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FIRST AMENDMENT—OBSCENITY AND INDECENCY

Pinkus v. United States, 98 S. Ct. 1808 (1978)
Federal Communications Commission v. Pacifica Foundation. 98 S. Ct. 3026 (1978)

INTRODUCTION

The Supreme Court last term attempted to define further the standards for determining the obscenity *vel non* of mailed materials. In *Pinkus v. United States*[1] the Court ruled, *inter alia,* that children are not to be included as a part of the community by whose standards obscenity is to be judged. However, the inclusion of sensitive adults was considered proper in the formulation of that community standard. Also, in *Federal Communications Commission v. Pacifica Foundation,*[2] the Court held that the Federal Communications Commission had the power to regulate the content and context of a radio broadcast which was indecent but not obscene.

DISCUSSION OF CASES

In *Pinkus,* the Court sought to resolve the ambiguities surrounding the definition of "contemporary community standards," as used by the Court in *Roth v. United States*[3] to define obscene materials.[4] The *Roth* standards for obscenity, as particularized in *Memoirs v. Massachusetts,*[5] stated that materials could be found obscene when: (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.[6]

The Court redefined obscenity in *Miller v. California,*[7] finding the "utterly without redeeming social value" requirement of *Roth* and its progeny to be a prosecutorial burden "virtually impossible to discharge under our criminal standards of proof."[8] Under the present day *Miller* standards, the trier of fact in an obscenity case must determine:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[9]

The petitioner in *Pinkus v. United States*[10] was charged with violation of a federal obscenity statute.[11] The acts upon which the charges were based occurred in 1971,[12] necessitating the application of the *Roth*[13] standards to the determination of obscenity *vel non.*[14] The district court failed to apply the *Roth* standards,[15] and cast its instructions to the

[1] 98 S. Ct. 1808 (1978).
[2] 98 S. Ct. 3026 (1978).
[3] 354 U.S. 476 (1957).
[4] The acts with which Pinkus was charged, *infra* note 12, occurred prior to the decision of Miller v. California, 413 U.S. 15 (1973), making the *Roth-Memoirs* standards applicable to that case. *See* Marks v. United States, 430 U.S. 188 (1977), holding "that the Due Process Clause [of the Fifth Amendment] precludes the application to petitioners of the standards announced in *Miller* v. *California,* to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs.*" *Id.* at 196.
[5] 383 U.S. 413 (1966).
[6] *Id.* at 418.
[7] 413 U.S. 15 (1973).
[8] *Id.* at 22.
[9] *Id.* at 24 (citations omitted).
[10] 98 S. Ct. 1808.
[11] 18 U.S.C. § 1461 (1976) in relevant part provides:
> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance . . .
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section . . . to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

[12] The 11 count indictment charged Pinkus with having: "mailed obscene illustrated brochures advertising sex films, books, magazines and playing cards; the magazine 'Bedplay'; and an 8 mm. film, 'No. 613,' to addresses in Nevada, New York, Iowa, Pennsylvania, Texas, and New Jersey." United States v. Pinkus, 551 F. 2d 1155, 1156 n. 1 (9th Cir. 1977).
[13] 354 U.S. 476 (1957).
[14] *See* note 4 *supra.*
[15] 98 S. Ct. at 1810. The District Court's decision was not published.

jury in a definition of obscenity under the *Miller*[16] standards. Accordingly, the Court of Appeals for the Ninth Circuit remanded the case[17] to the district court for a new trial under the appropriate standards. On retrial in 1976, petitioner was again convicted, fined and sentenced on the original charges.[18] On appeal to the Ninth Circuit, petitioner challenged four parts of the jury instructions and the trial court's exclusion of assertedly comparable materials, which were claimed to have had enjoyed commerial and popular success throughout the country. That court affirmed the conviction, finding no reversible error in the jury instructions.[19] In upholding one instruction which included children as a part of the community by whose standard obscenity was to have been judged, the circuit court noted that the "Supreme Court has both upheld a conviction involving the inclusion of children in the community [see *Roth v. United States,* 345 U.S. 476 ....] and intimated that it does not necessarily approve such a charge. *See Ginzburg v. United States,* 383 U.S. 463, 465 n.3 ... (1966)."[20]

The Supreme Court reversed and remanded the case back to the court of appeals, acknowledging its prior ambivalence on whether children should be included in the relevant community. The majority opinion[21] held that children are not to be included in the relevant community and reasoned that their inclusion might produce in the jury's eye a much lower "average person"[22] than would result if they "restricted their consideration to the effect of allegedly obscene materials on adults."[23] The Court observed that in the same term in which *Roth* was decided, it had reversed a conviction under a state statute proscribing the dissemination of a book "found to have a potentially deleterious influence upon youth."[24] The decision in *Pinkus* followed the logic of that ruling[25] by preventing the content of adult material from being governed by the community's concern for the protection of the morals of youth;[26] or, as Mr. Justice Frankfurter euphemistically stated, "burn[ing] the house to roast the pig."[27]

However, the *Pinkus* Court did not find error in the inclusion of sensitive adults in the jury instructions defining the relevant community by whose standards obscenity is to be judged. The Court found petitioner's reliance on passages from *Miller*[28] and *Smith v. United States*[29] to have been misplaced. The Court ruled that the allusions to the "average person" in those passages[30] was to emphasize an issue central to *Roth,* that "judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedom of speech and press."[31] The Court held that "[i]n the narrow and limited context of this case,[32] the community includes all adults who comprise it."[33] Whereas a jury should not use any particularly sensitive or insensitive persons or groups as a standard, it *should* include both the sensitive and insensitive person, however defined,[34] when determining the "collective view of the community."[35]

The petitioner in *Pinkus* also challenged the propriety of the trial court's instructions as to deviant

[16] 413 U.S. 15 (1973).

[17] United States v. Pinkus, No. 73-2900 (9th Cir. Feb. 5, 1975, rehearing denied May 13, 1975).

[18] 98 S. Ct. 1810. The District Court's decision was not published.

[19] United States v. Pinkus, 551 F. 2d 1155 (9th Cir. 1977). Pinkus challenged those jury instructions which included children and sensitive persons as part of the relevant community, as well as the instruction to consider the material's appeal to the prurient interest of deviant groups and the appellant's alleged involvement in the business of pandering.

[20] *Id.* at 1158.

[21] The Court's opinion was written by Chief Justice Burger and joined by Justices Blackmun, Rehnquist and White. Justice Stewart concurred in a separate opinion, as did Justice Brennan, who was joined by Justices Stewart and Marshall. Justice Powell filed a dissenting opinion.

[22] The Court held, *inter alia,* in Smith v. United States, 431 U.S. 291, 304 (1977), that, "obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant."

[23] 98 S. Ct. at 1812.

[24] *Id.* (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[25] Butler v. Michigan, 352 U.S. 380 (1957).

[26] There was no evidence in *Pinkus* that children had received, or were likely to have received, the challenged materials. 98 S. Ct. at 1812.

[27] 352 U.S. at 383.

[28] 413 U.S. 15 (1971).

[29] 431 U.S. 291 (1977).

[30] 413 U.S. at 33; 431 U.S. at 304. Both the *Miller* and *Smith* Courts held, *inter alia,* that the community standard was to be based on the "average person" in the community and not on the most sensitive or insensitive person.

[31] 354 U.S. at 489.

[32] Although the Court did not explicitly state what the "narrow and limited context of this case" was, reference may have been made to the fact that children and unconsenting adults were not exposed to the mailed materials.

[33] 98 S. Ct. at 1813.

[34] The Court did not attempt to define the terms "sensitive" and "insensitive" person, leaving that determination to the discretion of the individual jurors.

[35] 98 S. Ct. at 1813.

groups[36] and pandering.[37] He had contended that to support an instruction on the material's appeal to the prurient interests of deviants, the prosecution must come forward with evidence to guide the jury in the application of such an instruction. The Court disagreed, however, and held that *Paris Adult Theatre I v. Slaton*[38] required the prosecution to introduce expert testimony only where the "contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the [particular] prurient interest."[39] The Court found that the materials involved in *Pinkus* were not directed at "bizarre deviant groups"[40] and, accordingly, could be examined by the jurors without the aid of expert testimony.[41]

The Court also rejected the petitioner's challenge to the instructions that allowed the jury to consider the setting in which the materials were presented,[42] that is, evidence of pandering.[43] Relying on its decisions in *Splawn v. California*[44] and *Hamling v. United States*,[45] the Court ruled that, in a close case, a jury may consider the "touting descriptions along with the materials themselves to determine whether they were *intended* to appeal to the recipient's prurient interest in sex, [or] whether they were 'commercial exploitation of erotica—solely for the sake of their prurient appeal."[46] The Court held, further, that the prosecution need only present the mailings and the names, locations and occupations of the recipients as evidence to satisfy the requirements necessary to "trigger the *Ginzburg* pandering instruction."[47]

The concurrences filed in *Pinkus* by Justice Stevens and by Justice Brennan, in which Justices Stewart and Marshall joined, expressed a disfavor with the direction of the law of obscenity. Concurring in the holding solely because the plurality had relied faithfully on precedent and had refused to re-examine this area of the law, Justice Stevens reiterated the view he had expressed in past cases concerning Section 1461's[48] proscription of obscene materials. Stevens has questioned the propriety of a federal criminal obscenity statute which is applied without a uniform national standard.[49] Stevens has also noted that, regardless of whether a national or local standard is applicable, the "intolerably vague"[50] constitutional standards governing prosecutions under Section 1461 permit so much subjectivity in the jury's determination of obscenity *vel non* that "evenhanded enforcement of the law is a virtual impossibility."[51] For these reasons, Stevens has concluded that the value of purportedly obscene materials should be determined in "the free marketplace of ideas,"[52] and not by means of criminal prosecutions.

