968) at 43; Pastore, *Hearings on Violence*, pt. 1, 263-330 (1969) (information as of Nov., 1968, on ownership by city, by facilities owned).

Using the antitrust laws to break up networks or to limit regional or national power to communicate where no economic power is evident, raises difficult questions beyond the scope of this Note. But many cities suffer a media monopoly, or near monopoly, which appears to be within the reach of § 2 of the Sherman Act or § 7 of the Clayton Act. An example is Cheyenne, Wyoming, whose only TV station is owned by the same company which owns the only full-time radio station and Cheyenne's only two newspapers. At the Justice Department's urging [see *Petition for A Hearing, In Re Application of Frontier Broadcasting Co.* (December 30, 1968) (on file at the Yale Law Journal)] the Commission recently set for hearing the application for renewal of the TV license. N.Y. Times, February 13, 1970, at p. 75, col. 1. The least that can be said is that the Justice Department has been deferential to the FCC in the area of media concentration, and has been willing to allow the Commission to move at its own slow pace.

51. For example, a recent student Note concluded:

The power of the mass media carries a correlative responsibility. Unfortunately, mercenary self-censorship has led to an abdication of that responsibility. *When the private sector turns censor, it is time to trust the public.*

Note, *The FCC's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294, 305 (1969) (emphasis added).

52. Not easily fooled is the foxy Governor of Georgia, Lester G. Maddox, who criticized Vice-President Agnew for not going far enough in his Des Moines speech, *supra* note 48. Governor Maddox said:

"The handful of men with this dreadful power of opinion-making also come from areas other than the TV networks. This unprecedented concentration of power also comes from the White House, some members of the Supreme Court, the Department

complex of vested interests anxious about self-perpetuation and sensitive to opportunities for manipulating public opinion. As government has expanded in size and function over the last 40 years, both its desire and its ability to influence exchanges in the "marketplace of ideas" have also increased. Huge direct expenditures for "information dissemination," coupled with easy access to the media, make it a potent communicator. Over the same period many citizens have come to believe that it is personally dangerous to raise their voices in opposition to official policy. Millions of people work for the state apparatus at one level or another. Others go to schools or work for corporations which are government financed. The official power which results can be exercised in many ways, from overt attempts to punish unpopular opinions to subtle pressures never openly expressed. The FCC is not immune to political and intra-governmental pressure. The "public interest theory" places trust in the agency as the means of counterbalancing irresponsible private broadcasters even though government itself poses a significant threat to free speech.⁵³

The prevalence—and dangers—of the "public interest theory" are seen in the recent case of *Red Lion v. FCC*.⁵⁴ There the Supreme Court adopted, with minor verbal modifications, a version of the "theory" to turn back a First Amendment attack on FCC program regulation in general and the fairness doctrine in particular.⁵⁵ Com-

of Health, Education and Welfare, other news-media, some members of Congress and some big shot leaders in education and religion."

N.Y. Times, November 16, 1969, at p. 78, col. 3.

53. Professor Robinson has described how one can be lulled into ignoring the First Amendment problems of governmental regulation in the field of broadcasting.

So long as the broadcast licensee is regarded as a monopolist who, were it not for regulation, would be able to run free, it is he who is portrayed as the censor and not the Commission. Indeed, the Commission can pass itself off as the champion of free speech, dedicated to ensuring that the licensee gives the fullest expression to all possible viewpoints and addresses itself to all possible tastes. There is no doubt that the Commission is aided in playing this role by dissatisfaction with the average quality of programming, particularly among intellectuals who would be most likely to express concern about infringements on free speech.

Robinson, *supra* note 19, at 68.

54. 395 U.S. 367 (1969).

55. The personal attack rules, 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679, had been upheld by the lower court. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967). In *Red Lion*, the licensee broadcast a discussion about a book by Fred Cook on the 1964 Republican Presidential Campaign. Cook, a newspaperman, had previously written an exposé of certain types of radio programs, asserting that the specific program at issue was representative. During the broadcast, it was alleged that Cook had been fired for making a false charge against an unnamed New York official. Contrary to the FCC's personal attack policy, the licensee failed to notify Cook of the attack or furnish him with a transcript of the program and refused Cook's request for free time to respond to the attack. Following receipt of the complaint from Cook, the Commission issued a letter to the licensee ruling that it had violated the personal attack rules which were a part of the fairness doctrine. The Commission requested the licensee to advise the

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binning the public ownership and public trustee arguments, the Court asserted that broadcasters have few or no First Amendment rights vis-à-vis the public as represented by government:

[T]he people as a whole 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 Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.⁵⁶

This approach permits the Court to reject the rather obvious problems of vagueness and of chilling effect which are created by rules the FCC has promulgated "in the public interest."⁵⁷ Rejecting these attacks seems to be a mistake.⁵⁸ But the major shortcoming of *Red Lion* is the

Commission of its plans to comply with the fairness doctrine, further requiring that Cook be given the right of reply at no expense to Cook, unless Cook were willing to pay. In response to the licensee's request for a ruling, the Commission affirmed the constitutionality of the fairness doctrine as it was applied in this situation. On appeal, the licensee challenged the constitutionality of the fairness doctrine claiming among other things that it violated the First Amendment and was unconstitutionally vague.

