AN ANALYSIS OF THE FCC'S RULING ON FLEETING PROFANITIES AND OBSERVATIONS ON THE ROAD AHEAD FOR THE HIGH COURT

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INTRODUCTION

The holder of an FCC broadcasting license takes that franchise "burdened by enforceable public obligations."[1] Among

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those public-interest obligations is a duty not to transmit indecent material during times when children are likely to be listening.[2] The duty of licensees to refrain from broadcasting indecent materials was first set out in the Radio Act of 1927.[3] The U.S. Code now makes it unlawful to "utter[] any *obscene, indecent, or profane language* by means of radio communication . . . ."[4]

In 1978 the U.S. Supreme Court upheld on a 5-4 vote an FCC ruling in the case of *FCC v. Pacifica Foundation*.[5] That case involved an afternoon broadcast of a recording of George Carlin's satiric monologue entitled "Filthy Words."[6] Justices Powell and Blackmun concurred in part in the plurality opinion of Justice Stevens and concurred in judgment.[7] They wrote that the decision was restricted to the playing of the recording in the afternoon and was limited to the facts of the case because it did not uphold or review the sweeping order of the FCC.[8]

In January 2003, the NBC television network broadcast the Golden Globe Awards. In accepting the award for Best Original Song, the rock singer Bono said: "This is really, really fucking brilliant. Really, really great."[9] The Commission concluded that the broadcast of Bono's remark was indecent even though his use of the F-word was not "sustained or repeated."[10] In so

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[1] CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (quoting Office of Commc'n of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966)).

[2] *See* 18 U.S.C.A. § 1464 (West, Westlaw through P.L. 111-311), Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 4 FCC Rcd. 8358, 8358 para. 2 (1989).

[3] Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102.

[4] 18 U.S.C.A § 1464 (emphasis added).

[5] *See* FCC v. Pacifica Found., 438 U.S. 726, 751 (1978).

[6] *See id.* at 729-30.

[7] *Id.* at 755-62.

[8] *See id.*

[9] *See* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4976 n.4 (2004).

[10] *Id.* at 4980 para. 12.

doing, the FCC overruled its own Enforcement Bureau's decision.[11]

On December 9, 2002, the Fox television network broadcast the 2002 Billboard Music Awards beginning at 8 p.m. E.S.T.[12] During that broadcast, the entertainer Cher received an "Artist Achievement Award."[13] In her acceptance speech, Cher stated:

> I've had unbelievable support in my life and I've worked really hard.
>
> I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last forty years saying that I was on my way out every year. Right. So fuck'em. I still have a job and they don't.[14]

The next year, on December 10, 2003, Fox broadcast the 2003 Billboard Music Awards beginning at 8 p.m. E.S.T.[15] Nicole Ritchie and Paris Hilton, the stars of Fox's show "The Simple Life,"[16] were to present an award.[17] During their presentation, they engaged in the following exchange:

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[11] Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 FCC Rcd. 19859, 19861 para. 5-6 (2003).

[12] Brief for Petitioners at 9, FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 2308909, 2008 U.S. S. Ct. Briefs LEXIS 478.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] "The Simple Life" was a reality television series that broadcast from December 2, 2003, to August 5, 2007. *The Simple Life*, IMDB, http://www.imdb.com/title/tt0362153/ (last visited Oct. 31, 2010). The first three seasons were on FOX and the final two on E!. *Id.* The show's concept was to depict two wealthy young socialites (Paris Hilton and Nicole Richie), who had never worked a day in their lives, as they struggled to perform manual, low-paying jobs such as cleaning rooms, working on a farm, and waitressing. *Id.* All told, the series produced 56 episodes. *Id.*

[17] Brief for Petitioners, *supra* note 12, at 9.

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Ritchie: Okay, God.[18]
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> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Ritchie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.[19]

The Commission, on remand, affirmed its conclusion that the broadcasts of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material.[20]

On March 17, 2008, the United States Supreme Court granted certiorari to review the conflicting decisions between the Second Circuit Court of Appeal and the Federal Communication Commission on the FCC's new application of its doctrine of fleeting profanities to isolated instances.[21] Taking jurisdiction in both of these cases[22] promised to get the high court back into the business of line drawing involving indecent

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[18] If the government were still in the business of enforcing penalties against blasphemy, this sarcastic reference to Paris Hilton as "God" might possibly qualify as blasphemous. However, blasphemy has never been covered under any FCC's mandate because state enforcement of blasphemy sanctions seems to have mostly run its course in the 17th century. Although profanity had been covered by earlier acts, coverage of profanity was deleted by the 1996 Telecommunications Act. *See* Figure 1 and Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996).

[19] Brief for Petitioners, *supra* note 12, at 9-10.

[20] *Id.* at 10.

[21] *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 552 U.S. 1255 (2008).

[22] *See id.*; CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 2176 (2009).

speech and obscene expression, an area in which the high court historically has had difficulties.[23]

The FCC asserted that it has always had the power to fine broadcasting of fleeting profanities[24] and that its prior voluntary restraint does not now estop it from doing so in the cases before the Court.[25] Briefs of the respondents alleged numerous theories but primarily: (a) that the FCC has failed to abide by the provisions of the Administrative Procedure Act[26] in making a change to its rules;[27] (b) that the new obscenity regime of the FCC is unconstitutional because of broadness, i.e., it suppresses more speech than necessary to achieve its goals;[28] and (c) that the new obscenity regime of the FCC is unconstitutional for vagueness, broadcasters cannot know what will violate the new rules.[29]

In the analysis section of this article, we will take an overview of the statutes and ask whether the definitions

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[23] *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material [hard-core pornography] I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .").

[24] *See* Reply Brief for the Petitioners at 3, FCC v. Fox Television Stations Inc., 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 4080369. *See also* Complaints Regarding Various Television Broads. between Feb. 2, 2002, and Mar. 8, 2005, 21 FCC Rcd. 13299, 13307 (2006), *quoted in* FCC v. Fox Television Stations Inc., 129 S. Ct. 1800, 1809 (2009).

[25] *See* Reply Brief for the Petitioners, *supra* note 24, at 2. Petitioners' Counsel of Record made the argument in the following words: "Instead respondents argue, incorrectly, that the Commission failed to acknowledge its change in policy, and they advance a revisionist view of both the old policy and the new policy that is inconsistent not only with the opinion below but also with arguments they have advanced at earlier stages of this litigation." *Id.*

[26] Administrative Procedure Act, 5 U.S.C.A. § 553(b)-(c) (West, Westlaw through P.L. 111-290).

[27] Brief for Respondent at 18-19, *Fox Television Stations*, 129 S. Ct. 1800 (2009) (No. 07-582), 2008 WL 3153439.

[28] *Id.* at 31-32.

[29] *Id.* at 50.

contained in the Telecommunications Act of 1996[30] and its predecessors violate the best practices for statute writing and, perhaps, are either deliberately or carelessly obscure and convoluted[31] a potential model of bad practice for Congress and the country.

On April 28, 2009, the U.S. Supreme Court overruled (5-4) the Second Circuit's action setting aside the FCC decision in the *Golden Globe Awards Order*.[32] The Second Circuit had ruled the FCC had violated the Administrative Procedure Act.[33] The majority decision by Justice Scalia held that the indecency finding by the FCC for "fleeting expletives" [non-repetitive, non-literal use of F-word and S-word] was not arbitrary and capricious[34]. Further, the Court held that the FCC did *not* have to go through rule-making under the A.P.A. in order to "expand" its original rules from 1975.[35] The dissents were vociferous.[36]

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[30] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (1996).

[31] *See id.* The criminal penalty section is 18 U.S.C. § 1464.18 U.S.C.A. § 1464 (West, Westlaw through P.L. 111-311) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). This section, according to the Historical and Revision notes, is "[b]ased on sections 326 and 501 of title 47, U.S.C., 1940 ed., Telegraphs, Telephones, and Radio-telegraphs (June 19, 1934, ch. 652, §§ 326, 501, 48 Stat. 1091, 1100)." *Id.* This illustration may help demonstrate the intricacies of following provisions through the multiple changes in the Communications Act of 1934.

[32] Fox Television Stations v. FCC, 129 S. Ct. 1800 (2009); Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975 (2004).

[33] *Fox Television Stations, Inc.* at 1810.

[34] *See id*. at 1812 (2009) (Scalia, J., part III, section B).

[35] *Id.* at 1810 (Scalia, J.). ("We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard." (referring to the Second & D.C. Circuit precedents that require an agency to elucidate its actions that change previous practices, and, "heighten somewhat" a court's "standard of review" when an agency "reverses course.")).

[36] *See id*. at 1824-1841.

In all, there are seven (7) opinions: Justice Scalia's for the court;[37] two more for the majority;[38] one concurrence in judgment;[39] and three dissents.[40] On May 4, 2009, the Supreme Court without opinion vacated the judgment of the Third Circuit in *C.B.S. v. FCC* and remanded "in light of" its decision in *FCC v. Fox Television* – the *Golden Globe Awards Order*.[41] This case involved the infamous "wardrobe malfunction" of Janet Jackson at the Super Bowl halftime entertainment special in February 2004.[42]

A few "potty-mouth" utterances by people in the entertainment business coupled with a split-second exposure of part of a woman's breast have now led to a U.S. Supreme Court ruling, the wisdom of which is dubious. On April 28, 2009, a divided court reversed and remanded to the U.S. Court of Appeals for the Second Circuit its decision in *Fox TV Stations, Inc. v. FCC*.[43] The overall result, with five separate opinions, was along the usual 5-4 lines although Justice Kennedy did not join Justice Scalia's opinion in Part III-E,[44] a gratuitous and not particularly well-considered swipe at brothers Stevens' and Breyer's opinions.

Since the days of the Berger Court,[45] if not earlier, a majority opinion might offer a footnote or two defending its rationale

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[37] *See id*. at 1806-1815, 1819 (Parts I, II, IIIA-IIID, & IV).

[38] *See id*. at 1815-1819 (Scalia, J., plurality opinion with respect to Part IIIE), 1819-1822 (Thomas, J., concurring).

[39] *Fox Television Stations, Inc.* at 1822-1824 (Kennedy, J.)

[40] *See id*. at 1824-1841.

[41] *See* FCC v. CBS Corp., 129 S. Ct. 2176 (Mem) (2009); cases cited *supra* note 45.

[42] *See* CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008).

[43] Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 467 (2d Cir. 2007).

