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Panel on the Indecency Standard and Regulation of and by the Media

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Panelists: Irving Gastfreund, Esq.^b

Professor Carlton Long^c

Robert W. Peters, Esq.^d

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DEAN SMALL: I want to begin by saying that I believe in truth in reporting. After all, I used to work for NBC News as V.P. That, of course, was before pickup trucks from General Motors. I say that because the advance notice to this meeting listed me as a former president of CBS, a position that I have never held. But now you know more about me than anyone other than my wife and children, and so we can proceed with this program.

It's a great pleasure to be invited to come over from the Business School and be with you at the Law School, even though clearly the only reason they wanted me is that the topic is dirty words. But we'll do what we can.

The heart of the matter involves the indecency standard and relates to, as lawyers would say, 18 U.S.C. § 1464.¹ Basically, this is a rule that provides criminal penalties for anyone "who utters

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1. 18 U.S.C. § 1464 (1988).

obscene, indecent or profane language by means of radio communication."² Later, of course, [the statute was interpreted] to include television as well.

The [Federal Communications Commission or "Commission" or] "FCC" has defined indecency as "language [or material] that describes in terms patently offensive, as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs,"³ to which one might observe no excrement. Think about that for a moment.

The United States Court of Appeals [for the D.C. Circuit] then got into the question of the FCC's authority to restrict the time that indecent material could be broadcast.⁴ As you'll see, one of our speakers believes there shouldn't be any time limit. But in *Action for Children's Television v. FCC*, the ruling was that [the Commission must] provide a period, late at night, in which presumably children would not be listening so there would be this blanket, this haven of safety.⁵

More recently, in December of last year, a week before Christmas, a Christmas present was given to Howard Stern—a name unfamiliar, I'm sure, to everyone in this room. Mr. Stern's radio broadcaster, Infinity Broadcasting, was fined \$600,000 for airing indecent material on twelve separate days.⁶ I presume this means that the Commission did not listen on all fourteen days during that two week period. In any case, the ruling is presently under appeal.

In January of this year, a few weeks later, San Francisco Century Broadcasting was similarly fined for airing indecent material on

2. *Id.*

3. Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 8358 (1989); Infinity Broadcasting Corp., 2 F.C.C.R. 2705 (1987).

4. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *see also* *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

5. 852 F.2d at 1344.

6. Federal Communications Commission Order No. 92-555 (Released Dec. 18, 1992) (unpublished document, text available in Westlaw) [hereinafter FCC Order No. 92-555].

something called "The Rick Chase Show,"⁷—I don't know who the hell he is at all, but I'm sure he had a mouth which they found offensive.

In fact, even universities are not safe. SUNY, up in Cortland, New York, has a radio station. An afternoon indecent broadcast caused the FCC to request comments on whether they could [air their broadcast during the mid-afternoon] time period when children might be listening, rather than the "safe harbor hours," late at night.

Finally, in the Cable [Television] Consumer Protection [and Competition] Act of 1992,⁸ the cable industry was given the right, in effect, to block or censor material on cable access channels that it felt was indecent.⁹

We have with us a number of people who know a lot more than I do about the legal aspects of [indecent and the indecent standard].

* * *

It's with great pleasure that I present Irving Gastfreund to make the first remarks of this afternoon.

MR. GASTFREUND: It's always a challenge for me to try to address a group about something as definitive, concrete and as easily understood as the Federal Communications Commission's standard for assessing what is and what isn't indecent. Certainly, we all think we know what is and what isn't indecent—the problem is in articulating it so someone else can accept the same standard.

The FCC standard for indecent has not been a static one. Going back to the now famous George Carlin "Seven Dirty Words" case, *FCC v. Pacifica Foundation*,¹⁰ the FCC decided that there was, in that case, a deliberate repetitive onslaught of indecent language, akin to verbal shock treatment. [The case involved a] repet-

7. Liability of San Francisco Century Broadcasting, 8 F.C.C.R. 498 (1993).

8. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) [hereinafter 1992 Cable Act].

9. *Id.* § 10, 106 Stat. at 1486.

10. 438 U.S. 726 (1978), *rev'g*, 556 F.2d 9 (D.C. Cir.), *rev'g*, 56 F.C.C.2d 94 (1977).

itive use of expletives [over the radio airwaves on a weekday afternoon]. On that basis, the FCC originally found that the indecency standard of 18 U.S.C. § 1464 had been violated.¹¹ The case went all the way through the Court of Appeals for the D.C. Circuit and went to the Supreme Court.¹² The indecency standard was one which the Court never actually addressed specifically—that is, whether the Commission's definition of the term "indecent" was, on its face, unconstitutionally vague. You'll see a lot of FCC decisions that have come up since then that keep referring—almost as a self-evident truth—that the Commission's "indecency standard" has survived scrutiny. That's not quite true.

In fact, in the *Action for Children's Television* case, the Court of Appeals for the D.C. Circuit referred to this little quirk and made clear that the Supreme Court did not specifically rule on the issue of whether the FCC's definition of "indecency" was on its face unconstitutionally vague.¹³ The Supreme Court in *Pacifica* merely implied that it was passing on the constitutional validity of the indecency standard, but it really didn't. The Court basically seemed to hold, very narrowly, that the standard for indecency applied to that repetitive "shock treatment" barrage of expletives that was contained in the Carlin monologue [in *Pacifica*].¹⁴ What has happened since then, however, is that the Commission has expanded [the definition of] indecency and has now brought us to the point where so many things are encompassed within it that it isn't really clear what is and what is not proscribed speech.

Here are a couple of examples. Let's start with the Howard Stern case—very familiar. By the way, just as an aside, before Howard Stern came to New York to become famous he was in Washington and worked on a station that our firm had the pleasure of representing. It was always a challenge for the licensee of the station to make Howard keep in line with its policies. But the real

11. 56 F.C.C.2d at 99.

12. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), *rev'g*, 556 F.2d 9 (D.C. Cir. 1977).

13. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988); *see also Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

14. 438 U.S. 726.

problem had less to do with Howard and more to do with trying to figure out what the FCC meant by "indecent" material. The indecency standard evolved, and now "The Howard Stern Show," as was just mentioned, has generated a record \$600,000 FCC fine. It's inescapable that this fine was designed to send a message. And what a message it sent! We hear a lot in First Amendment cases about the so-called "chilling effect." That record-setting FCC fine certainly was intended to chill constitutionally protected speech.

The real problem, however, is that the Commission is on a very, very shaky foundation in assessing the fine it levied on the grounds that it did. Part of the basis for that \$600,000 fine was the Commission's view that the licensee of the stations in question, Infinity Broadcasting, had basically ignored the FCC's warnings about indecency and because it decided to broadcast Howard's material once again—in light of prior rulings by the FCC that other material previously broadcast during "The Howard Stern Show" was indecent—this somehow justified an increased fine.¹⁵ The FCC, by the way, used the same kind of jackhammer approach recently in connection with Evergreen Broadcasting, which now has its own problems in connection with WLUP in Chicago.¹⁶ Again, the FCC's approach seems to be that if it fines you at one point for violating the indecency standard, it can bang you again over the head with an even increased fine the next time you're found to have violated the indecency standard.

One little problem with that, however, is § 504(c) of the Communications Act.¹⁷ Under § 504(c), there is a procedural problem

15. FCC Order No. 92-555, *supra* note 6.

16. Federal Communications Commission Letter 93-97 (Released Feb. 25, 1993) (unpublished document, text available on Westlaw) [hereinafter FCC Letter 93-97].

17. Communications Act of 1934, 47 U.S.C. § 504(c) (1988). The section provides: Use of notice of apparent liability. In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

Id.

with the Commission using against a station in the indecency enforcement proceeding the fact that the FCC has previously ruled on an indecency matter against the station's licensee. Under this section, such a fact cannot be used against a licensee to its prejudice unless (a) the licensee has paid the fine or (b) the licensee has not paid the fine, has been sued by the government in court for collection of its fine, and the court of competent jurisdiction has ordered payment and that order has become final.

The way the FCC forfeiture system works—the FCC will issue what's called a Notice of Apparent Liability. The station licensee has the opportunity to respond to that. In a Notice of Apparent Liability, the FCC is basically saying [it] thinks you violated a particular rule or policy. The licensee then comes in with a response. The FCC assesses the response and then may issue an Order of Forfeiture—that is the agency's last word on the matter. A licensee can ask for reconsideration or it can ask for remission of the forfeiture, but basically, the Order of Forfeiture is the last word of the agency.

