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Broadcast Profanity and the "Right to Be Let Alone": Can the FCC Regulate Non-Indecent Fleeting Expletives Under a Privacy Model?

by

EDWARD L. CARTER,* R. TREVOR HALL†
AND JAMES C. PHILLIPS

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I. Introduction

Congress has empowered the Federal Communications Commission to regulate "obscene, indecent, or profane language" in broadcasting.1 Obscenity, defined 35 years ago by the U.S. Supreme Court as patently offensive depictions or descriptions of sexual conduct that lack aesthetic or scientific content and appeal to a morbid or prurient interest, enjoys no protection under the Constitution's First Amendment and may not be broadcast over the airwaves at any time.2 Indecency, meanwhile, has been defined by the FCC as "patently offensive references to excretory and sexual organs and activities";3 the First Amendment prohibits the government from completely banning indecent material, but restrictions on the times during which indecency may appear via broadcast airwaves have been approved by the Supreme Court.4 The most undefined—and, until recently, the most ignored—portion of 18 U.S.C. § 1464 concerns "profane language." Given the Supreme Court's 2008 Term consideration of an appeal in FCC v. Fox Television Stations, Inc.,5 however, that will apparently change. The Court scheduled oral arguments for November 4, 2008.

The term "profane language" admits no easy definition, let alone general agreement regarding its place in American society and the extent to which the government should attempt to regulate it.6 The

2. Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").
4. Id.
5. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), cert. granted, 128 S.Ct. 1647 (Mar. 17, 2008).
6. In the days immediately following the Supreme Court's grant of certiorari in the Fox case, for example, a handful of newspaper editorial writers railed against allowing the government to ask broadcasters to stop certain profanities. For example, the Concord Monitor editorialized against the FCC's position in the Supreme Court case, arguing that "f—" and "s—," when used on live television in 2002 and 2003, had nothing to do with sex or excretion. See Unsigned Editorial, A Slip Of the Tongue Shouldn't Mean a Fine, CONCORD MONITOR, April 9, 2008. See also Unsigned Editorial, Broadcast TV and 'Fleeting Obscenities,' ROCKY MOUNTAIN NEWS, March 23, 2008, at 5 (urging the Supreme Court to affirm the Second Circuit's opinion); Unsigned Editorial, Dirty Word Games, L.A. TIMES, March 22, 2008, at 22 (same). On the other hand, in an editorial published in USA Today, FCC Chairman Kevin J. Martin cited statistics indicating that three-fourths of adults in the United States support the FCC's efforts to enforce strict standards regarding profanity and indecency on television. See Kevin J. Martin, Defenses Can And Do Fail, USA TODAY, March 31, 2008, at 11A. Martin also cited a Parents
current Supreme Court appeal pits a newly aggressive content regulator in the FCC versus a newly aggressive broadcast industry led, in this case, by Rupert Murdoch and his News Corporation but joined also by erstwhile competitors NBC, CBS and ABC. Rhetoric abounds from both sides of the debate. Timothy F. Winter, president of the Parents Television Council, wrote in a newspaper op-ed piece that the lower court decision invalidating the FCC's new approach "had, in essence, stolen the airwaves from the public and handed ownership over to the broadcast industry." Meanwhile, broadcast executives claim a loss in the case for them would mean the death of live television. In light of the FCC's decision now to act on Congress' command to regulate its use in broadcasting, profanity must be considered from social, historical and legal perspectives apart from obscenity and indecency.

One scholar noted that the Latin roots of the word "profane" connote "to desecrate or violate a temple"; this blasphemy-related...
meaning has evolved now to encompass "more secular objects.\textsuperscript{12} Thus, profanity came to include within its ambit the demeaning of sex; the word "obscenity," too, had its beginnings in sacrilege before moving to the netherworld of carnality.\textsuperscript{13} In this sense, the meaning of profanity has become secularized along with much of the rest of contemporary society, and in the second half of the 20th century the taboo profanities in America shifted dramatically from references to Deity to references to sensuality.\textsuperscript{14} Given the likelihood that this historical pattern could repeat itself, and given that "people swear by what is most potent to them . . . .\textsuperscript{15} it is plausible that Murdoch's functionaries at Fox could convince the Supreme Court Justices in their 2008 Term that "f—" and "s—" have no real sexual or excretory meaning anymore\textsuperscript{16}—or, at least, no sexual or excretory meaning that cannot be wielded freely, openly and with impunity even when doing so invades the privacy, or "quiet enjoyment," of the homes of those who do not want to hear it.\textsuperscript{17}

The Supreme Court constitutionalized "f—" nearly four decades ago,\textsuperscript{18} and so in that sense the current Fox case—stemming from live broadcasts of the term uttered by, respectively, the global rock star Bono at the 2003 Golden Globe awards; the over-the-hill-but-in-denial actress Cher at the 2002 Billboard Awards; and the Simple Life

\begin{itemize}
\item[12.] GEOFFREY HUGHES, SWEARING: A SOCIAL HISTORY OF FOUL LANGUAGE, OATHS AND PROFANITY IN ENGLISH 246-47 (1991). See also Nomi Stolzenberg, The Profanity of Law, in LAW AND THE SACRED at 36 (Sarat et al., ed., 2007) ("In the ancient world, the profane referred literally, and without any value judgment, to the area of space directly before ('pro') the temple ('fanum'): profanum. Only in its second definition did the Latin profanum acquire the pejorative connotations of impiousness, wickedness, and ignorance.").
\item[13.] HUGHES, supra note 12, at 246-47. See also GEOFFREY HUGHES, AN ENCYCLOPEDIA OF SWEARING 362 (2006) ("All the principal synonyms for swearing, notability profanity, blasphemy, and obscenity, originally had strong religious denotations. This is now generally only true of blasphemy . . . .") (emphasis in original).
\item[14.] HUGHES, supra note 12, at 248-49.
\item[15.] Id. at 249.
\item[16.] See supra note 6 and accompanying text.
\item[17.] This raises the question of what could become the new profanity. If Deity and copulation are out, then perhaps some future blasphemers will take their cue from naïve computer users not yet accustomed to electronic security passwords: "'God,' 'sex' and 'money' are among the most popular passwords for those who are unschooled in computer security." Jennifer 8. Lee, And the Password Is . . . Waterloo, N.Y. TIMES, Dec. 27, 2001. See also Jennifer 8. Lee, Forgot a Password? Try Way2Many, N.Y. TIMES, Aug. 5, 1999 ("[H]acker folklore says some of the most popular individual passwords are sex, love, god, password, secret and qwerty.").
\end{itemize}
denizen Nicole Richie at the 2003 Billboard Awards—can break no new ground. In fact, the cachet of the word has faded so greatly one wonders why individuals such as Bono, Cher, and Richie even bother to use it. Lexicographers have been wearing out the term since 1598, and even tedious law professors have mind-numbingly exhausted its possibilities in fits of adolescence. In the broadcast context, the late George Carlin forever linked himself with the prank of saying on the radio the “seven dirty words” one is not supposed to say on the radio.

19. See FCC, In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975 (March 18, 2004); FCC, In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (Nov. 6, 2006). Although somewhat eclipsed, at least initially in the popular consciousness, by the furor that followed Janet Jackson’s infamous wardrobe malfunction during the 2004 Super Bowl, the three cases of fleeting expletives on live television have together constituted some of the most important broadcast regulation litigation in a generation. The first of these took place January 19, 2003 on NBC’s live broadcast of the Golden Globes. While on stage to receive an award, U2’s lead singer, Bono, proclaimed to millions of American viewers, “This is really, really f—ing brilliant.” Bono’s exclamation was reminiscent of a similar incident the previous year at the 2002 Billboard Awards broadcast in which Cher stated during her own acceptance speech, “People have been telling me I’m on the way out every year, right? So, f— ‘em.” Another incident occurred at the 2003 Billboard Awards when Nicole Richie, while presenting an award, asked the audience, “Have you ever tried to get horse s— out of a Prada purse? It’s not so f—ing simple.” Id. The FCC’s Enforcement Bureau made an initial determination that Bono’s statement was not indecent. The decision hinged on the view that the word was used as an “adjective or expletive” rather than a “description of sexual or excretory activity or organs” and thus could not be indecent. FCC Enforcement Bureau, In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 18 F.C.C.R. 19859 (Oct. 3, 2003). Five months later, commissioners overturned the Enforcement Bureau’s ruling, holding that “[t]he ‘F-Word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language” and “[i]ts use invariably invokes a coarse sexual image.” FCC, In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975 (March 18, 2004). However, the Second Circuit held in mid-2007 that the FCC had acted arbitrarily and capriciously or abused its discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), by beginning to regulate fleeting expletives. See Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007). In addition to the Supreme Court appeal, a fair amount of congressional posturing ensued. One legislative proposal, the “Protecting Children From Indecent Programming Act” (H.R. 3559, S. 1780), would require the FCC to target even single words and images as indecent programming.

20. See HUGHES, supra note 12, at vii (noting inclusion of the Italian “fottere” in the 1598 World of Words by John Florio).


22. See Pacifica, 438 U.S. at 751-55.
Given this history of dubious achievements in profanity, what is left to be at stake in the current appeal before the U.S. Supreme Court? First, it seems relatively clear that the U.S. Court of Appeals for the Second Circuit engaged in some convenient but doctrinally questionable jurisprudence by concluding (in a 2-1 decision) that the FCC had violated the Administrative Procedure Act in adopting a new rule regulating profanity. This portion of the Second Circuit's opinion, holding that the FCC's change in course was not "reasoned" in relying on the goal of preventing television consumers from absorbing the "first blow" of fleeting expletives, seems the most obvious candidate for Supreme Court focus. But speculation in the newspapers, at least, runs rampant that the Court will reach the constitutional merits of the profanity issue in what is being billed as "the first case on broadcast decency to go before the Supreme Court in 30 years." If the Court gets past issues of administrative

23. See Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), certiorari granted by 128 S.Ct. 1647.

24. Id. at 458.

25. Both the government and Fox spent the overwhelming majority of their briefs to the Supreme Court discussing the administrative deference question. See Brief for Petitioners at 20-41, FCC v. Fox Television Stations, Inc., No. 07-582 (U.S. brief filed June 2, 2008), available at 2008 WL 2308909; Brief for Respondent Fox Television Stations, Inc. at 18-42, FCC v. Fox Television Stations, Inc., No. 07-582 (U.S. brief filed Aug. 1, 2008), available at 2008 WL 3153439. The principles of administrative law are familiar if not clear. In Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984), the Supreme Court held that when Congress expressly delegates authority to an administrative agency to regulate in a certain area, "[s]uch... regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." In this case, notwithstanding the Second Circuit's conclusion to the contrary, it hardly seems the FCC acted without reasoned basis whatsoever. See Julie Hilden, "The Fight Over 'Fleeting Expletives': How a Grant of Supreme Court Review May Lead to Expanded FCC Power and Reduced First Amendment Rights for Broadcasters," at http://writ.news.findlaw.com/hilden/20080331.html (last visited May 17, 2008) ("This ruling was odd, to say the least. It wasn't the case that the record was blank; far from it. In fact, the FCC had cited a number of different bases for the change - so this ruling was tantamount to a claim that not one of these bases counted as being even minimally 'reasoned.' Put more bluntly, the majority was saying that the FCC was not only wrong, but irrational."). See also Justin Winquist, Note, Arbitrary and F@#$*! Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in Fox Television Stations, Inc. v. FCC, 57 AM. U. L. REV. 723 (2008) (arguing that the FCC order was not arbitrary and capricious).

