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DRAFT

W O R D S

THIS IS A PAPER DEALING WITH WORDS. MORE SPECIFICALLY THOUGH, WORDS IN THE ENGLISH LANGUAGE AND EVEN MORE SPECIFICALLY WE ARE DEALING PRIMARILY WITH DIRTY WORDS. EVEN MORE SPECIFICALLY, WE ARE DISCUSSING HOW OUR GOVERNMENT THROUGH ITS JUDICIAL SYSTEM STRAINS AND GROANS IN TRYING TO DETERMINE WHAT WORDS ARE OBSCENE OR PATENTLY OFFENSIVE SO THAT OUR TENDER EARS CAN BE PROTECTED FROM THEM. THE CASE AND POINT BEING THE FEDERAL COMMUNICATIONS ~~SYSTEM~~ Commission -VS- PACIFICA FOUNDATION, 438 U.S. 726, CITED JULY 3, 1978. THAT CASE IS BETTER KNOWN AS THE SEVEN DIRTY WORDS CASE AND WHILE THE WHOLE SUBJECT SEEMS SOMEWHAT FRIVOLOUS, THE CASE MAY WELL BE A LANDMARK DECISION UPON FREEDOM OF SPEECH IN THIS COUNTRY AND MAY ALSO HAVE A VERY SIGNIFICANT EFFECT ON FREEDOM OF COMMERCIAL SPEECH AS OPPOSED TO POLITICAL SPEECH.

WHAT ARE WORDS? WE HAVE 26 LETTERS IN THE ALPHABET AND BY PLACING THEM IN DIFFERENT ORDER, WE HAVE WORDS THAT MAKE DIFFERENT EXPRESSIONS OF THOUGHTS. SINCE THE LETTERS THEMSELVES DO NOT CHANGE, ONLY THE ORDER OF APPEARANCE, IS IT POSSIBLE TO TAKE THESE LETTERS AND SPACE THEM IN SUCH AN ORDER AS TO MAKE THEM OBSCENE, OFFENSIVE OR PATENTLY INDECENT? APPARENTLY, THE SUPREME COURT HAS FOUND THAT IS POSSIBLE. BEFORE WE GET INTO THE CASE AND POINT, LETS REVIEW FOR A MOMENT WHAT OTHERS HAVE SAID ABOUT WORDS. JOHN SELEN SAID "SYLLABLES GOVERN THE WORLD". KIPLING STATED "WORDS ARE, OF COURSE, THE MOST POWERFUL DRUG USED BY MANKIND." HELEN MERRELL LYND SAID "WORDS ARE SOMETIMES SENSITIVE INSTRUMENTS OF PRECISION WITH WHICH DELICATE OPERATIONS MAY BE PERFORMED AND SWIFT TRUTHS MAY BE TOUCHED; OFTEN THEY ARE CLUMSY TOOLS WITH WHICH WE GROPE IN THE DARK TOWARD TRUTHS MORE INACCESSABLE BUT NO LESS SIGNIFICANT". JOHN LANCASTER SPALDING SAID "THERE ARE THOSE WHOM WORDS FRIGHTEN MORE THAN THE THINGS THEY EXPRESS".

OTHERS HAVE TAKEN A LIGHTER VIEW SUCH AS ADLAI STEVENSON WHO SAID "MAN DOES NOT LIVE BY WORDS ALONE, DESPITE THE FACT THAT SOMETIMES HE HAS TO EAT THEM". MARK TWAIN SAID, "I NEVER WRITE METROPOLIS FOR SEVEN CENTS, BECAUSE I CAN GET THE SAME PRICE FOR CITY. I NEVER WRITE POLICEMAN, BECAUSE I CAN GET THE SAME MONEY FOR COP." SAM JOHNSON SAID, "A SYNONYM IS A WORD THAT YOU USE WHEN YOU CAN'T SPELL THE RIGHT ONE AND, THEREFORE, CAN'T FIND IT IN THE DICTIONARY". SAMUEL BUTLER SAID "OATHS ARE BUT WORDS, AND WORDS ARE BUT WIND". ABRAHAM LINCOLN SPOKE OF A COLLEAGUE WHEN HE SAID "HE CAN COMPRESS THE MOST WORDS INTO THE SMALLEST IDEA OF ANY MAN I EVER MET" AND PERHAPS MORE IN MIND WITH THE THEME OF THE PAPERS TONIGHT, PLUTARK, SAID "THESE MACADONIANS ARE RUDE AND CLANNISH PEOPLE; THEY CALL A SPADE A SPADE". PERHAPS IT WOULD BE GOOD FOR US TO KEEP IN MIND THE FACT THAT WORDS STANDING ALONE ARE NOT OFFENSIVE OR OBSCENE, RATHER IT IS WHAT THE LISTENER PERCEIVES THEM TO BE. YES, IF IT IS TRUE THAT BEAUTY IS THE EYE OF THE BEHOLDER, SO THEN MUST IT BE THAT WHETHER WORDS ARE BEAUTIFUL, OBSCENE OR INDESENT IT IS ALSO IN THE EYES OF THE BEHOLDER OR THE EARS OF THE LISTENER.

ON A TUESDAY AFTERNOON AROUND 2:00 O'CLOCK, A RADIO STATION AIRED, AS PART OF THE PROGRAM CONCERNING CONTEMPORARY SOCIETY'S ATTITUDE TOWARD LANGUAGE, A SATIRIC HUMORIST'S 12-MINUTE MONOLOGUE ENTITLED "FILTHY WORDS," IN WHICH THE HUMORIST, RELATING HIS THOUGHTS ABOUT "THE WORDS YOU COULDN'T SAY ON THE PUBLIC AIRWAVES," PROCEEDED TO LIST AND REPEAT OVER AND OVER A NUMBER OF COLLOQUIAL EXPRESSIONS FOR SEXUAL AND EXCRETORY ACTIVITIES AND ORGANS. 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 SATIRST 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 ATTITUDES TOWARDS THOSE WORDS. A MAN WHO HAD HEARD THE BROADCAST WHILE DRIVING WITH HIS YOUNG SON COMPLAINED ABOUT THE BROADCAST TO THE FEDERAL COMMUNCATIONS COMMISSION. SUBSEQUENTLY, THE COMMISSION ISSUED THE ORDER HOLDING THAT THE OWNER OF THE STATION COULD HAVE BEEN SUBJECT TO ADMINISTRATIVE SANCTIONS. ALTHOUGH NOT IMPOSING FORMAL SANCTION, THE COMMISSION STATED THAT THE ORDER WOULD BE ASSOCIATED WITH THE STATION LICENSE FILE AND IF SUBSEQUENT COMPLAINTS WERE RECEIVED THE COMMISSION WOULD DECIDE THE PROPRIETY OF UTILIZING ANY OF THE AVAILABLE SANCTIONS GRANTED BY CONGRESS. IN ITS MEMORANDUM OPINION, THE COMMISSION EXPRESSED ITS INTENT TO CLARIFY STANDARDS FOR CONSIDERING COMPLAINTS ABOUT INDECENT SPEECH ON THE AIRWAVES, AND STATED THAT UNDER STATUTES IT HAD POWER TO ISSUE PROHIBITIONS AGAINST ANY OBSCENE, INDECENT, OR PROFANE LANGUAGE BY MEANS OF RADIO COMMUNCATIONS AND APPLYING PRINCIPLES ANALOGOUS TO THOSE FOUND IN THE LAW OF NUISANCE, DETERMINED THAT THE "FILTHY WORDS" MONOLOGUE, AS BROADCAST, WAS INDECENT WITHIN THE MEANING OF THE STATUTE AND THAT IT HAD BEEN DELIBERATELY BROADCAST AT A TIME WHEN CHILDREN WERE UNDOUBTEDLY IN THE AUDIANCE AND CONTAINED WORDS WHICH DEPICTED SEXUAL AND EXCRETORY ACTIVITIES IN A PATENTLY OFFENSIVE MANNER. SUBSEQUENT TO THAT OPINION IN A REQUEST FOR CLARIFICATION, THE COMMISSION THEN DECIDED THESE INDECENT WORDS WERE NOT REALLY INDECENT IF THEY WERE APART OF A LIVE NEWSCAST, WHICH WE CAN ONLY ASSUME SOMEHOW MADE INDECENT LANGUAGE DECENT. APPARENTLY, SINCE PRIOR RESTRAINT IS A CODE WORD WITHIN THE MEDIA FOR CENSORSHIP, THE COMMISSION DECIDED THAT IF IT WAS A NEWSCAST, THAT THE WORDS WERE PERMISSIBLE AND THROUGHOUT ITS HISTORY HAS TAKEN THE POSITION THAT THEY WILL NOT CENSOR THE BROADCAST, HOWEVER, THEY WILL IMPOSE SANCTIONS FOR VIOLATIONS OF THEIR REGULATIONS. IN OTHER WORDS, THEY WON'T