Under existing law, a licensee cannot appeal that Order to the U.S. Court of Appeals the way it could any other final Commission decision. The reason it can't is that the licensee has an alternate remedy available. The remedy is that the licensee can sit tight and do nothing and wait for the FCC to go to the Justice Department to attempt to persuade the Justice Department to institute a suit for collection. Under § 504(a) of the Communications Act, such a suit is a trial *de novo* in the U.S. District Court in the district where the licensee has its principal place of business. Trial *de novo* means that the facts, as adjudicated by the FCC, are not just on review; rather, the government has to try the whole case from scratch. Only following such a trial *de novo* can you have an order being issued by the judge commanding the licensee to pay the FCC fine. When that order becomes a final order is when the fact of the decision can be used against the licensee under § 504(c) of the Communications Act.

Clearly, the Commission is abusing its powers by using the fact that it had previously ruled that there had been a violation of the indecency standard to justify these ever increasing fines in connection with the broadcasts of "The Howard Stern Show." By the way, that § 504(c) issue is now the subject of a lawsuit. A case called *Action for Children's Television v. FCC* is now on file in the U.S. District Court for the District of Columbia. It was filed on February 24, 1993. A broad ranging coalition of groups, including the ACLU, INTV, Fox Television, National Association of Broadcasters and others, have filed suit seeking, among other things, injunctive relief, claiming that the statutory forfeiture mechanism, as enforced by the FCC in connection with indecency fines, is unconstitutional as applied.

The suit raises the § 504(c) issue, and the plaintiffs claim that the Commission is abusing its powers by prematurely holding against the licensee the fact that the agency decided in prior cases that the licensee had violated the indecency standard. Secondly, the claim is made in the suit that the real purpose behind these monetary forfeitures is to send shockwaves through the broadcast industry to chill constitutionally protected speech. The real problem here is that these cases take years to wind their way through the FCC and the courts, and there is no mechanism for prompt judicial review. The plaintiffs claim that, since this is an area that is very sensitive from a First Amendment standpoint, what is constitutionally required is a prompt judicial review mechanism that is now being denied. Therefore, an injunction is being sought to prevent any further indecency fines from being issued.

Let me get away from Howard Stern for a moment and get to some other pragmatic problems that are faced in the indecency enforcement area. I've represented a number of broadcast stations that have been in the bore-sight of the FCC's guns on indecency, and believe me, it is not a simple situation to be in. One such station was a station in Cleveland that was not running "shock jock" programming like Howard Stern is allegedly [running]—they were running an ordinary AM news talk format. One of the station's talk show hosts was a gentleman by the name of Gary Dee, who in fact had some experience here at WMCA in New York for

a number of years. Gary Dee ran a straightforward, run-of-the-mill talk show program. During one of his broadcasts, there was a break for news, and during the newscast a wire-service story was read by the newscaster that was an actual story about a man who was living in the suburbs of Milwaukee who had an unfortunate accident. Apparently, he was mowing his lawn and his power mower developed a jam. While the motor was still running he put it up on blocks and foolishly got underneath the mower while it was still running. The blocks fell, and he was pinned underneath the mower and apparently it severed his penis. Someone called the paramedics, and, according to the wire-service story, in order to keep the flow of blood through the organ, they opened an incision in his arm and attached the penis to his arm until they could get him to the hospital.

The station came back from the break in the news and went into the call-in segment, and you can well imagine that the calls that came in had something to say about this news story. This was a legitimate news story. It was on the UPI wire-service. Some of the callers started making certain joking comments about the situation. The FCC got a complaint and issued a Notice of Apparent Liability and found, in its Notice of Apparent Liability, that the material in question was indecent.¹⁸ We filed a response—a pretty lengthy response—showing why (a) the material wasn't indecent under the standards articulated by the FCC, (b) in any event, this was legitimate news coverage and, in context, it couldn't be found indecent because of the news context in which the broadcast occurred, and (c) the fact that some of the call-in remarks were humorous shouldn't penalize the station for carrying this kind of material.

The FCC never really did get around to ruling on the matter for quite some time. Unfortunately for this particular station, the licensee of the station entered into an agreement to sell the station to a new purchaser. The assignment of license application was pending at the FCC while the indecency complaint was pending. The FCC refused to take action on the sale—on the application for

18. *Independent Group Ltd. Partnership*, 6 F.C.C.R. 3711 (1990).

consent to the sale—until it ruled on the indecency complaint. But yet, it wouldn't rule on that either. It was really wielding a club. And we said to the FCC, "Look, fine us. Do whatever you want. Forget the response we filed. We'll withdraw it. Just hit us with your maximum fine. Let us go home. Let us get this sale through." The agency still wouldn't act on it. It really took the threat of us going to court with some mandamus action in order to get the fine imposed and to get action on the assignment application to allow the sale to go through. Ultimately, we essentially consented to the fine. The real concern that the FCC had, it appeared to us, was that it really just did not want us to go to court on the issue.

There were a number of other things that I'll get into later, but these are some of the pragmatic problems with the indecency standard that I face as a lawyer representing a broadcaster and that face a broadcaster who is seriously trying to do his or her job in complying with the indecency standard. It can't work because the indecency standard, as applied by the FCC, is as vague as shifting quicksand.

DEAN SMALL: Let me introduce our next speaker who is Robert W. Peters, sitting to my left.

* * *

MR. PETERS: I'm here this afternoon representing the view of Congress, the President and the Supreme Court that the regulation of indecency in the broadcast medium is constitutional. I assume that we will soon see whether Congress, the President, and the Supreme Court agree about regulation of indecency on cable TV leased-access channels.

My first point is that I and Morality in Media very much believe both in public education and moral and economic persuasion, i.e., non-legal means to address the problem of indecency in the media. We try to communicate with industry executives, we have a turn-off-TV day, we try to communicate with advertisers, and occasionally we support a boycott against advertisers. I would add that the media does know how to "self-censor." It does so with racism and anti-semitism and homophobia and misogyny. It really

does. It may make some mistakes and it may let some programs through that offend some, but on the whole it doesn't have a pattern of doing these things. It really can and does exercise self-restraint when it wants to. But when it comes to gratuitous sex, vulgarity and violence, it seems to be suddenly blind.

My second point is that the law is needed as a protection against the lawless. I will state boldly that just as moral and economic persuasion will never stop the traffic in illegal drugs or obscenity, it, I fear, will not alone curb the entertainment media's assault on the core values of decency and civility. I wish things were different. I truly do.

I was recently preparing a rewrite of a fundraising proposal for our organization. I initially felt that the old proposal may have unfairly blurred the lines between the world of pornography and the entertainment media. But as I worked on this fundraising proposal, I came to the conclusion that it is not so easy to draw a clear line between the world of pornography and the world of entertainment media.

I would add that Morality in Media supports a twenty-four hour ban on hardcore indecent broadcast material and believes that the same standards that apply to over-the-air TV should apply to cable TV.

I next turn to three common arguments against the broadcast indecency law. Specifically, the first is that it violates the First Amendment. The simplest answer to that is that in a 1978 case, *FCC v. Pacifica Foundation*, the Supreme Court upheld the broadcast indecency law.¹⁹ In doing so, the Court pointed out that there were two unique characteristics of the broadcast media that had relevance to the indecency problem. The first being that the broadcast media has established a pervasive presence in the lives of all Americans, including adults. The Court went on to say that the broadcast medium confronts citizens in the privacy of the home, as well as in public, and that because the broadcast audience is constantly tuning in and out, it really is impossible to protect people

19. 438 U.S. 726 (1978).

by advance warning.²⁰ It's just an impossibility.

To illustrate this point, our senior editor, Betty Wein, subscribes to Manhattan Cable and recently happened to be flipping her TV dial at about 11:00 p.m. In the middle of her channel survey, she ran into an erect male penis on the leased-access channel where no regulation of indecency is, at least at this moment in time, permitted. That will hopefully soon change.

As to whether this caused her severe psychological harm, I don't know, but the Supreme Court will soon address the question, at least in the area of sexual harassment, as to whether such harm is necessary before adults can seek redress.²¹ Now my honest opinion, and I'm certainly no expert in the area of sexual harassment, is that the Supreme Court is going to say no, you don't have to show some severe, deep psychological harm to prove sexual harassment. I may be wrong, but that's my prediction. If I'm right, I would make the point that what holds true in the workplace ought to hold true in the living room.

[In *Pacifica*], the Court went on to say that the second characteristic about the broadcast medium that justifies special treatment of indecent material is that it's "uniquely accessible to children"²² and that the only way to protect children is to restrict the medium at its source.

A second argument against the broadcast indecency law that's often heard in the press is that it's censorship. In the case of *Near v. Minnesota*,²³ I think the Supreme Court went to great lengths to say that really the primary and overriding concern on the subject of censorship is previous restraint by government. The broadcast indecency law is punishment after the fact. I would add that the *Near* Court went on to say that this preliminary freedom to lay before the public what you want includes the false and the true.

