

# Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity

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## INTRODUCTION

The United States Supreme Court has rendered numerous high-profile opinions in the past thirty-five years regarding variations of the word “fuck.” Paul Robert Cohen’s anti-draft jacket,<sup>1</sup> Gregory Hess’s threatening promise,<sup>2</sup> George Carlin’s satirical monologue,<sup>3</sup> and Barbara Susan Papish’s newspaper headline<sup>4</sup> quickly come to mind.

These now-aging opinions address important First Amendment<sup>5</sup> issues of free speech, such as protection of political dissent,<sup>6</sup> that continue to carry importance today. It is, however, a March 2004 ruling

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1. *Cohen v. California*, 403 U.S. 15 (1971) (protecting, as freedom of expression, the right to wear a jacket emblazoned with the words “Fuck the Draft” in a Los Angeles courthouse corridor).

2. *Hess v. Indiana*, 414 U.S. 105, 105 (1973) (protecting, as freedom of expression, defendant’s statement, “We’ll take the fucking street later (or again),” made during an anti-war demonstration on a university campus).

3. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding the Federal Communications Commission’s power to regulate indecent radio broadcasts and involving the radio play of several offensive words, including, but not limited to, “fuck” and “motherfucker”).

4. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973) (protecting, under the First Amendment, the use of the headline “Motherfucker Acquitted”—referring to the acquittal of the leader of an organization called “Up Against the Wall, Motherfucker”—that was published in an underground college newspaper).

5. The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The “Free Speech” and “Free Press” Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

6. For instance, the speech in *Cohen v. California*, 403 U.S. 15 (1971), was dissenting against the government-enforced policy of conscription.

by the Federal Communications Commission (“FCC”)—not the nation’s highest court—that may turn out to be the most important decision on the use of the word “fuck,” and offensive language in general, in several decades.<sup>7</sup> In its Memorandum Opinion and Order, the FCC reversed an October 2003 ruling<sup>8</sup> and held that the use of the phrase “this is really, really fucking brilliant”<sup>9</sup> by Bono, lead singer for the Irish rock group U2, during the 2003 Golden Globe Awards television program constituted “material in violation of the applicable indecency and profanity prohibitions.”<sup>10</sup>

What is particularly striking about the Memorandum Opinion and Order issued by the five FCC commissioners<sup>11</sup> is *not* the mere act of reversing a decision; the FCC has reversed prior opinions involving indecency determinations.<sup>12</sup> Rather, its significance rests on several grounds, including the Commission’s decision to:

1. embark on an unexplored and “new approach to profanity”<sup>13</sup> that no longer limits the statutory meaning of the term “profane language”<sup>14</sup> to “blasphemy or divine imprecation,”<sup>15</sup> but

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7. FCC, In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, Memorandum Opinion and Order, FCC 04-43, File No. EB-03-IH-0110 (Mar. 18, 2004) [hereinafter *Golden Globes II*], available at <http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html> (last visited Mar. 30, 2004). Citations in this article to specific language and quotations from the March 18, 2004, opinion are to specific paragraphs in the opinion.

8. In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, Memorandum Opinion and Order, 18 F.C.C.R. 19859 (Oct. 3, 2003) [hereinafter *Golden Globes I*], available at <http://www.fcc.gov/eb/Orders/2003/DA-03-3045A1.html> (last visited Mar. 30, 2004). Citations in this article to specific language and quotations from the Oct. 3, 2003, opinion are to specific paragraphs in the opinion.

9. There is some dispute over the actual offending phrase. In addition to the one quoted in the footnoted text above, the phrase reportedly heard by some listeners was “this is fucking great.” *Golden Globes II*, *supra* note 7, ¶ 3 n.4.

10. *Id.* ¶ 2.

11. The five current commissioners, each of whom was involved in the decision, include Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin, and Jonathan S. Adelstein. One can access the home pages of each of the commissioners from the FCC’s web site at <http://www.fcc.gov/commissioners> (last visited Mar. 28, 2004).

12. For instance, the FCC in 2002 reversed an earlier ruling that a radio-edited version of Eminem’s song “The Real Slim Shady” was indecent. Citadel Broad. Co., Notice of Apparent Liability for Forfeiture, 16 F.C.C.R. 11839 (2001), *rev’d*, Memorandum Opinion and Order, 17 F.C.C.R. 483 (2002); see generally Jacob T. Rigney, Note, *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 the reversal in “The Real Slim Shady” dispute).

13. *Golden Globes II*, *supra* note 7, ¶ 15.

14. See 18 U.S.C. § 1464 (2004) (providing that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both”) (emphasis added).

15. *Golden Globes II*, *supra* note 7, ¶ 14.

significantly expands it to cover words such as “fuck” and variants thereof that are “highly offensive;”<sup>16</sup>

2. reverse course and declare as “not good law”<sup>17</sup> a string of earlier cases in which the FCC had held that isolated, fleeting, and otherwise unanticipated uses and broadcasts of the word “fuck” were not indecent; and
3. include technological advances—in particular, “[t]he ease with which broadcasters today can block even fleeting words in a live broadcast”<sup>18</sup>—as a factor in indecency determinations while excluding from that now-clouded calculus whether the broadcast of a word like “fuck” is unintentional.

The implications of these changes are profound. In particular, the FCC has given itself two separate avenues—indecentcy *and* profanity—for censoring offensive speech where it previously used only the former for this task.<sup>19</sup> An entirely new body of “profane language” guidelines must be developed for this uncharted territory.<sup>20</sup> Unfortunately, the guidelines will be formulated by the FCC in a “climate of Janet Jackson-induced<sup>21</sup> hypersensitivity”<sup>22</sup> and legislative hysteria—hysteria fanned by a presidential election year—that has already produced several bills designed to punish broadcasters. Those bills include the Broadcast Decency Enforcement Act of 2004,<sup>23</sup> which was approved by the U.S. House of Representatives in March 2004,<sup>24</sup> and the Clean Airways Act,<sup>25</sup>

16. *Id.*

17. *Id.* ¶ 12.

18. *Id.* ¶ 11.

19. See *supra* notes 14–15 (observing that blasphemy previously was used by the FCC only to regulate attacks on religion, not offensive speech generally).

20. See Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶ 1, 23 Comm. Reg. (P & F) 857 (2001) [hereinafter *Industry Guidance*], available at <http://www.fcc.gov/eb/Orders/2001/fcc01090.html> (last visited Mar. 25, 2004).

21. In February 2003, Jackson’s right breast was briefly exposed “by Justin Timberlake during a risqué halftime concert at the Super Bowl in Houston.” Bill Carter & Richard Sandomir, *Halftime-Show Fallout Includes F.C.C. Inquiry*, N.Y. TIMES, Feb. 3, 2004, at D1.

22. Ann Oldenburg, *They’re Flipping Out Over Simon’s Finger; Not a Dirty Bird, ‘Idol’ Judge Says*, USA TODAY, Mar. 25, 2004, at D1.

23. H. R. 3717, 108th Cong. (2004). This legislation increases the maximum amount of a forfeiture penalty to \$500,000 for a broadcast licensee who broadcasts obscene, indecent, or profane language. *Id.* On June 22, 2004, the U.S. Senate approved a similar fine-increasing measure by a 99–1 vote, with only Sen. John Breaux (D.-La.) dissenting. Frank Ahrens, *Bill Would Raise Fines for On-Air Indecency*, WASH. POST, June 23, 2004, at E01.

24. See David Hinckley, *Indecency Fines Could Soar*, DAILY NEWS (N.Y.), Mar. 12, 2004, at 129 (describing how “the House voted 391–22 to boost fines from their current \$27,500 ceiling”).

25. H. R. 3687, 108th Cong. (2003). This legislation amends 18 U.S.C. § 1464 such that the term “profane language” would specifically include “the words ‘shit,’ ‘piss,’ ‘fuck,’ ‘cunt,’ ‘asshole,’ and the phrases ‘cock sucker,’ ‘mother fucker,’ and ‘ass hole,’ compound use (including

which has yet to move forward in the House. In such an atmosphere, parent-pandering politicians will give First Amendment interests short shrift when profanity guidelines are devised.

Beyond its impact on the regulation of profanity, the long-term implications of *Golden Globes II*<sup>26</sup> on live sports broadcasts may be immense. In particular, the FCC made it clear that “a single and gratuitous use of a vulgar expletive”<sup>27</sup> is actionable as indecent speech, even if the broadcast of the word was unintentional. The FCC rests its conclusion on “[t]he ease with which broadcasters today can block even fleeting words in a live broadcast.”<sup>28</sup> In the process of reaching this conclusion, the FCC declared as no longer valid two of its earlier unpublished staff decisions that held that fleeting uses of the word “motherfucker” during sports broadcasts were not indecent.<sup>29</sup> This creates the very real possibility of monetary liability for broadcasters who unexpectedly catch a coach or player screaming an expletive from the sidelines or who allow fans’ chants of “bullshit” to go out over the airwaves.<sup>30</sup> To avoid such liability, broadcasters might end live broadcasts and choose to air sporting events with ten-second delays. In fact, CBS considered such an option in March 2004.<sup>31</sup> The phrase “live sports broadcasts” thus would become an oxymoron; real-time coverage would be relegated to the ashcan of television history.

Another negative ramification of the FCC’s new response to allegedly indecent and profane broadcast content may be a chilling effect<sup>32</sup> and a new wave of media self-censorship.<sup>33</sup> Some evidence

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hyphenated compounds) of such words and phrases with each other or with other words or phrases, and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms).”

26. *Golden Globes II*, *supra* note 7.

27. *Id.* ¶ 11.

28. *Id.*

29. *Id.* ¶ 12 n.32.

30. See generally Erik Brady, *How Free Should Speech Be at Campus Games? Legal Rights and Civility Clash at Sporting Events*, USA TODAY, Feb. 6, 2003, at A1 (describing how basketball fans at the University of Maryland “shouted obscenities early and often during a men’s basketball game last month against hated rival Duke. The chants aired live on national TV and have emerged as another pitched battle in the civil war over the coarsening of the culture.”).

31. See *CBS Won’t Use Broadcast Delays*, N.Y. TIMES, Mar. 16, 2004, at D1 (writing that CBS decided to “present the entire N.C.A.A. men’s basketball tournament live, after a senior CBS executive said in *The New York Times* yesterday that the network would install a 10-second delay for at least the games in the Final Four.”).

32. Cf. *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (observing that “a First Amendment plaintiff who faces a credible threat of future prosecution suffers from an ‘ongoing injury resulting from the statute’s chilling effect on his desire to exercise his First Amendment rights.’”) (quoting *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (emphasis added)).

33. See *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988) (observing that self-censorship is “a harm that can be realized even without an actual prosecution.”).

suggests this already is taking place.<sup>34</sup> As the *Rocky Mountain News* reported in late March 2004 after interviewing a number of radio industry officials, there has been “a wave of self-censorship on a national and local level.”<sup>35</sup> The National Association of Broadcasters even considered the adoption of a self-imposed “voluntary” code of conduct.<sup>36</sup> In today’s world, the danger of self-censorship cannot be ignored. As Professor Lawrence Soley argues in his recent book on free speech, “businesses and corporations now pose a greater threat to free speech than does government.”<sup>37</sup> Broadcasters may well kowtow and surrender content in order to prevent further FCC incursions into the realm of content and to avoid the loss of advertisers who shun association with radio chains and television owners that carry allegedly offensive expression.