STOP YOU FROM SAYING IT BEFORE YOU SAY IT. BUT IF YOU DO SAY IT, THEN YOU'LL LOSE YOUR LICENSE AND SOMEHOW THIS IS NOT CENSORSHIP.

NEEDLESS TO SAY, THIS DECISION WAS APPEALED TO THE U. S. COURT OF APPEALS. IT HAS BECOME APPARENT HOW EACH JUDGE AT EACH LEVEL OF COURT SYSTEM APPEARS TO BE APPLYING HIS OWN INTERPRETATION BASED ON WHAT HE FEELS WOULD BE OFFENSIVE TO HIM OR HIS CHILDREN AND THEREFORE EVEN WITH THE PRESENT DECISION, NO ONE REALLY KNOWS WHAT STANDARD WAS SET BY THE COURT. FOR INSTANCE, AT THE COURT OF APPEALS, A 3-JUDGE PANEL HEARD THE CASE AND THEY ALL WERE UNABLE TO AGREE ON AN OPINION. ONE OF THE JUDGES CONCLUDED THAT THE ORDER NOT ONLY REPRESENTED CENSORSHIP OVER THE RADIO COMMUNICATIONS, BUT THAT THE STATUTES INVOLVED WERE OVERBROAD AND ANOTHER STATUTE EXPRESSLY PROHIBITED THE COMMISSION FROM ENGAGING IN CENSORSHIP AND THEREFORE REVERSED THE CASE. THE REMAINING JUDGE STATED THAT HE FELT THAT ONLY OBSCENE LANGUAGE WAS FORBIDDEN AND, THEREFORE, THE ORDER OF THE COMMISSION ABRIDGED THE FIRST AMENDMENT. AS YOU WILL SEE LATER, APPARENTLY THE COURT MAKES A BIG DISTINCTION IN OBSCENE AND INDECENT.

TO SAY THAT THE SUPREME COURT ISSUED A SPLIT DECISION TO PUT IT MILDLY, IT DID IN EFFECT REVERSE THE COURT OF APPEALS AND LET STAND THE RULING OF THE FCC. HOWEVER, THE DECISION FROM WHICH WE WILL QUOTE EXTENSIVELY WAS BROKEN DOWN AS FOLLOWS: JUSTICE STEVENS ISSUED WHAT IS CONSIDERED THE MAJORITY OPINION. IT IS A FOUR PART OPINION. PART FOUR OF THE OPINION CONTAINS THREE SUBHEADINGS OF A, B, C. JUSTICE BURGER, JUSTICE REHNQUIST, BLACKMUN AND POWELL JOINED IN MOST OF THIS OPINION IN HOLDING THAT THE COURT'S POWER TO REVIEW THE DECISION WAS LIMITED TO THE FACTS BEFORE IT. IT WAS STRICTLY WHETHER OR NOT THE COMMISSION EXCEEDED

ITS POWER. BASICALLY, THAT DECISION SAID THE LANGUAGE WAS NOT OBSCENE, BUT INDECENT. APPARENTLY, IF ITS OBSCENE YOU CAN'T BROADCAST. IF IT'S INDECENT, YOU CAN BROADCAST IT, BUT YOU'VE GOT TO BE SELECTIVE ON WHEN AND WHERE. JUSTICE POWELL DID AN OPINION JOINED BY JUSTICE BLACKMUN CONCURRING IN MOST OF WHAT THE COMMISSION DONE, BUT INDICATED THAT THEY COULD NOT GO ALONG WITH PARTS 4A AND 4B, SINCE THEY FELT THAT THE JUSTICES OF THE SUPREME COURT WERE NOT FREE TO DECIDE ON THE BASIS OF CONTENT WHICH SPEECH IS PROTECTED BY THE FIRST AMENDMENT AND WHICH IS NOT AND WHICH IS DESERVING OF MORE PROTECTION AND WHICH IS DESERVING OF LESS PROTECTION. THEN JUSTICE BRENNAN DID AN OPINION JOINED BY JUSTICE MARSHALL DISSENTING; ATTACKING THE ENTIRE THEORY OF THE FIRST OPINION IN EFFECT STATING THAT THE GOVERNMENT HAS NO BUSINESS IN TELLING PEOPLE WHAT WORDS ARE NICE AND NAUGHTY. THEN JUSTICE STEWART WROTE AN OPINION JOINED BY BRENNAN, WHITE AND MARSHALL DISSENTING, ON THE GROUNDS THAT THE BROADCAST WAS NOT PROHIBITED, SINCE THE STATUTES PROHIBITED ONLY OBSCENE SPEECH. SO YOU CAN TELL UP FRONT, THAT WE ARE GOING TO HAVE A CLEAR AND DECISIVE PRONOUNCEMENT ON THIS ISSUE.

AS YOU GET INTO THE ISSUE OF OBSCENITY AND INDECENCY, MIGHT BE GOOD TO REMEMBER THAT THE LATE JUSTICE HUGO BLACK AND TO A LESSER DEGREE, FORMER JUSTICE WILLIAM DOUGLAS BOTH TOOK THE POSITION THAT THERE WAS NO MENTION OF OBSCENITY IN THE CONSTITUTION. JUDGE BLACK DID NOT EVEN BOTHER TO PARTICIPATE IN ANY ARGUMENTS INVOLVING THE QUESTION OF OBSCENITY. HE WOULD SIMPLY PULL FROM HIS BACK POCKET A LITTLE DOG-EARED COPY HE HAD OF THE CONSTITUTION, AND OPEN IT TO THE FIRST AMENDMENT AND STATE THAT HE SEES NOTHING THERE OTHER THAN WHAT IT STATED AND THAT WAS THE RIGHT OF FREE SPEECH WILL NOT BE ABRIDGED. PERHAPS THAT OVERLOOKS THE COMPLICATED PROBLEMS OF A SOPHISTICATED SOCIETY. HOWEVER,

AFTER ONE READS THESE DECISIONS AND TRIES TO UNDERSTAND HOW EACH JUSTICE TRIES TO REFINE THE STANDARDS OF DECENCY, IT MAY BE THAT JUSTICE BLACK WAS CORRECT.