20. *Id.* at 748-49.

21. *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992) (unpublished opinion, text available on Westlaw), *cert. granted*, 61 U.S.L.W. 3511 (U.S. Mar. 1, 1993) (No. 92-1168).

22. 438 U.S. at 727.

23. 283 U.S. 687 (1931).

But the Court then went on to say that the common-law rules that punish the libeler have not been abolished. I would expect that if the *Near* Court were sitting today it would have also mentioned the false advertiser. I would add that it did note that the primary requirements of decency may be enforced against obscene publications.

A third excuse against the broadcast indecency law is that it's "vague." Our first speaker stated that the Supreme Court really didn't decide that issue in *Pacifica*. The word vagueness, as I recall, does come into the [*Pacifica*] opinion, but in the context of an overbreadth argument. But I will say that the Court of Appeals for the District of Columbia Circuit [in *Action for Children's Television*] refused to buy the argument that the definition was vague because they felt that the Supreme Court had addressed the issue and that it was not at liberty to do so.²⁴

I would add, one of my favorite statements in the obscenity law area is in the case of *Jacobellis v. Ohio*,²⁵ where the former Mr. Chief Justice Warren, dissenting from a reversal of an obscenity case, stated a principle on obscenity that I believe has a great deal of application to indecent broadcast. He said, "No government . . . should be forced to choose between repressing all material, [sexual material,] including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this area" of law as in others.²⁶

I would just mention libel, incitement and sexual harassment as other areas of law where there are some very difficult questions that people have to ask or answer in terms of what is protected and permissible and what isn't. Some of you may have seen a March 2nd article in the *New York Post* that I thought did a good job of showing how difficult it can be to determine what constitutes sexual harassment on the job. Does that mean we should permit any abusive expression on a job?

Turning to a pragmatic approach—I'm coming down to my last

24. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988).

25. 378 U.S. 184 (1964).

26. *Id.* at 200.

point and then conclusion—the television in today's world is really an electromagnetic public access thoroughfare. We say at *Morality in Media* that just as a citizen should be able to walk down the street and not have to turn his or her eyes to avoid an offensive display of nudity or hard-core sex, or have to shield his or her children's eyes from these things, so a citizen should be able to come home from work, at whatever time of day or night, turn the television on and not be exposed to the same sort of thing in one's living room. Those of you who read the New York City press perhaps caught the flasher case recently. I think it was at the beginning of February when some man was exposing himself to Catholic school girls. A police officer dressed up in a Catholic school girl outfit, and they caught the rascal. Well, I say that what goes for a public street, again, should go for a living room.

For those who find patently offensive, indecent material to be entertaining or educational, there are appropriate mediums or places where they can listen to or view such material without stinking up the living rooms of the tens of millions of Americans who find such material offensive—and without corrupting children and youth too immature to know the difference between a nutritious meal or snack and garbage.

I conclude with a little personal story. I played football in college and after the end of double sessions in my junior year there was a tradition of a cookout. The seniors in my junior year gave out awards at that cookout. I received a "Bricklayer" award. To my knowledge, it's the only Bricklayer award ever given out in Dartmouth College football history and it was awarded to me because I had the filthiest mouth on the team. Over the years, I learned something from that experience. The Supreme Court, I think, also learned it, because in the "Seven Dirty Words" case it made the following statement: "A requirement that indecent language be avoided will have its primary affect on the form rather than the content of communication. There are few, if any, thoughts that cannot be expressed by use of less offensive language."²⁷ I close with a fact I gleaned from the Supreme Court's 1986 *Bethel*

27. *FCC v. Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978).

School District case. I'm relying on former Chief Justice Burger, who pointed out that the Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the United States House of Representatives, "provides that '[n]o person is to use indecent language against the proceedings of the House.'"²⁸

The high purposes of the First Amendment have not suffered because of that rule. The broadcast indecency law, enacted in 1927²⁹ and upheld by the Supreme Court,³⁰ also does not strike at the high purposes of the First Amendment.

DEAN SMALL: Our next speaker is Judith Phillips.

* * *

Judith, tell us what a network does to keep clear of Mr. Peters's ire.

MS. PHILLIPS: The opinions, I have to say, since this is a law school, are my own, not those of my company. I'm talking about today and my observations.

Besides conforming to all applicable governmental agencies, ABC does have a series of company policies, as far as commercial clearance is concerned, which are divided into product categories. I even brought it to show you. It's thick, okay?

We review commercials from script or storyboard through the final stages, sometimes looking at rough cuts in the process. A rough cut is like a negative. Before airing, a commercial must conform to our policies. Our review process can entail many things from approval (because there's absolutely nothing in the commercial) to requesting substantiation for claims made to ensure that claims are true, requiring the finished spot be in good taste,

28. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting Thomas Jefferson, *MANUAL OF PARLIAMENTARY PRACTICE* §§ 359-60, reprinted in *MANUAL AND RULES OF HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 271, 97th Cong., 2d Sess. 158-159 (1982)).

29. Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1172 (1927). The Radio Act's prohibition of any "obscene, indecent or profane" broadcast was later modified and incorporated into modern legislation through the enactment of 18 U.S.C. § 1464. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (detailed history of the earlier statute).

30. *Pacifica*, 438 U.S. 726 (upholding 18 U.S.C. § 1464 (1976)).

disallowing unfair disparagement and negative stereotyping, ensuring proper sponsor identification, and ensuring that the commercial does not depict unsafe behavior. With the exception of theatricals, which are an entity in themselves, I don't have too much of a problem personally with taste issues in my commercials. At times I have to caution the advertiser on the brevity of a bikini when an overzealous copywriter has gone a little overboard on a storyboard. But the bottom line, I find, is that advertisers want to sell their product. They don't want to offend their potential consumers. When you're dealing with network advertising, you are dealing with the broadest spectrum of peoples. Therefore, I find they mostly come down on a rather conservative side.

At ABC, for theatrical advertising and advertising for our own programming which is called promotion, they have the same standards regarding violence and good taste. For instance, we do not show a closeup of a gun pointed at or firing directly into a camera. We pay special attention to interpersonal violence and violence which involves people who look like you and me. Our perception is that the Rambos and the Terminators are viewed as cartoon, larger-than-life characters, and are less likely to be cause for emulation or fear. We do not show a gun pointed by one actor at another actor's head or neck. You will always, on ABC, and this is in programming too, see a gun pointed below that area, or you'll see a shot of the gun, then you'll see a shot of the person. We make a distinction between the blowing up of an inanimate object and a human being. What we attempt to do is to allow the advertiser to reflect accurately the content of the movie, while at the same time conform to what we consider suitable for television viewing.

Some of the above also applies to "One Life to Live," where we also preclude gratuitous profanity, the showing of blood squibs or excessive bleeding, and the impact of a bullet or another weapon on camera. Very often you'll see the "bang" and you'll see the guy go "UGH," but you don't see the bullet go in. And we also do not allow the slow motion technique which we feel underscores the violence of the act. The Department of Broadcast Standards also ensures that proper balance is given to all sides of a question

or an issue. Propaganda can be a potent force, especially couched in entertainment, and it should not go unexamined.

We have to deal frequently with love scenes on a soap opera, and these are very carefully choreographed. On ABC, we restrict nudity, impressions of actual intercourse, couples atop each other in the act of lovemaking, revealing costuming, people between each others legs, and the like. When I go on the set of "One Life to Live" very often the crew read me my report, because they think it's very funny.

On a daily basis it is the editor who must determine what is or is not acceptable for airing. And often this comes down to a gut reaction. If it makes me uncomfortable, it's probably going to do the same to you. And if I'm wrong I know immediately, because the phone begins to ring.

One instance that comes to mind is what we affectionately in the department call the "diaper doo-doo debacle." This was a spot for diapers which was initially turned down due to what the editor considered to be an overly graphic description of diaper content. It eventually aired, after much hubbub and pressure, and the phones lit up. The commercial was never seen again, anywhere. Some of the complaints that I receive personally are from people who don't object to what is being aired but they object to the time frame. For instance, a viewer does not feel that an advertisement for a particular movie should be scheduled in a particular program. I have had mostly women call me, just for your information. They seem to be reasonable and they allow me to express my rationale for my decision and we chat. The one man who called me this year just yelled at me. So I didn't have a chance to say anything.

I have a unique perspective in this area in that I did exactly the same job during the Sixties and then I left to raise a family, returning in 1988. I remember we couldn't say the word "broad," when referencing women on television in those days. Now we can call women almost anything. And I guess that's what they mean when they say, "we've come a long way." Times have changed, but it's basically the same public who decides what will be tolerated. It's what the market will bear. It's a combination, in my mind, of checks and balances and "Catch-22."

