South Carolina Law Review

Volume 31 | Issue 2 Article 7

1980

On Keeping Pigs Out of the Parlor: Speech As Public Nuisance after FCC v. Pacifica Foundation

Earl Maltz

COMMENTS

ON KEEPING PIGS OUT OF THE PARLOR: SPEECH AS PUBLIC NUISANCE AFTER *FCC v. PACIFICA FOUNDATION*

EARL M. MALTZ* AND L. LYNN HOGUE**

In *FCC v. Pacifica Foundation,*[1] the Supreme Court held that the Federal Communications Commission had at least limited power to impose sanctions for the broadcast of "indecent" material, at least at certain times of the day, even though the material broadcast was not obscene. A majority of the Court[2] explicitly accepted the idea that the government could regulate some such speech on a public nuisance theory,[3] notwithstanding the provisions of the first amendment. This comment will examine the theoretical underpinning of the public nuisance theory and its potential impact in light of the *Pacifica* decision.

I. THE PUBLIC NUISANCE THEORY GENERALLY

At the outset it is important to define precisely what the public nuisance theory for controlling speech entails. The argument is not that the prohibited speech falls outside the scope of first amendment protections altogether; in this sense the theory of *Pacifica* differs significantly from that of cases involving obscenity[4] and fighting words.[5] Rather, the concept is that the gov-

* B.A., 1972, Northwestern University; J.D., 1975, Harvard. Assistant Professor of Law, University of Arkansas at Little Rock School of Law.

** A.B., 1966, William Jewell College; M.A., 1968, Ph.D., 1972, University of Tennessee; J.D., 1974, Duke University. Assistant Professor of Law, University of Arkansas at Little Rock School of Law. Member, Arkansas and North Carolina Bars.

1. 438 U.S. 726 (1978).

2. Justice Stevens wrote an opinion that was joined in part by five justices. *See* 438 U.S. at 729-41, 748-51. The remaining portions of the Stevens opinion were joined only by Chief Justice Burger and Justice Rehnquist. *Id.* at 742-48 (opinion of Stevens, J.). Justice Powell wrote a concurring opinion. *Id.* at 755-62. Justice Brennan and Justice Stewart each wrote dissenting opinions. *Id.* at 762-77 (Brennan, J., dissenting); *id.* at 777-80 (Stewart, J., dissenting).

3. *See* 438 U.S. at 750.

4. *E.g.,* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

For a discussion of the potential use of nuisance law to control obscenity, see Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisance,* 14 WAKE FOREST L. REV. 1 (1978).

5. *E.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

ernment has legitimate interests in protecting sensibilities of the citizenry at large from being shocked or outraged and in safeguarding the impressionable minds of children. At some point these interests outweigh the right of a speaker to convey his message in some particular fashion. Judge McGowan aptly summarized the concept in *Williams v. District of Columbia:*

> Apart from punishing profane or obscene words which are spoken in circumstances which create a threat of violence, the state may also have a legitimate interest in stopping one person from "inflict[ing] injury" on others by verbally assaulting them with language which is grossly offensive because of its profane or obscene character. The fact that a person may constitutionally indulge his taste for obscenities in private does not mean that he is free to intrude them upon the attentions of others.[6]

By its nature, the public nuisance theory involves a kind of content regulation in that the government necessarily decides what words are profane or offensive and thus proscribable in some circumstances. But the type of content regulation involved is unusual in that it is unrelated to ideas *qua* ideas; it need not favor any one kind of idea or shade of opinion over another. Under the public nuisance theory any prohibition deals with the manner in which an idea is expressed rather than the nature of the idea itself.[7] Ideologically neutral regulation under this concept thus poses a significantly smaller threat to core first amendment values than does a typical content-oriented statute or ordinance.

At the same time, to attempt to analogize these regulations too closely to classical time, place, and manner restrictions would

---

6. 419 F.2d 638, 646 (D.C. Cir. 1969). *See also* Rosenfeld v. New Jersey, 408 U.S. 901, 903-09 (1972) (Powell, J., dissenting).

> [T]he exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience . . . [that] may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance.

Id. at 905-06 (Powell, J., dissenting). The term at issue in *Rosenfeld* was "the adjective 'M----- F-----' used on four occasions in the presence of women and children at a school board meeting." *Id.* at 910 (Rehnquist, J., dissenting).

7. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Fowler v. Rhode Island, 345 U.S. 67 (1953).

be a mistake.[8] While the communication of an idea itself will not be banned, a speaker's ability to effectively express such an idea may be intimately related to the type of language that he is allowed to use. To use an extreme example, certain political candidates would be greatly hindered if public use of the word "democrat" were proscribed as profane and offensive. Thus, the public nuisance theory falls into a gray area of first amendment jurisprudence that the Supreme Court has not explicitly dealt with until quite recently.

II. THE PRE-*Pacifica* LAW: *Cohen* AND *Erznoznik*

When the Court did begin to deal with the problem, it initially indicated that the scope of the public nuisance theory as a permissible limit on the right of free speech would be very limited. In *Cohen v. California*,[9] a man had been convicted of "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct"[10] for wearing a jacket which bore the legend "F[---] the Draft" while in the corridor outside a municipal courtroom.[11] The state argued that this application of the statute was justified by the governmental interest in "protect[ing] the sensitive from otherwise unavoidable exposure to" this "crude form of protest"[12]—a classic nuisance argument.

Rejecting this argument for the Court, Justice Harlan observed that "words are often chosen as much for their emotive as their cognitive force"[13] and noted the possibility that the proscription of certain words runs "a substantial risk of suppressing ideas in the process."[14] He further relied upon the absence of any apparent principled limits to the government's asserted power to "cleanse public debate."[15] He concluded that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent

8. *See, e.g.*, Adderley v. Florida, 385 U.S. 39, *reh. denied*, 385 U.S. 1020 (1966) (prohibition of demonstrations on jailhouse grounds); Kovacs v. Cooper, 336 U.S. 77 (1949) (regulation of sound trucks).

9. 403 U.S. 15 (1971).

10. *Id.* at 16 (*quoting* CAL. PENAL CODE § 415 (West 1970)).

11. 403 U.S. at 16.

12. *Id.* at 21.

13. *Id.* at 26.

14. *Id.*

15. *Id.* at 25.

upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[16] Finding no such privacy interest involved in *Cohen*, the Court reversed the conviction.

While generally hostile to the public nuisance concept in a first amendment context, the *Cohen* Court did not entirely foreclose the use of the theory, even as applied to language used in a public place. First, Justice Harlan suggested that the result might have been different if there had been an actual complaint from a person who had been powerless to avoid seeing the offending slogan.[17] More importantly, he also implied that a statute which was more narrowly drawn to obviate "the special plight of the captive auditor" could well have constitutionally supported the conviction in *Cohen*.[18] Thus, taken alone, *Cohen* is not inconsistent with the public nuisance theory.

However, the public nuisance theory was seriously undermined by the decision in *Erznoznik v. City of Jacksonville*.[19] A city ordinance declared it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity when such films would be visible from a public street or place.[20] The Court struck down this ordinance as facially invalid under the first amendment. Justice Powell's majority opinion contended that the challenged ordinance was analogous to laws which discriminated among speakers based on ideas expressed.[21] Echoing Justice Harlan's *Cohen* opinion, the Court found such restrictions could be upheld "only when the speaker intrudes on the privacy of the home . . . or the degree of captivity [of the audience] makes it impractical for the unwilling viewer or auditor to avoid exposure."[22] Justice Powell found the limited privacy interest of those on the public streets insufficient to support the challenged ordinance.

He also rejected arguments based upon the governmental

16. *Id.* at 21.

17. *See id.* at 22.

18. *Id.* at 22 n.4.

19. 422 U.S. 205 (1975).

20. *See id.* at 206-07.

21. *Id.* at 209. Specific reference was made to Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), in which the Court struck down a statute which discriminated between picketing relating to labor disputes and other forms of picketing, and Fowler v. Rhode Island, 345 U.S. 67 (1953), in which the Court held an ordinance unconstitutional because it discriminated against Jehovah's Witnesses.

22. 422 U.S. at 209 (citations omitted).

interests in protecting children[23] and promoting traffic safety.[24] With respect to the former, Justice Powell found the ordinance fatally overbroad;[25] the latter theory was rejected because there was no evidence demonstrating that nudity was any more distracting than other scenes regularly presented on movie screens.[26] Thus, the Court held the challenged ordinance unconstitutional on its face.