Broadcasters also may be more willing to rapidly settle disputes with the FCC over alleged instances of indecent broadcasts rather than contest and fight the charges in the name of the First Amendment’s protection of free speech. This certainly appeared to be the case in June 2004, when Clear Channel Communications entered into a record \$1.75 million settlement over indecency complaints with the FCC.<sup>38</sup> The settlement came despite the fact that Andrew Levin, the chief legal officer for Clear Channel, told reporters that he “didn’t agree that all the complaints were legally indecent.”<sup>39</sup> As media writer Frank Ahrens of the *Washington Post* bluntly put it in describing the settlement, Clear Channel “has chosen a measure of capitulation.”<sup>40</sup> Media industry analyst Gordon Hodge of Thomas Weisel Partners in San Francisco remarked that settlements like the one agreed to by Clear Channel could have a “chilling effect to the content.”<sup>41</sup>

This article examines the FCC’s vigorous new approach to indecency and profanity determinations, including both the legal issues

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34. See Scott Collins et al., *Pulled into a Very Wide Net: Unusual Suspects Have Joined the Censor’s Target List, Making for Strange Bedfellows (Wait Can We Say That?)*, L.A. TIMES, Mar. 28, 2004, at E26 (chronicling a number of recent instances of self-censorship by the broadcast networks, each of which appears to be based on a fear of FCC-imposed fines for indecent content).

35. Mark Brown, *No Evil: Broadcast Words, Actions Stir Efforts To Clean Up ‘Dirty’ Airwaves*, ROCKY MOUNTAIN NEWS, Mar. 27, 2004, at 1D.

36. Andrew Mollison, *Feds Push For Code Of Airwaves Decency*, ATLANTA J.-CONST., Apr. 1, 2004, at 1E.

37. LAWRENCE SOLEY, CENSORSHIP, INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES 9 (2002).

38. See generally Travis E. Poling, *Clear Channel Puts Indecency Issue Behind*, SAN ANTONIO EXPRESS-NEWS, June 10, 2004, at 1E (discussing the settlement).

39. Frank Ahrens, *Deal Erases Pending Charges Against Clear Channel*, WASH. POST, June 10, 2004, at C04.

40. *Id.*

41. Poling, *supra* note 38, at 1E.

and the greater cultural, political, economic, and social contexts in which that approach is developing. Part I describes the FCC's initial decision regarding the Golden Globes' 2003 broadcast and then compares it with the March 2004 reversal. In the process, Part I lays the historical framework for the FCC's power over indecent expression on the public airwaves. Part II then contextualizes the FCC's new course of action within the framework of the ongoing cultural wars and political battles in the United States and suggests that the FCC and Congress have unfairly singled out broadcasters for attack with an underinclusive<sup>42</sup> approach to addressing what supposedly ails the nation. Part III more thoroughly addresses the negative ramifications of the FCC's actions and argues that the Commission must temper its approach lest the contentious concept<sup>43</sup> of the "public interest,"<sup>44</sup> which has long been left to marketplace forces,<sup>45</sup> be dictated by the political forces that influence the five FCC commissioners<sup>46</sup> and inevitably shift with the hot-button cultural movement of the day.<sup>47</sup> Finally, the Conclusion calls for the FCC to abandon its new line of "profanity" enforcement and for Congress to cease being guided by election-year politics when it foists new obligations on the Commission.<sup>48</sup> First Amendment rights must not be sacrificed for the short-term political gain of pandering politicians.

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42. See *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (observing that "the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles").

43. Cf. Danielle L. Sarver, *In the Public's Interest*, in CONTEMP. MEDIA ISSUES 49, 50 (Emily Erickson & William David Sloan eds., 2d ed. 2004) (describing "the enduring struggle over what the 'public interest standard' means for U.S. broadcasters" and observing that "the debate has grown even more intense" in recent years with the "accelerating deregulation in the broadcast industry.").

44. See 47 U.S.C. § 310(d) (2004) (setting forth the statutory mandate that the issuance and renewal of broadcast licenses depends, in part, on whether "the public interest, convenience, and necessity will be served thereby"); 47 U.S.C. § 311 (2004) (requiring that agreements between two or more applicants for a permit for construction of a broadcasting station be "consistent with the public interest, convenience, or necessity.").

45. See generally Anastasia Bednarski, Note, *From Diversity to Duplication: Mega-Mergers and the Failure of the Marketplace Model Under the Telecommunications Act of 1996*, 55 FED. COMM. L.J. 273, 280 (2003) (describing a marketplace model of public interest regulation that "assumes that broadcasters will inherently act in the public interest by adjusting their content to satisfy their audience's preferences" and observing "the shift from the trusteeship model to the marketplace model.").

46. See 47 U.S.C. § 154 (2004) (setting forth the statutorily defined number of FCC commissioners, the appointment process, and the requisite qualifications to hold the position of a commissioner).

47. *Infra* notes 171–206 and accompanying text.

48. *Infra* notes 207–231 and accompanying text.

PART I. ONE WORD, ONE BROADCAST, TWO DECISIONS THAT ARE NOT THE SAME:<sup>49</sup> WHAT'S SO "BRILLIANT" NOW?

More than a quarter of a century has passed since the United States Supreme Court ruled in *FCC v. Pacifica Foundation*<sup>50</sup> that the Commission, acting under its public interest powers for the concern of protecting children, may restrict indecent speech broadcast during certain times of the day<sup>51</sup> without violating the First Amendment speech rights of broadcasters.<sup>52</sup> The Court reasoned that the broadcast of comedian George Carlin's twelve-minute "Filthy Words" monologue on the radio during the afternoon was "like a pig in the parlor instead of the barnyard."<sup>53</sup>

Since that time, the FCC has developed an entire regulatory enforcement scheme around the concept of indecent speech, which it currently defines 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."<sup>54</sup> Whether material is patently offensive is a matter of context guided by three factors, including:

(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.<sup>55</sup>

The FCC has found many metaphorical pigs in the broadcast parlor when applying this test in the past. Howard Stern<sup>56</sup> and the duo of Opie

49. Cf. U2, *One, on ACHTUNG BABY* (Polygram Records 1991) (singing "one love, one blood . . . but we're not the same").

50. 438 U.S. 726 (1978).

51. While the Court in *Pacifica Foundation* did not create a specific time period during which indecent speech could be broadcast, today the period from 10:00 p.m. until 6:00 a.m. is considered a safe-harbor zone and the FCC does not enforce its indecency provisions during that time period. See *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (instructing the FCC "to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.").

52. *Pacifica Found.*, 438 U.S. at 749–51.

53. *Id.* at 750 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

54. Federal Communications Commission, *Obscene and Indecent Broadcasts*, at <http://www.fcc.gov/parents/content.html> (last visited Mar. 26, 2004).

55. *Industry Guidance*, 16 F.C.C.R. at 8003, ¶ 10 (emphasis added).

56. In re Infinity Broad. Corp. of Pa., Memorandum Opinion and Order, 2 F.C.C.R. 2705 (1987), *recon. granted in part*, In re Infinity Broad. Corp. of Pa., Memorandum Opinion and Order, 3 F.C.C.R. 930 (1987) (involving the "Howard Stern Show" and the FCC's use of its indecency standard); see KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 407 (6th ed.

and Anthony<sup>57</sup> quickly come to mind. It took an offhand, adjectival form of the word “fuck,” however, to get the Commission to not only reinterpret the application of its indecency standards, but create a new alternative to the indecency standard—in particular, the category of profane language—to attack a perceived rise of offensive language in the broadcast medium.

The remainder of Part I examines the initial FCC decision and its subsequent reversal. Section A examines the initial Memorandum and Opinion Order issued in October 2003 by David H. Solomon, chief of the FCC’s Enforcement Bureau, in the dispute over Bono’s use of the word “fucking” during the Golden Globe Awards program. Section B follows with a discussion of the March 2004 reversal of that opinion by the FCC commissioners.

### *A. Finding of No Liability: The Wisdom of Solomon*

The trouble began, ironically, in staid Beverly Hills, California, on January 19, 2003. The singer known simply as Bono<sup>58</sup> was at the aging Beverly Hilton Hotel that night to accept, on behalf of his top-selling group U2,<sup>59</sup> the Golden Globe award for Best Original Song in a Motion Picture for “The Hands That Built America” from the movie *Gangs of New York*.<sup>60</sup>

During his speech, however, Bono, sounding more like he was in West Hollywood than Beverly Hills, committed what one movie critic at

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2004) (writing that “Infinity Broadcasting Corporation paid the FCC \$1.7 million after the commission asserted that several broadcasts by the controversial ‘shock jock’ Howard Stern were indecent.”).

On the same day that the FCC issued its reversal in the Bono controversy, it also issued a Notice of Apparent Liability for Forfeiture in the amount of \$27,500 against Infinity Broadcasting based on a July 26, 2001, episode of the “Howard Stern Show” that was determined to be indecent. In re Infinity Broad. Operations, Inc., Notice of Apparent Liability for Forfeiture, FCC 04-49, File No. EB-01-IH-0633 (Mar. 18, 2004).

57. In re Infinity Broad. Operations, Inc., Notice of Apparent Liability for Forfeiture, FCC 03-234, File No. EB-02-IH-0685 (Oct. 2, 2003) (holding that Infinity Broadcasting and a number of its licensees are apparently liable for a monetary forfeiture in the amount of \$357,500 for the broadcast of indecent material); see Howard Manly, *WEEI Feels Squeeze Over Offensive Chatter*, BOSTON HERALD, Oct. 19, 2003, at 12 (describing how the FCC imposed “a \$357,500 fine against Infinity Broadcasting for allowing its ‘Opie and Anthony’ show to award prizes for callers who had sex in the weirdest places.”).

58. Bono’s birth name is Paul Hewson. See Mark Memmott, *Bono Explores Poetry of America While Promoting AIDS Awareness*, USA TODAY, Dec. 4, 2002, at A4.

59. See Justin Oppelaar, *Recording Academy to Honor U2’s Bono*, DAILY VARIETY, Oct. 7, 2002, at 7 (writing that “Bono and U2 have sold more than 100 million albums over the band’s 26-year history and won 14 Grammys, including record of the year honors for the last two years running.”).

60. See Jon Burlingame, *Without Song, Noms Still Enjoy Mingling*, DAILY VARIETY, Jan. 14, 2003, at A32.

the time aptly called “the indiscretion of the evening”<sup>61</sup> when he uttered the phrase “fucking brilliant.”<sup>62</sup> The speech “was delivered live to East Coast viewers of NBC,”<sup>63</sup> although it “was bleeped for the West Coast feed.”<sup>64</sup> Jeff Zucker, president of NBC Entertainment, immediately announced that the network “in no way condoned”<sup>65</sup> Bono’s language.

While David H. Solomon, the chief of the FCC’s Enforcement Bureau, also may not have condoned the language, it was his decision not to condemn it—a decision interpreted by the mainstream medium to stand for the simple and straightforward proposition that the “F-word is OK on TV when it’s an adjective”<sup>66</sup>—that would ultimately cause the FCC to take a renewed interest in indecency and a completely new approach to profanity. Solomon’s reasoning, for all of the barbs that have been hurled at it, is quite simple to understand and breaks down into a few basic steps:

1. The FCC’s definition of indecency requires, as a threshold matter, that the speech in question describe or depict either sexual or excretory organs or activities;<sup>67</sup>
2. Bono did not use the word “fucking” to either depict or describe sexual or excretory organs or activities, but rather “as an adjective or expletive to emphasize an exclamation,”<sup>68</sup> and therefore the subject matter in question was not of the kind that could be found indecent;
3. Even if the word “fucking” was used by Bono in a sexual sense, the FCC precedent would permit its use because “we have previously found that fleeting and isolated remarks of this nature do not warrant Commission action.”<sup>69</sup>

That, in a nutshell, was all it took for Solomon to find no liability on the part of NBC affiliates for their broadcast of the Golden Globe

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61. Mick LaSalle, ‘Chicago’ Breezes Through Globes, S.F. CHRON., Jan. 20, 2003, at A2.