I HAVE PROBABLY TEASED YOU LONG ENOUGH ABOUT THIS PAPER SO PUT YOUR MIND AT REST BEFORE I GET INTO THE DECISION. I AM SURE YOU WANT TO KNOW WHAT THE SEVEN DIRTY WORDS ARE. THEY COME FROM THE OFFICIAL RECORDS APPENDED TO THE CASE, A COMPLETE TRANSCRIPT OF THE MONOLOGUE AND WHILE MR. CARLIN HAS AMENDED HIS LIST SOMEWHAT, THE ORIGINAL SEVEN WORDS WERE SHIT, PISS, FUCK, COCKSUCKER, MOTHERFUCKER, CUNT AND TITS.

THE COMMISSION HAD FOUND THESE WORDS TO BE PATENTLY OFFENSIVE BUT, STRANGLY ENOUGH, NONE OF THE JUSTICES FOUND THAT THESE WORDS WERE OBSCENE. HAD THEY SO FOUND THEN THE WORDS WOULD NOT BE PERMITTED. HOWEVER, IN OTHER CASES BEFORE THE COURT OVER A PERIOD OF YEARS, THE DEFINITIION OF OBSCENITY HAD BEEN SO REFINED AS NOT BE APPLICABLE IN THIS CASE. TOM SOYARS DID A PAPER ON OBSCENITY SEVERAL YEARS AGO, WHICH BETTER COVERED THAT AREA. IN ANY EVENT THE OBSCENITY DECISIONS WERE DIRECTED PRIMARILY AT PHOTOGRAPHS AND MAGAZINE ARTICLES, BOOKS AND MOVIES. ASIDE FROM HAVING NO REDEEMING SOCIAL VALUE, TO BE OBSCENE A WORK MUST ALSO APPEAL TO PRURIENT INTERESTS WHICH IS A WORD ITSELF THAT COULD PROBABLY BE SUBJECTED TO ANOTHER WHOLE PAPER. I BELIEVE ORIGINALLY THE WORD REFERRED TO A TINGLING SENSATION AND NOW HAS MOVED TO THE REALM OF MEANING SEXUAL STIMULATION. AND OBVIOUSLY GEORGE CARLIN SATIRIC MONOLOGUE WAS NOT SEXUALLY STIMULATING. AT LEAST TO THE JUSTICES OF THE SUPREME COURT. ONCE THE COURT DECIDES THAT THEY ARE NOT OBSCENE THAT MEANS THAT THEY CAN BE BROADCAST. BUT UNDER OTHER STATUTES THEY FOUND THAT THE WORDS WERE INDECENT. THE SECOND OPINION OF THE FCC STATED THEY NEVER INTENDED TO PLACE AN ABSOLUTE PROHIBITION ON THE BROADCAST OF THIS TYPE LANGUAGE BUT RATHER SOUGHT TO CHANNEL IT INTO TIMES OF DAY WHEN CHILDREN WOULD MOST LIKELY NOT BE EXPOSED TO IT. THERFORE, SAYING

YOU CAN BROADCAST IT BUT WE MIGHT PUNISH YOU FOR IT. THE COURT AND THE COMMISSION FOUND THAT THIS WAS NOT A FORM OF CENSORSHIP WHICH WAS FORBIDDEN UNDER A 1927 ACT. HOWEVER, THE SAME ACT, THE SAME LANGUAGE AND THE SAME PARAGRAPH THAT PROHIBITED CENSORSHIP ALSO STATED THAT NO PERSON WITHIN THE JURISDICTION OF THE UNITED STATES SHALL UTTER ANY OBSCENE, INDECENT OR PROFANE LANGUAGE BY MEANS OF RADIO COMMUNICATIONS. SOME OF THE JUSTICIES HAVE FOUND THAT INDECENT IS A NUISANCE AS DISTINGUISHED FROM OBSCENE. OTHERS FOUND THAT INDECENT AND OBSCENE MEANT THE SAME THING AND THEREFORE IF INDECENT WAS OBSCENE AND OBSCENE HAD BEEN DEFINED AND THESE WORDS DID NOT FIT THE DEFINITION OF OBSCENITY, THEN THE COMMISSION HAD NO POWER TO STOP THE USE OF THE LANGUAGE. IT IS INTERESTING TO NOTE THAT THE 1927 ACT I REFERRED TO WAS TESTED IN 1931 BY A DOCTOR WHO WAS PRESCRIBING MEDICINE ON A CALL-IN MEDICAL SHOW. HE OWNED THE RADIO STATION AND HE ALLEGED CENSORSHIP WHEN HIS LICENSE WAS DENIED. APPARENTLY, THE DENIAL WAS UPHELD ON THE FACT THAT HE WAS NOT SERVING THE PUBLIC BY SERVING HIS OWN PRACTICE. ANOTHER CASE, DID INVOLVE BAD LANGUAGE WHICH IN 1932 INVOLVED A RADIO MINISTER, A METHODIST CHURCH MINISTER, WHOSE PROGRAM WAS CRITICISED DUE TO HIS CONSTANT REFERENCES TO PIMPS AND PROSTITUTES AND HIS ATTACKS ON THE ROMAN CATHOLIC CHURCH. THEY DENIED IMPOSING ANY PRIOR RESTRAINTS, BUT DID LIFT THE LICENSE ON THE BASIS OF ABUSE OF THE PRIVILEGE OF BROADCASTING.

AS I STATED THE MAJORITY OPINION, OR THE SO-CALLED MAJORITY OPINION DID DISTINGUISH BETWEEN PRURIENT APPEAL AND INDECENT LANGUAGE AND FOUND THE COMMISSION COULD REGULATE INDECENT LANGUAGE. IT WAS ARGUED IN THE MAJORITY OPINION THAT ADMITTEDLY GIVING THE COMMISSION THE POWER TO CONTROL LANGUAGE THAT IS NOT CONSIDERED OBSCENE COULD HAVE THE SAME EFFECT AS CENSORSHIP. BUT THEY ALSO POINTED OUT THAT THE REQUIREMENT THAT INDECENT LANGUAGE BE AVOIDED WILL HAVE ITS PRIMARY EFFECT ON THE FORM, RATHER THAN THE CONTENT, OF SERIOUS COMMUNICATION. THERE ARE A FEW, IF ANY, THOUGHTS