The precise problem that the *Erznoznik* majority saw in the challenged ordinance was not entirely clear from the Court's opinion. At one point Justice Powell seemed to suggest the difficulty was that the ordinance dealt only with the depictions of nudity rather than with all movies which might offend passers-by.[27] This distinction makes little sense, however, since the remainder of the opinion indicated that the primary concern was that the ordinance discriminated on the basis of content. A limitation on the showing of vulgar or offensive movies generally is no less a discrimination on the basis of content than is a mere ban on the presentation of nudity; the only relevant difference between the two types of regulation that proscribe depiction of nudity is that one discriminates against a narrower class of speech.

But in any event, the *Erznoznik* opinion was a serious blow to the use of the public nuisance theory to control offensive speech. In rejecting the Jacksonville ordinance, the Court rejected what seemed to be the major option remaining after *Cohen*—the use of a regulation which specifically defined the types of speech proscribed and the circumstances under which such speech was prohibited. Indeed, Justice Powell's reasoning seemed to threaten even conventional indecent exposure laws. In response to this concern, he argued that the Jacksonville ordinance dealt with "[s]cenes of nudity . . . [that] must be considered as part of the whole work," whereas public nudity is generally not an intrinsic part of an attempt to convey a message.[28] Consider the case, however, of a person walking naked down a public street emblazoned with the slogan "John Smith is an attractive candidate with nothing to hide." Certainly, the fact

23. 422 U.S. at 212-13.
24. *Id.* at 214.
25. *Id.* at 213-14.
26. *Id.* at 214-15.
27. *Id.* at 208.
28. *Id.* at 211 n.7.

that the nudity was inextricably connected with the message conveyed would not prevent the human billboard from being arrested, convicted, and punished. To hold that the first amendment prohibited such a conviction would be rather startling.[29] Given Justice Powell's reasoning, however, it is difficult to see how the constitutionality of such a conviction would be sustained.

III. REVIVAL OF THE PUBLIC NUISANCE THEORY: *Young* AND *Pacifica*

The first indication that the public nuisance theory might retain some viability came in *Young v. American Mini Theatres, Inc.*[30] *Young* involved a city ordinance which included "adult" book stores and movie theaters (defined as those establishments presenting material which emphasized sex or nudity) among "regulated uses."[31] No regulated use was allowed within 500 feet of a residential area, and no two such uses were to be located within 1,000 feet of each other.[32] The argument was made that because not all theaters were similarly restricted, the first amendment rights of owners of adult theaters were violated by the ordinance. The Court rejected this argument, concluding that the ordinance was an acceptable land-use regulation.

The dissent attempted to analogize the case to *Cohen* and *Erznoznik*;[33] however, the issue presented in *Young* was plainly different. The claim of the government in *Young* was not that unwilling viewers or hearers would be offended by the speech at issue—obviously no unwilling viewers would be exposed to a movie presented in a theater. Rather, the question was whether the state can constitutionally determine that concentration of a certain type of business—in this case business concerned primarily with sexual activity[34]—would cause a neighborhood to

29. *See* Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places . . . ."); Wilkenson, *Constitutional Protection for Personal Lifestyles,* 62 CORNELL L. REV. 563 (1967); Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances,* 14 WAKE FOREST L. REV. 1, 30 n.148 (1978) and sources cited therein.

30. 427 U.S. 50 (1976).

31. *Id.* at 52-53 and 53 nn.4-5.

32. *Id.* at 52.

33. *Id.* at 85 (Stewart, J., dissenting).

34. The ordinance also designated cabarets, establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls as regulated uses. *Id.* at 53 n.3.

deteriorate, defining those businesses by types of speech.[35] The Court's affirmative answer to this question does not contradict the holdings in *Cohen* and *Erznoznik*. *Young* does make clear, however, that the nature of speech may in some circumstances be appropriately considered in designing governmental regulations, and this principle is critical to the survival of the public nuisance theory.