62. *Golden Globes I*, *supra* note 8.

63. Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV*, N.Y. TIMES, Jan. 25, 2003, at B7.

64. Rob Owen, *WPGH Anchor Says Move Wasn’t Planned*, PITT. POST-GAZETTE, Jan. 23, 2003, at D-6.

65. Rutenberg, *supra* note 63.

66. Joanne Ostrow, *As TV Talk Decays, Network Execs Swear There Are Standards*, DENVER POST, Oct. 29, 2003, at A-01. *See also* Frank Ahrens, *Nasty Language on Live TV Renews Old Debate*, WASH. POST, Dec. 13, 2003, at A01 (writing that the FCC’s October 2003 opinion regarding Bono’s language stands for the proposition that one could use the word “fuck” on television “as long as it is used as an adjective”).

67. *See supra* note 54 and accompanying text (setting forth the FCC’s current definition of indecent language).

68. *Golden Globes I*, *supra* note 8, ¶ 5.

69. *Id.* ¶ 6.

Awards. There was no need to address whether the speech was patently offensive for the broadcast medium because the initial question of whether the speech was about sexual or excretory organs or activities had been answered in the negative.<sup>70</sup> Solomon also concluded that the broadcast was not obscene under the United States Supreme Court's then thirty-year-old test in *Miller v. California*<sup>71</sup>—a thoroughly non-controversial decision given the Court's pronouncement that obscene "expression must be, in some significant way, erotic."<sup>72</sup>

Bono's use of the word "fucking" initially brought relatively few complaints to the FCC—as *The New York Times* reported, "the telephones hardly rang at the Federal Communications Commission"<sup>73</sup> after the singer's remarks—and it was two other decidedly non-Bono incidents that, in fact, triggered a flurry of complaints to the FCC about allegedly indecent broadcasts during the third quarter (July through September) of 2003.<sup>74</sup> As a result of those complaints, Solomon's opinion got the attention of Congress<sup>75</sup> and certain segments of the public, including interest groups such as the Parents Television Council ("PTC"). The PTC, which boasts its own ratings scheme for television programs<sup>76</sup> and features a fill-in-the-blank FCC complaint form on its

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70. *Id.* ¶ 5.

71. 413 U.S. 15 (1973). The test for obscenity created in *Miller* asks:

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

413 U.S. 15, 24 (1973) (citations omitted).

72. *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Roth v. United States*, 354 U.S. 476 (1957)).

73. Rutenberg, *supra* note 63, at B7.

74. See David Hinckley, *Coming to Grips with FCC's Numbers*, DAILY NEWS (N.Y.), Nov. 6, 2003, at 108 (writing that "the Federal Communications Commission reported that in the third quarter, it received 19,920 complaints about broadcast obscenity or indecency—up from 351 in the second quarter," but noting that, according to an FCC spokeswoman, the majority of those complaints "were directed at two TV shows that had been singled out by morality groups"—an episode of the ABC network's *NYPD Blue* "that showed a bare backside" that, in turn, triggered multiple complaints from a group called One Million Moms, and an episode of a now-cancelled police show that aired on the FOX network called *Keen Eddie* that prompted a campaign of complaints by the Parents Television Council).

75. See, e.g., John McCaslin, *Dangerous Precedent*, WASH. TIMES, Nov. 25, 2003, at A05 (quoting Rep. Jo Ann Davis, a Virginia Republican, for the proposition that Bono's language has "long been deemed inappropriate by American society and, consequently, has not been permitted on broadcast television and radio, and its use factors into movie ratings. However, with this recent FCC ruling, we are opening the door to a whole new world of what is deemed acceptable for television audiences.").

76. See Parents Television Council, *Parents Television Council Ratings Explanation and Legend*, at <http://www.parentstv.org/PTC/familyGuide/legend.htm> (last visited Mar. 31, 2004).

web site,<sup>77</sup> describes itself as being “established in 1995 as a nonpartisan group, offering *private sector solutions* to restore television to its roots as an independent and socially responsible entertainment medium.”<sup>78</sup> Ironically, the PTC failed to offer a private sector solution to the Bono incident; instead, the PTC actively called for a government response to reverse Solomon’s opinion.<sup>79</sup> The five FCC commissioners, as Part II describes, would not only grant the PTC’s Application for Review, but also its wish that Solomon’s decision be overturned.

### *B. The Reversal: The Commissioners Weigh In*

The Commissioners’ decision to reverse Solomon’s holding hardly came as a surprise when the opinion was released on March 18, 2004. The *Atlanta Journal-Constitution*, for instance, had reported nearly a month before that “FCC Chairman Michael Powell recommended [Solomon’s opinion] be rescinded.”<sup>80</sup> Powell had even sent a personal letter to Brent Bozell, the founder and president of the PTC, back in November 2003, in which he wrote:

As a husband and father of two boys, I am personally disturbed by the continued proliferation of profanity, violence and sex in our daily lives. Whether over our airwaves or cable and satellite television systems, in our movie theatres, in our advertisements, over the Internet or in our children’s music and videogames, today’s parents are faced with the difficult challenge of protecting our children from perverse sights, sounds and images. I applaud your personal efforts and those of the Parents Television Council and like-minded organizations that have fought tirelessly to empower our nation’s parents so that they can better protect our children.<sup>81</sup>

When the Memorandum and Opinion Order was eventually released on March 18, 2004, about five months after the Powell missive to Bozell, it became clear that the word “profanity” as used in that letter

77. See Parents Television Council, *File An FCC Complaint*, at <https://www.parentstv.org/ptc/fcc/fcccomplaint2.asp> (last visited Apr. 1, 2004).

78. See Parents Television Council, *About Us*, at <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Mar. 31, 2004) (emphasis added).

79. See Parents Television Council, *Press Release: PTC Commends Congressional Action to Address Broadcast Decency*, at <http://www.parentstv.org/ptc/publications/release/2004/0112.asp> (last visited Mar. 31, 2004) (writing that “[t]he PTC appealed the FCC’s initial decision to the full five-member Commission and began calling for immediate congressional hearings to investigate the FCC’s refusal to do its job.”).

80. Rodney Ho, *Radio Execs Order DJs to Clean Up On-Air Acts*, ATLANTA J.-CONST., Feb. 26, 2004, at 1A.

81. Letter from Michael K. Powell, Chairman of the Federal Communications Commission, to L. Brent Bozell, III, Founder and President, Parents Television Council (Nov. 25, 2003) (on file with author).

had taken on a newfound importance at the FCC. In particular, the five Commissioners concluded that the Golden Globes broadcast “included material in violation of the applicable *indecenty* and *profanity* prohibitions.”<sup>82</sup> The FCC, as the italicized language in the previous sentence suggests, had found two different ways in which to punish the telecast of Bono’s speech.

### 1. The Indecency Determination

On the issue of indecency, the Commission initially found that, contrary to David Solomon’s opinion, the subject matter of Bono’s speech depicted and described sexual activities.<sup>83</sup> The Commission reasoned that “the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.”<sup>84</sup>

Having concluded that the subject matter was one that fell under the FCC’s definition of indecency, the Commission then focused its analysis on whether the depiction of this subject matter was patently offensive under contemporary community standards for the broadcast medium.<sup>85</sup> As discussed above,<sup>86</sup> Solomon never addressed this issue because he found that the material did not clear the threshold subject-matter question.<sup>87</sup>

To reach its determination on patent offensiveness, the Commission cited the three principal factors that the FCC had used in other cases: (1) whether the description was explicit or graphic; (2) whether the language was repeated or dwelled on; and (3) whether the use of the language was designed to shock, pander, or titillate the audience.<sup>88</sup>

In addressing the first factor, the Commission cursorily concluded that “the ‘F-Word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language.”<sup>89</sup>

As to the second factor, whether the language was repeated, the Commission had to reverse its own precedent. In particular, it wrote that, “[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-Word’ such as that here are not indecent or would not be acted upon, consistent with our decision today we

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82. *Golden Globes II*, *supra* note 7, ¶ 2 (emphasis added).

83. *Id.* ¶ 8.

84. *Id.*

85. *Id.* ¶ 9.

86. *Supra* notes 67–70 and accompanying text.

87. *Supra* notes 67–70 and accompanying text.

88. *Golden Globes II*, *supra* note 7, ¶ 7.

89. *Id.* ¶ 9.

conclude that any such interpretation is no longer good law.”<sup>90</sup> Clarifying this fit of administrative activism, the Commission added that “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>91</sup>

Why did the Commission reverse course on the repeated-or-dwelled-upon factor? It gave two reasons: The first is technological, and the second is somewhat akin to capable-of-repetition-yet-evading-judicial-review logic in mootness issues.<sup>92</sup>

With regard to the technological basis for reversing precedent on the fleeting use of offensive language, the FCC wrote that “technological advances have made it possible as a general matter to prevent the broadcast of a single offending word or action without blocking or disproportionately disrupting the message of the speaker or performer”<sup>93</sup> and added that “[t]he ease with which broadcasters today can block even fleeting words in a live broadcast is an element in our decision to act upon a single and gratuitous use of a vulgar expletive.”<sup>94</sup> In other words, if there is a chance that an expletive may be uttered, then the broadcaster had better use a delay mechanism. Delay mechanisms, of course, are not infallible, if they even exist,<sup>95</sup> and thus the mere practice of using one will not always prevent liability under the FCC’s new approach. The reality is that “many live programs now operate with a five-second delay, and networks are taking a hard look at any envelope-pushing content.”<sup>96</sup> The implications for sports broadcasts are discussed in Part III of this article.<sup>97</sup>

As to the second rationale for changing course on the fleeting use of offensive language, the FCC wrote that “if the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the

90. *Id.* ¶ 12.

91. *Id.*

92. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 117 (2d ed. 2002) (describing this doctrine and noting that the abortion case of *Roe v. Wade*, 410 U.S. 113 (1973), is “a paradigm example of a wrong capable of repetition yet evading review.”).

93. *Golden Globes II*, *supra* note 7, ¶ 11.

94. *Id.*

95. As media critic Tom Shales recently wrote:

In that beloved best seller “Live from New York,” the late Dave Wilson, who directed “Saturday Night Live” for 20 years, said that for all the times he heard that a five- or 10-second delay had been imposed because of fears over controversial comic material making it onto the airwaves, he didn’t think anybody ever really got the delay to work. And when they really needed it (Sinead O’Connor, Martin Lawrence, et al.), it wasn’t even hooked up.

Tom Shales, *Banning The Breast Is Only the Beginning*, TELEVISION WK., Feb. 9, 2004, at 45.

96. Steve Jones, *Jackson Steps Out as ‘Damita Jo,’* USA TODAY, Mar. 30, 2004, at 1D.

97. *Infra* section III.B.

audience, this would likely lead to more widespread use of the offensive language.”<sup>98</sup> This line of reasoning reflects the idea that, if there were a hard-and-fast rule that isolated and unintentionally aired uses of offensive material were protected, then the FCC would never be able to punish such uses, which, in turn, could spread to more and more shows. In other words, if broadcasters knew they could get away with isolated and gratuitous uses of offensive language, then they might begin to sprinkle such use into more and more shows, resulting in a snowball effect.