Network television is supported by advertising, which in turn is supported by the viewer. Viewer expectation plays a large part in the decision I make every day. If television offends the viewer, the advertiser gets tarred with the same brush. If the viewer turns a show off, the advertiser cannot convey his message and no one is happy. On the other hand, if the viewer is not watching a show, for whatever reason, the advertiser does not want to buy the show, and it eventually gets canceled.

I don't think, personally, people realize just how much power they have. Viewers have kept cancelled shows on the air. They have caused shows not to be repeated because they have made such an outcry on the first airing. They have caused advertisers to exert pressure on programming. They are the ultimate "standards and practices" editors. If reasonable people are genuinely concerned with decency on television, they should make themselves heard. I suggested that we stop scheduling commercials which had slightly scary undertones on "Good Morning America" on the basis of four telephone calls—not from fanatics, who had their own personal agenda, but from reasonable, articulate people who related how these commercials caused them problems. We do not air those commercials anymore on that program.

Some seem to believe that network TV, if it is to survive at all, will undergo radical change, including the removal of a standards department. They also said when videos and cable came along that no one would watch movies which are edited on network TV. Yet, they do. I think living in a urban, sophisticated environment we tend to forget that there are people who would like to see a good action movie without the original sex, violence and language. Certainly our ratings say this is so.

I asked a big shot producer if he thought American network TV would someday have frontal nudity, et cetera, et cetera, and he said he thought the Catholics were too powerful to ever allow that. (I thought being here at Fordham you might be interested in that.) I asked another programming person and he thought the days of the censor, which is of course what we're called even though that's not what we are, were coming to a close. Yet, when another network tried to get rid of their censors not too long ago the newspapers

said the outcry was such that many were hired back. Many creative advertisers and clients, as well as viewers, want the existence of such a department. They seem to expect that from a network. While I disagree emphatically that we should substitute for poor parenting, I think we do play an essential role—one I hope will not cease to exist.

DEAN SMALL: Our final speaker is a political scientist, Carlton Long. Professor Long is with us today, in part, because he had the interesting assignment of being an expert witness in the case of *Skywalker Records v. Navarro*³¹ and testified on the content of the 2 Live Crew's recording, "Nasty As They Want To Be."

MR. LONG: I'm really delighted to be able to be here. Before I get into the substance of my talk, there are just a couple of remarks I feel pressed to make. One of them is that I sat here listening to the various talks and I began to think about the many ideas that I want to share with you from the vantage point of political science and social science and various other tangential aspects of my own professional training. One of the questions I had to ask myself was: "How will I relate some of my ideas to a group full of lawyers?" I thought perhaps I should start by saying, some of my best friends are lawyers—and I have worked with several in the shaping of the defense for 2 Live Crew. The other question which I raised in my mind—with a great deal of kindness in the sense of being colleagues, although not altogether arguing from the same angle—is that I had to ask myself whether it was merely a coincidence that I was seated immediately to the left of Mr. Peters. I think that some of that will be borne out through my discussion, which I'm happy to share with you.

I took for my own topic the notion of regulation of speech in general. That is, the aspects of First Amendment protections that I've been involved with have dealt not explicitly with the notion of an indecency standard, but really the standard for obscenity which is remarkably similar, as I'm sure many of you know, through your

31. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd*, *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

own review of *Miller v. California*.³² [The standards] sound remarkably similar in terms of patent offensiveness, and community standards, and things of that sort. They apply, certainly, to issues that I was concerned with [for the 2 Live Crew defense] which did not deal explicitly with the media. And yet, I believe there is enough overlap in terms of what I attempted to do and what people here are discussing that I should begin by sharing with you some of my own political perspectives in terms of how I began to get involved in this issue as well as some of my own thoughts—specifically on the more narrow discussion of the regulation of speech in general. So, for my purposes, I've outlined five points simply to hit upon briefly.

One is to discuss the unexamined bias in the concept of the regulation of speech as well as the implications of some of the biases that are entailed in examples of bias or bias regulatory actions as they impacted upon the case in which I was involved—specifically, those dealing with 2 Live Crew. Also, I want to touch upon, briefly, issues that are commonly missed as a result of the imbalance of power that exists around the regulators and those who are, essentially, regulated. Finally, I want to submit some of my own reflections on how we might begin to think, not simply as lawyers but as concerned citizens, about how we can move even beyond a First Amendment defense of speech.

How did I come into this arena? In the Spring of 1990 I was involved in politics, actually, in City Hall working for elected officials. One of my colleagues was Robert Perry who ran, for a while, the New York University Law Clinic. He was involved in shaping the defense of a case dealing with 2 Live Crew, the group which was at that time largely unknown. Because of my own background, not only in political science, but particularly in foreign language, anthropology and literature, I was asked by attorney Perry to consider being perhaps an expert witness for a case which was occurring in Alabama, the Tommy Hammond case, which he was sure would come to trial. I knew nothing, like most Americans in the Spring of 1990, about 2 Live Crew. I was asked—I

32. 413 U.S. 15 (1973).

was given, really—the modest task of trying to understand them. I was given, essentially, a tape—a copy of “Move Somethin’” by 2 Live Crew—and asked to spend the weekend listening to it and thinking about ways to construct a First Amendment defense. I had never heard anything by the group, and I said, “Well, of course, fine,” and I took the tape home. That tape was called “Move Somethin’,” and was the foundation of the legal case.

It was more than a mild shock, that weekend, as I listened to the tape and began to ask myself: “How can I get out of this?” In all honesty, after having been completely blown away by the lyrics and the content of the tape, I began to ask myself whether there were more complex issues here or more socially important phenomena that were at work in terms of what was going on—the political dynamic, in terms of free speech. I believed then that there were, and I’m even more certain now, that there were other social and political phenomena that needed to be examined in terms of the regulation of that speech. I will touch upon that later in my discussion.

I should also point out that, as many of you will recall, 1990 was a high tide of censorship action in the United States with regard to the arts. There was much discussion and much written about it on the covers of *Time* and *Newsweek*, etc.—issues of art, art versus obscenity, and when is that line crossed. Certain topics for the discussion included not only 2 Live Crew, but the art of Jose Serrano, of Robert Mapplethorpe, of Karen Finley, and there were even opaque references to *The Last Temptation of Christ*. Yet, in a personal way and in something of an intellectual way, I began to try to synthesize my own ideas about free speech more effectively into my own ideology. Much of this eventually culminated in the work that I now do at Columbia. One of the courses I teach is the politics of censorship.

I would like, then, to start here by examining some of the bias in the regulation of speech that I noted in the defense for 2 Live Crew. I won’t go through the details of all of our defense, although they were elaborate—with a great deal of references in terms of politics, in terms of culture, in terms of sociology, in terms of language theory—and there was no dearth of diagrams

that we took into the courtroom. I think when we look at the regulation of speech it's important to note how Americans very often work from rather flawed assumptions about the collectivity and universalism of our assessment of speech. That is, there is a very strong tendency to introduce complex issues under a broad and purportedly all inclusive banner. One such assumption is the notion [that indecency] standards either do or should exist across the board without fine or subtle distinctions between groups.

That is, for example, the issues of controversy surrounding Mapplethorpe, Serrano, Finley, and 2 Live Crew were all subsumed under the banner of free speech—they were all essentially free speech issues or First Amendment issues. To be certain, on one level that is clearly, from a legal standpoint, a vital and a valid starting point. But if we look more closely, say from a social scientific point of view, we can begin to see certain distinctions which throw themselves into relief with regard to each of the individual persons and groups that were besieged with regard to free expression. The Mapplethorpe issues clearly were operating under some veil of intolerance towards homosexuality. The 2 Live Crew issues clearly smacked of other issues which were tangential—involving race, involving social class, involving perceptions of the youth and our perceptions of youth culture. And with regard to Karen Finley, there are certainly issues, not only of sexism, but a certain degree of concern about how avant garde art is valued.

Yes, they are free speech issues, but we need to ask ourselves—I often argue as a social scientist—what else is going on here? One of the best examples of this problem came to my mind in 1990. I was rather upset by an article that appeared in the *Washington Post* by our second lady, Tipper Gore, "Hate, Rape and Rap."³³ One of Tipper Gore's central arguments was that something terrible had gone wrong in our collective consciousness and in our communal language. How is it, she asked, that since the 1960s we've put away all of those bad words and those terribly offensive slogans, how is it that we have come to a point where individuals are now managing to go forward and deigning to use

33. Tipper Gore, *Hate, Rape and Rap*, WASH. POST, Jan. 8, 1990, at A15.

language which is so offensive—so offensive from a linguistic and dogmatic point of view unacceptable?

Well, there is a lot of discussion and I'm sure maybe some of you have even read in *The New York Times* in recent weeks some of the discussion about the use of the term "nigger" that was the foundation for Tipper Gore's arguments. One of the things that I attempted to discuss was how there are groups that operate within a certain kind of shared linguistic culture and, in fact, one of the things I said in a more popular way amongst my friends was, "Is nothing sacred?" In my personal circles my response was, "Is nothing sacred?" Now I have a white woman telling me I can't use the word nigger. But what was even more—which was actually deeper than that—was the sense that there were groups which have always used languages. I mean, you can look at examples now in which words—such as "Queer Nation" for instance—how words are inverted and are taken by a group which has experienced its own oppression over time and create a new meaning by taking the very words that were used in an oppressive way. My argument was, had Tipper Gore done her homework—in terms of understanding black culture—one of the things she would have realized is that since the days of slavery the word nigger has been used in certain circles in black communities since that time—and have not ceased to be used. The difference is that it has played itself out very largely across social class lines. If you are familiar with blues and jazz you may find in many of the early blues recordings language would be deemed largely offensive which also includes such words as nigger. And yet when you look at jazz, which is considered much more highbrow aspect of musical culture for African-Americans, that's just not the case. There are others who have written about this and we've submitted some of their works. Lawrence Levine, [who wrote] *Black Culture and Black Consciousness*,³⁴ is an example. There are all sorts of complex issues involved with the history of language and the political aspects of that—ways in which groups have used language in order to further their own

34. LAWRENCE W. LEVINE, *BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM* (1977).

liberation struggles. These are things which I touched upon but which time simply does not permit me to go through here.

The main point, I think, to extract from Tipper Gore and that particular article is a sense that it's very easy to project meaning into words from the vantage point of power and from the vantage point of the regulator. One needs also to ask how is it that certain individuals gained the positions to be regulators of speech. How is it, for instance, that the Parent Music Resource Center managed to get such national attention and managed to get Senate hearings when many other groups which were starting out in the 1980s did not gain the kind of national attention that they did? A hint, I would submit to you, is that two of the women who founded it, have the last names of Baker and Gore, in Washington, D.C.

What are some of the implications of this in terms of the ways in which language may be misunderstood? One is that those who exercise power and control can, despite their noblest intentions, apply standards to speech that are not relevant, in that because of the epistemological limitations of the observer [or] censor, go largely unseen. A large part of the theoretical construct that I made—and which we, I should add, prevailed in all of the three cases that went to trial with regard to 2 Live Crew—is that there are very often shared communications between groups and that there are intended audiences in terms of speech. Then there are those whom we labeled simply eavesdroppers. There are also ways of attempting to decode language which can and cannot be touched upon, depending on the willingness of the listener and the ability of the listener to get under the language and into the culture and into the origins of the speech.

I think one of the most salient examples of how language can be misconstrued or taken out of context is the specter that we had of Nina Tottenberg reading the lyrics—reading the lyrics, I should underscore—of 2 Live Crew on national public radio. If we know anything about the coloring of words, the subtlety of words, the inflection, the tonality; if we know anything about the sounds that actually imbue words with meaning, the fact that we would have someone simply reading lyrics in a very distilled way to an audience would give us pause to consider what is the total meaning that

is intended and what is essentially being extracted.

We also spoke of the difficulties of dealing with language in terms of the meaning of words not having one objective meaning, but having meanings which can also be subject to the projections of the listener. One of the salient examples is of Churchill and F.D.R., which some of you may have read about in history. One of their conferences in which the salient issue dealing with the alliance came up and the two heads of state were speaking about central issues facing the West. The response from Churchill was, "We're going, let's table this issue." F.D.R. had a great deal of intolerance with the notion that this issue should be tabled. F.D.R. considered the issue to be of vital importance to national security and he said there's no reason to table this. Well, if you know anything about British society, to "table" something is to put it at the absolute top of the agenda as opposed to, in the United States, where we table things by tossing them out. So we've had two individuals speaking essentially the same language but coming to the words with completely different codes such that they meant exactly polar opposite ideas in terms of what they were extracting and, in that sense, what the words tended to represent.

One of the things we attempted to do and I think we did successfully in the defense for 2 Live Crew—and again my job was to deal specifically with the lyrics in the context of all these other things—[was to] point out to the judges and to the jury that there are ways in which individuals can feel either close to language, or they can feel alienated from language based on their own social construction. But there are ways in which individuals may feel hostile to, or receptive to, language based on their age, based on their experience, based on their personal dogma about language, which may be steeped in religion or in family culture. There are the issues of race and ethnicity, sex and gender—which is not to argue that there is a certain determinism, that is, that all blacks are going to like 2 Live Crew. That's a very easy argument to refute, and we heard that on television a lot. You hear a lot of blacks saying, "Well, I'm black and I think it's disgusting"—which is a perfectly acceptable claim because it's not arguable, at least, it was not in our case, that this was representative of black culture. Rath-

er, this was representative of a particular sociological culture—individuals existing in a certain environment with certain cues which were immediately understood by those who shared their language. Persons such as a PMRC and other regulators attempting to regulate that speech were essentially not getting at the real meaning. That was not because it was absolutely impossible for them to do so, but because they had not equipped themselves by doing the work to understand the sociological underpinnings of that language exchange.

There are [also] issues of socioeconomic class and life experience which would make some of the lyrics and the music of 2 Live Crew simply sound humorous or non-threatening to individuals. There were other examples, but I won't go into those.

Finally, I would simply say that there is a great challenge to us who are at all concerned with the issues of free speech, not simply to look at these issues as cut and dried issues of First Amendment or simply slippery-slope arguments—that very often there are all sorts of subtle nuances that exist which have a great deal to do with who is targeted, why that individual is targeted, and sometimes the action of regulators may have nothing to do with something that is particularly conscious, but may be something which is quite pre-conscious, and which is something that individual is responding to. But I think that our challenge would be to get them to begin to unpack that and to see why it is that a 2 Live Crew makes them feel particularly uncomfortable. I think there are myriad sociological and political reasons and historical reasons as to why this is the case for some people.

Finally, I would leave them with the question that I often ask other observers of free speech issues to pose. That is, to ask themselves, as people often did in the 1960s, where is it that they're coming from? That is, from where is it that this language is coming, what is the origin of the language, and, am I really hearing what I think I'm hearing? Because very often what the intended audience gets is very different from what the eavesdroppers get.

DEAN SMALL: Okay, panel, you have taken us all over the place. There's a great variety and diversity of subjects you've raised. Let me ask a couple of questions of you and then I'll open

it to our audience. Let me begin with Bob Peters and then, Irv Gastfreund, I'd like your reaction.

You startled me when you quoted *Near v. Minnesota*.³⁵ *Near* is, indeed, the classic case in prior censorship. As you know, it involved the father of Irving Shapiro, the retired chairman of DuPont. When he was a boy in Minneapolis, his father had a dry cleaning establishment and he was approached by some goons who wanted him to pay protection money. When he refused they threw acid over the clothes and they beat him up. The media in Minnesota ignored the subject except for J. M. Near, who published a scurrilous sheet. Fred Friendly wrote a book about it called *Minnesota Rag*.³⁶ It was a sheet that was anti-black, anti-semitic, anti-homosexual, anti-women, and anti-establishment—in terms of the legal officials in the State. Minnesota tried to suppress the distribution of that paper.

But Bob, I would contend that the content of what *Near* published each week is exactly the kind of thing that *Morality in Media* opposes. And yet you're citing that case in support of your argument.

MR. PETERS: Well, the *Near* case, for example, mentioned a newspaper publishing times of departure of troop ships at a time of war.³⁷ I presume that neither you nor I would agree that there is such a right. There were a number of categories of speech that the *Near* Court talked about. We can all be thankful that the decision was in favor of the newspaper. But the Court wanted to make it very clear that while we do have freedom of press, it's not an unlimited one—libel being one of the key examples of what can be punished after publication. There are a lot of parallels between obscenity law and the law of libel. It's very difficult sometimes to know what you can say, and where, and about whom. Does that mean that we should do away with the law of libel? I say no.

35. 283 U.S. 697 (1931).

36. FRED W. FRIENDLY, *MINNESOTA RAG: THE DRAMATIC STORY OF THE LAND-MARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS* (1981).

37. 283 U.S. at 716.

There are also questions, difficult ones, in obscenity or indecency. Does that mean that we should allow the pornographers to take over the world? Again, I say no. Perhaps a majority of you say yes. But what about the workplace? I'm sure most women would be very concerned about graphic depictions of sex being thrust in their face on a job. Yet while many of you would agree that there should be some regulation of this type of expression in the workplace, when it comes to TV, some of you will stand up and say that regulation will destroy the First Amendment. I say that's nonsense. I think the Court [in *Near*] was trying to draw some distinctions. One of the distinctions that it drew was that the primary, if not exclusive, concern regarding censorship, was prior government restraint, not punishment after the fact.

DEAN SMALL: Mr. Gastfreund.

MR. GASTFREUND: Well, I find those comments intriguing because I sense that sometimes we don't have a unitary standard that's a guiding analysis in this area. For example, one of the cases I've been working on is one that's gotten some notoriety lately. It involves the question of whether a broadcaster has, or should have, the discretion to decide to broadcast a candidate's political announcement during hours when there's a reasonable risk of children being in the audience when that announcement contains graphic, shocking, bloodied images of aborted fetuses. Should that broadcaster be given the discretion to say: "No, I'm not going to broadcast it during those hours? I will broadcast it, but during later evening hours."

Intriguingly, in the last election there were a number of instances where candidates running on an anti-abortion platform have attempted to seek airtime for broadcast of just those types of spots and to have them broadcast during hours when children are very likely to be in the audience. In fact, in one particular case, the candidate wanted one of the spots run during Saturday morning cartoon shows. The purpose was very clear: They wanted it done for shock value. I represented the coalition of broadcast stations that went to the FCC with a request for a declaratory ruling, asking that broadcasters be given the discretion to channel those types of graphic spots to later hours. The argument that we based it on was

that broadcasters should have the discretion, in reviewing that kind of spot, to take the position that spots that show graphic, bloodied depictions of dead fetuses constitute excretory material and that fits four-square within the FCC's standard of indecency. We received, you might imagine, a not-surprising amount of resistance from some candidates that wanted to have those types of spots aired during hours when children were likely to be in the audience.

Interestingly, the FCC Mass Media Bureau initially took the view that these spots were not indecent.³⁸ We appealed to the full FCC, and that case is still pending before the agency after it solicited public comment.³⁹ The last word hasn't been written yet, but it's impossible to reconcile the staff's ruling that these kinds of spots are not indecent with other rulings from the FCC involving the FCC definition of indecency under 18 U.S.C. § 1464. You just can't reconcile it side by side with other FCC rulings in the indecency area where, for example, the FCC has fined stations, including those that I've represented, for broadcasting material that is mere innuendo and double entendre.

I represent a station in Washington, where Howard Stern got his start, WWDC-FM. The person who took Howard Stern's place at that station is a gentleman by the name of Doug Tracht, better known as the "Grease Man," who is now being heard in New York. He is currently the subject of an indecency complaint that was filed against WWDC-FM. What was it that he broadcast that was so horrible? He broadcast some stories that were humorous that contained some double entendre and innuendo. He used the terms, "whaling away," "shangri-la," and several others. In fact, the references were so veiled that unless you really understood what he was talking about, there was no way that a child of tender years, or for that matter an adult, would have been able to listen to that story and understand that there was any veiled sexual reference.

It is hard to reconcile that ruling, on the one hand, with the

38. Federal Communications Commission Public Notice 92-486, Mass Media Docket No. 92-254 (Released Oct. 30, 1992) (unpublished document, text available on Westlaw).

39. *Id.*

ruling on the abortion spots, on the other—both of them deal with the same statutory benchmark: indecency. Why is it that veiled innuendo and double entendre are indecent in the WWDC-FM context and yet shocking, graphic depictions of aborted, bloody fetuses are not? According to the FCC, the linchpin for regulation of indecency has been the need for protection of impressionable young children. And if that's the benchmark, how can you reconcile rulings? And I'm very curious to hear Bob Peters remarks concerning that.

DEAN SMALL: Well, that's the next subject I'm going to raise—and the last—I'll tell those of you who are raising your hands now. There is a single thread that's running through this, among many varicolored threads; it is the question that Irv has just raised. Mr. Gastfreund is talking about children and exposure to the anti-abortion commercials, which indeed are graphic. The opponent to Senator Moynihan in this state ran on such a program—the question was raised about funds for a candidate who would basically use the candidacy as a platform—a single issue candidate. However, as you well know, that law is meant to protect political speech and broadcasters, unless you're successful in your appeal, cannot censor any political speech.

But let's address the question of children. You have all raised it in different ways. Judith Phillips talks about running promos in a time frame when children might be watching. 'Carlton Long tells us about Tipper Gore who basically is concerned about recordings that might be offensive to children—that has been her rationale. Indeed, Bob Peters wants an extension so that the so-called "safe harbor" no longer exists and material offensive to children's ears is never heard on the air.

So what I'd like to do, and brevity would be welcome despite this long introduction, is begin with Professor Long and just ask each of you to comment on the question, should we have separate standards, aware that children might be listening at certain times of day?

MR. LONG: I have no difficulty with a difference of standards with regard to presenting information for children. What I was more deeply concerned with, and something that has bothered me

for awhile, has been the role, the actual role, of parenting with relationship to the dissemination of the information. I have more difficulty with the idea of the government acting alone and whether it should be involved in regulating this material or disseminating it.

DEAN SMALL: But there is the argument that the parents have no control. It comes on the air. You don't know it's coming. The child's in the room. Whether it's 2 Live Crew or whatever. Here's language that might be offensive to the parent in terms of the child.

MR. LONG: Well, I think that speaks to the way in which we parent. That's one of the central criticisms I've had of the PMRC, even from their video, which was disseminated across the nation to local PTAs. I believe the video begins by saying, you know, your children are always exposed to music. They wake up in the morning, and then they show the radio going off and the children being exposed to these things. The underlying message that I saw from there was that in no moment did I see a parent sitting down with a child who was being exposed to this music. I understand that we all have different jobs and things of that sort. I'll just use one personal example quickly. I have been involved with raising a nephew who is a teenager. He was very much interested in what I was doing and, when I was doing my research on 2 Live Crew, in listening to my tapes. My response was, you can listen to my tapes. You're going to sit here with me and listen [to] them. Then I would like to talk with you about the way that you view sex, power, and relationships [between] men [and] women, which I believe are the underpinnings of all these things. And I believe that effective parenting is more the answer to a lot of this problem rather than simply arguing that there needs to be intense control from the government.

DEAN SMALL: Bob Peters.

MR. PETERS: On your question, my first point is that the only Supreme Court case on the subject of indecent broadcast is the

Pacifica case.⁴⁰ In *Pacifica*, both Justice Stevens's plurality opinion and the concurring opinion recognized the interest of adults. Now whether the Supreme Court is going to overturn or ignore that part of its decision may yet remain to be seen. We do not view its refusal to hear the case, *Action for Children's Television v. FCC*,⁴¹ as a decision on the merits. So the last word we have is that adults do have an interest when it comes to broadcasting decency.

A second quick point is that Morality in Media has always maintained that time of day is a factor in whether something is indecent, and that something that might be indecent at 2:00 p.m. may not be indecent at 2:00 a.m. Perhaps the abortion ad would be such an example. However, there are some things that are indecent at any time of day.

DEAN SMALL: Isn't what you just said in conflict with your desire to have the indecency rulings apply at all times?

MR. LONG: Well, I did say that I think some things—for example, depictions of hard-core sex in a movie—might genuinely, taken as a whole, have serious value. However, because a movie taken as a whole has serious value doesn't mean that people should be able to show that movie at any time of day if it contains a ten-minute scene where people are copulating, and having oral sex, and sadomasochistic abuse, and urinating on each other for fun. That's our view. But there are some things that I think time of day makes a difference. Perhaps it's because the youngest children are no longer up—that is a factor. I suspect the fetal ad might really do damage to a very small child—I don't know. I think some of the violence that is shown also does damage.

But we are not totally against expanding the definition of indecency to include such things as cannibalism—"patently offensive" depictions thereof. I would say that in regard to decapitation and maiming, these are two of the standard results of abortions. So maybe we'll cut our own throat on the right-to-life issue, but we recognize that chopping up human beings and showing them, and

40. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

41. *F.2d 1504* (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

perhaps one day in our progress of human race we'll eat fetal tissue. That's a lot to look forward to.

DEAN SMALL: Mr. Gastfreund.

MR. GASTFREUND: Well, obviously the one thing that my petition emphasized to the FCC was that we were not arguing in favor of any expansion of the FCC definition of indecency. We were saying that whatever the definition is, Commission, you've made your bed, so sleep in it. This [political advertisement] falls within that definition. So that's point one.

Point two. The situation with indecency is a difficult one because, as you know, the Supreme Court, in *Sable Communications, Inc. v. FCC*,⁴² has made very clear that you can't use children as the lowest common denominator and thereby deny access to adults to constitutionally protected programming that others might view as objectionable. The reality of the indecency standard is that it is vague. It is vague even if the statute, as Mr. Peters assumes it has been, has been found to be constitutionally valid on its face. The real problem is that in implementing that presumptively valid statute, the Commission has acted in a manner which is unconstitutional because in implementing that statute it has acted in an unconstitutionally vague pattern. That is, the statute, as implemented throughout these various decisions that I've alluded to, is so difficult to understand that people of common intelligence necessarily have to guess at what is proscribed conduct and what is not.

That is the difficulty that I face in representing broadcasters who really are trying seriously to comply with the law. The problem is: how do I guide them in telling them what the law is and what it isn't? That is the problem that I think is just not faced by the standard that Mr. Peters espouses.

DEAN SMALL: Yes.

MS. PHILLIPS: The largest section in this [commercial clearance policies] book is devoted to children's advertising. It also includes children's programming. Certain hours are set aside by CapCities/ABC devoted strictly to children. The biggest difference

42. 492 U.S. 115 (1989).

in the advertising we accept for children, for instance, is that it is oral [and not textual], while often for advertising directed at adults, we will accept visual “supers” and disclaimers. The ages of the children that our programming is directed towards is two to eleven. Many of them do not read. We take care of that by having everything spoken instead of written. But we set aside time for the children and there is a great deal of care taken.

My biggest frustration as an editor is many of the phone calls that I get are from mothers who say, my eight-year-old was watching “Roseanne” and I don’t think that you should have advertised that R-rated movie cause it scared her. And my question back to her is, when am I supposed to advertise it? I have to pick a time—and granted it has to be arbitrary—but if I wait until 11:00 p.m., most adults are going to bed, because many of us work, men and women both now. There has to be a time that we have to set aside for what we consider adult programming. I suggested one time to a woman that maybe she might want to put her daughter to bed instead of having her watch “Roseanne” because it really wasn’t a suitable program for her. She didn’t like that very much.

DEAN SMALL: Neither did Roseanne. Okay, we’ll take questions from the audience.

MR. GASTFREUND: May I just interject one final thought on this?

DEAN SMALL: Of course.

MR. GASTFREUND: And that is to respond to the last two comments. The linchpin of decency regulation has always been the protection of children. The intriguing point is that, to my knowledge, there has not been one study yet that has demonstrated that children are likely to be psychologically harmed by exposure to radio broadcasts that contain sexually-oriented material. By the way, that conclusion is now contained in a submission that Infinity Broadcasting has recently made to the FCC in connection with the Howard Stern appeal. The Infinity submission contains the analyses of three noted psychologists who have reviewed all of the literature and the psychological studies in question. And their conclusion is that the studies just don’t support the underlying premise,

children are likely to be psychologically harmed by exposure to the Howard Stern Show or radio shows like it. If that's in fact true, it raises grave questions about the entire validity of the regulatory process relating to indecency.

DEAN SMALL: Okay. Questions?

MR. PETERS: Just two comments. There are studies that indicate that pornography and the entertainment media have a negative impact on kids. I would also say that growing up in the Fifties and Sixties was much more sane, particularly for young people. Things have changed a lot. I don't think that change is primarily the fault of the parents. I think public schools are part of the problem, but the primary influence on youth that has changed since I grew up is the media. In terms of studies, although I would dispute that there is no psychological evidence, I think one reason why there is a dearth of evidence on the impact of media sex on youth is because it's not politically correct to study that. It is politically correct to study the impact of violence on children and youth. Liberals and conservatives can agree on that. But it is not politically correct for liberals to study the impact of graphic descriptions and depictions of illicit, promiscuous, perverse sex on kids, so there aren't many studies on it. That's my own theory.

Obviously kids aren't just going out and committing crimes. They are also getting pregnant in unprecedented numbers and spreading disease. They're learning something that when I was a kid in the Fifties and Sixties, most didn't learn when we were in grade school and high school. So it has to be coming from some place. I don't think that the churches as yet are teaching this type of behavior. So who's teaching the kids this if it's not the records, the movies and TV? Where else would they be getting it in this mass media culture in which we live?

DEAN SMALL: I suggest if you have a question raise your hand fast.

AUDIENCE MEMBER: Okay, before I ask a question I just want to make a comment. I'm surprised that psychology is being treated as some type of measure of morality. They seem to me two fairly different questions. My question is in two parts, but they're

related. The FCC has power to regulate indecent material to keep it from minors. First, do the states have this power aside from the federal power? And, are there any instances of that? The related question is, has indecent speech regulation been recognized outside of the FCC-regulated areas of radio, television and telephone?

MR. GASTFREUND: I guess I could try to respond to that. The federal regulations on indecency are not preemptive. Nor can you assume that any time the federal government acts that there is an attempt to preempt state regulation. Similarly the fact that there are federal statutes that prohibit obscenity doesn't—

AUDIENCE MEMBER: That wasn't really the question.

MR. GASTFREUND: Yes, I must have misunderstood.

AUDIENCE MEMBER: The question was that until the "Seven Dirty Words" case there was no such thing as indecent speech. There was obscene speech and the rest of speech. The rest being protected by the First Amendment. Then this indecency category came into being. So far I've only seen it in terms of FCC regulation, with the FCC having this extra ability to regulate the airwaves because of scarcity. Has this indecency approach to speech regulation been recognized anywhere, state or federal, outside of the FCC's sphere of activity?

MR. PETERS: My quick answer to that is that if you look at the history of indecency regulation you'll find that it started before the advent of the movies and TV. It had to do with real life behavior in public places. But to me there is little difference between that and showing it in my or your living room. Not too long ago, I went over to the law library and looked up old cases on indecency. It's interesting. It started with real life behavior. Today they take pictures of it and say it's okay to show it anywhere, even in everybody's living room.

AUDIENCE MEMBER: I want to steer this back to my question one last time.

MR. PETERS: One other point that I'd like to make is that if you look at the history of the decency law it never was aimed at protecting only children.

AUDIENCE MEMBER: Okay, one last time.

MR. PETERS: It is aimed at protecting all of society.

AUDIENCE MEMBER: One last time. To go with the Supreme Court's distinction between speech and acts, you're talking about restriction of indecency behavior as some type of precedent for the FCC indecent speech regulation. I'm inquiring specifically about indecent speech regulation, not indecent behavior regulation.

MR. GASTFREUND: Again, to try to answer your question. There may very well be state statutes that try to get at this. I know that there have been state statutes that get at indecency in other media, for example, cable. There has been litigation in the federal courts in Utah, for example, because Utah's tried on a number of occasions, and also certain municipalities in Utah, to pass indecency statutes, if you will, regulating the content of cable television.⁴³ Those statutes were found unconstitutional for a variety of reasons.⁴⁴ But yes, there have been efforts made. I'm not aware, sitting here, of any specific situations where similar attempts have been made and have been found valid in connection with broadcast media. But there's certainly no preemption.

As to your second question regarding the other media that are subject to indecency-type analysis, cable strikes me as the obvious one. In fact, in the cable television provisions of the Communications Act [of 1934], which by the way very recently has been amended through the 1992 Cable Act, there is now a entire section that deals with regulation of indecency on leased-access cable channels.⁴⁵ Particularly, cable operators are now given the authority, the discretion if you will, to adopt their own policy to prohibit indecent material on leased-access channels. Even if they decide on their own not to adopt such a policy, if there is to be indecent programming on a leased-cable access channel, the cable operator has to channel it into a blocked channel that can only be received

43. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985).

44. *Id.* at 1109. The district court held that the Utah cable statute was fatally overbroad because it impinged on constitutionally protected areas of free speech and because it failed to follow the three-prong test for obscene speech regulation enunciated by the Supreme Court in *Miller v. California*, 415 U.S. 15 (1973).

45. 1992 Cable Act, *supra* note 8, § 10, 106 Stat. at 1486 (amending 47 U.S.C. § 532 (1984)).

if the subscriber requests it affirmatively and if the subscriber is over the age of eighteen. All of that indecent programming has to be channeled or funneled into one or more such blocked channels. Those rules, by the way, are now on appeal as to their constitutionality. So the answer is yes, the indecency standard can be applied to other media.

DEAN SMALL: Let me give you a specific case in terms of your first question. The State of Alabama has laws regulating indecent and profane material, including that on bumper stickers. It led to one of my favorite cases, and if there are any tender ears in the audience, I warn you I will cite language that you would not print in public. A truck driver named Baker was arrested or threatened with arrest because he had a bumper sticker on his truck that said, "How's my driving? Call 1-800-EAT-SHIT."⁴⁶ The local Alabama Department of Public Safety told him that was unacceptable under the law. He offered to make changes and they said the word "CRAP" as a substitute was unacceptable and so was "DOO DOO"—which means, of course, that George Bush could not speak freely in the State of Alabama. He took them to court and those of you northerners in the room will say, well we know how that came out. You're wrong. The court ruled in his favor.

Another question.

AUDIENCE MEMBER: Yes, a question for Ms. Phillips. What is the standard today at ABC with regard to the portrayal in prime-time programming of the use of condoms by teenagers or adolescents?

MS. PHILLIPS: California deals with prime-time programming. I can only tell you that for the daytime soap operas which are aired on the east coast, or aired nationwide, but done on the east coast, we do not permit teenagers to have sex on—you have to be over eighteen to have intercourse on ABC.

DEAN SMALL: What are the enforcement procedures that you use?

MS. PHILLIPS: I had one character on a soap opera once and

46. *Baker v. Glover*, 776 F. Supp. 1511 (M.D. Ala. 1991).

he went from being a freshman in college to being a graduate in about three weeks. But they do that anyway. Any person who's spent any time watching soap operas knows that Jane has a baby on Monday and he's going off to boarding school on Wednesday. Soap operas have that kind of theatrical license, but we do not.

DEAN SMALL: But you don't know what the rule is with regard to prime-time?

MS. PHILLIPS: Well, I'm pretty sure primetime is the same.

DEAN SMALL: Is it?

MS. PHILLIPS: They really frown on underage young people engaging in sex, actual sex.

DEAN SMALL: So the Age of Chancellor Fernandez would not be portrayed as the Age of Enlightenment with regard to the distribution of condoms in schools, for example.

MS. PHILLIPS: Well, remember we're a network, and there's a lot that Fernandez did that would not fly in Dubuque. That's what we have—we have to look at what's going on.

DEAN SMALL: But it would be on your newscast?

MS. PHILLIPS: Well, news does not come under my department, nor does sports. Although, I had a very funny thing happen to me in the sixties. Roone Arledge, who is a wonderful sports-caster, revolutionized the broadcasting of sports. He came to ABC and developed a camera called the "creepy-peepy" because it could go anywhere, which it did. I used to have to watch the commercials on sporting events. I went in and they took the microphone into the huddle and I was sitting up in the screening room being rather bored. The quarterback suddenly looked up and he said, okay guys, let's go kick the "f'ing s." out of that other team. I went <speaker bangs table> and I had about one minute to get it out of California, but it went to the rest of the [country].

DEAN SMALL: There's a question on this side. Yes?

AUDIENCE MEMBER: This is for Mr. Gastfreund. In the 1992 amendments to the Cable Act, the more stringent provisions on indecency are for leased-access channels. What's the distinction? Why are they making more stringent rules for the leased-

access channels as opposed to the other cable channels?

MR. GASTFREUND: Well, that's a very good question. That's one of the arguments that a number of the commenting parties made in trying to challenge the constitutionality of the rules. I guess the argument really applied to the Act, because this is the way the Act was structured. Let's be candid about it: the agency is hardly in a position to challenge the constitutionality of the congressional amendments to the Act. But the argument was that the Act was unconstitutional because it was underinclusive. That is, in focusing attention on indecency just on the leased-access channels, and I guess also on the PEG channels—the public, educational, governmental channels—[the Act] discriminated between indecency on those channels and similar material, that might very well be deemed indecent, that was on other cable channels.

For example, R-rated movies of a certain type might be shown with impunity, if you will, on HBO, Showtime, Cinemax, the traditional cable channels. The argument is, why is that permissible without requiring blockage and requiring the subscriber to put a request in writing in advance to get the programming and certify that he's over the age of eighteen? Yet, you have to do that and you have to funnel it all through these blocked channels when you're dealing with access channels. The FCC's response to that has been that there's really no constitutional infirmity because of underinclusiveness.⁴⁷ The only thing that really is of concern here, according to the FCC, is the issue of content discrimination by the government. That's based on the *R.A.V. v. City of St. Paul*⁴⁸ case that came out of the Supreme Court last term, where the Court basically held that even in proscribing otherwise unprotected speech, the government is not in a position to engage in content discrimination. As long as the content discrimination isn't being engaged in, the Commission reasoned, the fact that there was underinclusiveness in the statute really didn't mean anything from

47. Federal Communications Commission Report & Order 93-72, Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Mass Media Docket No. 92-258 (Released Feb. 3, 1993) (unpublished document, text available on Westlaw) [hereinafter FCC Report & Order 93-72].

48. 112 S. Ct. 2538 (1992).

a constitutional standpoint. Furthermore, Congress, according to the FCC analysis, was capable of focusing attention on certain aspects of a problem without necessarily dealing with the entire landscape.⁴⁹ That issue is now on appeal because those cable access regulations, and indeed the constitutionality of the access provisions of the Cable Act of 1992, are now before the [Court of Appeals for the] D.C. Circuit.

MR. PETERS: Just a quick comment, if I may? One explanation would be, at least in regard to basic cable, the absolutely worst problem has been on leased-access channels. There undoubtedly is indecent material on regular commercial channels, but if you go down into lower Manhattan and turn on channel J after 10:00 p.m., you will see what for most people I think would be the shocking difference between what is shown on leased-access versus commercial.

DEAN SMALL: We'll take one more question, but wasn't the rationale, I ask both these gentlemen, in that case that the cable operator makes a choice in terms of what movies he shows, what networks he carries? Forget carrying local stations which usually are not a problem for him, but in terms of access, that's material that, in essence, comes over the transom and he has less power, until this regulation, to have any control over what is said there.

MR. GASTFREUND: Well, I'm not sure that he has less control. I mean, one of the things that the 1992 Cable Act did, for better or worse, is it eliminated the provision in the 1984 Cable Act that had granted cable operators immunity from prosecution even for obscenity that was contained in access programming. Now that immunity is gone, so obviously there has to be some measure of control here.

DEAN SMALL: That's my point exactly. It is a protective device so that having lost the immunity, they now have an opportunity to prevent that from going on the air.

MR. GASTFREUND: But the real question here is when you're dealing with an area that has sensitive First Amendment

49. FCC Report & Order 93-72, *supra* note 47.

considerations—as this does—and we’re dealing with speech, obviously you have to serve a compelling governmental interest before a government regulatory program will survive constitutional scrutiny, and you have to show that compelling governmental interest is being advanced through the least intrusive means possible.

The question being raised in terms of the constitutionality of these access provisions is, is this arrangement that’s now been mandated by the Cable Act, and embodied in the FCC rules, the least intrusive means? Wouldn’t a parental lockbox arrangement, which has now been in effect as the dominant mode of restricting children’s access to improper programming, be a suitable and less intrusive medium for achieving the same governmental purpose than forcing everything into the funnel of a blocked channel? That is one of the issues that are before the Court.

DEAN SMALL: Okay, who wants the last one?

AUDIENCE MEMBER: This is for Mr. Gastfreund. Mr. Gastfreund, what impact do you think that the *Sable Communications*⁵⁰ holding will have on the upcoming matters pending with Howard Stern and the Grease Man?

MR. GASTFREUND: I’m not sure that it will have much impact. I think *Sable* arose in a unique context. It involved the question of the constitutionality of restrictions on access to dial-a-porn services on telephones. *Sable* certainly reaffirmed, as I said earlier, the concept that you can have restrictions on obscenity, even by telephone, but in restricting indecency by telephone, you can’t. You can’t force indecency to be removed from media and thereby restrict its availability to adults. That concept is still there. Well, obviously the logic of that is being used in defense of all of these indecency broadcast cases.

Where will it go? That’s a very good question. I think there’s a very serious flaw in terms of the Commission’s enforcement of indecency for reasons I’ve already stated. We haven’t yet really gotten the constitutionality of the indecency standard, as applied, ruled upon yet by the Court. That you will not have happen, by

50. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

the way, until those monetary forfeitures cases have gotten to the Court. Now we've got Evergreen Media, which is a licensee of WLUP in Chicago, in court.⁵¹ The Justice Department has now brought an action to enforce a forfeiture to the FCC levied on WLUP. Evergreen is contesting it. Ultimately it's going to be a trial de novo. Presumably, we're going to have an appeal. You're going to have some law made on that issue.

DEAN SMALL: I want to thank the panel for raising a number of issues. I don't know how many we've resolved here today. I'm just haunted by the prospect when I go home tonight and Mrs. Small asks, "What did you do today?" I'll say, "Well there was this interesting panel discussion and a Washington lawyer named Irv Gastfreund told us a story about a guy who lost his penis and had it sewn on his arm." And once again Mrs. Small will ask, "What do you do at that school?"

51. See FCC Letter 93-97, *supra* note 16.