In *United States v. Radio-Television News Directors Ass'n*, 400 F.2d 1002 (1968), the Seventh Circuit had held that the personal attack rules and the fairness doctrine could be sustained against First Amendment attack only if the FCC demonstrated significant public interest in attainment of fairness in broadcasting and that the Commission was unable to obtain fairness by less dramatic means.

56. 395 U.S. 367, 390 (1969).

57. *Id.* at 392-396.

58. The Court rejected the argument that, if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least chilled. Although the Court stated that such a result would indeed be a serious matter, it accepted the FCC's finding that the possibility was speculative. In support of this finding, the Court noted that the communications industry has taken pains to present controversial programs in the past and assumes that the industry will continue to do so in the future. But the issue is not whether some controversial programming will survive, but rather whether some will be inhibited.

To deny the inhibiting effect of regulations which require *free* time for opposing views is to overlook the fundamental premise of capitalism. Broadcasters are primarily businessmen whose goal is to maximize profits; to present controversial programming is to risk a loss of income by incurring the duty to give away air time free.

Even apart from this economic issue, it should be obvious that the fairness doctrine will have some inhibiting effect on speech. Imagine a statute requiring that Madelyn Murray O'Hair, or her designated representative, be notified whenever a Jehovah's Witness makes a house call. Mrs. O'Hair would then have the right to hurry over to explain her opposing views on religion. Such a statute would make Jehovah's Witnesses less enthusiastic about door-to-door evangelism, and in due time fewer houses would be visited. To lessen the effectiveness of someone's speech is to inhibit it; the *Red Lion* court obscured that fact by simply accepting the FCC's finding that in the past the fairness doctrine produced no inhibiting effect.

Also, the Court dealt with the vagueness of the two pillars of the fairness doctrine—"controversial issue" and "fair treatment"—in a conclusory fashion. (*Id.*, at 395.) These terms are so vague that a licensee must self-censor a broader range of programs than the Commission deems "controversial" in order to avoid deciding whether such programs fit a larger pattern of "fair treatment." In the same way, the licensee must give fairer "fair treatment" than the FCC requires to be sure that the station is not forced to give free time. It might be argued that this vagueness improves the system of free expres-

Court's blind acceptance of the notion that the government can be installed as virtually the unrestricted regulator of the system of expression without endangering the very freedoms that system is supposed to enhance.

Enforcement of the fairness doctrine requires the following determinations *by government*: Was an individual program "controversial"? If so, were opposing views "treated fairly" on the station? If not, how much free time should be given "responsible opposing views"? It is submitted that these determinations involve program control: the Commission, or a reviewing Court, is telling the licensee which specific views must be broadcast, at what times, and for how long. Although such control amounts to less than total censorship, it should be characterized as action that allows the government to determine what is "proper" speech content. Such action is necessarily suspect in a system of free expression and should be so treated, even by a court that ultimately upholds the fairness doctrine.⁵⁹

By ignoring the dangers inherent in the granting of such governmental power, the Court was able to hold that government can undertake regulatory activity in broadcasting to "promote" the public interest.⁶⁰ Under the "public interest" theory as developed by the FCC, almost unrestricted governmental control is allowed by a finding that the public interest outweighs the broadcaster's interest in non-interference. Under the Court's *Red Lion* standard, the same result is reached by a finding that a certain regulation promotes the interest of the public at large in an effective system of free expression.

The rationale of *Red Lion* could, for example, be used to justify direct governmental censorship.⁶¹ Obviously, the rationale enunciated

sion; that is different from asserting, as the Court did, that the fairness doctrine may not have an inhibiting effect on broadcasters.

59. This Note sharply questions the fairness doctrine as it has developed but does not attempt to decide whether the doctrine should be abandoned. See pp. 1358-59.

60. The regulations promote the "First Amendment goal of producing an informed public . . ." 395 U.S. 367, 392 (1969).

61. Direct censorship could be justified in at least two ways. First, offensive programming forces many people to curtail or eliminate their use of radio and TV. To protect the right of people to hear, the FCC should suppress those programs which offend many people.