THAT CANNOT BE EXPRESSED BY THE USE OF LESS OFFENSIVE LANGUAGE AND WHERE THE JUSTICES BEGIN TO SPLIT IS AT THIS POINT. WHILE THE MAJORITY HAD AGREED THAT THERE SHOULD BE SOME CONTROL, BUT WHEN IT COMES TO SETTING THE AMOUNT OF CONTROL IS WHERE THE DISAGREEMENT ALWAYS BEGINS. EVERYONE ADMITS THAT CARLIN'S MONOLOGUE WAS UNQUESTIONABLY SPEECH WITHIN THE MEANING OF THE FIRST AMENDMENT. BUT WHERE THE COURT CONSIDERS THE CONTEXT OF THE SPEECH, THEY GO BACK AND CITE THE CLASSIC STATEMENT OF JUSTICE HOLMES WHO STATED "THE MOST STRINGENT PROTECTION OF FREE SPEECH WOULD NOT PROTECT A MAN WHO HAD SHOUTED FIRE IN A THEATRE AND CAUSING A PANIC. IT DOES NOT EVEN PROTECT A MAN FROM INJUNCTION AGAINST UTTERING WORDS THAT MAY HAVE ALL THE AFFECT OF FORCE. THE QUESTION IN EVERY CASE IS WHETHER THE WORDS USED ARE USED IN SUCH CIRCUMSTANCES AND ARE OF SUCH A NATURE AS TO CREATE A CLEAR AND PRESENT DANGER THAT THEY WILL BRING ABOUT THE SUBSTANTIVE FIELDS THAT CONGRESS HAS A RIGHT TO PREVENT."

THEREFORE, WE HAVE NOW ARRIVED AT THE POINT WHERE IT DEPENDS ON THE CONTEXT OF THE WORDS AS TO WHETHER OR NOT THEY ARE ACCEPTABLE. THE COURT FURTHER ADMITTED THAT HAD THESE WORDS BEEN IN A POLITICAL NATURE OR PART OF A POLITICAL SPEECH, THAT THEY COULD NOT BE RESTRICTED. THEREFORE, AGAIN HAD GEORGE CARLIN BEEN CAMPAIGNING FOR PUBLIC OFFICE DELIVERING THIS SPEECH, HE WOULD BE FREE TO DO SO. ANOTHER COMPLICATED DISTINCTION.

BOTH THE MAJORITY AND MINORITY CITED THE OPINION OF THE CASE INVOLVING PAUL COHEN. HE WORE A JACKET WITH LARGE LETTER EMBLAZONED ON IT STATING FUCK THE DRAFT. HE TOOK THE JACKET OFF WHEN HE ENTERED THE COURTROOM, FOLDED IT AND PUT IT BACK ON WHEN HE LEFT AND WAS ARRESTED AND PLACED IN JAIL FOR THIRTY DAYS. THERE THE SUPREME COURT OVERTURNED THE CONVICTION STATING THERE WAS NO EVIDENCE THAT ANYONE WAS OFFENDED NOR WAS THERE ANY EVIDENCE THAT ANYONE WHO MIGHT

HAVE BEEN OFFENDED COULD NOT HAVE AVOIDED LOOKING AT HIM. THUS THE VIEWPOINT TO CONSIDER IS WHETHER OR NOT THE OFFENSIVE ACT IS ONE THAT YOU NECESSARILY HAVE TO HEAR OR SEE. IT'S KINDA LIKE THE LITTLE OLD LADY WHO CALLED THE HOUSE DETECTIVE TO HER HOTEL ROOM SAYING THERE WAS A NAKED MAN IN A ROOM ACROSS THE COURTYARD. AFTER THE HOUSE DETECTIVE LOOKED OUT THE WINDOW HE TOLD HER HE DIDN'T SEE ANYONE. SHE ADVISED HIM THAT IF HE STOOD ON THE TRUNK WITH THE BINOCULARS, HE COULD. THUS THERE IS A REAL ISSUE IN WHETHER OR NOT A PERSON IS REALLY EXPOSED TO THE OFFENSIVE WORDS OR CONDUCT. HERE BASICALLY THE COURT SAID THAT DUE TO THE UNIQUELY PREVASIVE PRESENCE IN THE LIVES OF ALL AMERICANS OF THE RADIO, THAT PATENTLY OFFENSIVE INDECENT MATERIAL PRESENTED OVER THE AIRWAVES CONFRONTS THE CITIZEN NOT ONLY IN PUBIC BUT IN THE PRIVACY OF HIS HOME WHERE AN INDIVIDUAL'S RIGHT TO BE LEFT ALONE PLAINLY OUTWEIGHS THE FIRST AMENDMENT RIGHTS TO BE AN INTRUDER. BECAUSE THE BROADCAST AUDIENCE IS CONSTANTLY TUNING IN AND OUT, PRIOR WARNINGS CANNOT COMPLETELY PROTECT A 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 ASSUALT IS RUN AWAY AFTER THE FIRST BLOW. ONE MAY HANG UP ON AN INDECENT PHONE CALL, BUT THAT OPTION DOES NOT GIVE THE CALLER THE CONSTITUTIONAL IMMUNITY TO AVOID A HARM THAT HAS ALREADY TAKEN PLACE.

SECONDLY, AND PERHAPS MORE IMPORTANTLY, FROM THE MAJORITY'S VIEWPOINT, IT IS THAT BROADCASTING IS UNIQUELY ACCESSABLE TO CHILDREN, EVEN ~~THOSE~~ THOSE TOO YOUNG TO READ. ALTHOUGH COHEN'S MESSAGE ON HIS JACKET MAY HAVE BEEN INCOMPREHENSIBLE TO A FIRST GRADER, SPECIFICALLY THIS BROADCAST COULD HAVE ENLARGED ~~THIS~~ A CHILD'S VOCABULARY IN AN INSTANT. OTHER FORMS OF OFFENSIVE EXPRESSION MAY BE WITHHELD FROM THE YOUNG WITHOUT RESTRICTION AND EXPRESSION AT ITS SOURCE. BOOKSTORES AND MOTION PICTURE THEATRES, FOR EXAMPLE, MAY BE PROHIBITED