In *Pacifica*, the Court placed more direct limitations on the principles enunciated in *Cohen* and *Erznoznik*.[36] *Pacifica* involves broadcast of a monologue by comedian George Carlin entitled "Filthy Words"[37] in which he satirizes the attitude of society toward the use of seven words "you couldn't say on the public . . . airwaves."[38] In the course of the monologue, Carlin made repeated use of the "forbidden" words. In response to a complaint from a person who had heard the monologue, the Federal Communications Commission issued an order holding that the station "could have been the subject of administrative sanctions."[39] In so doing, the Commission relied heavily on a nuisance theory.[40]

Reversing a court of appeals decision finding this order invalid,[41] the Supreme Court reinstated the Commission order. Dealing only with the power to prohibit the broadcast of the Carlin monologue itself at the particular hour at which it was broadcast,[42] the Court explicitly approved the use of the nuisance

35. *See* 427 U.S. at 83-84 (Powell, J., concurring).

36. *See also* Hess v. Indiana, 414 U.S. 105 (1973) (per curiam). Other cases, while not dealing directly with the public nuisance theory, also seemed to suggest that its utility for controlling speech would be quite limited. *See* Eaton v. City of Tulsa, 415 U.S. 697 (1974) (per curiam) (reversing contempt conviction for the use of word "chicken-sh[--]" in court); Papish v. Board of Curators, 410 U.S. 667 (1973) (per curiam) (reversing expulsion from school for distribution of newspaper "containing forms of indecent speech").

37. A full transcript of the monologue was included as an appendix to the majority opinion in *Pacifica*. *See* 438 U.S. 726, app. at 751 (1978).

38. *Id.* at 729.

39. Pacifica Foundation, 56 F.C.C.2d 94 (1975). The Commission argued that its authority to issue this order derived from 18 U.S.C. § 1464 (1976), which made it a crime to utter "any obscene, indecent or profane language" by means of radio communication.

40. *See* 56 F.C.C.2d at 97.

41. Pacifica Foundation v. FCC, 566 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

42. One opinion in the court of appeals dealt with the FCC opinion as the functional equivalent of a rule and concluded that it was overbroad and thus unconstitutional on its face. 556 F.2d at 13-14 (Tamm, J.). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). Arguing that "[t]he general statements in the Commission's memorandum opinion do not change the character of its order," the Supreme Court restricted its review to the specific factual context of the case in which

rationale.[43] Justice Stevens concluded that

> a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.[44]

The key factor on which the *Pacifica* Court relied in distinguishing *Cohen* and *Erznoznik* is that the Carlin monologue was broadcast over the public airwaves, rather than simply being worn on a jacket as in *Cohen* or projected on a movie screen as in *Erznoznik*.[45] The principle that the content of radio broadcasts could, consistently with the first amendment, be subject to more sweeping controls than the content of speech generally was established in *Red Lion Broadcasting Co. v. FCC*.[46] *Red Lion* involved an attack on both the general principles of the "fairness doctrine" and the more specific requirements of regulations governing personal attacks and political editorials. The former requires that broadcasters give adequate coverage to controversial issues of public importance and that this coverage include reasonable op-

---

the order was issued. 438 U.S. at 732.

But even accepting the Court's characterization of the Commission order, there still remained the question whether, as interpreted by the Commission, 18 U.S.C. § 1464 itself was unconstitutional on its face. Overbreadth problems could be avoided simply by a construction limiting the power of the Commission to those applications that were constitutional. However, there still would remain possible problems of vagueness. *See* Amicus Curiae Brief for American Broadcasting Co. at 33-39, FCC v. Pacifica Foundation, 438 U.S. 726 (1978). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Justice Stevens confronted this problem directly, arguing that because the speech at issue was at the periphery of first amendment protection, facial review of the statute was inappropriate. 438 U.S. at 743 (opinion of Stevens, J.). However, on this point he spoke for only three members of the Court. The remaining members of the majority contented themselves with a reference to the practice of not deciding constitutional issues unnecessarily and to the contention that a "narrow focus is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts." *Id.* at 756 (Powell, J., concurring).

43. *Id.* at 750.

44. *Id.* at 750-51 (*quoting in part* Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (Sutherland, J.)). Pacifica also argued that the word "indecent" in § 1464 should be interpreted to mean only "obscene" in order to avoid constitutional problems and that the Commission order should be overturned for exceeding statutory authority. *Id.* at 777-80 (Stewart, J., dissenting). The majority rejected this contention. *Id.* at 738-41.

45. *Id.* at 748-51.