Second, it could be argued that radio and television have an enormous and disproportionate power to communicate ideas. As the broadcast media's power has grown, other ways of disseminating ideas have been destroyed, so that today even reallocation of ownership could not restore a truly diverse system of expression. Radio and television have created one all-pervading consciousness; now that consciousness controls those who work for or own the media. The only agent that can break into this circle is the government, representing the people. Direct censorship is necessary to restore the marketplace of ideas, since the truth cannot win out in competition with the constant barrage of untruths broadcast by mass media. For government to do less violates the duty of the elected representatives of the people to serve the system of free expression demanded by the First Amendment, it could be argued.

in the case does not require such censorship. Indeed, the Court was careful to state that direct censorship was not at issue.⁶² But it must be emphasized that *Red Lion's* rationale places no limit on government action because any regulation, including direct censorship, could be justified as necessary for promoting the public's First Amendment rights.⁶³

II. A New Approach to Broadcast Regulation: The Structure-Content Distinction

A workable theory of broadcast regulation must account for a basic tension implicit in the government's role between the necessity for some governmental interference and the dangers of such interference to a system of free expression. Given the scarcity of broadcast outlets and the breakdown of the market in the broadcast industry, governmental action is necessary to insure diversity of expression. However, every FCC regulation has *some* effect on speech content. The goal of any theory of broadcast regulation must be to protect the system of expression from the dual threat of private monopolists and overweening government, to satisfy the need both for continued action by the government and for greater limitation on that action.

A first step in the development of such a theory would be to distinguish between regulations which affect the structure of the broadcast industry and regulations which affect program content directly. A viable system of free expression must make the means of communication accessible to many, and allow free and uninhibited expression of diverse views. Regulations which affect the structure of the broadcast industry can promote the goals of accessibility and diversity without unduly impeding free expression. Other regulations which impinge directly on the content of particular programs severely impede the free presentation of ideas.

The structure-content distinction provides a standard for evaluating FCC actions that gives proper weight to First Amendment considera-

62. 395 U.S. 367, 396 (1969).

63. A lower court has already relied on *Red Lion* to uphold program restrictions imposed by the FCC on over-the-air subscription television.

[T]he Commission must seek to assure that the listening and viewing public will be exposed to a wide variety of 'social, political, esthetic, moral, and other ideas and experiences.' [*Red Lion* at 390.]

The need to make choices of this kind requires the Commission to take some cognizance of the kind and content of programs being offered to the public
National Ass'n of Theater Owners v. FCC, 17 P & F RADIO REG. 2d 2010, 2027-8 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

tions. Regulations that provide government with the opportunity to control content and impose its own views directly would be forbidden. This category includes those regulations which provide government with unlimited discretion to determine in the short-run the particular content of what is to be broadcast. The clearest and most extreme example is direct, uncontrolled governmental censorship. Other types of regulation which are seemingly structural but, in fact, are directed toward controlling particular content should also be prohibited. Examples of this type of regulation would be statutes requiring that the FCC grant licenses only to persons loyal to the government,⁶⁴ or to persons not members of labor unions, or to people who are white.⁶⁵ Though written in terms of industry structure, such a statute would be a transparent attempt to control viewpoint directly.

Correlatively, those structural regulations aimed at providing greater accessibility and increased diversity would be permitted. Such regulations have only an indirect and long-term effect on particular program content and thus are less likely to allow government to interfere with program content. The one-to-a-customer rule,⁶⁶ the policy favoring integrated management and ownership,⁶⁷ or rules requiring a minimal amount of non-network programming are examples.⁶⁸

The many other governmental regulations that fall within the limiting examples cited above present difficult problems. Such regulations include requirements of program balance, equal time provisions, the fairness doctrine, and minimum racial quotas on ownership.⁶⁹ The root problem lies in formulating for a highly concentrated industry standards of diversity and equal access which can be administered without highly subjective government review of program content. Solutions

64. The Commission has attempted to enforce such a requirement in the past. See the case of Edward Lamb, discussed in Brown, *Character and Candor Requirements for FCC Licenses*, 22 LAW & CONTEMP. PROB. 644, 652-654 (1967) and in Commissioner Jones' dissent in WBNX Broadcasting Co., 4 P & F RADIO REG. 242, 255-257 (1948).

In 1954, the FCC announced a proposed rule which would deny a radio license to Communists and persons of low moral character. In 1962, the Commission finally ended the rule-making proceedings without adopting the rule. Scheibla, *Air Wave Pollution*, BARRON'S, April 6, 1970, at 12, col. 3. But in 1964 the Commission announced that membership in the Communist Party was relevant to a public interest finding. Pacifica Foundation, 36 F.C.C. 147, 1 P & F RADIO REG. 2d 747, 752-3 (1964).

65. In fact, less than one tenth of 1% of broadcast stations are owned by black people. N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 110 (1970). A recent study of 310 radio stations aimed at a black audience found that only nine were owned by Negroes. New York Times, March 27, 1970, at p. 67, col. 1.

66. *Supra* note 21.

67. See Hi-Line Broadcasting Co., 13 P & F RADIO REG. 1017, 1042 (1957); Biscayne Television Corp., 11 P & F RADIO REG. 1113, 1156 (1956).

68. *Supra* note 22.

69. There is no racial quota at present. See note 65 *supra*.

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to these difficulties will require development of more sophisticated tests which will complement the structure-content distinction.

The formulation of the distinction is thus no more than an initial step in adequately dealing with the free speech tension inherent in FCC regulation.⁷⁰ The benefit claimed for the approach is that regulatory problems are framed in terms of considerations important to a system of free expression. By considering the nature and degree of governmental interference with particular views, a court is less likely to overlook the threat that government poses to free speech in the broadcast area.

III. First Amendment Standards Should Apply To Offensive Speech

The structure-content distinction helps place current FCC practices involving "offensive" programs in a context which emphasizes First Amendment issues. Operating under the "public interest theory," the FCC can freely penalize a wide range of quasi-obscene speech that the Commission considers offensive but which would not meet the Supreme Court's test for obscenity were the material to appear in a movie or newspaper. The following cases are illustrative.

In *Palmetto Broadcasting*, the Commission came to grips with Uncle Charley Walker ("This is your Uncle Charley letting it hang out and drag in the sand"), an announcer whose patter was "suggestive, vulgar and subject to double meaning."⁷¹ The FCC recognized that Uncle Charley's quips could not be considered obscene.⁷² But the narrow standard of the relevant obscenity statute⁷³ was not considered a limita-

70. The commended approach does not require the radical restructuring of the broadcast industry that may be necessary. But it would legitimize measures which structure control over broadcast facilities in ways that assure diversity of expression, but avoid direct imposition of government views as to what the public shall see or hear. Examples include encouraging CATV; distributing licenses on a random basis among applicants with minimal technical qualifications; granting more licenses to listener-supported stations; licensing some stations to serve as common-carriers with fixed rates for air-time available on a first-come basis; granting licenses to communities which set up procedures for electing a board of directors to oversee the use of the station; and limiting the duration of licenses to five years, with no renewal. All of these actions would help mitigate present broadcasting problems without sacrificing the value of free speech.

These and other structural reforms are viewed with horror by present broadcasters; for them, government interference with their programs is a lesser evil, since they care more about their license than they do about censorship. "At gunpoint, and given the choice of 'your money or your life,' the ordinary citizen promptly yields up his money. Not so the broadcasters." *VARIETY*, March 26, 1969, at 74, col. 2.

71. *Palmetto Broadcasting Co.*, 33 F.C.C. 250, 23 P & F RADIO REG. 483, 485g (1962). The Court of Appeals affirmed on grounds not related to the obscenity issue. *Robinson v. FCC*, 334 F2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843 (1964).

72. *Palmetto Broadcasting Co.*, *supra* note 71, at 485f.

73. 18 U.S.C. § 1464 (1964).

tion on the Commission's decision that "coarse and vulgar" comments, over a period of time, violated the public interest.⁷⁴ Hence, Palmetto's license was not renewed.

In 1964, the Commission renewed the licenses of the Pacifica Foundation. Its decision followed a sustained public controversy—including Senate hearings⁷⁵—about the Pacifica broadcasts of Edward Albee's *The Zoo Story*, a Ferlinghetti poem, and a discussion of homosexuality by eight practitioners.⁷⁶

Our function, we stress, is not to pass on the merits of the program—to commend or to favor. Rather . . . 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 this case. . . .⁷⁷

In spite of the favorable disposition of all charges against Pacifica, the Commission, a year later, limited all subsequent license renewals to one year (rather than the normal three).⁷⁸

In April, 1970, the Commission imposed a forfeiture on Philadelphia's WUHY-FM, a noncommercial educational station, for the broadcast of indecent material. During an interview, broadcast from approximately 10:00 p.m. to 11:00 p.m., Jerry Garcia, leader of the Grateful Dead, a California rock group, expressed his views on ecology, music, philosophy, and interpersonal relations.⁷⁹ The Commission found the

74. Palmetto Broadcasting Co., 33 F.C.C. 250, 23 P & F RADIO REG. 483, 485h (1962).

75. In 1963, the Senate Internal Security Subcommittee held extensive hearings on alleged Communist influence in Pacifica. The committee never issued a report. Schelblu, *Air Wave Pollution*, BARRON'S, April 6, 1970, at 12, col. 4.

76. The other material consisted of excerpts from "Ballad of the Despairing Husband," a poem by Robert Creeley, and excerpts from *THE KID*, an unfinished novel by Edward Pomerantz. Pacifica Foundation, 36 F.C.C. 147, 1 P & F RADIO REG. 2d 747, 749 (1964).

77. *Id.* at 751.

78. Pacifica Foundation, 6 P & F RADIO REG. 2d 570 (1965). The Commission cited deviations from Pacifica's program supervisory policies as the reason for the short renewal. *Id.* at 571.

79. The Commission characterized the radio media as a public arena and concluded that although a person might use the kind of language expressed in the broadcast in other settings, "he has no right to do so in public arenas. . . ." Eastern Education Radio, 18 P & F RADIO REG. 2d 860, 863 (1970). The Commission also affirmed the captive audience theory for broadcasting:

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 . . . 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.

