

casting isolated instances of expletives or brief nudity could lead to punishment. 18 U.S.C. § 1464 bans the broadcast of “any obscene, indecent, or profane language,” but the FCC had a long-standing policy that it would not consider “fleeting” instances of indecency to be actionable, and had confirmed such a policy by issuance of an industry guidance. The policy was not announced until after the instances at issue in this case (two concerned isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable as indecent.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.<sup>1039</sup> For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied.<sup>1040</sup> Thus, in *Palmer v. City of Euclid*,<sup>1041</sup> an ordinance punishing “suspicious persons” defined as “[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself” was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio, was engaging in conduct which could not reasonably be anticipated as fitting within the “without any visible or lawful business” portion of the ordinance’s definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.<sup>1042</sup> Thus, a Chicago ordinance that required police to disperse all persons in the company of “criminal street gang members” while in a public place with “no apparent purpose,” failed to meet the “requirement that a legislature establish minimal guidelines to govern law en-

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<sup>1039</sup> Where the terms of a vague statute do not threaten a constitutionally protected right, and where the conduct at issue in a particular case is clearly proscribed, then a due process challenge is unlikely to be successful. Where the conduct in question is at the margins of the meaning of an unclear statute, however, it will be struck down as applied. *E.g.*, *United States v. National Dairy Corp.*, 372 U.S. 29 (1963).

<sup>1040</sup> *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 494–95 (1982).

<sup>1041</sup> 402 U.S. 544 (1971).

<sup>1042</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).