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## PANEL III: Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws

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## PANEL III: Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws

Moderator: Abner Greene\*  
Panelists: William Davenport†  
Jeffrey Hoeh‡  
C. Edwin Baker§  
Paul J. McGeady||  
John Fiorini, III#

MR. SPARKLER: Good afternoon and welcome back to our final panel, "Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws."

Before we get started, I wanted to thank the staff and Editorial Board of the *Journal* for making this year's Symposium such a success. I also want to thank Darin Neely from Academic Programs, who tirelessly helped me for the last three months. Thank you also to, Sheea Sybblis, the Symposium Editor, who put in a lot of time over the summer and in the early part of the fall to make sure that today went off without a hitch.

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# Wiley Rein & Fielding L.L.P. B.S., Georgetown University; J.D., University of Pennsylvania Law School.

For those of you not affiliated with our *Journal*, my name is Andrew Sparkler and I'm the Editor-in-Chief of the *Intellectual Property, Media & Entertainment Law Journal* here at Fordham.

I want to thank everybody for coming because after all the hard work we put into it, it's really the speakers and audience who make today such a success.

With that, it's my pleasure to introduce Professor Abner Greene. Professor Greene has taught at Fordham since 1994. His areas of expertise include criminal law, First Amendment, federal courts, and administrative law. He was Fordham Law School's Professor of the Year in 2002. He also wrote a book that chronicled the details of the election in 2000, entitled *Understanding the 2000 Election: A Guide to the Legal Battles that Decided the Presidency*.<sup>1</sup> Before teaching, he clerked for Justice Wald of the D.C. Circuit and also for Justice John Paul Stevens of the Supreme Court.

Thank you.

PROF. GREENE: Thanks, Andrew. I'm hoping I don't have to write *Understanding the 2004 Election*. Let's all hope that no one has to write that book.

I'm pleased to be here today. We have five distinguished panelists to discuss this very intriguing and controversial topic. The panelists will be speaking in the order listed in your program. I'll introduce each as they are about to speak. I think that's probably the best way to do it. Each panelist will have twelve minutes. After that we'll have a little colloquy among us and then we'll take questions from the floor.

First up is William Davenport. Mr. Davenport is the Chief of the Investigations and Hearings Division of the FCC's Enforcement Bureau. He oversees investigations on a wide variety of matters reflecting the FCC's broad regulatory authority. Previously he served as Legal Advisor in the office of the FCC's Enforcement Bureau and as a staff attorney in the Common Carrier

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<sup>1</sup> ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY* (2001).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1089

Bureau. Before joining the FCC Mr. Davenport was with the D.C. firm of Preston Gates & Ellis.

Mr. Davenport.

MR. DAVENPORT: Thanks. Good afternoon, everyone. I want to say thank you to the *Law Journal* [sic] for inviting me up here. It is really a pleasure to be speaking to you today.

Before I get started on my remarks, I wanted to just say that whatever I say today is on my own behalf, my own opinion; it is not speaking on behalf of the Commissioners or the Commission as a whole.

When I took this job back in January of 2004, as it was stated earlier, I had a background as a common carrier lawyer and litigator and really had never done any indecency work. I took the job about mid-January of this past year.

On February 1<sup>st</sup>, as we all know, Janet Jackson had her “wardrobe malfunction” at the Super Bowl, and it has never been the same since.<sup>2</sup> In the last year, we have ruled that a single use of the “F-Word” during an awards show is indecent and profane,<sup>3</sup> we have entered into some multimillion-dollar consent decrees with radio broadcasters,<sup>4</sup> and we proposed record-breaking forfeitures against some of those same broadcasters.<sup>5</sup> In fact, just a week or two ago we imposed the largest indecency fine in Commission history against various affiliates of the Fox Network for the reality TV show “Married By America.”<sup>6</sup> So it has been an incredible

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<sup>2</sup> Kelefa Sanneh, *Pop Review: During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D1.

<sup>3</sup> See Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4980 (2004) [hereinafter Golden Globe Awards] (holding that the live broadcast of the phrase “fucking brilliant,” used by U2’s Bono during an acceptance speech at the 2003 Golden Globe Awards, was profane).

<sup>4</sup> See *Obscene, Profane, & Indecent Broadcasts: Consent Decrees* (listing 2004 consent decrees with Viacom, Emmis Communications, and Clear Channel in the amounts of \$3.5 million, \$300,000, and \$1.75 million, respectively), at <http://www.fcc.gov/eb/broadcast/CD.html> (last updated Jan. 24, 2005).

<sup>5</sup> See *Obscene, Profane, & Indecent Broadcasts: Forfeiture Orders*, at <http://www.fcc.gov/eb/broadcast/FO.html> (last visited May 17, 2005).

<sup>6</sup> See Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program “Married By America” on Apr. 7, 2003, 19 F.C.C.R. 20191, 20191 (2004) [hereinafter Married By America] (imposing a total fine of over \$1.18

1090                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV

year. We have received over a million complaints at this point,<sup>7</sup> and it is not even over yet.

Today, I am going to quickly discuss the standards that we use in applying our indecency analysis, then I will talk about some recent developments that have occurred over the past year or so. Finally, I will give you a heads up about things that might be coming down the pike in the next few months.

I'm sure that the rest of the panel is probably more familiar with the standard than I am, but I just wanted to go through it real quick to put things into context.

The statute that the FCC works under in regulating indecency prohibits the broadcast of "obscene, indecent, or profane language by . . . radio communication,"<sup>8</sup> which is essentially broadcast of TV and radio. I am going to focus on indecency because that is the major focus of the Commission right now.

When we receive an indecency complaint, we look at two major things. First, is it a broadcast; did it occur over TV and radio broadcast, as opposed to cable or satellite? The indecency rules do not apply to either cable or satellite.<sup>9</sup> Second, did the broadcast occur between 6:00 a.m. and 10:00 p.m. local time?<sup>10</sup> This is because the Commission has created what it would call a "safe harbor" for broadcasts after 10:00 at night and before 6:00 in

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million against 169 Fox Television Network affiliates for their broadcast of indecent material during a taped episode of the Fox series "Married By America" on April 7, 2003); Leon Lazaroff & John Cook, *FCC Fines Fox Reality Show for Indecency*, CHI. TRIB., Oct. 13, 2004, at C1.

<sup>7</sup> See Complaints & NALs: 1993–2004 (March 5, 2005) [hereinafter FCC Indecency Complaints & NALs] (listing the number of complaints received in 2004 as 1,440,419), at <http://www.fcc.gov/eb/broadcast/ichart.pdf>.

<sup>8</sup> 18 U.S.C. § 1464 (2000).

<sup>9</sup> *Cf. id.* (regulating the broadcasting of "obscene, indecent, or profane language by means of *radio communication*" (emphasis added)); 47 U.S.C. § 153(33) (2000) (defining "radio communication" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission").

<sup>10</sup> See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8001 (2001) [hereinafter Industry Guidance] (policy statement).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1091

the morning.<sup>11</sup> If it does still fall within those parameters, then we actually apply our indecency analysis to the broadcast.<sup>12</sup>

The first thing we look at is: does the broadcast involve “sexual or excretory organs or activities?”<sup>13</sup> This is what we call, essentially, the subject matter scope of our indecency analysis.<sup>14</sup> Usually, before we even get started we pretty much know that without even going into it.

But the second part is really the heart of the indecency analysis, and that is: was the broadcast “patently offensive based on contemporary community standards?”<sup>15</sup> This is an area where I think much of the debate about whether broadcasts are indecent or not actually occurs.

The “patently offensive” analysis is really broken up into three parts. It is a balancing test. Three factors: first, was the broadcast explicit and graphic; second, did the material at issue dwell on the apparently indecent material, or potentially indecent material, or was that material simply fleeting; and then third, was the material presented in a way that was pandering or titillating or simply just for shock value?<sup>16</sup>

Like I said, this is a balancing test, so the existence or lack of existence of one or more of these factors really doesn't control the outcome.<sup>17</sup> The key is to try and figure out, based on a combination of all the factors, is this bad enough to be indecent?

Over the last year, as I said, we have done an enormous amount of work on indecency enforcement. We received over 542,000 complaints on the Super Bowl.<sup>18</sup> We received almost a half-

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<sup>11</sup> See 47 C.F.R. § 73.3999(b) (2004) (“No licensee of a radio or television broadcasting station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”); see also Industry Guidance, 16 F.C.C.R. at 8001.

<sup>12</sup> See Industry Guidance, 16 F.C.C.R. at 8001.

<sup>13</sup> *Id.* at 8002.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 8003.

<sup>17</sup> *Id.*

<sup>18</sup> Ann Oldenburg, *A New Battle Over Indecency?*, USA TODAY, Nov. 15, 2004, at D3.

1092            *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*            [Vol. XV

million additional complaints on other shows.<sup>19</sup> The Commission has vigorously responded to this.<sup>20</sup>

This more aggressive approach, although I think people generally think of it back to the Super Bowl,<sup>21</sup> or maybe the Bono thing at the Golden Globes,<sup>22</sup> actually began as long ago as April of last year, when the Commission imposed a forfeiture against a Detroit station, Infinity Broadcasting,<sup>23</sup> for a broadcast that occurred. I'm not going to get into the details, but it was probably one of the most shocking and appalling broadcasts that I think the Commission had ever seen. I think this was the tipping point to which you can trace back the Commission's more aggressive stance.<sup>24</sup>

At that point, the Commission rapidly escalated the fines that it was imposing against broadcasters to the statutory maximum, \$27,500,<sup>25</sup> and teed up the issue of license revocation for the first time<sup>26</sup> and said, "If you are a repeat violator, an egregious violator, of our indecency rules, we will actually consider putting you out of business." In virtually every major indecency decision that we have done since then, the Commission has reminded broadcasters that that is a very real possibility.

But beyond the warning about revocation, the Commission has done three major things in the last year that are interesting.

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<sup>19</sup> See FCC Indecency Complaints & NALs, *supra* note 7 (subtracting the 542,000 Super Bowl complaints from the 1,405,415 total complaints listed as received during 2004 leaves 863,415 complaints received on other shows).

<sup>20</sup> See, e.g., Stephen Labaton, *Indecency on the Air, Evolution at F.C.C.*, N.Y. TIMES, Dec. 23, 2004, at E1.

<sup>21</sup> See *id.*

<sup>22</sup> See Reuters, *Bono Promises Not to Swear Again at Golden Globes*, Jan. 23, 2004, [http://www.u2world.com/news/article.php3?id\\_article=20337](http://www.u2world.com/news/article.php3?id_article=20337).

<sup>23</sup> Infinity Broad. Operations, Inc. (WRRIC-FM), 18 F.C.C.R. 6915 (2003) (fining a radio station \$27,500 for willfully broadcasting indecent language during the "Deminski & Doyle Show").

<sup>24</sup> See *id.* at 6919.

<sup>25</sup> See, e.g., Diane de la Paz, *Analysis: Jackson, Ashcroft: Who's More Abreast of Contemporary Tastes? Attorney General's Hand Can Be Seen in Decisions on Many Television Shows*, THE NEWS TRIBUNE (Tacoma, Wash.), May 23, 2004, at E5; see also *infra* notes 164–167 and accompanying text.

<sup>26</sup> See, e.g., Bill McConnell, *Get Ready to Rumble; After Months of Assault, Defenders of the First Amendment Go on the Offensive*, BROADCASTING & CABLE, July 5, 2004, at 1.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1093

The first is that we have imposed larger and more frequent penalties.<sup>27</sup> In the past year, the Commission has imposed a greater amount of indecency forfeitures than in the past ten years combined.<sup>28</sup> In fact, if you add in the “Married By America” forfeiture that was proposed a couple of weeks ago,<sup>29</sup> the Commission has imposed close to \$4 million worth of forfeitures.<sup>30</sup> By way of comparison, in 2000 the Commission proposed about \$48,000 worth of forfeitures.<sup>31</sup>

The second major factor that has happened over the past year is that our investigations are reflecting the scope of the programming that we’re reviewing. Previously the Commission might have focused just on an individual station that aired a program, but over the past year or so we have expanded that approach to now look at all the stations that might air a program.

So for example, with programs like “The Howard Stern Show” or network shows like “Married By America” or the Super Bowl, we are now looking at not only fining the station about which we received complaints, but also all the stations that might have aired a particular broadcast.<sup>32</sup> Our investigations reflect that. We now ask the networks, “What affiliates aired this program?”

Also, over the last year we have tackled the tough cases. Like I said, we have addressed the Super Bowl situation with the

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<sup>27</sup> See FCC Indecency Complaints & NALs, *supra* note 7 (showing an upward trend in total yearly penalties imposed by the FCC since 1995).

<sup>28</sup> See *id.* The FCC proposed \$7,928,080 in forfeitures in calendar year 2004, while from 1994–2003 the FCC proposed total forfeitures of \$1,506,900. *Id.*

<sup>29</sup> Married By America, 19 F.C.C.R. 20191 (2004) [hereinafter Married By America]; see also *supra* note 5 and accompanying text; Martha Kleider, *Fox Affiliates Fined for Indecent Reality Show*, Culture and Family Institute (Oct. 15, 2004), at <http://www.cwfa.org/articledisplay.asp?id=6544&department=CFI&categoryid=pornography>. “The [FCC] has imposed a \$1.18 million fine against 169 Fox Television Network affiliates for airing the April 7, 2003, episode of *Married By America*. The proposed forfeiture is for the minimum \$7,000 per station airing the program. . . . The FCC. . . received 159 complaints about this episode.” *Id.*

<sup>30</sup> See FCC Indecency Complaints & NALs, *supra* note 7.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., Clear Channel Broad. Licensees, 19 F.C.C.R. 6773 (2004); Married By America, 19 F.C.C.R. 20191; Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230 (2004) [hereinafter Super Bowl] (providing a notice of apparent liability for forfeiture).

affiliates and whether or not affiliates should be subject to forfeiture.<sup>33</sup> In that case, the Commission said that affiliates could be subject to forfeiture, but because of the unique circumstances of that particular situation, the Commission is choosing not to fine those stations.<sup>34</sup>

In the Golden Globes case<sup>35</sup> from March of this past year, the Commission overturned a body of precedent that probably dated back twenty years. It said that a fleeting use of a single expletive was not indecent.<sup>36</sup> The Commission overturned that body of law and said now it's fair game.<sup>37</sup>

Lastly, just a couple of weeks ago, the Commission imposed the "Married By America" Notice of Apparent Liability ("NAL") against all the Fox stations that aired the program.<sup>38</sup> That was the very first time that the Commission held affiliates of television programs responsible for programming originated by the network. One notable thing about that decision is that it was the first time the Commission actually said even if you blur out—they call it pixelating—even if you pixelated nudity, it can still be indecent if the sexual meaning is inescapable.<sup>39</sup>

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<sup>33</sup> See Super Bowl, 19 F.C.C.R. at 19241.