Id. at 864. (Emphasis in original.) The Commission further noted that this type of programming should be prohibited because of the large numbers of children in the radio and TV audiences.

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material offensive because "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'." An example cited by the Commission were the words: "political change is so fucking slow."⁸⁰ The Commission found that it had authority to punish the broadcast of the program on two separate grounds. First it held the broadcast "indecent" under 18 U.S.C. § 1464, which penalizes the use of any obscene, indecent, or profane language in radio communications.⁸¹ This was the first time that the FCC had given the word "indecent" a meaning independent of the word "obscene."⁸² Secondly, the Commission held that this particular broadcast could be punished because it did not serve the public interest.⁸³

These cases hold that certain program content, although not obscene under the federal statutes, violates the public interest. The FCC interfered with particular expression and made a determination about what is "proper" program content. Penalties resulted. By suppressing this material, the Commission dictated what the public could see or hear. These cases penalizing "quasi-obscenity" were decided on the wrong grounds, since the official action should have been judged by First Amendment standards rather than by standards developed under the "public interest theory."

80. *Id.* at 861.

81. The Commission conceded that the broadcast would not necessarily come within the standard laid down in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 418 (1965). "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." 18 P & F RADIO REG. at 865. The Commission stated that the issue whether the term "indecent," has a meaning different from "obscene" is not clear and can only be definitely settled by the courts. *Id.* at 868. But for the reasons cited in footnote 79, *supra*, the Commission decided that it did have a different meaning. *Id.*

82. "There is no precedent, judicial or administrative, for this case." *Id.* at 866. Compare *Jack Straw Memorial Foundation (KRAB-FM)*, 21 F.C.C. 2d 833, 18 P & F RADIO REG. 2d 414 (1970) (limiting license renewal to one year because of a broadcast containing four letter words; the licensee was punished for his lack of care in failing to screen programs in accordance with his own policy).

There is judicial precedent as to the word *indecent*. Statutes containing that word have been ruled unconstitutional in *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) (per curiam), cited with approval in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968); *United States v. Klaw*, 350 F.2d 155, 160-163 (2d Cir. 1965) ("it is doubtful whether any standard other than obscenity could stand the constitutional test." *Id.*, at 163); *State v. Vollmar*, 389 S.W.2d 20, 29 (Mo. 1965).

83. *Eastern Education Radio*, *supra* note 79 at 867. The Commission imposed a forfeiture of \$100.00, stating that because the broadcast was an isolated occurrence on the station there was no question of revocation or denial of license. However, the Commission thought it appropriate to impose some penalty, even though minimal, to allow for court review of the decision, since it involved certain First Amendment questions of first impression, "particularly as to the Section 1464 aspect." *Id.* at 868.

IV. Defining Obscenity in the Broadcast Media

Speech which courts have held to be unprotected by the First Amendment can be suppressed in broadcasting as in other media. A federal statute limited to punishing judicially-defined obscenity in broadcasting is a better tool for dealing with the "offensive" speech problems than the current method of regulation.⁸⁴ However, difficulties arise in applying the obscenity doctrines to the broadcast setting. These difficulties stem from the Supreme Court's inability to define obscenity in other media.

To be judged obscene, material must meet each of three criteria: it must (1) be "patently offensive," (2) be "utterly without social or literary or artistic or any other importance," and (3) appeal to "prurient interest," i.e., "have a tendency to induce lustful thoughts."⁸⁵ One

84. Another method of regulating quasi-obscene or offensive speech is to give the words "indecent" and "profane" contained in 18 U.S.C. § 1464 (1964), quoted *supra* note 29, a meaning independent of the word "obscene." The Commission in the *Eastern Educational Radio* case, *supra* notes 79-81, recently utilized this approach for the first time.

However, giving the words "indecent" and "profane" meanings independent of the word "obscene" would raise serious constitutional problems. Statutes containing the word "indecent" have been ruled unconstitutionally vague in *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955) *per curiam*, cited with approval in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 683 (1968); *United States v. Klaw*, 350 F.2d 155, 160-163 (2d Cir. 1965)—"It is doubtful whether any standard other than obscenity could stand the constitutional test." *id.* at 163; *State v. Vollmar*, 389 S.W.2d 20, 29 (Mo. 1965); and *Hallmark Productions, Inc. v. Carroll* 384 Pa. 348, 121 A.2d 584 (1956). Licensing standards proscribing offensive material in such terms as "sacrilegious," "immoral" and "cruel" have been struck down by the Supreme Court as unconstitutionally vague. *Winters v. N.Y.*, 333 U.S. 507 (1948); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas* 343 U.S. 960 (1952); and *Superior Films, Inc. v. Dept. of Education* 346 U.S. 587 (1954). The obscenity test has consistently escaped the vagueness condemnation on the ground that it is a narrow exception to freedom of speech which has evolved a sufficiently clear meaning from its long history of enforcement.

Furthermore, even if the "indecent" and "profane" language of § 1464 were not found unconstitutional on its face, its constitutionality would probably be limited to those instances in which there is a valid state interest to be protected. *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969); *Karp v. Collins*, Civil Action No. 756-69 (D.N.J. 1970). Apparently, the only two legitimate state interests in suppressing offensive and indecent material for adults are (1) an interest in preventing listeners from reacting physically and spontaneously, thereby causing a breach of the peace, and (2) an interest in protecting the sensibilities of individuals who did not consent to hear the offensive material. *Street v. New York*, 394 U.S. 576, 590-91 (1969); *Williams v. District of Columbia*, *supra*, at 646; *Karp v. Collins*, *supra*.

These interests would not generally be applicable in situations in which offensive material is aired over the broadcast media. The interest of the state in preventing a spontaneous eruption of violence (the *Chaplinsky* fighting words situation) is not present because there is no physical proximity in broadcasting between the speaker and audience; there may be a danger that the broadcast will provoke the members of the audience to retaliate against others, but that of course would have to be shown.

The interest of the state in protecting the sensibilities of the audience—and an additional state interest, preventing indecent or profane material from reaching children—is dealt with, pp. 1364-66 *infra*, in the discussion of whether, in contrast to giving meaning to the words "indecent" and "profane," there should be a broadening of the definition of "obscenity" in the broadcast media.

85. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966). For discussion of the Supreme Court's development of

question that has important implications for defining obscenity in the broadcast setting is: what constitutes the relevant audience for determining prurient interest? Most judicial definitions of obscenity consider the "average man" the relevant audience for testing a law of general prohibition, while allowing a different standard for statutes limited to punishing distribution to minors. However, the Court has not begun to formulate a definition of obscenity for children.⁸⁰

A second important issue is whether constitutional doctrine which allows suppression of obscenity can be applied to other categories of offensive speech such as violence,⁸⁷ blasphemy, sacrilege,⁸⁸ vulgarity⁸⁹ and prejudice.⁹⁰ The Court has evolved no rationale to explain why sexual imagery can be suppressed while these other kinds of offensive materials are protected. The argument that sexual material leads to criminal acts or personal corruption can be made equally well⁹¹ for depictions of violence, prejudice or sacrilege.⁹² An argument based on

obscenity law, see generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 467-515 (1970); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963); Kalven, *Metaphysics of Law of Obscenity*, 1960 SUP. CT. REV. 1; Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203; Krislow, *From Ginsburg to Ginsberg: The Unhurried Children's Hour In Obscenity Litigation*, 1968 SUP. CT. REV. 153; Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, Note, *Much Ado About Dirty Books*, 75 YALE L.J. 1365 (1966).

86. The Court considers children to lack the mature judgment which is necessary for exposure to a full range of ideas. See generally *Ginsberg v. New York*, 390 U.S. 629 (1968); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). Cf. *Rabeck v. New York* 391 U.S. 462 (1968) (per curiam). For another kind of relevant audience problem, see *Mishkin v. New York*, 383 U.S. 502, 508-10 (1966), and *United States v. Klaw*, 350 F.2d 155 (2d Cir. 1965).

87. Cf., *Winters v. New York*, 333 U.S. 507 (1948).

88. *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495 (1952).

89. *Hannegan v. Esquire*, 327 U.S. 146 (1946).

90. *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930; *Dan Sanders*, 17 F.C.C. 2d 204, 15 P & F RADIO REG. 2d 1096 (1969). Cf. *Office of Communications of the United Church of Christ v. FCC*, 38 U.S. LAW WEEK 2002 (D.C. Cir. 1969), *rev'g Lamar Life Broadcasting Co.*, 13 P & F RADIO REG. 2d 769 (1968).

91. *Stanley v. Georgia*, 394 U.S. 557 (1969), apparently refutes this argument, as applied to adults. In that case a search of Stanley's home yielded three reels of allegedly obscene eight-millimeter film. The majority's reversal of the state court conviction for possession of obscene materials is based not on grounds of illegal search, but rather on the right of privacy. In upholding the right to private possession of obscene materials, the Court rejects or severely curtails the state's interest in regulating obscenity for the purpose of protecting moral standards (by implication), or of controlling the moral content of a person's thoughts, or of preventing deviant sexual behavior or crimes of sexual violence (*Id.*, at 565-67). *Stanley* would seem to leave the State only two interests in regulating obscenity: (1) preventing children from obtaining obscene material and (2) protecting unwilling adults from intrusions on their sensibilities or privacy. It is on these two grounds that the Court distinguishes *Roth v. United States*, 354 U.S. 476 (1957). Cf. *Redrup v. New York*, 386 U.S. 767, 769 (1967) (per curiam). For a good discussion of *Stanley*, see Katz, *Privacy and Pornography: Stanley v. Georgia*, 1969 SUP. CT. REV. 203.