[36] The challenged jury instruction read in the disjunctive, stating that the materials could be found to be obscene if they constitute an "appeal to the prurient interest of the average person *or* the prurient interest of members of a deviant sexual group at the time of mailing." *Id.* at 1814 (emphasis added).

[37] The jury instruction on pandering stated:

> You must make the decision whether the materials are obscene under the test I have given you. In making that determination you are not limited to the materials themselves. In addition, you may consider the setting in which they are presented. Examples of what you may consider in this regard are such things as: manner of distribution, circumstances of production, sale and advertising.

United States v. Pinkus, 551 F.2d at 1159.

[38] 413 U.S. 49 (1973). *Paris* involved the display of "adult" films by a commercial movie theater, allegedly in violation of a Georgia obscenity statute. The Court held, *inter alia*, that states have a "legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accomodation, including so-called 'adult' theaters," and reversed petitioner's conviction and remanded the case for a determination of obscenity *vel non* under the *Miller* standards. *Id.* at 69–70.

[39] *Id.* at 56 n.3.

[40] "The witness testified that there was an appeal in the materials to the prurient interests of homosexuals, sadomasochists and those interested in group sex." United States v. Pinkus, 551 F.2d at 1158 n.7.

[41] *See* Hamling v. United States, 418 U.S. 87, 100 (1974), and Ginzburg v. United States, 383 U.S. 463, 465 (1966).

[42] *See* note 37 *supra.*

[43] Pandering was defined by the *Ginzburg* Court as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." 383 U.S. at 467 (quoting Roth v. United States, 354 U.S. 476, 495–96 (1957)) (Warren, C.J., concurring).

[44] 431 U.S. 595 (1977). The *Splawn* Court held, *inter alia*, that, "There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering . . . is relevant in determining whether the material is obscene." *Id.* at 598.

[45] 418 U.S. at 130.

[46] 98 S. Ct. at 1815 (emphasis added) (quoting Ginzburg v. United States, 383 U.S. at 466).

[47] 98 S. Ct. at 1815. Petitioner also challenged the exclusion of comparison evidence. The Court held that in light of its disposition of the case, the issue of admissibility of comparison evidence was not before the Court. The Court noted that the fines levied against Pinkus were cumulative and left the issue of admissibility to the court of appeals.

[48] 18 U.S.C. § 1461. *See* note 11 *supra.*

[49] *See, e.g.*, Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting).

[50] Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part).

[51] *Id.*

[52] 431 U.S. at 321 (Stevens, J., dissenting). *See also*

Justice Brennan, joined by Justices Stewart and Marshall, concurred in *Pinkus*, stating a fundamental disagreement with the Court which transcended the facts and issues of that case. Brennan challenged the *corpus juris* supporting the proscription of obscene material. He claimed that section 1461 was "clearly overbroad and unconstitutional on its face."[53] This, perhaps, should be read in conjunction with Justice Brennan's past statement that: "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents."[54] According to Justice Brennan, any statute which proscribed the sale or distribution of obscene materials to all persons was considered overinclusive and, therefore violated the first amendment.[55]

In *Federal Communications Commission v. Pacifica Foundation*,[56] the Court dealt with the relationship between the actions taken by a regulatory agency pursuant to a federal statute[57] and the first amendment.[58] The respondent in the case owned and operated a radio station which made an afternoon broadcast of George Carlin's satiric monologue, "Filthy Words."[59] The Commission, after forwarding a listener's complaint to the radio station and receiving the station's response, issued a declaratory order granting the complaint.[60] Although the Commission did not impose formal sanctions on the respondent for its violation of a federal statute,[61] the Commission stated that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."[62] After issuing the order, the Commission declined to clarify its opinion beyond the "specific factual context" of the respondent's case.[63] On appeal to the United States Court of Appeals for the District of Columbia, the Commission's decision was reversed, with each of the three judges on the panel writing separately.[64]

In a plurality opinion[65] the United States Supreme Court reversed the court of appeals in a decision which required both statutory and constitutional interpretation. Holding that the appropri-

Ward v. Illinois, 431 U.S. 767, 777 (1977) (Stevens, J., dissenting).

[53] 98 S. Ct. at 1816 (Brennan, J., concurring) (citing Millican v. United States, 418 U.S. 947, 948 (1974) (Brennan, J., dissenting) and United States v. Orito, 413 U.S. 139, 148 (1973) (Brennan, J., dissenting)).

[54] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (Brennan, J., dissenting).

[55] The sole dissenting opinion in *Pinkus* was filed by Justice Powell, who agreed with the Court that children should not be included as part of the relevant community, but who found such an inclusion a harmless error within the factual context of the *Pinkus* case. 98 S. Ct. at 1816 (Powell, J., dissenting).