<sup>34</sup> See *id.* In response to the FCC's "new, supersize anti-indecency standards," in November 2004, many ABC affiliates refused to air the unedited version of "Saving Private Ryan," even though most of these affiliates had already aired the unedited version of the film in 2001 and 2002. See Lisa de Moraes, "Saving Private Ryan": A New Casualty of the Indecency War, WASHINGTON POST, Nov. 11, 2004, at C1, available at <http://www.washingtonpost.com/wp-dyn/articles/A41464-2004Nov10.html>.

<sup>35</sup> Golden Globe Awards, 19 F.C.C.R. 4975 (2004) (addressing the live broadcast of the phrase "fucking brilliant," used by U2's Bono during an acceptance speech at the 2003 Golden Globe Awards).

<sup>36</sup> See, e.g., Applications of Lincoln Dellar for Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM), Paso Robles, California, 8 F.C.C.R. 2582, 2585 (1993) ("[N]ews announcer's use of single expletive [did not] warrant further Commission consideration in light of the isolated and accidental nature of the broadcast."); Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to L.M. Communications of S.C., Inc. (WYBB(FM)), 7 F.C.C.R. 1595, 1595 (1992) (The "broadcast contained only a fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction.").

<sup>37</sup> See Golden Globe Awards, 19 F.C.C.R. at 4980.

<sup>38</sup> See Married By America, 19 F.C.C.R. 20191, 20196 (2004); see also Kleider, *supra* note 29.

<sup>39</sup> See Married By America, 19 F.C.C.R. at 20194 ("Although the nudity was pixelated, even a child would have known that the strippers were topless and that sexual activity

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1095

So the Commission has been very aggressive on these issues lately and we are breaking new ground in some respects, but we think that to a large extent this is something that may have been overdue.<sup>40</sup>

With all that being said, we are extremely sensitive to First Amendment considerations.<sup>41</sup> The statute that we work under has a specific section that says that we cannot censor,<sup>42</sup> and so we work very hard to be sensitive to the First Amendment. We review the cases very carefully. We think hard before we send out letters of inquiry to broadcasters asking for information about broadcasts. We really bend over backwards to try to get the right answer.

One of the things that we do, for example, is that to the extent the Commission is revising its old law or making a new legal position, we apply that position only on a forward-going basis, so that the broadcasters have notice that the law is changing or that the approach of the Commission has changed.<sup>43</sup>

Now let me give you a little preview of where the Commission is headed over the next few months. You are likely to see more enforcement actions over the next few months that will be very tough, much tougher than what had occurred in previous years, but probably consistent with what the Commission has done so far.

At the same time, you are also likely to see some high-profile denial cases, where the Commission looks at cases involving programs that I think everyone knows and denies the complaints against them because they simply are not valid.

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was being shown.”); *see also* Lisa de Moraes, *No Ifs Ands or Buts: Fox's Bottom Line*, WASHINGTON POST, Jan. 18, 2005, at C1, available at <http://www.washingtonpost.com/wp-dyn/articles/A16857-2005Jan17.html>.

<sup>40</sup> *See* Industry Guidance, 16 F.C.C.R. 7999, 8021 (2001) (separate statement of Commissioner Harold W. Furchtgott-Roth).

<sup>41</sup> U.S. CONST. amend. I.

<sup>42</sup> *See* 47 U.S.C. § 326 (2000)

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

*Id.*

<sup>43</sup> *See, e.g.*, Golden Globe Awards, 19 F.C.C.R. 4975, 4981–82 (2004); *see also infra* text accompanying notes 165–166.

The Commission is also considering, in separate proceedings, whether or not it should regulate violence.<sup>44</sup> One of the things that Congress and the public have asked is that the Commission look into the issue of whether excessive violence is indecent.<sup>45</sup> The Commission is concerned about this issue, but there are statutory questions, and so it has opened a rule-making proceeding to figure out whether or not that is appropriate.<sup>46</sup>

Lastly, as the program notes, Congress is considering whether or not to increase the Commission's authority to impose fines or to even compel license revocation if a broadcaster is a repeat offender<sup>47</sup> This is something that did not get out of Congress before they broke for the election, but Congress is coming back into session after the election, and so we're not really sure what is going to happen.

In conclusion, I wanted to say that we understand that people feel passionately about these issues. We value each case on its own merits. We look at it very closely. We consider the carrying out of our responsibilities to be vitally important. We do our best to balance the considerations of the First Amendment and the indecency statute.<sup>48</sup> But please, as a warning to broadcasters, they need to be aware that the Commission has become much more aggressive on this issue and will not hesitate to take appropriate enforcement action in appropriate circumstances.<sup>49</sup>

Thanks.

PROF. GREENE: Thank you, Bill.

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<sup>44</sup> See Ted Hearn, *Violence Regulations vs. Free Speech: Pay TV Providers, Broadcasters Air Constitutional Concerns to FCC Studying the Issue*, MULTICHANNEL NEWS, Oct. 25, 2005.

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

<sup>47</sup> See Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, COMM. LAW., Spring 2004, at 1, 25.

<sup>48</sup> See generally Industry Guidance, 16 F.C.C.R. 7999 (2001); Jacob T. Rigney, *Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 FED. COMM. L.J. 297 (2003) (discussing Industry Guidance).

<sup>49</sup> See generally Fallow, *supra* note 47; Eleanor Lackman, *Cleaning the Airwaves: Will the FCC's Crackdown on Indecent Broadcasters Put a Chill on Protected Speech*, N.Y. STATE B.A. ENT., ARTS & SPORTS L.J., Summer 2004.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1097

The next speaker is Jeff Hoeh. Jeff is the Senior Media Counsel in the Media Law group of the NBC Law Department. In this capacity, he counsels various stations on news gathering, news content, and other newsroom issues. Before joining NBC in 1998, Jeff worked as a litigation associate at the New York firm of Willkie Farr & Gallagher and handled media-related work for the firm's client, Bloomberg LP. Jeff Hoeh.

MR. HOEH: Thank you.

I think I will start with a disclaimer as well. I think you heard from my introduction that I am not an FCC lawyer *per se*; I am not NBC's FCC lawyer. That role falls to my colleague, Bill Lebow in Washington, and he has instructed me to be very circumspect in my comments, given the presence of an FCC attorney here, which I will do.

My experience with FCC issues is relatively recent and also a result of the Bono decision<sup>50</sup> and the Janet Jackson "wardrobe malfunction" issue.<sup>51</sup> In that context I really want to talk about the issues that are on the forefront of what I do day to day: what effects these decisions, particularly the Bono case, have on live television broadcasting. In the context of the Bono decision, how do you put live television on the air without exposing your station, your station groups, the affiliates, to risk of fines for unscripted live indecent comments.<sup>52</sup>

The Bono decision, as Mr. Davenport mentioned, was really a departure from prior precedent,<sup>53</sup> and it has certainly caused a great deal of concern among people who do what I do. Essentially, my job is to counsel news clients about the risks associated with putting news on television.

I also have the pleasure of doing the same thing for some of our comedy programs. Fortunately, the comedy programs tend to

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<sup>50</sup> Golden Globe Awards, 19 F.C.C.R. 4975 (2004) (finding that Bono's statements constituted actionable indecency and profanity).

<sup>51</sup> Super Bowl, 19 F.C.C.R. 19230 (2004) (The FCC fined CBS parent Viacom \$550,000 for 20 Viacom Stations' indecent broadcast of "Jackson's breast-baring finale to the [Super Bowl] halftime program.").

<sup>52</sup> See, e.g., Fallow, *supra* note 47, at 26 (discussing the *Golden Globe Awards* decision and the networks' reaction).

<sup>53</sup> See Golden Globe Awards, 19 F.C.C.R. at 4981.

be scripted, and if something is scripted you can be a little bit more careful about what goes out over the airwaves.

I sit next to the censor who censors “Saturday Night Live” every night they do a live show. Anybody who saw the show last Saturday knows we actually are live.<sup>54</sup> We may bolster the sound occasionally, but we are live.<sup>55</sup> But there is a censor there.

We do not have censors for our news broadcasts. In the past, we have relied on precedent which gave us some protection for broadcasting live news reports.<sup>56</sup> While the Bono decision was retroactively applied against NBC and I think this was unfair, I think we can still get some comfort that there is some continued protection for live broadcasts in the news context. It appears the Commission did not overturn the notion that if crude language is integral to a news report, it may not be indecent.<sup>57</sup> Here, they relied on a case where certain undercover audiotapes of alleged mobsters were played on NPR, unedited and unbleeped.<sup>58</sup> The comments were played after an appropriate disclaimer and following the broadcast there was another disclaimer informing the audience that the crude language would no longer be heard on the airwaves.<sup>59</sup>

We think there probably is some protection for that, although as a practical matter we generally aren’t in the business of

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<sup>54</sup> Referring to Ashlee Simpson’s October 22, 2004, performance on “Saturday Night Live” in which the wrong song started to play during the singer’s performance. See Kevin Winter, *Did “Saturday Night Live” Expose Ashlee Simpson’s Extra Help?*, USA TODAY, Oct. 24, 2004, at [http://www.usatoday.com/life/music/news/2004-10-24-simpson-snl\\_x.htm?POE=LIFISVA](http://www.usatoday.com/life/music/news/2004-10-24-simpson-snl_x.htm?POE=LIFISVA).

<sup>55</sup> See *id.*

<sup>56</sup> See, e.g., *Pacifica Found., Inc.* 2 F.C.C.R., 2698, 2699 (1987) “If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite.” *Id.*; *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987) “Speech that is indecent must involve more than the isolated use of an offensive word.” *Id.*

<sup>57</sup> See *Golden Globe Awards*, 19 F.C.C.R. at 4979 (2004). The FCC noted that “NBC does not claim that there was any political, scientific or other independent value of use of the word here, or any other factors to mitigate its offensiveness.” *Id.*

<sup>58</sup> See Peter Branton, 6 F.C.C.R. 610 (1991) (letter from Donna R. Searcy, Secretary, FCC).

<sup>59</sup> See *id.*

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1099

intentionally putting on that sort of language. We probably would bleep it anyway.

I think where we really run into trouble is in the news and even in the sports context—and I'll mention sports in a minute—when we are out doing a live shot and someone runs onto our screen and makes a comment. It happened to one of our News Channel reporters. News Channel is kind of our group news feed service where we share stories throughout the NBC-owned station family and the affiliate family. One of our News Channel reporters was reporting on one of the many hurricanes that hit this season, and somebody literally ran into his spot and started uttering profanities. We don't control that. We don't control those people. Are we now subject to fines for broadcasting that sort of language live?

When the Bono decision came down, we talked a lot about this, and I went out and I talked to our News Director group, and we talked about all the different scenarios. And lo and behold, they have happened. They happened to the Fox station here in New York; somebody uttered a profanity in the back of a live shot.

That's the way we do news. We send people out in the field, they introduce stories from a location, they cut to a package,<sup>60</sup> then they get back, and there is sometimes some cross-talk. It is very unusual that one of our people curses on the air, but occasionally people we are interviewing do. Can you prescreen everybody? Even the people we do not interview often will, as I said, run into the screen.

I think this really causes us significant concern. Obviously, as a broadcaster, we recognize that we are reaching a broader audience than our cable competitors, and we recognize our obligations to try to keep the airwaves as clean as possible. But how far does that go, particularly in the news context?

A couple of weeks ago, there was a NASCAR event and Dale Earnhardt, Jr. won, and on the podium he uttered the "F-Word".<sup>61</sup>

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<sup>60</sup> A package is an edited segment rolled into a live broadcast.

<sup>61</sup> See Jeff Wolf, *One Word Should Not Change Cup Points Race*, LAS VEGAS REV. J., Oct. 8, 2004, at C6; *NBC is Adding a Five-second Delay to its NASCAR Telecasts After Dale Earnhardt Jr. Cursed During a Post-race TV Interview Last Weekend*, BROADCAST NEWS, Oct. 7, 2004 (noting that NBC instituted a five second time delay after Earnhardt

Well, my friend the censor from SNL was at work on Sunday last week censoring the NASCAR broadcast to avoid that sort of problem again.

I actually asked her to put together a list of programs that we have now put on a delay as a result of some of these decisions. We actually were on a delay for the Golden Globes this year, and the Golden Globes were broadcast a few days before February 1<sup>st</sup>,<sup>62</sup> so we were ahead of the game. Nonetheless, we did have a five-second delay there. And we did a delay for a number of our other live programs. The Radio Music Awards the other night were on a delay.

We do not do "Saturday Night Live" on a delay. Our news broadcasts are not on a delay. I know there has been some talk at stations about implementing technology to at least having in place a delay on news.<sup>63</sup> I don't know if the American people want their news on a delay. I don't want to deliver the news on a delay, again speaking individually. But I think it raises a very significant concern.

One of the things we have tried to do as a result of these decisions is to get into our newsrooms, particularly on the news side, and educate, to remind people how important it is to do our very best to control what goes out over our airwaves. We try to keep the newsrooms cognizant of what is going on around them when they are doing their live shots and also train people about the risks associated with being live on television.<sup>64</sup> We have gone out to all of our stations to talk to them about these things. But at the end of the day we can't control everything.

I am eager to hear what the other panelists have to say about the issue and their thoughts about how you "do" live television.

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used the word "shit" during a live celebratory speech in a the winner's circle immediately following a victory in a race on October 7, 2004).

<sup>62</sup> Feb. 1, 2004 was the date of the Janet Jackson Super Bowl broadcast.

<sup>63</sup> See, e.g., Jamie Gumbrecht, *American Media Still Reeling, but 'Desperate' to Provide Smut; Nipplegate: One Year Later*, LEXINGTON HERALD LEADER (KY), Feb. 6 2005, at C15 ("News organizations privately fret that increased indecency rules could kill live news broadcasts from 6 a.m. to 10 p.m.").

<sup>64</sup> See generally Wolf, *supra* note 61.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1101

We have been talking about the issue of sports. We don't have a lot of sports now. But, you know, anytime you cover a sporting event, there are issues with fans yelling obscenities. Anybody who has ever been to a hockey game or a football game in particular knows that.

And it happened to us at NASCAR, and it happened to be one of the drivers.<sup>65</sup> So now, are no sports live? Do you have to put everything on a delay? I think with this kind of an aggressive approach that we are seeing by the FCC, we are seeing a real erosion of our ability to air some of these historically live programs.

I think if you look at the Janet Jackson situation, there were a lot of very bad facts that went into that. You had rehearsals.<sup>66</sup> You had a lot of very suggestive promotion.<sup>67</sup> A lot of the incidents that happen do not involve those sorts of circumstances. The Janet Jackson situation happened on the most high-profile television event there is, and I think it has really focused attention on the issue of indecency.

Some of our programming obviously is within the safe harbor, broadcast after 10:00 p.m.<sup>68</sup> "Saturday Night Live" is broadcast after 10:00 p.m.

One of the things we have considered in dealing with indecency issues is shifting some programming outside of the 6:00 a.m.-to-10:00 p.m. time period to try to at least take advantage of the protections afforded by the safe harbor.

I wonder how the Commission would feel about SNL's parody of a shampoo for pubic hair, which features pixelated images of naked men, very well pixelated. Obviously, "Saturday Night Live" is broadcast after 10:00 p.m. everywhere that it is broadcast, and it is not in the sexual context. But we have to think about every single one of these issues.

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<sup>65</sup> See *supra* note 61 and accompanying text.

<sup>66</sup> See Frank Rich, *The Super Bowl of Hypocrisy*, THE INT'L HERALD TRIBUNE, Feb. 14, 2004, at 7.

<sup>67</sup> See Scott Collins & Meg James, *After '04 Fiasco, Super Bowl Wants to Avoid Going Offside*, THE NEW YORK TIMES, Feb. 4, 2005, at A1.

<sup>68</sup> See 47 C.F.R. § 73.3999(b) (2004); see also *supra* note 63 and accompanying text.

From a censor's standpoint, I think the definition of indecency has always been a moving target, and the pendulum seems to be swinging back towards a more restrictive-type enforcement.<sup>69</sup> We are very cognizant of that as a broadcaster, and again very cognizant of our responsibilities as a broadcaster.

So, in response to the recent FCC activity, we have been trying to look at training and to think about the issues. We're interested to hear what people have to say. I'm personally interested to hear what people have to say about the notion of delaying a news broadcast or delaying sports.

You know, with other programming we control we have standards and practices. We have people who review our ordinary entertainment programming. But it is more difficult with live programming.

PROF. GREENE: Thank you, Jeff.

I thought I would intervene with a quick question to Bill, and I'd like to see if you can answer this yes or no. If they are doing a hurricane shot and someone walks in front of the shot and utters profanity, is that actionable or not, or can you not answer it under those circumstances?

MR. DAVENPORT: Well, we have a number of complaints actually relating to news programming or live programming where someone does wander onto the show. We even have a situation where a news reporter was interviewing somebody who was wearing a T-shirt that said "[F-Word] the NCAA." You know, it really . . .

PROF. GREENE: So it depends on the situation?

MR. DAVENPORT: It really depends on the situation. Like I said, the three-part analysis really is key.<sup>70</sup>

PROF. GREENE: Okay. "Depends on the situation" is the answer. I thought maybe the answer would be, "No, we don't regulate that."

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<sup>69</sup> See generally Fallow, *supra* note 47; see also Lackman, *supra* note 49.

<sup>70</sup> See *supra* notes 11–17 and accompanying text (discussing the three-part analysis used by the FCC to determine whether material is "patently offensive").

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1103

The next speaker is Ed Baker, the Nicholas F. Gallicchio Professor at the University of Pennsylvania School of Law. I can tell you Ed is a renowned First Amendment scholar. We're very honored to have him here today. Before he was a law professor, he was a staff attorney at the ACLU. He is the author of three very well regarded books: *Media, Markets, and Democracy*;<sup>71</sup> *Advertising and a Democratic Press*;<sup>72</sup> and one of the real major works in First Amendment theory in this generation, *Human Liberty and Freedom of Speech*.<sup>73</sup> Ed.

MR. BAKER: Thank you.<sup>74</sup>

I want to go back to the one Supreme Court case upholding a regulation of indecency in broadcast, *FCC v. Pacifica Foundation*,<sup>75</sup> where they held that George Carlin's "Seven Dirty Words" monologue broadcast at 2:00 in the afternoon was indecent as broadcast.<sup>76</sup>

I am not a fan of the case. I agree with Justices Brennan and Marshall that the Court displayed "a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities."<sup>77</sup>

I also agree with Steve Shiffrin<sup>78</sup> that "people with any First Amendment bones in their bodies are troubled. . . . Carlin's speech

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<sup>71</sup> C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* (2002).

<sup>72</sup> C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992).

<sup>73</sup> C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

<sup>74</sup> Mr. Baker's talk is based on arguments made on arguments made in C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937 (1983) and subsequently developed in C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH*, *supra* note 73, at 173-80, 305 n. 26, a brief submitted in action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988), and in C. Edwin Baker, *The Evening Hours in Pacifica Standard Time*, 3 VILL. SPORTS & ENT. L.J. 45 (1996).

<sup>75</sup> *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>76</sup> *See id.* at 750-51.

<sup>77</sup> *Id.* at 775 (Brennan, J., dissenting).

<sup>78</sup> Professor of Law, Cornell Law School; author: *Dissent, Injustice, and the Meanings of America* (1999), *The First Amendment, Democracy, and Romance* (1990); casebook co-author: *Constitutional Law*, (9th ed. 2001), *The First Amendment* (2d ed. 2001).

1104                      *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                      [Vol. XV

is . . . precisely what the First Amendment is *supposed* to protect. . . . Carlin *is* the prototypical dissenter.”<sup>79</sup>

Moreover, I would note that whatever sense the *Pacifica* decision made at the time it was decided, new technologies, in particular things like the lockbox and other features that give parents greater control, arguably eliminate the underpinnings of the decision.

Nevertheless, what I want to do this afternoon is, as someone who is inclined towards an absolutist view of the First Amendment, to consider the extent I can say anything in favor of *Pacifica* and the extent that praise should extend.

Generally, any law will favor someone and disfavor someone else. I was impressed, though, with an economist pointing out that, at least in some zoning laws, it is potentially possible that everybody would benefit. For example, at a beach where a bunch of kids want loud music and to play beach volleyball and would rather not have boring oldsters like me around and where there are also a lot of such oldsters who would rather be able to quietly enjoy the waves and contemplate the sunset. In such a situation, a zoning rule allocating different parts of the beach to each group could benefit both.<sup>80</sup>

Take that message and think about *Pacifica* and its companion case, *Young v. American Mini Theatres*,<sup>81</sup> which were both zoning cases. In *American Mini Theatres* it was space zoning.<sup>82</sup> In *Pacifica* it was time zoning.<sup>83</sup>

The two cases are remarkably analogous. They have the same author of the plurality opinion (Stevens), the same author of the concurring opinion (Powell), and three out of the four dissenting Justices were the same.<sup>84</sup> There are other similarities, which I will get to in a minute.

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<sup>79</sup> STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 80 (1990)

<sup>80</sup> E.J. Mishan, *Pareto Optimality and the Law*, 19 OXFORD ECO. PAP. 225 (1967).

<sup>81</sup> 427 U.S. 50 (1976).

<sup>82</sup> *See id.* at 52.

<sup>83</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 738–39 (1978).

<sup>84</sup> Justices Stewart, Brennan, and Marshall dissented in both cases. *See id.* at 762, 777; *American Mini Theatres*, 427 U.S. at 84, 88. In *Pacifica*, the 4th dissenter was J. White

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1105

But what I am going to ask is whether or not they can be given a construction that is susceptible to defense on the basis of a full protection view of the First Amendment. My claim is that they can if you accept three distinctions: a distinction between abridging and regulating; between advocacy speech and the usual commercial entertainment speech and between a state interest in supporting squeamish parents and a state interest in preventing child access to materials that the state, with little empirical support, concludes is bad for the children.

First, the difference between abridging and regulating. Abridgement, I think, can be reasonably understood to mean a restriction on speech activity of someone who desires to engage in it or receive it and the restriction seriously interferes with their engagement or receipt.

In *American Mini Theatres*, for example, both the plurality and concurrence emphasized repeatedly that there was no claim that Detroit's law prevented or seriously interfered with the availability of adult theaters in New York, or significantly restricted the audience's access to it.<sup>85</sup> If that is the idea of abridgement, there is available the notion of a law that regulates speech but doesn't abridge speech, and that characterization may fit the situation in *American Mini Theatres*.<sup>86</sup>

I note that in the *Pacifica* case, the Court emphasized again and again that all it was holding was that George Carlin's monologue at 2:00 in the afternoon wasn't decent.<sup>87</sup> It repeatedly limited its holding to the facts. This left open the question of what was the

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and in *American Mini Theatres*, it was J. Blackmun. Justice Stewart wrote a dissenting opinion in both cases.

<sup>85</sup> See *American Mini Theatres*, 427 U.S. at 62 (plurality), 78–79 (Powell, J., concurring).

<sup>86</sup> See *id.* at 73 n.35.

The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight.'

*Id.*

<sup>87</sup> See *Pacifica*, 438 U.S. at 750–51.

situation at 2:30 or at 3:00 o'clock in the afternoon. More realistically the Court suggested that some degree of channeling—such as that approved in *American Mini Theatres*—is permissible but left open the view that anything more than a limited degree of channeling would be impermissible.

The second difference is between advocacy speech and commercial entertainment. Stevens, in *American Mini Theatres*, described the significance of the speech there as of “wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire’s immortal comment.”<sup>88</sup> Most commentators have focused on “lesser” and have suggested that, despite the fact that indecency is protected by the First Amendment, it receives a lesser degree of protection and, thus, can be justifiably restricted, though not totally prohibited.<sup>89</sup> That view shouldn’t sit very well with a First Amendment absolutist.

But I want to emphasize the other word in Stevens’ quote, the idea of “different.” The question is: do rules that abridge advocacy speech also necessarily abridge entertainment speech? Well, look at the difference between the two types of speech. Advocacy often requires that the speaker go to where her targeted audience is and confront that audience. That audience may listen even if it would not seek out the speech. Or the advocate may want the audience confronted with their protest, their views, even if the audience does not want to hear.

Commercial entertainers, on the other hand, for the most part only want to reach an audience that desires to be reached. In fact, usually in the case of entertainment speech they can depend, at least to a degree, on the audience coming to the speech, on the audience being willing to make some effort. In fact, often as in the case for movies, the speaker only wants to reach those willing to pay to receive the speech. In broadcasting, recipients pay most obviously by watching so that their attention can then be sold to an advertiser.

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<sup>88</sup> *American Mini Theatres*, 427 U.S. at 70.

<sup>89</sup> See 16A AM. JUR. 2D *Constitutional Law* § 512 (2004). Cf. *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (Stevens, J. and Ginsburg, J., dissenting)

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1107

The next thing I would want to note is that even so-called absolutists like Justice Hugo Black or Professor Thomas Emerson have accepted the legitimacy of regulation—so-called “time, place, manner” regulation.<sup>90</sup> Those regulations restrict speech that is incompatible with the designed or dedicated use of some space or time of the resource in question,<sup>91</sup> so long as the regulation leaves ample alternative channels available for the speaker.<sup>92</sup>

Almost by definition, a regulation that prevented advocacy speech in a manner or place that was central to the expressive activity does not leave adequate alternatives available.<sup>93</sup> I would think that a public nudity prohibition could not be permissibly applied to suppress an anti-prudery group’s nude realist street theater. A “time, place, manner” regulation, a restriction on rallies or marches, applied to a civil rights group’s open housing rally cannot properly restrict them to the black section of a town to the extent that what they want to do is confront a white community.

But the claim as to entertainment speech is that time or space zoning may not be an abridgement if it leaves ample space or time to reach the desired adult audience.<sup>94</sup>

The third distinction I want to make is between two conceptions of what the state interest was in *Pacifica*.<sup>95</sup> As the dissent shows, the two can conflict but language in the case does not sharply distinguish between them and does not explain which is crucial. Although I think that the case is read best to support the second of these two interests, I recognize that either reading is possible.

First, the state interest could be in preventing children from seeing or hearing indecent content on the government’s view that viewing or hearing this content is bad for them.<sup>96</sup> But note what this would mean if you accepted that. First, it would mean that you could only effectively advance the interest if you prohibited

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<sup>90</sup> *See id.*

<sup>91</sup> *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

<sup>92</sup> *Id.* § 517.

<sup>93</sup> *See id.* § 512.

<sup>94</sup> *See, e.g., Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

<sup>95</sup> *See FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

<sup>96</sup> *See id.* at 749.

indecent during all the hours in which children are in the audience—and research suggests that is basically all hours. Or, if you wanted to get at the bulk of the problem in relation to broadcasting, you could restrict between early morning and midnight, which is the time that most kids watch TV. You would also require a prohibition on parents from showing children indecent content. Probably, the state would have to require parents to keep sexually explicit magazines and art reproductions in portions of their home to which children have no access. Of course, children would be barred from most museums, probably from the streets.