As for the third factor in the patent offensiveness determination, whether the language at issue was designed to shock, pander, or titillate, the FCC wrote that “[t]he use of the ‘F-Word’ here, on a nationally telecast awards ceremony, was shocking and gratuitous. In this regard, 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.”<sup>99</sup> In an important footnote, the FCC added that its reference to factors akin to those in the third prong of the *Miller* obscenity test<sup>100</sup> “is not to suggest that the fact that a broadcast had a social or political value would necessarily render use of the ‘F-Word’ permissible.”<sup>101</sup> This is particularly troubling because there may be uses of offensive language that do have social value—George Carlin’s entire monologue was ostensibly a social commentary on societal squeamishness over language.<sup>102</sup>

In summary, the FCC found the Bono speech indecent because the word “fucking” inherently describes sexual conduct and because that description, in turn, was patently offensive across the three factors traditionally employed by the FCC. But the Commission did not stop there. It also found the language was profane, not merely indecent.

## 2. The Profanity Determination

Federal law provides that “[w]hoever utters any obscene, indecent, or *profane language* by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”<sup>103</sup> The FCC used the italicized language above for what it called “an

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98. *Golden Globes II*, *supra* note 7, ¶ 9.

99. *Id.*

100. *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Roth v. United States*, 354 U.S. 476 (1957)).

101. *Golden Globes II*, *supra* note 7, ¶ 9 n.25.

102. See Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1279 (2000) (describing Carlin’s monologue as “satire”).

103. 18 U.S.C. § 1464 (2004) (emphasis added).

independent ground”<sup>104</sup> and “a new approach”<sup>105</sup> for holding that the Golden Globes broadcast violated federal law. The FCC wrote:

Broadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of “profanity” the “F-Word” and 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. We will analyze other potentially profane words or phrases on a case-by-case basis.<sup>106</sup>

The FCC failed, however, to define what it meant by “highly offensive,” and it did not create or adopt any factors like the ones used in indecency determinations to decide whether speech is patently offensive. This creates substantial dangers of vagueness<sup>107</sup> and vast discretion that may result in possible uneven and subjective enforcement of a federal law affecting a constitutional right. All that the FCC added to flesh out the meaning of profanity was a statement that “use of the ‘F-Word’ in the context at issue here is . . . clearly the kind of vulgar and coarse language that is commonly understood to fall within the definition of ‘profanity.’”<sup>108</sup> With that, the FCC now leaves broadcasters to ponder a definition of profanity that is equated with the terms “coarse,” “vulgar,” and “highly offensive.”

Why did the FCC act the way it did in declaring the Bono acceptance speech to be both indecent and profane? The next part of the article attempts to address that question by examining the cultural, legal, and political forces that may have impacted the thinking of the five commissioners.

## PART II. FREE SPEECH IN THE CULTURE WARS: POLITICAL PANDERING AND THE BATTLE OVER THE AIRWAVES

“[The media] are directing culture and need to take responsibility.”<sup>109</sup> That is how United States Senator Sam Brownback, a Kansas Republican, admonished more than 300 members of the National

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104. *Golden Globes II*, *supra* note 7, ¶ 13.

105. *Id.* ¶ 15.

106. *Id.* ¶ 14.

107. In order to avoid being declared unconstitutionally void for vagueness, a statute must be “sufficiently clear that persons of ordinary intelligence can determine what is prohibited.” *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1056 (9th Cir. 2003).

108. *Golden Globes II*, *supra* note 7, ¶ 13.

109. Lynn Smith, *Quick Takes; Self-Regulation for the Airwaves*, L.A. TIMES, Apr. 1, 2004, at E5.

Association of Broadcasters at a special summit on the topic of indecency less than two weeks after the FCC issued its reversal of David H. Solomon's Golden Globe opinion.<sup>110</sup>

Of course, calling for the media to take responsibility for the harms their wares supposedly cause is nothing new. In just the past five years, a spate of legislative efforts and lawsuits has surfaced blaming a veritable laundry list of media artifacts for supposedly causing all varieties of harms to both society at large and to individuals. Frequent targets of attack include violent video games,<sup>111</sup> television talk shows,<sup>112</sup> web sites,<sup>113</sup> musical recordings,<sup>114</sup> and motion pictures.<sup>115</sup>

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110. *Id.*

111. Several municipalities and governmental entities have tried unsuccessfully to restrict minors' access to video games depicting violence, on the belief that the games harm minors psychologically and may cause them to aggress against others. See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), *petition for reh'g en banc denied*, 2003 U.S. App. LEXIS 13782 (July 9, 2003) (striking down, for violating of the right of free speech guaranteed by the First Amendment, a St. Louis County, Missouri, ordinance making it unlawful to knowingly sell, rent or make available graphically violent video games to minors); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (declaring unconstitutional, in violation of the First Amendment right of free speech, an Indianapolis, Indiana, ordinance that limited the access of minors to video games that depict violence); *Order Granting Plaintiff's Motion for Preliminary Injunction, Video Software Dealers Ass'n v. Maleng*, No. C03-1245L (W.D. Wash. filed July 10, 2003) (issuing a preliminary injunction preventing the state of Washington from enforcing a first-of-its-kind state statute prohibiting the sale or rental of video and computer games to minors that depict realistic images of violence on figures who appear to be law enforcement officers). See generally Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1 (2002) (analyzing and lauding the opinion authored by Judge Posner in *American Amusement*).

In addition to legislative initiatives targeting video games and the ills they supposedly cause, there have been several civil lawsuits singling out video game manufacturers for harms allegedly caused by video game players. See, e.g., *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002) (dismissing product liability, unfair trade practices, and emotional distress claims filed by the mother of a boy who was stabbed to death with a kitchen knife by another youth who allegedly was obsessed with the video game *Mortal Kombat*). See generally Clay Calvert, *Media Liability for Violent Conduct: One Year Later*, 23 LOY. L.A. ENT. L. REV. 247 (2003) (discussing several cases filed against video game manufacturers for violence allegedly caused by the playing of their products).

112. There are two recent high-profile cases claiming that daytime television talk shows are responsible for causing physical harm or death to others. *Graves v. Warner Bros.*, 656 N.W.2d 195 (Mich. Ct. App. 2002), *appeal denied*, 666 N.W.2d 665 (Mich. 2003), *motions for recon., recusal, and evidentiary hearing denied*, 669 N.W.2d 552 (Mich. 2003), *motion for recon. denied*, 673 N.W.2d 745 (Mich. 2004) (rejecting a wrongful death action filed against the producers and distributors of the *Jenny Jones Show* by the representatives of the estate of Scott Amedure, a man who was shot to death, three days after appearing on the show, by another individual, Jonathan Schmitz, who appeared on the same episode); *Craver v. Povich*, 768 N.Y.S.2d 571 (N.Y. Sup. Ct. 2003) (involving claims for negligence, negligent hiring and retention, slander, intentional infliction of emotional distress, and negligent infliction of emotional distress against the *Maury Povich Show* stemming from the alleged rape of a 14-year-old guest, who appeared on the show on a segment about out-of-control teens, by a limousine driver who identified himself as "Maury's limo driver"). See generally Robert D. Richards, *Reality TV Shows Could Turn into Big Jackpot for Attorneys*, L.A.

It is within this context of a media blame game<sup>116</sup> that the current FCC and congressional battle over indecent and profane language on television and radio is now being fought. That battle, in turn, is part of a much larger culture war<sup>117</sup> featuring a colorful cast of characters. Howard Stern, for instance, has been transformed “into a high-profile fighter for freedom of speech and a formidable force—if he keeps it up—in the culture wars.”<sup>118</sup> He has recently taken on the FCC and the Bush Administration with a vengeance.<sup>119</sup> The debate has also resuscitated the celebrity and the importance of aging social satirist George Carlin, turning him from a footnoted father of FCC controversies over the use of dirty words into a once-again cited sage. For instance, Carlin gave his

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DAILY J., Mar. 2, 2004, at 6 (describing the “new breed of lawsuit” for so-called “talk show torts” and discussing the *Graves* and *Craver* cases).

113. Web sites that feature sexually explicit material are a favorite target of legislators who believe that the content harms minors. For instance, the Child Online Protection Act, (“COPA”) is designed to restrict non-obscene material on the web that is harmful to minors due to its sexual nature. The law was enjoined in 2003 by a federal appellate court. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). The United States Supreme Court heard oral arguments on the constitutionality of the COPA in March 2004. See David G. Savage, *Supreme Court Signals Curb to Online Porn*, L.A. TIMES, Mar. 3, 2004, at A14 (describing the arguments before the nation’s high court and writing that the COPA received a “friendly reception” from several justices).

Civil litigation also was filed, albeit unsuccessfully, against the operators of sexually oriented web sites on the grounds that the sites allegedly caused a user to commit violence. See *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003) (blaming, among other media defendants, the operators of a web site called *PersianKitty.com* for allegedly causing Michael Carneal to kill three fellow students in the lobby of Heath High School in Paducah, Kentucky, in December 1997).

114. See *Pahler v. Slayer*, 29 Media L. Rep. 2627 (Cal. Super. Ct. 2001) (involving a case filed against the members of a band called “Slayer” seeking to hold them civilly liable for the murder of a 15-year-old girl by a group of boys who listened to the group’s music); see generally Clay Calvert, *Framing and Blaming in the Culture Wars: Marketing Murder or Selling Speech?*, 3 VAND. J. ENT. L. & PRAC. 128 (2001) (analyzing and critiquing the case filed against the members of “Slayer”).

115. *The Basketball Diaries*, a movie starring Leonardo DiCaprio, has been a target of liability claims in at least two federal lawsuits stemming from school shootings. See *Meow Media*, 300 F.3d at 683 (dismissing a wrongful death action blaming, among other media defendants, the makers and distributors of *The Basketball Diaries* for allegedly causing Michael Carneal to kill three fellow students in the lobby of Heath High School in Paducah, Kentucky, in December 1997); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002) (dismissing, for failure to state a claim, a wrongful death action brought against the makers and distributors of *The Basketball Diaries*, as well as several other media defendants, by the wife of a teacher killed at Columbine High School near Littleton, Colorado, in April 1999).

116. See generally Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech After Columbine High and Jenny Jones*, 2000 L. REV. M.S.U.-D.C.L. 151 (2000) (describing the propensity in the United States to blame the media for societal ills).

117. See Patrick Goldstein, *The Decency Debate*, L.A. TIMES, Mar. 28, 2004, at E1 (contending that “there’s a culture war raging” around the FCC’s attempts to crack down on language used in the broadcast medium).