46. 395 U.S. 367 (1969). For a general discussion of the problems raised by *Red Lion*, see Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on Red Lion*, 29 S.C.L. REV. 539 (1978).

portunities for the presentation of opposing viewpoints on these issues.[47] The latter requires more specifically that when one is subject to a personal attack in the context of a discussion of a controversial issue of public importance he must be given an opportunity to respond to this attack,[48] and that when a broadcaster endorses a candidate for election the other candidates for the office must be offered reply time.[49]

The broadcasters mounted a first amendment challenge to these regulations, noting that "[n]o man may [constitutionally] be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents."[50] Since this principle would rather plainly prevent the government from ordering a newspaper to print a defense of the political beliefs of the publisher's opponents,[51] the argument was made that the same protection applied to broadcasters as well.

The Court rejected this contention, asserting that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them."[52] Justice White argued that the critical factor in the case was that the scarcity of available radio frequencies required the government to to ration the right to use the frequencies among competing applicants. In such a context he reasoned that to allow successful applicants an unrestricted right to broadcast (or not to broadcast) whatever they pleased would place those applicants' rights in a superior position to the rights of unsuccessful applicants even though, for first amendment purposes, successful and unsuccessful applicants stand on an equal footing.[53] Further, the Court

47. 395 U.S. at 377. The Federal Communications Commission has recently codified and reformulated the fairness doctrine. *See* The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974), 58 F.C.C.2d 691 (1976), *aff'd in part and remanded in part sub nom.* Nat'l Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

48. 395 U.S. at 378.

49. *Id.*

50. *Id.* at 386.

51. At the time *Red Lion* was decided, the Court had not passed on the issue of the constitutionality of similar regulations of newspapers. Subsequently, in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court held unconstitutional a Florida statute which granted to a political candidate an enforceable right to equal space to answer criticism and attacks on his record by newspapers.

52. 395 U.S. at 386 (footnote omitted).

53. *Id.* at 387-89.

found that if licensees were permitted the option of broadcasting only one viewpoint on controversial issues of public importance, the public's collective first amendment right to be informed in an "uninhibited marketplace of ideas" might well be violated.[54] It was this last right which Justice White deemed paramount,[55] and the various challenged regulations were seen as an appropriate vehicle to vindicate this interest.

While the basic principle that radio broadcasts pose special first amendment problems is critical to the result in *Pacifica*, the rationale underlying the *Red Lion* result provides little or no support for Justice Stevens' *Pacifica* opinion. One can plausibly posit, as did the *Red Lion* Court, a first amendment right to hear varying viewpoints; by contrast, freedom of speech clearly does not encompass any right *not* to hear what is offensive to the listener. Thus, if *Pacifica* is to be adequately distinguished from earlier cases, the distinction must rest on other special characteristics of the broadcast media.

One factor upon which the *Pacifica* Court placed heavy reliance was the potential of broadcast media to invade the privacy of listeners.[56] In *Cohen* and *Erznoznik*, any unwilling exposure to the offensive message would take place in public areas. When venturing into such areas, the Court reasoned that one must necessarily assume some risk of viewing offensive material.[57] By contrast, radio broadcasts such as those in *Pacifica* have at least the potential of invading one's home, where one's right to control the sights and sounds viewed and heard is paramount.

In support of this distinction, Justice Stevens analogized *Pacifica* to laws regulating annoying or harassing telephone calls[58] and cited *Rowan v. Post Office Department*.[59] *Rowan* dealt with the rights of householders to have their names removed from mailing lists. Under a federal statute, if one had received advertisements which offered for sale "matter which the addressee in his sole discretion believes to be erotically arousing or sexually

54. *Id.* at 389-90.

55. *Id.* at 390.

56. 438 U.S. at 749 & n.27. The complaint from which the FCC action in *Pacifica* arose came from one who heard the Carlin monologue while riding in an automobile. *Id.* at 730.

57. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Cohen v. California, 403 U.S. 15, 21 (1971).

58. 438 U.S. at 749.