Note that the indecency ban must apply during hours when most adults view TV, which would be inconsistent with the *Butler v. Michigan* mandate,<sup>97</sup> accepted by the Court in *Pacifica*, that you should not reduce adults to the level of children in their consumption of media products.<sup>98</sup>

Of course, all this would be inconsistent with the tradition in a diverse society of recognizing parents' presumptive authority to decide within limits—they aren't allowed to beat their kids to a pulp—of how they want to raise their children.

Nevertheless, I must note that this is the interest that was accepted by the D.C. Circuit *en banc* decision in the *Action for Children's Television v. FCC* litigation, upholding the FCC's right to bar indecency between early morning and midnight.<sup>99</sup> I should disclose that I was one of the lawyers involved in the earlier stage of this litigation, but not at the time when it got to the *en banc* court, where the Court accepted this interest.

Alternatively, the case could involve a different state interest. That could be in supporting parents' ability to raise children as they desire.<sup>100</sup> This interest could be advanced by restricting indecency during those hours when parents are least likely to be at home—for example, the period from breakfast to supper.

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<sup>97</sup> *Butler v. State of Michigan*, 352 U.S. 380, 383–84 (1957).

<sup>98</sup> *See Pacifica*, 438 U.S. at 750 n.28.

<sup>99</sup> *See* 58 F.3d 654, 661 (D.C. Cir. 1995) (*en banc*).

<sup>100</sup> *See id.* at 660.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1109

This shortened channeling would provide those parents that were squeamish about their children seeing this material, those parents who wanted to have the capacity to restrict their children's viewing of indecency, with the ability to do so, or at least enhance their ability to do so.

Further, the shorter breakfast to dinner block would not prevent other parents from allowing their children to view the material during other hours of the day—for instance, after supper—if the parents chose to do so. This was the state interest implicitly accepted by the D.C. panel decision in *ACT* when it remanded the time limits to the FCC to show how they were justified.<sup>101</sup> It is also an interest that is entirely consistent with everything that the Court did and said in the *Pacifica* case.<sup>102</sup>

Thus, for my argument in favor of a narrow *Pacifica* decision, you must accept the first two distinctions—the distinction between regulate and abridge and the distinction between different types of speech<sup>103</sup> which raise different potential complaints against zoning regulations. Then, you must accept that the state interest that the Court was using to justify *Pacifica* was the final one—supporting parents' control, not an interest in keeping the material from kids. If you accept these distinctions, then there is a possible justification for channeling that would last during the general daytime hours,<sup>104</sup> but would not extend into the early evening,

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<sup>101</sup> 852 F.2d 1332, 1334 (D.C. Cir. 1988).

We vacate the FCC's orders regarding the post 10:00 p.m. broadcasts and remand those cases to the Commission with instructions to reopen the time limitation or channeling aspect of the rulings for fresh decision on a full record and in a manner sensitive to these considerations: (1) the speech at issue, as the FCC has acknowledged, is protected by the first amendment; (2) the Commission's avowed objective is not to establish itself as censor but to *assist parents* in controlling the material young children will hear.

*Id.*

<sup>102</sup> *Pacifica*, 438 U.S. at 749–50. “We held in *Ginsberg v. New York*, 390 U.S. 629, [639–40 (1968)], that the government's interest in the ‘well-being of its youth’ and in supporting ‘parents’ claim to authority in their own household’ justified the regulation of otherwise protected expression.” *Id.*

<sup>103</sup> See *supra* text accompanying notes 84–85.

<sup>104</sup> *Action for Children's Television*, 58 F.3d at 688 (Wald, J., dissenting).

1110                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV

much less to 10:00 as the FCC currently does, or midnight as the D.C. *en banc* decision said would be permissible.<sup>105</sup>

It would seem to me that this regulation, to the extent that it wasn't applied to advocacy speech—and I would be inclined also to say to even broadcast news, particularly news where the content of the speech was integral to the news broadcast—may be very consistent with a more absolutist protection of free speech.<sup>106</sup> No speaker would be prevented from reaching her desired adult audience, prevention that would constitute an abridgement.

PROF. GREENE: Thank you, Ed.

Next on our panel is Paul McGeady. Mr. McGeady is the General Counsel of Morality in Media—a National Interfaith Organization organized in 1962 by a Catholic priest, protestant ministers, and a Jewish rabbi.<sup>107</sup> Its purpose is to combat obscenity generally throughout the United States and indecency on radio and TV. Mr. McGeady is also the Director of the National Obscenity Law Center, which exists to assist prosecutors, city attorneys, and members of the bar nationwide to understand the intricacies of the law of obscenity.<sup>108</sup> Paul McGeady.

MR. McGEADY: Thank you.

I am going to talk on four different subjects, but all related to indecency. I am going to talk on Bono's the "F-Word," Janet Jackson's "wardrobe malfunction," and what the FCC did about both of these things; and then I am going to try to give a quick history of FCC enforcement. That is a lot, so if I am not able to finish in time, I will have, on my desk, a complete rundown of what the FCC has done relative to enforcement or non-enforcement through the years.

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<sup>105</sup> *Id.* at 665.

<sup>106</sup> *See generally Pacifica*, 438 U.S. at 726.

<sup>107</sup> *See About Morality in Media*, at <http://www.moralityinmedia.org> (last visited May 17, 2005).

<sup>108</sup> *See id.*; National Obscenity Law Center, *About the NOLC*, at <http://www.moralityinmedia.org/nolc/aboutnolc.htm> (last visited May 17, 2005).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1111

I think, first, I should mention that the *Pacifica* case did have a lockbox in the case, in the brief of the defendant,<sup>109</sup> so the Supreme Court was well aware that the lockbox existed at that time and they didn't even mention it.

But anyhow, getting back to my other subjects, Bono is a famous singer and songwriter featured in an Irish band.<sup>110</sup> The Golden Globe Awards are presented on nationwide TV by the Hollywood Foreign Press Association.<sup>111</sup> On January 19, 2003, NBC and its affiliate TV stations, with a potential nationwide audience, aired the live awards program at a time when children were in the audience. Bono, upon receiving the award for the Best Original Song, said, "This is really, really ['F'] brilliant. Really, really great."<sup>112</sup>

Hundreds of complaints were filed with the Federal Communications Commission that NBC and Bono had violated the federal statute which prohibits broadcasting of "obscene, indecent, or profane language."<sup>113</sup> That section had been upheld in *FCC v. Pacifica* by the Supreme Court.<sup>114</sup>

At that time, the Supreme Court gave a definition of indecency as "nonconformance with accepted standards of morality."<sup>115</sup> They also blessed the FCC definition, which read "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium,

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<sup>109</sup> See Brief for Pacifica Found. at 47 n.40, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (No. 77-528), available at 1978 WL 206840. "According to Broadcasting magazine, technology is now prepared to provide parents with a device which will permit them to 'program' their home television set in advance so that it will only receive material selected by the parent, even in the parent's absence." *Id.*

<sup>110</sup> The band is U2. See U2.com, at <http://www.u2.com> (last visited May 18, 2005).

<sup>111</sup> See Hollywood Foreign Press Association, *History of an Award*, at <http://www.hfpa.org/goldenglobe-history.html> (last visited May 18, 2005).

<sup>112</sup> Golden Globe Awards, 19 F.C.C.R. 4975, 4976 n.4 (2004).

<sup>113</sup> See *id.* at 4976 n.4.

<sup>114</sup> See generally 438 U.S. 726.

<sup>115</sup> *Id.* at 740.

1112                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV

sexual or excretory activities or organs.”<sup>116</sup> That is still the section that is controlling, except the words “in context” are used.<sup>117</sup>

In October of 2003, Mr. Solomon, Chief of the Enforcement Bureau, dismissed all of the complaints, saying that the language used by Bono “did not describe [in context] sexual or excretory organs or activities.”<sup>118</sup> It was used as an adjective, not as a noun and not as a verb.<sup>119</sup> It also said that the utterance was “fleeting and isolated” and that it was “used to emphasize an exclamation.”<sup>120</sup>

The Bono decision caused an uproar in Washington and throughout the country.<sup>121</sup> Commissioner Powell actually suggested to the other Commissioners that they should meet together and review this ruling. They did and on March 18, 2004, the full Commission reversed the staff ruling and found, given the context, that Bono’s use of the “F-Word” in the was both indecent and profane, holding that “it does depict or describe sexual activities.”<sup>122</sup> The “F-Word” “inherently has a sexual connotation.”<sup>123</sup> “[U]se of the ‘F-Word’ on a nationally televised awards ceremony . . . was shocking and gratuitous” and patently offense.<sup>124</sup> Failure of the Commission to act “when children were

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<sup>116</sup> *Id.* at 732; *see also* Industry Guidance, 16 F.C.C.R. 7999, 8000 (2001) (stating that the *Pacifica* Court “quoted the Commission’s definition of indecency with apparent approval”).

<sup>117</sup> *See* Industry Guidance, 16 F.C.C.R. at 8000; Federal Communications Commission, *Obscene, Profane, & Indecent Broadcasts: FCC Consumer Facts* [hereinafter *FCC Consumer Facts*], at <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last updated May 18, 2004). “The FCC has defined broadcast indecency as ‘language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.’” *Id.*

<sup>118</sup> *Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 18 F.C.C.R. 19859, 19861 (2003), *rev’d en banc* 19 F.C.C.R. 4975 (2004).

<sup>119</sup> *See id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See* Melanie Hunter, *FCC Ruling on “F-Word” Fires up Pro-Family Groups* (Nov. 18, 2003), at <http://www.cnsnews.com/Culture/archive/200311/CUL20031118a.html>.

<sup>122</sup> *Golden Globe Awards*, 19 F.C.C.R. 4975, 4978 (2004).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 4979.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1113

expected to be in the audience” would more likely lead to a wider spread of offensive language.<sup>125</sup>

They also said that NBC was “on notice that an award presenter or recipient might use offensive language.”<sup>126</sup> The “F-Word” was used in a 2002 Billboard Award, and the Commission suggested they could have instituted a time delay and bleeped it.<sup>127</sup> Bono actually is reported to have used it in a 1994 Grammy Awards broadcast.<sup>128</sup>

At this point, they said that the prior Commission interpretation on fleeting expletives is no longer good law.<sup>129</sup> Then, they went further and said that they are going to use the definition of “profanity” or “profane” adopted by the Seventh Circuit in 1972, which means—now we’re on “profanity”—“language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”<sup>130</sup> So they, in effect, said it was both indecent and profane, which is part of the statute.<sup>131</sup>

They went on to tell broadcasters that they were “on notice that the Commission in the future [would] not limit its definition of profane speech to blasphemy . . . , but, depending on the context, will also consider under the definition of ‘profanity’ those words [or variants thereof] that are as highly offensive as the ‘F-Word’ to the extent such language is broadcast between 6 a.m. and 10 p.m.” and that they would analyze it on a case-by-case basis.<sup>132</sup>

No penalty was imposed on NBC and its affiliates because the Commissioners took a new approach and departed from several prior published decisions which permitted fleeting expletives, and

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See id.* at 4978–80.

<sup>128</sup> *See id.* at 4979.

<sup>129</sup> *See id.* at 4980.

<sup>130</sup> *Id.* at 4981 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)). The *Golden Globe Awards* decision stated that nothing in the Commission’s profane speech cases suggests “that the Commission could not also apply the definition articulated by the Seventh Circuit.” *Id.*

<sup>131</sup> *See* 18 U.S.C. § 1464 (2000).

<sup>132</sup> *Golden Globe Awards*, 19 F.C.C.R at 4981.

1114            *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*            [Vol. XV]

because of their old rule that you had to defame the deity to be profane, which they abandoned in this case.<sup>133</sup>

Next came a petition for reconsideration in the Bono Commission ruling, filed by NBC.<sup>134</sup> A separate petition was filed by various radio and TV stations.<sup>135</sup> Our organization, Morality in Media, opposed the reconsideration of these—practically the rest of the industry came into this reconsideration request—on the simple enunciation that they had no standing, that only NBC and possibly its affiliates had standing.<sup>136</sup>

NBC filed a petition for reconsideration and said that the FCC must show a “compelling governmental interest,”<sup>137</sup> but that doesn’t happen to be the law. The Supreme Court of the United States has said in the broadcast area you don’t need a compelling interest, an important or substantial interest is sufficient.<sup>138</sup>

So this approach, which is still in the approach that the FCC uses, is absolutely, flat-out not the law. In fact, in *FCC v. League of Women Voters*,<sup>139</sup> the Supreme Court actually reversed a lower court that said you must have a compelling interest.<sup>140</sup> So we have a situation where, hopefully, the FCC will no longer look for a compelling interest when there is a purported violation.

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<sup>133</sup> See *id.* at 4981–82. Historically, profane language has been interpreted in the legal context to mean blasphemy. See *Duncan v. United States*, 48 F.2d 128, 133–34 (9th Cir. 1931). Language that is irreverent to God and implies divine condemnation was considered profane. See *id.*

<sup>134</sup> Pet. for Partial Recons., Golden Globe Awards, 19 F.C.C.R. 4975 (2004) (No. EB-03-IH-0110) [hereinafter NBC Pet. for Partial Recons.] (filed by NBC), available at <http://www.fcc.gov/eb/broadcast/Pleadings/NBCPet.pdf> (last visited May 18, 2005).

<sup>135</sup> See *id.* (filed by “a diverse group of broadcast licensees, public interest organizations, professional associations, production entities, programmers, writers and performers that have a direct stake in the FCC’s enforcement of 18 U.S.C. § 1464”).

<sup>136</sup> Brief of Amici Curiae Morality in Media at Part IIA, Golden Globe Awards, 19 F.C.C.R. 4975 (2004) (No. EB-03-IH-0110), available at <http://moralityinmedia.org/medialssues/GGComments-NBCReconsider.htm> (last visited May 18, 2005).

<sup>137</sup> See NBC Pet. for Partial Recons., *supra* note 133, at 2.

<sup>138</sup> See *FCC v. League of Women Voters*, 468 U.S. 364, 376, 380 (1984).

<sup>139</sup> *Id.*

<sup>140</sup> *League of Women Voters* actually affirmed a Central District of California ruling that rejected the FCC’s contention that the statute at issue “served a compelling government in ensuring that funded noncommercial broadcasters do not become propaganda organs for the government.” *Id.* at 372–73 (quoting 547 F. Supp. 379, 384–85 (C.D.Cal. 1982), *aff’d*, 468 U.S. 364 (1984)).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1115

I will go on to the Janet Jackson case.<sup>141</sup> In that case, there were an estimated 90 million viewers.<sup>142</sup> It happened February 1, 2004, at the Super Bowl.<sup>143</sup> There was a fifteen-minute, half-time, MTV entertainment starring Janet Jackson and Justin Timberlake.<sup>144</sup> It was broadcast by the CBS Network stations at 8:30 p.m.<sup>145</sup> The licensees were Viacom and its entities controlled by Viacom.<sup>146</sup> They received 542,000 complaints about this “wardrobe malfunction.”<sup>147</sup> I don’t think I have to describe what the malfunction was, but I will describe why they said it was indecent.

During the entertainment, Timberlake was dancing around, grabbing at Janet Jackson, and he sang, “gonna have you naked at the end of this song.”<sup>148</sup> Now, nudity is not in the definition that I gave. So the question arises, “how can the network be fined because when Timberlake grabbed at her clothing and exposed her breast, that’s simple nudity?”

Well, apparently the whole context was what got the FCC moving, including the fact of this song and the dancing around in what they considered a sexual manner.<sup>149</sup> But yet it did not fit the definition, so they have really reverted to a fundamental determination of “indecent” that can include such acts. Of course they would say, well, it was sexual activity. That’s debatable. It was offensive activity for sure.

But anyhow, the full Commission considered it and reversed the staff. The show was deemed both explicit and graphic, the song lyrics and the choreography and simulated sexual activity,

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<sup>141</sup> Super Bowl, 19 F.C.C.R. 19230 (2004); see also *Apologetic Jackson Says that ‘Costume Reveal’ Went Awry: FCC to Investigate Incident at End of Halftime Show* (Feb. 3, 2004), at <http://www.cnn.com/2004/US/02/02/superbowl.jackson>. (reporting FCC investigation of incident at end of the Super Bowl halftime show wherein singer Janet Jackson exposed her right breast on camera).

<sup>142</sup> *Id.* at 19240.

<sup>143</sup> *Id.* at 19230.

<sup>144</sup> See *id.* at 19233.

<sup>145</sup> *Id.* at 19230.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 19231 n.6.

<sup>148</sup> *Id.* at 19236.

<sup>149</sup> See *id.* at 19235–36.

including the line “gonna have you naked.”<sup>150</sup> And the nudity, they said, “was designed to pander [and] titillate and shock.”<sup>151</sup> They said, “we hold that it was indecent.”<sup>152</sup>

By airing it, they said, CBS and its owned affiliates violated the indecency statute and they assessed a \$550,000 forfeiture.<sup>153</sup> None of these forfeitures have been paid to my knowledge.

Now, I don’t have too much time to talk about the history of enforcement. But briefly, it started with George Carlin’s “Seven Dirty Words” in the *Pacifica* case,<sup>154</sup> and then for many years the only thing that the FCC would enforce was if somebody repeated one of those words, which of course was ridiculous.

So finally, our organization and others went down to Washington and we picketed the FCC, saying, “They’re not enforcing the indecency law.” There is nothing in the law that says that they are restricted to these seven dirty words.

The message got through, because the General Counsel, Jack Smith, came down and asked us to go to his office, and he said, “From now on we’re going to enforce a generic definition.” And they did for a while, but very loosely.

I know of at least three cases where the FCC during this period let the statute of limitations run rather than assess a forfeiture.<sup>155</sup> The five-year statute ran out in three cases.<sup>156</sup> So what did they do? They said, “Well, the limitation has ran, so we will reverse the Notice of Liability,” and they did. So there was a lot of loose enforcement.

But after Bono and Janet Jackson, Mr. Powell and company made a 180-degree turn and now we have vigorous enforcement.

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<sup>150</sup> See *id.* at 19235–36.

<sup>151</sup> *Id.* at 19236.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.* at 19240.

<sup>154</sup> FCC v. *Pacifica Found.*, 438 U.S. 726 (1978).

<sup>155</sup> See generally John Dunbar, *Shock-Jock Stern Draws \$1.96M in Fines*, BUS. J. (Youngstown, OH) (Mar. 18, 2004), available at <http://www.business-journal.com/LateMarch04/SternDrawsinFines.html> (stating that an analysis conducted by the Center for Public Integrity identified \$152,150 in proposed fines that had been dismissed since 1990 due to the expiration of the statute of limitations).

<sup>156</sup> See Dunbar *supra* note 1555.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1117

Thank you.

PROF. GREENE: Thank you, Paul.

Finally on our panel is John Fiorini. John Fiorini is a partner in the Washington law firm of Wiley Rein & Fielding, which is one of the nation's major communications law firms, where he represents mass media companies, particularly radio and television broadcasters, before the FCC. For more than thirty years he has advised broadcasters on regulatory issues associated with licensing and transactional matters. John Fiorini.

MR. FIORINI: Thank you very much.

I see that I am bringing up the rear. Can I say "rear," Bill?

MR. DAVENPORT: He said, "Where does the FCC get off?"

MR. FIORINI: Never having been under any illusion that I am a legal scholar, I thought that this afternoon I might give you a brief report from ground level, where I have spent more time than I would ever have imagined over the past few years trying to keep my clients out of Bill Davenport's clutches, with varying success I might add.

My wife says, "It's a dirty job, but somebody has to do it."

Initially, and perhaps to state the obvious, the current furor over indecency is being shaped more by political, moral, and ideological forces than by the legal ones. Concern about consolidation in big media, increasing polarization of society generally, and the mobilization of special interest groups,<sup>157</sup> aided certainly by the astonishing efficiencies of the Internet, among other factors, seem to have coalesced to turn the indecency debate into what has been called "the perfect storm."

And Congress, which knows a winning political opportunity when it sees one, has made abundantly clear its interest in more stringent indecency enforcement.<sup>158</sup>

This isn't to suggest that the broadcasting industry is entirely blameless. Clearly some material has been broadcast that, legal

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<sup>157</sup> See *Mediaweek Daily Briefing: Activists Dominate Content Complaints*, MEDIAWEEK, Dec. 6, 2004.

<sup>158</sup> See generally Fallow, *supra* note 47.

1118                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV

niceties aside, should, by any common-sense standard, never have been on the air.

Incidentally, although industry consolidation is often fingered as the culprit here, my own view is that competition is the real cause. As the number of radio and TV outlets has proliferated, while at the same time viewers and listeners now have access to many alternative sources of entertainment and information.<sup>159</sup> In such an environment, the inclination towards sensationalism is, I think, understandable, whether or not you find it to be excusable.

Whatever the cause or motivation, however, what is unmistakable is the remarkable escalation in enforcement activity that has taken place at the FCC over the past three or four years. Some of the measures that the FCC has implemented were summarized by Bill, but I would like to go through them and a few others very quickly anyway.

As Bill mentioned, the Commission now, almost as a matter of course, imposes the maximum fine allowable by statute.<sup>160</sup> The base amount of forfeiture for indecency that is provided for in the FCC's rules is \$7,000,<sup>161</sup> and you still do see some of those, most recently in the Fox "Married By America" case that was referred to.<sup>162</sup> But more often than not, you see the statutory maximum of \$27,500, which I guess is actually \$32,500<sup>163</sup>—is that right, Bill?

MR. DAVENPORT: That's right.

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<sup>159</sup> See Paul Farhi, *Voters Are Harder to Reach as Media Outlets Multiply*, WASH. POST, June 16, 2004, at A01; Edward Wyatt, *The Winds of Change Are Felt at Publishers Weekly*, N.Y. TIMES, Jan. 5, 2005, at E3.

<sup>160</sup> See 47 C.F.R. § 1.80(b)(1) (2004).

If the violator is a broadcast station licensee . . . , the forfeiture penalty under this section shall not exceed \$32,500 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$325,000 for any single act or failure to act . . . .

*Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Married By America, 19 F.C.C.R. 20191 (2004); see *supra* notes 29–31 and accompanying text; see also Press Release, Parents Television Council, FCC Fine of FOX's "Married by America" a Victory for America's Families (Oct. 12, 2004), available at <http://www.parentstv.org/ptc/publications/release/2004/1012.asp>.

<sup>163</sup> 47 C.F.R. § 1.80(b)(1).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1119

MR. FIORINI: Although Bill will, I'm sure, take issue with my view here, in my view the Commission has in effect shifted the burden of proof in indecency cases, or at a minimum reduced the standard of proof that is required from a complainant. Until a few years ago, I think it's fair to say the general Commission policy was that a complainant who was upset over allegedly indecent material had to supply a tape or transcript of the material that he or she was concerned about. More recently, the Commission has relaxed that requirement, sometimes accepting even a brief summary of a broadcast, and then requiring the broadcaster in effect to prove that indecent material was not aired.

The Commission has also most recently begun imposing fines for each allegedly indecent utterance. Whereas previously it had viewed violations on a per-program basis, each program constituting only one violation, more recently they have said that they would go to a per-utterance standard.<sup>164</sup> And in one recent case they did that, although in that instance they didn't parse each statement separately; they did it on the basis of speaker—there were two speakers and they imposed two fines—but they did it with the caveat that in the future they might refine their approach further and fine on literally a word-by-word or statement-by-statement basis.

As another example of the escalation in enforcement activity, when the FCC receives an indecency complaint now, it routinely requires a station to provide a tape or transcript not only of the precise material that is the subject of the complaint but also fifteen minutes on either side. The Commission's announced purpose for this is to get a better sense of context, which, as has already been said, is an integral part of the definition.<sup>165</sup> Some of the cynics among us might ask the question whether at some point it becomes a bit of a fishing expedition.

This might be a good place, by the way, to give a disclaimer that the Enforcement Bureau does not make policy.<sup>166</sup> The

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<sup>164</sup> Cf. *Entercom Kan. City Licensee*, 19 F.C.C.R. 25011, 25019 (2004) (warning that "we may issue forfeitures for each indecent utterance in a particular broadcast").

<sup>165</sup> See *supra* notes 15–16 and accompanying text.

<sup>166</sup> See *generally About the FCC*, at <http://www.fcc.gov/aboutus.html> (last updated May 12, 2005).

1120                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV]

Commission *en banc*, the five appointed Commissioners, make policy and the Enforcement Bureau implements it.<sup>167</sup> So to the extent that I may be critical of the escalation in enforcement activity, that is not intended to be directed to the Bureau, which does a very professional and high-quality job within the parameters that are given to them.

As Bill mentioned, the Commission also now routinely asks what other commonly owned stations broadcast material and has not been reluctant to impose fines in each case, multiple fines for multiple stations for exactly the same material.<sup>168</sup>

As I think Bill also suggested, in the Fox case, the “Married By America” case, the Commission for the first time has proposed to fine affiliates, something like 140 of them I think, in addition to twenty-five Fox-owned stations. They are carrying out these actions on the premise that, unlike in some prior cases, including the Bono and Super Bowl cases, the Fox affiliates had an opportunity to review and to edit or reject outright the material involved.<sup>169</sup> I think it is still a bit unclear whether those facts will be borne out, since that notice of apparent liability is now only a few weeks old, but I think it shows once again that the Commission is extending its reach.

Two further things. One, which is not something that is within the Enforcement Bureau’s purview at all but it’s clearly related, is that the Commission has a rule-making proceeding underway in which it proposes to require broadcasters to retain tapes, transcripts, or other records of their broadcasts.<sup>170</sup> The announced purpose of this is to assist the Commission in indecency enforcement by providing a record of what was broadcast.<sup>171</sup>

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<sup>167</sup> See generally *id.*

<sup>168</sup> See *supra* notes 27–32 and accompanying text; see, e.g., Wade Paulsen, *FCC Seeks to Fine Fox Affiliates \$1.18 Million for ‘Married By America’ Broadcast* (Oct. 13, 2004), at <http://www.realitytvworld.com/index/articles/story.php?s=2974> (noting that the FCC fined 169 Fox affiliates \$7,000 each for broadcasting the raunchy show during “family hours” when children were most likely to be watching television).

<sup>169</sup> See *Married By America*, 19 F.C.C.R. 20191, 20196, 20198–220 (2004); see also Paulsen, *supra* note 168 (stating that 169 Fox Affiliates aired the broadcast in question).

<sup>170</sup> See Notice of Proposed Rulemaking, 19 F.C.C.R. 12626, 12636 (July 7, 2004) (Statement of Commissioner Michael J. Copps).

<sup>171</sup> *Id.*

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1121

Broadcasters, I think almost universally, have argued against this proposal, saying that it should either be rejected outright, or at least more narrowly tailored to be addressed to the stations that have been the troublemakers.<sup>172</sup> We will see what happens.

Finally, as Bill also suggested, the Commission, beginning in April of last year and most recently just a couple of weeks ago, has said that broadcasters that are found to have aired indecent material risk license revocation.<sup>173</sup> Since many broadcasters, probably most broadcasters, could not survive the loss of a license, this amounts to a threat to use the administrative equivalent of the death penalty, and broadcasters have seen it as such.

Contrary to what some groups would have you believe, the Commission has got broadcasters' attention, and most of them have reacted in various ways.<sup>174</sup> They have instituted training programs; they have installed delay mechanisms; they have disciplined employees.<sup>175</sup>

In two cases so far—in both of which, for better or worse, I was involved—they have entered into consent decrees requiring payment of substantial fines, admissions of liability, and rigorous compliance plans. I would say very quickly, parenthetically, that one might think that interest groups in favor of indecency enforcement would have viewed these decrees as a sort of victory. But far from it. Both decrees are being challenged, one in court and one before the Commission, leaving one to wonder whether

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<sup>172</sup> See Reply Comments of the National Association of Broadcasters, Retention by Broadcasters of Program Recording, Docket No. 04-232 (released July 7, 2004) available at [http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6516485287](http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516485287).

<sup>173</sup> See, e.g., Entercom Kan. City Licensee, 19 F.C.C.R. 25011, 25019 (2004) (adopted Sept. 28, 2004). “[S]erious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings . . .” *Id.*

<sup>174</sup> See, e.g., Anne Marie Squeo, *Broadcasters' FCC Petition Sets Battle on Indecency Crackdown*, WALL ST. J., Apr. 19, 2004, at A1; NAB Summit on Responsible Programming (Mar. 31, 2004) at <http://www.nab.org/Meetings/ResponsibleProgrammingSummit/default.asp> (last visited May 18, 2005).

<sup>175</sup> See, e.g., Richard Sandomir, *Sports Briefing: Pro Football; 10 Second Delay for Show*, N.Y. TIMES, Sept. 7, 2004, at D5; Bill Carter, *Broadcasters Wrestle F.C.C. for Remote; Pushed on Obscenity, Networks Delays, Even on Sports*, N.Y. TIMES, Mar. 15, 2004, at C1.

1122            *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*            [Vol. XV

the challengers are interested in compliance or something more—say plain old retribution maybe.

Talent too, has reacted. Some have been willing and able to adapt to the new environment. Some have sought what they view as greener—or maybe more accurately less confining—pastures, such as satellite radio.<sup>176</sup> At least one, Todd Clem, once notoriously known as “Bubba the Love Sponge,” is reportedly running for sheriff in Florida.<sup>177</sup>

This migration to satellite radio, by the way, is a source of no small concern to broadcasters. At a time when their bottom lines are already under pressure, they have to be concerned about loss of audience to a medium that is not subject to indecency regulation. Broadcasters are increasingly vocal about leveling the playing field in this regard, although there are obvious legal and constitutional issues implicated.<sup>178</sup>

Finally, where do we go from here? To court—I think. It seems unlikely that the Commission will change course in the foreseeable future, whatever the outcome on Tuesday.<sup>179</sup>

Consider, for example, that Kevin Martin, generally regarded as the most conservative Commissioner, and Michael Copps, generally considered the most liberal, have taken nearly indistinguishable positions favoring aggressive indecency enforcement.<sup>180</sup>

And Congress certainly will not be urging moderation. As Bill suggested, it came within inches earlier this month of passing legislation that would increase the maximum fine to \$500,000,

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<sup>176</sup> See, e.g., Joanne Ostrow, *All Because of a “Wardrobe Malfunction” Indecency Police and FCC Team Up to Spark Self-Censorship*, DENVER POST, Dec. 26, 2004, at F-03 (noting that Howard Stern moved to satellite broadcasting to “escape the reach of federal regulators”).

<sup>177</sup> Michael Sandler, *Could Infamy Give Clem A Boost?*, ST. PETERSBURG TIMES (FL), Oct. 3, 2004, available at [http://www.sptimes.com/2004/10/03/Tampabay/Could\\_infamy\\_give\\_Cle.shtml](http://www.sptimes.com/2004/10/03/Tampabay/Could_infamy_give_Cle.shtml).

<sup>178</sup> See Jennifer 8. Lee, *Bill to Raise Indecency Fines Is Reintroduced*, N.Y. TIMES, Oct. 9, 2004, at C3.

<sup>179</sup> Mr. Fiorini was referencing the U.S. Presidential Election of November 2, 2004.

<sup>180</sup> See Martha Kleder, *Two FCC Commissioners Blast Lax Indecency Enforcement* (July 16, 2003), at <http://www.cultureandfamily.org/articledisplay.asp?id=4279&department=CFI&categoryid=cfreport>.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1123

with a daily maximum of \$3 million.<sup>181</sup> Other proposed legislation would mandate a license revocation hearing for a station with three or more indecency violations.<sup>182</sup> Nobody expects these efforts to be abandoned any time soon.

So court challenges will surely come. As has already been suggested, a coalition including the ACLU, Margaret Cho, Penn and Teller, and the Screen Actors Guild, among others, as well as a number of broadcasters, is poised to appeal the Bono decision, though there are standing issues.<sup>183</sup> At a minimum, the Commission must first deal with a reconsideration request because of a remedy exhaustion issue.

Viacom reportedly plans to challenge the Super Bowl decision.<sup>184</sup> All this will take time, and in the interim we all have to deal with the turmoil and uncertainty in the present situation.

But against this somber backdrop I will tell you that, like the character in the GEICO commercial, I have good news: business is booming.

Thank you very much.

PROF. GREENE: Thank you very much, John, and to the panelists.

When Andrew asked me to do this, I was just going to moderate, but I have been moved to prepare a few brief remarks because I have some very strong feelings on this. I hope they can be brief.

First, as a preface, from my point of view it is totally fine and permissible, for the government to use its spending power to advance its views of morality. I have written on this.<sup>185</sup> Many of my liberal friends disagree with me on this. I think it is fine for the

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<sup>181</sup> See Greg Gatlin, *FCC's Powell Picking His Fights*, BOSTON HERALD, Oct. 20, 2004, at 33. The House of Representatives has since passed H.R. 310, The Broadcast Decency Enforcement Act of 2005, which increases the maximum fine to \$500,000. H.R. 310, 109th Cong. § 2.

<sup>182</sup> See Fallow, *supra* note 47, at 1, 25.

<sup>183</sup> *Id.*

<sup>184</sup> See Lynn Elber, *CBS To Fight any FCC 'Janet' Fines*, CBS News, July 21, 2004, at <http://www.cbsnews.com/stories/2004/09/22/entertainment/main644991.shtml>.

<sup>185</sup> See generally Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1 (2000).

government to, for instance, fund only art that it believes to be decent and to leave the funding of indecent art to private parties.<sup>186</sup>

Secondly, I think it is fine for private parties, including privately owned media, to engage in whatever sort of content choices they want. I think broadcasters, newspapers, parents, magazines, churches, synagogues—you name it, any private party—can speak in whatever way it wants to, or not.

Having cleared the deck on government funding of speech and on private speech, let me say that I believe that it is ludicrous and patently unconstitutional for government to engage in any kind of content regulation of sexual or indecent speech.<sup>187</sup> I would overrule *Miller v. California*<sup>188</sup> and *Pacifica*.<sup>189</sup> Now let me say a few things about this. I have four points.

First, this kind of regulation is clearly content-based. It requires the government, in doing the regulation, to assess the message and content of the speech. Generally speaking, content regulation is the most difficult for the government to defend.<sup>190</sup> I cannot go into all of the First Amendment doctrine here today, but generally speaking, it is something that we consider to be highly problematic because government is favoring certain types of speech, certain viewpoints and certain messages, over others.<sup>191</sup>

In this setting, there are various ways to deal with the problem that parents don't like their kids to watch or hear this speech. First of all, the old "averting your eyes" from *Cohen v. California*,<sup>192</sup> *Erznoznik*,<sup>193</sup> *Texas v. Johnson*<sup>194</sup>—all cases involving a harm to

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<sup>186</sup> See generally *id.*

<sup>187</sup> See generally *id.* at 41–52.

<sup>188</sup> 413 U.S. 15 (1973). (rejecting the "utterly without redeeming social value" standard as a constitutional standard in obscenity cases).

<sup>189</sup> *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

<sup>190</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (stating that "content-based regulations are presumptively invalid").

<sup>191</sup> See *Tex. v. Johnson*, 491 U.S. 397, 415 (1989). (holding that the state could not prosecute a defendant who burned a flag for the purpose of preserving the United States flag).

<sup>192</sup> 403 U.S. 15 (1971) (holding that states could not criminalize the public display of an expletive).

<sup>193</sup> *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (holding that a city ordinance prohibiting drive-in movie theaters from showing movies containing nudity is invalid).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1125

sensibility. In all these cases, the Supreme Court basically said you have to take that first hit to your sensibility and then avert your eyes or your ears.<sup>195</sup>

With regard to children, there are various ways that parents can try to control what their children see and hear, both when the parents are home and not. We live in a culture where children are exposed to an enormous amount of content of various sorts every day, and the notion that the government can promulgate regulations and enforce them in a way that can somehow restrict children to a certain type of content is, I think, very far-fetched.

So the first argument is that these regulations are content-based and problematic for various reasons.

Secondly, these types of regulations are also overbroad. In a series of recent cases about Internet regulation,<sup>196</sup> the Supreme Court has very carefully and cogently said that even if it would be permissible, *arguendo*, to regulate indecent speech toward children, so much of this regulation spills over to adult-to-adult speech; you can't just regulate the speech toward children.<sup>197</sup> By doing that you are limiting what the broadcasters want to say from adult speakers to adult listeners.<sup>198</sup> That kind of overbreadth has been a clear problem throughout First Amendment doctrine. It is clearly the point of the Internet cases where the government has lost consistently,<sup>199</sup> and I think should be applied equally in the broadcast setting.

Third, there is the problem of uncertain application, which is an enormous problem here. Mr. Davenport said that the statute or the regulation, maybe both, says that the government cannot censor.<sup>200</sup> Well, what is the government doing here but censoring? Now, his

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<sup>194</sup> 491 U.S. 397 (1989) (holding that burning of the American flag is conduct protected by the First Amendment).

<sup>195</sup> See, e.g., *Erznoznik*, 422 U.S. at 210–11.

<sup>196</sup> See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 124 S. Ct. 2783 (2004).

<sup>197</sup> *Id.* at 2791.

<sup>198</sup> *Id.*

<sup>199</sup> See, e.g., *id.* at 2795 (upholding an injunction on enforcement of the Child Online Protection Act); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 885 (1997) (holding that sections of the Communications Decency Act were unconstitutional).

<sup>200</sup> See *supra* note 42 and accompanying text.

answer may be it's not censoring based on ideas. But it is clearly censoring based on the message or the content of the speech.

How can we tell apart what should be censored and what shouldn't be? What's indecent? What's sexual? It is very hard. As you hear, the panelists disagree about some of the cases we have here.

It reminds me, if you'll pardon me for one moment, to invoke the great satirist Tom Lehrer and his great song called "Smut," which I will refrain from singing in its entirety to you. If you don't know him, you should go out and buy one of his CDs. He was, I believe, a Harvard math professor who became a satirical songwriter and singer. One of his lines about this point of uncertainty of application is: "Truth, I'm glad to say, is in the eyes of beholder; when correctly viewed, everything is lewd. I can tell you a story about Peter Pan and the Wizard of Oz—there's a dirty old man."<sup>201</sup>

And of course the great line from Justice Harlan in *Cohen v. California*, that "one man's lyric is another man's vulgarity"—or I may have that reversed.<sup>202</sup>

So uncertainty of application is an enormous problem.

And finally, my fourth point—and I'm substantially indebted to Georgetown law professor, David Cole, and his wonderful piece on the regulation of pornography for this one:<sup>203</sup> we live in a culture that is rife with sexual images. They appear during our daytime soap operas—people sort of having sex but you can't quite see it, but it's very sexual. We have bus ads that have people barely clothed, luring people to look at it, to imagine what they are wearing. It seems to me that the regulation of pornography adds to the luridness and adds to the gaze and the desire of people to engage in pornography.

There is a famous story, and I don't remember if it's Biblical or not—I'm sorry for not remembering the source—of Susanna and the Elders, where Susanna is bathing and the elders both

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<sup>201</sup> Tom Lehrer, *Smut*, on THAT WAS THE YEAR THAT WAS (Warner Bros. 1965).

<sup>202</sup> *Cohen v. Cal.*, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric").

<sup>203</sup> David Cole, *Playing Pornography's Role: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 157, 166 (1994).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1127

alternatively gaze at her and then regulate her. It is captured beautifully in a poem by Wallace Stevens called "Peter Quince at the Clavier,"<sup>204</sup> which I also recommend to you.

With that rather polemical manifesto-laden comment, I will close and open it to my co-panelists to respond to each other, and then we will take questions from the floor.

MR. DAVENPORT: Unfortunately, a lot of the

issues that the professor is discussing are actually tied up in various appeals of Commission orders. All I can say briefly is that the Commission has found that historically, given the fact that broadcasters are using a public resource, they are using public spectrum. Thus reasonable restrictions are appropriate, and, given this issue of protecting children, there is a compelling interest in protecting the kids, and so restrictions are appropriate.<sup>205</sup>

Beyond that, though, unfortunately I can't comment.

PROF. GREENE: Any of the other panelists who had things that they wanted to say as a result of other people's comments?

MR. McGEADY: Yes. You've got to remember that the *Pacifica* case was decided on more than one basis.<sup>206</sup> It was not just protection of children; it was protection of unwilling adults having to be assaulted by this material.<sup>207</sup> So there is more than one issue at stake.

Certainly, if we abolish the *Miller* case and we abolish the *Pacifica* case, we are going to see actual copulation on TV available to anybody. I'm not sure that is what the American people want.

PROF. GREENE: Any of the other panelists, or shall we go straight to questions? Ed?

MR. BAKER: A couple of things. First, I note that the broadcasters using the public resource, the airwaves, was explicitly

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<sup>204</sup> Wallace Stevens, *Peter Quince at the Clavier*, in *Harmonium* 132–34 (Alfred A. Knopf 1923) (1915), available at <http://eir.library.utoronto.ca/rpo/display/poem2015.html> (last visited May 19, 2005).

<sup>205</sup> See Fallow, *supra* note 47, at 29–30.

<sup>206</sup> *FCC v. Pacifica Found.*, 438 U.S. at 726., 748–50 (1978).

<sup>207</sup> *Id.*

not part of the justification in *Pacifica*. The dissent in *Pacifica* observed that this was good because that argument only provides as a reason to expand what is in broadcasting, not contract it.<sup>208</sup> So, if it is a scarce limited public resource, you could put obligations on broadcasters to carry communications on that they might not want.<sup>209</sup> But this wouldn't be a justification to censor what they wanted to air.

Second, as to unwilling adults being assaulted, as a general matter, the Court has defended in strong terms the idea that offensive speech, speech that people personally find to be assaulting, is precisely the type of speech that the First Amendment protects. The fact that its content or meaning is offensive or that the audience finds it offensive is, as a general matter, a reason to protect it. It should be noted that this principle has mostly been applied in the context of advocacy speech, not so much in the context of entertainment speech, because usually there the audience is choosing the entertainment so it's not a problem.<sup>210</sup>

Third, that leads to the question about whether or not zoning regulation in this context, to the extent that it doesn't substantially interfere with access to an adult audience, might be a permissible way to advance various forms of public interest. If so, the regulation is consistent with a strong First Amendment view, though. In the end, mostly on pragmatic and empirical grounds, I do not particularly want to endorse it.

I agree with Abner that *Pacifica* should be overruled, though, if anything, I am more disturbed by *Miller*, because that seems to be the more central interference with individual liberty.<sup>211</sup>

My final comment, because it came up in the discussions in two of the remarks, is that it would seem to me that the broadcasters have an obligation—not a legal obligation necessarily, that depends on where the law is at the moment, and it

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<sup>208</sup> *Id.* at 764–65 (Brennan, J., dissenting).

<sup>209</sup> *Id.*

<sup>210</sup> See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). “[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.” *Id.*

<sup>211</sup> See *Miller v. Cal.*, 413 U.S. 15 (1973).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1129

has changed on this over time—but they have an obligation as a medium of mass communication to provide good news.

It also seems that in the context of providing good news, they are not being accurate when they describe *Cohen v. California* as “the ‘F-Word’ case,” it was “the fuck the draft case.”<sup>212</sup> That’s the language the Court used. If they had used different language in the Court opinion, if they had said, “the ‘F-Word,’” or if the Court had written “F—,” then a good news reporter could reasonably report it that way.

If a candidate for office, a public figure, or an idol in the cultural industry uses particular language, it is important for the American public to know the type of language they are using. A report on that would need to be in the precise language that they used.

Now, I admit that the journalistic profession has lots of standards of how they convert the mass reality that they have, into what they show us. However, it should be impermissible for the government to require—and I would think the wrong decision for the media to decide—not to report the news, at whatever hour, in the way that is most informative to the public.

PROF. GREENE: Let me just see if Jeff or John wanted to jump in.

MR. FIORINI: I have a question for Bill and it has to do with the Bono decision<sup>213</sup> and its possible ramifications for news. The Commission did cite in that decision, as someone has already mentioned—Jeff I think—the early case involving the Gotti tapes, and the reputed use of the “F-Word,” and the Commission’s finding there that because they found it integral to the news broadcast that it wasn’t indecent.<sup>214</sup> But there is still, I will tell you, out there in the sticks, at least among a significant number of broadcasters, a question as to what is left of that doctrine, if you will, in the aftermath of Bono.

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<sup>212</sup> *Cohen v. Cal.*, 403 U.S. 15 (1971).

<sup>213</sup> Golden Globe Awards, 19 F.C.C.R. 4975 (2004).

<sup>214</sup> See *supra* notes 57–59 and accompanying text.

1130

FORDHAM INTELL. PROP. MEDIA &amp; ENT. L.J.

[Vol. XV]

And so I guess my question is: do you believe that the Commission in the weeks or months to come is likely to clarify that point? It has caused a lot of consternation, as I'm sure you know.

MR. DAVENPORT: Well, as I mentioned before, we do have additional "F-Word" complaints arising out of a variety of contexts. We have the Dale Earnhardt complaint for example.<sup>215</sup> We have the complaint that I mentioned earlier; situations where people utter the "F-Word" in the background of a news story, or even potentially show it in the background visually.<sup>216</sup>

I would say that the Commission is likely, sometime in the near future, to clarify its Golden Globe decision, either in an additional proceeding or in the order on reconsideration.

MR. HOEH: With respect to reporting the news accurately, you know, on the one hand, I might have a personal view about how we should be reporting the news and whether we should be accurately portraying what is said by people in whatever language they use. But we operate a business as well, and with the Commission issuing the type of fines they are—even if airing questionable language were something that our news management were interested in doing, from a business standpoint the risk of fines is substantial. This is particularly true when you are now talking about a per-utterance as opposed to a per-program fine.<sup>217</sup> I just don't think it's even possible to consider that in a practical situation.

PROF. GREENE: I think we will go to questions. There probably are some from the floor. We'll start down here and then move up there. You're first.

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<sup>215</sup> See Press Release, Parents Television Council, PTC Files Indecency Complaint over NBC's Airing of Dale Earnhardt Expletive (Oct. 18, 2004), available at <http://www.parentstv.org/ptc/publications/release/2004/1018.asp>; see also *supra* notes 66–67 and accompanying text (statement of Jeffrey Hoeh).

<sup>216</sup> See *supra* text accompanying notes 60–61 (response of William Davenport); see also *supra* text accompanying notes 66–67 (statement of Jeffrey Hoeh).

<sup>217</sup> Cf. *Infinity Broad. Operations, Inc.*, 18 F.C.C.R. 6915, 6919 (2003). (noting that each indecent conversation would be viewed as a separate violation under the FCC's rules).

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1131

QUESTION: My name is Raymond Dowd. I'm an attorney in private practice. I have both sued media defendants and defended them.

I organized, some time ago, a panel on the trials of Lenny Bruce, and fairly recently, Governor Pataki posthumously pardoned Lenny Bruce.<sup>218</sup> I wrote a book review in the *New York Law Journal*, about a book that came out about Lenny Bruce and I think it's the first time that publication had printed the word "motherfucker."<sup>219</sup> It was in the context of a discussion of Richard Kuh, who was the prosecutor, questioning a clergyman on the meaning of the word in a court proceeding.<sup>220</sup>

The decision itself has never actually been published by the *New York Law Journal* because the decision itself was obscene.<sup>221</sup> And that is considered the law of the State of New York with respect to the "F-Word." It might bear some scholarly attention.

My question for Professor Greene is, if you think it's okay for the government to spend money with respect to morality. Looking at Attorney General Ashcroft's decision to cover up the "wardrobe malfunction of justice,"<sup>222</sup> which I think cost us \$7,500, do you

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<sup>218</sup> See John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES, Dec. 24, 2003 at A1.

<sup>219</sup> See Raymond J. Dowd, *Lenny Bruce as Pioneer of Free Speech Rights*, 229 N.Y. L.J. 2 (2003), available at <http://www.law.com/jsp/article.jsp?id=1044059423734>. But see J. Kelly, *Threats to Kill Police Officers Are Admitted on Issue of Intent; People v. David Fischer*, 206 N.Y. L.J. 21 (1991) (representing the first printing of the term "motherfucker" by the *New York Law Journal*). The word "motherfucker" has been published by the *New York Law Journal* more than ten times since 1991, not including Dowd's article.

<sup>220</sup> See Dowd, *supra* note 219.

<sup>221</sup> See *id.*

<sup>222</sup> See de la Paz, *supra* note 25 (stating that, in January 2002, Attorney General John Ashcroft ordered the statute of Justice's bosom draped, "apparently because he didn't want news photographers spreading around pictures of bare bosoms, even sculpted metal ones"); Robert Plotkin, *A Negligee for Murals In a Harlem Courthouse*, N.Y. TIMES, Feb. 6, 2005, § 14 at 4 ("[T]he Department of Justice was widely attacked for spending \$8,650 on a curtain to cover the partly nude statue 'Spirit of Justice'; Attorney General John Ashcroft had said he was uncomfortable with the nudity."). But see Jay Nordlinger, *Ashcroft With Horns*, National Review Online, May 24, 2002, at <http://www.nationalreview.com/flashback/flashback-nordlinger072402.asp> (noting that an aide ordered the statue covered without the knowledge of Attorney General John Ashcroft).

1132                      *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                      [Vol. XV]

think it is okay for the government to start covering up every portrayal of women's nipples that may be made available to the public?

PROF. GREENE: Let me just jump in and then turn to the next question, because I don't want to be the center of this.

First of all, the article I wrote, if you're interested, is called "Government of the Good," and it is published in *Vanderbilt Law Review*.<sup>223</sup> You also know that I am generally, I think, if I understand, on your side of almost all these issues, except maybe this one.

I believe that it should be permissible for the government in power, whichever government gets elected, to spend whatever funds are otherwise appropriate for whatever program it chooses, to advance their views of morality, yes I do. So I think that if I don't agree with this Administration's decision to spend money covering up naked busts of women, I still think they have the constitutional power to do so, just like I think we have the constitutional power to run the Voice of America or to fund the National Endowment for Democracy, but not fund the National Endowment for Communism. If one administration wants to fund landscape painting and the next one wants to fund nude painting, I think it should be a political issue and not a constitutional one.

I would draw the line between government funding, which I would leave very broad discretion to, and government regulation, which I would leave almost no discretion to.

In the back?

QUESTION: Mr. Greene, my question went along with Mr. Dowd's. He asked it in a much more articulate manner than I believe I can. However, I also felt that your comments concerning government funding could almost be looked upon as a back-door way into censorship, because without funding for, say, National Endowment for the Arts, a lot of art, dance, literature would not get made. In order to promote anything along those lines, any form of repression on funding, automatically is a form of

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<sup>223</sup> Greene, *supra* note 186.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1133

ensorship. I wondered how you justified that with your other remarks.

PROF. GREENE: I am going to actually use my discretion as the moderator to say just this. If you want to read what I have written on this, it is called "Government of the Good" in *Vanderbilt Law Review*.<sup>224</sup> There is a follow-up piece in *Fordham Law Review* called "Government Speech on Unsettled Issues."<sup>225</sup> I don't want to spend any more time on that.

But if any of my panelists have any comments on the issue of government using its funding power to advance certain ideas or not advance others, I'd be happy to hear from them. Otherwise we'll go to the next question.

MR. BAKER: I want to suggest that the issue is extraordinarily complicated because it is clear that the government can make expenditures to get the type of expression it wants in many circumstances. If there is going to be an argument that they are engaging in improper censorship in the context of some funding program, I think the argument is going to have to be made in terms of the nature and structure of the funding program. The argument must show that what the government can legitimately justify themselves as doing with the program is inconsistent with imposing a particular content restraint. This requires a non-positivist conception of what they were doing with the funding program, because there is always the possibility that when lawmakers approve the funding and stop the restraint at the same time, the government can say precisely that "we were funding non-indecent stuff."

Sometimes that doesn't make sense to the project they are engaged in, and in the context where it doesn't, there is a legitimate First Amendment challenge. But this is a very complicated theory. Courts have not articulated well what they think should be done in that situation, or at least that is my reading of the opinions.

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<sup>224</sup> *Id.*

<sup>225</sup> Abner S. Greene, *Government Speech on Unsettled Issues*, 69 *FORDHAM L. REV.* 1667 (2001).

1134

FORDHAM INTELL. PROP. MEDIA &amp; ENT. L.J.

[Vol. XV]

PROF. GREENE: That's for sure. I mean the leading Supreme Court cases are *Rust v. Sullivan*,<sup>226</sup> the abortion counseling gag rule, and *NEA v. Finley*<sup>227</sup> on the indecency provision in the National Endowment for the Arts statute.<sup>228</sup>

But let's move on to some other subjects. Who else wants to chime in? How about up in the back corner?

QUESTION: I am referring to the concern about, or the issue about, possibly having a five-second delay in news broadcasts, which was raised I believe by Jeff,<sup>229</sup> in terms of governmental interest. Today there is a national atmosphere where there is growing mistrust of the media on both sides, particularly the news media, and specifically there is concern in placing too much power in what could happen with the five-second delay. For instance, we are used to the call-in shows where Benny from Sheepshead Bay suddenly gets strangled off because Benny got out of line.

I would put this as a question: wouldn't the interest in having people not lose more trust in the media override the possibility that someone might be instantaneously offended because some little character in the background runs through and says something inappropriate? In terms of the balance, isn't the trust in the media, or at least retaining what we have right now, more important than protecting the hypersensitive from hearing "fuck" one small time today?

PROF. GREENE: I guess that would be a question for either Bill or Paul.

MR. McGEADY: I'll respond to that. The Bono case, if you read the decision of the FCC, they say the "[u]se of the 'F-Word'

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<sup>226</sup> 500 U.S. 173 (1991). (holding that regulations of federal Title X funds barring abortion counseling and advocacy of abortion did not violate the First Amendment).

<sup>227</sup> 524 U.S. 569 (1998). (holding that a statute requiring the National Endowment for the Arts consider general standards of "decency and respect" for diverse beliefs and values of the American public before giving a grant did not violate the First Amendment).

<sup>228</sup> National Endowment for the Arts, 20 U.S.C. § 954(d) (2000). "[A]rtistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public; . . . obscenity is without artistic merit, is not protected speech, and shall not be funded." *Id.*

<sup>229</sup> See *supra* text accompanying notes 61–64.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1135

in the context at issue here<sup>230</sup>—in other words, prime time, hundreds or maybe millions of people listening—that is the only thing they decided. They did not say the “F-Word” was banned.

MR. HOEH: But practically the way we argued—I believe we argued in our brief that Bono uttered the word as—I don’t think it was an intensifier.<sup>231</sup>

MR. FIORINI: Intensifier.

MR. HOEH: Intensifier, right, it was an intensifier.<sup>232</sup> He wasn’t referring to a sexual act.<sup>233</sup> He was using it as if he would use. . .

PARTICIPANT: In Ireland it’s every other word.

MR. HOEH: So I think the opinion purports to apply to that one unique circumstance,<sup>234</sup> but in reality it would apply to anytime anybody on live television outside of the safe harbor utters the word as an intensifier.

MR. McGEADY: I don’t agree with that at all. I think the decision is plain. It says *in contexts such as this*.<sup>235</sup>

MR. FIORINI: Yes it does, but it also says that the “F-Word” has an intrinsically sexual meaning and that every time it is used, as an intensifier or otherwise, it has a sexual meaning.<sup>236</sup> Therefore I agree—and this is the question I asked Bill Davenport—the Commission didn’t make it clear, as it didn’t make a number of things clear in that decision, where it would come out in some other context.

But once you say—even leaving aside the profanity aspect of the decision, which is novel to say the least—once you say that it has an intrinsically sexual meaning, you have taken yourself pretty

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<sup>230</sup> Golden Globe Awards, 19 F.C.C.R. 4975, 4981 (2004).

<sup>231</sup> *See id.* at 4978 & n.22.

<sup>232</sup> *Id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See, e.g.,* Golden Globe Awards, 19 F.C.C.R. 4975, 4981–82 (2004) (describing Bono’s use of the “F-Word”); *see also supra* text accompanying notes 52–53.

<sup>235</sup> *See id.* at 4981.

<sup>236</sup> *See id.* at 4978. “[W]e believe that, given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation . . .” *Id.*

1136

FORDHAM INTELL. PROP. MEDIA &amp; ENT. L.J.

[Vol. XV]

far along in an analysis that leads you to conclude that it is always going to be indecent.

MR. HOEH: And just to be clear, this was unscripted and uttered by a non-NBC employee.

PROF. GREENE: The man in the red tie.

QUESTION: Is not the use of the term “F-Word” itself an obscenity? If you know what it stands for, then you immediately translate it to what it is, “fuck.” If you don’t know what it stands for, then it’s meaningless.

PROF. GREENE: Anyone like to respond to this interesting linguistics argument? Jacques Derrida<sup>237</sup> may be no longer with us, but—

MR. FIORINI: It’s a little bit like the pixelation decision in the Fox case, where the Commission just recently found that even though activity was obscured by the use of pixels, that people could figure out what was going on, and therefore it was indecent, virtual indecency in a way.<sup>238</sup>

MR. DAVENPORT: Each case needs to be evaluated on its own merits. It is very possible—you know, if the “F-Word” were obscene or something like that, then you could extend that reasoning all the way to saying bleeping, like John was saying, not just visual pixelation but audio bleeping, could potentially be the same. It’s all incredibly complicated and has to be evaluated on its own.

PROF. GREENE: We are going to go down here in a second, but I just have to say—let me just say I am not a big watcher of

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<sup>237</sup> Jacques Derrida (1930–2004) was “arguably the most well known philosopher of contemporary times. . . . [I]n the mid 1960s he developed a strategy called deconstruction. Deconstruction is not purely negative, but it is primarily concerned with something tantamount to a ‘critique’ of the Western philosophical tradition, although this is generally staged via an analysis of specific texts. . . . Deconstruction has had an enormous influence in many disparate fields, including psychology, literary theory, cultural studies, linguistics, feminism, sociology and anthropology.” Jack Reynolds, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, *Jacques Derrida*, at <http://www.iep.utm.edu/d/derrida.htm> (last visited May 19, 2005).

<sup>238</sup> See *supra* note 39 and accompanying text; see also *FCC Fines Fox \$1.2M For Indecency* (Oct. 12, 2004), available at <http://www.cbsnews.com/stories/2004/10/12/entertainment/main648911.shtml>.

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1137

soap operas, I have watched very few of them—but it seems to me that there is a lot of sexual activity in soap operas covered up carefully by sheets or scrims or whatever. If that isn't apparent sexual activity, if that isn't the visual equivalent of saying the "F-Word," then I don't know what is.

MR. HOEH: You've got to be careful. Bill is going to shut us down. I don't know if he knows about this.

PROF. GREENE: And this is daytime stuff, and kids are home with their nannies watching this stuff. And talk about discretion and deciding what kind of content we are going to single out and what not, it's mind-boggling to me.

MR. FIORINI: Just very quickly, one Commissioner suggested that soap operas ought to be investigated.

PROF. GREENE: Well, there you go. As well they ought to be.

Down in front?

QUESTION: When we start getting into this whole news area, which is particularly troubling to me, I am just wondering how—I mean isn't it just another step for the FCC to stop us from broadcasting like Abu Ghraib kind of photographs and footage?<sup>239</sup> I mean if you want to talk about something that is indecent, that is highly indecent and clearly sexual and all of that. So why are just words, a few swear words, so much worse? This is like Holden Caulfield trying to erase the dirty words on the subway wall.<sup>240</sup>

MR. DAVENPORT: The important thing to go back to is the analysis of the issue of "patently offensive."<sup>241</sup> The third prong of that analysis is about whether or not it is pandering, titillating, or intended to shock the audience.<sup>242</sup>

One of the things that we look at is: what is the intent of the broadcaster here? Is it to educate the audience? Is the potentially indecent material really important to whatever story it is trying to

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<sup>239</sup> See, e.g., Phillip Carter, *The Road to Abu Ghraib*, WASH. MONTHLY (Nov. 2004), available at <http://www.washingtonmonthly.com/features/2004/0411.carter.html>.

<sup>240</sup> J.D. SALINGER, *THE CATCHER IN THE RYE* (1951).

<sup>241</sup> See *supra* notes 15–16 and accompanying text.

<sup>242</sup> See *supra* note 15 and accompanying text.

1138                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV

tell? Or is it something that the broadcaster just put in because the broadcaster thought that this would get attention, that this would get people stirred up?

With respect to the soap opera question—and actually I think this relates to some other questions that have been asked—the Commission does not go out and monitor programming. We know that there are some sex scenes or that sort of thing on soap operas, but we haven't received any complaints about them. And so to the extent that we haven't received complaints about the programming, we're not conducting investigations.<sup>243</sup> If we did receive complaints about soap operas, we would look into them.

PROF. GREENE: How about way over here, and then up there.

QUESTION: I personally, on the policy level very much doubt the effect of having more prohibition and having more enforcement. I have to say, since I have been here I have been exposed to so much indecent language that my language in English is much worse than it ever would be in German. If I spoke in German, if I used the same words, I would actually be disgusted in Germany.

PROF. GREENE: Exposed on the street or exposed via the media?

QUESTIONER: Everywhere. And that's the problem for me. I think the fact that things are so restricted here—I mean you have movies, like "The Grudge," which is a horror movie. You are allowed to go in because it is rated PG-13. Then you have movies rated R because of adult language. I think it is just backfiring.

I think on the policy level this Puritan approach is actually going the wrong way, because the language that is used in the States is much worse than anything in Germany. And I think it is

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<sup>243</sup> *Cf.* FCC Consumer Facts, *supra* note 117.

Enforcement actions in this area are based on documented complaints received from the public about indecent, profane, or obscene broadcasting. The FCC's staff reviews each complaint to determine whether it has sufficient information to suggest that there has been a violation of the obscenity, profanity, or indecency laws. If it appears that a violation may have occurred, the staff will start an investigation by sending a letter of inquiry to the broadcast station.

*Id.*

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1139

just backfiring, because it is the thrill, it's the little rebellion, it's because mommy and daddy say you are not allowed to say it and the government says you are not allowed to say it that it becomes great to see a movie with adult language. What's going to happen is I think it is backfiring. I think it is just getting worse and worse. It's getting more obscene and more indecent because you are trying to hide things.

PROF. GREENE: Any response to that?

MR. DAVENPORT: Like I said, we have received a million complaints so far this year,<sup>244</sup> and so there are a lot of people who would disagree with the approach of pulling back.

And as far as the impact that it is having, I think that Jeff would testify that it has had a dramatic impact, that they are pulling back. I think John would say the same thing.

Broadcasters are paying attention and they are regulating their conduct, and I think the content has become less indecent as a result.

PROF. GREENE: With all respect, I think the gentleman's point is—and I recommend to you this article by David Cole, I think it's in *Pennsylvania Law Review*.<sup>245</sup> The point is that the pervasiveness of America's obsession with regulating sexuality in its various ways for many years reproduces itself and it kind of recreates itself in a kind of pornographic culture and an indecent culture.<sup>246</sup> That's what you mean by backfiring. You know, this is a question of social anthropology which we could debate.

Did any of you also want to respond to that?

We had another question over here?

QUESTION: The thing that struck me most is the FCC's current functional definition of indecency.<sup>247</sup> As much as the "Seven Dirty Words" rule was subject to ridicule and seemed to be a kind of mechanical approach, the replacement is so vague that scanning my memory I'm pretty much persuaded that a broadcast

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<sup>244</sup> See *supra* notes 18–19 and accompanying text.

<sup>245</sup> Cole, *supra* note 203.

<sup>246</sup> See *id.* at 114.

<sup>247</sup> See *supra* note 10 at 8001–03.

1140                    *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*                    [Vol. XV]

of Molly Bloom's soliloquy<sup>248</sup> would meet your standard. I'm wondering whether the Commission has given any formal consideration yet to the vagueness issue regarding indecency.

The second is I am rather surprised, given the general market orientation of the current Administration, that the lodging of 542,000 complaints wouldn't reassure those concerned about the problem of things like Janet Jackson's entertainment,<sup>249</sup> which Fox or NBC or whomever it was who broadcast it might not respond on their own and that some deference might be owed to see whether there was repetition or not.

MR. HOEH: I think that is an interesting point about self-censorship, because it clearly happens. I mean we self-censor. We have censors. This public response—you know, "we get 500,000 complaints so we've got to go after them and we have to fine them a huge number"—I think it doesn't recognize that there is self-censorship that goes on.<sup>250</sup>

PROF. GREENE: The gentleman down in front. We have time for just one or two more questions.

QUESTION: I can't believe that a discussion on obscenity usually ends up in this fashion. I think we have gone back in a psychological sense seventy-five years, where we are arguing the works of authors and artists who were considered obscene in the 1920s, Judge Woolsey's famous decision<sup>251</sup> on—what was that book?

PARTICIPANT: *Memoirs of a Woman of Pleasure*.<sup>252</sup>

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<sup>248</sup> JAMES JOYCE, *ULYSSES* (1922). "Molly Bloom's soliloquy is the final chapter of . . . *Ulysses*." *Molly Bloom's Soliloquy*, at [http://en.wikipedia.org/wiki/Molly\\_Bloom%27s\\_Soliloquy](http://en.wikipedia.org/wiki/Molly_Bloom%27s_Soliloquy) (last modified Apr. 7, 2005).

<sup>249</sup> See *supra* text accompanying notes 18–19, 66–67 (statement of Jeffrey Hoeh), 141–153 (statement of Paul McGeedy).

<sup>250</sup> See *supra* note 176; see also Rob Thomas, *Media Musings: Networks' Ridiculous Self-censorship*, *THE CAPITAL TIMES*, Nov. 30, 2004, available at <http://www.madison.com/tct/features/index.php?ntid=19549&ntpid=0>.

<sup>251</sup> *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2d Cir. 1934) (holding that James Joyce's *Ulysses* may be imported into the United States and that "whilst in many places the effect . . . on the reader undoubtedly is somewhat emetic, nowhere does it tend to be an aphrodisiac").

<sup>252</sup> *Memoirs of a Woman of Pleasure* has been the subject of several legal disputes, although none adjudicated by Judge Woolsey. See, e.g., *A Book Named "John Cleland's*

2005] *FCC'S RECENT ENFORCEMENT OF OBSCENITY LAWS* 1141

QUESTIONER: That, *Ulysses*, and a few others.

But I can't seem to get excited and spend time on the word "f-u-c-k," which is a standard Norman word of expression that goes back to—I don't know what—the 12<sup>th</sup> or 13<sup>th</sup> century. You'll find it in *The Canterbury Tales*.<sup>253</sup> It just amazes me in this day of sensitivity and whatever.

Thank you.

PROF. GREENE: One more. Yes?

QUESTION: I'm just wondering, as a parent, how does the state justify taking control over what I do or choose to do or not to do with my child? I mean that's really where you're saying you are deriving all of this state or governmental powers from. As a parent, frankly I resent that, because I think we have a responsibility to raise our own children. Can somebody address that and where the state comes in?

PROF. GREENE: Let me see if Paul wanted to comment. The woman is suggesting that, by the state intervening based on its view of what is good for children, it is depriving her of exposing her child or not to whatever she chooses.

MR. McGEADY: Well, the state also enforces the criminal statutes, and that may interfere with her too.

What you have here is a law that says "you shall not put indecency on radio and TV."<sup>254</sup> That is a function that the state has the ability to do. Health, safety, welfare, and morals can all be regulated by the state.<sup>255</sup> This is a moral situation and the state has

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*Memoirs of a Woman of Pleasure*" v. Att'y Gen. of Mass., 383 U.S. 413 (1966) (stating that "the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact—given the view of the Massachusetts court attributing to *Memoirs* a modicum of literary and historical value—that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value"); *Commonwealth v. Holms*, 17 Mass. 336 (1821).

<sup>253</sup> GEOFFREY CHAUCER, *THE CANTERBURY TALES* (Nevill Coghill trans., 1986) (c. 1400).

<sup>254</sup> See 18 U.S.C. § 1464 (2000).

<sup>255</sup> See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1986) (citing *Manigault v. Springs*, 199 U.S. 473, 480 (1905), for the proposition that the police power "is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people").

1142

*FORDHAM INTELL. PROP. MEDIA & ENT. L.J.*

[Vol. XV]

determined that this type of language is immoral and does harm. So you might not like it, but that is what the law happens to be, that they do have the power. It has been upheld in the Supreme Court decisions.<sup>256</sup> So there we are.

PROF. GREENE: It's 4:15, and since someone is going to have to have the last word, I am going to arbitrarily let Paul McGeady have had the last word.

Thank you all for your attendance. I would like to thank my co-panelists.

MR. McGEADY: If I have the last word, I have one more word to say. I have in front of me the portion of my talk that I was unable to give. It talks about broadcast indecency laws being constitutional, how they should be enforced, and also be extended to cable TV. Anyone who wants one, they are here.

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<sup>256</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).