[44] *See Fox Television Stations*, 129 S. Ct., at 1815-1819 (2009) (Scalia, J., plurality opinion).

[45] Warren E. Burger of Minnesota was Chief Justice of the U.S. Supreme Court, succeeding Earl Warren, from 1969 to 1986, and was followed by the late Chief Justice William Rehnquist. *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY xiii (2005). *See generally* THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT

against dissenters;[46] it is unusual and seemingly ill-mannered, if not churlish, for the majority opinion to spend an entire section attempting to ridicule the positions of two dissenters. As may become clearer later on, this action by Justice Scalia reminded us of the proverbial occupant of a glass house throwing stones.[47]

This article will examine the specificity of the FCC prohibitions and look at the requirements of the Administrative Procedure Act of 1946.[48] Whether this content-based regulation endorsed by the High Court opens the door to a new Fairness Doctrine for the air waves[49] is a matter we will leave for others because it far exceeds the scope of this article. Finally, we will examine the future of the Court's work in the area of "obscene,

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1969-1986 (Herman Schwartz ed., 1987); and BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

[46] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). The five opinions in *Wygant* that resulted in the reversal of the Sixth Circuit Court of Appeals decision, 746 F.2d 1152, contain a number of polite and only lightly barbed footnotes aimed at refuting arguments of the dissents or of the plurality or of Justice White's decision concurring only in the judgment. It is a good example of the level of civilized repartee that dominated the court's discourse for most of its existence; and it also sharply contrasts with Justice Scalia's opinion ridiculing his colleagues in *Fox Television Stations*. *See* 129 S. Ct. at 1815-19. For instance, Justice Powell writing the plurality opinion in *Wygant*, takes issue with Justice Marshall's contentions in note 5, *Wygant*, 476 U. S. at 278 n.5; similarly in the last paragraph of note 8, *id.* at 281 n.8. Justice Marshall, in his dissenting opinion, takes issue with Justice White in note 5, *id.* at 309 n.5; and Justice Marshall similarly criticizes the confusing result of the case in note 7, wherein he stated, "I do not envy the District Court its task of sorting out what this Court has and has not held today," *id.* at 312 n.7.

[47] The common proverb is: "Those who live in glass houses should not throw stones." THE PENGUIN DICTIONARY OF PROVERBS 49 (Rosalind Fergusson & Jonathan Law eds., 2000). The accompanying explanation is that "people should not be too eager to criticize in others faults they possess themselves." *See also* Adam Winkler, *Justice Scalia & the Coarsening of American Culture*, THE HUFFINGTON POST (July 1, 2006 7:34 PM), http://www.huffingtonpost.com/adam-winkler/justice-scalia-the-coarse_b_24203.html.

[48] *See* Administrative Procedure Act, 5 U.S.C.A. § 553(b)-(c) (West, Westlaw through P.L. 111-290).

[49] *See, e.g.*, Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 278-84, 292-97 (2009).

indecent, or profane"[50] language and suggest a tentative model for analyzing freedom of expression under the First Amendment. Our suggestion involves creating a strong presumption in favor of First Amendment-protected expression that would have to be overcome by any part advocating regulation or censorship of such expression.[51]

DISCUSSION

I. SACRED AND PROFANE: A PLEA FOR CLARITY IN LANGUAGE

One of the marks of an educated person is that such a person tends to love the language.[52] Oliver Wendell Holmes, Jr., once wrote, "A word . . . is the skin of a living thought."[53] Anyone who loves the language (and that group includes many writers, teachers, and journalists – even some lawyers) is usually exquisitely sensitive to correct usage, grammar, and word choice.[54] It is no small matter when a court or federal agency is

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[50] 18 U.S.C.A. § 1464 (West, Westlaw through P.L. 111-311).

[51] *See infra* notes 237-41 and accompanying text.

[52] "Language most shews a man: Speak that I may see thee." Ben Jonson, *Explorata*, "Oratio Imago Animi," *in* TIMBER, OR DISCOVERIES (c. 1640), *quoted in* BERGEN EVANS, DICTIONARY OF QUOTATIONS 651 (Delacorte Press 1968). *See also* Howard Bennett, On Graduate Mindedness 2-3 (1963) (unpublished manuscript) (on file with author). It would seem to follow that an educated person, one who thinks critically and reads widely, would love the language – the essential material of thought – in the same way that a gifted violinist would love fine music. *See, e.g.*, STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE (Penguin 2008).

[53] Towne v. Eisner, 245 U.S. 418, 425 (1918). The full quotation is: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Id.* (further citation omitted).

[54] *See, e.g.*, PAUL FUSSELL, BAD OR, THE DUMBING OF AMERICA (1991); LYNNE TRUSS, EATS, SHOOTS, & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION 2004).

sloppy in its word choice or indifferent to the correct meanings of a word.[55]

"Profanity" is defined as, "Irreverence towards sacred things; particularly, an irreverent or blasphemous use of the name of God; punishable by statute in some jurisdictions."[56] None of the various incidents at issue qualifies as irreverence toward the sphere of the sacred. The FCC's label of "Fleeting Profanities" raises issues under the APA[57] and of imprecision or vagueness under the Fourteenth Amendment.[58]

An Associated Press (AP) article headed "Profane title fuels 'Bull' sales" caught our attention as we were thumbing a newspaper a while back.[59] It turned out to be a headline for a review of a book by Harry G. Frankfurt, a Princeton University professor *emeritus*, entitled *On Bullshit*, published by the Princeton University Press.[60] Since there is nothing profane about bullshit, we thought perhaps that the headline had been done carelessly, by a harried copy editor up against a deadline. But, alas, the theme of "profanity" was contained in the text of the article and used interchangeably with other adjectives such as "impolite" and "offensive" and "nonsense" and "poppycock" and "balderdash" and others.[61]

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[55] *See, e.g.*, 18 U.S.C.A. § 1464; Administrative Procedure Act, 5 U.S.C.A. § 553(b)-(c) (West, Westlaw through P.L. 111-290 (excluding P.L. 111-259, 111-267, 111-275, and 111-281)).

[56] BLACK'S LAW DICTIONARY 1375 (rev. 4th ed. 1968) (citations omitted).

[57] *See* Administrative Procedure Act, 5 U.S.C.A. § 553(b)-(c).

[58] "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Jordan v. De George, 341 U.S. 223, 231-32 (1951) (citing Connally v. General Construction Co., 269 U.S. 385 (1926)). Common understanding and practice should probably not be distorted into "the usual illiterate understanding and practice" because to do so would rob the court's standard of meaningful content.

[59] David B. Caruso, *Profane title fuels 'Bull' sales*, CINCINNATI ENQUIRER, June 17, 2005, at E7.

[60] HARRY G. FRANKFURT, ON BULLSHIT (2005).

[61] Caruso, *supra* note 59.

A. Clear Writing Requires Clear Thinking

It is axiomatic that "[c]lear thinking becomes clear writing."[62] Consequently, I was mildly disappointed that a writer for the AP could be so insensitive to the meaning of words. We are well aware that journalistic standards have fallen over the past decades, and that even basic good grammar cannot be taken for granted when watching the evening news,[63] but this exceeded our tolerance.

Professor Wines remembers with fondness, Bergen Evans, late professor of literature at Northwestern University.[64] One day in class, usually on Monday, Wednesday, or Friday at noon in the engineering building in the biggest auditorium on campus, Professor Evans digressed from his assigned subject matter and held forth on the differences between swearing, cussing, obscenity, profanity, and blasphemy. I was simultaneously stunned by my lack of clarity and awed by his analysis. This small epiphany took place over forty years ago, but it has stayed with me. Sloppy thinking has been around for millennia, but it had not historically "gone out" over the AP wire.

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[62] *See* WILLIAM ZINSSER, ON WRITING WELL 8 (7th ed. 2006) ("Clear thinking becomes clear writing; one can't exist without the other.").

[63] One evening on the local television news here in St. Joseph (KQTV) in June, 2009, Ms. Blevins, the local news anchor, reported that a man's leg "had been so badly severed that it had to be amputated." *KQTV News* (television broadcast June 2009). Of course, the word "severed" means "to remove (as a part) by or as if by cutting." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1073 (10th ed. 1994). The word "amputate" is defined as "to cut (as a limb) from the body." *Id.* at 40.

[64] Bergen B. Evans (1904 – 1978) was educated in English and American schools. *Bergen Evans (1904-1978) Papers*, N.W. U. ARCHIVES, http://files.library.northwestern.edu/findingaids/bergen_evans.pdf. He graduated Phi Beta Kappa from Miami of Ohio at the age of 19. *Id.* He held an M.A. from Harvard and attended Oxford as a Rhodes Scholar from 1929 to 1931. *Id.* He returned to Harvard where he received a Ph.D. in English Philology in 1932. *Id.* He taught at Northwestern University from 1932 to 1974. *Id.* He was the author of prize-winning short stories, wrote newspaper column for three years, edited anthologies, and wrote numerous books. *Id.* He was also a nationally known radio and television personality. *Id.* In 1957, he was awarded a Peabody Award for outstanding public service in broadcasting. His papers are in the archives at Northwestern University. *Id.*

Sloppy thinking is one of the root causes of poor writing. In the current vernacular, let us "try *and* do something" about it – rather than *try to do* something about it. "Hi, I'm Dorita and I'm going to be *serving you guys* tonight," has become a casually accepted form of address to a group of men and women. In the past fifty years, it seems that the English language has suffered general deterioration. This deterioration seems to have coincided with declines in high school graduate reading levels and general interest in reading.[65]

Sometimes politeness has provided an excuse to not think or talk or write about certain subjects unless one was willing to employ euphemisms.[66] Certainly, there is little wrong with euphemisms per se. However, when euphemisms and their rationale, politeness, provide cover for stubborn refusals to engage unpleasant or disquieting ideas rather than merely attempts at putting others at social ease, we have an issue that needs to be addressed. If the refusal to think about unpleasant things, e.g., war, suffering, poverty, deaths of non-combatant civilians, or the waste by-products of bovine digestion, is caused by an ideological or rigid close-mindedness, then society will be poorer; and public discourse – a necessary but not sufficient condition for a vibrant democratic republic – may be confounded or prevented. To quote Bergen Evans, "Freedom of speech and freedom of action are meaningless without freedom to think. And there is no freedom of thought without doubt."[67]

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[65] *See* Motoko Rich, *Study Links Drop in Test Scores to a Decline in Time Spent Reading*, N.Y. TIMES, Nov. 19, 2007, at E1, *available at* http://www.nytimes.com/2007/11/19/arts/19nea.html; Press Release, National Endowment for the Arts, Literary Reading in Dramatic Decline (July 8, 2004) (http://www.nea.gov/news/news04/ReadingAtRisk.html).