26. Unsigned Editorial, Should the Supreme Court Overturn FCC Policy on Obscenities? Yes, KANSAS CITY STAR, April 10, 2008, at B8. Newspaper speculation, however, is off-target in at least some regards. For example, the Kansas City Star somewhat speciously suggested that the outcome of the Fox case could lead to more sinister government regulation of speech: "Once the government can decide what is obscene, they can easily move on to what is 'dangerous' speech because it disagrees with
deference,27 in the current or a future appeal, then the core questions seem to become (1) what is the meaning of profanity in today’s society?; and (2) assuming profanity can be defined, how far may the FCC go in regulating its use on television?

This article proceeds to examine those questions in four substantive parts. Section II examines the history and contemporary status of profanity in society and law. Section III discusses in detail the rationales behind the First Amendment’s protection of expression, as applied to profanity. Section IV reviews the FCC’s evolution from regulating profanity as indecency to, in its current effort, regulating profanity primarily as profanity. Section V posits that, assuming profanity is expression, its broadcast into the home presents a unique legal posture due to the Supreme Court’s extreme solicitude to the privacy of the home.

II. Brief Legal History of Profanity

Approximately 1450 B.C., Moses came down from Mt. Sinai and instructed the Israelites that God had commanded, “Thou shalt not take the name of the Lord thy God in vain . . . .”28 More than two millennia later, the injunction given to the Anglo-Saxons in the Laws of Alfred had changed slightly to, “Do not ever swear by the heathen gods.”29 In the Middle English period there was a subtle shift in focus from “swearing by” to “swearing at.”30 Punishments for swearing under Henry I (1068-1135) included fines, whipping and branding

the politics of the current administration.” Id. This statement, of course, ignores the fact that the federal government has defined and regulated obscenity for decades, and that the Supreme Court has held that obscenity is not protected by the First Amendment. See supra note 2 and accompanying text.

27. In its brief to the Supreme Court, the government asked the Court to remand the case to the circuit court for consideration, in the first instance, of constitutional issues the Second Circuit only made “observations” about in its 2007 opinion. See Brief for Petitioners, supra note 25, at 42. Even if the Supreme Court does not address the constitutional issues in the current appeal, it seems likely the Court will again be asked to do so in the future. The broadcast networks NBC, CBS and ABC, in a brief filed separately from Fox, tackled the constitutional issue head-on and urged the Court to find that the FCC cannot, consistent with the First Amendment, regulate broadcast fleeting expletives. See Brief of Respondents NBC Universal, Inc., et al. at 15-47, FCC v. Fox Television Stations, Inc., No. 07-582 (U.S. brief filed Aug. 1, 2008), available at 2008 WL 3153438.

29. HUGHES, supra note 12, at 43.
30. Id. at 56.
with a hot iron.\textsuperscript{31} By the time of the Renaissance, the regulation of profanity had shifted from sectarian to secular authorities; the English Crown created the position of Master of the Revels in 1574 to approve \textit{ex ante} the content of theater productions, although "linguistic censorship" did not begin until 1606.\textsuperscript{32} The "Act to Restraine Abuses of Players" prohibited "prophanely speak[ing] or us[ing] the holy name of God or of Christ Jesus, or of the Holy Ghoste. . ."\textsuperscript{33}

Some observers concluded that the U.S. frontier, with its exuberance and lack of restraint, fostered "strong language" even beyond that commonly heard in England, which was itself described by one 19th century author as "rather a foul-mouthed nation."\textsuperscript{34} Use of profanity, though, is not universal; certain cultures, "including the American Indians, the Japanese, the Malayans and most Polynesians, do not swear."\textsuperscript{35} Even though Americans may have appeared uncouth to British observers, colonists preserved the common law's punishments for profanities that disturbed community peace and enjoyment and, in so doing, constituted public nuisances.\textsuperscript{36}

A. Profanity Under the Common Law of Nuisance

The common law of nuisance\textsuperscript{37} has regulated public profanity for hundreds of years.\textsuperscript{38} When combined with blasphemy, profanity could

\begin{itemize}
\item \textit{Id.} at 59-60 (citation omitted).
\item \textit{Id.} at 102-03.
\item \textit{Id.} at 103.
\item \textit{Id.} at 1, 168 (citation omitted).
\item \textit{Id.} at 3 (citation omitted).
\item See \textit{infra} notes 40-54 and accompanying text.
\item The law of nuisance sanctions "unreasonable interference" with common public rights and generally requires "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience [.]" \textit{Public Nuisance}, RESTATEMENT (SECOND) OF TORTS § 821B (2007). The repetitiveness or duration of interference is an important consideration, and therefore brief or one-time occurrences may not rise to the level of punishable public nuisances. \textit{Id.} \textit{See also} John Kimpfen, \textit{Blasphemy and Profanity}, 12 AM.JUR.2D Blasphemy and Profanity § 10 (2007). Common-law criminal public nuisances include minor offenses posing risk of public harm or discomfort such as storage of explosives or dissemination of bad odors. \textit{Public Nuisance}, RESTATEMENT (SECOND) OF TORTS § 821B. Not all public nuisances are criminal in nature and thus subject to the penalty of incarceration or criminal fine. Some public nuisances are considered civil in nature and thus the remedy might include damages, abatement or injunction. \textit{Id.} Justice George Sutherland's allusion to the "pig in the parlor" aptly summarizes the law of nuisance. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
\end{itemize}
support a criminal conviction under English common law.\textsuperscript{39} An early U.S. case clarified that “profane swearing” was not indictable as a crime without evidence that the profanity had caused a “disturbance [or] injury . . . to those who hear it.”\textsuperscript{40} Profane swearing was later equated with drunkenness: When either was repeatedly committed in public or in such a way to “become an annoyance and inconvenience to the citizens at large[,]” a criminal indictment for common nuisance was in order.\textsuperscript{41} For profane swearing committed just once, however, the sanction was minor; the single profanity was to be dealt with “summarily by a justice of the Peace” through a small fine.\textsuperscript{42} In the 19th century a single instance of loud and public swearing in North Carolina was found not to constitute an indictable nuisance crime even though it disturbed a “singing school” nearby.\textsuperscript{43} Instead, the swearing must have inconvenienced or disturbed the whole community in order to rise to the level of a criminally punishable nuisance; the North Carolina Supreme Court applied the standard that the profanity would have had to “very gravely influence the good order or enjoyment or convenience of the citizens in general.”\textsuperscript{44} Repetition of the swearing, in loud and public ways, could eventually rise to the level of a community-wide nuisance punishable by the criminal law.\textsuperscript{45}

Swearing in public required not just repeated profanities in a place where members of the public might hear; instead, prosecutors carried the burden to demonstrate that other individuals did in fact hear and were disturbed.\textsuperscript{46} Nineteenth century state courts also suggested that a single swearing incident could lead to a criminal indictment, although that would be the rare exception.\textsuperscript{47} In the case of

\textsuperscript{38} See, e.g., Bowman et al. v. Secular Soc’y, [1917] A.C. 406 (House of Lords) (opinion of Lord Sumner) (reviewing the British history, beginning in about the 17th century, of sanctions for profanity, which was related to blasphemy).

\textsuperscript{39} \textit{id.}

\textsuperscript{40} State v. Kirby, 1 Mur. 254, 5 N.C. 254 (N.C. 1809).

\textsuperscript{41} State v. Ellar, 1 Dev. 267, 12 N.C. 267 (N.C. 1827).

\textsuperscript{42} \textit{id.}

\textsuperscript{43} State v. Baldwin, 1 Dev. & Bat. 195, 18 N.C. 195 (N.C. 1835).

\textsuperscript{44} \textit{id.}

\textsuperscript{45} \textit{id.} (stating “[i]t is possible that a frequent and habitual repetition of acts which singly are but private annoyances may constitute a public or common nuisance.”).

\textsuperscript{46} State v. Jones, 9 Ired. 38, 31 N.C. 38 (N.C. 1848).

\textsuperscript{47} Gaines v. State, 75 Tenn. 410 (Tenn. 1881) (“It is possible, however, to conceive of cases where even a single oath, either by its terms, its tone or manner, might, under the peculiar circumstances, be held to be a nuisance. But such cases would constitute exceptions to the general rule.”).
a man who swore twice—once at a home and once on a public street of East Knoxville at 9 p.m.—in the presence of a prosecutor and his wife, the Supreme Court of Tennessee held that only a minor nuisance claim could be sustained.\textsuperscript{48} Hence the penalty was not jail time or a criminal fine but rather a “small pecuniary penalty for each oath, recoverable before a justice of the peace.”\textsuperscript{49}

Public profanity uttered on “divers days” before “divers persons” could clearly constitute a criminal nuisance,\textsuperscript{50} but the Supreme Court of North Carolina in 1881 also upheld a jury verdict of guilt for public profanity shouted loudly during a single five-minute episode:

To become a public nuisance, the conduct of a party must pass beyond the point of being injurious to individuals, and be hurtful and offensive to the community; and it may be difficult to prove that the use of profane words but for the space of five consecutive moments, could so inconvenience the community as to amount to a nuisance; yet we can suppose such cases, and surely, the fact that it may be difficult to establish an offence, and punish the offender, cannot be a valid reason for relaxing the law with regard to it. But, in this case, the jury have [sic] said that such was the consequence attending the defendant’s conduct, and the door is therefore closed as to him, against any further inquiry into that question.\textsuperscript{51}

A man who was convicted of criminal nuisance for a one-minute profane tirade was able to win reversal of the conviction on appeal, although the reversal was not due to the fact that one minute was too short for profanity to constitute a nuisance.\textsuperscript{52} Instead, the appellate court reversed the conviction because the indictment, or charging document, contained three deficiencies: it failed to set forth the actual profane words used and instead merely stated that the defendant “did curse[,] swear and blaspheme the name of Almighty God”; it failed to allege that the profanity was repetitive; and it failed to allege that the profanity was heard by multiple citizens nearby.\textsuperscript{53} Early U.S. common-law court decisions generally did not focus on the duration

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.}
\item \textsuperscript{50} State v. Brewington, 84 N.C. 783 (N.C. 1881).
\item \textsuperscript{51} State v. Chrisp, 85 N.C. 528 (N.C. 1881).
\item \textsuperscript{52} State v. Barham, 79 N.C. 646 (N.C. 1878).
\item \textsuperscript{53} \textit{Id. See also} State v. Powell, 70 N.C. 67 (N.C. 1874) (reversing a conviction for criminal nuisance due to insufficiency of an indictment even though facts showed the defendant used loud profanity “from dark until 11 o’clock at night” such that people in the streets and houses as far away as 300 yards could hear).
\end{itemize}
\end{footnotesize}
of uttered profanity but rather its repetitive nature; a man convicted for 12 seconds of profanity ultimately prevailed on appeal due to failure of the indictment to allege repetition, among other flaws.  