[56] 98 S. Ct. at 3026.

[57] 5 U.S.C. § 554(e)(1976) provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

[58] U.S. CONST. amend. I.

[59] Carlin's monologue saterized society's attitude toward certain expletives, "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say." 98 S. Ct. at 3041 (appendix to the Court's opinion). The expletives, as used in the monologue, did not present an appeal to a prurient interest and, therefore, were not found to have been obscene. *Id.* at 3035–36.

[60] 56 F.C.C.2d 94 (1975). The Commission stated in its opinion that it sought to regulate indecent speech, such as that found in the Carlin monologue, using principles analogous to those governing the law of nuisance where the "law generally speaks to *channeling* behavior more than actually prohibiting it." *Id.* at 98.

[61] 18 U.S.C. § 1464 (1976) provides: "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."

[62] 98 S. Ct. at 3030 n.1 (quoting Pacifica Foundation v. FCC, 56 F.C.C.2d at 96). The Commission noted:

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

[63] 59 F.C.C.2d 892, 893 (1976).

[64] Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977). The opinion submitted by Judge Tamm stated that the Commission's order constituted a form of censorship expressly prohibited by § 326 of the Communications Act. Alternatively, Judge Tamm read the Commission's opinion as the functional equivalent of an order and found it to be "overbroad and vague." *Id.* at 18. Concurring in the result, Chief Judge Bazelon founded his objections to the Commission's order on constitutional grounds. He concluded that § 1464 must be narrowly construed, proscribing only that language which is obscene or otherwise unprotected by the first amendment. *Id.* at 24–30. Judge Leventhal, in dissent, stated that the state's interest in the protection of children provided a sufficient basis for the FCC's regulation of the language "as broadcast." *Id.* at 31.

[65] The opinion was written by Stevens, J., and joined by Burger, C.J., and Rehnquist, J., Powell, J., joined by Blackmun, J., concurred in a separate opinion. Brennan, J., filed a dissent and was joined by Marshall, J., Stewart, J., filed a separate dissent and was joined by Brennan, White and Marshall, JJ.

ate focus of review for the Court was on the Commission's determination that the Carlin monologue was indecent as broadcast, the Court addressed two statutory issues: whether the Commission's action was forbidden censorship within the meaning of Section 326[66] and whether speech which is indecent, but not obscene, may be regulated under Section 1464.[67] The Court ruled that Section 326 of the Communications Act did not limit the Commission's authority to impose criminal sanctions under Section 1464 on licensees who are found in violation of that section. The Court based this decision on the legislative histories of these two statutes, finding that Congress intended to give meaning to both of these provisions. As the Court noted, "[r]espect for that intent requires that the censorship language be read as inapplicable to the prohibition on broadcasting obscene, indecent or profane language."[68]

The Court rejected the respondent's contention that the words "indecent" and "obscene," as used in Sections 1461[69] and 1464,[70] must be interpreted as proscribing only that material which appeals to a prurient interest. The Court ruled that whereas such a construction was proper in the context of regulating the mails,[71] the reasoning underlying that construction was inapplicable to the public broadcast medium. The differences which exist between the dissemination of patently offensive matter by means of personal mail and public broadcast were found to justify the Commission's interpretation of Section 1464 as encompassing more than the obscene.[72] The Court further found that Congress had intended to impose different limitations on these methods of dissemination.[73] Therefore, the Court concluded that each of the words of Section 1464, "obscene, indecent or profane," was to be accorded a separate meaning by the FCC in its review of public broadcasts.

The respondent had urged that the Commission's construction of the statutory language encompassed so much constitutionally-protected material that the Commission's order was overly broad and, therefore, in violation of the first amendment.[74] Writing for the plurality,[75] Justice Stevens disagreed, stating that the Court's review was limited to the question of "whether the Commission has the authority to proscribe this *particular broadcast.*"[76] The plurality noted that the Commission had indicated that it "would not impose sanctions without warnings in cases in which the applicability of the law was unclear."[77] Justice Stevens acknowledged that even this safeguard may result in some broadcasters censoring themselves in an effort to avoid the possibility of having a broadcast deemed "indecent." However, he stated that the Commission's order would suppress only the broadcasting of "patently offensive references to excretory and sexual organs and activities"[78] at mid-afternoon, when children were likely to be in the audience. "While some of these references may be protected, they surely lie at the periphery of First Amendment concern."[79]

The plurality found no absolute first amendment protection against governmental restrictions on the public broadcast of indecent language "in any circumstances."[80] Rather, both the content and

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[66] 47 U.S.C. § 326 (1970) provides:
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.

[67] *See* note 61 *supra.*

[68] 98 S. Ct. at 3034.

