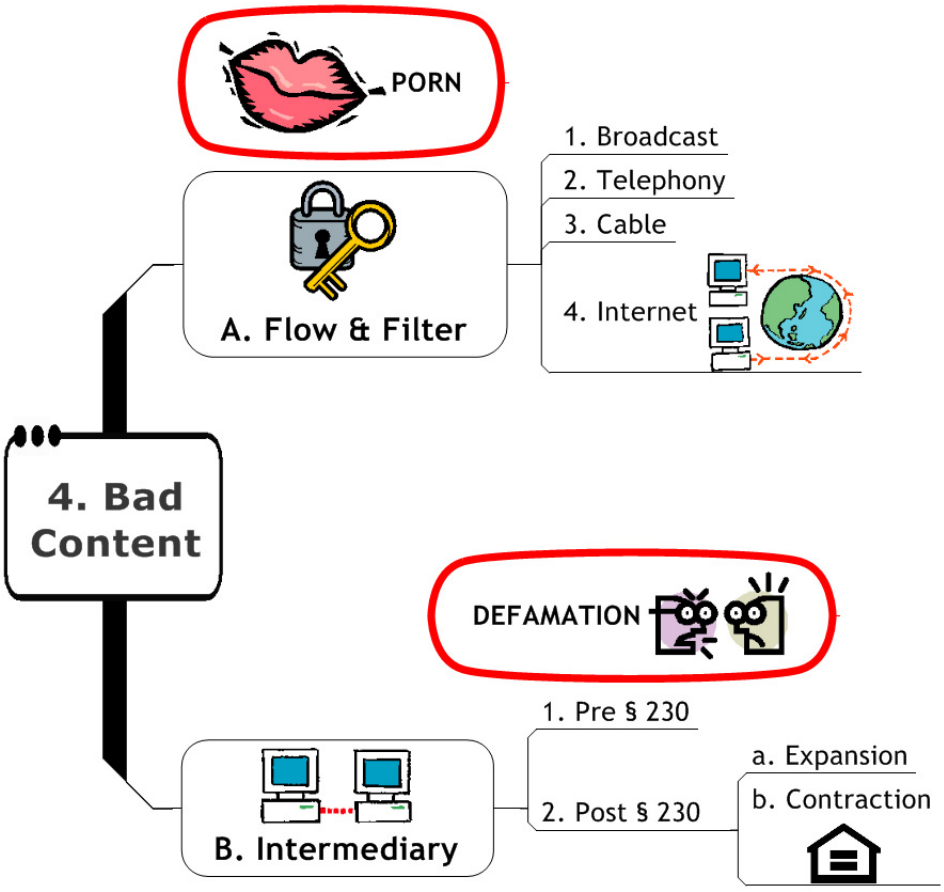
CHAPTER 4

Bad Content



So far, we have discussed what it takes to *enter* various communication industries that provide and transport information. We have also examined how and why society might *price* these services outside the default framework of the marketplace. We now turn our focus directly to the bits of information themselves—the *content*. In this chapter, we address content that society labels "bad." In the next chapter, we address content that society labels "good."

Central to any discussion about content, good or bad, are two bodies of law: intellectual property and the First Amendment. The former topic is outside the

scope of this text. Although a few notes refer to current controversies, copyright and related intellectual property issues should be studied in a separate class. Instead, our focus is on the latter topic.

Various types of information—such as genuine threats, defamation of character, releases of military secrets, fraudulent claims of medical cures, or racial epithets—can cause great harm. From a policy perspective, many government initiatives might be worth implementing—at least as an experiment—to address such harms. However, from a legal perspective, many of these initiatives would violate the U.S. Constitution's First Amendment, which protects freedom of expression.

Two broad themes emerge regarding "bad" content. First, communication technologies increase the flow of bad content. Consider, for instance, how much easier it is for a teenager to locate hardcore pornographic video on the Internet than it is for that same teenager to rent an adult videotape at a local bricks-and-mortar store. Interestingly, the same technologies create tools that allow individuals, families, institutions, and even governments to filter this flow. Second, communication technologies introduce new players who facilitate content flow. Whether these information intermediaries should be held accountable for bad content presents novel legal and policy questions.

A. Flow and Filter

Since CHAPTER 1: POWER, we have studied how communication technologies make it easier to create, search, and distribute information—in some sense, how technology makes information flow more easily. But these technologies do not distinguish between content that human beings judge to be good or bad. To the communications matrix that interconnects our world, content is content, bits are bits. One type of bad content that has been a thorn in Congress's side is indecency.

The basic policy issue is simple. Some sexual content should almost never be exposed to children, at least not without the consent of their parents. Also, some content should not even be exposed to adults unless they consent in advance. As the flow of this "offensive" content becomes more plentiful and intrusive in our increasingly interconnected world, what can and should society do? Can it apply some legal or technological filter to block or shunt it off? We discuss these issues across numerous communication services, in part because the law has developed separately, service by service. Throughout our study, we question whether such disparate treatment can be justified.

1. Broadcast

Imagine that you are driving your nephew back from school one afternoon and you turn on your car radio and hear the following:

> I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever. . . . [I]t came down to seven but the list is open to amendment. . . . The . . . words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter). . . . [*]

FCC v. PACIFICA

438 U.S. 726 (1978)

Mr. Justice STEVENS delivered the opinion of the Court.

I

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission.

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

On February 21, 1975, the Commission [held] that Pacifica "could have been the subject of administrative sanctions." The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file. . . ."

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion

[*] George Carlin, Seven Dirty Words Monologue, FCC v. Pacifica, Appendix, 438 U.S. 726 (1978).

that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it. . . . [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." 56 F.C.C.2d, at 98.[5] . . . In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464."

The United States Court of Appeals for the District of Columbia Circuit reversed. . . .

IV

C

We have long recognized that each medium of expression presents special First Amendment problems. Joseph Burstyn, Inc. v. Wilson. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, Miami Herald Publishing Co. v. Tornillo, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. Red Lion Broadcasting Co. v. FCC.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Dept. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that

[5] Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience.