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Panel IV: Censorship of Cable Television’s Leased and Public Access Channels

Moderator: Professor James E. Fleming

Panelists: Marjorie Heins, Esq.
           James N. Horwood, Esq.
           Robert T. Perry, Esq.
           Michael Sitcov, Esq.

PROFESSOR FLEMING: Welcome to the fourth panel of our program. We’re going to focus on censorship of cable television’s leased and public access channels. We’ll cover a broad range of issues, I hope. Although I’m the moderator, in this crowd of First Amendment absolutists I don’t want to exercise too much control over the course of the discussion.

Among the issues we expect to take up will be the following: What is the future of the indecency standard as applied to cable? Are the indecency provisions of the 1992 Cable Act\(^1\) unconstitutional? What role should the Federal Communications Commission

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("FCC") play in regulating freedom of expression? And, is self-censorship by the converging media entities a threat?

In connection with those topics, we'll also talk about the two recent District of Columbia Court of Appeals opinions that were handed down in November of 1993, *Action for Children's Television v. FCC* ("ACT II"), and *Alliance for Community Media v. FCC*. Both cases struck down indecency regulations. Indeed, three out of four of our panelists took part in the latter case, and one of them, Marjorie Heins, took part in the former case as well.

Now, let me introduce our panelists, and then I'll outline the order of discussion. First, we have Marjorie Heins, who is director and staff counsel of the American Civil Liberties Union Foundation’s Arts Censorship Project and also the author of a recent book, *Sex, Sin and Blasphemy: A Guide to America's Censorship Wars*. She's been active in a number of litigations involving censorship, including both of the cases I just mentioned.

We also have James N. Horwood, a partner in Spiegel & McDiarmid in Washington, D.C. He has done work with the Alliance for Community Media and also was on the brief in the *Alliance* case that I mentioned earlier.

Next is Professor Robert Perry, who has been involved in a number of cases concerning the media, including cable access channels. Before I came to Fordham, I practiced litigation at Cravath, Swaine & Moore for a few years and, in fact, worked with Bob Joffe and Marc Apfelbaum, who were on the second panel this morning. We had the privilege of litigating against Professor Perry in a lawsuit that he brought on behalf of the New York Citizens Committee on Cable Television against our client, Manhattan Cable TV. He, too, was involved in *Alliance*.

Finally, we have Michael Sitcov, who is senior trial counsel,
Federal Programs Branch, in the Civil Division of the Department of Justice. In that capacity, he has been involved in the important cable case, *Time Warner Entertainment Co. v. FCC.*

Now, I shall briefly outline what our order of discussion will be. Jim Horwood will open with a discussion of the background and an overview of access and censorship. He'll also discuss the recent cases in the D.C. Circuit invalidating indecency regulations. Furthermore, since Jim has been here all day, he'll try to tie this panel together with some of the discussion in earlier panels.

Then, Michael Sitcov will present the arguments on the government's side, defending the FCC's indecency regulations. We'll also ask him among other things to try to articulate what the role of the FCC should be in regulating freedom of expression.

Next, Marjorie Heins will address censorship, especially from the standpoint of concern for arts censorship. Among the litigations she's worked on is *Finley v. National Endowment for the Arts,* a suit that seeks to invalidate the requirement that all federal arts grants comply with general standards of decency.

Finally, Robert Perry will broaden the discussion somewhat to take up censorship of hate speech. Robert has handled cable access cases defending the rights of racist groups such as the Ku Klux Klan.

So, let's begin with Jim Horwood.

MR. HORWOOD: Thank you. I'm glad I'm going ahead of Marjorie, because one of the issues that is kind of driving me and may be discussed a lot during this panel is diversity. I'm the sixteenth white male to speak of sixteen speakers here. It's a diversity perspective that I'm going to give you that you really haven't heard about in any of the prior panels, except possibly to the extent that David Bronston talked somewhat about the public, educational and governmental channels.

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What we’re really dealing with here are two kinds of channels, leased access and the so-called PEG access channels—public, educational and governmental—and for purposes of this discussion, it will be the public access part of it. This is the kind of programming that isn’t going to be carried by the broadcasters, by the cable companies, and by the telephone companies, because if it was going to be carried by them, there wouldn’t be a need for the federal regulation or local regulation that we’ve seen for a number of years to allow what I’ll call the under-resourced to be able to use the electronic medium.\textsuperscript{9} Without having some kind of provision in the law that guarantees people the right to use this medium, a large segment of the population won’t be able to use it. As we move into the new technologies and new ways of communicating, it’s all the more important that some mechanism be set aside for the folks who aren’t the media conglomerates with lots of resources to be able to use this medium to communicate with each other and with other people.

Public access has a longer history than leased access. The FCC, when it was regulating cable back in the early ’70s, required a certain segment of the spectrum of cable channels to be set aside for public, educational and governmental access.\textsuperscript{10} These are channels that are available for the public to be able to use on a non-content or non-viewpoint-based basis, and it’s usually first come, first served. It could follow a model of a lottery, although I’m not aware where that’s been used. When Congress changed the regulation of the cable industry in 1984 ("1984 Cable Act"),\textsuperscript{11} it provided for local franchising authorities—which are typically cities, but sometimes states—to require PEG access channels to be set aside in a franchise.\textsuperscript{12} It’s an optional provision—governments can establish PEG access channels, but are not required to. It also required cable systems to set aside a certain percentage of capacity

\textsuperscript{10} Cable Television Report and Order, 36 F.C.C.2d 143, 192, 197 (1972); 47 C.F.R. § 76.251 (1974).
for leased access use which is commercial use, which is channels available for hire.\textsuperscript{13}

A problem under the 1984 Cable Act was there was no mechanism for regulating the rates to be charged by cable operators, so you wound up having leased access virtually non-existent except for, I guess, New York City and a few other places where there were some leased access channels and programming. When it passed the 1992 Cable Act, Congress attempted to redress this perceived problem by providing some mechanism for rate regulation by the FCC.\textsuperscript{14}

The thrust of both the leased access and the PEG access provisions was to provide the widest possible diversity of information sources and services to the public. That was set forth in the 1984 Cable Act, and the 1992 Cable Act really didn’t change that, so capacity was being set aside. From the standpoint of public access, cities could require facilities and equipment to be set aside for access use—which is important, because you have to have a studio to be able to come in and use these channels—and a function that public access organizations have served is as a training vehicle for people to be able to use this medium.

A statistic that the Alliance for Community Media likes to toss out is that there are 20,000 hours a week of programming on PEG access channels, which is more than all the broadcast channels combined. People tend to at times perceive PEG access as something marginal, but it’s not. It’s significant, and a lot of the debate which caused Congress to pass the censorship provisions we’re going to be talking about concerned a few highly visible problems of programs that may be pushing the edge of the envelope in terms of sexual indecency. There have been some problems of hate speech. But this is a minor portion of what’s been on these channels. Nonetheless, it’s what attracts attention because it’s newsworthy.

What we at the Alliance like to talk about are the programming

for racial minorities, programming by and for foreign language organizations. There's programming in Portuguese, Farsi, Vietnamese, and other foreign languages. PEG access is a way to use this medium for what's called "narrowcasting," rather than broadcasting, and to target and be able to allow people within more limited communities to be able to use this medium. So that's the purpose for having these channels set aside.

Leased access is a little different. It is a way to say that programmers or people with a message who want to be able to use cable for for-profit programming, but who don't have enough money to be a broadcaster or are unable to sell their services to a cable operator, have a vehicle to come in, pay a fee, and be able to put their programming on.

The 1992 Cable Act reversed a provision in the 1984 Cable Act which had provided that cable operators could not exercise any editorial control over any video programming provided over access channels. Congress provided that these channels could be set aside, and they said, all right, cable operators, you can't exercise your editorial control.

In the 1992 Cable Act, Congress—not in any kind of reasoned legislative judgment like we've heard about in the last panel, but in floor amendments offered on the last day without any committee consideration—passed a couple of amendments which required the FCC to adopt regulations designed to (1) restrict access of children to indecent programming on leased channels and (2) to permit cable operators to prohibit the use of PEG access facilities for any programming, and I'm quoting the statutory language, "which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." And if you think about those words, none of those deals with areas of speech that are constitutionally prohibited. It says "obscene material," it doesn't say obscenity. Under the Supreme Court's definition of obscenity, you

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can’t know whether programming is obscene until you’ve seen it in the entire context, and material which may be obscene in isolation isn’t obscene under the constitutional standards the courts have developed over the years.\(^\text{18}\)

“Sexually explicit conduct” is a very, very broad phrase. Some sexually explicit conduct may be obscene, but a lot of sexually explicit conduct is constitutionally protected when in the form of speech.\(^\text{19}\)

And finally, “material soliciting or promoting unlawful conduct” means that you couldn’t have programming that advocated civil disobedience, for example, which is a form of speech that’s clearly protected.\(^\text{20}\)

So, you had this provision by Congress, and the FCC—duly responsive to what Congress required—issued notices of proposed rulemaking as it was required to do under the 1992 Cable Act.

Comments were filed by a number of parties. The Alliance for Community Media was joined by the ACLU, People for the American Way, and Alliance for Communications Democracy, which is an organization of public access centers, in filing what were, by far, the most extensive comments submitted to the FCC. We also filed reply comments, elements of the cable industry filed comments, and the FCC eventually came down with its regulations,\(^\text{21}\) which really didn’t surprise us. The thrust of our comments was that the FCC could do nothing in the way of coming up with regulations that would survive constitutional scrutiny because the Act,

\(^{18}\) See Miller v. California, 413 U.S. 15, 24 (1973) (“A state offense must . . . be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” (emphasis added)).


as we viewed it, was pretty well unconstitutional on its face, although we suggested ways that the FCC might have been able to construct regulations. Well, the FCC didn’t. The PEG access regulations it came up with said that “[a]ny cable operator may prohibit the use on its system of any channel capacity [for PEG] for any programming which contains obscene material, indecent material . . . or material soliciting or promoting unlawful conduct.” So the FCC just picked up the language that was in the statute because it’s not going to run into any trouble with Congress by picking up on it. They then said, “[f]or purposes of this section, ‘material soliciting or promoting unlawful conduct’ shall mean material that is otherwise proscribed by law.” What does that mean? In the text of its order, but not the rules themselves, the FCC said, well, this wouldn’t reach civil disobedience but it would reach other things. For example, it would reach speech advocating prostitution in states where prostitution was illegal. The FCC came up with a couple of examples, but didn’t come up with any kind of rational distinction there.

And something that’s more of a problem—and Marjorie will get to this when she talks about it—the FCC regulations said that “[a] cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.” This is a provision that could have a seriously chilling effect on speech.

The leased access regulations were somewhat different because the provision dealing with leased access was different. The regulations provided that a cable operator “may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, [that is, the cable operator reasonably believes] describes or depicts sexual or excretory activi-

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23. Id.
24. Id.
ties or organs in a patently offensive manner as measured by contemporary community standards," which is kind of a test that's been in the broadcast industry, but this was a complete ban on such programming and not time channeling as we've seen in the ACT [Action for Children's Television] I, II and II cases that we'll be talking about later.

Then the regulations say that a cable operator that does not elect to prohibit programming on the leased access channels "shall place any leased access program identified by program providers"—in other words, those who have to incriminate themselves—"as indecent on one or more channels that are available to subscribers only with their prior written consent." So a programmer has to decide whether its programming is indecent, and if it's indecent then it gets to be segregated onto this separate channel and then the cable operator doesn't have to make that programming available, except upon written request of the subscriber. It can take up to 30 days to do that, which can eliminate a lot of time-sensitive programming.

Then the regulation says a program provider requesting access shall identify programming that is indecent, and that "[a] program provider requesting carriage of 'live programming' on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented." Then "[a] cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming," so you're getting

27. Id.
30. 47 C.F.R. § 76.701(b) (1993).
32. 47 C.F.R. § 76.701(d) (1993).
33. 47 C.F.R. § 76.701(e) (1993).
then into the chilling effect and self-incrimination.

Once the FCC came out with these regulations, we were pretty quick in going to court to appeal them. The FCC had a single rulemaking proceeding dealing with both kinds of access. Then it issued the leased access rules earlier because it had an earlier time deadline imposed by Congress. We went to court on leased access and got those regulations stayed.\(^3\) Then we went to court on the PEG access rules when those were issued, got those stayed, and had the two consolidated,\(^4\) and the case was then argued. It was briefed on a fast track and argued on a fast track. Then on November 23 of this past year, the court decided the case, and the panel there unanimously found that both the leased access and PEG access regulations should be rejected.\(^5\) The court had identified two key constitutional questions under the challenges to those acts.

One is, can a government permit cable operators to be censors of programming on access channels?\(^6\) The second issue is, can the government compel cable operators to place indecent leased access programs on a separate channel blocked from viewing unless requested in writing?\(^7\)

The court in \textit{Alliance} started by pointing out as a prelude that it's reiterating that indecent speech, as distinct from obscene speech, is protected by the Constitution, so what we're dealing with here is programming that is not constitutionally proscribed.\(^8\) Because if it's obscene speech, it can be prevented, although only under constitutional safeguards that certainly were not provided for under these regulations.

The court pointed out, and I'm quoting, a "truly scientific pro-

\(^{34}\) Alliance for Community Media v. FCC, No. 93-1169 (D.C. Cir. Apr. 7, 1993) (order).
\(^{35}\) Alliance for Community Media v. FCC, No. 93-1169 (D.C. Cir. May 7, 1993) (order).
\(^{36}\) Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993).
\(^{37}\) \textit{Id.} at 816.
\(^{38}\) \textit{Id.} at 817.
gram . . . that discusses the prevention of life-threatening diseases through the use of condoms could perhaps be considered 'indecent' but would hardly seem to lack the scientific or social value so as to lose protection under the First Amendment.” 40 So the court was focusing on the really broad sweep of what the FCC had come up with as it had been directed to do by Congress.

The government's main argument was that this wasn't state action, that all it was doing was allowing cable operators to act as editors and as censors. 41 It's the kind of argument that the folks from Time Warner, who were on either end of the second panel, think is wonderful, and it's kind of the cable industry's view that yes, it's our channel and you can't take anything away.

We heard discussion earlier in the first panel by Andrew Merdek, who came up with seven kinds of First Amendment analyses; actually there's an eighth which he didn't talk about, and that's a public park. We view public access like a public park. If you have a building developer who is required to set aside some green space for the public to use, that's really what public access is like. I think it's a traditional public forum, but in any event, it's clearly a designated public forum entitled to protection. With leased access, you've got something that's a form of common carriage. While cable operators aren't common carriers under the 1984 and 1992 Cable Acts, the leased access provision is really saying that, as to this certain portion of your spectrum, you're going to be a common carrier, and you have common carriage obligations.

Cable operators say, well gee, we had this all in the first place, and we're just being allowed to program it. But that really defeats the whole thrust of what's involved here. If you accept that argument, it's no longer common carriage, or it's certainly no longer a public forum, because you're allowing cable operators to be editors. And what the court was able to perceive—which I don't think was very difficult to understand—is you had the government's fingerprints all over this. Government defined what indecent speech was; the government said that you can censor this kind

40. *Alliance*, 10 F.3d at 817 n.3.
41. *Id.* at 817-22.
of speech, but you can't censor other kinds of speech. You can only censor this kind of speech that we, the government, don’t particularly like—and that could be civil disobedience, and it could be programming that’s indecent which is really sexually explicit, as the FCC defined it. Perhaps what is most pernicious is the provision that removed the cable operators’ statutory immunity under the 1984 Cable Act from liability for access programming insofar as it “involves obscene material.”\(^\text{42}\) This provision places cable operators in peril of civil or criminal liability if they fail to use their newly-granted authority to censor.

What’s even worse—and this gets into kind of an equal protection argument that’s at play in the leased access consideration\(^\text{43}\)—is that it’s the kind of programming that cable operators don’t keep out of the programming they choose to put on. How many of you get HBO and have seen the program, “Real Sex”? Well “Real Sex” is much more sexually explicit than a lot of what’s complained about that has appeared on leased access or public access channels. The afternoon soaps contain sexually explicit programming as defined by the FCC, so you’ve got the kind of programming that the cable operator will allow on itself, but is permitted to censor when done by these other speakers who are there to offer diversity.

The court did remand to the FCC the question on leased access of whether this equal protection issue would be alleviated if other commercial programming were subject to similar segregation and blocking requirements.\(^\text{44}\)

Let me kind of stop here, except by giving you one final little update which is a little bit disturbing, and that’s that the government asked for a rehearing en banc, and the court has asked for a response by the petitioners in that case on whether or not a rehearing en banc should be granted. That’s obviously not a good sign. The court has not granted rehearing, and we’re not sure what’s


\(^{43}\) See Alliance, 10 F.3d at 824-25.

\(^{44}\) Id. at 829-30.
driving the court. The same panel, which consists of the only three Democrats that sit on the D.C. Circuit, had two other newsworthy decisions. One was the broadcasting indecency case, and the other was the Steffan case involving the gay midshipman who was dismissed from Annapolis, and on all three of those there was a unanimous decision by this panel where the court has asked for responses on whether it should reconsider en banc. Maybe I'll stop there and let Marjorie pick it up later.

MR. SITCOV: I need to make a couple of disclaimers before I begin. One is, as the other Justice people who spoke here today have also said, my views are not necessarily the views of the Justice Department or the Attorney General or the FCC. And the second disclaimer is that I am going to talk about the role of the FCC with respect to indecency, and its regulation of indecency, and I guess I would just say it's a double whammy, my disclaimer with respect to that part of my talk.

The FCC's view with respect to indecency is, of course, formulated in large measure by what Congress tells it to do. Congress at one time, as you just heard, told the FCC that it shouldn't allow indecency in the broadcast media. And that didn't fly with the courts.

In the cable context, the FCC is attempting essentially to apply the Pacifica decision. One thing that I think is necessary to keep in mind, if you read Pacifica—as I re-read it yesterday—is that the case was the result of the complaint of a single citizen who was offended by the Carlin monologue, notwithstanding the disclaimer that the broadcaster of the Carlin monologue put on before the

45. The three Democrats are Chief Judge Abner Mikva and Judges Patricia Wald and Harry Edwards.
46. ACT III, 11 F.3d 170 (D.C. Cir. 1993).
47. Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993).
48. [Eds. note: On February 16, 1994, the Circuit Court for the District of Columbia Circuit, sitting en banc, vacated the judgments in Alliance for Community Media and ACT III and ordered that the cases be reheard by the court sitting en banc. Alliance for Community Media v. FCC, 15 F.3d 186 (D.C. Cir. 1994); Action for Children's Television v. FCC, 15 F.3d 186 (D.C. Cir. 1994).]
monologue was aired. The government’s view is generally that it
does have a role to play in protecting minors from indecency, and
Congress has certainly made it clear that it views that in the cable
context as well.

The real issue in the cable area is not whether there should be
a safe harbor, but what the limitations of that safe harbor should
be. Specifically, should it be from midnight till 6:00? From 10:00
until 6:30? From 10:30 until 6:00? Those are issues which, I
think it’s safe to say, the government views as, in general, being
best resolved by the administrative agency that is charged with the
enforcement of the statutes that govern the cable industry. None-
theless, there’s unquestionably a role that the courts are going to
play. It seems to me that one of the problems that has been atten-
dant upon cable action by the government in the past—and it cer-
tainly is reflected in at least the decision in ACT II and perhaps
in a related manner in the Quincy Cable case, and Century as
well, which dealt with “must carry” as a regulation—is that often-
times, there are either thin legislative records or thin administrative
records to support government action. We don’t believe that in
ACT III, the record was thin, and that is the purpose for which we
have sought reconsideration.

As far as the FCC’s role is concerned, as the agency that is
primarily responsible for discharging the government’s responsibili-
ties in the area of cable television, the FCC must not only take its
cue from Congress in the literal word of the statutes it’s required
to enforce, but it also must rely heavily on the involvement of
citizens through the complaint process and through notice and com-
ment rulemaking.

I know that there has been a bitter back-and-forth on this issue,
not just in court, but through the administrative process as well.
I think it’s really quite difficult, at least at this point, to project

51. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476
52. Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert.
what the outcome will be, given that there is a re-hearing petition. Even if the re-hearing petition is denied and cert is not sought, or cert is sought and the FCC were to lose, there still will be a back-to-the-drawing-board problem for the FCC in articulating exactly what that safe harbor will be. I suppose it's anybody's guess at this point what they would select historically. I think the *ACT II* decision talked about the 10 p.m. to 6 a.m. period as being the historic safe harbor period.\(^5\) Whether it would be a return to that, I simply don't know.

On the issue of whether or not indecent speech is speech that ought to be controlled in that way is a matter—it seems to me—for Congress, and having spoken on the issue, I don't know that the FCC has much to do other than carrying out the traditional administrative function of taking what evidence it can, administratively reaching whatever expert administrative conclusions it can reach, and then attempting to implement them. Given the sensitivity of this type of fare, there's no doubt that whatever decision the FCC reaches, there will be dissatisfaction on both sides, and it's not an issue that's likely to be settled without at least a lot more furor one way or the other.

PROFESSOR FLEMING: The assumption that you seem to make is that there will be a safe harbor, and the question is, when will it be? Is that an assumption that you share?

MR. SITCOV: Well, remember, I say that without the authority of the Commission to say that. But I think it's safe to say that there would be a safe harbor of some type.

PROFESSOR FLEMING: Is it conceivable that the safe harbor would be even narrower?

MR. SITCOV: Well, at least in *ACT II*, the court of appeals had discussed the safe harbor as having been 10 until 6, I believe, but the problem in *ACT II* was that Congress had eliminated the safe harbor. The D.C. Circuit struck down Congress' 24-hour ban and said go back to the drawing board.\(^4\) So, I don't doubt that

\(^5\) See *ACT II*, 932 F.2d at 1506.

\(^4\) Id. at 1510.
there will be a safe harbor, and my guess is that it will probably be pretty close to what has been acceptable, or at least appeared to have been acceptable in the past.

PROFESSOR FLEMING: Well, maybe we could use this issue as a transition to Marjorie Heins. Do you share the assumption that there will be a safe harbor?

MS. HEINS: No. But first I should tell you what ACT I, II, and III are for those of you who don’t know. ACT stands for Action for Children’s Television which, by virtue of its beginning with an “A,” has been the lead plaintiff in a whole series of lawsuits which have been going on for almost ten years now, over what, if any, safe harbor is appropriate for the FCC to set for the broadcast of so-called indecent material on broadcast television and radio. The notion of regulating indecency in the electronic media and establishing a safe harbor period—usually late at night, during which so-called indecency can be aired—has been strictly limited to broadcast—until the 1992 Cable Act, which Jim talked about—and the FCC had no power to censor indecency or channel it to late night hours on cable. The 1992 Cable Act attempted to change that, but as Jim pointed out, the indecency provisions of the Act were struck down in the Alliance case last year.

MR. SITCOV: But they only tried to change it for the access channel.

MS. HEINS: True, that’s pretty much true. I think that the ACT III decision casts doubt on whether the FCC can set any restriction on indecency at all, in the absence of its ability (and it’s now tried three times) to come up with an administrative record justifying what is, in essence, censorship by the Federal Government of constitutionally protected speech. And part of the reason for that is in the Pacifica decision, which Michael Sitcov mentioned, the Supreme Court in a split decision with a plurality did uphold the FCC’s definition of indecency, which you’ve heard mentioned in the context of cable, but it’s essentially the same for broadcast. The FCC came up with this definition which basically derives from one of the three prongs of the Miller v. California
obscenity test. But it's only one prong, and it's the "patently offensive depiction or description of sexual or excretory activities or organs" in a manner that's considered patently offensive "as measured by contemporary community standards," and in the context of *Pacifica*, it was contemporary standards for the radio broadcast medium. That's very vague and subjective, I think you'll agree, and I should correct myself a little bit because I don't think the plurality in *Pacifica* really upheld that definition. What they did was they upheld the application of an indecency standard to the George Carlin famous filthy words monologue, and if you want to know what it was, you can look at the *Pacifica* decision and it's all set out there in all its filthiness and humor and satiric value.

MR. SITCOV: I don't think there's much doubt that the D.C. Circuit thinks that the Supreme Court thought that it was at least defining.

MS. HEINS: Yes, well that certainly was true in *ACT I*. Ruth Bader Ginsberg wrote the decision I think, and she said, we think the Supreme Court upheld the indecency standard, but if we're wrong we defer to "Higher Authority": they can correct us. And now she's up there, so maybe she'll have something more to say about it.

But what happened about six or seven years after *Pacifica* was that the FCC had this broad standard, but they initially interpreted it only to apply to the seven dirty words. And so broadcasters at least knew you could talk about sex as long as you didn't use those words. You used circumlocutions instead.

What the FCC did in the mid-1980s was vastly expand—it's

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   The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (quotation omitted).


probably fair to say, under pressure from a right-wing "social values" type of administration and powerful radical right-wing political pressure being placed on agencies in the federal government—their definition from the "seven dirty words" to virtually anything that they in their infinite wisdom decided was offensive. And what's patently offensive to a gay rights activist on the Lower East Side of Manhattan is not the same as the thing that's patently offensive to a Baptist minister in a little town in Oklahoma, and you've got as many definitions of what's patently offensive as you do Americans. So the FCC really expanded it to something that was so subjective and unpredictable that it created a lot of problems for broadcasters and viewers. That standard, in conjunction with the various different safe harbors that either the FCC has decided upon or Congress has imposed on the FCC, has really been under challenge since the very first ACT case which was decided in 1988 and each time right up to the present with the decision in ACT III in November of last year. There, the D.C. Circuit said, FCC, you have not met the constitutional burden of justification of what is, in fact, censorship of constitutionally protected material, and you have to go back and prove your case. In ACT III in particular, there's some very strong language about the First Amendment rights of adults and older minors to have access to, to talk about, to receive information about, sexual matters, such as the safe sex condom information that was particularly mentioned in the Alliance decision in the passage that Jim read.

FCC, you haven't considered that this is content-based regulation. You have to meet a strict scrutiny standard, and you have to establish that the compelling interest—which we concede is compelling in protecting minors from so-called indecency—is being served by the narrowest possible regulations that adequately take into consideration the First Amendment rights of adults and older minors. And frankly, I don't think the FCC can compile a record that will meet that standard—and they certainly haven't yet—so

58. ACT I, 852 F.2d 1332.
59. ACT III, 11 F.3d at 182-83.
60. Id. at 181-82.
there is a lively difference of opinion as to whether they can constitu-
tionally be in the business of censoring indecency.

MR. SITCOV: I think that you really have to think about the
decision in Beach,61 where the Supreme Court made it pretty clear
that it didn’t think the D.C. Circuit ought to be doing the kind of
review of rulemaking that it kept doing in that case. That was
another cable TV situation, and it seems to me, therefore, that
Beach is a rather compelling basis upon which one could argue that
the D.C. Circuit’s decision in ACT III goes far beyond what would
be the appropriate role of a reviewing court considering an admin-
istrative determination within the area of expertise of an agency
charged by Congress to do something.

MS. HEINS: The major distinction is that Beach Communica-
tions, a decision of the Supreme Court last year, was about cable
regulation, but it had nothing to do with content. It wasn’t a cen-
sorship case. And the difference is that the FCC has no expertise
in deciding what’s patently offensive. In fact, when it comes to
speech, the First Amendment says, “Congress shall make no law
...,”62 so the federal government shouldn’t be in the business of
deciding what people can and can’t have access to.

MR. SITCOV: But the court never said that the FCC cannot
consider what is appropriate speech for purposes of indecency, and
so you have to start from the assumption that at least the Court has
accepted the fact that Congress views the FCC as the appropriate
repository for the government’s administrative expertise in this
area, and I think that it’s not unlikely that the Supreme Court might
agree with that view.

MS. HEINS: Well, time will tell.

Let me go back a little bit, because we sort of got started in the
middle.

As was mentioned, I’m director of a little project at the Ameri-
can Civil Liberties Union (“ACLU”) called the Arts Censorship
Project, which got started in early 1991, basically in response, not

62. U.S. CONST. amend. I.
to anything the FCC was doing, but to the attacks on the National Endowment for the Arts. I'm sure you can remember televised images of Senator D'Amato angrily tearing up pictures of Andres Serrano's *Piss Christ*, and a big flap about Mapplethorpe and performance artists like Karen Finley, and a lot of attacks on the agency, and attempts to impose restrictions on the kind of art that the agency should be funding.\textsuperscript{63}

And the other thing that was happening in those days, and is still happening to some extent, were attacks on rap music. Now if you go back to the mid 1980s, we had Tipper Gore and the attacks on rock music\textsuperscript{64}—that it was making our children into drug addicts and so forth. Of course, attacks on popular music go way back even before Tipper Gore, but the most recent incarnation has been the attack on rap, both for violent imagery and lyrics and for misogynist imagery and lyrics. In 1990, there were actual criminal obscenity prosecutions against rap musicians and music stores that sold their works\textsuperscript{65} and also against a museum, as you remember, in Cincinnati for showing the traveling retrospective exhibition of Robert Mapplethorpe's works.\textsuperscript{66} There was a censorship problem, and the ACLU got around to creating this project.

What I discovered once I got there was that, in addition to those censorship issues involving music and government funding and all the kinds of complicated constitutional analysis you go through—I can see Ted Hirt writing this all down—about what


\textsuperscript{64}Tipper Gore was a leader of the Parents Music Resource Center ("PMRC") which, in 1985, took its concerns regarding the possible negative impact of rock music lyrics to the Senate Committee on Commerce, Science, and Transportation. Senate hearings were held to bring this issue to the attention of the public at large. See *Contents of Music and Lyrics of Records: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. (1985).


limitations the First Amendment imposes on content-based restrictions on government benefit or funding programs, there was this whole issue with the FCC and censorship of so-called indecency. And I must admit I was pretty amazed when I began to read some of these cases and think about the fact that as far as I know, the FCC is the only federal agency that is currently existing as a censorship board, deciding what Americans shall be allowed to broadcast and hear and see on what is acknowledged to be the major medium of communication these days.

So I started getting into this area, and although some people may say that the notion of arts, which is my turf, and television are mutually contradictory, in fact one thing I’ve discovered is there’s a lot of good art on television, and partly that’s been a result of being educated by people like Jim and the Alliance for Community Media and the public access and leased access programmers out there. They’re cable, they’re not broadcast. They are communicating some very interesting and provocative work, and as Jim pointed out, these are the access channels. These are the folks who do not have mega-bucks behind them to produce mass entertainment. I’m basically a ’60s person, and if any of you go back that far, I think of some of these access programmers as the Liberation News Service of the electronic media. The leased access programmer that we represented in the Alliance case is an outfit called “The ’90s Channel,” which puts on innovative features that sometimes disagree with U.S. foreign policy, that have radical critiques of social and economic government policies, that have sexually explicit material, but it’s not your typical mainstream, heterosexual male soft porn. The sexually explicit material on these access channels often tends to be gay in orientation or radical feminist in orientation, and I’ll give you some examples of that a little later.

There’s a lot of information in the record that was compiled before the commission in the Alliance case about the innovative value of some of the access programming that is, as Jim mentioned, the only kind of programming that is subject to FCC censorship under section 10 of the 1992 Cable Act. As I discovered in my work in other areas of censorship, so in the area of the FCC’s regulation of indecency, it’s sex that does seem to be the
major issue, always has been, in terms of censoring arts and entertain-
ment in the United States. In other countries they’re more
concerned about politically radical subversives; you know, the IRA
can’t speak on British television. In some societies where there is
no separation of church and state, it’s blasphemy: you not only
have your government funding removed, you can be stoned to
death if your art or entertainment—or if your novel—is blas-
phemous.

In the United States that would be clearly unconstitutional, but
we still have this thing about sex. Not only do we have the ob-
scenity exception to the First Amendment, where if some court or
jury in its infinite wisdom decides that sexually explicit material
lacks serious literary, artistic, political, or scientific value, you can
go to jail for that. But we also have this indecency which is
constitutionally protected material, but what has happened, since I
think at least the 1960s, is that the Supreme Court started putting
limitations on obscenity law and saying you cannot punish people
for creating, producing, distributing sexually explicit information,
art, entertainment, unless you can really show, in the language of
the 1973 Miller case, that the work lacks “serious value.” (The
original test was that it was “utterly without redeeming social val-
ue.”) The government had that burden before it could criminalize
or prohibit or suppress sexually explicit art or entertainment. That
was a rather hard burden to meet, and in fact, the government was
unable to meet it in the rap music prosecutions I mentioned earlier,
certainly was unable to meet it in the Mapplethorpe case, and is
often unable to meet it in straight prosecutions of pornography.

So, to avoid the difficulties of proving obscenity, the govern-
ment and those who have a problem with sexual explicitness in the
arts have adopted this indecency standard. And although the Su-
preme Court has said repeatedly that indecency, because it is not
the same as obscenity, is constitutionally protected, nevertheless, all
this regulation has been allowed to proliferate, the FCC being the

68. See A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v.
most conspicuous example of a government board censoring art and entertainment with sexual content. But also, in the context of federal arts funding, as I mentioned, Congress passed a law a couple of years ago requiring that National Endowment for the Arts grants comply with "general standards of decency and respect for the diverse beliefs and values of the American public."\(^6\) "Respect for diverse beliefs and values" is sort of the "blasphemy" part of the test, which I think is quite clearly unconstitutional. But "general standards of decency" has its roots in FCC law. So the notion of decency as this vehicle for censorship—to circumvent the requirements of obscenity law—is certainly something that we're confronting in a lot of areas.

Let me just wind up by telling you a few war stories, talking about a couple of cases that I've been involved in around the country that really I see flowing from the 1992 Cable Act. The Act, as Jim mentioned, for the first time took the FCC indecency definition, messed with it a little, changed it from contemporary community standards for the broadcast medium, to contemporary standards for the cable medium, and applied it to cable access channels.\(^7\) Now, one might argue that standards for cable are more liberal than broadcast standards, because there's so much variety on cable and it's been previously unregulated.

As Jim mentioned, section 10, with its convoluted scheme for censoring so-called indecency (which Congress pretty much knew it couldn't do directly), tried to deputize cable operators, who Congress knew didn't like access channels anyway, to do the censoring for them. Section 10(b) said to cable operators: if you don't decide to censor from your access channels everything that you reasonably believe is indecent, we're going to impose these burdensome regulations.\(^7\) The programmers have to certify whether or not their material is indecent, which as Jim mentioned, has a rather sobering, chilling effect. As in any kind of vague and overbroad

\(^6\) See Finley v. NEA, 795 F. Supp. 1457 (C.D. Cal. 1992) (amendment to NEA grant-making procedures requiring "general standards of decency" violated First Amendment by encroaching upon protected expression).

certification scheme or loyalty oath type of situation, the producers—the creative people—will steer wide of what they consider might get them into trouble and will censor themselves, and we will all lose, both the creative people and the viewers. The receivers of information will lose from that certification requirement, so section 10(b) said that to the extent that the cable operator, and this is for only leased access, doesn't censor all that it reasonably believes is indecent, then the cable operator will have to require the certifications from programmers, and anything that is not certified as decent has to go on a special locked, blocked channel that you can only get if you are brave enough to write down that you want it and affirmatively request it. That's certainly going to cut down on the viewing audience for this type of programming.

Now, both sections 10(a) and (b), and section (c)—which is the censorship provision for public access or PEG access—were all struck down in the Alliance case, but meanwhile what happened is I started getting phone calls about cable censorship from all around the country. Usually something was broadly defined as indecent—sometimes it was by the cable operator, and sometimes it was by the municipality, and sometimes it was by the public access center, which was supposed to be deputized by the municipality as the people who would administer this public forum, this green space for freedom of speech for access that Jim mentioned. And sometimes they all got together and went after some particular program that they considered offensive and didn't want.

One example is a case in which we just filed an amicus brief, in San Francisco of all places. Now you would think if there's any place in the country where nothing is patently offensive by contemporary community standards, it would be San Francisco, but Viacom disagreed, and Viacom is the cable operator of the system in San Francisco and has long been resisting the very notion of public access. They have never even turned over the public access function to the public access non-profit center, which their fran-

72. Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993).
chise agreement required them to do, so they’ve been running it themselves, and over the course of the last year or so, they have pulled two public access programs because somebody—usually just the engineer who’s watching the thing as it is being aired—decides that there’s a penis somewhere in this picture. It may not even be a sexual scene, but one of Viacom’s rules was that they won’t have any indecency, and they defined any nudity as indecency, and they also defined any gross language referring to sexual activities as indecency. So there are very broad standards, and we are arguing in this case that even the 1992 Cable Act doesn’t authorize that kind of censorship. In fact, section 10 of the 1992 Cable Act, the indecency provisions, have been struck down in Alliance, so Viacom certainly has no basis for refusing to permit this material on public access, and in fact is directly violating the provisions of the 1984 Cable Act, which as Jim mentioned, prohibit cable operators from exercising any editorial control over access channels.

The other show that is at issue in the Viacom case in San Francisco is a show called “Erotica SF,” and again it is not your standard Playboy Channel-type pornography. What it is is a sort of radical—what they call out in the Bay area “sex positive”—documentary and feature program on what you might call sexual minority kinds of activities, and the particular segment of “Erotica SF” that Viacom just decided was not acceptable to them was footage of the Fetishists’ Ball. I guess that’s a big deal out in San Francisco, and everybody comes dressed up in whatever their favorite fetish costume is. And you know, it’s campy, and I’m sure there’s a lot of cross-dressing and everything else going on. I haven’t seen it, but it is certainly not your standard porn, it represents the views of a minority community, and as we have argued all along, if you don’t like it, you don’t have to tune it in, or if you’ve got it tuned in, you can switch the dial, or if you’re afraid your kid might be harmed for life by seeing a minute of the Fetishists’ Ball, you can get a lock-box and lock it out when you’re not home. And that has always been the acceptable, least restrictive alternative form of helping parents protect their children if they feel this is what their children are in need of protection from.

I’ll just mention one more case to drive home the point that
what gets censored through the FCC’s indecency regulations is often the non-mainstream, provocative, radical material that doesn’t really get a voice in the media otherwise, and this is a case out of Colorado. And this one, I’m sorry to say, arose as a result of censorship by the cable access center itself, the people who are established as a non-profit and delegated by the City of Denver with the mission of administering the electronic public forum that the 1984 Cable Act created for access channels. Denver Community Television, the public access administrator in Denver, decided that a program called “Gay Lesbian Magazine,” produced by a gay rights activist and theater director in Denver, was not even indecent, but obscene. Of course, they didn’t consult any lawyers—or if they did, the lawyers hadn’t read any Supreme Court cases recently—because the program that they were concerned about was very, very far from any definition of obscenity. It didn’t have nudity, it didn’t have any sex acts, and certainly Denver Community Television did not follow what are the constitutionally required procedures, which meant going to court before you impose a prior restraint and censor something because you think it’s obscene. “GL Magazine,” in this particular segment, consisted of two talking heads, two guys having a talk show conversation about gay rights, and there were cutaways to a film that had actually been broadcast in a previous edition of the show which was, from my point of view, not great art, but it basically showed some guys all clad in leather gyrating in a leather bar, and that was it.

So my point is that it is very often the minority viewpoint and what would be considered unconventional sexual politics—programming that definitely has a message—that gets censored under this rubric of indecency once you let it fly out into the world.

So let me end for now, subject to further interrogation.

PROFESSOR FLEMING: Marjorie has observed that many of our censorship wars center on sex. Robert Perry has been involved in litigation that also has involved censorship through denial of access to dissident political groups espousing hateful ideas, such as

the Ku Klux Klan. He has also been involved in cases involving censorship of rock music. Robert.

MR. PERRY: I'd like to add a few comments on the censorship of sexually explicit programming over leased and public access channels, if time permits. But first, let me briefly discuss the censorship of controversial political programming, including what might be classified as "hate speech," over access channels, because I view the latter censorship as even more troubling than the censorship of sexually explicit programming over access channels.  

The most notable example of the censorship of controversial political programming over public access channels occurred in Kansas City, Missouri in the late 1980s, where a cable franchise had been awarded in 1979 to American Cablevision of Kansas City, Inc. ("ACV"). Under the 1979 cable franchise, ACV was required to set aside one channel for public access programming (which became Channel 20) and was also required to provide public access producers with production equipment facilities and staff.

75. I do not mean to suggest that sexually explicit and controversial political programming are mutually exclusive categories. Indeed, there is a long tradition of mixing sexually explicit materials with core political speech. During the French Revolution, for example, a print entitled Grand DeBandement de L'Armee Anticonstitutionelle appeared in an ultra-royalist newspaper. It portrayed Austrian troops dispersing because several women with revolutionary sympathies had lifted their skirts and disrespectfully displayed their buttocks. The title contains several puns deriving from the various meanings of debander, which include "to disband" and "to lose one's erection." Vivian Cameron, Political Exposures: Sexuality and Caricature in the French Revolution in EROTICISM AND THE BODY POLITIC 90-95 (Lynn Hunt ed., 1991); see generally THE INVENTION OF PORNOGRAPHY: OBSCENITY AND THE ORIGINS OF MODERNITY, 1500-1800 (Lynn Hunt ed., 1993).

76. ACV was initially a wholly owned subsidiary of American Television and Communications Corporation ("ATC"), which by the late 1980s had become the second largest multiple system operator ("MSO") in the United States. ATC was itself a wholly owned subsidiary of Time, Inc. Following the merger of Time, Inc. and Warner Communications, Inc. ("Warner") in 1989, ATC and Warner Cable, Inc., Warner's own MSO, were consolidated into a single MSO called Warner Cable, which remains the second largest MSO in the United States. CABLEVISION, June 7, 1993, at 126. In 1985, Telecommunications, Inc. ("TCI"), the nation's largest MSO, id., acquired 50 percent of ACV's ownership. Thus, by the late 1980s, ACV was jointly owned by the two largest MSO's in the United States. At the time, ACV ranked as the nation's twenty-sixth largest single cable system, in terms of total number of basic cable subscribers; today, it is the twenty-eighth single largest cable system in the country. Id. at 127.
assistance free of charge.\textsuperscript{77}

In August 1987, several representatives of the Missouri Knights, an unincorporated association of individuals espousing a “racialist” viewpoint that opposed racial integration, contacted ACV officials and requested a weekly time slot on Channel 20 to air a public access series of 45 programs collectively entitled “Race and Reason” and hosted by Tom Metzger, a nationally known organizer of the Ku Klux Klan and former Grand Dragon of the California Knights. During the mid- to late-1980s, “Race and Reason” had aired on many public access channels around the United States, seldom drawing much attention from the local community. While virtually all public access coordinators and cable officials were uncomfortable with the racist viewpoints expressed in “Race and Reason,” very few attempted to censor that programming from public access channels because such censorship would have violated the policy goal underlying public access channel requirements in cable franchises, which is to create electronic public fora in local communities. Instead of censoring “Race and Reason,” access coordinators around the country typically aired counterprogramming that challenged the racist viewpoints expressed in “Race and Reason.”

The Missouri Knights’ request for a weekly time slot to air “Race and Reason” was, however, denied by ACV officials, who told them that only locally produced programs could air on Chan-

\textsuperscript{77} Missouri Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347, 1349 (W.D. Mo. 1989). The 1979 franchise actually required ACV to offer thirty-two channels of cable programming, including four “public channels” reserved for use by the public at no charge. Two of these public channels were reserved for educational programming, the third for cultural programming, and the last for general public access use. None of these public channels could be eliminated without the prior written approval of the Kansas City Council. Nevertheless, even though required to provide separate public channels for cultural programming and general public access use, ACV created a single channel, Channel 20, for both uses. \textit{Id}. Moreover, Channel 20 was not even available on a full-time basis for public access programming because ACV preempted weekends to air a national, home-shopping network. The Kansas City City Council acquiesced in these and other breaches of ACV’s public access obligations during the 1980s. Ironically, the Council had selected ACV in 1979 over other applicants for the de facto exclusive cable franchise in Kansas City largely because of its greater stated commitment to public access.
nel 20. In fact, there was no such rule precluding non-local programming from airing on Channel 20, and, indeed, non-local programming regularly aired on that public access channel. Nevertheless, the Missouri Knights did not dispute the ACV officials but instead requested a weekly time slot on Channel 20 to air locally produced programming which espoused the Knights' racist viewpoint. ACV officials responded that the Knights' members would first have to be trained by ACV personnel before they could use Channel 20's production facilities and equipment. This too was a pretext. Nevertheless, the Missouri Knights agreed to undergo such training, which, needless to say, was delayed for many months so that ACV could mount a public relations campaign to eliminate Kansas City's only public access channel.

In late January 1988, a local group called the Concerned Citizens for Decency held a press conference at Kansas City City Hall to protest the Missouri Knights' planned use of Channel 20 to air their locally produced, racist programming. ACV's Director of Public Affairs attended that press conference and publicly stated that ACV desired not to carry the Missouri Knights' public access programming. Over the next several months, members of the Concerned Citizens for Decency and ACV officials privately met with members of the Kansas City City Council to consider how to keep the Missouri Knight off ACV's cable channels. This ultimately led to the Council's passage in mid-June 1988 of a resolution modifying ACV's cable franchise to authorize the cable operator to delete

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78. Satellite-delivered public access programming from Deep Dish regularly aired on Channel 20. In addition, ACV regularly aired a national home-shopping network over Channel 20 on weekends.

79. Although its cable franchise obligated ACV to provide formal training in the use of Channel 20 production facilities and equipment, such training had been sporadically provided during the 1980s. Indeed, the training coordinator's position was left vacant after May 1986. In the absence of a formal training program and training coordinator, new public access producers were simply "trained" by existing producers.

80. In Kansas City, the public access channel and studio facilities and equipment were administered by the cable operator's employees. In many cities, however, the cable franchise designates a community access organization ("CAO") to handle such administrative responsibilities. Even CAO staff have been known to invoke nonexistent or long-ignored rules to censor public access programming they dislike. See infra note 115 and accompanying text.
its public access channel.\textsuperscript{81} Although the resolution was content-neutral on its face, the legislative history made unmistakably clear that it had been passed for the sole purpose of suppressing the Missouri Knight's viewpoint.\textsuperscript{82}

Shortly thereafter, ACV formally eliminated the public access channel in Kansas City. Although it continued to carry locally produced programming that had aired on Channel 20 prior to passage of the June 1988 resolution, ACV increased its editorial control of such programming on its newly created "community programming channel."\textsuperscript{83} In August 1988, it denied the Missouri Knights' request for a regular time slot.\textsuperscript{84} The Knights were, however, not the only speakers censored from ACV community programming channel. In addition, ACV also refused to air Kent Teel's proposed documentary on Leonard Peltier, the Indian rights activist imprisoned following conviction for the murder of two FBI agents in 1975.\textsuperscript{85}

Thus, elimination of Kansas City's public access channel and

\begin{itemize}
\item \textsuperscript{81} Missouri Knights, 723 F. Supp. at 1349-50.
\item \textsuperscript{82} The Kansas City City Council did not even provide a stated objective in the resolution authorizing ACV to delete the public access channel. Kansas City, Mo., City Council Res. No. 62655 (adopted June 16, 1988). A resolution authorizing ACV to delete the public access channel had first been introduced on April 22, 1988, shortly after the City Council had received a letter from ACV's president proposing elimination of the channel to ensure that morally objectionable programming was not aired on local cable channels. The entire City Council debate on the proposal to delete the public access channel focused on the "Klan" problem. See, e.g., City Puts Reins on Klan on TV: Council Vote Ends Public Access Channel, KAN. CITY TIMES, June 17, 1988, at 1.
\item \textsuperscript{83} In mid-July 1988, ACV modified its channel lineup, repositioning all public access programming from Channel 20 to Channel 30, which became ACV's "community programming channel." Most, but not all, public access programs that had aired on Channel 20 continued to air on Channel 30, albeit no longer as a matter of right but rather at ACV's discretion.
\item \textsuperscript{84} ACV did, however, offer the Missouri Knights the opportunity to appear as guests on a one-time basis on either of two other weekly community programs. The invitation was deemed unacceptable by the Knights because the format of each program severely restricted the Knights' opportunity for self-expression.
\item \textsuperscript{85} Mr. Teel had previously produced a public access show on Peltier, whose claim that he was wrongfully convicted has drawn considerable public support. The prior documentary had aired on Channel 20. ACV, however, denied approval for production and airing of the new documentary on Peltier because ACV officials deemed that Mr. Teel's proposal did not sufficiently reflect the FBI perspective.
\end{itemize}
return of the channel to ACV's private control not only resulted in suppression of the Missouri Knights' racist viewpoint but also had a ripple effect, creating the real possibility that all controversial political programming would henceforth be suppressed from cable channels in Kansas City. One might analogize the events in Kansas City in 1988 to a decision privatizing Central Park to ensure that no controversial political rallies are held in the Park.  

Needless to say, the community of public access producers in Kansas City was greatly dismayed by the elimination of the local public access channel, but most access producers were in no position to bring a lawsuit challenging that elimination. While these producers clearly had standing to file such a lawsuit, not only did they, individually and collectively, lack the resources to bring such a lawsuit, but most were reluctant to bring any suit that might, even if only superficially, suggest their support for the racist viewpoint expressed by the Missouri Knights. The ACLU's local affiliate found a Kansas City attorney who agreed to represent the Knights in a legal challenge to the Kansas City City Council's elimination of the public access channel. But when the local press reported that he had agreed to take the case, his partners, who had not been consulted, asked him to leave the firm.

At that point, I was asked by the ACLU to assist several other attorneys in representing the Knights in a legal challenge to the Kansas City City Council's action. After much deliberation, we filed a lawsuit against the City in late 1988. At my suggestion, Kent Teel and several cable subscribers were joined with the Missouri Knights as co-plaintiffs to emphasize that elimination of Kansas City's public access channel to suppress the Knights' viewpoint had resulted in suppression of other controversial political view-

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87. At the suggestion of Joe Van Eaton, formerly one of Jim Horwood's colleagues at Spiegel and McDiarmid, ACV was not named as a defendant in the lawsuit. This was an important strategic decision. Because ACV declined to intervene as a party defendant, plaintiffs did not have to address the cable operator's likely defense that public access channel requirements violate cable operators' First Amendment rights. See, e.g., Time Warner Entertainment Co. v. FCC, 810 F. Supp. 1302 (D.D.C. 1992).
points and also adversely affected Kansas City cable subscribers' ability to receive such viewpoints over local cable channels.  

Several of plaintiffs' claims for relief relied, in part, on public forum analysis.  The legislative history of the 1984 Cable Act describes public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." Nevertheless, the status of public access channels as public fora under First Amendment principles had never before been squarely addressed, let alone resolved, by the courts. Accordingly, the public forum issues presented in Missouri Knights were ones of first impression.

The public forum doctrine was born in 1939, when the Supreme Court decided that certain public places—parks, sidewalks and streets—had to be available for expressive activities, subject to reasonable time, place and manner regulations, because they had "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."  

By the 1980s, the Supreme Court had refined public forum analysis to recognize three categories of government fora. First, there are "traditional" public fora consisting of places that had "by long tradition or by government fiat . . . been devoted to assembly and debate," such as streets and parks. "In these quintessential
public fora, the government may enforce a content-based exclusion [only if] its regulation is necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.\(^9\) Second, there are designated public fora “consisting of public property which the [government] has opened for use by the public for expressive activity.”\(^95\) Although the government “is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”\(^96\) Finally, there are non-public fora consisting of “public property which is not by tradition or designation a forum for public communication.”\(^97\)

traditional public fora is a closed category limited only to public parks, sidewalks and streets. There is language in some Supreme Court decisions suggesting that other public places may fall into that category even if they have not been open for expressive activity from “time out of mind.” See, e.g., \(\text{Perry, 460 U.S. at 45}\) (traditional public fora include places open for expressive activity “by long tradition or by government fiat”); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 815 n.32 (1984) (traditional public fora include government property “clearly held in trust, either by tradition or recent convention, for the use of citizens at large”). To be sure, the Court recently declined to classify airport terminals as traditional public fora. International Soc’y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992). But while the Court noted that airport terminals had not “‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity,” \(\text{id. at 2706 (quoting Hague, 307 U.S. at 515 (Roberts, J., concurring))}\), that did not end the analysis. The Court also considered whether “even within the rather short history of air transport,” airport terminals had been a forum for expressive activity. \(\text{id.}\) The Court declined to classify the terminals as traditional public fora only after noting that expressive activity in these public places did not become “common practice” until recent years. \(\text{id.}\)

\(^94\) \(\text{Perry, 460 U.S. at 45}\). In traditional public fora, the government “may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.” \(\text{id.}\)

\(^95\) \(\text{id.; see, e.g., \text{Widmar v. Vincent, 454 U.S. 263 (1981)} (university meeting facilities that had been made available for student groups to meet); \text{Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)} (municipal theaters that had been made available for touring theatrical productions); \text{Perry, 460 U.S. at 46 n.7 (a designated ‘public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects’)}\).\)

\(^96\) \(\text{Perry, 460 U.S. at 46}\).

\(^97\) \(\text{id.}\) The government “may reserve [a non-public] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” \(\text{id.}\)
The Supreme Court has also made clear that public forum analysis applies not only to real property, like parks and streets, but also to "a particular means of communication" even if it "lacks a physical status."\textsuperscript{98} Hence, the mere fact that public access channels lack a physical status does not render public forum analysis inappropriate.

Nevertheless, in Kansas City's motion to dismiss the complaint for failure to state a claim for relief, its lawyers argued that public forum analysis was inappropriate because public access channels, like other cable channels, remained the private property of ACV. At my suggestion, we argued that the title to Kansas City's public access channel was irrelevant because the Supreme Court had made clear in a number of its public forum decisions that even private property may under some circumstances qualify for public forum status.\textsuperscript{99} The district court agreed with our argument in its June 1989 decision denying the City's motion to dismiss.\textsuperscript{100}

\textsuperscript{98} Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 805 (1985) (charity drive aimed at federal employee); Perry, 460 U.S. at 47 (school's internal mail system).

\textsuperscript{99} See Cornelius, 473 U.S. at 801 (public forum analysis applied to "public property or to private property dedicated to public use"); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 814 n.32 (1984) (property "owned or controlled by the government" may qualify for public forum status); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) (privately owned mailboxes were part of a nonpublic forum, i.e., the Postal Service's system for delivery and receipt of mail, although not ruling that public forum analysis was altogether irrelevant to privately-owned mailboxes); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (upholding right to petition in common areas of a large privately-owned shopping center, the Court assumed that those areas had been transformed into a public forum, even though they remained private property, and owner may adopt time, place and manner regulations); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 555 (1975) (holding that privately-owned theater leased by the local government was designated public forum for touring theatrical productions); see also Pruneyard, 447 U.S. at 103 (Powell, J., concurring) ("I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums."); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that the streets and sidewalks in a company-owned town constituted a public forum); Evans v. Newton, 382 U.S. 296, 299 (1966) (although there was no First Amendment issue, the Court analogized the privately-owned park to the company-owned town in Marsh v. Alabama).

\textsuperscript{100} "Whether a particular piece of property is to be considered public for the public forum analysis has never rested entirely on the status of its owner. Rather, the inquiry
The district court held, in particular, that plaintiffs' averments, if proven true, would mean that Channel 20, when it functioned Kansas City's public access channel, had become a public forum. Without deciding whether Channel 20 had become a traditional or designated public forum, the court ruled that plaintiffs had adequately stated that the public forum had been closed in a manner inconsistent with First Amendment principles. First, notwithstanding the facial content-neutrality of the Kansas City City Council's June 1988 resolution, plaintiffs had alleged that the resolution constituted impermissible viewpoint-based discrimination because it had been adopted to facilitate suppression of the Missouri Knights' viewpoint from local cable channels. Second, even assuming, arguendo, that the City Council resolution was content-neutral—which it was not—the incidental burden on free speech may have been greater than necessary to achieve the City's stated interests.