FROM MAKING INDECENT MATERIAL AVAILABLE TO CHILDREN AND THEY MAY ACCOMPLISH THIS BY SIMPLE WARNINGS BEFORE THE MATERIAL IS DISTRIBUTED OR SHOWN. PERHAPS THE MAJORITY WENT TOO FAR WHEN IT WENT ON TO SAY THAT THIS PARTICULAR ACT BY GEORGE CARLIN WAS DIFFERENT, IT WAS ~~IN~~ NOT A CONVERSATION ~~BETWEEN~~ ON A TWO WAY RADIO, OR ELIZABETHAN PLAY OR COMEDY, OR A CLASSIC LIKE CHAUSER MILLER'S TALE, IMPLYING THAT THIS LANGUAGE MIGHT BE ALL RIGHT FOR CHILDREN IN A DIFFERENT CIRCUMSTANCE. BUT IN CONCLUDUING THE COURT STATED THAT IT WAS A NUISANCE AND QUOTED A PREVIOUS DECISION SAYING THAT THE "NUISANCE MAY BE MERELY A RIGHT THING IN THE WRONG PLACE". "LIKE THE PIG IN THE PARLOR AND WE SIMPLY HOLD THAT THE COMMISSION FINDS THAT THE PIG HAS ENTERED THE PARLOR, THE EXERCISE OF REGULATORY POWER DOES NOT DEPEND UPON PROOF THAT THE PIG IS OBSCENE." SOME OF THE CONCURRING OPINIONS AS INDICATED EARLIER FELT THE COURT OVERSTEPPED ITS BOUNDS IN SAYING IN EFFECT WHICH FIRST AMENDMENT RIGHTS WERE MOST VALUABLE AND HENCE DESERVING MORE PROTECTION AND WHICH WERE LESS VALUABLE IN TRYING TO STATE WHEN AND WHERE SUCH WORDS COULD BE USED. BUT THE MOST DEVISTATING ATTACK ON THE COURT'S MAJORITY OPINION WAS GIVEN BY JUSTICE BRENNAN. HE STARTED HIS OPINION BY SAYING THAT HE FINDS THE COURT'S MISAPPLICATIONS OF THE FUNDAMENTAL FIRST AMENDMENT PRINCIPLE SO PATENT AND ITS ATTEMPT TO IMPOSE ITS NOTIONS OF PROPRIETY OF THE WHOLE OF THE AMERICAN PEOPLE WAS SO MISGUIDED THAT HE WAS UNABLE TO REMAIN SILENT. FIRST, THE MAJORITY MISCONCEIVES AND THE NATURE OF THE PRIVACY INTERESTS INVOLVED WHERE AN INDIVIDUAL VOLUNTARILY CHOOSES TO ADMIT RADIO COMMUNICATIONS TO HIS HOME. SECONDLY, IT IGNORES THE CONSTITUTIONLY PROTECTED INTERESTS OF BOTH THOSE WHO WISH TO TRANSMIT AND THOSE WHO DESIRE TO RECEIVE BROADCASTS THAT MANY, INCLUDING THE FCC AND THIS COURT, MIGHT FIND OFFENSIVE. WHATEVER THE MINIMUM DISCOMFORT SUFFERED BY A LISTENER WHO INADVERTENTLY TUNES INTO A PROGRAM

HE FINDS OFFENSIVE DURING A BRIEF INTERVAL BEFORE HE CAN SIMPLY EXTEND HIS ARM TO SWITCH STATIONS OR CLICK THE OFF BUTTON, IT IS SURELY WORTH THE CANDLE TO PRESERVE THE BROADCASTER'S RIGHT TO SEND AND THE RIGHT OF THOSE INTERESTED TO RECEIVE A MESSAGE ENTITLED TO THE FULL FIRST AMENDMENT PROTECTION. "TO REACH A CONTRARY BALANCE AS DOES THE COURT, IS CLEARLY TO FOLLOW MR. JUSTICE STEPHENS RELIANCE ON ANIMAL METAPHORS "TO BURN THE HOUSE TO ROAST THE PIG."

HE STATED MOST PARENTS WOULD FIND THE COURT'S AND the FCC'S POSITION TO PREVENT OFFENSIVE BROADCASTS FROM REACHING THE EARS OF UNSUPERVISED CHILDREN TO BE COMMENDABLE. WHILE THE COURTS HAVE RECOGNIZED THE GOVERNMENT'S RIGHT TO PROTECT THE CHILDREN FROM OBSCENE MATERIAL, HERE MATERAL WAS FOUND NOT TO BE OBSCENE. SPEECH THAT IS NEITHER OBSCENE, AS TO YOUTHS NOR SUBJECT TO SOME OTHER LEGITIMATE PROSCRIPTION CANNOT BE SUPPRESED SOLELY TO PROTECT THE YOUNG FROM IDEAS OR IMAGES THAT A LEGISLATIVE BODY THINKS IS UNSUITABLE FOR THEM.

IN CONCLUDING THAT THE PRESENCE OF CHILDREN IN THE LISTENING AUDIENCE PROVIDES AN ADEQUATE BASIS FOR THE FCC TO IMPOSE SANCTIONS ON A SPECIFIC BROADCAST OF CARLIN'S MONOLOGUE, THE MAJORITY STRESSED THE TIME HONORED RIGHT OF A PARENT TO RAISE HIS CHILD AS HE SEES FIT, THE RIGHT THIS COURT HAS BEEN VIGILANT TO PROTECT. AS SURPRISING AS IT MAY BE TO OTHER INDIVIDUAL MEMBERS OF THIS COURT, SOME PARENTS MAY ACTUALLY FIND MR. CARLIN'S UNBASHED ATTITUDE TOWARD THE SEVEN DIRTY WORDS HEALTHY AND DEEM IT DESIREABLE TO EXPOSE THEIR CHILDREN TO THE MANNER IN WHICH MR. CARLIN DEFUSES THE TABOOS SURROUNDING THE WORDS. SUCH PARENTS MAY CONSTITUTE A MINORITY OVER THE AMERICAN PUBLIC, BUT THE ABSENCE OF GREAT NUMBERS WILLING TO EXERCISE THE RIGHT TO RAISE THEIR CHILDREN IN THIS FASHION DOES NOT ALTER THE RIGHT'S NATURE OR ITS EXISTENCE. ONLY THE COURT'S REGRETABLE DECISION DOES THAT.

TAKEN TO THE LOGICAL EXTREME, THESE RATIONALS THAT SUPPORT CLEANSING OF THE PUBLIC RADIO OF ANY FOUR-LETTER WORDS REGARDLESS OF THEIR CONTEXT. COULD JUSTIFY BANNING FROM RADIO LITERARY WORKS AND NOVELS, POEMS AND PLAYS BY THE LIKES OF SHAKESPEARE, JOYCE, HEMMINGWAY, BEN JOHNSON, HENRY FIELDING, ROBERT BURNS AND CHAUCER. THEY COULD SUPPORT THE SUPPRESSION OF GOOD DEAL IN POLITICAL SPEECH, SUCH AS THE NIXON TAPES AND THEY COULD EVEN PROVIDE A BASIS FOR IMPOSING SANCTIONS ON THE BROADCAST OF CERTAIN PORTIONS OF THE BIBLE.

QUOTING THE LATE JUSTICE HARLAN IN THE COHEN CASE, BRENNAN WENT ON TO SAY "WE CAN NOT OVERLOOK THE FACT BECAUSE IT IS WELL ILLUSTRATED BY THE EPISODE INVOLVED HERE, THAT MUCH LANGUISTIC EXPRESSIONS SERVES A DUEL COMMUNICATIVE FUNCTION. IT CONVEYS NOT ONLY IDEAS CAPABLE OF RELATIVELY PRECISE, DETACHED EXPLICATION, BUT OTHERWISE INEXPRESSIBLE EMOTIONS AS WELL. IN FACT, WORDS ARE OFTEN CHOSEN AS MUCH FOR THEIR EMOTIVE AS THEIR COGNITIVE FORCE. WE CANNOT SANCTION THE VIEW THAT THE CONSTITUTION, WHILE SOLICITOUS OF THE COGNITIVE CONTENT OF INDIVIDUAL SPEECH, HAS LITTLE OR NO REGARD FOR THAT EMOTIVE FUNCTION WHICH, PRACTICALLY SPEAKING, MAY OFTEN BE THE MORE IMPORTANT ELEMENT OF THE OVERALL MESSAGE SOUGHT TO BE COMMUNICATED." SAYING THAT THOSE WHO WANT TO HEAR OR SEE MR. CARLIN CAN PAY TO GO TO A CONCERT OR BUY A RECORD IGNORES THE FACT THAT THEY MAY NOT BE ABLE TO AFFORD TO EITHER GO TO A CONCERT OR BUY A RECORD. BRENNAN WENT ON TO SAY "I FIND IT DISTURBING, AND STATED FURTHER YET THERE RUNS THROUGHOUT THE OPINIONS MY BROTHERS POWELL AND STEPHENS ANOTHER VEIN I FIND EQUALLY DISTURBING A DISTRESSING INABILITY TO APPRECIATE THAT IN OUR LAND OF CULTURAL PLURALISM THERE ARE MANY WHO THINK, ACT AND TALK DIFFERENTLY FROM THE MEMBERS OF THIS COURT AND WHO DO NOT SHARE THEIR FRAGILE SENSIBILITIES. IT IS ONLY AN ACCUTE ETHNOCENTRIC MYOPIA THAT ENABLES THE COURT TO APPROVE THE CENSORSHIP OF COMMUNICATION