Although a single instance of profane swearing might not have been indictable as a criminal nuisance or other common-law crime, courts into the late 19th century approved the idea that a state legislature could pass a criminal law punishing a single profanity. In 1931 the U.S. Court of Appeals for the Ninth Circuit upheld the conviction of a man for violating the Radio Act of 1927, prohibiting the use of profane language on broadcast radio. Well into the 20th century, however, some courts still related profanity statutes to blasphemy; a Jehovah's Witness in Wyoming who vigorously invoked the name of Deity while gathering signatures on a petition was held not to have committed the misdemeanor crime of profanity. The Wyoming Supreme Court held that it was not enough that the man had shown "manifest or implied contempt of sacred things" or "irreverence toward God or holy things." Instead, profanity required "imprecation of divine vengeance" or "divine condemnation." Still, in 1987 the U.S. Supreme Court listed public profanity among other public nuisances interfering with "public morals.

Swearing became more common in the United States after soldiers returned from World War II, but the trend did not immediately spill over onto television, which was considered "a family medium" and thus "was constrained by even more rigorous prohibitions against nudity, profanity and immorality than film." Television advertisers, too, at least initially constituted a pressure

54. State v. Pepper, 68 N.C. 259 (N.C. 1873). That the repetitive nature of profanity is not necessarily dictated by its duration was illustrated by a case in which a man uttered profanities for two hours and yet won reversal of a criminal nuisance conviction because of the indictment's failure to allege repetitiveness. State v. Jones, 9 Ired. 38, 31 N.C. 38 (N.C. 1848).

55. Ex Parte Delaney, 43 Cal. 478 (Cal. 1872).

56. Duncan v. United States, 48 F.2d 128 (9th Cir. 1931) (noting the relationship between profanity and blasphemy and stating that the man had said certain individuals would be "damned," had used the phrase "By God" and had stated that he would call a curse of God upon some people).


58. Id.

59. Id. at 624.


61. HUGHES, supra note 12, at 199.
group to keep television shows "clean," apparently in order not to offend viewers and potential consumers. Eventually, changes in American society's view toward profanity occurred, and those changes were reflected in Supreme Court opinions. Other early American attitudes, such as the idea that profanity can rise to the level of a public nuisance and be thus punished, have been preserved notwithstanding the constitutional protection extended to profanity in the latter half of the 20th century.

B. The U.S. Supreme Court and Profanity

The U.S. Supreme Court has considered, in various contexts, whether profanity is protected by the First Amendment. For example, in *Chaplinsky v. New Hampshire*, the mid-19th century Court reviewed the constitutionality of a conviction of a Jehovah's Witness in New Hampshire who, while being confronted by police officers over complaints of public disturbance, directed expletives at one of the officers. While the Court acknowledged that the freedom of speech is "among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion of state action," it ultimately found that profanity was an example of the "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." Further, the Court cited Zechariah Chafee in concluding that vulgar or profane words by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Holding that the First Amendment had not been offended, the Court affirmed the man's conviction.

62. *Id.*
63. See, e.g., TIMOTHY JAY, WHY WE CURSE 266 (2000) ("We found that curse words are normal, frequent, contextually relevant, and informative."); TIMOTHY JAY, CURSING IN AMERICA 15 (1992) ("Cursing and dirty word use also change over time and are influenced by social forces . . .").
64. 315 U.S. 568 (1942).
65. *Id.* at 570-71.
66. *Id.* at 571-72.
67. *Id.* at 572 (citation omitted).
Nearly three decades later in *Cohen v. California* the Court considered the constitutional status of vulgarity used not as a mere epithet, as in *Chaplinsky*, but rather as part of a political statement. In 1968 Paul Robert Cohen was arrested in the hallway of the Los Angeles County Courthouse for wearing a jacket that carried the message: "F— the Draft." The Court found that Cohen's message could not be labeled obscene because it lacked eroticism. Additionally, the profanity in question could not be classified as fighting words since the phrase was not directed at anyone in particular and no incitement occurred.

Finally, the argument that the message subjected people to unwanted speech was rejected as the speech took place in a public setting outside the sanctuary of the home. The Court did not, however, alter the essential rule from *Chaplinsky* that the First Amendment would not prohibit government regulation of profane speech that rose to the level of a public nuisance; the *Cohen* Court merely held that the particular breach of the peace regulation in question was too broad but that it might have been constitutionally permissible had it, for example, targeted only "loud . . . vulgar, profane or indecent language within the presence or hearing of women or children." The Court conceded that Cohen's expression "is perhaps more distasteful than most others of its genre," but concluded that government should not wade into "matters of taste and style." The Court latched onto the idea that constitutionally protected communication can aim for emotional impact and not merely information exchange, and to replace Cohen's profanity with a euphemism would have watered down the potential emotional force of his message. In defending the right of the freedom of speech, the Court evoked a Meiklejohnian self-governance rationale:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such

69. Id. at 16.
70. Id. at 20.
71. Id. at 21-22.
72. Id. at 22 n.4.
73. Id. at 25.
74. Id. at 26.
freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.\textsuperscript{75}

Given this context, the Court's holding thus stands for the proposition that the First Amendment may protect profanity when it is part of a political message that could not be expressed as effectively if sanitized. Three justices dissented from the majority opinion and would have held that, under Chaplinsky, Cohen's speech was not protected by the First Amendment.\textsuperscript{76}

In the decade after Cohen, Supreme Court opinions at times protected specific uses of profanity but did not alter Chaplinsky's essential rule and its endorsement of Chafee's nuisance rationale for profane speech. In Hess v. Indiana,\textsuperscript{77} for example, the Supreme Court held that the disorderly conduct conviction of a student anti-war protester who muttered "We'll take the f-ing street later (or again)" in the vicinity of a police officer was unconstitutional.\textsuperscript{78} The Court concluded that Gregory Hess' statement constituted neither obscenity nor fighting words.\textsuperscript{79} Most relevant for this manuscript, however, the Court also rejected the idea that the phrase could have constituted a public nuisance because there had not been a "showing that substantial privacy interests are being invaded in an essentially intolerable manner."\textsuperscript{80} Importantly, the Court did not hold that the First Amendment prohibited speech from being deemed a public nuisance; instead, the Court merely said that such a conclusion required a sufficient justification, which the prosecution had not undertaken in Hess.\textsuperscript{81}

Similarly, other precedents—even when seemingly extending First Amendment protection to certain uses of profanity—have not altered the longstanding rule that profane or vulgar speech could become a public nuisance subject to government sanction.\textsuperscript{82} Instead,

\textsuperscript{75} Id. at 24.
\textsuperscript{76} Id. at 27 (Blackmun, J., dissenting).
\textsuperscript{77} 414 U.S. 105 (1973).
\textsuperscript{78} Id. at 107.
\textsuperscript{79} Id. at 107-08.
\textsuperscript{80} Id. at 108.
\textsuperscript{81} Id.
\textsuperscript{82} See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (concluding that a municipality's denial of use of its theater for a production of the musical "Hairspray" was not constitutionally permissible because it lacked the necessary procedural safeguards against unconstitutional prior restraint, but not prohibiting nuisance
the U.S. Supreme Court has, in contemporary times, endorsed the conclusion that government-imposed exclusion of certain profane words from the marketplace of ideas does not infringe First Amendment rights.\textsuperscript{83} This is particularly so when the offensive speech "intrudes on the privacy of the home."\textsuperscript{84} Thus, in the constitutional landscape prior to \textit{Pacifica} the Court permitted application of the nuisance rationale to regulate speech when the speech did not serve an important role in furthering the marketplace of ideas or self-governance.\textsuperscript{85}

As is well known, the Court in \textit{Pacifica} held that George Carlin's monologue, though not obscene, constituted indecency within the meaning of 18 U.S.C. § 1464 because it contained "patently offensive references to excretory and sexual organs and activities."\textsuperscript{86} Recalling \textit{Chaplinsky}, the \textit{Pacifica} Court held that Carlin's so-called "dirty words" were "no essential part of any exposition of ideas."\textsuperscript{87} The Court evoked the language of nuisance law when it held that "[w]ords that are commonplace in one setting are shocking in another."\textsuperscript{88} In other words, the pervasive nature of broadcasting in the home (or private car) and unique accessibility by children made Carlin's profanity "merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."\textsuperscript{89} Key to the \textit{Pacifica} holding was the repetitive nature of the profane monologue; the facts of the case did

\textsuperscript{83} See Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) (stating, in a case involving exclusion from school libraries of certain books, "an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar") (emphasis in original).

\textsuperscript{84} \textit{Erznoznik}, 422 U.S. at 209.

\textsuperscript{85} See \textit{supra} notes 82-83.


\textsuperscript{87} \textit{Id.} at 746.

\textsuperscript{88} \textit{Id.} at 747.

\textsuperscript{89} \textit{Id.} at 750 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (majority opinion of Sutherland, J.)).
not require consideration of the status of fleeting expletives, and that
issue was left for another day.