118. Danny Schechter, *Eye on the Media: Stern’s Loose Lips Give Bush the Slip*, NEWSDAY, Mar. 24, 2004, at A39.

119. Bob Baker, *Politics a la Stern*, L.A. TIMES, Mar. 22, 2004, at E1.

own take on the current culture wars in *Time* magazine in March 2004, contending that “[t]here is no question that the repressive, Christian, right-wing, criminal, Republican section of our country has gained the upper hand.”<sup>120</sup>

What gave rise to this latest round in the culture wars, besides an election year in which conservatives and liberals desperately try to distinguish themselves from one another, and why is it being fought on the broadcast battlefield? For many people, it was, as journalist Eugene Kane observed, “the brief sight of Jackson’s right breast adorned by a nipple shield”<sup>121</sup> on national television during the Super Bowl halftime show. This observation, however, is incorrect; the process is much more complex and predates the Jackson breast baring.<sup>122</sup> As FCC Commissioner Michael J. Copps observed in his address to the National Association of Broadcasters at its indecency summit, which occurred less than two weeks after the FCC issued its reversal in the Bono dispute, “it wasn’t the Super Bowl that started all this.”<sup>123</sup>

While the Janet Jackson incident certainly cast the public spotlight on the role of the FCC in policing the public airwaves and may have influenced the FCC in its subsequent crackdown, it was Bono who “broke a taboo and inadvertently opened a front in the American culture wars.”<sup>124</sup> And it was, in turn, David H. Solomon who, by protecting Bono’s expression in October 2003 and “giving the green light for use of the f-word when it’s not used as a specific reference to sex,”<sup>125</sup> riled cultural conservatives and pro-family organizations. A spokesperson for PTC, for instance, put pressure on both Congress and the FCC Commissioners to challenge Solomon’s wisdom<sup>126</sup> by calling the FCC “a

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120. Richard Zoglin, *10 Questions for George Carlin*, TIME, Mar. 29, 2004, at 8.

121. Eugene Kane, *Super Bowl Stunt Could Reveal More Than Just Jackson's Breast*, MILWAUKEE J. SENTINEL, Feb. 8, 2004, at 3B.

122. FCC Chairman Michael Powell expressed in mid-January 2004—more than two full weeks before the Janet Jackson incident—his desire that David H. Solomon’s opinion on Bono’s speech be overruled. See Frank Ahrens, *FCC Chairman Seeks Reversal on Profanity*, WASH. POST, Jan. 14, 2004, at E01 (writing that “Federal Communications Commission Chairman Michael K. Powell asked his four fellow commissioners yesterday to overturn a heavily criticized agency ruling that found a profanity uttered on network television by rock-and-roller Bono was not indecent.”).

123. FCC Commissioner Michael J. Copps, *Remarks at the NAB Indecency Summit in Washington, D.C.* (Mar. 31, 2004), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-245610A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245610A1.pdf).

124. Conor O’Clery, *Bono’s Eloquence Wins Over TV Censors*, IRISH TIMES, Jan. 31, 2004, at 11.

125. Bill McConnell, *FCC Won’t Budge on Infinity Indecency Fine*, BROAD. & CABLE, Mar. 8, 2004, at 40.

126. For instance, Bob Peters, the president of Morality in Media, said that Solomon’s decision reflected “a complete breakdown in moral sanity.” Rodney Ho, *Pushing Envelope on Media Vulgarity FCC Decision OKs Word Once Off-Limits*, ATLANTA J.-CONST., Oct. 13, 2003, at E1.

toothless lion” after the initial decision.<sup>127</sup> Indeed, as *Broadcasting & Cable* magazine observed, “conservatives made a cause celebre of the FCC’s exculpation of NBC stations for airing rock star Bono’s f-word-laced speech during the Golden Globes broadcast.”<sup>128</sup> Solomon’s decision, in fact, “prompted a PTC campaign, one of three orchestrated barrages by family values activists that helped fuel a spate of indecency complaints.”<sup>129</sup>

Then came reality-television personality Nichole Richie’s utterance of another expletive-laden phrase—“Why do they even call it the ‘Simple Life’? Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple”—on the FOX Network’s live broadcast in December 2003 of the Billboard Music Awards.<sup>130</sup> The next high-profile broadcast incident took place on February 1, 2004, when Janet Jackson’s right breast “made a surprise appearance during the AOL Super Bowl Halftime Show.”<sup>131</sup> That incident produced what media critic and film reviewer Richard Roeper correctly called an “increasingly insane overreaction.”<sup>132</sup> The reconsideration of Bono’s acceptance speech, unfortunately, would be swept up as part of the overreaction by the FCC.

In summary, it was the confluence of many factors and many incidents—Bono’s speech, Solomon’s decision, conservatives’ complaints, Richie’s rant, and Jackson’s breast—that likely pushed the FCC to not only reverse its course on indecency, but also to open up a new battle front called “profane language.” At the same time that these broadcast incidents and controversies were occurring, the public debate on other hot-button cultural issues such as gay marriage<sup>133</sup> and the Pledge of Allegiance<sup>134</sup> were rising to public prominence. From the perspective

127. *Id.*

128. Staff, *The Shape of Things to Come*, BROAD. & CABLE, Jan. 5, 2004, at 32.

129. Staff, *Capital Watch*, BROAD. & CABLE, Sept. 22, 2003, at 19.

130. Bill Holland, *Complaints over Potty-Talk at Billboard Awards*, BILLBOARD, Jan. 10, 2004, at 8.

131. Lisa de Moraes, *The CBS-Jackson Nexus: Time to Throw a Flag*, WASH. POST, Feb. 2, 2004, at C07.

132. Richard Roeper, *We Can Block Out Smut Without Government’s Help*, CHI. SUN-TIMES, Mar. 1, 2004, at 11.

133. See generally Mike Allen, *Bush Highlights Social Issues*, WASH. POST, Feb. 27, 2004, at A08 (noting that President George W. Bush both has called “for a constitutional amendment to ban gay marriage” and has stated that Americans “will not stand for judges who undermine democracy by legislating from the bench, or try to remake the culture of America by court order.”).

134. The same month that the FCC handed down its opinion reversing David H. Solomon’s decision, the United States Supreme Court heard oral argument regarding the First Amendment-based implications, under the Establishment Clause, of the phrase “under God” in the Pledge of Allegiance. See Linda Greenhouse, *Atheist Presents Case for Taking God from Pledge*, N.Y. TIMES, Mar. 25, 2004, at A1 (describing oral argument in the case of *Elk Grove Unified Sch. Dist. v. Newdow*).

of the cultural conservatives on the FCC, it surely must have seemed like something—anything—needed to be done lest the United States continue to, as conservative jurist Robert Bork might put it, slouch towards Gomorrah.<sup>135</sup>

The FCC's stepped-up efforts to target the use of particular words as indecent or profane are troublesome, in part, because those efforts represent a thoroughly underinclusive approach to a perceived problem. Bleeping words on a ten-second delayed basis where most reasonable listeners or viewers can easily figure out what was said, despite such masking tactics, does not clean up culture. Coarse language can be heard nearly everywhere today in nearly every media product.<sup>136</sup> The word "fuck" is, as Professor Lynn Schofield Clark recently observed, "becoming more common in everyday conversation."<sup>137</sup> The broadcast of an occasional, unintentional, and unexpected expletive by NBC hardly constitutes a drop in the ocean of profanity to which people of all ages are exposed.

More important than the proliferation of profanity is the fact that more significant and pressing societal issues linger while the FCC and Congress collectively posture and foam at the mouth over naughty words. As Susan Campbell of the *Hartford Courant* recently observed about the FCC's new approach to profanity, "as that august body seeks to bring decency back to our land, so much dangerous misogynistic, racist and homophobic crap is left to fester. As in Groucho Marx's old television show, the duck drops down, but only if you use the right—or wrong—word."<sup>138</sup> As Campbell suggests, the eradication of certain "wrong" words from television will not address problems such as racism and homophobia.

Campbell's comments regarding the real problems that exist in society give rise to another question: Is it more harmful for minors to hear the word "fucking" uttered by a singer and political activist like Bono in a decidedly nonsexual context, or for them to grow up against a "backdrop of hyper-sexualized stars like Britney Spears?"<sup>139</sup> The "Lolita

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135. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

136. Cf. Don Aucoin, *Curses! 'The Big One' Once Taboo, the Ultimate Swear Is Everywhere, and Losing Its Power to Shock*, BOSTON GLOBE, Feb. 12, 2004, at B13 (observing that "Once the ultimate taboo, the F-word has aggressively muscled its way into the wider culture, raising the distinct possibility that it could someday follow other once-verbotten vulgarities into the realm of the permissible.").

137. *Id.*

138. Susan Campbell, *Like It or Not, I Must Stand Up for Howard Stern*, HARTFORD COURANT, Mar. 31, 2004, at D1.

139. Shanda Deizel, *Avril's Edge*, MACLEAN'S, Jan. 13, 2003, at 22.

tease,”<sup>140</sup> Spears,<sup>141</sup> and her rival, Christina Aguilera, “have infected millions of girls with an early onset of body consciousness, with the bare midriff becoming the ‘tweener equivalent of cleavage. The mating dance begins in grade school, and approximately four out of ten American girls will become pregnant at least once before reaching age 20.”<sup>142</sup> Oral sex is increasing among young teens today and a recent national study estimated that about twenty percent of all children ages fourteen and under have had sex.<sup>143</sup> To put it differently and into context, the issues of minors and media culture do not revolve around hearing the word “fucking” used in a non-sexual sense by a singer when accepting an award, but rather from constantly consuming images and hearing lyrics by singers that suggest the sexual meaning of that same word is the conduct in which they should be engaging.

The underinclusiveness of the FCC’s action also is illustrated by analogy to the City of Indianapolis’s recent approach to the problem of youth violence. Indianapolis adopted an ordinance that limited minors’ access to video games depicting violence.<sup>144</sup> In striking down the ordinance as an unconstitutional infringement on the First Amendment freedom of speech, Judge Richard A. Posner wrote for a unanimous Seventh Circuit Court of Appeals:

We can imagine the City’s arguing that it would like to ban violent movies too, but that either this is infeasible or the City has to start somewhere and should not be discouraged from experimenting. Experimentation should indeed not be discouraged. But the City makes neither argument. Its only expressed concern is with video games, in fact only video games in game arcades, movie-theater

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140. Steve Hochman, *Duff Serves the Pop Without the Tart*, L.A. TIMES, Jan. 26, 2004, at E1.

141. Britney Spears, although now in her early twenties, embraces the role of teen nymphet, with a rather recent article in the *San Francisco Chronicle* describing her as the following:

a whipless kitten longing to be eternal jailbait. Her lips are as pink as fresh bubblegum, her voice as modulated as Minnie Mouse’s, her sexuality still that of the calculating nymphet. Humbert Humbert would be the first to say that, at 20, she’s too old to play the Lolita role, but Britney offers little to replace it.

Neva Chonin, *The Divas: From Girls to Women*, S. F. CHRON., Apr. 7, 2002, at Sunday Datebook 60.

Spears has influenced teen fashion, producing what some have called a “Britney Effect . . . more skin on today’s 14-year-old girls than the tabloids would allow in their ads for pornographic movies a generation ago.” Froma Harrop, *Parents Must Counter the ‘Britney Effect,’* SEATTLE TIMES, Aug. 15, 2002, at B6.

142. Joe Williams, *Act Your Age!*, ST. LOUIS POST-DISPATCH, May 18, 2003, at F3.

143. Jane Elizabeth & Mackenzie Carpenter, *More Kids Are Having Sex, and They’re Having It Younger*, PITT. POST-GAZETTE, Sept. 14, 2003, at A-1.