1. Plaintiffs had alleged that Channel 20 had been created as a vehicle for public expression; that ACV could neither exercise editorial control over Channel 20 nor eliminate the channel; and that access was guaranteed on a first-come, first-served basis, regardless of the programmer's viewpoint. Id. The district court stated that if these averments proved true, Channel 20 was a public forum. Id. at 1351-52.

2. There is a very credible argument that public access channels are traditional public fora as well as designated public fora. In many communities, public access has become a well established local tradition—one recognized, not created, by Congress when it authorized franchising authorities to require that cable operators set aside certain channels for public, educational and government access. See 47 U.S.C. § 531 (1988 & Supp. IV 1992). Language in several Supreme Court decisions leaves open the real possibility that recently created public fora may qualify for "traditional" public forum status. See supra note 93. The classification of public access channels as traditional, rather than designated, public fora has important consequences. First, while the closing of a traditional public forum "is at least presumptively impermissible," United States v. Grace, 461 U.S. 171, 180 (1983) (sidewalks surrounding the Supreme Court building), government "is not required to indefinitely retain the open character" of a designated public forum. Perry, 460 U.S. at 46. Second, while government may not limit the subject matter of expression in a traditional public forum, it may create a designated public forum "for a limited purpose such as . . . the discussion of certain subjects." Perry, 460 U.S. at 45 n.7.


102. Id.
The district court also declined to dismiss plaintiffs' other claims for relief. Shortly after the district court denied Kansas City's motion to dismiss, the City agreed to settle the case by rescinding the June 1988 resolution and requiring ACV to restore the public access channel. I donated my $19,000 in attorneys fees to the ACLU of Kansas and Western Missouri with instructions that some of the money be used to fund public access programming that would counter the Missouri Knights' racist viewpoints.

The recognition that public access channels are public fora has implications extending well beyond the Kansas City case. It was an issue in the Alliance for Community Media case discussed by my co-panelists. While the public access petitioners argued that public and leased access channels were electronic public fora, the FCC attorneys argued, as Kansas City had done in the Missouri Knights case, that cable channels are private property to which public forum analysis does not apply. They also argued that access channels were merely a new form of common carrier regulation. The federal courts in recent years have upheld severe restrictions on adult message services over telephone lines, which the FCC attorneys argued were equally justified for the cable medium. The panel, however, did not address this issue in the November 1993 opinion.

I never expected that a similar free speech controversy over public access channels would arise here in New York City. But recent events have proven me wrong. In January 1993, Manhattan Neighborhood Network ("MNN"), the community access organization ("CAO") that supervised public access channels in Manhattan, began airing a weekly call-in show called "America Speaks: Race and Reason," featuring a retired Brooklyn chiropractor who espoused a "racialist" viewpoint on a set with the Nazi and Confederate flags. Produced in Florida, "America Speaks" aired on Manhattan public access channels on a taped basis, at the request of a

105. Id.
local sponsor. The show's debut went virtually unnoticed. Indeed, "America Speaks" prompted very few complaints during its first four months on Manhattan public access channels. In May 1993, however, a local television news program and several local newspapers did stories on "America Speaks." Almost immediately, MNN was flooded with phone calls protesting its decision to air "America Speaks" and threatening MNN with harm if the show was not cancelled. To its credit, MNN resisted such pressure, noting its obligation to carry all public access programming on a first-come, first-served basis. But in late May 1993, the local sponsor decided to withdraw the show from the Manhattan public access channels.\footnote{108}

That, however, was not the end of the matter. Those who had protested "America Speaks" were not satisfied with the cancellation of the program. They also sought public disclosure of the identity of the show's local sponsor. A New York City Councilman named Ken Fisher invoked a little known rule of the New York State Commission on Cable Television ("CCT") requiring CAOs such as MNN to make the names and addresses of all public access producers and local sponsors available for public inspection.\footnote{109} After MNN reluctantly disclosed that information, Councilman Fisher held a press conference to publicly announce the name and address of the individual who had locally sponsored "America Speaks." At that press conference, Fisher stated: "Every citizen has an undeniable First Amendment right to air his or her views, however disgusting they may be [but] we have the right to share the identity of someone who would spread such hate in our city."\footnote{110}

\footnote{108. See Forum for Bigotry? Fringe Groups on TV, N.Y. TIMES, May 23, 1993, § 1, at 29; Sponsor Pulls Plug on Nazi's Cable Show, N.Y. NEWSDAY, May 22, 1993, at 2; Cable Hate Show Spiked, N.Y. DAILY NEWS, May 22, 1993, at 29; 'Hate' Show Draws Fire, N.Y. DAILY NEWS, May 21, 1993, at 4; see also All You Need Is Hate, TIME, June 21, 1993, at 63.}

\footnote{109. Section 595.4(10) of the CCT's rules provides, in pertinent part, that "[t]he entity responsible for the administration of a public access channel shall maintain a record of the use of such channel which shall include the names and addresses of all persons using or requesting the use of any such channel and which record shall be available for public inspection for a minimum of two years." N.Y. COMP. CODES R. & REGS. tit. 9, § 595.4(10) (1988).}

\footnote{110. Is There a Neo-Nazi Bunkering Down on Montgomery Place?, PARK SLOPE}
In August 1993, a rally organized by the Jewish Defense Organization ("JDO") and several other local organizations and attended by several hundred people was held outside that individual's Brooklyn home. A JDO spokesman stated that the organizers' objective was not only to protest the local sponsorship of "America Speaks," but to also force eviction of the local sponsor from his home and ultimately to drive him from the community. I wrote a letter to one of the local weekly papers objecting to public disclosure of the identity of "America Speaks" local sponsor because of its inevitable chilling effect on controversial speech over local public access channels. I contended that other citizens will think twice before producing or sponsoring controversial public access programs that might result in protest rallies outside their homes. I also questioned the legality of the CCT's rule, noting that in 1960 the Supreme Court in *Talley v. California* had declared invalid a local law that required disclosure of the sponsor's identity on all handbills distributed because "identification and fear of reprisals might deter perfectly peaceful discussions of public matters of importance." Finally, I predicted that someone would soon bring a legal challenge to the CCT's public disclosure requirement.

In October 1993, one of my former students, Brian D. Graifman, contacted me regarding two public access producers whom he had been representing in negotiations with Queens Public Communications Corporation (d/b/a "QPTV"), the CAO designated to administer the public access channels in Queens. Chaim Ben Pesach and Sarah Bat Tzvi had been close friends and followers of

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COURIER (Windsor Terrace/Prospect Heights), Aug. 9, 1993, at 1.
111. 300 Demand Nazi Ally Quit Slope Home, PARK SLOPE COURIER (Windsor Terrace/Prospect Heights), Aug. 23, 1993, at 13.
112. 1st Amendment Rights, PARK SLOPE COURIER (Park Slope/Windsor Terrace), Aug. 23, 1993, at 18.
114. Id. at 64-65. In declaring the handbill disclosure requirement to violate First Amendment principles, the Court also observed that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Id. at 64. Similarly, Professor Tribe has written that "anonymity has long been recognized as absolutely essential for the survival of dissident movements." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1019 (2d ed. 1988).
the late Rabbi Meir Kahane, the founder of the Jewish Defense League who was assassinated in November 1990. Pesach and Tzvi produced and hosted two public access series, “Positively Jewish” and “Jewish Task Force on Media Bias,” which have aired continuously on public access channels in Manhattan since their debut in January 1992. The producers seek to expose all enemies of the Jewish people, and their target audience includes Jews living in New York City. On their public access shows, Pesach and Tzvi have long called for the federal arrest and prosecution of El Sayyid Nosair, who was acquitted of state charges that he had murdered Meir Kahane and other alleged Islamic-Arab terrorists, including Sheik Omar Abdul Rahman. Long before the World Trade Center bombing in February 1993, Pesach and Tzvi predicted Islamic-Arab terrorist attacks on a grand scale in the United States. During their public access shows, they regularly invite viewers to write to them at a post office box address. Needless to say, not everyone agrees with Pesach and Tzvi’s viewpoints. They have received many death threats.

Shortly after “Positively Jewish” and “Jewish Task Force on Media Bias” first aired on public access channels in Manhattan in January 1992, Pesach and Tzvi applied for weekly time slots on Queens public access channels to air tapes of their public access shows. QPTV staff, however, told Pesach and Tzvi that they could not obtain channel time until they had completed QPTV’s “training” course for new public access producers—even though tape replay of the Manhattan public access shows on Queens public access channels would not entail use of QPTV’s production equipment. This was a mere pretext; in fact, QPTV’s rules did not make completion of the CAO’s training course a prerequisite for airing shows on Queens public access channels.¹¹⁵

In June 1993, Pesach and Tzvi renewed their request for channel time on Queens public access channels, with Graifman’s assistance. This time they were told that there were no available time

¹¹⁵. QPTV staff thus did exactly what ACV officials had done to keep the Missouri Knights off the public access channel in New York City: they made up non-existent rules. See supra note 80 and accompanying text.
slots because Queens public access channels were only on the air for nine hours a day and 75 percent of that channel was reserved for “certified” public access producers who had completed QPTV’s training course. The latter reason was another pretext to keep Pesach and Tzvi’s shows off Queens public access channels. Graifman, however, reviewed QPTV’s rules and concluded that they reserved 75 percent of the channel time for Queens residents and organizations, not for “certified” producers. Since Pesach resided in Queens, his shows were eligible for the reserved channel time. When Graifman disputed QPTV staff’s interpretation of their own rules, they backed down and agreed to air Pesach and Tzvi’s shows, beginning in October 1993.