92. Advocacy of illegal sexual practices has been held not to justify censorship, so such advocacy alone cannot come under obscenity laws. *Kingsley Int'l Picture Corp. v. Regents of the University of State of New York*, 360 U.S. 684, 688-89 (1959).

the concept of moral nuisance would seem to apply equally to all forms of offensive material, whether sex is involved or not. So too the right of the majority to pass laws punishing practices for which the community feels moral revulsion does not distinguish sexual from other offensive expression.⁹³ Thus, although the Court has limited its definition of obscenity to material with prurient appeal, there is at present no theoretical barrier to expanding the definition to other offensive topics.

Such an extension might well occur in broadcasting. The FCC has received complaints about isolated use of profanity,⁹⁴ off-color jokes,⁹⁵ use of words with a double meaning,⁹⁶ suggestive songs, or DJ patter.⁹⁷ These examples and many others raise the problem of whether "offensive" speech without "prurient appeal" can be constitutionally suppressed. Since the Court has demonstrated its willingness to interpret the First Amendment differently to reflect differences between media,⁹⁸ the arguments in favor of encompassing more types of material within the term *obscenity* as it applies to broadcasting must be considered.

First, it can be argued that TV viewers, or radio listeners, should be considered an unwilling or captive audience when offensive matter is presented on the air. Offensive material can be suppressed when the alternative is to allow its imposition upon individuals against their will. Professor Emerson believes that to shock another by offensive verbal communication, when done intentionally, constitutes an invasion of privacy.⁹⁹ Radio and TV, according to Judge Bazelon, play to captive audiences because escaping the set requires leaving the room, changing the channel, or doing some other affirmative act (for example, turning it off or falling asleep).¹⁰⁰

93. A recent District of Columbia case holds that offensive language in public is not actionable merely because it offends the sensibilities of passers-by. *Williams v. District of Columbia*, 419 F.2d 638, 646 (1969). *But cf.* *Street v. New York*, 394 U.S. 576, 590-591 (1969); *Karp v. Collins*, Civil Action No. 756-69 (D. N.J., *opinion filed* March 12, 1970).

94. *See, e.g.*, *Eastern Education Radio*, *supra* note 79; *Jack Straw Memorial Foundation*, *supra* note 82.

95. *See, e.g.*, cases cited at note 33, *supra*.

96. *Id.*

97. *See, e.g.*, cases cited at note 32, *supra*.

98. "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). *See also* *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 49 (1961); *Kingsley Int'l Pictures Corp. v. Regents of University of State of New York*, 360 U.S. 684, 689-90 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

99. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 500-01 (1970). *See* *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam). *Cf.* *Fort v. City of Miami*, 389 U.S. 918 (1967).

100. *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968). *See also*, the FCC brief submitted in *Grove Press v. Christenberry*, reported 25 Fed. Reg. 7292, 7293 (1960):

"[R]adio and TV programs enter the home and are readily available not only to the average adult but also to children and to the emotionally immature . . . Thus, for

The captive audience argument for regulation of offensive programming can be met by requiring a system of warnings more or less like those used for movies. The Pacifica station KPFFK-FM warned throughout the broadcast day that an offensive poem would be read at a certain time.¹⁰¹ Such a warning would not reach a person who tuned into a program just before the offensive material was broadcast and was thus captive. But it can be argued that the position of such a person is similar to the position of one who suddenly confronts offensive words or pictures while reading through a book or turning the pages of a magazine. Further, a warning could be given intermittently during the broadcast itself. If proper warnings are given, the captive audience problem is not arguably different in broadcasting than in other media, and thus the existence of the problem cannot justify different standards of obscenity. The cost of protecting from shock those few unsuspecting viewers or listeners who are not reached by warnings is simply too high—much controversial material would have to be censored so as not to offend the unwary.

A second argument for more thoroughgoing government censorship under a special obscenity standard for broadcasting is that broadcasters, unlike book sellers or theater owners, cannot prevent offensive material from reaching innocent children. Minors watch an enormous amount of television and are an important segment of the radio audience. Justice Stewart stated in *Ginsberg v. New York* that a child is like a captive listener or viewer since he does not have full capacity for individual choice.¹⁰² Stricter standards of obscenity can therefore be applied for minors, just as voting rights or the ability to marry can depend on age.¹⁰³ But as noted above,¹⁰⁴ the Court has not defined what is “obscene” for minors.

In practice, any definition must blend adult norms with prevailing theories of child development and socialization. A notable example is the statute in *Ginsberg* forbidding the sale to minors of a book or picture which (i) “predominantly appeals to the prurient, shameful or morbid interest of minors”; (ii) “is patently offensive to prevailing standards in the adult community as a whole with respect to what is

example, while a nudist magazine may be within the protection of the First Amendment . . . [t]he televising of nudes might well raise serious questions of programming contrary to 18 U.S.C. 1464. . . .”