SOLELY BECAUSE OF THE WORDS THEY CONTAIN. "A WORD IS NOT A CRYSTAL, TRANSPARENT AND UNCHANGED, IT IS THE SKIN OF LIVING THOUGHT AND MAY VARY GREATLY IN COLOR AND CONTENT ACCORDING TO THE CIRCUMSTANCES AND THE TIME IN WHICH IT IS USED." "HOLMES" HE ADDED THAT THE GOVERNMENT'S OWN RESEARCH HAS REPORTED IN LANGUAGE IN THE INNTER CITIES: STUDIES IN THE BLACK ENGLISH VERNACULAR (1972) AS STATING THAT WORDS GENERALLY CONSIDERED OBSCENE LIKE BULLSHIT AND FUCK ARE CONSIDERED NEITHER OBSCENE NOR DEROGATORY IN THE BLACK VERNACULAR EXCEPT IN PARTICUALR CONTEXTUAL SITUATIONS AND WHEN USED WITH CERTAIN INTONATIONS. HE CONCLUDED BY SAYING THAT MANY REGARD CARLIN MONOLOGUE AS SILLY AND HARMLESS. HOWEVER, HE DOUBTED THAT THE DECISION OF THE COURT WHILE SILLY WOULD REMAIN HARMLESS. WITHOUT GETTING INTO DETAIL, THE EFFECTS OF THE DECISION COULD BE TREMENDOUS. FOR INSTANCE, COMMERICAL SPEECH. YOU NOTE THAT THE COURT SAYS THAT POLITICAL SPEECH IS PROTECTED THIS MONOLOGUE IS PROTECTED TO SOME DEGREE BUT IS SUBJECT TO SANCTIONS. ANOTHER FORM OF SPEECH CALLED COMMERCIAL SPEECH WHICH WE SEE MORE OF THAN ANY OF THE OTHER ON THE MEDIA, AND THAT IS ADVERTISING PRODUCTS FOR SALE TO THE CONSUMER. THE FEDERAL TRADE COMMISSION IS NOW CONSIDERING ACTION ON ADVERTISEMENTS DIRECT AT CHILDREN FOR PRODUCTS CONTAINING SUGAR OR JUNK FOODS. REGARDLESS OF THE MERIT OR LACK THEREOF FOR SUCH PROPOSAL, WHICH INCLUDES REQUIRING THE THOSE WHO DO ADVERTISE TO PAY IN EFFECT PENALTIES IN CASH WHICH WOULD BE USED FOR COUNTERADVERTISING FAVORING MORE WHOLESOME FOODS, THE FACT IS THAT THIS DECISION TO REGULATE LANGUAGE, OTHER THAN OBSCENE LANGUAGE, AND TO DETERMINE WHEN AND WHERE CERTAIN MATERIAL MAY BE USED CAN BE CITED AS THE AUTHORITY FOR FURTHER RESTRICTIONS ON THE BROADCAST MEDIA.

NOW FOR THE GOOD PART OF THE PAPER. WE TALKED ABOUT ALL THE LEGAL COMPLEXITIES AND CONSTITUTIONAL BARRIERS INVOLVED IN FREE SPEECH. AS I INDICATED TO YOU EARLIER,

PRINTED IN THE SUPREME COURT REPORTER NEXT TO MAJORITY OPINION IS THE COMPLETE TRANSCRIPT OF THE GEORGE CARLIN MONOLOGUE. MR. CARLIN DID NOT CHOOSE TO TALK ABOUT EACH OF THE DIRTY WORDS, BUT DID MAKE A LIGHT OF THEM. FRANKLY, ~~MUCH~~ MOST OF HIS ~~MONOLOGUE~~ WORDS I HAVE FOUND LISTED IN NEW COLLEGIATE VERSION OF WEBSTER'S DICTIONARY AND WITH THE SAME MEANING AS HE ASCRIBES TO THEM.

IN THE MONOLOGUE CARLIN DID NOT DISCUSS IN DETAIL ALL OF THE WORDS AND DIRECTED HIS PRIMARY ATTENTION TO ONLY TWO OF THEM. HE POINTED OUT THAT SOME OF THEM ARE DOUBLE WORDS WHEN SEPARATED ARE ACCEPTABLE STANDING ALONE. MOST OF HIS ATTENTION WAS DIRECTED TO THE COMMON FOUR LETTER WORDS OF SHIT AND FUCK. AS HIS MONOLOGUE DEMONSTRATES THE WORDS WHEN USED ARE SELDOM USED IN A FORM THAT WOULD REFLECT THEIR ORDINARY MEANING.

WE'VE ALL BEEN TAUGHT THAT THE WORD FUCK IS OFFENSIVE. HOWEVER, WHEN LOOKING AT THE ORDINARY MEANING, IS IT ANY LESS OFFENSIVE THAN THE WORD RAPE OR INCEST WHICH ARE PERFECTLY ACCEPTABLE WORDS? CARLIN CONTENDS THAT SHIT IS A WORD THAT THE MIDDLE CLASS HAS NEVER REALLY ACCEPTED OR APPROVED OF, BUT YET THE MIDDLE CLASS IS THE GROUP WHO USES IT MOST. THEY USE IT TO EXPRESS DISAPPOINTMENT, HAPPINESS, FRIGHT, ANGER OR JUST ABOUT ANY OTHER EMOTION YOU CAN THINK OF. THEY ALSO USE IT IN A VARIETY OF OTHER WAYS WHICH ARE REALLY HUMOROUS, AND, IF YOU DESIRE TO SEE A COPY OF THE MONOLOGUE I HAVE IT HERE WITH ME TONIGHT. HOWEVER, IT SEEMS THAT WHILE THE WORDS STANDING ALONG IS UNACCEPTABLE IF YOU PUT HORSE, BULL, COW, RAT, BAT OR SNAKE IN FRONT OF IT, OR OWL, IT BECOMES MORE ACCEPTABLE.

BASICALLY, HE CONCLUDES THAT THIS IS ~~ALSO~~ SILLINESS, WHICH IT IS. AND PERHAPS IF WE PAID LESS ATTENTION TO IT, IT WOULD BE LESS FORBIDDEN AND, THEREFORE, LESS ATTRACTIVE AND OUR GOVERNMENT AGENCIES AND COURTS COULD DEVOTE THEIR ATTENTION TO MORE SIGNIFICANT THINGS.