59. *Id.* at 748 (citing 397 U.S. at 728 (1970)).

provocative," he could send a notice to the Postmaster General, who would then issue an order directing the sender to refrain from further mailings to the named addressee and to delete the addressee's name from all mailing lists.[60] The mailers argued that this statute violated their first amendment right to communicate.[61] Noting that the "mailer's right to communicate is circumscribed only by an affirmative act of the addressee" requesting that the mailings be terminated, the Court rejected this argument,[62] concluding that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."[63]

But neither *Rowan* nor the harassing telephone call example is closely analogous to the situation in *Pacifica*. For if one wishes to be certain that he will not be exposed to indecent radio broadcasts in his home, he can resort to the simple expedient of not turning on his radio. When he does choose to listen to the electronic medium, the listener has in effect voluntarily invited a segment of public life into his hitherto private dwelling. In short, the privacy question in *Pacifica* is not whether the listener has a right not to hear indecent language in his home, but rather whether he has a right to listen to his radio without having any possibility of hearing such language even for the short period of time necessary to turn off the radio or change stations.

The differences between the respective communications media suggest another distinction between *Rowan* and *Pacifica*. In the former, any action by a recipient of sexually explicit material only affected his own exposure to that material; any other addressee who wished to continue to receive the offending advertisement could continue to do so. By contrast, vindication of the unwilling hearer's privacy right in *Pacifica* of necessity deprives those who might wish to hear the Carlin dialogue of access to it through the radio. In this regard, *Pacifica* was strikingly similar to *Erznoznik*.[64]

This is one of a number of close analogies between *Erznoznik* and *Pacifica*. Both involved communications media intended to reach large numbers of people simultaneously. Further, unlike

60. 397 U.S. at 732.
61. *Id.* at 735.
62. *Id.* at 737.
63. *Id.* at 736-37.
64. *See* 438 U.S. at 769 (Brennan, J., dissenting).

Cohen, neither presentation was primarily aimed at shocking unwilling or unwary viewer/listeners; the exposure of such viewers was solely an accidental byproduct of attempts to reach willing consumers.[65] Indeed, in some respects *Pacifica* presented a more compelling case for first amendment protection than did *Erznoznik*. In *Pacifica*, the listener could always easily terminate his exposure to the offensive broadcast; by contrast, in *Erznoznik* the possibility of averting one's eyes may be largely theoretical. For example, when one is driving down a road from which the view is dominated by a drive-in movie screen, looking away may well result in a traffic accident.[66] Moreover, the proposed remedy in *Erznoznik* was much more narrowly focused on the perceived evil than was the sanction in *Pacifica*. In the former, the challenged ordinance only required a screen that would block the view of offended viewers and random bystanders; those wishing to view the movie could still attend the drive-in theater. In *Pacifica*, on the other hand, the FCC action effectively banned the use of radio for broadcast of monologues such as "The Seven Dirty Words" (at least during most of the day[67]), thus depriving even willing listeners of the opportunity to hear the presentation over the radio.[68]

Ranged against these factors, the distinction based on the fact that radio broadcasts can come into listeners' homes seems weak indeed—especially given the fact that the broadcast can only be heard if invited by the listener. Thus, if *Pacifica* is to be

---

65. *See* Erznoznik v. City of Jacksonville, 422 U.S. at 210 n.6 (1975). *See also* Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972) (Powell, J., dissenting).

66. *See* Parker v. Utah, 285 U.S. 105, 110 (1932) (Brandeis, J.).

67. The FCC decision left open the possibility that the Carlin monologue could be legally broadcast during hours when few children were likely to be listening. *See* 438 U.S. at 750 n.28.

68. *See* 438 U.S. at 769 (Brennan, J., dissenting). In another context, Justice Stevens attempted to defuse this argument by reference to the potential for willing listeners to obtain access to the monologue through other media such as tapes, records, and nightclubs. 438 U.S. at 750 n.28. However, this contention ignores two points. First, at the very least, the other suggested media, unlike radio, entail expenditures by the listener; thus, the FCC ban would deter some listeners because of increased cost. *See generally* Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.8 (1975) (regulation which raises costs to only those theaters which show motion pictures containing nudity violates the first amendment). Second, Justice Stevens' argument ignores the special role that the broadcast media plays in the dissemination of material such as the Carlin monologue. The radio provides a unique forum by which persons are informed of the existence and content of such material; if broadcast is not allowed, some persons who might wish to hear (and later purchase) the Carlin monologue might remain forever unaware of its existence. *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (first amendment rights of listeners paramount).

convincingly distinguished from *Erznoznik*, the distinction must be based on other factors.

The other consideration on which the *Pacifica* majority relied is the "unique accessibility" of the broadcast media to children, particularly unsupervised children.[69] This factor is related to two closely connected but analytically separable governmental interests. The first is a direct concern for the psychic well-being of the children. In order to protect the children from bad influences, it is argued that the state must have some power to prohibit the dissemination of certain messages to them even when the first amendment would protect the communication of the same messages to adults.[70]

In addition, the likelihood that many children in the audience will be unsupervised while listening to the radio implicates the interest of the state in preserving parental autonomy. In our society, parents are expected to fill the primary role in guiding the moral development of their children, avoiding their exposure to material such as the Carlin monologue. The efforts of the government to prevent unsupervised children from hearing such broadcasts may be viewed as vindicating the interests of these parents as well as the independent interests of the state in protecting the morality of its youth.[71]

Ginsberg v. New York[72] is the prime example of the Court's recognition that the government may regulate some speech directed at minors even when the same regulation would violate the first amendment if applied to speech aimed at adults.[73] *Ginsberg* dealt with a New York statute that proscribed the sale to persons under the age of seventeen of materials defined by the statute to be "obscene." The statutory definition of obscenity closely tracked the prevailing constitutional standards for the identification of obscenity; however, these standards had been modified to focus on the effect the material would have on a minor rather than on a member of the population at large. Thus, a statutory violation occurred if a child under seventeen was sold a magazine portraying nudity that "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently

69. 438 U.S. at 749-50.
70. *See* Ginsberg v. New York, 390 U.S. 629, 640 (1968).
71. *See id.* at 639.
72. 390 U.S. 629 (1968).
73. *Id.* at 636-37.

offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."[74]

The net result of such a statute was that minors were prohibited from buying materials to which adults could not constitutionally be denied access. Nonetheless, the Court refused to strike down the statute, holding that special governmental interests with respect to minors justified the distinction.

Pacifica represents a significant extension of the *Ginsberg* rationale in at least two respects. First, *Ginsberg* dealt solely with the printed media; thus the challenged law could be tailored to affect the ability of children only to obtain the offending material. By contrast, the FCC action in *Pacifica* of necessity had to restrict the access of adults to the Carlin monologue in order to prevent unsupervised children from being exposed to the monologue.

Perhaps more importantly, the *Pacifica* opinion greatly expanded the type of speech that can constitutionally be controlled on the ground that children may be exposed to it. The theory of *Ginsberg* was that even though certain sexually oriented speech was not obscene when directed at adults, the same speech became obscene (and thus no longer protected) when read or viewed by children.[75] *Erznoznik* strongly suggested that *only* speech that is obscene for minors could be controlled under the governmental power to protect children and preserve parental autonomy.[76] But in *Pacifica*, there was not even a suggestion that the Carlin monologue would be considered obscene even if directed only to minors. Certainly it does not bear the traditional indicia of obscenity; while the monologue may in the broadest sense be seen as concerned with sex, the broadcast was not erotic in any sense.

Further, on this point the principles developed in *Pacifica* cannot be limited to the electronic broadcast media alone. The particular characteristics of those media may explain why the state may affect the rights of adults under the rationale of protecting children, but those characteristics can have no relevance in the determination of those words from which the state is empowered to shield children. Thus, *Pacifica* must be seen as expanding the governmental power over not only radio and televi-

74. 390 U.S. at 633 (quoting N.Y. PENAL LAW § 484h (1)(f)(Consol. 1965)).
75. *Id.* at 641.
76. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 n.15 (1975).

sion, but also over books, movies, and other forms of communication.

IV. FUTURE OF THE PUBLIC NUISANCE THEORY

Whether or not it is convincingly distinguishable from *Erznoznik*, *Pacifica* clearly establishes the right of the government to use a public nuisance theory to place some limitations on the manner in which ideas are expressed. The issue then becomes what limitations the first amendment imposes upon this power. Justice Stevens apparently envisions a kind of balancing test based upon the various factors that contribute to the overall concept of "context."[77]

One critical factor is the composition of the audience that is exposed to the offending communication. Where this audience is composed entirely (or almost entirely) of willing adult listeners or watchers, the case for allowing government regulation is weak. Not only is the state interest in suppressing the expression in such a case minimal, but the first amendment rights of the listeners—rights that the *Red Lion* Court deemed "paramount"[78]—militate strongly against regulation or suppression. Conversely, as the number of unwilling listeners and unsupervised children in the audience becomes larger, the governmental interest in protecting these listeners from unwanted intrusions becomes weightier and the use of the nuisance theory becomes more attractive.