[66] In Victorian England, extreme sensitivity to anything sexual generated a common practice of referring to bulls as "male cows" and roosters as "he-hens"—a practice that we would find excessive by modern standards. *See* BURGES JOHNSON, THE LOST ART OF PROFANITY 139 (1948).

[67] BERGEN EVANS, THE NATURAL HISTORY OF NONSENSE 275 (Alfred A. Knopf, Inc. 1946).

B. Bullshit

Semantics is the "study or science of meaning in language forms, [especially] with regard to its historical change."[68] In the area of logic, semantics is "[t]he study of relationships between signs and symbols and what they represent."[69] The term "bullshit" is not found in my *American Heritage Dictionary*. It was probably considered as too coarse for inclusion. There are, however, two definitions of "bullshit" in my *Webster's Third New International Dictionary*.[70] Both are labeled "vulgar" – meaning not acceptable usage, "crude or offensive in language."[71]

"Bullshit" has two dictionary definitions: (1) as a noun, it is synonymous with nonsense, especially: "foolish, insolent talk – [usually] considered vulgar;" and (2) as an intransitive verb, it means "to talk bullshit – [usually] considered vulgar."[72] Yet, the term "bull session" is included in virtually all modern dictionaries, and it has been defined as "*n., Informal.* A random, informal group discussion."[73] In our experience, bull sessions seem to have been named that way because a "lot of bull" is thrown around; and since most of our colleagues and we do not follow rodeo, the term "bull" is short for digestive residue, not male bovines on the hoof. This may be a nice – even a delicate – distinction without much of a sharp rationale.[74]

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[68] AMERICAN HERITAGE DICTIONARY 1114 (2d College ed. 1991).

[69] *Id.*

[70] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 294 (Philip Babcock Gove, ed., 1993).

[71] *Id.* at 2566. Synonyms given are "earthy, indecent, and indelicate." The word "vulgar" comes from a Latin root meaning of the mob or common people, not refined or educated. *Id.*

[72] *Id.* at 294.

[73] AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 216.

[74] *See* FRANKFURT, *supra* note 60, at 34-38, for an extended analysis of the OED definitions of "bull session" and "shooting the bull." Professor Frankfurt concludes, "The very term *bull session* is, indeed, quite probably a sanitized version of *bullshit session*." *Id.* at 38.

According to Professor Frankfurt, the "essence of bullshit" is the "lack of connection to a concern with truth – this indifference to how things really are."[75] In other words, the speaker is "bullshitting" when "[h]er statement is grounded neither in a belief that it is true, nor as a lie must be, in a belief that it is not true."[76] Again, if further exposition were needed, Frankfurt declares, "The realms of advertising and of public relations, and the nowadays closely related realm of politics, are replete with instances of bullshit so unmitigated that they can serve among the most indisputable and classic paradigms of the concept."[77]

C. Profanity

Let us turn to another question: Is the term "bullshit" really "profane" – as asserted? What does "profane" mean? As an adjective, profane means "[s]howing contempt or irreverence toward God or sacred things; blasphemous."[78] As a transitive verb, "profane" means "[t]o treat with irreverence . . . [t]o put to an improper, unworthy, or degrading use; abuse."[79] The derivation of the term "profane" comes from the Latin word

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[75] *Id.* at 33-34.

[76] *Id.* at 33.

[77] *Id.* at 22. *See also* LAURA PENNY, YOUR CALL IS IMPORTANT TO US: THE TRUTH ABOUT BULLSHIT (2005). In a similar and very supportive vein, Ms. Penny laments:

> Since I started cobbling this book together, in 2001, America has been in war mode, and war and bullshit go together like peanut butter and jelly, gin and tonic, or Oceania and Eastasia and Eurasia. The word *bullshit* first appeared in a dictionary as American vulgar slang in 1915, but some etymologists argue that the term was popularized during the world wars, overtaking previous epithets like chickenshit. Moreover, I think that the vast bullshit-disseminating apparatus is a descendant of the war propaganda deployed in the service of both world wars.

Id. at 211.

[78] AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 988.

[79] *Id.*

"*profanus: pro-*, before + *fanum*, temple."[80] Profanity, properly understood, requires that something sacred be disrespected.[81] There is nothing sacred either in "bullshit" or about "bullshit."

When I taught at university in Hanoi, Vietnam in 1994 and 1995, I lived in a Swedish development villa in the Lake District at 115 Quan Tang Street near Ho Chi Minh's mausoleum.[82] For most of the Vietnamese people in Vietnam, Ho Chi Minh is considered both the father and the liberator of his country.[83] To explain that to a typical American, it might be well to say that he is both George Washington and Abraham Lincoln in their history. How to act "before the temple" might well be explained by reference to the level of respect required in front of Ho Chi Minh's mausoleum.

People waiting in line to view Ho's embalmed remains are required to stand quietly in line and are not, for example, allowed to put their hands in their pockets.[84] No one is allowed to walk on the sidewalk in front of the monument; pedestrians are required to either cross the street or get off the sidewalk and walk in the street – 24 hours per day.[85] This level of respect may give us an idea of the base root of "profane" from Roman times when one passed in front of a temple, say a temple to Jupiter, Janus, Diana, Minerva or Venus.

D. Swearing

When Professor Wines was growing up in Milwaukee, Wisconsin in the 1950s, almost everyone lumped all impolite

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[80] *Id.*

[81] "Profane" as a verb transitive means "to treat (something sacred) with abuse, irreverence, or contempt." MERRIAM-WEBSTER'S *supra* note 63, at 930. The synonym given is "desecrate" as in to *desecrate the temple. See id.*

[82] This material and some of the materials that follow are based on Prof. Wines' own recollections.

[83] *See, e.g.*, WILLIAM J. DUIKER, HO CHI MINH (2000); DAVID HALBERSTAM, HO (Alfred A. Knopf 1987).

[84] Recollection of author Wines.

[85] *Id.*

speech into the category of "swearing."[86] This is an outstanding example of mislabeling speech. To swear means to make or take an oath or "[t]o make a solemn declaration" or "[t]o promise or pledge with a solemn oath; vow."[87] Thus, if a child in grade school uttered a "shit" or a "fuck," the culprit was punished at school for "swearing"; and a note was sent home to that effect. In those days, the child would expect additional punishment, often more severe, when he (usually a boy)[88] got home. Even on Broadway, the catch-all label of "swearing" was found in plays; and also found in some Hollywood scripts. In the critically acclaimed 1955 play based upon the Scopes trial in Dayton, Tennessee, in 1925 called *Inherit the Wind*, the authors put these words into the dialogue for the Clarence Darrow character (played by Spencer Tracy in the 1960 movie), "I don't swear just for the helluvit. There are damn few words we can use to make ourselves understood, and we ought to use them all."[89] We like the play and the movie, which is based upon the play very much, but those lines do not ring true. Darrow had a keen intellect, was an ardent free-thinker, and was well read.[90] His inappropriate use of the term "swear" in a courtroom seems both improbable and out of character.

E. "Cussing" [Cursing]

The term "cussing" is frequently misused as a catchall term for all impolite or vulgar words in a similar manner to the misuse of the term "swearing" discussed above. In John Wayne's last movie, *The Shootist* (1976), Wayne plays John

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[86] *Id.*

[87] AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 1227.

[88] Women, in general, did not develop "potty mouths" until the 1960's – the "why" and "wherefore" of which are subjects well beyond the scope of this article. *See generally* PINKER, *supra* note 52.

[89] INHERIT THE WIND (United Artists 1960), adapting the 1955 play by Jerome Lawrence and Robert Edwin Lee. The play was based upon the 1925 Scopes trial in Dayton, Tennessee. The movie was produced and directed by Stanley Kramer.

[90] *See generally, e.g.*, IRVING STONE, CLARENCE DARROW FOR THE DEFENSE (Signet 1969) (1941); KEVIN TIERNEY, DARROW: A BIOGRAPHY (1979).

Bernard "J.B." Books, a notorious gunman who is dying of cancer.[91] The movie also stars a young Ron Howard (22 years old) as Gilliam Rodgers, the slightly delinquent adolescent son of a widow woman, Mrs. Rodgers (played by Lauren Bacall), who takes in boarders, including Books.[92] In one scene featuring Wayne and Howard, Howard's character (Gilliam Rogers) mutters "son of a bitch" in amazement at what Wayne has set up [the movie's climatic gun fight].[93] Wayne, who was trying to provide a positive male model for the boy, reprimands him with, "Don't cuss."[94] Rest easy, Duke, because the boy did not cuss – or "curse" as the proper term would be.[95]

Cursing or putting a curse on someone seems to have peaked as an art form in the late Middle Ages. Nowadays, a curse might be as mundane and uninspired as "damn it" or "aw, go to hell."

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[91] THE SHOOTIST (Paramount Pictures 1976), adapting a novel of the same name by Glendon Swarthout. *See* GLENDON SWARTHOUT, THE SHOOTIST (1986). Wayne's co-star in the film was Lauren Bacall, as the widow Rogers. THE SHOOTIST (Paramount Pictures 1976). The movie was produced by M. J. Frankovich and William Self, and it was directed by Don Siegal. *Id.* One review stated that it was "One of [John] Wayne's best and most dignified performances about living up to a personal code of honor. [James] Stewart and [Lauren] Bacall head excellent supporting cast." VIDEO HOUND'S GOLDEN MOVIE RETRIEVER 898 (Jim Craddock, ed., 2009).

[92] THE SHOOTIST (Paramount Pictures 1976).

[93] *Id.*

[94] *Id.* John Wayne knew when John Ford died (August 31, 1973) that he "would not be able to cheat death much longer." RANDY ROBERTS & JAMES S. OLSON, JOHN WAYNE: AMERICAN 613-14 (1995) (citations omitted). In the weeks after Ford's death of stomach cancer, Wayne suffered with depression. *Id.* at 614. Wayne's first bout with cancer had been in 1964; and, despite press to the contrary, he knew he was not invincible. *See id.* In 1974, John Wayne got so excited about Glendon Swarthout's novel that he tried to buy the movie rights to it. *See id.* Paramount beat him to it, but the studio hired Wayne to star in it. *Id.* Wayne insisted on some changes to the dialogue and the ending. *Id.* He wanted the movie to end on an upbeat note. *See id.* In a very real sense, "*The Shootist* is John Wayne's dialogue with death," spoken through J. B. Books." *Id.* The film character of Books may have gone out in a glorious gunfight, but "[u]nfortunately for Wayne, there was no real way to die of cancer in a blaze of glory. There wasn't even a way to do it neatly." *Id.* at 615.

[95] *See* AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 357. "Cuss," as an informal and intransitive verb is defined as "[t]o curse or to curse at"; and as a noun it means "a curse." *Id.*

By Middle Ages standards, those imprecations would hardly do at all. We might examine Shakespeare to see what a proper curse looks like. Macbeth declares, "Yet I will try the last: before my body I throw my warlike shield: lay on, Macduff; And damn'd be him that first cries 'Hold, enough!'"[96] This is a mild curse in a battle scene for our first example.

William Shakespeare wrote numerous other curses into his plays. One famous one appears in *Troilus and Cressida* in Act II, scene iii, starting at line 27:

> The common curse of mankind, folly and ignorance, be thine in great revenue! Heaven bless thee from a tutor, and discipline come not near thee! Let thy blood be thy direction till thy death! Then if she that lays thee out says thou art a fair corse [corpse], I'll be sworn and sworn upon't she never shrouded any but lazars. Amen.[97]

These words are directed at Patroclus, a Grecian commander, by Thersites, a scurrilous Grecian and "fool" or court jester to Ajax and subsequently to Achilles.[98]

A well-known curse is uttered by the dying Mercutio in Act III, scene i of *Romeo and Juliet* when he declared, "A plague o'c both your houses" (meaning the Capulets and the Montagues) three times before he died.[99] In one of his final personal actions,

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[96] WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH, act 5, sc. 8, *in* THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 1054 (William Aldis Wright ed., Doubleday & Co., 1936).

[97] WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA, act 2, sc. 3, *in* THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 833 (William Aldis Wright ed., Doubleday & Co., 1936). In archaic usage, a "lazar" was one afflicted by leprosy. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 994 (4th ed., 2006), *available at* http://www.yourdictionary.com/lazar. The dictionary etymology of this archaic word is as follows: "Middle English, from Old French *lazre*, from Late Latin *Lazarus*, Lazarus, the beggar full of sores in a New Testament parable (Luke 16:20)." *Id.*

[98] *See* SHAKESPEARE *supra* note 97, at 833.

[99] WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, act 3, sc. 1, *in* THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 333 (William Aldis Wright ed., Doubleday & Co., 1936).

William Shakespeare is reputed to have written these lines for the inscription upon his tomb at Holy Trinity Church in Stratford-upon-Avon, where he was buried on April 25, 1616:

> Good friend for Jesus sake forbear
>
> To dig the dust enclosed here!
>
> Blest be the man that spares these stones
>
> And curst be he that moves my bones.[100]

F. Obscenity

What is "obscene"? "Obscene" is defined as "[o]ffensive to accepted standards of decency or modesty."[101] Obscenity, it follows, is then defined as "[t]he state or quality of being obscene" or a second level definition is "[i]ndecency, lewdness, or offensiveness in behavior, expression, or appearance."[102] One suggested synonym for obscene is "shocking."[103] In a general sense, what is "obscene" is that which should *not* be seen; something that should be either covered or obscured, meaning to hinder discovery or knowledge of. Obscenity, as United States courts have held, is therefore a matter of a social judgment, a community standard.[104] What was permissible by social standards as a lady's dress in Victorian England[105] differs

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[100] Terry Kirby, *Writing is on the Wall for Crumbling Church Where Shakespeare is Buried*, INDEP., Mar. 7, 2005, *available at* http://www.independent.co.uk/news/uk/this-britain/writing-is-on-the-wall-for-crumbling-church-where-shakespeare-is-buried-756123.html.

[101] AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 858.

[102] *Id.*

[103] WEBSTER'S THIRD, *supra* note 70, at 1557.

[104] *See, e.g.*, Roth v. United States, 354 U.S. 476, 488-89 (1957) and subsequent cases.

[105] Young women at Vassar College during the Victorian Era were required to have their dresses "measured" so that no part of the ankle was visible. *See* JOHNSON, s*upra* note 66, at 139. In England, even the legs of a piano were covered in polite society. *See id.*

from the standards in New Guinea as well as the standards in modern New York City or among the Amish in Lancaster, Pennsylvania.[106]

Some of us, who are occasionally derided as "permissive liberals," often wonder why in American culture the human form is considered obscene but the rankest types of murderous violence, torture, and mayhem are considered to be appropriate television and movie fare for children. Lovemaking is considered obscene,[107] and some states forbid sex education in the public schools,[108] but decapitation is considered acceptable

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[106] Cole Porter caught the essence of this sentiment with the theme song to his 1934 Broadway musical, "Anything Goes." In part, the lyrics declare:

> In olden days a glimpse of stocking
>
> Was looked on as something shocking.
>
> But now God knows,
>
> Anything goes.
>
> Good authors too who once knew better words
>
> Now only use four-letter words
>
> Writing prose.
>
> Anything goes.

See Anything Goes Lyrics by Cole Porter, LYRICS DEPOT, http://www.lyricsdepot.com/cole-porter/anything-goes.html (last visited Jan. 13, 2011).

[107] *See, e.g.*, Mike Butts, *Library Board Member Resigns*, IDAHO PRESS-TRIBUNE, June 11, 2008, http://www.idahopress.com/news/article_7a3d8ca9-e723-59c1-b6c7-86c4bfb6cd4a.html; *Idaho Library Takes 2 Sex-ed Books Off Shelves*, FIRST AMENDMENT CENTER (June 7, 2008), http://www.firstamendmentcenter.org/news.aspx?id=20142 (reporting that the Nampa Public Library Board agreed to take *The New Joy of Sex* off the shelves based upon a resident's complaint).

[108] *See, e.g.*, IDAHO CODE ANN. § 33-1608 (West, Westlaw through 2010 Legis. Sess.).

> The legislature of the state of Idaho believes that the primary responsibility for family life and sex education, including moral responsibility, rests upon the home and the church and the schools can only complement and supplement those standards which are established in the family. The decision as to whether or not any program in family life and sex

entertainment. In some of our communities, a woman nursing her baby in public is considered outrageous and may subject her to arrest for indecent exposure.[109] Yet, a bullet exploding the head of a person is accepted virtually unchallenged in public entertainment forums. How did we get to this level of dangerous nonsense? I suspect that we have buried the Puritans, but they rule us yet from their graves.[110]

> education is to be introduced in the schools is a matter for determination at the local district level by the local school board of duly selected representatives of the people of the community. If such program is adopted, the legislature believes that:
>
> a. Major emphasis in such a program should be to assist the home in giving them the knowledge and appreciation of the important place the family home holds in the social system of our culture, its place in the family and the responsibility which will be there much later when they establish their own families.
>
> b. The program should supplement the work in the home and the church in giving youth the scientific, physiological information for understanding sex and its relation to the miracle of life, including knowledge of the power of the sex drive and the necessity of controlling that drive by self-discipline.
>
> c. The program should focus upon helping youth acquire a background of ideals and standards and attitudes which will be of value to him now and later when he chooses a mate and establishes his own family.

Id.

[109] Although an "overwhelming majority of states explicitly protect nursing mothers from legal sanction," in 2003, a nursing mother was indicted by a Texas grand jury for "lewd exhibition" and "inducing a child to engage in 'sexual conduct and sexual performance,'" for her appearance in a photo while breastfeeding her infant son. Lis Wiehl, *Indecent Exposure*, FOXNEWS.COM, http://www.foxnews.com/story/0,2933,200615,00.html (last visited Jan. 13, 2011).

[110] This is a paraphrase of the well-known (at least by legal scholars) line by the eminent legal historian F. W. Maitland that, "The forms of action we have buried, but they still rule us from their graves." F. W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES 2 (A.H. Chaytor & W.J. Whittaker eds., 1948).

G. Blasphemy

The term "blasphemy" has been defined as "[a] contemptuous or profane act, utterance, or writing concerning God."[111] The root word in the derivation of blaspheme (the verb) is Greek *blasphemos* meaning roughly "to speak of (God or something sacred) in an irreverent or impious manner."[112] In the seventeenth century in England, blasphemy was a felony, and the punishments were severe.[113] For instance, the Second Protectorate Parliament under Oliver Cromwell tried James Nayler for blasphemy in 1656.[114] James Nayler's trial was the most important blasphemy trial since that of Michael Servetus in Geneva, Switzerland more than a century earlier.[115]

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[111] AMERICAN HERITAGE DICTIONARY, *supra* note 68, at 186.

[112] *Id.*

[113] *See, e.g.*, LEONARD W. LEVY, BLASPHEMY: VERBAL OFFENSES AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE 238 (1993). Levy states that the history of blasphemy in seventeenth century Britain was "richly detailed," greatly varied, and "deadly." *Id.* By contrast, Levy's opinion of the blasphemy trials in the American colonies during the seventeenth century, "notwithstanding ferocious laws," was not much lengthier than "a history of the sex life of a steer . . . ." *Id.*

[114] *See, e.g.*, LEO DAMROSCH, THE SORROWS OF THE QUAKER JESUS: JAMES NAYLER AND THE PURITAN CRACKDOWN ON THE FREE SPIRIT (1996) (providing a detailed account of the 1656 blasphemy trial, conviction, and punishment of James Nayler).

[115] *See* LEVY, *supra* note 113, at 190-91, wherein Professor Levy wrote:

> Cromwell's second Parliament, which met in September 1656, was even more conservative than the first on religious matters. Of 460 who were elected, approximately one hundred were so objectionable that the Council of State . . . excluded them. About fifty more failed to take their seats . . .
>
> And this was the "Nayler Parliament," in the words of the historian Thomas Carlyle . . . .
>
> Carlyle's parody lacked understanding, because the Nayler case raised fundamental constitutional questions that received serious consideration by Parliament. Moreover, the case really tested the limits of tolerance in a Christian commonwealth that enjoyed a greater degree of free exercise of religion than England had ever known, and many members of Parliament, including some of the rabid ones,

H. Indecency

The term "indecency" can be defined as "the quality or state of being indecent."[116] The term "indecent" is then defined as "not decent; esp.: grossly unseemly or offensive to manners or morals."[117] "Decent" for our purposes is defined as "conforming to standards of propriety, good taste, or morality."[118] The synonym given for decent is "chaste."[119] An editor notes that the synonyms of "CHASTE, PURE, MODEST, DECENT mean free from all taint of what is lewd or salacious. . . . MODEST and DECENT apply esp. to deportment and dress as outward signs of inward chastity or purity . . . <*decent* people didn't go to such movies>."[120]

Thus defined "decent" and its reciprocal "indecent" are boundary crossers; they implicate both the domains of morality and of etiquette. Note that an indecent act is "offensive to

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> sought to rationalize their positions. *Not since the Servetus case had there been so important a blasphemy trial*, and this one produced the greatest debate on the meaning of blasphemy, and thus on the limits of toleration, in English history. . . . The key votes were close, and the issues so complex that many members could not make up their minds; almost one-third of the House abstained from voting.

Id. at 190-91 (emphasis added). Professor Levy also wrote that James Nayler's trial in 1656 was the "greatest blasphemy trial of the century." *Id.* at 177. A detailed treatment of the life, trial, and brutal execution of Michael Servetus on October 27, 1553 at Geneva can be found in LAWRENCE & NANCY GOLDSTONE, OUT OF THE FLAMES: THE REMARKABLE STORY OF A FEARLESS SCHOLAR, A FATAL HERESY, AND ONE OF THE RAREST BOOKS IN THE WORLD (2002). The Goldstones' tribute to Michael Servetus is framed in these words: "[T]he Servetus trial stands with other, similar affairs like the Dryfus case and the Scopes trial as a testament to courage of conscience. These cases become starting points at which other champions of justice and fairness may draw a line and say, 'This was wrong.'" *Id.* at 322.

[116] MERRIAM-WEBSTER'S, *supra* note 63, at 590.

[117] *Id.*

[118] *Id.* at 298.

[119] *Id.*

[120] *Id.* at 194.

manners or morals."[121] The distinction between manners and morals is significant. Good manners involve observance of the rules of etiquette, and etiquette is defined in relevant part as "the conduct . . . required by good breeding or prescribed by authority to be observed in social or official life."[122] Etiquette concerns itself with a number of rules derived from custom and set down by authorities such as Emily Post (1872-1960) to be followed by people concerned about making a good impression, usually on higher society.[123] Morals, by contrast, are the prima facie rules that people live by[124] and that "operationalize" their abstract values.[125] A choice can be said to impact the moral domain when it influences the quantity or quality of life for part of sentient creation.[126] The choice of forks to be used in eating the salad course;[127] the order in which toasts are offered at a wedding;[128] and the order in which guests are seated at a formal dinner[129] do not rise to that level of significance.

In his majority opinion in *FCC v. Pacifica*, Justice Stevens, for the Court, held that the George Carlin monologue played on

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[121] *Id.* at 590.

[122] MERRIAM-WEBSTER'S, *supra* note 63, at 399.

[123] *See, e.g.*, PEGGY POST, EMILY POST'S ETIQUETTE (16th ed. 1997) (an example of a leading publication on American etiquette).

[124] *See* WILLIAM A. WINES, ETHICS, LAW, AND BUSINESS 40 (2006).

[125] *See id. See also* William A. Wines & Nancy K. Napier, *Toward an Understanding of Cross-Cultural Ethics: A Tentative Model*, 11 J. BUS. ETHICS 831, 833 (1992).

[126] *See, e.g.*, William A. Wines, *Does Capitalism Wear a White Hat or Ride a Pale Horse? Physical and Economic Violence in America and a Survey of Attitudes Toward Violence Held by U.S. Undergraduate Business Majors Compared to Ohio Valley Quakers*, 33 S.U. L. REV. 103, 108-13 (2005) (suggesting that unnecessary harm to sentient creation so as to diminish the quality or quantity of its life may be morally indefensible).

[127] *See* POST, *supra* note 123, at 235-40.

[128] *Id.* at 498-99.

[129] *Id.* at 381-85 (providing information on the etiquette of formal dining at home).

an afternoon radio program was "indecent" but *not* "obscene" in the constitutional sense.[130]

I. OBFUSCATION FOR MODESTY AND GOOD MANNERS

Sometimes well-meaning people seek to make others comfortable, normally a sign of good manners,[131] by resorting to euphemisms or by obfuscating the clear but discomforting facts. At other times, some speakers will thoughtlessly protect their "political correctness" by resorting to various neutral terms, such as "pregnant persons"[132] instead of "pregnant women" or using the pronoun "their" for a singular antecedent. Finally, some spokespersons for the U.S. military establishment,[133] in a bid for political cover, may euphemistically coin less well-meaning inexactitudes such as the obscene euphemism "collateral damage" instead of "dead civilians" or "dead men, women and children;" and again use the term "enhanced interrogation techniques" instead of the more apt term "torture."[134]

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[130] *See* FCC v. Pacifica Found., 438 U.S. 726, 746-51 (1978).

[131] "It is never proper etiquette to give someone a piece of your mind. Hurting someone or making him or her feel embarrassed is a mark of bad manners." NAT SEGALOFF, THE EVERYTHING ETIQUETTE BOOK 247-48 (1998). Peggy Post, who married into the U.S. manners franchise, wrote, "Manners, ultimately, are a combination of common sense, generosity of spirit, and some specific know-how that helps us to do things thoughtfully and with care for one another." POST, *supra* note 123, at xvii.

[132] *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 166.098 (West, Westlaw through 2009 Legis. Sess.).

[133] The cabinet portfolio was for "The War Department" (established 1789) until after a 1947 re-organization and consolidation when, for a period of a little less than two years, it was called the "National Military Establishment." Martin Blumenson, *U.S. Department of the Army, in* 2 ENCYCLOPEDIA AMERICANA 361, 361 (2006); Harry L. Coles, *U.S. Department of Defense, in* 8 ENCYCLOPEDIA AMERICANA 627, 627 (2006). The NME (an unfortunate acronym) was re-named The Department of Defense under President Harry Truman in 1949. Blumenson, *supra*, at 261; Coles, *supra*, at 627-28. After the offensive war in Iraq started by President George W. Bush, perhaps, we ought to go back to using the original label for the sake of honesty.

[134] *See* United States v. Ghailani, No. S10 98 Crim. 1023 (LAK), 2010 U.S. Dist. LEXIS 109690, slop op. at *4, *69 (S.D.N.Y. Oct. 6, 2010) (denying prosecution right to call Hussein Abebe as a witness because his name was

There is an old story, perhaps apocryphal, about President Harry Truman and the etiquette of euphemisms. Bess Truman had some ladies over to the White House for a ladies luncheon. The President made a brief appearance and some short remarks. Afterwards, one of the ladies asked Bess why she did not stop

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extracted from defendant "under duress"). The term used by the Attorney General's lawyers was "enhanced interrogation methods" – which has been defined to include waterboarding. *See id.* at *3. Human Rights First lawyer, Daphne Eviatar, called Ghailani's interrogation "torture." Press Release, Human Rights First, Statement of Daphne Eviatar as Ghailani is Sentenced to Life (Jan. 25, 2011) (http://www.humanrightsfirst.org/2011/01/25/statement-of-daphne-eviatar-as-ghailani-is-sentenced-to-life).

A comprehensive discussion of the problems inherent in using so-called "harsh interrogation" or "enhanced interrogation techniques" is contained in Michael John Garcia, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CONG. RES. SERVICE, Jan. 26, 2009, http://www.fas.org/sgp/crs/intel/RL32438.pdf. Torture is a war crime under the 1949 Geneva Convention. *Id.* at 8 n.54. Torture violates the U.N. Convention Against Torture, signed by the U.S. and 140 other countries. *Id.* at 1. Torture violates 18 U.S.C. §§ 113, 114, 1112 (b), and 1111(b). *Id.* at 8. The U.S. Supreme Court has held that Common Article 3 of the Geneva Conventions applies to the conflict with Al Qaeda. *See* Hamdan v. Rumsfield, 548 U.S. 557, 631-32 (2006).

Two memorandums, one from DOJ and the other from DOD, in 2002 attempted to make a critical distinction between general and specific intent so as to create a "loophole" for CIA operatives to engage in "harsh" or "enhanced" interrogation techniques. Garcia, *supra* at 9. Congress passed laws in 2006, popularly known as the "McCain Amendments," in an effort to forestall U.S. torture of detainees. *Id.* at 12-13. Several of the techniques used by the CIA against detainees (loud music for prolonged times, sleep deprivation, and use of prolonged exposure to cold air) were found by U.N. Committees investigating Israeli interrogation of Palestinians to be "completely unacceptable," i.e., they constitute violations of CAT. *Id.* at 20-22.

ABC News reported that CIA operatives had used prolonged sleep deprivation, cold and wet cells, and water boarding on detainees. Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABCNEWS.COM (Nov. 18, 2005), http://abcnews.go.com/Blotter/Investigation/story?id=1322866. CIA sources described the list as "Enhanced Interrogation Techniques" and said they were instituted in March 2002. *Id.* As a direct result of these techniques, one detainee died in Afghanistan; and two died in Iraq. *Id.*

the President from saying "manure" so often. Bess is reported to have replied, "Oh dear, it took me forty years to get him to say 'manure.'"[135] One man's euphemism may be another's crude expression.

II. "VOID FOR VAGUENESS:" THE LEGAL REQUIREMENT OF CLARITY

Although parts of the law are imprecise, as indicated above in FCC usage, there are other parts of American law where clarity, or a minimum level of specificity, is mandated. One of those areas is imbedded in the requirements of due process under the Fourteenth Amendment. The precise doctrine is known as "void for vagueness."[136] In U.S. constitutional law, the Fourteenth Amendment provides, in part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law."[137] Part of due process has been held to include adequate and specific notice of what is prohibited by criminal statutes. If someone were to be convicted of violating a statute that was so vague as to defy common understanding, such an act would be a denial of due process. It would render other aspects

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[135] There are several variations of this story. A similar but slightly different one was published by *Time* magazine in its obituary for President Truman, who died at 88 in 1973. *See, e.g.*, *The Presidency: The World of Harry Truman*, TIME, Jan. 8, 1973, *available at* http://www.time.com/time/printout/0,8816,910501,00.html.

[136] In many decisions over the years, the Court has therefore invalidated under the Due Process Clauses of both the Fifth and Fourteenth Amendments any law that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 557 (1992) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926))."Moreover, a 'vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.'" LIEBERMAN *supra*. (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

[137] U.S. CONST. amend. XIV, § 1.

of individual rights hollow. How could advice of counsel help in a situation where the offense was so broadly construed that the elements of it could not be ascertained? Likewise, the right to confront witnesses or the right to know the nature of the charges would be gutted.

A. The Vagueness Standards

The doctrine of "vagueness'" has, according to one respected commentator, been "most frequently employed as an implement for curbing legislative invasion of constitutional rights *other* than that of fair notice," although there is "an actual vagueness component in the vagueness decisions."[138] As others have noted decades earlier,

> [T]he use of the vagueness doctrine as a tool to protect free speech illustrates a modern role of several of the "procedural" guarantees noted here: . . . there has been a growing Court practice to protect highly valued substantive rights via the oblique technique of tailoring (and sometimes distorting) procedural safeguards.[139]

Such valued substantive rights for which the vagueness doctrine provided protection included, inter alia: (a) the right to be free from criminal conviction without presentation of evidence;[140] (b) right to make a non-violent civil rights protest without being convicted of conducting a parade without a permit when the law governing permits gave the city administrators

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[138] Anthony G. Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court: A Means to an End*, 109 U. PA. L. REV. 67, 87-88 (1960), *reprinted in* SELECTED ESSAYS ON CONSTITUTIONAL LAW, 1938-1962, 560, 576 (Comm. of the Ass'n of Am. Law Schools ed.,1963), *quoted in* GERALD GUNTHER & NOEL T. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 911 (8th ed. 1970) (emphasis added).

[139] GUNTHER & DOWLING, *supra* note 138, at 911-12.

[140] *Id.* at 912 (citing Thompson v. City of Louisville, 362 U.S. 199, 206 (1960)).

"virtually unbridled and absolute power";[141] and (c) fairness of juvenile court proceedings.[142]

B. Maxim: Use Plain Words in Their Ordinary Sense

"*[A] penal law [should not be construed] by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of law . . . .*"[143] The "correct and ordinary meaning" of the words of the law, then, are the boundaries for enforcement of criminal laws as well as for agency regulations that are enforceable with penalties – such as license revocation, license non-renewal, or monetary fines. It would seem to follow that the federal enabling statues would prescribe also the limits and boundaries of enforcement and compliance regulations. An agency regulation that exceeds the scope of the enabling statute is, per se, invalid in the same way that laws of physical science decree that water in its natural state cannot rise higher than its source.

Let us take an extreme hypothetical for the purpose of discussion: *assume* that the Federal Communications Commission held the appropriate A.P.A. hearings and then issued a rule that outlawed all on-air references to "the expelling or passing of digestive gases." Assume further that in the implementing regulations for this new rule, the FCC defined "the expelling or passing of digestive gases" as "any public statement, position statement, or news release from a local,

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[141] *Id.* at 1187 (citing Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149-50 (1969)).

[142] *Id.* at 915 (citing *In re* Gault, 387 U.S. 1 (1967)).

[143] United States v. Sheldon, 15 U.S. 119, 121 (1817) (emphasis added). The full quotation is:

> It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law, particularly when it is confirmed by the interpretation which the legislature has given to the same expression in the same law.

Id. at 121-22.

state or national branch of the American Civil Liberties Union." The FCC defended its rule as being within the mandate it received from Congress to regulate interstate transmission of "obscene, lewd, lascivious, filthy, or indecent" communications with the intent to annoy another under Section 223 of the Communications Act of 1934, as amended.[144] The definition in the new regulation could not withstand judicial scrutiny because it has no relationship to the common, ordinary meaning of the words in the rule. In sum, the new definition would be void as unconstitutional under the First and Fourteenth Amendments.

The Telecommunications Act of 1996[145] is another in a line of congressional acts that are descended from the Radio Act of 1927[146] and the Communications Act of 1934[147]. The two antecedent laws attempted to prohibit "obscene, indecent, or profane" language and "obscene, lewd, lascivious, filthy, or indecent" language respectively. In the 1996 Act, Congress shifted gears in response to court decisions and constituent complaints. The Telecommunications Act of 1996, seen in one light as a resurrection of the 1986 Indecency Statute, inserted the traditional language of "obscene, indecent, profane et al." into the harassing, annoying etc. communications section and dropped the "profane" terminology.[148] Next, Congress outlawed [fines and/or two years in prison] "knowingly" permitting any telecommunications facility to be used to transmit any communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[149]

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[144] *See* 1968 Amendment to the Communications Act of 1934, Pub. L. No. 90-299, 82 Stat. 112 (1968).

[145] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996).

[146] *See* Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102.

[147] *See* 1968 Amendment to the Communications Act of 1934.

[148] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133 (1996).

[149] *Id.* at 134.

Other attempts by cultural conservatives to modify the FCC's mandate have had mixed results. On December 8, 2003, Representative Doug Ose (R., Sacramento) introduced H.R. 3687, ("The Clean Airwaves Act") designed to amend section 1464 of title 18 of the United States Code to provide for punishment for the use of eight specific terms as "profane" if used in public broadcasting.[150] His co-sponsor was Representative Smith (R. Texas).[151] The terms as listed in the House Bill included "the words 'shit', 'piss,' 'fuck', 'cunt', 'asshole', and the phrases 'cock sucker', 'mother fucker', and ass hole', compound use (including hyphenated compounds) of such words and phrases . . . ."[152]

The occasion that prompted Representative Ose's action was the decision by the Enforcement Division of the FCC not to punish television stations that showed rock star Bono (the U2 frontman) using an expletive (F-word as a gerund) at the Golden Globe Awards in January 2003.[153] The Associated Press in its article noted that the "language of the bill, the Clean Airwaves Act, is far saltier than Bono's comment."[154] Congressman Ose said, "I regret you gotta [sic] be specific, but apparently there's someone out at the FCC who needs that kind of direction."[155] In October 2003, the FCC's enforcement bureau had issued a decision on Bono's remarks; and that decision was being reviewed by the five FCC commissioners following an appeal by a L.A.-based watchdog group calling itself the "Parents Television Council."[156] Congressman's Ose's proposed

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[150] H.R. 3687, 108th Cong. (2003). On January 15, 2004, the bill was referred to the Subcommittee on the Constitution, where it died. *Bill Summary & Status*, THOMAS (LIB. CONG.), http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.03687: (last visited Apr. 2, 2011).

[151] *See* H.R. 3687.

[152] *Id.*

[153] Associated Press, *Congressman Proposes Banning 8 Crude Words from Airwaves*,FIRST AMENDMENT CENTER (Dec. 16, 2003), http://www.firstamendmentcenter.org/news.aspx?id=12353.

[154] *Id.*

[155] *Id.*

[156] *Id.*

legislation might be understood as an attempt to influence the FCC's review. The FCC's decision was based on the manner in which Bono used the expletive; it was not used in a sexual sense but as an intensifier.[157]

Since the failure of the 2003 Clean Airwaves Act to become law, at least one expert commentator has published observations on the proposed legislation. Harvard psychology professor Steven Pinker wrote: "Unfortunately for Rep. Ose, the bill would not have closed the loophole after all, because it fails to specify the syntax of Bono's expletive properly (to say nothing of its misspelling of *cocksucker*, *motherfucker*, and *asshole*, or its misidentifying them as 'phrases')."[158]

U.S. Senator Sam Brownback (R., Kansas)[159] sponsored a bill in the Senate that ultimately became law (bill number S. 193) –

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[157] *Id.* (citing a letter from FCC Chairman Michael Powell and unspecified statements by the FCC).

[158] PINKER, *supra* note 52, at 360.

[159] Sam Brownback has been serving as the 46th Governor of Kansas since January 10, 2011. He gave up his seat in the U.S. Senate to be elected Governor in November 2010. Brownback and the Kansas legislature face a $550 million budget shortfall for the new fiscal year beginning July 1. *See* Associated Press, *Brownback Sworn in as Kansas' New Governor*, KTKA (Jan. 10, 2011), http://www.ktka.com/news/2011/jan/10/brownback-sworn-kansas-new-governor/. Senator Brownback is a Christian conservative who has historically supported the death penalty and opposed abortion. *See Sam Brownback on the Issues*, ONTHEISSUES.ORG, http://www.ontheissues.org/Sam_Brownback.htm (last visited Sept. 21, 2010).

He has hawkish views on the wars in Iraq and Afghanistan even though he has never personally served in the military. *See id.* In 2002, Senator Brownback officially converted to the Roman Catholic faith. Chris Suellentrop, *The Rev. John McCloskey*, SLATE MAGAZINE (Aug. 9, 2002 at 11:03 A.M.), http://www.slate.com/id/2069194.

His conversion was facilitated by Opus Dei priest Father C. John McCloskey. *Id.* Brownback received his law degree from the University of Kansas and then worked as a broadcaster. *See* Rachel Kapochunas, *Brownback, Set to Launch GOP White House Bid, Will Fight from the Right*, NY TIMES, Jan. 18, 2007, http://www.nytimes.com/cq/2007/01/18/cq_2142.html. He started his political career in 1986 as the Kansas Secretary of Agriculture. *Id.* In 1994, he was elected to the U.S. House of Representatives where he served two years before jumping to the Senate by winning a special election to fill Bob Dole's vacated seat. *See id.*

The Broadcast Decency Enforcement Act of 2005.[160] The purpose of this bill was to greatly increase the penalties for violations by television and radio broadcasters of the prohibitions against transmitting obscene, indecent, and profane language under the Communications Act of 1934, as amended.[161] The maximum penalty for a single violation or each day of a continuing violation was set at $325,000.[162]

All forms of expression are not equal before the First Amendment.[163] Although framed by James Madison and the founders in the absolute ["Congress shall make no law . . ."], the First Amendment protections of speech and press have never been understood as absolute prohibitions.[164] Defamation (libel and slander), seditious speech, and hard-core pornography have never had any judicial protection under the First Amendment. The issue we wish to raise is whether hard-core pornography

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[160] Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006); S. 193, 109th Cong. (2005).

[161] *See* § 2, 120 Stat. 491.

[162] *Id.*

[163] *See, e.g.*, FCC v. Pacifica Found. 438 U.S. 726, 745-46 (1978). Justice Stevens writing for the majority declared, "But the fact that society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 745. Later in the same opinion, Justice Stevens wrote, "Although [certain] words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected." *Id.* at 746. Stevens then proceeds to say that the amount of protection varies with the context. *Id.* at 747 (citing Cohen v. Cal., 403 U.S. 15, 25 (1971)). In *Cohen*, the phrase "Fuck the Draft," written on the back of a jacket, was held to be protected political speech. *Cohen*, 403 U.S. at 16, 26.

[164] The dissenting opinions of Justices Douglas and Black urging an absolute prohibition during the years of the Earl Warren Court are probably best understood as a political effort to stake out ground to the left of the Court. This was likely done in order to move the Court more rapidly in the direction of increasing liberties associated with freedom of expression. Seen in that light, Douglas and Black were moderately effective. The author rejects any suggestion that either Black or Douglas would have written such opinions if they had been writing for the Court. Both Justices were much too savvy for that possibility. Any Supreme Court Justice has much more literary freedom in dissent than when the same Justice is writing legal precedent for the Court. *See* Stone, *supra* note 90 at 275 n.8.

can be metamorphosed into "offensive [by community standards descriptions of] sexual or excretory activities or organs" merely by Congressional fiat[165] and judicial acquiescence?[166]

Let us examine the issue of vagueness for a start. Which community decides what is offensive – as a matter of law? How did we get into the business of community standards anyway? Does the use of community standards not mandate that a television show cannot be legally broadcast in one town but can be in another? This result is not only offensive to common sense, but it also flies in the face of the purposes of the 1934 Act as stated in Section 1.[167] And ultimately is not the issue of "offensiveness" a matter of good taste, discretion, and etiquette – rather than an appropriate area for laws and legislation? Moreover, community standards – any community – are moving targets. That might actually, by itself and without any further help, qualify this statute as vague and indefinite.

III. THE A.P.A. REQUIREMENT OF ADMINISTRATIVE DUE PROCESS

The Administrative Procedure Act (APA) was enacted in 1946 to standardize procedures used by federal agencies in rule

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[165] Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 134 (1996), *amended by* PROTECT Act of 2003, Pub. L. No. 108-21, § 603, 117 Stat. 650, 687(2003). *See also* Stone, *supra* note 90, at 283-85 (discussing the category of low value speech).

[166] *See* FCC v. Fox Television Stations, Inc. 129 S. Ct. 1800, 1812 (2009). Justice Scalia wrote: "Moreover, the agency's reasons for expanding the scope of its enforcement activity were entirely rational. It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words . . . ." *Id.* Justice Scalia further states "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission." *Id.* at 1813.

[167] Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064. "[T]he purpose of regulating . . . communication . . . [is] to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ." *Id.*

making and adjudication.[168] Only a handful of significant amendments have been made to this Act over the decades.[169] However, the APA is still the basis of most of the requirements governing the conduct of federal administrative agencies, such as the Federal Communications Commission.[170]

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person may be deprived of "life, liberty, or property, without due process of law."[171] This principle of due process applies to all levels of state and federal governmental action – including the actions of the FCC.[172] Due process is not a fixed or arbitrary standard.[173] It is, however, a flexible term because the requirements of due process differ depending upon the context in which it is applied.[174] For instance, the extent of due process and the formality of the hearings required to satisfy an administrative hearing on a

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[168] Administrative Procedure Act, ch. 324 , 60 Stat. 237 (1946) (codified as amended at 5 U.S.C.A. §§ 551-96, 701-06 (West, Westlaw through P.L. 111-312)).

[169] The APA was re-codified in 1966. *See* Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 381-88, 392-93 (1966). The Freedom of Information Act was added to the provisions of section 552 in 1966, *see id.* at 383; and in 1976, as part of the Government in the Sunshine Act , a ban was added on ex parte communications to decision makers in formal proceedings, *see* Pub. L. No. 94-409, § 4, 90 Stat. 1241, 1246 (1976). In 1978, the APA was amended to substitute the term "administrative law judge" (ALJ) for "hearing examiner." Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183 (1978). In 1990, a few provisions were added by the Administrative Dispute Resolution Act. *See* Pub. L. No. 101-552, § 4, 104 Stat. 2736, 2737-45 (1990). For detailed treatment of amendments to the APA section by section, see an annotated version of the U.S. Code. *See, e.g.*, 5 U.S.C.A. §§ 551-96, 701-06 (West, Westlaw through P.L. 111-312).

[170] *See* 5 U.S.C. § 706.

[171] U.S. CONST. amends. V; XIV, § 1.

[172] *See* WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES & EXPLANATIONS 109 (3rd ed. 2009).

[173] ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS: IN A NUTSHELL 201 (5th ed. 2006) ("[D]ue process rights in administrative law can vary enormously, depending on the context in which they are asserted.").

[174] *See id.*

child's suspension for ten days from a public school[175] would be much less than that required before the Social Security Administration could terminate a person's Social Security disability payments.[176]

Most agency decisions made under rule-making powers are reviewable in the courts unless Congress has provided specifically in the enabling statute that an agency's decisions are non-reviewable.[177] When rules and regulations are subject to judicial review, the review is usually initiated by a party that considers itself adversely affected.[178] Initiation in a rule-making situation is usually done by filing a lawsuit in federal court alleging, inter alia, that the agency did not follow APA procedures on notice and hearings; that the regulation exceeded the scope of the enabling statute; or that the regulation is unconstitutional.[179] Normally a regulation will be upheld if all of the above challenges are rebutted and if the agency did not act in an "arbitrary and capricious" manner in issuing the regulation.[180]

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[175] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975). *See also* FUNK & SEAMON, *supra* note 172, at 129 (discussing the *Goss v. Lopez* decision).

[176] *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976). *See also* FUNK & SEAMON, *supra* note 172, at 126-28 (discussing the *Mathews v. Eldridge* decision).

[177] GELLHORN & LEVIN, *supra* note 173, at 360-61.

[178] 5 U.S.C.A. § 702 (West, Westlaw through P.L. 111-312) (using the terms "[a] person . . . adversely affected or aggrieved by agency action").

[179] Title 5, section 706 of the United States Code is entitled "Scope of Review" and states the six grounds ((2)(A) through (2)(F)) under which the reviewing court may set aside agency action, findings, and conclusions. 5 U.S.C.A. § 706 (West, Westlaw through P.L. 111-312 (excluding P.L. 111-259, 111-267, 111-275, 111-281, 111-296, and 111-309)). Subsection (2)(D) addresses agency failure to follow required procedures; subsection (2)(C) deals with exceeding authority; and subsection (2)(B) specifies actions that are contrary to the Constitution. *Id.*

[180] *Id.* at § 706 (2)(A).

IV. JUDICIAL REVIEW UNDER "ARBITRARY AND CAPRICIOUS" STANDARD

If there is judicial review under the APA, the court reviewing an agency's action will examine the record pursuant to U.S.C. title 5, section 706.[181] The court is required to give deference to and a broad discretion for the expertise of the administrative agency involved.[182] If there is sufficient factual information to support the agency's action in the record and no clear error, the agency's action will stand.[183] If not, the action will be reversed by the reviewing court. This review standard is designated as the "arbitrary and capricious" test.[184]

Note that this is not a full and detailed review of the record.[185] Under the arbitrary and capricious test, the reviewing court may not substitute its judgment for the agency's judgment just because it would have reached a different result based upon the record.[186] Instead, the judicial review is limited to a reading of the record to assure that the agency had substantial evidence to support its result.[187] The essence of the disagreement between the majority and the dissents in *FCC vs. Fox Television Stations*[188] is whether the agency's decision to resurrect a power it had claimed in 1978 prior to the *Pacifica* decision and then renounced[189] for almost three decades amounts to the making of

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[181] See *id.* at § 706.

[182] *See* GELLHORN & LEVIN, *supra* note 173, at 74-79.

[183] *See* 5 U.S.C.A. § 706.

[184] *See, e.g.*, FUNK & SEAMON, *supra* note 172, at 312-22; GELLHORN & LEVIN, *supra* note 173, at 102-07.

[185] *See, e.g.*, FUNK & SEAMON, *supra* note 172, at 312-22; GELLHORN & LEVIN, *supra* note 173, at 102-07.

[186] FUNK & SEAMON, *supra* note 172, at 314 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977)).

[187] *See* FUNK & SEAMON, *supra* note 172, at 314.

[188] *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1817-18 (2009).

[189] Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 449 (2d Cir. 2007) (citing WGBH Educ. Found., 69 F.C.C.2d 1250 (1978)).

a new rule that would require notice and opportunity to be heard before it could become final under APA procedures.[190] From a neutral perspective and embracing the spirit of due process embodied in the APA, the authors believe that the FCC's decision in *FCC vs. Fox Television Stations* seems to amount to rule-making and requires observance of the notice-and-opportunity-to-be-heard process.

V. TOWARD A MODEST CONCEPTUAL FRAMEWORK FOR FCC REGULATIONS

Let us review how we arrived at the *FCC v. Fox Television Stations* decision. Public broadcasting licenses are issued freighted with the burden of the public interest in promoting the general health and welfare of our society.[191] In 1978, the U.S. Supreme Court upheld the penalties for playing George Carlin's monologue on the "Seven Dirty Words" over the air in afternoon (primetime) programming.[192] In 1996, the Congress addressed, in the Telecommunications Act, the issue of obscene, indecent, and profane language by outlawing [fines and/or two years in prison] "knowingly" permitting any telecommunications facility to be used to transmit any communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ."[193] Thus, the U.S. Congress reduced the scope of punishable language to two types of bodily functions and two sets of body organs. The concepts of profanity and blasphemy were sent to the dust heap of history.

On March 15, 2006, the FCC issued several orders; the largest of which was called the "Omnibus Order" and contained six Notices of Apparent Liability ("NALs") for indecency

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[190] *See Fox Television Stations*, 129 S. Ct. at 1817-18.

[191] *See* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981).

[192] FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978).

[193] Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 STAT. 56, 133-34 (1996), *amended by* PROTECT Act of 2003, Pub. L. No. 108-21, § 603, 117 Stat. 650, 687 (2003).

violations.[194] The FCC also reaffirmed its decision to fine CBS $550,000 for Janet Jackson's "wardrobe malfunction" during the 2004 Super Bowl halftime show.[195] The assessed forfeiture against CBS for the 2004 Super Bowl entertainment is still under judicial review.[196]

The context for this spasm of sudden activity by the F.C.C seems to have been kicked off by the re-election bid in 2004 of President George W. Bush, who ran for office espousing "compassionate conservatism," evangelical Christianity, and family values. The FCC had come under pressure from various groups for not doing more to promote family values – as defined in the context of a GOP conservative and evangelical Christian agenda. Members of Congress, as noted above, seemed particularly harsh in their criticisms of the FCC's approach to "dirty words" on television.