Feb. 5, 1981

Stephen Underwood
(Read By Curtice Brashear)

INTRODUCTION

The following paper was produced by the writer following an interview with retired Christian Circuit Court Judge, Ira Smith. The conversation and interview with Judge Smith were tape recorded and then transcribed by this writer for use in this paper so as to preserve and not alter the unique qualities of such an experience. The compilation and editing of this paper were undertaken by the writer bearing in mind this object of preservation.

At the request of Judge Smith, the final product is not designed to be biographical in nature and, where possible, a discussion of what might be considered to be politics has been avoided, in keeping with the principles of this Society.

CHANGES I HAVE SEEN IN THE LAW
(By Judge Ira D. Smith, as told
to Stephen E. Underwood, 2/5/81)

Before I was elected to the Circuit Court bench in 1928, I had been practicing law here in Hopkinsville for about eighteen years. I was absent for one year during that period of time due to the First World War. I went to MIT to train up there as part of the Air Force and the Navy and then at Pensacola, USMRA. Well, when I came back from the war, I practiced for awhile but I got interested in politics and went to the legislature in 1922. Although I did accomplish one or two things - I got a little appropriation through for the Jeff Davis monument down there - I didn't care so much for the legislative seat. I did have a right interesting experience, however, while I was in the legislature. The fundamentalist members of the church wanted to pass an anti-evolution law. They said that teachers were teaching evolution - that man started from a monkey - and that wasn't right to them. You have no idea how many people believe that that is wrong. That is, they are fundamental believers and what the Bible says, that the Lord created heaven and earth and man too. Well, anyway, they brought up the bill and I didn't particularly please them too much at that time. That was before that case down in Tennessee. I thought the bill would probably be defeated. Its wrong for the

legislature to tell the schools what they ought to teach, anyway. It got to a narrow vote in the House and there was one representative that hadn't cast his vote. He passed when his name was called. Well, it so happened that I knew this fellow who had passed when his name was called. It so happened that I had been appointed on a contest committee, his seat had been contested by the Republican and we had a hearing. We decided that he ought to have his seat, he was a Democratic and the other fellow was a Republican anyway. I must say, really, the Republican didn't have the right to be in the House because he was a magistrate and had never resigned his job as a magistrate. The law says that if you run for the legislature you have got to resign your job. Well anyway, the vote got so close, gosh I went to him and said - How are you going to vote? He said - I don't know. Well, I said - if you should vote against this bill, it's wrong, it's fundamentally wrong. Well, he said that he would do that and remembered that I had helped him a little bit on this committee and he cast his vote that way. You know what, that bill passed by 1 vote. We had something like Tennessee.

Well, that had repercussions. When I came home, as I say, I decided that I did not want to be in the legislature anymore and it looked to me like it was a good time to consider running for the bench since Judge Bush had been there eight or ten years and he was getting old. Because I had gotten into politics, I had a good many friends and they all persuaded me to run for Judge Bush's job.

Well, I got into the race and it was kind of a three cornered race. Judge Ryan down at Cadiz announced and Judge Bush then announced for re-election. We were all going for the same spot. I've forgotten how many speeches we made, but during the race Judge Bush's health kind of got to worrying him and his doctor advised him not to keep in the race. We were scheduled to meet down at Lynn Grove in Calloway County, one of the four counties in my district, for a debate. I went to the schoolhouse and we really had a big crowd. Just about the time the proceedings had opened up, Herman Southall came in, said that he was representing Judge Bush and that Judge Bush had resigned from the race. Well, all my friends were very happy. But that didn't last too long because then Frank Reeves announced for the race when he heard that

Judge Bush was out of commission and filed within just two days of the deadline. Well, as it turned out I won very nicely in the primary but I wasn't done. Prentice Thomas, who was County Attorney down in Cadiz, a Republican - I've forgotten now just how he happened to be elected, but he announced to run against me. Well you know there are just swarms of Thomas' down in Trigg County and he had a whole lot of kinfolks. His main thing in the race was the fact that I had voted against the evolution law and you know he got out a postcard - I wish I had it, with Smith carrying a monkey in a baby buggy and circulated this postcard all over the district. You can imagine that it was kind of a tactless thing to do, but it got him votes. He carried Trigg County, but I had such a big majority in Calloway County and I think the vote was about even in Christian County, but I won overall by about 3500 votes. Can you imagine, the idea of carrying a printed postcard with my name on it - Smith - and this monkey in the baby buggy?

When I went on the bench, there was no such thing as a probation law in criminal cases at all. Although there was a parole law, I've never believed too much in parole - in the system. I think if a man is sent to the penitentiary he ought to be kept there, but he might be entitled to sometime off of his sentence for good behavior. I don't really think the parole law has worked very well. But now the probation law is a different thing. It is supposed to apply to a young and first offender and it gives them a chance not to have a criminal record against them. A man that is convicted and sent to the penitentiary well, his life is done usually. He can't come back very well under a parole system in my opinion. The parole law has been greatly abused. But they didn't have any probation laws at the time I took the bench and I got sick and tired of sending those defendants to the penitentiary for stealing a $4.00 hog or a $2.00 chicken and making them serve 1, 2 or 3 years. But there was nothing much I could do about it. The jury had convicted him and I had sentence them and I couldn't give them any suspended or probated sentence. It's hard to realize now that that was true, but it was. So I went to work and when Jim Breathitt was Lt. Governor in 1932 or 1933 I think, and along with a great many Judges doing stuff like I did, we had the first probation law. Of course, it

has been greatly amended but it gave us the leeway to give these first offenders, these youngsters that had no criminal instincts, a chance in life - a second chance. I think it has worked out very well, I know it did in my district.

Although people don't think of it now very much, I think there has been another very important change in the law. As you know, for years and years it was the law that when a husband died without a Will the widow received an interest in only one-third of the real estate for life. Well, what usually happened was that the widow didn't know how to run a farm and you had to appoint commissioners of the Court to go out and decide what her dower interest was under the law. As a result, she normally got rid of the farm and normally there weren't many other assets either, so she got a pretty poor deal. Well, another Breathitt came along then, Ned Breathitt, and was elected to the legislature. I got him to introduce a bill and with some modifications it became the present law, that the wife is entitled to one-half of the real estate, absolutely, just like she is entitled to one-half of the personal property. I don't know that people always realize what an important change in the law that this was, but I consider it to be one of the greatest things that was done.

There have been so many changes that I have seen take place. It is hard to realize, but when I went on the bench they were paying Circuit Judges $400.00 a month. You could not earn over $5,000.00 a year and you didn't get any expenses or have any offices or any secretaries. For years and years the constitution limited all state officers to $5,000.00 a year as salary. It is my understanding now that Judges are getting $30 to $35,000.00 a year. I guess I was just born at the wrong time. That reminds me of something I wanted to ask you. How do you lawyers get the right to charge as much as you do? When I started practicing law, I made - well you make as much in a week as I did in a year. Of course, inflation has something to do with it. But lawyers are charging their clients $50 or $100 an hour. I just can't see that. I don't see how you can measure, fix a fee. I think a fee ought to be considered on the seriousness of the person's case and the time that you have used up studying and practicing the case and also consider the value that you absolutely gave to your client. But to just arbitrarily fix a $50 or $100 an hour fee - I just don't see it. You know, it has

gotten so that lawyers are making all the money in the cities - such as corporate lawyers, corporation advisors, bond advisors. But I just bet that some of our lawyers are charging too much too - like the doctors. I think the costs make people afraid to go to a lawyer. Even the corporations have gotten so that they would much rather settle a case then go through the courts because it cost so much. It's just too expensive. I don't think litigation ought to be made so expensive. But of course, I know lawyers have a great many expenses these days that didn't have before. I mean that books cost more, typewriters and gadgets, all those things, prettying up the offices - oh yeah you lawyers are riding high. You've got nice and bigger offices. And I'm sure that your secretaries cost alot also. When I started practicing I think we paid our secretaries about $12.50 a week. I don't know now how they lived on it, but I guess they did. It bothers me that so many lawyers drift to the bigger cities and get associated with large law firms. Take the Louisville firm that was in the news - I understand that they merged and that they got 30 or 40 lawyers working under that firm. Well, when you do that you are destroying the personal intimacy that a lawyer has with his client. I think that meant a great deal in the old days and it makes good sense now.