Another closely related factor is the type of forum into which the offending communication is projected.[79] When the unwilling listener is exposed to the communicator in an area where he has a reasonable expectation of privacy (his home being the paradigm example),[80] then his interest in avoiding the communication becomes weightier. Thus, the state's interest in protecting the listener takes on added significance. By contrast, a person in a public area is required to take a greater risk of being exposed to unwelcome sights or sounds and the governmental interest in protecting him in such an area is correspondingly less substantial.[81]

---

77. *See* 438 U.S. at 750.
78. 395 U.S. at 390.
79. 438 U.S. at 748.
80. *See* Rowan v. Post Office Dept., 397 U.S. 728 (1970).
81. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-11 (1975); Cohen v. California, 403 U.S. 15, 21 (1971).

Finally, the precise content of the message sought to be regulated is also an important factor in the balance.[82] When a broadcast contains only isolated expletives, the potential unavoidable damage to the listeners' sensibilities is quite limited; after hearing the first offending words, the sensitive listener will be able to avoid substantial further embarassment or indignity simply by changing channels. On the other hand, the use of potentially offensive language in the Carlin monologue is so pervasive that one would be exposed to a large volume of such language even in the short time that it would take for a listener to discern the subject matter of the monologue and take the necessary action to avoid further exposure.

All of the factors discussed thus far bear on the intensity of the governmental interest in protecting unwilling listeners and children from sustaining offense or harm by being exposed to inappropriate speech. Justice Stevens would also have the level of first amendment protection afforded to any given speech depend upon the social value attached to that speech.[83] Because of the nature of the Carlin monologue, Justice Stevens viewed it as being at the periphery of the values that the first amendment was designed to protect.[84] He argued that regulations such as those involved in *Pacifica* should thus be subject to less stringent judicial scrutiny than controls on more conventional political speech.[85]

On this point, Justice Stevens spoke for only three members of the Court; a majority of the justices took the position that the content of the protected, noncommercial speech was irrelevant to the degree of first amendment protection accorded to such speech.[86] Nonetheless, the Stevens' viewpoint might have a significant influence on the outcome of later first amendment cases argued under the public nuisance theory. A broadcast of offensive language in the context of political discussion or a "serious" artistic work might be viewed by one or more of those fully concurring in the Stevens opinion as deserving more stringent first amend-

82. 438 U.S. at 750.

83. *Id.* at 744-48 (opinion of Stevens, J.). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-73 (1976) (opinion of Stevens, J.).

84. 438 U.S. at 743 (opinion of Stevens, J.).

85. *Id.* at 744-47 (opinion of Stevens, J.).

86. *Id.* at 744-45; *id.* at 761 (Powell, J., concurring); *id.* at 762-63 (Brennan, J., dissenting). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 84-85 (Stewart, J., dissenting).

ment protection than the Carlin monologue.[87] This in turn might lead to the conclusion that the broadcast could not be regulated. Given the close division of the Court in *Pacifica*, the shift of even a single vote could be critical.

V. CONCLUSION

The *Pacifica* decision makes clear that the public nuisance theory for controlling speech retains some vitality, notwithstanding the apparently near-fatal blows dealt to the concept by the *Cohen* and *Erznoznik* cases. The long-term significance of the Court's approval of the action against the broadcasters of the Carlin monologue may be limited by two factors. First, *Pacifica* was explicitly limited to the issue of control of a specific broadcast on a medium over which the government has historically been constitutionally allowed to exercise an unusual measure of content control. Thus, the case left unresolved whether a more general statute can be drafted which would effectively implement the public nuisance theory in other media of communication while at the same time being sufficiently narrow and specific in its terms to satisfy the stringent standards established by *Cohen* and *Erznoznik*.

Second and equally important is that the order in *Pacifica* was upheld by only the narrowest of margins, and that the five justice majority gives every sign of being a very fragile coalition. There was sufficient common ground for a majority opinion to be produced; however, at the same time, even the members of the majority indicated that they had substantial differences of opinion over the proper mode of analysis to be employed.

87. *See* 438 U.S. at 747 (opinion of Stevens, J.).