The Court conceded that some limited self-censorship by
broadcasters could occur as a result of the *Pacifica* holding, but the
Justices concluded this would generally “deter only the broadcasting
of patently offensive references to excretory and sexual organs and
activities. While some of these references may be protected, they
surely lie at the periphery of First Amendment concern.”\(^9\) The Court
majority did not view indecent speech as essential to the expression of
ideas in the marketplace: “A requirement that indecent language be
avoided will have its primary effect on the form, rather than the
content, of serious communication. There are few, if any, thoughts
that cannot be expressed by the use of less offensive language.”\(^91\)

After *Pacifica*, the Court held that Texas’ nuisance abatement
procedures were constitutionally deficient when applied to motion
pictures.\(^92\) This holding, however, relied extensively on the procedural
safeguards required by *Freedman v. Maryland*,\(^93\) and the 21st century
Supreme Court has all but eviscerated the *Freedman* safeguards.\(^94\) As
a result, it is questionable whether the holding of *Vance* regarding
nuisance in the First Amendment context remains viable,\(^95\) but in any
case, that opinion’s holding hinged on the unique factual setting of
censorship in licensing motion pictures for exhibition, and those same
facts are not present in the FCC’s after-the-fact fines against
broadcasters for profanity on television. In *Pacifica*, the Supreme
Court explicitly held that the FCC’s post-broadcast regulation was
not censorship.\(^96\)

C. Profanity’s Place in the Law Today

One of the most common and prominent arguments of the
networks and their supporters is that profanity is simply too rampant

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90. *Id.* at 743.
91. *Id.* at 743 n.18.
94. See Edward L. Carter and Brad Clark, *Death of Procedural Safeguards: Prior
Restraint, Due Process and the Elusive First Amendment Value of Content Neutrality*, 11
dicta that if the government targeted a bookstore for closure as a nuisance due to erotic
material, there “might [be] a claim of selective prosecution”).
96. 438 U.S. at 737-38.
in society to even attempt to regulate it on television. While it may be true that profanity can be regularly heard on the street or in the public-school hallway, it is not the case that the law has abandoned all attempts to regulate profanity in contemporary society. In fact, a non-exhaustive review of some situations in which profanity is still legally punishable reveals that while profanity exists in abundance in society and apparently always has, the use of profanity in modern America is not necessarily appropriate or socially and legally condoned in every setting. In other words, the network proponents' argument (because profanity is everywhere, we should allow it anywhere), emanates from a false premise; profanity is not, indeed, everywhere. For example, at the behest of Congress in the Fair Debt Collection Practices Act, profanity is not—at least not without the right to compensatory damages—allowed as part of debt collection by a debt collector. Similarly, notwithstanding the First Amendment's protection of speech, quasi-government transportation systems do not violate the Constitution when they prohibit advertisements containing profanity on public buses and subway trains.

Although many high school students undoubtedly use profanity and consider themselves sophisticated for doing so, profanity need not—and, indeed, in some cases, may not—be abetted by school officials. The U.S. Supreme Court's decision in *Bethel School District


98. Even General George Washington in 1776 chided his soldiers for "the foolish, and wicked practice, of profane cursing and swearing[.]" *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1301 (11th Cir. 2007) (internal citation omitted), but the unsurprising fact that profanity is common among soldiers at war still presents a markedly different situation than use of profanity, for example, by an insurance company's district manager directed at subordinates in the contemporary workplace. *Id.*

99. For example, the city of South Pasadena, California, declared itself "cuss-free" for one week during March 2008, after efforts by South Pasadena High School freshman McKay Hatch, who started a No Cussing Club that soon boasted 10,000 members in 50 states. *Bob Pool, "S. Pasadena Does So Solemnly Not Swear," L.A. Times*, March 6, 2008. *But see Melanie B. Glover, What the Heck? Casual Cursing By Teens Is Rising*, DESERET NEWS, Feb. 25, 2008 (noting that one expert, Timothy Jay, "estimates that the average adolescent uses roughly 80 to 90 swear words a day").


102. *See supra note 99.*
v. Fraser has been interpreted by lower courts to mean that "a school may categorically prohibit lewd, vulgar or profane language." Although it might seem logical that the most common profanity-in-school case would involve a student who wants to swear and is prohibited from doing so, sometimes the calculus is reversed. In the states comprising the U.S. Court of Appeals for the Tenth Circuit, at least, students enjoy the right not to be forced by their teachers to utter profanities in contravention of their personal or religious convictions.

Meanwhile, the principle of a (partially, at least) profanity-free school zone governs the conduct of teachers and parents as well as students. For example, a high school teacher fired for allowing students to use profanity in class writing assignments could not prevail in an action for an alleged First Amendment violation because, by allowing profanity, she had transgressed a legitimate school policy. Similarly, in early 2008 an Iowa school district was held not to have acted improperly in firing a high school basketball coach who, among other things, directed profanity at his players in violation of a provision in the district coaches' handbook. An Ohio appeals court in 2007 upheld the conviction, under a municipality's safe schools ordinance, of a parent who yelled profanities in school hallways after a meeting with her children's principal.

Similarly, government may constitutionally excise profanity completely from the courtroom and, more generally, the practice of law. This applies to litigants, lawyers and even judges. An Illinois criminal defendant who used profanity during a pretrial hearing was

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105. This type of case does exist. See, e.g., R.D.W. v. Natchez-Adams Sch. Dist., 987 So.2d 1038 (Miss. 2008) (upholding the suspension of a high school student who directed profanity at the school's assistant principal.).
106. Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) (University of Utah was not entitled to summary judgment in a lawsuit brought by an acting student who alleged violations of her First Amendment rights when she was punished for refusing to use profanity as part of her course assignments).
110. See infra notes 111-114 and accompanying text.
held in criminal contempt and sentenced to 180 days in jail; on appeal, the sentence—to run consecutive to other jail time—was upheld. A lawyer was suspended from practicing law in federal district court for three years for using profanity in his practice; during one mediation, he had called opposing counsel a "f—ing liar." The discipline was upheld on appeal. A state court judge in Maryland who used profanity in addressing criminal defendants and others in his courtroom received a 30-day suspension without pay.

Although prisons are notorious for the colorful language inmates speak, profanity may be strictly regulated in that setting. A New York jail inmate who shouted profanities at a laundry supervisor violated an inmate rule prohibiting the creation of a disturbance. A prison employee's declaration constituted sufficient evidence that an inmate had directed profanities at other inmates, in violation of a prison rule, such that the inmate could not succeed on a retaliatory discipline claim. The use of profanity and threats by prison guards is evidence of malicious intent in a lawsuit for infliction of cruel and unusual punishment in violation of the Eighth Amendment. Prison guards can also be fired for using profanity.

Use of profanity in the workplace may be cause for termination in various settings. An employee was legally terminated for using profanity notwithstanding the employee's argument that use of profanity in a stressful work setting was too minor to constitute cause for termination under the employee union's collective bargaining

111. People v. Goodwin, 888 N.E.2d 140 (Ill. 2008). See also K.Q.S. v. Florida, 975 So.2d 536 (Fla. Ct. App. 2008) (juvenile's use of profanity during court proceeding held, on appeal, to be just cause for multiple contempt citations and 80 days in secure detention); United States v. Johnson, 497 F.3d 723 (7th Cir. 2007) (convicted criminal defendant's sentence may be enhanced based on obstruction of justice for profane threats to confidential informant); Warr v. State, 877 N.E.2d 817 (Ind. Ct. App. 2007); Illinois v. Smith, 878 N.E.2d 1222 (Ill. App. Ct. 2007).

112. In re Fletcher, 424 F.3d 783 (8th Cir. 2005).

113. Id. See also In re Lee, 977 So.2d 852 (La. 2008) (lawyer who directed profanities at judge was disciplined under the rules of professional conduct; his suspension from the practice of law for 45 days was upheld on appeal).


115. See infra notes 116-119 and accompanying text.


117. Hartsfield v. Nichols, 511 F.3d 826 (8th Cir. 2008).

118. Bozeman v. Orum, 422 F.3d 1265, 1271 n.11 (11th Cir. 2005).

119. Cygan v. Wisconsin Dept. of Corrections, 388 F.3d 1092 (7th Cir. 2004).
agreement with the employer. Similarly, the use of profanity is grounds for employment disciplinary action against a federal law enforcement officer. Police officers in Milwaukee may not direct profanity at prisoners. A "housing information vendor" who used profanity to "chase ... away" disabled callers searching for housing, in violation of the Fair Housing Act's non-discrimination provisions, could be subject to punitive damages. The Ninth Circuit saw no constitutional or legal problem with a labor agreement under which an employee was fired for twice using profanity; the fired employee, however, prevailed in a sex discrimination lawsuit against the union because it failed to represent her as zealously as it represented male employees disciplined for using profanity.

Profanity plays an integral role in many workplace sexual harassment lawsuits. Although the federal anti-sexual harassment law, Title VII, 42 U.S.C. § 2000(e) et seq., "does not prohibit profanity alone [,” it is nevertheless the case that gender-specific profanity—which is to say more degrading to women than to men [,” for example—may rise to the level of unlawful sexual harassment. A former shopworker was entitled to compensatory and punitive damages from her former employer for its reckless disregard of her right to be free from sexual discrimination, including sex-based profanity. Conversely, the use of profanity by an alleged victim of sexual harassment may constitute unprofessionalism and undermine claims of harassment by others. The U.S. Court of Appeals for the Fourth Circuit held that a former women's soccer player at the University of North Carolina at Chapel Hill could proceed with a lawsuit for violation of Title IX and 42 U.S.C. § 1983 as a result of profanity used by her former coach, Anson Dorrance. Although

121. Lane v. Dept. of Interior, 523 F.3d 1128 (9th Cir. 2008).
122. See Henry v. Jones, 507 F.3d 558, 562 (7th Cir. 2007) (quoting Rule 4, Section 2/455.00).
124. Beck v. United Food and Commercial Workers Union, Local 99, 506 F.3d 874 (9th Cir. 2007).
125. Baldwin, 480 F.3d at 1301.
126. ld. at 1302.
127. Parker v. General Extrusions, Inc., 491 F.3d 596 (6th Cir. 2007). See also Louis v. Mobil Chem. Co., 254 S.W.3d 602 (Tex. 2008) (use of profanity by a supervisor against an employee may not constitute intentional infliction of emotional distress, but the profane language used could be actionable as racial discrimination or harassment).
128. Moser v. Indiana Dept. of Corrections, 406 F.3d 895 (7th Cir. 2005).
129. Jennings v. University of North Carolina, 482 F.3d 686 (4th Cir. 2007).
much of his profane language was sexual in nature, the coach also used the term “f—ing brilliant,” the same term employed by Bono at the Golden Globes in 2003.

Use of profanity occurs frequently in situations leading to disorderly conduct and similar actions. In Georgia, using profanity in a threat to fight a police officer constitutes obstruction of an officer. A man’s conviction for using profanity in violation of a telephone harassment statute did not violate the First Amendment. The Sixth Circuit upheld a civil fine against an airport passenger who used profanity, and thus caused a disruption, in an airport security line in violation of 49 C.F.R. § 1540.109. County supervisors did not violate an employee’s clearly established free speech right when they had her arrested for a “profanity-laced tirade” complaining about excessive payroll taxes while refusing to leave a supervisor’s office. A motorist’s use of profanity, coupled with other erratic behavior during a late-night traffic stop, provided an officer with reasonable suspicion of law violation to justify a pat-frisk.

All of these examples illustrate that, when the profane pig is in the proverbial parlor, the government is entitled to remove it. This does not mean, of course, that the government will be allowed to keep the pig from enjoying life in its pen; nor does it mean the no-pig-in-the-parlor rule can be applied to non-pigs attempting to enter the parlor.