[69] 18 U.S.C. § 1461. *See also* note 11 *supra.*

[70] 18 U.S.C. § 1464. *See also* note 61 *supra.*

[71] 98 S. Ct. at 3035-36 (citing Hamling v. United States, 418 U.S. at 99). The *Hamling* Court reaffirmed the holding that § 1461, when applied to obscene material, alone, does not offend the first and fifth amendments. *See also* Manual Enterprises v. Day, 370 U.S. 478, 483 (1962) (Harlan, J., writing for the plurality), stating: "the statute [§ 1461] since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex."

[72] "[W]hile a nudist magazine may be within the protection of the First Amendment . . . the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464." *Programming Policy Statement,* 44 F.C.C. 2303, 2307 (1960).

[73] 98 S. Ct. at 3036.

[74] The first amendment overbreadth doctrine operates to invalidate statutes which proscribe protected as well as unprotected speech. In applying the doctrine, the courts have refrained from considering whether the activity before them could have been prohibited under a more narrowly drawn statute. *See* Broadrick v. Oklahoma, 413 U.S. 601, 610-15 (1973).

[75] Justice Stevens was joined in his opinion for the plurality by Burger, C.J., and Rehnquist, J.

[76] 98 S. Ct. at 3037 (emphasis added).

[77] *Id.* at 3037. *See also* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969). There the Court held that the unique qualities of public broadcasting supported the constitutionality of the FCC's fairness doctrine, which required fair and equal coverage be afforded each side of public issues discussed over radio and television broadcasts.

[78] 98 S. Ct. at 3037.

[79] *Id.*

[80] *Id.*

context of speech were considered critical to the determination of first amendment protection. The Court observed that many forms of speech may be regulated or proscribed by the government,[81] and although the first amendment guaranteed a speaker the right to voice his opinions, a speaker may be constitutionally limited in his choice of words. The Court ruled that the "vulgar, offensive and shocking"[82] language of the Carlin monologue exemplified the sort of word choice which may be subject to governmental restriction, since "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[83] For these reasons, the Court concluded that the protection of such language depended partly upon the context in which the speech was disseminated.

The Court[84] agreed with the FCC that it was improper to broadcast Carlin's monologue at mid-afternoon. In so holding the Court found radio broadcasting entitled to more limited first amendment protection than other forms of communication[85] for two reasons: radio's "persuasive presence"[86] in the homes of many Americans, and its unique accessibility to children.[87] The Court reasoned that, because the broadcasting audience was constantly tuning in and out, there was no way to protect adequately the home listener or viewer from unexpected program content. The Court concluded that the individual's right to be free from offensive broadcasts, while in the privacy of his home, plainly outweighed the first amendment rights of the broadcaster of indecent materials.[88]

Similarly, the Court found that the government's interest in the "well being of its youth"[89] and in supporting "parents' claim to authority in their own household to direct the rearing of their children"[90] aptly justified the regulation of otherwise protected materials.[91]

The concurring and dissenting opinions in *Pacifica* indicated that this "relatively new and difficult area of the law"[92] governing the broadcast of offensive material will continue to be met with controversy among the members of the Court. The criticisms voiced by these Justices go to the general constitutional issues involved in the regulation of speech.

Justice Powell's concurring opinion expressed grave misgivings about the plurality's view of the Court's ability to place a hierarchy of values on the content of an expression. He stated that such a judgment is one "for each person to make, not one for the judges to impose upon him."[93] Powell would have confined the basis of the decision to the unique qualities of the broadcast media, combined with society's interest in protecting youth from speech "inappropriate for their years,"[94] and the privacy interest of unwilling adults in not being "assaulted by such offensive speech in their homes."[95]

Justice Brennan, in dissent, criticized the decision on broader constitutional grounds,[96] finding the Court's emphasis on the protection of children and the privacy interest of the home listener to have been misplaced. He focused instead on the willing listener who, because of the Court's decision, would be prevented from obtaining a Carlin-type message by means of a public broadcast. Brennan cited *Cohen v. California,*[97] which held, *inter alia,* that a State cannot, in consonance with the first and fourteenth amendments, proscribe the "simple public display . . . [of a] single four-letter expletive"[98] to protect the unwilling person "from

[81] *Id.* at 3038. The Court noted that the government may punish the false shouting of fire in a crowded theater, *see* Schenck v. United States, 249 U.S. 47, 52 (1919); it may forbid speech calculated to provoke a fight, *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); it may differentiate between commercial speech and other varieties, *see* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); it may treat libels against private citizens more severely than libels against public officials, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); and, obscenity may be totally proscribed, *see* Miller v. California, 413 U.S. 15 (1973).

[82] 98 S. Ct. at 3039.

[83] *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. at 572).

[84] Powell, J., and Blackmun, J., concurred in this part of the Court's opinion.

[85] 98 S. Ct. at 3040.

[86] *Id.*

[87] *Id.*

[88] *Id.* (citing Rowan v. Post Office Department, 397 U.S. 728 (1970)).

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

[90] *Id.* at 639.