144. *Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 573–74 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001) (observing that the “legislative history indicates that the City believes that participation in violent video games engenders violence on the part of the players, at least when they are minors.”).

lobbies, and hotel game rooms. It doesn't even argue that the *addition* of violent video games to violent movies and television in the cultural menu of Indianapolis youth significantly increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior. Violent video games played in public places are a tiny fraction of the media violence to which modern American children are exposed. Tiny—and judging from the record of this case not very violent compared to what is available to children on television and in movie theaters today.<sup>145</sup>

Such an underinclusive, band-aid approach to violence mirrors Congress' and the FCC's election-year, hand-wringing response to broadcast expression in cases like Bono's acceptance speech and Jackson's breast baring. The fact that it is an election year is important. Professor Matthew Baum, a political scientist at UCLA,<sup>146</sup> recently called the indecency regulation issue "red meat for social conservatives. Since moving to the center may do them no good, this may be part of a different campaign strategy."<sup>147</sup> As journalist Eric Deggans observed, FCC Commissioner Michael Powell's efforts to control broadcast indecency have "kickstarted an issue that speaks directly to President Bush's conservative base during an election year."<sup>148</sup>

While the indecency issue might have kickstarted Bush's constituents, it also "brought together liberals and conservatives in an often-warring Congress"<sup>149</sup> by giving them a subject for agreement with popular appeal that cuts across party lines. There was, for instance, overwhelming bipartisan support in March 2004 of a measure to increase fines for indecency violations.<sup>150</sup> The fact that policies affecting the First Amendment rights of broadcasters are driven by political grandstanding from both sides of the aisle during an election year is wrong, though far from surprising. The long-term costs to freedom of expression are ignored today in favor of short-term benefits at the voting booth in November 2004.

Almost as disturbing as the heightened government censorship campaign is the self-censorship taking place among media owners who

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145. *Id.* at 579.

146. See generally Professor Baum's web site, at <http://www.boi.ucla.edu/~mbaum> (last visited Apr. 1, 2004).

147. Noel C. Paul, *Behind the Media's New Propriety*, CHRISTIAN SCI. MONITOR, Mar. 1, 2004, at 2.

148. Eric Deggans, *FCC vs. Bubba: The Politics of Reining in the Shock Jocks*, ST. PETERSBURG TIMES (Fla.), Feb. 1, 2004, at 1P.

149. Richard Simon, *House Bill Would Raise Penalties for Indecency*, L.A. TIMES, Mar. 4, 2004, at A9.

150. *Id.*

want to ward off further government reaction and intervention. For instance, Clear Channel Communications,<sup>151</sup> the nation's largest radio chain and owner of 1,200 stations,<sup>152</sup> fired the radio personality known as "Bubba the Love Sponge" and pulled Howard Stern from its stations shortly after the Janet Jackson Super Bowl incident.<sup>153</sup> This is self-censorship in action, designed, as discussed below, to fend off government-imposed restrictions favored by Democrats on the number of radio stations a single entity may own. Not surprisingly, then, at least one journalist has described Clear Channel as the "multimedia conglomerate that's blazed the trail in blurring the line between journalism and government in their fawning coverage of the Bush administration."<sup>154</sup> By March 2004, Clear Channel executives had "given \$42,200 to Bush, vs. \$1,750 to likely Democratic nominee John Kerry in the 2004 race,"<sup>155</sup> and Democrats "draw links between the Republican-controlled FCC, the White House and Clear Channel."<sup>156</sup>

The self-censorship is not confined to radio. On television, NBC eliminated from an episode of *ER* "a glimpse of an 80-year-old patient's breast."<sup>157</sup> The *San Diego Union-Tribune* reported in May 2004 that "[e]ven shows as benign as 'Antiques Roadshow' have not been immune from review. One episode almost had a segment edited out because it featured a 50-year-old lithograph of a nude celebrity."<sup>158</sup> But perhaps more disturbing than the self-censorship of entertainment programming like *ER* or *Antiques Roadshow* is the self-censorship of news content on matters of public concern. In particular, in May 2004, CBS-affiliated television stations feared that, "[u]nless the Federal Communications

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151. See Clear Channel Communications's web site at <http://www.clearchannel.com> (last visited Apr. 2, 2004).

152. See Clay Calvert, *Dual Responsibilities of the Corporate Newsroom*, in CONTEMPORARY MEDIA ISSUES 27, 31 (Emily Erickson & Wm. David Sloan eds., 2d ed. 2004) (writing that Clear Channel Communications owned or operated "more than 1,200 radio stations and 36 television stations in the United States" in 2003).

153. Tim Feran, *Shock Jock's Suspension Boosts Decency Efforts*, COLUMBUS DISPATCH (Ohio), Feb. 27, 2004, at 11D (describing Clear Channel's actions with both Bubba the Love Sponge and Stern). Stern's company, One Twelve, Inc., and his show's distributor, Infinity Broadcasting, filed a \$10 million lawsuit against Clear Channel for pulling the Stern show from six stations. That lawsuit prompted a countersuit in July 2004 for \$3 million by Clear Channel for breach of contract. John Maynard, *Clear Channel Countersues Howard Stern for \$3 Million*, WASH. POST, July 22, 2004, at C07.

154. Campbell, *supra* note 138.

155. Jim Hopkins, *Clear Channel Execs Donate More to Bush*, USA TODAY, Mar. 23, 2004, at 1B.

156. Frank Ahrens, *Radio Giant in Record Indecency Settlement*, WASH. POST, June 9, 2004, at A1, A7.

157. Collins, *supra* note 34.

158. Jennifer Davies, *Fine-Wary Broadcasters Toe a Shifting Line*, SAN DIEGO UNION-TRIB., May 29, 2004, at A-1.

Commission makes some exceptions in its crackdown on foul language, live news coverage may be an endangered species.”<sup>159</sup> The *Los Angeles Times* reported at the time that “a CBS affiliate in Phoenix curtailed its live coverage of a memorial service for ex-football star Pat Tillman because of some mourners’ language.”<sup>160</sup>

Why the self-censorship or near self-censorship, in the case of *Antiques Roadshow*? The major television networks and radio owners want to not only ward off new government-imposed indecency standards, but they also want to see a relaxation in FCC-imposed ownership limitations and a concomitant increase in media consolidation and concentration.<sup>161</sup> By appearing to be concerned about content issues like indecency, and by demonstrating that they can adequately police themselves, the owners of big media may be attempting to reinforce to both the Republican-controlled FCC and to Congress that there is no need to worry about structural ownership issues.<sup>162</sup> Bluntly stated, the cultural conservatism exhibited in the self-censorship of content may be designed to self-servingly promote the corporate conservatism of media ownership.

The media owners, it should be noted, need the help of many cultural conservatives on the issue of expanding ownership because “skeptics of further media consolidation hail from across the political spectrum.”<sup>163</sup> Although Republican-appointed FCC Chief Michael Powell was the architect and main proponent of the FCC’s move to increase the national television ownership cap from 35 percent to 45 percent of the national audience,<sup>164</sup> along with fellow Republican

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159. Lynn Smith, *Profanity Rules Bother News Shows*, L.A. TIMES, May 6, 2004, at C1.

160. *Id.*

161. The issue over an increase in the national-audience reach cap from 35 percent to 45 percent (and then reduced by Congress to 39 percent) is currently in litigation in federal court. See Stephen Labaton, *Court Is Urged to Change Media Ownership Rules*, N.Y. TIMES, Feb. 12, 2004, at C14 (describing the arguments in *Prometheus Radio Project v. FCC*). In June 2004, a federal appellate court did not disturb the 39 percent cap, but it did remand to the FCC for further justification or modification of a number of other ownership-related rules. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

162. Cf. Kay McFadden, *FCC Media Rules Change May Be Real Obscenity*, SEATTLE TIMES, Feb. 13, 2004, at E1 (discussing the relationship between the current battle over broadcast indecency and the fight over broadcast ownership limits, and observing that “[t]he same day FCC Chairman Michael Powell was railing at Super Bowl smut, his agency was in Philadelphia defending its decision last June to relax limits on how many media outlets can be owned by one company.”).

163. Bonnie Pfister, *FCC Boss To Get an Earful at S.A. Hearing Today; Meeting Focuses On Who Controls Broadcast Airwaves*, SAN ANTONIO EXPRESS-NEWS, Jan. 28, 2004, at 1A.

164. See David Zurawik, *FCC Hearings Seen as Just Theater*, BALT. SUN, Feb. 11, 2004, at 1E (describing “the rule changes championed by Powell last year that would allow a company to own TV stations that reach 45 percent of the households in the United States (up from 35 percent). The protests to that FCC action were so widespread that Congress responded with legislation capping ownership at 39 percent.”) (emphasis added).

commissioners Kathleen Q. Abernathy and Kevin J. Martin, conservative organizations, including the National Rifle Association, oppose it.<sup>165</sup>

In addition, the “two less industry-friendly commissioners,”<sup>166</sup> Democrats Michael J. Copps and Jonathan S. Adelstein, believe that there is a direct link between increasing consolidation and increasing indecent content. As Copps said during testimony to Congress in February 2004, “We open the door to unprecedented levels of media consolidation, and what do we get in return? More garbage, less real news and progressively crasser entertainment.”<sup>167</sup>

In brief, the concepts of content regulation and structural regulation of the media are inextricably intertwined in the current battle over indecent expression in the broadcast medium, and it is critical to contextualize the recent wave of self-censorship. Clearly, self-censorship is self-serving conduct.

It is far from clear, then, that media owners are willing to fight for their First Amendment rights when it comes to the government’s current content-restrictive actions. So far the media companies have only issued the obligatory mea culpas during congressional hearings<sup>168</sup> and engaged in acts of self-censorship.<sup>169</sup> Because no one from the media (other than Howard Stern and his ilk) is carrying the First Amendment flag,<sup>170</sup> Congress and the FCC have run roughshod over freedom of expression interests. Some of the other dangers of this course of events are described in the next Part of this article.

### PART III. THE FIRST AMENDMENT IN THE BALANCE: WHY THE FCC’S REVERSAL IS WRONG

“It appears the FCC has declared war on the First Amendment.”<sup>171</sup> That is how First Amendment attorney<sup>172</sup> and author<sup>173</sup> Robert Corn-

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165. The National Rifle Association “opposes the rules, because of worries about restrictions on NRA access to the airwaves.” Andrew Calabrese, *Amassing Media*, ROCKY MOUNTAIN NEWS, May 24, 2003, at 22B.

166. David Zurawik, *TV, Radio Get Static from Congress*, BALT. SUN, Feb. 12, 2004, at 3A.

167. *Id.*

168. See generally Griff Witte, *Broadcasters Promise To Curtail Indecency*, WASH. POST, Feb. 27, 2004, at E01 (describing how “broadcasters sought to convince Capitol Hill lawmakers that they’re serious about limiting indecency on the airwaves without a congressional crackdown.”).

169. *Supra* notes 151–60 and accompanying text.

170. In March 2004, Stern regularly “blam[ed] the Bush administration on-air for a crackdown on indecent broadcasting.” Doug Halonen, *Stern Spurns Bush, But Is Kerry in His Corner?*, TELEVISION WK., Mar. 22, 2004, at 2.

171. John Eggerton, *FCC’s Got a Brand-New Bad*, BROAD. & CABLE, Mar. 22, 2004, at 6.

172. A complete description of Robert Corn-Revere’s practice areas can be found on the web site of his law firm, Davis Wright Tremaine LLP, available at <http://www.dwt.com/lawdir/attorneys/CornRevereRobert.cfm> (last visited Mar. 30, 2004).

Revere bluntly described the March 18, 2004, Memorandum Opinion and Order by the FCC that declared that the live broadcast of the 2003 Golden Globe Awards violated both indecency and profanity laws.

This Part of the article describes several problems with the FCC's new approach to offensive broadcast language—problems that could affect the First Amendment. In particular, Section A examines the issues raised by the FCC's decision to embark on a new course of profanity determinations. Next, Section B moves from the problems raised by the new category of profanity to the issues presented by the FCC's new approach to the category of indecency. Section C then examines the larger implications of the FCC's decision on the concept of the public interest that is central to all broadcast regulation in the United States.