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130. Id. at 711.
135. Helms v. Zubaty, 495 F.3d 252 (6th Cir. 2007). But see Orem v. Rephann, 523 F.3d 442 (4th Cir. 2008) (officer who used Taser to subdue woman who shouted “f—you” was not entitled to summary judgment on qualified immunity grounds in civil-rights violation action for damages under 42 U.S.C. § 1983); York v. City of Las Cruces, 523 F.3d 1205 (10th Cir. 2008) (officers were held to have violated citizen’s clearly established constitutional right by arresting him merely for saying “bitch.”).
137. The Federal Communications Commission, in its declaratory order in the Pacifica case, put it this way: “The law of nuisance does not say, for example, that no one shall
III. Free Speech Rationales and Profanity

The freedom of speech, created by 14 words in the Constitution’s First Amendment, has given birth to volumes of discussion in the realm of legal philosophy and constitutional adjudication. Over the years, several schools of thought have developed to explain the values served by the First Amendment’s protection of speech. Prominent is the notion, championed by John Stuart Mill and Justice Oliver Wendell Holmes, Jr., of an intellectual marketplace where everyone is free to sell their ideas, with truth eventually triumphing. In this capitalistic conception of competitive communication, limiting expression is harmful not so much to the speaker, but to the community of listeners who must be free to hear and judge the value of the speech for themselves.

Substantial debate has raged for decades about whether the “marketplace of ideas” must include certain less desirable, or low value, categories of speech, such as profanity. For example, Chafee argued more than 50 years ago that profanity did not constitute an idea and hence need not be protected within the marketplace of ideas: “[P]rofanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth.” Because discerning truth is the reason for allowing the free expression of ideas in the Millian/Holmesian verbal marketplace, epithets that convey no ideas capable of being true or false are viewed as worthless and, hence, unworthy of constitutional protection. Even the “slight social value” of profanity, in Chafee’s view, is “clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see.” Further, profanity thwarted the marketplace process because it allowed “little opportunity for the usual process of counter-argument.”

138. U.S., CONST. amend. I (“Congress shall make no law... abridging the freedom of speech, or of the press....”).
139. JOHN STUART MILL, ON LIBERTY (1859); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
140. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 150 (1941).
141. Id.
142. Id.
Chafee even went so far as to equate obscenity and profanity with other nuisances, such as smoking in a streetcar, that society had a right to prohibit. Wellington agreed, writing that “speech often hurts,” and that “a great deal of other conduct that the state regulates has less harmful potential.” Ingber pointed out that the “imagery of the marketplace of ideas is rooted in laissez-faire economics” and posited that just as modern economists admit that some government regulation is necessary to fix problems in the market, “state intervention [may be] necessary to correct communicative market failures.” Hence, the Millian/Holmesian marketplace does not appear to preclude government limits, particularly on speech largely failing to facilitate the search for truth.

A second justification for freedom of speech has been the idea of self-governance, most notably put forth by Alexander Meiklejohn. In this view, speech is seen as most valuable, and deserving of protection, when it deals with political issues and allows citizens in a democracy to govern themselves through making informed decisions. Thus, limiting speech that is political in nature would be harmful, but speech outside of the political arena is less valuable and therefore subject to increased regulation. “[T]he First Amendment, then, is not the guardian of unregulated talkativeness,” Meiklejohn declared.

Former U.S. Circuit Judge and Supreme Court nominee Robert Bork agreed with Meiklejohn:

If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech . . . . [T]he notion that all valuable types of speech must be protected by the first amendment confuses the constitutionality of laws with their wisdom. Freedom of nonpolitical speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives.

143. Id.
146. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNANCE* (1948).
147. Id. at 25.
However, Meiklejohn and Bork have their critics, including Chafee, who declared the obscure line between political and non-political speech to be problematic.\textsuperscript{149} Redish observed an even deeper value than democracy being protected by the Constitution, arguing that “individual self-realization” reached beyond the confines of politics.\textsuperscript{150} Hence,

free speech aids all life-affecting decision-making, no matter how personally limited, in much the same manner in which it aids the political process . . . . [There] thus is no logical basis for distinguishing the role speech plays in the political process.\textsuperscript{151}

Cass Sunstein seemed to take more of a middle ground in the scholarly divide on the issue by arguing that “the First Amendment is principally about political deliberation” and any speech that makes a “contribution to public deliberation about some issue” should fit under the rubric of political speech.\textsuperscript{152}

A third major area of free speech scholarship revolves around the right of autonomy and self-fulfillment. Richards posited that “the value of free expression, in this view, rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.”\textsuperscript{153} Likewise, Scanlon initially joined the autonomy/self-fulfillment side, seeing government involvement as anything but innocuous:

[To] regard himself as autonomous . . . [a] person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action . . . . [An] autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do . . . . Conceding to the state the right to [restrict expression] to secure compliance with its laws [is] a concession that autonomous citizens could not make, since it gives the state the right to deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed.\textsuperscript{154}

\textsuperscript{149} Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 896 (1949).
\textsuperscript{151} Id. at 604.
However, Scanlon would later reject these notions, hypothesizing that freedom to access information is just as important as the freedom to express in the decision-making process, and deceptive communication should not be given the same freedoms as other communicative forms.\textsuperscript{155} Bork also took issue with the autonomy/self-fulfillment rationale, arguing that speech cannot be delineated from other types of activities that are open to government limitation.\textsuperscript{156}

Other theories have provided various rationales for protecting speech. Blasi contended that the freedom of expression acts as a check against “the abuse of power by public officials.”\textsuperscript{157} He does not address, however, whether profanity would aid this checking capacity. Emerson felt that free speech added to societal unity:

[The] process of open discussion promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process... Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.\textsuperscript{158}

However, given the ability of speech to inflame passions and ignite action that can destroy the balance between stability and change, free speech might play just as important a role in unsettling society as it does in binding society together. Finally, Bollinger contended that the real value of free speech came in its ability to “shape the intellectual character of the society” toward tolerance.\textsuperscript{159}

In summary, then, neither the marketplace of ideas rationale nor the self-governance rationale for free speech requires that profanity be afforded constitutional protection in all cases. If profanity, however, were included as part of a political message or true expression of ideas then perhaps it would merit protection along with the rest of the message. The self-fulfillment rationale for free speech might justify protection of profanity in virtually any setting as long as it satisfies the needs of the profane speaker. Even then, however,

\textsuperscript{156} Bork, \textit{supra} note 148.
\textsuperscript{158} THOMAS EMERSON, \textit{THE SYSTEM OF FREEDOM OF EXPRESSION} 7 (1970).
\textsuperscript{159} LEE BOLLINGER, \textit{THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA} 107 (1986).
some scholars might question whether protection of profanity as free speech cheapens the constitutional notion of valued expression:

This country managed to live most of its years under rules, conventional and legal, that forbade the public use of profanity . . . [and] it would be an abuse of language to say that its freedom was thereby restricted in any important respect. Now, suddenly, and for reasons that ought to persuade no one, we are told that it is a violation of the First Amendment for the law to enforce these rules; that however desirable it might be to see them preserved, there is no way for the law to do this except by threatening the freedom of all speech. [Do] we really live in a world so incapable of communication that it can be said that “one man’s vulgarity is another’s lyric”?  

IV. The FCC and Regulation of Profanity

A noteworthy phenomenon of the late 19th and early 20th centuries in the United States was the emergence of regulatory agencies. According to Horwitz, regulation developed as a response to the economic turbulence of the late 1800s. Regulatory structure takes adjudicative power from the federal judiciary and legislative authority from Congress; hence administrative agencies are quasi-judicial and quasi-legislative. The acceptance of administrative law, or regulation, in America has been tenuous at best. This may be attributed in part to a mistrust of government and deference toward the principle of separation of powers. Broadcast regulation poses a unique dilemma.

The FCC’s predecessor, the Federal Radio Commission (FRC), was created during a time of significant political opposition to expansion of administrative law. The final bill was delayed in part because of disagreement over the extent of social versus technical limitations of the agency’s authority. Proponents of social regulation, such as Senator Clarence Dill, argued that too much focus on mere technical issues would unnecessarily hamper the agency from the

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162. Id.
broader view of the "social and economic good of people . . . .". Opponents of social regulation, such as Secretary of Commerce Herbert Hoover, wanted allocation authority restricted to narrow technical parameters; judgments based on social factors carried the implication of censorship. Ultimately, under the intolerable spectrum situation created by the 1920s radio boom, the bill became law as the Radio Act of 1927. Social considerations were included in the agency's licensing authority under a vague mandate to regulate in the "public interest, convenience or necessity." The Communications Act of 1934 further institutionalized the FRC as the Federal Communication Commission.

Because of spectrum scarcity along with technical and fiscal realities, only a relatively few traditionally have had access to broadcast their voices. Common law notions of public interest allow those few to operate their business in exchange for serving the common good. Despite court challenges to the constitutionality of the authority given to the FCC to, in essence, unilaterally make law, the Supreme Court has upheld the standard as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."

The vagueness of the public interest standard also allows the court its best opportunity to affect policy. This has led to some controversy over what role the courts should play in actually making communications policy. Schools of thought regarding the relationship that the courts should have in policymaking range from judicial restraint—conceding expert and statutory authority to the FCC—to judicial activism. The first sees the court's responsibility to judge procedural issues or the agency's decision making process vis-à-vis the decision itself. Another view is that the "the courts cannot, in the communication area, avoid making policy. The reason is that the standard of public interest, convenience, and necessity is so imprecise that almost any interpretation of it—by the FCC or by a court—

164. 67 CONG. REC. 12,358 (1926)
165. SLOTTEN, supra note 163.
170. KRASNOW, supra note 168.
171. Id.
makes policy.”

This dynamic policymaking process among the legislative, executive and judicial branches of government continues to be particularly prominent and important in the ongoing debate about broadcast profanity.

The third school of thought, espoused by the late U.S. Court of Appeals Judge David Bazelon, views the courts as collaborators in regulatory policymaking. Rather than merely nodding approval and acquiescing to the “mysteries of administrative expertise,” the judiciary should take a more activist role. He reasons that since administrative litigation increasingly touches on social issues, strict judicial scrutiny is required to ensure administrative neutrality by the regulatory agencies. This assumes, of course, strict neutrality on the part of the courts themselves.

In the past, the Supreme Court has for the most part dismissed the second view, instead deferring policymaking decisions to the FCC. The recent decision by the Second Circuit Court of Appeals once again raises various questions regarding FCC indecency regulation. To what extent should courts act as a policymaking body? Does the court’s action violate the precedent of deferring interpretation of the “public interest” to the FCC? To what extent is preserved the original trustee notion of licensees receiving a preferred status in return for fulfilling a public obligation? To what extent can the FCC change its position with respect to new developments or changing conditions?

A. Profanity as Indecency

Prior to Pacifica, FCC Hearing Examiner Sol Schildhause assumed without serious doubt that “damn,” “bastard” and other unmentionables constituted “obscene, indecent or profane language” in violation of 18 U.S.C. § 1464. In 1970 Philadelphia radio station WUHY-FM broadcast an interview with Jerry Garcia of the Grateful Dead in which Garcia uttered such profundities as “Any of that s—either” and “Political change is so f—ing slow.” The FCC concluded

172. Id. at 64.
174. Id. at 598.
that "the speech involved has no redeeming social value" and that "it conveys no thought to begin some speech with 'S-t, man . . . .', or to use 'f—g' as an adjective throughout the speech." As a result, "its use can be avoided on radio without stifling in the slightest any thought which the person wishes to convey." The Commission concluded that the Garcia interview was not obscene because it did not refer to sex, but the material was indecent because it was patently offensive and lacked social value. Commissioners did not consider whether the language might be profane.

Following its adjudication in the Garcia case, the FCC continued to apply the indecency, rather than profanity, rubric to broadcasts involving four-letter words. In 1971, however, the Chief of the FCC's Complaints and Compliance Division wrote to a complainant that the FCC did not consider "damn" to be profanity. The FCC renewed a Seattle station's license notwithstanding the fact it had broadcast "the one word most likely to offend if heard over the air or anywhere else" a single time in a "serious discussion of language usage"; the FCC thus concluded that, in this context, "the four-letter Anglo-Saxon verb denoting the act of sexual intercourse" was not indecent. A Hearing Examiner suggested in that 1971 case that whether the word might be indecent could not be categorically determined but would depend on time and circumstance. Applying the standard in the WUHY-FM case, the Commission determined that an Illinois radio station's broadcast that "consisted of explicit exchanges in which

178. Id. at 410.
179. Id.
180. Id. The Commission relied heavily on the unwilling listener rationale, without using that term, and the conclusion that the profanity was gratuitous or not necessary to express the message being conveyed. See id.
181. See id.
182. FCC Chief of Complaints and Compliance Division, In re Complaint by Warren B. Appleton, 28 F.C.C.2d 36, 37 (1971) (citing Gagliardo v. United States, 366 F.2d 720 (9th Cir. 1966), in which the Ninth Circuit held that "G—damn it" was not profane within the meaning of 18 U.S.C. § 1464).
184. Id. at 355. ("We can not avoid the difficult result that what particular language may be unacceptable for broadcast is not susceptible to being reduced to an immutable, time resistant glossary."). The Hearing Examiner also held forth at length on then-President Richard Nixon's views about the profane film "Love Story," based on Erich Segal's book. President Nixon was said to have been "mildly upset at the film's profanity"; the noted swearer-in-chief also gave some advice: "Mr. Nixon said that swearing 'has its place, but if it is used it should be used to punctuate.' If profanity is overused, he said, 'what you remember is the profanity and not the point.'" Id. (citation omitted).
female callers spoke of their oral sex experiences” was indecent. On a petition for reconsideration, however, the FCC clarified that so-called “topless radio,” or sex-talk shows, were not necessarily forbidden: “We are emphatically not saying that sex per se is a forbidden subject on the broadcast medium. We are well aware that sex is a vital human relationship which has concerned humanity over the centuries and that sex and obscenity are not the same thing.”

The Commission later noted that the Sonderling case was significant because the U.S. Court of Appeals for the District of Columbia Circuit, in affirming the FCC's indecency conclusion, approved for the first time the idea that “the probable presence of children in the radio audience is relevant to a determination of obscenity.” The Commission expressed reservations, however, that the then-existing version of 18 U.S.C. § 1464 was too narrow in that it spoke of “language” and thus might not authorize regulation of indecent or obscene images. The FCC’s response to the Carlin monologue hinged, of course, largely on the likelihood (and, as it turned out, reality) of children hearing the profane broadcast at 2 p.m. on October 30, 1973 on New York City station WBAI-FM. The Commission first noted that the WBAI broadcast did not implicate obscene speech, which the Commission said it had found in the discussion of oral sex in the Sonderling case; given the Supreme Court’s then-recent definition of obscenity in Miller v. California, the Commission readily acknowledged that Carlin's profane monologue did not constitute obscenity.

185. FCC, In re Apparent Liability of Station WGLD-FM, 41 F.C.C.2d 919 (1973). The station was operated by Sonderling Broadcast Corp. in Oak Park, Illinois. Id.
188. FCC, Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 425 (1975) (“The new definition of ‘indecent’ is tied to the use of language that describes, in terms patently offensive as measured by contemporary community standards for broadcast media, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”).
189. Id. at 424.
As is well known, the Commission also articulated the characteristics of broadcasting that allowed differential constitutional treatment when compared to other communications media:

(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.\textsuperscript{193}

The Commission largely focused on a "parental interest" in protecting children from exposure to profane language.\textsuperscript{194} Thus, the Commission distinguished indecency from obscenity by saying that description of sex or excretion may be indecent, when children are present, even if the material does not appeal to prurient interest and even if the material possesses scientific, literary, artistic, or political value.\textsuperscript{195} The commissioners discussed the privacy interest that arises in one's own home.\textsuperscript{196} Hence the FCC admonished broadcasters that, if they choose to convey indecent material when children are not likely to be present—as they may legally do—they "must make substantial and solid efforts to warn unconsenting adults who do not want the type of language broadcast in this case thrust into the sanctuary of their home."\textsuperscript{197} This has typically been thought of as the "unwilling listener" problem,\textsuperscript{198} but in reality it has more to do with privacy—"the right to be let alone."\textsuperscript{199}

Subsequent to Pacifica, the FCC's approach to regulating profanity under the indecency rubric changed little for more than 20

\begin{enumerate}
\item Id. at 97.
\item Id. at 98.
\item Id. \cite{Cohen}
\item Id. \cite{Cohen, 403 U.S. at 21-22} (majority opinion of Harlan, J.) ("government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot totally be barred from the public dialogue").
\item Id.
\item See, e.g., Pacifica, 438 U.S. at 763 (Brennan, J., dissenting).
\item See Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (calling this "the most comprehensive of rights and the right most valued by civilized men"). For elaboration on the right to privacy in the context of profane broadcasting, see infra notes 265-281 and accompanying text.
\end{enumerate}
Perhaps the most significant change in the 1980s was that the Commission explicitly disclaimed the need for references to sex or excretion to be repeated; in other words, such material referenced just once, in certain contexts, could be considered indecent. A major dispute in the 1990s concerned the "safe harbor" in which the FCC would allow broadcasters to air indecent material; after several administrative and judicial looks at the issue, the FCC in 2001 solidified the parameters of the safe harbor as between 10 p.m. and 6 a.m. At the same time the FCC issued a Policy Statement detailing, for the benefit of broadcasters, the agency's definition of and approach to regulating broadcast indecency. The Policy Statement explained that the FCC would treat as indecent any material that explicitly depicts or describes sex or excretion in a way patently offensive to the contemporary community standard, particularly where the material is dwelt upon and appears aimed to pander, titillate, and shock viewers or listeners. The Policy Statement explicitly did not address profane language, but the Statement did emphasize that the FCC would consider, among other factors,

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200. Comparing the FCC adjudications from the late 1970s with those of the late 1990s, it is clear that the applicable legal standard for indecency had not changed. The FCC also indicated in these adjudications that a single profanity would not likely rise to the level of indecency. See, e.g., FCC, In re Notice to Trustees of the University of Pennsylvania, 57 F.C.C.2d 782, 790 (1975) (finding, under the then-applicable standard of the WUHY and Sonderling adjudications, that a university radio station had broadcast indecent material in a segment called the Vegetable Report that included an in-studio announcer asking a three-year-old boy whose mother had called the show, "Johnny, can you say "f—"?"); FCC, In re Application of WGBH Educational Foundation, 69 F.C.C.2d 1250, 1254 (1978) (expressing skepticism, in light of the Supreme Court's then-recent opinion in Pacifica, that a single profanity could be considered indecent); FCC Enforcement Bureau, In the Matter of WLDI, Inc., 16 F.C.C.R. 3011, 3012-13 (2001) (on-air discussion of sex was indecent under standard adopted in FCC's Pacifica order); FCC, In the Matter of Citicasters Co., 16 F.C.C.R. 7546, 7547 (2001) (graphic on-air discussion of masturbation and various forms of sex was indecent, but the Commission did not consider whether it was profanity).


204. Id.

whether the material was repetitive. Thus it appeared at that point that the FCC would not attempt to regulate fleeting expletives, and indeed "Bono himself reportedly used the 'F-Word' on the 1994 Grammy Awards broadcast" with no apparent FCC action.  

On October 3, 2003, the FCC responded to the 2003 Bono incident through an adjudicative order issued by David H. Solomon, chief of the Enforcement Bureau. Solomon wrote that Bono's fleeting expletive did not fall under the FCC's enforcement mechanism because Bono did not describe sexual or excretory activities or organs and because the FCC previously had declined to punish one-time profanity. But the full Commission disagreed and held that Bono's fleeting expletive was "shocking and gratuitous" and had no political meaning; thus the Commission concluded that NBC and other broadcast licensees could be held responsible to take advantage of technological advances—such as time delay—that would enable editing of profanity before public broadcast. The commissioners reasoned that "any use of that word or a variation, in any context, inherently has a sexual connotation"; that "[i]ts use invariably invokes a coarse sexual image" and is therefore patently offensive; and that any prior agency interpretation declining to act on fleeting expletives "is no longer good law."

206. *Id.* at 8003 ("The principal factors that have proved significant in our decisions to date are: (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.") (emphasis in original).


209. *Id.* at 19861 ("The word 'f-ing' may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word 'f-ing' as an adjective or expletive to emphasize an exclamation.").

210. *Id.* (citation omitted).


212. *Id.*
B. Profanity as Profanity

However, in its 2004 order in the Bono case, the FCC did not stop with its indecency analysis. Instead, the Commission also held that Bono’s fleeting expletive was punishable as profanity under 18 U.S.C. § 1464. Although acknowledging its adjudication history provided little background on which to define impermissible profanity, the Commission nonetheless stated that it would begin to regulate, as profanity, “the ‘F-Word’ and those words (or variants thereof) that are as highly offensive as the ‘F-Word . . . ’.” Not limiting its profanity definition to blasphemy, the FCC pointed to a 1972 Seventh Circuit opinion upholding a conviction under 18 U.S.C. § 1464 and defining profanity as “those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” The FCC in 2006 held that the broadcasts involving profanity by Cher and Richie also were both indecent and profane under 18 U.S.C. § 1464. Although the Second Circuit in 2007 reversed the 2004 and 2006 FCC orders, the basis for that reversal was the Administrative Procedure Act and hence the court never reached the question of whether the FCC could regulate non-obscene, non-indecent profanity as a public nuisance or privacy invasion of the home.

The FCC’s parting shot in its 2004 Bono order was that networks could avoid liability for unscripted profanity on live television by implementing a technological solution—a “delay/bleeping system.” As of spring 2008, after the Supreme Court had granted certiorari and merits briefs deadlines had been set in the appeal, the networks all

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213. Id.

214. The Commission cited Black's Law Dictionary in defining profanity as “vulgar, irreverent, or coarse language.” Id. at 4981.