[91] The Court noted that other forms of indecent expression may be withheld from children without restricting the expression at its source. — U.S. at —, 98 S. Ct. at 3040.

[92] *Id.* at 3044 (Powell, J., concurring).

[93] *Id.* at 3047 (Powell, J., concurring).

[94] *Id.*

[95] *Id.*

[96] Justice Brennan also dissented with respect to the Court's interpretation of § 1464, stating that the section should be read as a prohibition of obscene speech, only. *Id.* at 3047 (Brennan, J., dissenting).

[97] 403 U.S. 15 (1971).

[98] *Id.* at 26.

otherwise unavoidable exposure"[99] to a "crude form of protest."[100] He concluded that the privacy interest asserted by the potentially unwilling audience must be invaded in an "essentially intolerable manner"[101] to justify the suppression of otherwise protected speech. "Any broader view of this [the government's] authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[102] Brennan reasoned further that, in as much as the radio was a public medium, an individual's decision to tune-in at any given time could at most be viewed as an election to participate in a public discourse; therefore, he found no fundamental privacy interest involved in the reception of a radio broadcast. Alternatively, Brennan concluded that even if a privacy interest was involved, an unwilling listener's momentary exposure to the type of speech found in the Carlin monologue did not invade that interest in an "intolerable manner."

Justices Brennan and Marshall commended *Pacifica's* concern for aiding parents in the rearing of their children, but found that basing a decision on that concern was not mandated by precedent. Prior decisions permitted restriction of the dissemination to minors of otherwise protected material *which appealed to their prurient interests.*[103] This, however, was the first time that the Court had allowed materials without a prurient appeal to be withheld from minors. Further, Brennan and Marshall found that the Court violated the principle of *Butler v. Michigan,*[104] which stated that the State's concern for the protection of youth could not justify a statute which reduced the adult population to "reading only what is fit for children."[105] Thus, the two justices concluded, the Court effectively reduced the content of public broadcasts to material suitable for minors; in their opinion, the decision of whether children should listen to indecent speech on the radio would best be left to their parents.

One of the dissent's major objections to the Court's decision concerned the imposition of a majoritarian conception of decency on the minority. Brennan cited ethnocentric cultural studies for the proposition that many of the words contained in Carlin's monologue were used in everyday conversations among several subcultures.[106] Therefore, Brennan predicted that the Court's decision would have its greatest impact on broadcasters attempting to reach these subcultures and on members of these subcultures who want to listen to those broadcasters.

Justice Stewart, in a dissent joined by Brennan, White, and Marshall, criticized the *Pacifica* majority's interpretation of Sections 1461[107] and 1464.[108] Finding the legislative history to be silent on whether the words "indecent" and "obscene" were intended to have separate meaning under section 1464, Stewart concluded that both statutes must be construed similarly. The four dissenters thus contended that the majority had violated a fundamental precept of constitutional adjudication: "the need to construe an Act of Congress so as to avoid, if possible, passing upon its constitutionality."[109]

Analysis

The dissenters' criticism of *Pacifica* demonstrates that indecent speech is differentiated from obscene speech by the absence of a prurient appeal in the former and the presence of such an appeal in the latter. Further, speech reviewed for either an obscene or indecent content is evaluated within the context of its potential audience, which resulted in the inclusion of children in *Pacifica,* and the exclusion of children, but the inclusion of sensitive adults, in *Pinkus.* Thus, the differences which existed between the methods of dissemination of the indecent speech in *Pacifica* and the obscene speech alleged in *Pinkus* explain the majority's concern for children in *Pacifica* and lack of concern for children in *Pinkus.*

In *Pinkus,* an adamant, slim majority[110] sought to refine an established legal concept which the

[99] *Id.* at 21.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] 98 S. Ct. at 3050 (Brennan, J., dissenting). Brennan stated that, "Because the Carlin monologue is obviously not an erotic appeal to the prurient interest of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them." *Id.*
[104] 352 U.S. 380 (1957).
[105] *Id.* at 383.
[106] 98 S. Ct. at 3054 (Brennan, J., dissenting)(citing B. Jackson, Get Your Ass in the Water and Swim Like Me (1974); J. Dillard, Black English (1972); and W. Laboy, Language in the Inner City: Studies in the Black English Vernacular (1972)).
[107] 18 U.S.C. § 1461.
[108] *Id.*
[109] 98 S. Ct. at 3055 (Stewart, J., dissenting).
[110] Chief Justice Burger and Justices Blackmun, White, Rehnquist and Powell did not express a desire to change the underlying law of obscenity; Justices Stevens, Brennan, Stewart and Marshall did express such a desire.

minority preferred to discard. Given the predilections of the members of the Court, the majority's decision to exclude children and include sensitive persons in defining the relevant community was predictable. The *Roth* standards required that a jury view the challenged material through the eyes of the "average person" in the community. Later, the *Ginsberg* Court ruled that where materials were made available to children, a jury properly considered the material's prurient appeal to youth.[111] That Court held that a state may proscribe the sale of material to children when the material appealed to the prurient interest of youth, even though that material was protected in its distribution to consenting adults.[112] Such materials may possess obscene qualities in the eyes of the young, but only indecent qualities in the eyes of adults. Examples would include materials which lie at the periphery of protected adult matter. Therefore, in all probability, *Pinkus* properly held that a jury should not consider children when the challenged material will be available to adults but not to youth.

Although the Court has not had the "occasion to decide what effect *Miller* will have on the *Ginsberg* formulation,"[113] the exclusion of children from the relevant community for the determination of obscenity *vel non* of adult material should be equally as applicable under *Miller* as under *Roth*. The *Miller* Court adopted the "contemporary community standards"[114] criteria of *Roth* and its progeny, making this definitional aspect of obscenity identical under both standards.[115] Similarly, the Court's inclusion of sensitive adults in its definition of the average person in the community was consonant with prior decisions, and should find equal applicability under both the *Roth* and *Miller* standards.

The problem with the majority's approach to obscenity in *Pinkus* is that no matter how precisely the Court defines the attributes of the average man, at least in the context of obscenity, the jury's decision will continue to be plagued by subjective inconsistencies. These inconsistencies are compounded when a jury, striving to envision that chimerical "average man," is required to include in that formulation the material's prurient appeal to abnormal groups. These inescapable inconsistencies have been the focus of Justice Stevens' criticisms, and the moving force in his efforts to have criminal sanctions removed from obscenity law.

Justices Brennan, Stewart and Marshall have posited more manageable standards for the regulation of obscene materials. They would regulate the conduct of disseminators of allegedly obscene material, but not the content of that material. They maintain that one should be free to disseminate or receive materials, regardless of content "at least in the absence of distribution to juveniles or obstructive exposure to consenting adults."[116] While this standard at first may appear easy to implement, its effect may move the focus of this difficult area of the law from the problems encountered in separating the indecent from the obscene to the closely related difficulties involved in determining "obstructive exposure" *vel non* and deciding what material is inappropriate for juveniles. That is, the standards for determining 'obstructive exposure' and suitability for youth will be analogous to the obscenity standards announced in *Miller*.

The Court's reluctance in *Pacifica* to identify standards applicable to the determination of indecency *vel non* indicates that the law of indecency will also remain unsettled in years to come. Moreover, in holding the Carlin monologue indecent, the Court attached a meaning to "indecent speech" which encompassed more than a possible appeal to a prurient interest.[117] What the Court did state in *Pacifica* was that its basic predisposition, supporting the right of parents to rear their children as they wish and protecting the home from offensive intrusions, will permeate the law of indecency. These concerns have weighed heavily in the area of obscenity, where decisions such as *Ginsberg*[118] and *Rowan*[119] have established them as clear boundaries on the distribution of sexually offensive materials.

The *Ginsberg* Court held that a state's constitutional power to regulate the dissemination of offensive materials to youth was premised on two justifications: the state's respect for the right of parents to raise their children as they deem proper[120] and the state's independent interest in the well being of

[111] 390 U.S. at 638.

[112] *Id.* at 634–35.

[113] Erznoznik v. City of Jacksonville, 422 U.S. at 213 n.10.

[114] 413 U.S. at 24.

[115] Although the *Roth* standards, as particularized in *Memoirs*, do not explicitly state that a jury must apply an "average man" standard, as stated in *Miller*, the *Pinkus* decision makes it clear that the "average man" standard is to be used when applying the *Roth* test for determining obscenity *vel non*. *See Pinkus*, 98 S. Ct. at 1812–14.

[116] Paris Adult Theatre I v. Slaton, 413 U.S. at 113 (Brennan, Stewart and Marshall, JJ., dissenting).

[117] *See* 98 S. Ct. at 3050 (Brennan, J., dissenting).

[118] 390 U.S. 629.

[119] 397 U.S. 728.

[120] 390 U.S. at 639.

its youth.[121] The *Pacifica* Court incorporated both of these interests into the law of indecency by allowing the FCC to regulate the Carlin monologue "as broadcast."[122] It was only by confining *Pacifica* to the speech "as broadcast" that the decision may have been consistent with *Erznoznik v. City of Jacksonville*,[123] where the Court held that a statute prohibiting a motion picture, containing any nude scenes, from being exhibited if the screen was visible from any public place, was "broader than permissible" under the first amendment.[124] Therefore, the *Pacifica* decision cannot be read to allow the FCC to proscribe *all* offensive speech.