I also saw changes in the lawyers that would come in front of me as I stayed on the bench through the years. Back in the old days, the lawyers loved to harangue the jury. But as the years passed, they didn't do that so much. It used to be the peoples opinion that a lawyer that couldn't harangue a jury and make a good speech wasn't much of a lawyer and the public used to really come and listen to the cases be tried. The public seemed to enjoy the Courthouse. Take Commonwealth Attorneys, like Dennis Smith and John King, well, they were really ace prosecutors, but now it has gotten so that the Court of Appeals says that that is too much and that they will set the verdict aside because the prosecutor prejudiced the jury. Well, I never could see that. I always thought that a juror had enough sense that although he might be emotionally influenced to a degree, he would still try the case on its facts rather than on just a speech.

As I am sure you realize, you are going through a kind of change in the courts system since this new judicial amendment. Well,

I was for the change. I think it had gotten so that the wheels of justice were running too slow and clogged up with too much delay. The idea of having to wait two years for the Court of Appeals to pass on case is wrong. It appears to me that the people have gotten used to the new Court of Appeals, but I'm not sure that everybody has gotten quite used to the District Courts yet. I hope that it is like a new pair of shoes, in time it will get more comfortable. Our courts system really ought to have been changed, when it was and John Palmore of the Kentucky Supreme Court, deserves alot of credit for what he has done in bringing about the efficient administration of the courts.

I think it is right that the people have always been able to elect there Judges in your State courts. It bothers me that the Judges in the Federal Court system are never voted on. They serve for life on good behavior. I take the position that our United States Supreme Court, with all it's decisions affecting the rights now as they do of so many people, ought to be only a term proposition. I think they ought to serve for eight years, long enough to give them some stability, but I think they ought to be required to go before the people after eight years at an election. These life time Judges - well, back in the old days that might have been alright, but with the power and what they do now, I think that is a change that ought to be made in the law.

In looking back, I have often thought about the death penalty. You know, I sentenced five men to death, every one of them passed on with my conviction on them and they all paid the extreme penalty. I hated to do it, but it wasn't up to me. The jury decided they ought to pay the penalty. I have often thought that that was one reason during my long term of 42 years on the bench, there was not a single lynching in my district. There wasn't a single lynching in my 3rd judicial district. I had some pretty close calls sometimes - we had to protect the prisoners sometimes and sometimes they got transferred out of the County very quickly - but there were not any lynchings. It looks like some people are just willful killers. I was reading the other day about one man who went to the penitentiary three times for murder. He was paroled the first time, paroled the second time and still kept on killing

people. I want to be humane and I believe in human kindness, but when a man shows that he is such a degenerate as to just go out and slay people such as that fellow in Chicago that killed so many nurses all in one night, now what are you going to do with an human animal like that He has got no business circulating in society. Its hard to say, but I would have to be in favor of permitting capital punishment.

Of course, another thing I have seen change has been the large increase in the size of the awards of damages made by jurys. I've read about jurys giving millions of dollars as damages. When I was practicing before I went on the bench, I had hard luck with my verdicts. Just to show you, right before I was Judge, we were trying to sue for the widow of a methodist man who had been confined to Western State Hospital. I don't know whether you might have ever heard about the case or not, but he died out there. Well, instead of notifying his widow of the death, they packed up his body and shipped it to a medical school in Louisville for research. When the widow found out about it, she immediately wanted to claim the body. So the medical school up there said alright and they preserved it for her and shipped it back. So they put it in a casket and it came from some town down here in Western Kentucky, I've forgotten which, but when they opened the casket it was a redheaded boy and you can imagine that that created a whole lot of commotion. Well, the widow lived in Henderson and she employed this attorney over there and they came to see us and we filed suit against the hospital, medical school and against the fellow that was the superintendent at the hospital. We tried the case out and you can imagine that it had some ramifications. The jury returned the verdict here in Christian County of $18,000.00. That was one of the biggest verdicts ever made in this County. Well Judge Bush was on the bench and that looked to big for him so he set it aside as being excessive. Of course, it wouldn't be excessive now. So we had to try it again and the next time we tried it we got a verdict of $10,000.00, but for some reason they left out the superintendent - the jury left out the superintendent and simply made the Judgment against the hospital and the medical school. Well Seldon Trimble's father was representing the other side. And I was about to get worried about the case. It went to the Court of Appeals, we had an oral argument and they reversed it. They said that Christian County did not have jurisdiction. The hospital

actually belonged to the State and the medical school in Louisville, which was not a State institution, had the right to be sued in the County where it was located and that technicality lost the case. I remember that I wanted to settle the case after the first verdict, but my friend in Henderson was so elated about the verdict, the widow was too, that they wouldn't talk about settling it. Mr. Trimble realized it too, that it was a dangerous case and he was willing to pay some more, but wouldn't everyone agree. Well, I guess that shows you some of the changes. Not just because of that particular old case, but I have always had the opinion that the doctrine of soverign immunity has been too strictly applied in the law. Its just not logical to say that the government, now that it is involved in so many things, in every day life, cannot be held responsible for damages that they cause. I guess this is slowly changing somewhat, as it should, but it seems to me that its still being applied too strictly. There is one final thing that I would like to comment on although it is not necessarily a change that I have seen, it is a change that I hear is being suggested and I don't think it is a good idea. I've read that the Chief Justice of the United States Supreme Court has advocated that some types of cases should not be decided by a jury, but being decided instead by only the Judge, whether the parties agree to that or not. That's a very bothersome idea. I think that the jury system ought to never be done away with. Like so many things, it could stand to be improved, but it should never be done away with. Neither is it right to keep a jury more than a week at a time. I don't like this Federal business of keeping a Federal Grand Jury for 12 to 18 months simply looking for something to indict an official on or something. The jury can't possibly see enough or memorize enough evidence in that period of time to make a fair decision and I think it is wrong to take up so much time. But of course that increases the lawyers fees, doesn't it? Maybe that's the reason they want to charge $50 an hour.

I guess I may think of something else, but I think you could put together a pretty interesting paper on the changes in the law since I have been Judge based on what we have talked about. You know that I served as Circuit Judge longer than any Circuit Judge ever in the history of Kentucky. Although they didn't allow me much money, the

people have been mighty good to me and I'm glad I had the durability to go ahead and serve.

Respectfully submitted,

STEPHEN E. UNDERWOOD