215. Id.


217. Id. at 286.


219. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 449 (2d Cir. 2007).

had some type of system in place. Frank Ahrens, the Washington Post reporter, provided a “rare glimpse” into the “closely guarded” process employed by one network to thwart fleeting expletives on live TV:

Currently, another network has four employees in four separate booths watching programming as it airs, their fingers literally hovering over two delay, or “dump,” buttons, one for video, one for audio.

The network also has a fifth staffer who maintains an open phone line to two executives at the live event as it airs. The employees in the booths must undergo periodic “button training,” during which they are shown mock broadcasts to test their reaction time and judgment.

During an actual broadcast, if any one of the staffers hears or sees something they feel could prompt an FCC fine and pushes their button, the show’s audio will be dropped for as many seconds as necessary and the video shot will be switched away from the offending party, to thwart lip-readers.

Ahrens quoted network executives who said that, if allowed to continue, fines for fleeting expletives on live TV will essentially mean the end of live television. Although network critics, including Parents Television Council President Tim Winter and FCC Chairman Kevin J. Martin, charged the networks with trying to use the fleeting expletive issue as a first step to undermine all regulation of indecency and obscenity, the networks contended that the protection from fines for fleeting expletives was merely a stopgap for infrequent errors. “A positive ruling from the court would simply acknowledge that no system is perfect and must allow for a small margin of human error,” a Fox representative, Scott Grogin, told the newspaper. But Winter, a former broadcast TV executive, noted recent instances of profanity and argued that fleeting expletives are substantially increasing in number in recent years: “Recently, NBC aired the unedited four-letter ‘C-word’ for female genitalia spoken by Jane Fonda during an interview on the Today show. Actress Diane Keaton

221. See Frank Ahrens, TV Decency Showdown Heads to Supreme Court, ST. PAUL PIONEER-PRESS, April 13, 2008, at A8.
222. Id.
223. Id.
224. Investor’s Business Daily speculated that this was the aim of Rupert Murdoch, whose News Corp. media empire includes Fox. See Unsigned Editorial, Foxy Malady, INVESTOR’S BUSINESS DAILY, April 2, 2008.
225. Id.
used the ‘F-word’ during her interview on ABC Good Morning America.”

The arguments against the FCC’s recent position on broadcast profanity include the notion that self-censorship will occur because the networks will not want to come close to violating the standard.\textsuperscript{227} The risk of self-censorship, or a chilling effect, certainly poses First Amendment concerns because the quantity and quality of speech available in the marketplace of ideas could be reduced. In fact, none of the First Amendment values—search for truth, self-governance, self-expression, check on government, tolerance—\textsuperscript{228} is generally served by silence. But the self-censorship argument assumes that network executives and other network employees are not smart enough to figure out the difference between, for example, profanity in the World War II films “Saving Private Ryan” and “Schindler’s List,” on the one hand, and profanity in radio talk shows with personalities such as Bubba the Love Sponge and Howard Stern, on the other hand.\textsuperscript{229} Another common argument is that profanity is simply too prevalent in society for regulating it on television to make any difference, but it already has been established that the government disallows profanity in various circumstances, including schools, courtrooms, debt collection efforts, prisons, airports, public buses or subways, and the workplace.\textsuperscript{230}

V. Profanity and Privacy In The Home

A review of U.S. Supreme Court precedent suggests there is ample basis for the conclusion that broadcast profanity may—should the relevant and empowered legislative and administrative actors choose to do so—be regulated as a nuisance or an invasion of privacy. For example, in \textit{Cohen} the Court suggested that unwanted profanity in the sanctuary of the home could—and perhaps even should—be treated differently than profanity in a public setting.\textsuperscript{231} Although the

\textsuperscript{226} Winter, \textit{supra} note 9.
\textsuperscript{227} Calvert, \textit{supra} note 97, at 64-65, 83.
\textsuperscript{228} \textit{See supra} notes 138-160 and accompanying text.
\textsuperscript{230} \textit{See supra} notes 97-137 and accompanying text.
\textsuperscript{231} \textit{See supra} note 71 and accompanying text.
Court rejected the argument that Cohen's profane jacket in the courthouse hallway was constitutionally unprotected because it subjected unwilling viewers to words they preferred to avoid, the Court nonetheless appeared to approve the idea that an unwilling listener in his or her own home would have a much stronger claim. Further, the Cohen Court said that loud and public profanity could be regulated where it was in the hearing of women and children. With regard to children, then, it might be reasonable to conclude that broadcast television profanity, like indecency, can be regulated within certain hours (such as 6 a.m. to 10 p.m.) when children are likely to be watching and listening.

Cohen's use of profanity differed greatly from the uses of Bono, Cher and Nicole Richie of the same vulgar four-letter word. While Cohen expressed a particular political message that would not have been as effective without the word, none of the three celebrities in question came anywhere near the level of Cohen's political feeling and expressiveness. Bono and Richie merely used a four-letter word as an adjective outside the political context to describe their own accolades and activities, and the behavioral idiosyncrasies of celebrities pale in comparison to the high-value speech generally at the heart of the marketplace of ideas and self-governance rationales for free expression. Cher, meanwhile, used the same word merely as an epithet. Although not directed at particular individuals and thus not fighting words or incitement, the word used by Cher came in the mode of a personal attack and not a political message at all. The Cohen Court's words about protecting even profanity as part of a political message in order to advance self-government do not seem applicable to gratuitous celebrity uses of profanity on prime-time television.

As in Cohen, the Supreme Court's opinion in Hess provides grounding for the regulation of broadcast profanity notwithstanding the First Amendment. While the Hess opinion states that a university student's muttering of a four-letter word under his breath on a public street during a demonstration on a university campus did not invade substantial privacy interests, the calculus could be different when the same word is said on national, prime-time television being

232. Id.
233. See supra notes 202 and accompanying text.
234. See supra note 74-75 and accompanying text.
235. See supra notes 77-81 and accompanying text.
broadcast into millions of homes with children present and listening. The latter resembles intrusion upon the seclusion, or trespass, of viewers in their homes; the constitutional difference between the use of the word by Hess and Bono, for example, is clear when one considers the Court's distinction in *Erznoznik v. City of Jacksonville* between the home, on the one hand, and, on the other, the environs of a drive-in theater visible from a public street.\(^{236}\)

Meanwhile, the Supreme Court in *Pacifica* specifically held that certain speech in the wrong setting can become like a pig in the parlor.\(^{237}\) The *Pacifica* Court further concluded that the "unique pervasiveness" of broadcasting may "invade" the home, and therefore some government regulation is necessary to protect the substantial privacy interest of personal enjoyment and peace in one's own home. Under *Pacifica*, though, the nuisance rationale may be applied to broadcast profanity only when it is repetitive and rises to the level of indecency. That holding does not foreclose the regulation of broadcast profanity under a mere profanity (i.e., non-indecent) rationale, however. Instead, the common law of nuisance may apply to even non-obscene and non-indecent broadcast profanity if it substantially interferes with the public interest.

The extensive common-law jurisprudence of nuisance indicates that profanity becomes a public nuisance when it causes disturbance or injury to listeners,\(^{238}\) inconveniences or disturbs the whole community;\(^{239}\) "very gravely influence[s] the good order or enjoyment or convenience of the citizens";\(^{240}\) and is "hurtful and offensive to the community."\(^{241}\) Clearly, not every profane utterance on broadcast TV would justify a finding of public nuisance, but the overall repetitiveness of profanity on television generally might be called a nuisance. Even in contemporary times, courts have applied the common law of nuisance to regulate public profanity outside the broadcast context, and this is particularly so when the profanity invades or affects the home.\(^{242}\) The remainder of this section will

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236. See supra note 82 and accompanying text.
237. See supra note 89 and accompanying text.
238. See supra note 40 and accompanying text.
239. See supra note 41 and accompanying text.
240. Id.
241. See supra note 51 and accompanying text.
242. See, e.g., Commonwealth v. Brown, 7 Pa. D. & C.3d 418, 425 (Dauphin Co. Ct. Comm. Pleas 1978) (public nuisance was established when a group of teenagers threw rocks and trash, spit, played loud music and uttered profanities to the disturbance of nearby homes); Green v. State, 56 So.2d 12 (Miss. 1952) (public nuisance existed when a
further explore the right one might be said to have, within the walls of his or her own home, to be free from profanity that invades privacy. This will be accomplished by first examining the captive audience doctrine and then exploring the application of Justice Brandeis’ “right to be let alone” in the broadcast profanity context.

A. Captive Audience

The captive audience doctrine brings another dimension to the discussion of whether or not the FCC can regulate profanity. Eugene Volokh argued that the captive audience doctrine is really two doctrines as the doctrine differs based on whether the speech in question occurs outside or inside the recognized private sanctuary of the home; he posits that, in the few instances the Court has sustained restrictions based on content in order to protect captive audiences, those audiences have been in the home. Besides Pacifica, where the Court determined that “the home . . . [is] a place where people’s privacy interest is entitled to extra deference,” and “in the privacy of the home . . . the individual’s rights to be left alone plainly outweighs the First Amendment right of an intruder,” several other cases—most notably Frisby v. Schulz and Rowan v. U.S. Post Office—have built up the notion of a captive audience in the home having rights protecting them from unwanted, invasive speech.

In Frisby the Court upheld a law restricting picketing outside a specific home by contending that those in the home were “captive” “with no ready means of avoiding the unwanted speech.” Thus the Court held that the rights of those in the home who desired to avoid

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243. Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).
245. Even in dissent, Justice Powell conceded in Pacifica that “broadcasting—unlike most other forms of communication—comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds . . . . Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away . . . . a different order of values obtains in the home.” Pacifica, 438 U.S. at 759.
246. Id. at 731 n.2.
247. Id. at 748.
250. 487 U.S. at 484.
251. Id. at 487.
the intrusive, undesired speech outweighed the free speech rights of the picketers, declaring that “there is simply no right to force speech into the home of an unwilling listener.” Similarly, the Court’s 1970 decision in *Rowan*, upholding a law requiring mass mailing companies to remove addressees from their list when so requested, found that “even ‘good’ ideas” did not merit sufficient constitutional protection to allow someone “to send unwanted material into the home of another . . . . That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sounds does not mean we must be captives everywhere.”

Other cases have made minor but still important contributions to the captive audience doctrine and the notion of home privacy rights against unwanted speech. The Second Circuit Court of Appeals found that harassing telephone calls constituted an invasion of privacy and stated that the state had “a compelling interest in the protection of innocent individuals from fear, abuse or annoyance” in their own homes. Also, the U.S. Supreme Court determined in *Ward v. Rock Against Racism* that government has a right “to avoid undue [noise] intrusion into residential areas” in its ruling that New York City was justified in cutting off electricity to a concert in Central Park when the concert repeatedly ignored demands to lower their volume after complaints by nearby residents. While not dealing with a residential setting, the Supreme Court recognized in *Bethel v. Fraser* the right “of parents, and school authorities acting *in loco parentis*, to protect children—even in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.”