### *A. The New Battleground: Profane Language*

As described in Part II, the FCC has now expanded the meaning of profanity beyond attacks on religion to include “vulgar and coarse language”<sup>174</sup> and language that is, in context, “highly offensive.”<sup>175</sup> The FCC failed, however, to articulate factors, such as the three-pronged approach for patent offensiveness in indecency determinations, that are to be taken into consideration in future profanity determinations. All that broadcasters now know is that the word “fucking” is profane in the context of a Golden Globe acceptance speech, and that the FCC promises that it “will analyze other potentially profane words or phrases on a case-by-case basis.”<sup>176</sup>

Defining the concept of profanity in terms of “vulgar and coarse language” does not help broadcasters. Why? The FCC would have been wise to recall the words of the United States Supreme Court in *Cohen v. California*<sup>177</sup> more than thirty years ago, that it is “often true that *one man's vulgarity is another's lyric*. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”<sup>178</sup> This suggests that the concept of vulgarity—the same term the FCC now is using to define profanity—is inherently void for vagueness. Under the void for vagueness doctrine, “a law is unconstitutionally vague if a reasonable person cannot tell what speech is

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173. Corn-Revere is a co-author of a major treatise on communications law. See HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW (1999).

174. *Golden Globes II*, *supra* note 7, ¶ 13.

175. *Id.* ¶ 14.

176. *Id.*

177. 403 U.S. 15 (1971).

178. *Id.* at 25.

prohibited and what speech is permitted.”<sup>179</sup> Given the fact that usage of the word “fuck” is far more common today than it was back in 1971 when *Cohen* was decided,<sup>180</sup> the inference would be that similar words today are more likely lyrical than vulgar, to put it in the *Cohen* court’s language.

Another problem is the ultimate sweep of the category of profane language. Will it turn out to be largely redundant with, and duplicative of, the category of indecency? There is a strong possibility of this outcome, in which case expansion of the category of profane language to encompass vulgar and coarse language is a waste of the FCC’s administrative time and energy. Consider words like shit, crap, fuck, ass, piss, pussy, and dick. Each of those words either depicts or describes sexual or excretory activities or organs—the threshold requirement for an indecency determination. What’s more, the very same words, when stripped of all other context, also might be thought of by some people as vulgar or coarse—the meaning the FCC currently has provided for what constitutes profane language. In other words, the same language may be both indecent and profane under the new standards, in which case the new avenue the FCC opened up in the Bono opinion is purely for show and political posturing rather than for targeting a new or different type of content.

The greater danger, of course, is that the category of profane language ultimately will sweep more widely and more broadly than the current scope of indecency. Given the profoundly vague nature of terms like “vulgar” and “coarse,” the FCC has the latitude to broadly define those terms in future cases so as to censor far more content than mere indecency. The definition of indecency not only requires that the word in question depict or describe sexual or excretory activities or organs, but that it is used in a way that is patently offensive for the broadcast medium.<sup>181</sup> The FCC may choose not to impose a similar patent offensiveness requirement in profanity determinations, thereby making it easier to find content profane.

Finally, given the free-speech hostile climate described in Part II, any guidelines that the FCC does develop to further clarify the meaning of “profanity” will be heavily influenced by the political pressures of the moment. Lobbying groups like the PTC are sure to exert pressure and engage in letter-writing campaigns in future cases involving profanity determinations. The creation of a new, undefined category of profanity

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179. CHEMERINSKY, *supra* note 92, at 910.

180. See Aucoin, *supra* note 136 (discussing how common today is usage of the word “fuck”).

181. See *Obscene and Indecent Broadcasts*, *supra* note 54 (setting forth the FCC’s current definition of indecency).

gives censorship advocates the chance to impose their influence on broadcast expression in a permanent and oppressive manner.

*B. Unintentional Indecencies: The Future of Live Sports and Television*

John McEnroe, one of the greatest tennis players of the late 1970s and 1980s, was known as much for his on-court temper as he was for his talent.<sup>182</sup> He once told a fan at the United States Open tournament to “sit the (expletive) down” during a match.<sup>183</sup> On another occasion, as McEnroe himself describes it in his recent autobiography, he yelled “shut the fuck up” into the headset of an NBC cameraman.<sup>184</sup> For such outbursts, he has been dubbed “the expletive champion of Centre Court.”<sup>185</sup>

Now imagine a modern-day McEnroe popping off to a linesman over a bad call, telling him loudly that the call was “bullshit.” The player might be assessed a warning or point penalty by the chair umpire, but the trouble would not end there. What if the word were captured by a parabolic on-court microphone and disseminated across the country over airwaves by a network like CBS? Would the FCC hold CBS responsible for such an incident? Before March 18, 2004, the answer would have been no; today, the answer would most likely be yes.

The FCC’s March 18, 2004, Memorandum Opinion and Order in the Bono dispute makes it clear that whether the broadcast of a word like “fuck” “may have been unintentional is irrelevant”<sup>186</sup> in determining whether the broadcast is indecent. In addition, the fact that the use of the language is “isolated or fleeting”<sup>187</sup> does not prevent liability, primarily because of “[t]he ease with which broadcasters today can block even fleeting words in a live broadcast.”<sup>188</sup> The five commissioners thus specifically declared as “not good law”<sup>189</sup> a 2001 unpublished staff opinion holding that the broadcast of a baseball player’s use of the word “motherfucker” during a playoff game was not indecent.<sup>190</sup> Based on this

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182. See generally Laura Vecsey, *Commentary: We Now Know Why McEnroe Lost Temper*, L.A. TIMES, Jan. 18, 2004, at D2 (describing how McEnroe won “seven major titles” and describing his “tirades” when he “launched into Vesuvius mode” and calling him “McBrat” and “a ranting but deft champ.”).

183. Ron Kroichick, *The Sound of Silence: Why Fans Hush When Tiger Putts or Serena Serves*, S.F. CHRON., July 24, 2003, at C1.

184. JOHN MCENROE, *YOU CANNOT BE SERIOUS* 177 (2002).

185. John Roberts, *Tennis: Henman Turns To Sampras’ Former Coach Annacone*, INDEP. (London), Dec. 4, 2003, at Sports 28.

186. *Golden Globes II*, *supra* note 7, ¶ 9.

187. *Id.* ¶ 12.

188. *Id.* ¶ 11.

189. *Id.* ¶ 12.

190. *Id.* ¶ 12 n.32.

line of reasoning, it would seem that CBS, more likely than not, would be held accountable in the above-mentioned tennis hypothetical by the FCC. Although the Commission did not go so far as to mandate or adopt a new rule that requires a time-delay system in broadcasting on what would otherwise be live content, it did make clear that the availability of this technology “is an element in our decision to act upon a single and gratuitous use of a vulgar expletive.”<sup>191</sup>

Networks that broadcast sporting events live must make a choice to either implement a five-second delay to avoid liability, assuming the individual with his or finger on the button actually uses it to bleep the offensive utterance, or go bare, as it were, and risk the chance of liability. Another reason for holding CBS liable for the unintended expletive lurks in the FCC’s opinion where it wrote:

NBC and other licensees were on notice that an award presenter or recipient might use offensive language during the live broadcast, and it could have taken appropriate steps to ensure that it did not broadcast such language. In this regard, this is not the first case where such language has been used by an award recipient in a live program.<sup>192</sup>

This suggests that, to the extent the FCC has made notice of the possibility of offensive language a factor in its indecency determination calculus, networks should take caution with all live sports broadcasts. Tennis is just one example where networks clearly are on notice that bad language sometimes slips out.<sup>193</sup> For example, John Tortorella, who coaches the National Hockey League Stanley Cup champion Tampa Bay Lightning, is infamous for his “eloquent tongue [that] will require the use of the five-second delay should any TV station plan on carrying his postgame press conferences live.”<sup>194</sup> Elsewhere, Infinity Radio’s Washington attorney Steve Lerman has reportedly “urged delay systems on sports play-by-play and pregame and postgame shows.”<sup>195</sup>

Of course, the delay issue affects more than just sports, and the networks already err on the side of safety. For instance, shortly after the FCC’s decision involving Bono, NBC announced that it would implement a delay on the live finale of Donald Trump’s reality television

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191. *Id.* ¶ 11.

192. *Id.* ¶ 10.

193. See *supra* notes 26–31 and accompanying text (providing other examples of sportscasts including offensive language).

194. Sherry Ross, *Shocking Development*, DAILY NEWS (N.Y.), Mar. 21, 2004, at 83.

195. Bill McConnell, *Lawyers Take Aim at FCC Flip-Flops*, BROAD. & CABLE, Mar. 29, 2004, at 8.

show, *The Apprentice*, and on its broadcast of the Miss USA pageant.<sup>196</sup> The FOX network currently carries all of its live shows “with a 5-second delay, which would allow them to censor on the spot any offending material.”<sup>197</sup>

A short delay might not seem significant, but it changes the very meaning of “live” television. Even if words are bleeped out during a sporting event when a delay is effectively implemented, is any reasonable listener going to be unable to figure out what was said? The fact that there is a bleep in the first place may serve as a trigger and make listeners run through all of the curse words in their heads to figure out what was said. Stated differently, listeners might not hear the word being said because of the FCC’s actions, but they certainly will think about it.

### *C. The Public Interest in Perspective*

All of the actions taken by the FCC are designed, under statutory mandate,<sup>198</sup> to ensure that broadcasters serve the public interest.<sup>199</sup> What “public interest” means, however, is unclear. As the author of this article has written elsewhere:

The dispute over the meaning of this crucial concept can be reduced to a dialectic: Is the public interest whatever the public is interested in watching, as determined by marketplace forces such as audience size and demographics, or is the public interest whatever the public needs to watch, as determined by government agencies and politicians? Even more simply, the dispute boils down to a wants versus needs contest: Is the public interest measured by what the public wants to watch or by what the public needs to watch?<sup>200</sup>

With its re-invigorated approach to indecency and its all-new approach to profanity, the FCC has now firmly taken a stance that the public interest—at least when it comes to broadcast content—means what the public needs to watch as determined by government agencies and politicians, rather than what the public wants to watch, as determined by marketplace forces. The fact is that, of the millions of people who tuned in to watch the Golden Globe Awards and who heard Bono utter the controversial phrase, the FCC “received 234 complaints, 217 of them

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196. Paige Albiniak, “*We Have to Be Perfect*”; *In Wake of Indecency Flap, a Tougher Look at Content*, BROAD. & CABLE, Apr. 5, 2004, at 16.

197. Richard Huff, “*Idol* Hand’s in a Flip Flap”, DAILY NEWS (N.Y.), Mar. 25, 2004, at 104.

198. See 47 U.S.C. § 310(d) (2004) (setting forth the statutory mandate that the issuance and renewal of broadcast licenses depends, in part, on whether “the public interest, convenience, and necessity will be served thereby.”).

199. *Id.*

200. CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE 109–10 (2000).

from people associated with the Parents Television Council, a conservative nonprofit organization with offices in California and Virginia.”<sup>201</sup> That response was not a groundswell from the public at large. The overwhelming majority of the public did not object enough to take the time to formally complain. Instead, the FCC has chosen to override the marketplace sentiment and put in that sentiment’s place its own belief about which language is appropriate and inappropriate for the public’s ears.