101. See note 2, *supra*.

102. *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

103. *Id.*

104. P. 1363.

suitable material for minors"; and (iii) "is utterly without redeeming social importance for minors."¹⁰⁵

Yet concern for the large number of minors who comprise radio and TV audiences does not necessarily justify an expansion of the obscenity test in broadcasting. Of equal concern is the spirit of the command in *Butler v. Michigan* that government cannot "reduce the adult population . . . to reading only what [is] fit for children . . ." ¹⁰⁶ It is necessary to strike a balance between society's interest in controlling the programs heard or seen by children and the interest of the adult members of society in having access to the widest possible range of broadcast material. One way to lessen the conflict might be to require broadcasters to make all possible efforts to minimize the number of children in the audience for programs that present quasi-obscene and other offensive material but to apply the standard obscenity test to the material itself. Warnings and late night programming could reduce the number of minors in the audience, but of course such precautions do not completely solve the problem of a juvenile audience. At some point, however, parents must bear the major responsibility for controlling what their children see and hear. To place the responsibility on the licensee might make TV a marvelous medium for children, but the cost would be to subject adults to programs suitable only for juveniles.

Finally, it can be argued that the great impact of radio and TV justifies giving unusually broad effect to those obscenity laws which apply to broadcasting. This argument is similar to the impact argument used to justify broadcast regulation. To say that material which would not be considered obscene in a book or movie should be so considered in radio and TV is to assume that the First Amendment becomes less applicable as the media's impact becomes more powerful. As noted before, such an assumption ignores the threat posed by government interference to the system of free expression.

Nonetheless, in the future, courts may adopt a less restrictive obscenity test for radio and TV for the reasons just discussed. For example, the immature audience rationale may be used to characterize the average man of the obscenity formula as an "average" child. The effects of a broadened obscenity test might differ very little from application of the public interest standards with respect to suppression of offensive programming. A lengthy First Amendment argument would

105. N.Y. Penal Law § 484-h, subsection 1(f)(i)(ii) and (iii) (McKinney 1965).

106. 352 U.S. 380, 383 (1957). See also *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

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then have been made to protect offensive programming from the effects of the "public interest theory" of regulation, only to have such programming censored almost as effectively by the use of a redefined obscenity standard.

However, even if the courts were to interpret the obscenity standards broadly, some progress could be claimed. When the FCC makes the initial decision about offensive speech, regulation under the obscenity laws will require the Commission to justify its decision in a manner more amenable to judicial review than is the case under the "public interest theory." At present, the reviewing court has no standard for rejecting the FCC's finding in the licensing decision except unreasonableness.¹⁰⁷ Experience with the reasonableness test in broadcasting has proved its worthlessness, at least where important values are in conflict.

In conclusion, the Pacifica Foundation broadcasts should be re-examined in the light of the foregoing analysis. If the restrictive obscenity standard used in other media is applied to broadcasting, then none of these broadcasts was obscene. They fail to satisfy all three tests of the obscenity definition, each of which must be independently met.¹⁰⁸ First, if the relevant audience is realistically defined as including the poor, the young, radicals, and other groups besides the middle-aged, white middle class, the broadcasts may not meet the "patent offensiveness" criterion.¹⁰⁹ Second, although expletives and words describing sexual acts are used in some broadcasts, this language may not appeal to prurient interest in the context in which it was used.

107. Refusal to grant or renew a broadcast license on the grounds of previous presentation of objectionable programming is arguably a prior restraint. It is at least analogous. The Supreme Court has repeatedly warned of the dangers to free expression of permitting non-judicial bodies to issue prior restraints on speech. *Tietel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). *Tietel Film* and *Freedman* hold that when non-judicial bodies make the initial decision, there must be speedy and complete judicial review. Compare *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968).

108. The poem, "Anti-Semitism," was held to be protected expression in *Dan Sanders*, 17 F.C.C. 2d 204, 15 P & F RADIO REG. 2d 1096 (1969). The Justice Department notified the FCC that *Jehovah's Child* did not warrant prosecution under 18 U.S.C. § 1464 (1964). Letter from William Session, Chief, Government Operations Section, Criminal Division, Department of Justice, to Henry Geller, FCC General Counsel, October 22, 1969, published in *Hearings on S. 2004*, pt. 2, at 355.

109. Commissioner Johnson, dissenting in *Eastern Educational Radio*, 18 P & F RADIO REG. 2d 860, 872d (1970) observed:

What this Commission condemns today is not words, but a culture—a life-style it fears but does not understand. . . . What the Commission decides, after all, is that the swear words of the lily white middle class may be broadcast, but those of the young, the poor, or the blacks may not.

Id. at 872d, 872e. See also A. MONTAGU, *THE ANATOMY OF SWEARING* (1967).

Most clearly of all, the broadcasts fail to meet the third criterion of being "utterly without social or literary or artistic value or any other importance." They all involve controversial social and political issues. Assuming that rules regarding warnings and late night programming would be applied in the future, broadcasts similar to these should not fall within the obscenity exception to the First Amendment. Their suppression is inconsistent with a system of free expression.