*Bethel* indirectly introduces the home-parent-child nexus behind much of the captive audience doctrine as it applies to a residential setting. The pervasive nature of the television presents difficulty for parents in adequately supervising their children’s watching habits.

252. *Id.*
253. 397 U.S. at 738.
This leads to a situation where parents suffer significant cultural pressures to have a television set and keep it in one's home. Once television is in the home, it is difficult to protect unwilling listeners from encountering programs they don't want to watch other than by keeping the television turned off at all times. The captive audience doctrine, it is said, has special force in the home because expectations of privacy are higher there.  

While such an argument might not be valid if applied only to adults, scholars and justices have contended that children constitute a uniquely captive audience. In his concurrence in *Ginsberg v. New York*, Justice Stewart declared that "the Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose." He went on to assert that "a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Hence, Araiza posits that "not only are children more 'captive' than adults in the sense of not being as able to choose to receive or reject certain speech, but they may also be harmed more by unwanted speech that is in fact received." Araiza notes the constitutional stature that parental authority receives, and given that the home is the domain for such authority, the government has often been justified in helping parents limit children's access to undesirable materials or experiences. Thus, Marcy Strauss's trio of "specific interests [that] underlie the right to be let alone in the captive audience context: the right to make individual choices (autonomy); the right to repose; and the right to be free from offense," appear to apply even more to children than to adults.

B. "Right to Be Let Alone"

The FCC in 1987 explicitly disclaimed the scarcity rationale as a basis for regulating indecency so the remaining justifications asserted in the 1975 *Pacifica* FCC order are effect on children, forced exposure

259. Id. at 1137.
261. Id. at 649-50.
263. Id.
to unwilling listeners and the privacy of the home. Although not discounting the impact of broadcast profanity on children, this section focuses on the home privacy interest. In reality, the impact on children and the home privacy interest are closely connected, and the privacy issue is virtually all-inclusive because it also implicates the interests of unwilling adult listeners with no children at home. The Supreme Court has recognized protecting the privacy of the home as a compelling government interest. As has been noted, the Supreme Court has given special consideration to the impact of broadcast indecency on the privacy of the home.

Dissenting in Pacifica, Justice William Brennan contended that the "right to be let alone" within the walls of one's home was not implicated by broadcast profanity because anyone who chooses to turn on a television or radio is really choosing to participate in public discourse. This statement was made as part of the well-worn argument, eloquently advanced here by Justice Brennan, that viewers may simply turn off the television when confronted with something they do not want to see or hear. For whatever merits that argument might have had in 1978, its effectiveness is largely lost in an age when Americans are accustomed to constantly growing rights of privacy and personal choice that allow them to legally edit profanity on DVD copies of Hollywood films, elect not to have certain material mailed

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265. FCC, In the Matter of Pacifica Foundation, Inc., 2 F.C.C.R. 2698, 2699 (1987) ("We no longer consider the argument of spectrum scarcity to provide a sufficient basis for this type of regulation.").

266. For more on the government interest in protecting children from profanity, see Catherine J. Ross, Anything Goes: Examining the State's Interest in Protecting Children From Controversial Speech, 53 VAND. L. REV. 427 (2000).

267. See Carey v. Brown, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.").

268. See supra notes 88-89 and accompanying text.

269. 438 U.S. at 765-66 (Brennan, J., dissenting) ("Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.").

270. Id.

to their homes via the U.S. Postal Service, place their telephone numbers on a national "Do Not Call" list, and protect their financial, medical, educational, and even videotape rental information from disclosure.

The argument that unwilling listeners in their homes can take action every time they do not want to be further exposed to broadcast profanity they already have been forced to hear is simply outdated and out of step with movement in the rest of the law. Scholars have noted that the entire U.S. legal system has moved from one in which property was the paradigmatic right to one in which privacy looms large. In reality, however, the right to privacy might be a misnomer. Jeremy M. Miller has argued that the right to privacy really should be called the right to dignity; the right to dignity, in turn, hinges on individual choice. Thus, in the context of broadcast profanity, the dominant constitutional principle at work is not free expression, as the Supreme Court cases clearly have held that profanity in and of itself has little or no value and is not protected except in the case of certain political messages expressed in public. Instead, the key constitutional principle involves privacy, dignity and choice: "No one has the right to force an individual to accept what they are entitled to exclude, including what they must listen to. If a person cannot assert his or her authority at home, that person loses a part of his or her sense of dignity."

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272. See Rowan, 387 U.S. at 738.
276. Jeremy M. Miller, Dignity As A New Framework, Replacing the Right to Privacy, 30 T. JEFFERSON L. REV. 1, 28-29 (2007) ("[T]he Court is not protecting privacy in any sense, but dignity. Certainly, one's power to make personal decisions, at the least, affects one's sense of self-worth and respect and the respect received from others. Thus, the ability to exercise those rights undeniably influences the growth of individuals and in turn, society . . . . The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice.").
277. See supra notes 68-84 and accompanying text.
278. Miller, supra note 276, at 33.
one's own home, broadcast profanity may become a private nuisance.279

The roots of a right to privacy, or dignity, have always centered on protection of individuals' right to make decisions for themselves in their own homes. In their seminal privacy article, Warren and Brandeis stated that "the right to be let alone" was paramount in one's own home: "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands."280 Possibly what most upsets those who complain about broadcast profanity is simply the lack of choice within their own homes.281 Although the V-chip, TV ratings and so-called "family hour" have purported to give television consumers control over the content they receive, the reality is those attempted solutions largely have not been sufficient.282 Real choice might look something like multiple broadcast feeds from each network, enabling consumers to select the level of profanity—if any—they want delivered to their homes. Such a system would protect any vestigial constitutional right of the sender while also preserving the right of access for those who do wish to receive the material.283 Unless


281. The "right to be let alone," to the extent it has been actually applied, has often acted to prevent government intrusion into an individual's expectation of privacy. See, e.g. Griswold v. Connecticut, 381 U.S. 479 (1965) (right of marital privacy includes contraceptive use); Eisenstadt v. Baird, 405 U.S. 438 (1972) (declaring unconstitutional, on individual privacy grounds, a Massachusetts law prohibiting the sale of contraceptives to consumers who were not married); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy included some abortions). See also GLENDON, supra note 275, at 57 ("Eisenstadt ... marked the elevation to constitutional status of an individual's right to be let alone ... "). However, scholars and jurists have noted that, in today's world, the need to be protected from privacy invasion extends at least as much to large corporate interests—such as hegemonic broadcast networks operating under government licensing on the public airwaves—as it does to government. See Helen Nissenbaum, Privacy As Contextual Integrity, 79 WASH. L. REV. 119 (2004) (discussing video surveillance, among other things, by large non-government institutions). See also Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) (discussing the right to be let alone by the news media).

282. See, e.g., Genelle I. Belmas, Gail D. Love & Brian C. Foy, A Consumer Perspective on FCC Broadcast Indecency Denials, 60 FED. COMM. L. J. 67, 97-98 (2007) ("It has been suggested that children's television rules, FCC indecency regulations, and the V-Chip have all had limited utility in protecting children ... .") (internal citations omitted).

283. While the creation of such a system obviously would present its own set of challenges, it is clear that it would be preferable for the broadcast industry and the government if it were voluntary rather than compelled through legislation or regulation.
and until something like that happens, the unwilling listener and those concerned about their children will continue to object to the increasingly profane broadcast content to which they are subjected in their own homes.

VI. Conclusion

While constitutional precedent, combined with the common law of nuisance or the law of privacy, would seem to allow sanctions of broadcast profanity in some situations, this does not mean every utterance of a four-letter word on broadcast television must subject broadcasters to large fines. For example, in the context of meaningful political discussion or public affairs reporting, broadcasters whose interviewees speak profanities should not be responsible for nuisance or invasion of privacy. On the other hand, broadcasters who—with the technological ability to prevent it—appear to sanction and abet gratuitous profanity on celebrity awards shows or raunchy talk shows, for example, may ultimately be causing or contributing to a nuisance or privacy invasion that would justify regulation.

The FCC, however, might do well to even more completely shift its focus from treating profanity as indecency to instead treating profanity as profanity. This approach was envisioned by Congress in 18 U.S.C. § 1464 and would likely prove more straightforward and precise than attempting to shoehorn profanity cases into the indecency rubric. Profanity that does not describe sexual activity or excretory organs does not square with the definition of indecency even though it might be considered disturbing, offensive, substantially inconvenient and hurtful, but such profanity may well constitute a nuisance because it substantially interferes with privacy interests. Broadcasters, scholars and others might argue there is no precise definition of profanity-as-nuisance or profanity-as-privacy-invasion. Thus far, the FCC has only defined profanity as "the 'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word [',]" This definition obviously would have to be made more precise so that broadcasters have notice of what is prohibited.

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This is so for prudential reasons as much as legal and constitutional reasons; while the constitutionality would have to be examined, the Supreme Court has approved compelled broadcast speech in another context. See Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (fairness doctrine).

284. As has been noted, drawing such lines can be admittedly difficult. See supra note 149 and accompanying text.

285. See supra note 215 and accompanying text.
Constitutionally sufficient guidance could be achieved through FCC rulemaking and adjudication as well as observance of developing federal court jurisprudence.\(^\text{286}\)

If facilitating individual self-fulfillment and autonomy is the true and only goal of the First Amendment’s speech protection, then broadcast profanity likely should not and cannot be regulated without violating the Constitution. If, on the other hand, the meaning of the First Amendment extends primarily to protecting political and other high-value speech that leads to truth and democratic decision-making, then profanity with nothing more remains at the margins of the First Amendment and may—under certain circumstances—be regulated at least as to its time, place, and manner. The answer to the question raised by broadcast profanity is far from obvious, and well-meaning individuals can disagree as to the proper outcome of the ongoing debate over the issue.

This manuscript’s attempt has been not to establish who is right or wrong in specific instances, nor has it attempted to determine what course of action is socially or morally desirable with respect to broadcast profanity. Instead the manuscript has explored, first, whether constitutional barriers exist to regulation of broadcast profanity and, second, whether there is sufficient basis in the law of nuisance and privacy to justify such regulation should the government choose to engage in it. The study of relevant Supreme Court precedents demonstrates that the Court’s protection of speech within the ambit of the First Amendment does not dictate that profanity may not be regulated by the FCC. In fact, even speech-protective opinions such as *Cohen* and *Hess* have made a distinction between a single public profanity protected by the First Amendment and unwanted profanity in one’s own home that would not be constitutionally shielded from regulation. Combined with the common law of nuisance and the law of privacy, this jurisprudence seems to indicate that the FCC could, without offending the Constitution, directly regulate profanity as one of the objects of Congressional intent in 18 U.S.C. § 1464.

\(^{286}\) See *Tallman*, 465 F.2d at 286 (defining profanity as “those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”). This definition, too, remains admittedly vague and will need refining by legislators, regulators and jurists.