The *Pacifica* Court's reliance on *Rowan*[125] for the proposition that an individual's privacy interest supported the FCC action was not as well founded as its protection of children rationale. In *Rowan*, the Court held that a statute which allowed an individual to censor his own mail did not offend the first amendment rights of the mailor. The *Pacifica* decision, however, removed that exercise of choice from the individual and placed it with a governmental agency.[126] Such a decision could only be justified by the Court's explicit adoption of a standard which extended varying degrees of first amendment protection to different modes of communication.[127]

The concern for privacy and the protection of children provided the basis for the narrow *Pacifica* decision: offensive speech may be restricted from entering the home of an unwilling audience or an audience compiled of children.[128] The problem with the Court's decision was that it provided no standards for determining indecency *vel non*, leaving that judgment to the FCC. Future cases will undoubtedly impel the law of indecency toward the same definitional problems which have plagued the law of obscenity. The problem is further compounded in the law of indecent speech by the fact that speakers' opinions receive protection, but the words used to express those opinions may be subject to restrictions.[129] The law of obscenity avoids this dilemma by focusing on prurient appeal alone, and not on the method of communicating that appeal.[130]

Pacifica implied that, in different "contexts," the author must use different language to express the same idea. However, the Court has previously recognized the dangers of such a requirement, stating in *Cohen v. California* that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[131] Further, requiring that an author select his language to suit the context of his speech may often result in a "sterilized message,"[132] devoid of the author's personality and failing to "convey the emotion that is an essential part of so many communications."[133]

Justice Brennan alluded to these communication difficulties in his *Pacifica* dissent, when he spoke of the Court's neglect for the concerns of ethnocentric subcultures whose speech commonly included words which the majority of the country would find offensive.[134] Such concerns will raise in the future the issue of the relevant geographic community to be considered in determining the indecency *vel non* of a broadcast. The *Miller* Court held that in determining obscenity *vel non*, a jury may not be instructed to apply a national community standard.[135] However, an anomalous situation is created by the FCC's role in determining the indecency *vel non* of a broadcast, because that deter-

[121] *Id.* at 640. *See also Pacifica*, 98 S. Ct. at 3035-36.

[122] The term, "as broadcast," must be read as relating to that particular time of the day when children are likely to be in the audience.

[123] 422 U.S. 205 (1975).

[124] *Id.* at 213.

[125] 98 S. Ct. at 3040. (citing 397 U.S. 728).

[126] Justice Stevens wrote for the Court in *Pacifica*, upholding the FCC's regulation of indecent speech. This is contrary to the "marketplace" approach he has adopted with respect to obscenity law. *See* Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting), Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring and dissenting) and Splawn v. California, 431 U.S. 595, 602 (1977) (Stevens, J., dissenting).

[127] *See Pacifica*, 98 S. Ct. at 3039-40, stating that, of all forms of communication, radio broadcast has received the most limited first amendment protection (citing Joseph Burnstyn, Inc. v. Wilson, 343 U.S. 495 (1952): "Each method [of communication] tends to present its own peculiar problems." *Id.* at 503).

[128] Cohen v. California, 403 U.S. 15, 26 (1971). The *Cohen* Court upheld the right of a person to use offensive language, in a public place, to express a political opinion.

[129] *See Pacifica*, 98 S. Ct. at 3038-39.

[130] In *Roth* and subsequent obscenity decisions the Court has held that the trier of fact must instruct the jury to consider a work as a whole in determining the prurient appeal *vel non* of that challenged material. 354 U.S. at 489.

[131] 403 U.S. at 26.

[132] 98 S. Ct. at 3053 (Brennan, J., dissenting).

[133] *Id.* Justice Brennan also contends that, even though the Court's decision does not prevent an adult from purchasing the Carlin record or attending one of his live performances, interested listeners may be precluded from this material by their own financial constraints.

[134] *Id.* at 3054 (Brennan, J., dissenting).

[135] 413 U.S. at 30.

mination is not dependent upon "lay jurors."[136] This difference would seem to allow the Federal Communications Commission to adopt a national standard.

Therefore, the geographic boundaries of the relevant public broadcast community should be established, logically, by the station's physical broadcast range. That community should be comprised of all persons, including children, who might be expected to be in the audience at the time of the broadcast. This conclusion is compelled by the Court's analogous decision in *Pinkus*, where the availability of the challenged material to sensitive persons and the inaccessibility of children to that material dictated that the former group be included, and the latter group excluded, from the jury's evaluation of that material.

[136] *Id.*

Conclusion

Pacifica demonstrates that the regulation of offensive speech, even if based on the mode of dissemination of that material, cannot avoid at least a cursory review of the content of that material. Indeed, it is the content of the material which determines the permissible time, manner and place of its dissemination.[137] The disharmony within the Court, evidenced by the *Pinkus* obscenity holding and the *Pacifica* indecency decision, suggests that the Court will not be able to establish standards relating offensive materials to their permissible modes of distribution which will satisfy more than a slight majority of the members of the Court.

[137] It must be recognized that, under the present obscenity standards, there are no permissible modes for disseminating materials which are found to be obscene. *See* Miller v. California, 413 U.S. 15 (1973).