All of this comes at a time when, as noted above, Michael Powell and the conservatives on the FCC seek further deregulation of the ownership restrictions that the agency currently imposes.<sup>202</sup> Thus, there now appears to be what social scientists might call a “negative relationship”<sup>203</sup> between content regulation and structural-ownership regulation. Simply put, as calls from conservatives for content-based regulation *increase*, calls from conservatives for ownership regulation *decrease*. In other words, it’s a *hands-off* approach taken to ownership, but a *hands-on* approach taken to content.

It is a dangerous turn of events when the FCC steps into the marketplace of ideas<sup>204</sup> and takes a paternalistic attitude toward the speech the public wants to hear, or, at the very least, speech that the public doesn’t mind. By expanding the meaning of profane language and taking a ratcheted-up approach to indecency, however, the FCC has done precisely that. The FCC’s efforts to dictate content, one can only hope, will wane as the election year passes and other issues surface. There already was some reason in June 2004 to believe that congressional interest in indecency was waning, as several of the early measures proposed to crack down on indecent content were stalled in Congress, and issues such as the war in Iraq “moved to the forefront of the national political agenda.”<sup>205</sup> As Jacques Steinberg observed in *The New York Times*, “[p]oliticians who push too hard on the decency issue may risk appearing to have their priorities out of whack.”<sup>206</sup> The final Part of this article now attempts to place the current situation into a larger context and laments the course that the FCC and Congress have taken in 2004.

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201. *Busybodies vs. Bono*, BOSTON GLOBE, Mar. 24, 2004, at A18.

202. *Supra* notes 161–65 and accompanying text.

203. See LAWRENCE R. FREY ET AL., INVESTIGATING COMMUNICATION: AN INTRODUCTION TO RESEARCH METHODS 358 (2d ed. 2000) (explaining that a negative relationship occurs when “two variables move, or change, in *opposite* directions, such that if one variable goes up, the other goes down.”).

204. See generally MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 2–8 (2001) (discussing the marketplace theory in First Amendment jurisprudence).

205. Jacques Steinberg, *Move to Stiffen Decency Rules Is Losing Steam in Washington*, N.Y. TIMES, June 7, 2004, at C1.

206. *Id.*

## PART IV. CONCLUSION

Battles over the use of offensive language, including skirmishes over the line between protected expression and freedom from offense, seem to pose intractable and persistent problems for both our culture and our legal system.<sup>207</sup> Consider a fairly recent non-FCC-centered dispute.

Canoeist Timothy Boomer uttered, as his defense attorney aptly put it, “an ‘f-word’ or two when he fell into the Rifle River”<sup>208</sup> in Michigan back in the summer of 1998. A year later, he was convicted of violating “an 1897 cursing law that bans swearing in front of women and children.”<sup>209</sup> The century-old law provided that “any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of any woman or child shall be guilty of a misdemeanor.”<sup>210</sup> Boomer had more luck on appeal, and in March 2002, a Michigan appellate court held that the law was unconstitutionally vague.<sup>211</sup> In reaching this decision, the appellate court reasoned:

There is no restrictive language whatsoever contained in the statute that would limit or guide a prosecution for indecent, immoral, obscene, vulgar, or insulting language. Allowing a prosecution where one utters “insulting” language could possibly subject a vast percentage of the populace to a misdemeanor conviction.<sup>212</sup>

The *Boomer* case, as the president of the Michigan Bar Association wrote, “helped start a national debate on free speech and a local debate on the usefulness of some of our older laws.”<sup>213</sup> As in all legal battles, context is key, and Timothy Boomer can feel fortunate that he did not utter his words in the context of a broadcast medium, which is more heavily regulated by the government and the FCC than other media. As the United States Supreme Court wrote in the seminal indecency dispute over the radio play of George Carlin’s filthy words monologue, “each

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207. See Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 GA. ST. U.L. REV. 671, 671 (2002) (observing that “First Amendment battles over where to draw the line between freedom of expression and freedom from offense—be it vulgarity or indecency, racism or homophobia—flared up all over the United States in 2000 and 2001.”).

208. John Flesher, *Cussing Canoeist Guilty, May Get 90 Days*, CHI. SUN-TIMES, June 12, 1999, at 1.

209. Tresa Baldas, *Appeals Court Gives ‘Cussing Canoeist’ the Last Word*, RECORDER, May 10, 2002, at News 3.

210. MICH. COMP. LAWS § 750.337 (1998).

211. *Michigan v. Boomer*, 655 N.W.2d 255, 256 (Mich. Ct. App. 2002), *appeal denied*, 653 N.W.2d 406 (Mich. 2002).

212. *Id.* at 258–59.

213. J. Thomas Lenga, *President’s Page: It Ain’t Always Pretty, but It Works*, 78 MICH. B. J. 394, 394 (May 1999).

medium of expression presents special First Amendment problems,”<sup>214</sup> and speech in the broadcast medium “has received the most limited First Amendment protection.”<sup>215</sup> The Court, over the years, “has adopted a medium-specific First Amendment jurisprudence”<sup>216</sup> in which, as the Court put it in *Reno v. ACLU*,<sup>217</sup> characteristics of the broadcast medium, including spectrum scarcity and its invasive nature, provide “special justifications” for more closely regulating the broadcast marketplace of ideas<sup>218</sup>—justifications that are not present in other mediums.

In the hypothetical battle of *Boomer v. Bono*, the former prevails with his use of the word “fuck” while the latter loses out. Beyond the issue of the medium, the case of Timothy Boomer is also important because it points out that a law targeting “vulgar” speech<sup>219</sup>—the same term now used by the FCC to define profanity<sup>220</sup>—can be held unconstitutionally vague.<sup>221</sup> Additionally, the cases illustrate the paradox that, at roughly the same time, an out-of-date law based on the immorality of swearing in front of women and children was struck down while a new legal attack, premised on the immorality of swearing in front of children, was launched by the FCC.

Professor Robert M. O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, contended in a 2002 law journal article that “much confusion surrounds the constitutional boundaries in the quest for civility.”<sup>222</sup> He added that “the consequent difficulty of defining the line between protected speech and unprotected epithets is apparent.”<sup>223</sup> The FCC’s reversal in the *Bono* dispute only adds to the “confusion” described by O’Neil.

The FCC’s new approach to so-called profane language must be abolished not only because it is inherently vague and fails to clarify the confusion that O’Neil so aptly defines, but also because it may turn out to be duplicative of indecency determinations. Alternatively, the new approach may spread wildly and widely beyond the category of

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214. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

215. *Id.*

216. Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, but New Issues Remain Untapped*, 23 HASTINGS COMM. & ENT. L.J. 507, 513 (2001).

217. 521 U.S. 844 (1997).

218. *Id.* at 868.

219. MICH. COMP. LAWS § 750.337 (1998).

220. *Supra* notes 107–08 and accompanying text.

221. *Supra* notes 107–08 and accompanying text.

222. Robert M. O’Neil, *Enduring and Empowering: The Bill of Rights in the Third Millennium: Rights in Conflict: The First Amendment’s Third Century*, 65 LAW & CONTEMP. PROBS. 7, 16 (2002).

223. *Id.*

indecenty, thereby jeopardizing the First Amendment interests of both broadcasters and adult audience members. Whichever scenario ultimately results, the new approach is flawed.

The FCC's new course of indecency determinations, under which unintentional broadcasts of fleeting instances of expletives are punishable, must be abandoned. A major disconnect exists between speech in the real world, which is growing more coarse by the day, and speech in the broadcast world, which will now grow more prudish by the day.<sup>224</sup> The latter is now envisioned as some sort of expletive-free utopia or, as FCC-whipping boy and radio host Howard Stern put it, "one sickeningly sweet America."<sup>225</sup> It is guided by the notion that the First Amendment rights of broadcasters to speak, along with the concomitant First Amendment rights of adults to receive speech, are dictated and controlled by what allegedly is suitable for the ears of children. One thing that is forgotten from the equation today is that children, too, have First Amendment rights.<sup>226</sup> Now, however, the FCC and censorship-friendly groups with benign-sounding names like the Parents Television Council speak on behalf of children. Is that the right solution? Is that the correct way to handle the nexus between offensive broadcast speech and children?

The answer is no. As Nancy Franklin, television critic of *The New Yorker* magazine, recently wrote:

The outrage expressed by Michael K. Powell, the chairman of the Federal Communications Commission (son of Colin), the day after Janet Jackson's Super Bowl incident was the equivalent of a herd of elephants expressing outrage that there is one flea in their midst. All this talk about children—are Powell and other parents so without resources that they couldn't discuss the "wardrobe malfunction" with their kids and figure out some way to get past it? Families that watch together presumably talk together, too; this was a chance for parents to say, well, that was unfortunate, but it's live TV and things like that can happen, and it's not the end of the world.<sup>227</sup>

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224. As Professor Robert Thompson, director of the Center for the Study of Popular Television at Syracuse, put it, "You hear these words standing in line to get tickets to the ferris wheel. Broadcast television was in this parallel universe where this stuff was forbidden. Now there's this big catch-up." Mark Jurkowitz, *Curses! The Clampdown Fed Up with Indecency on Television, Washington Begins to Fight Back*, BOSTON GLOBE, Feb. 12, 2004, at B13.

225. Colleen McCain Nelson, *Shock Jock Stern Turns to Politics*, SEATTLE TIMES, Apr. 3, 2004, at A4.

226. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001) (observing that "[c]hildren have First Amendment rights").

227. Nancy Franklin, *Decent Exposure*, NEW YORKER, Mar. 15, 2004, at 147.

In academia, this would be referred to as a teachable moment: a chance to take an incident that is both unexpected and jarring and turn it into a valuable learning experience. Rather, the moment is squandered and the lesson taught instead is that government censorship is good.

One wonders what the often-prosecuted, now-pardoned<sup>228</sup> comedian Lenny Bruce would think about all of this if he were alive today.<sup>229</sup> Contrary to the lyrics of the Georgia-based band R.E.M., he just might be afraid, given the FCC's actions.<sup>230</sup>

Will all of this election-year decisionmaking and legislating really help children to grow up to be better people by shielding them from the realm of the real world within the realm of the broadcast world? We shall see; but, for now, the First Amendment will not grow. It will, instead, be stunted because of a dangerous combination and convergence of lobbying groups, conservative commissioners, pandering politicians and, ironically and unintentionally, by one of the most thoughtful singers<sup>231</sup> in modern times.

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228. See John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES, Dec. 24, 2003, at A1 (describing how "Lenny Bruce, the potty-mouthed wit who turned stand-up comedy into social commentary, was posthumously pardoned yesterday by Gov. George E. Pataki, 39 years after being convicted of obscenity for using bad words in a Greenwich Village nightclub act.").

229. See generally RONALD K. L. COLLINS & DAVID M. SKOVER, *THE TRIALS OF LENNY BRUCE: THE RISE AND FALL OF AN AMERICAN ICON* (2002) (providing an excellent overview of Bruce's work and his legal battles).

230. See R.E.M., *It's the End of the World As We Know It (and I Feel Fine)*, on DOCUMENT (I.R.S. Records 1987) (singing "That's great, it starts with an earthquake, birds and snakes, an aeroplane and Lenny Bruce is not afraid").

231. See generally J. Michael Parker, *Christian Themes Resonate in Mass Market*, SAN ANTONIO EXPRESS-NEWS, Mar. 29, 2004, at 1A (writing that "U2 lead singer Bono has challenged world leaders to forgive Third World debt and used profits from the band's most recent tour to create a memorial to the victims of the 9-11 terrorist attacks").