Pesach and Tzvi completed and submitted QPTV’s application, listing their post office address but not their home addresses. But shortly after the first show aired in early October, QPTV staff demanded that Pesach and Tzvi disclose their residential addresses as well, which would not only become part of QPTV’s internal records but also be available for public inspection by any person. Realizing that such public disclosure would place their families’ lives in danger, Pesach and Tzvi balked at this new demand. QPTV promptly cancelled their shows.

At this point, I became involved in the dispute, assisting Graifman in preparing legal papers to commence a lawsuit for declaratory and injunctive relief restoring Pesach and Tzvi’s programming to Queens public access channels. The day before we planned to file the lawsuit in the federal court in the Eastern District, Graifman called QPTV’s attorneys to advise them that we would be filing the lawsuit the next day. They asked Graifman to hold off a day so that QPTV could reconsider its demand for disclosure of Pesach and Tzvi’s residential addresses. Within a few days, QPTV had rescinded its demand and agreed to resume airing Pesach and Tzvi’s public access series.

Nevertheless, the CCT’s rule requiring CAO’s to make the names and addresses of all public access producers and local sponsors available for public inspection remains in effect. While the CCT’s rule evidently requires only the disclosure of a post office address, I am sure that it will continue to chill the presentation of
controversial public access programming not only in New York City but throughout New York State. I hope that someone will bring a legal challenge to this rule in the near future. This concludes my remarks.

PROFESSOR FLEMING: Let's have some counter-speech by the government, through Michael Sitcov.

MR. SITCOV: Some government-speech. I don't know that it's counter-speech, but it seems to me that the discussion you just heard from Mr. Perry and then from Ms. Heins, gives you some taste for what people who have to administer programs involving cable television face. People at opposite ends of the spectrum hate each other, want to do each other in, and are vying, for example, for space on cable, and are accusing each other of fomenting violence, of being irresponsible, of causing great damage.

The Congress, I think quite wisely, has placed very, very narrow limitations on certain types of speech with respect to leased access and PEG programming, and just this little discussion should give you some sense that it's not a completely crackpot idea to do so.

MR. HORWOOD: Let me respond to that. We've got part of the government that hasn't been paying attention to Congress or the FCC on censorship issues, and that's the National Telecommunications and Information Administration, known as NTIA, which is a branch of the Department of Commerce. NTIA was required by the prior Congress to do a report on the role of telecommunications in hate crimes, and they issued a notice of proposed rulemaking, and it turns out that the comments indicated that there really wasn't any problem because telecommunications did not cause hate crimes.

MR. SITCOV: I'm not suggesting that it does.

MR. HORWOOD: And what you do have is when you're willing to look at things objectively and actually go out and get the data, you come up with this kind of finding, and I'm quoting from NTIA, after looking at the evidence of lack of evidence that was

presented to it: "The best response to hate speech is more speech to educate the public and promote greater tolerance, rather than government censorship or regulation. This is consistent with the well-recognized theory that free speech serves an 'enlightenment function.'" And it says: "Government can take further steps to ensure that hate speech is met with more speech. Examples include: (1) Intensifying efforts by government officials to speak out against bigotry and prejudice in American society; (2) Encouraging the private media industries to produce and disseminate programming to counter messages of hatred and prejudice, and to educate their audiences about the destructive impact of intolerance."

And so, what you have here is kind of a traditional First Amendment approach that I don’t think we should be losing sight of. The real pernicious effect of what happened in Kansas City until access got restored is you had the Ku Klux Klan in effect destroying a forum for other people to talk. And I guess I take the view—and I don’t think it’s Pollyanna-ish—that if you’ve got this hate and bigotry out there, the worst thing you can do is to keep it hidden and simmering. Bring it out into the open and debate it and talk about it—that’s been the model, as Bob talked about, that public access tended to follow with “Race and Reason” everywhere else, except in Kansas City, where counterprogramming was fostered. What happened is, while it was obviously discomforting to have this kind of programming, especially for those who were targeted by it, most people realize it turned out to be a good thing, because this programming, which was poorly produced, went away and the human rights programming that was counterprogramming tended to last.

I’m personally a little bit uncomfortable because this all happened prior to getting somebody like David Duke—who is a lot slicker than Tom Metzger in getting across his message—and I don’t know whether in the future I’d be here saying, well gee, let’s get it all out because good speech is going to drive out the bad

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118. Id. (numerals added).
speech. It's easy when the bad speech is clumsily presented and delivered, but when you get people slick doing it, I don't know. But at least for the moment, I feel a lot more comfortable in letting it all hang out and trying to get the good speech out there and getting the hate speech exposed and countered.

PROFESSOR FLEMING: Marjorie, did you want to say anything?

MS. HEINS: Well I'll just make a brief philosophical comment, but then I see some hands up, so maybe we should let these patient folks talk.

What I have seen in the last couple of years is growing intolerance for the fundamental notion of free speech. Jim addressed that a little bit, and in its place, there is this notion that we can't afford to have the First Amendment—it's too dangerous because, after all, everybody knows that violent television programming causes kids to behave like Beavis and Butthead and causes adolescents to lie down on the highway, and pornography causes men to become rapists. This scapegoating of speech—or blaming the book, as one of my colleagues calls it—has become a very common, pervasive attitude among the American public, and what's dangerous about that is not only that it's untrue empirically that arts and entertainment cause people to become violent or criminal in the sort of simplistic cause-and-effect way that smoking causes cancer. It's different and more complicated when you're dealing with the human brain and the multifarious ways in which human personalities, with all the different variables that go into our personalities, respond to an image.

What it's really about is not empirical causation, but attitudes and the formation of attitudes which are much more complicated, and what you would end up doing if you followed that kind of scapegoating speech causation theory—that is, we want to keep hate speech off, we want to keep violence off—is you would completely eviscerate the First Amendment without probably making any perceptible impact on the problems of social dysfunction, family dysfunction, sexual violence, and other violence.

The other thing that this blaming of the media does, of course,
is it’s very convenient for politicians, be it Jesse Helms or Paul Simon—Jesse Helms fulminating against pornography, Paul Simon fulminating against violence. It’s very convenient for them because it distracts people; it grabs us. These are hot-button issues. We think our politicians are doing something about crime and violence and misogyny and they’re not; they’re ignoring those issues, and we have to address the real world issues, which, of course, the media only reflect.

MR. SITCOV: I just want to say one thing about that, and I’ll limit it simply to obscenity and indecency. I don’t think the courts have ever required the Congress or the states to demonstrate by empirical data that there is a direct relationship between pornography and indecency and sexual crime, for example. I think what Miller and the cases before it recognize is that there are certain fundamental characteristics about that type of communication that are inimical to society, irrespective of whether the direct result of those things is wife beating or some other truly horrible situation, and I think that on that level alone, it simply can’t be dismissed as ridiculous or irresponsible for Congress to take some action about that type of fare on cable television.

PROFESSOR FLEMING: Let’s take some questions from the audience.

AUDIENCE MEMBER: Did someone from Manhattan Neighborhood Network or QPTV, the Queens Public Television, address Mr. Perry’s points? I just want to raise the issue of the addresses. Essentially, access organizations are supposed to be primarily local access organizations, they’re supposed to allow local people from the borough, community franchise area, to gain access. That’s the reason for the addresses, so they can be sure it’s someone either sponsoring or from the community. It’s not supposed to be available to anyone from Oshkosh or Portland, and that essentially is the reason for the address requirement. The other thing is it’s public access and you’re supposed to encourage a debate, shouldn’t there be some willingness to sign your work?

MR. PERRY: There are two separate issues here. First of all, the CAO may have legitimate interest in collecting personal information from access producers to be used internally by the CAO.
That's one issue. At first blush it seems perfectly legitimate for the CAO to require public access producers to disclose their names and addresses so the CAO can verify that you are a local resident, or that you are who you say you are. But the problem here is that a state rule requires such personal information collected by the CAO for legitimate internal purposes be made available for redisclosure to the public. Producers names and addresses thus become part of the public record. And I can tell you how that came about, because ironically, I had something to do with the promulgation of that language, in a rulemaking proceeding that ended in the late 1980s. I, at that time, had been representing various public access producers, who were concerned about their inability to network among themselves. They all had complaints about the administration of public access channels here in Manhattan, yet they didn't know each other's names and addresses, they needed to have some way of communicating with each other, and so we proposed that the names and addresses of public access producers be publicly available except in the event that a producer opts for privacy. The language was adopted without the exception clause. Again, there are two steps here. The first step is the disclosure of the information to the CAO, and the second step is the redisclosure to the public. I'm particularly concerned about the second step. I'm not as much concerned about the first step, but in the QPTV situation, because of time constraints, I didn't have a chance to go through all of the examples of bad faith on the part of QPTV staff, which had, over a number of months—and I abbreviated the story—given various pretexts for keeping Pesach and Tzvi's programs off the air. Given the bad faith record, my clients were greatly concerned that QPTV would not insure confidentiality of their residential addresses. But maybe if there were sufficient information management protections, that would be okay.

Why should anybody be concerned about their identification with a certain program? Again, the problem is that with dissident programming, with marginal programming, people want that programming out there, but they don't want to take all the flak. They don't want to have protests outside their home, or outside their place of work, or outside their church, or whatever. The public
disclosure requirement thus doesn’t further debate; it chills debate.

AUDIENCE MEMBER: I think if you can’t address the counter-point, the counter-argument to a sponsor, to an author, then you really are curtailing debate.

MR. PERRY: You could air the same counterprogramming and reach the very same audience over public access channels, and I’m sure the local sponsor would see that programming, so I don’t see debate being curtailed at all.

PROFESSOR FLEMING: Thank you very much.