A. Is it really "About the Children"?

Justice Scalia, writing for the majority, implied that the fines assessed against FOX and CBS are being done to preserve the innocence of our children.[197] Yet, Justice Scalia declared in the

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[194] Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664 (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-17A1.pdf. The forfeitures imposed by the six NALs in the Omnibus Order totaled over $350,000. *Id. See also* Press Release, FCC, FCC Releases Orders Resolving Numerous Broad. Television Indecency Complaints (Mar. 15, 2006) (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264344A1.doc).

[195] Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 6653 (2006) (denying Petition for Reconsideration of Forfeiture Order), *vacated*, CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009) (remanding to the Third Circuit to consider in light of FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009)).

[196] *See, e.g.*, John Eggerton, *FCC, CBS Continue to Battle over Janet Jackson Reveal*, Broadcasting & Cable (Dec. 27, 2010 9:22:46 AM), http://www.broadcastingcable.com/article/461513-FCC_CBS_Continue_To_Battle_Over_Janet_Jackson_Reveal.php. The U.S. Court of Appeals for the Third Circuit is currently reviewing its earlier decision, after the matter was remanded back to it from the U.S. Supreme Court. *Id.*

[197] *See Fox Television Stations*, 129 S. Ct. at 1806, 1808. In *Fox Television Stations*, Justice Scalia cited *Pacifica* for the proposition that "the First

same opinion that "scant empirical evidence can be marshaled" for the harmful effects of broadcast profanity on children.[198] Getting carried away with his own rhetoric, he further asserts that those who want FCC rulings to be based upon evidence and studies are "insist[ing] upon obtaining the unobtainable."[199] Then, Justice Scalia concludes his minor-league *tour-de-force* with this piece of thunder, "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity."[200]

Justice Scalia's grand assertion that empirical studies are unobtainable is somewhat puzzling in view of the dissent's citation of two such studies.[201] In short, what empirical studies

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Amendment allowed Carlin's monologue to be banned in light of the 'uniquely pervasive presence' of the medium and the fact that broadcast programming is 'uniquely accessible to children.'" *Id.* at 1806 (citation omitted). Later in his opinion, Justice Scalia declared that "Commission action was necessary to 'safeguard the well-being of the nation's children from the most objectionable, most offensive language.'" *Id.* at 1808 (citation omitted). At the end of his opinion, Justice Scalia took issue with the Second Circuit's observation that children today "likely hear this language far more often from other sources than they did in the 1970's when the Commission first began sanctioning indecent speech." *Id.* at 1819 (quoting Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461 (2007)) (internal quotations omitted). In Justice Scalia's view, the "Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children." *Id.*

[198] *Id.* at 1813.

[199] *Id.*

[200] *Id.*

[201] *Id.* at 1839. Justice Breyer, in dissent, pointed out that a 2004 article in a Mass Communication journal found two studies that conclude it is unlikely that children under 12 years of age suffer any negative effects from hearing sexual language and innuendo. *Id.* (citing Barbara K. Kaye & Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 Mass Comm. & Soc'y 429, 433 (2004). The Kaye and Sapolsky article relies on two 1992 studies to support their proposition that children under the age of 12 are not affected by vulgarities on television. Kaye & Sapolsky, *supra* at 433. In his dissent, Justice Breyer concluded that the FCC's

that exist are opposed to the conclusion that the FCC and the five-member majority of the Court embrace. In that light, Justice Scalia's discourse on his concern for the children is shown for what it is: mere political cant. One popular theme, at the time and one relating to various issues seemed to be: "Please do not confuse me with facts (about WMD, links to al-Qaeda, abstinence-only sex education, or global warming), my mind is [already] made up."

B. The coarseness of U.S. public dialogue

On the other hand, Justice Scalia seems to be on more solid footing when he cites with approval findings that political discourse in the U.S. has gotten coarser over the three decades since the Court's decision in *Pacifica*.[202] There are numerous treatises documenting and discussing the coarsening, dumbing-down, and increasing rudeness in America's public discourse since the 1960's.[203] One might even be tempted to remind

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"failure to discuss this or any other such evidence, while providing no empirical evidence at all that favors its position, must weaken the logical force of its conclusion." *Fox Television Stations*, 129 S. Ct. at 1839.

[202] *See, e.g.*, William A. Wines & Michael P. Fronmueller, *American Workers Increase Efforts to Establish a Legal Right to Privacy as Civility Declines in U.S. Society: Some Observations on the Effort and its Social Context*, 78 NEB. L. REV. 606 (1999) (arguing that civility in the United States has declined). *See also* Winkler, *supra* note 47.

[203] *See, e.g.*, MARK CALDWELL, A SHORT HISTORY OF RUDENESS: MANNERS, MORALS, AND MISBEHAVIOR IN MODERN AMERICA (1999); DAVID CALLAHAN, THE CHEATING CULTURE: WHY MORE AMERICANS ARE DOING WRONG TO GET AHEAD (2004); PAUL FUSSELL, BAD OR, THE DUMBING OF AMERICA (1991); LYNNE TRUSS, TALK TO THE HAND: THE UTTER BLOODY RUDENESS OF THE WORLD TODAY, OR SIX GOOD REASONS TO STAY HOME AND BOLT THE DOOR (2005). Circuit Judge Pooler, writing for a three-judge panel of the Second Circuit in *Fox Television Stations*, observed:

> Similarly, as NBC illustrates in its brief, in recent times even the top leaders of our government have used variants of these expletives in a manner no reasonable person would believe referenced 'sexual or excretory organs or activities.' See Br. of Intervenor NBC at 31-32 & n.3 (citing President Bush's remark to British Prime Minister Tony Blair that the United Nations needed to 'get Syria to get Hezbollah to stop doing this shit' and Vice President Cheney's widely reported

Justice Scalia of his own political party's leaders using the very words he finds so indecent.[204]

C. An ethical dilemma of second kind?

The cases of FOX Television Stations and CBS can be viewed as presenting an ethical encounter (or dilemma) of the second kind[205] to the Federal Communications Commission, if it were disposed to see them in those terms. The two ethical principles that conflict seem to be that of the First Amendment's freedom of speech and that of the duty to promote the general welfare by tamping down the coarseness in American public discourse. We get to this dilemma once we have passed the due process issues raised under the APA and past the highly charged emotionalism invoked by cries of "The children! Save the children!" As has been observed, there are no automatic solutions for ethical encounters of the second kind.[206]

D. Exploring potential solutions to the dilemma

As we explore solutions to the dilemma presented by fleeting expletives, we are struck by the seeming insignificance of this issue in contrast to the vast wasteland[207] that is the content of

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'Fuck yourself' comment to Senator Patrick Leahy on the floor of the U.S. Senate).

Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 459-60 (2d Cir. 2007). In a Huffington Post essay, a U.C.L.A. Law School Professor excoriated Justice Scalia for his contributions toward coarsening public discourse, noting Justice Scalia's "infamous hand-gesture" just a few months ago when a reporter asked him about the effect of his religion on his judicial opinions. Winkler, *supra* note 47.

[204] *See* Winkler, *supra* note 60; *Fox Television Stations*, 489 F.3d at 459-47.

[205] *See, e.g.*, WINES, *supra* note 124, at 6.

[206] *Id.*

[207] The term was coined by Newton Minnow, the FCC Chairman, under President Kennedy in the context of television programming in the early 1960's. *See* Newton N. Minnow, Speech to the National Association of Broadcasters in Washington, D.C.: Television and the Public Interest (May 9, 1961), *available at* http://www.americanrhetoric.com/speeches/newtonminow.htm. Programming seems to have deteriorated since then.

much television and cable programming in the U.S. A seriously divided U.S. Supreme Court gives testimony to the difficulties with which legal mechanisms can be wielded to solve what are essentially social problems. Moreover, whether or not vulgar words depicting sexual or excretory organs and/or byproducts are prohibited on network broadcasting during primetime with exceptions for news seems to be an exercise in whether or not to dump water from a tea cup in the face of a social tsunami. Our point is that a narrow preoccupation with "dirty words"[208] might be understood as generally sophomoric given the size and scope of our nation's public discourse problems. Research on pervasive desensitization to violence by having our culture's entertainment saturated in violence and violent images[209] gets ignored while George Carlin's seven words get scrutinized. The messages of "you are not okay" sent by commercial speech go unchallenged, as do its damaging messages to adolescent girls in our society who have unmatched levels of eating disorders. Yet, unchallenged, commercial messages (advertising) fill up most of the cultural space in our society. Do we really want to spend our regulatory capital on outlawing so-called "dirty words" that many of us picked up at scout camp or learned from Mom or Dad?

E. Tentative Proposal for a First Amendment Presumption

1. Review of Article's Main Points. During "family viewing time"– a concept from the 1960's[210] -- when one TV per

[208] One problem that seems to go beyond the scope of this article is whether the seven dirty words somehow become sanitized if we were to translate them into French, i.e., *merde.*. *See* note 10 *supra*. *See also* note 202 *supra*.

[209] *See, e.g.*, Wines, *supra* note 126.

[210] The so-called "family viewing time" was voluntarily adopted by the National Association of Broadcasters (NAB) into the NAB TV Code in 1975. *History of Television*, HIGH-TECH PRODUCTIONS, http://www.high-techproductions.com/historyoftelevision.htm (last visited Oct. 31, 2010). The time before 9 p.m. during the broadcasting day was supposed to be devoted to all members of the family. *Id.* In February 1970, Action for Children's Television (hereinafter "ACT"), a Massachusetts non-profit corporation, submitted several proposals to the Federal Communications Commission (FCC) to improve children's television programming. Action for Children's Television v. FCC, 564 F.2d 458, 461 (D.C. Cir. 1977). These

household was more common[211] than it is now[212] and when more families actually did watch television together,[213] the FCC required that profanities or obscenities not be broadcast. Current FCC definitions of proscribed words are now limited to words that describe sexual or excretory organs, their functions,

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proposals centered mainly on eliminating all sponsorship and commercial content from such programming, and requiring all licensees to provide a minimum amount of age-specific programming for children. *Id.* Because of wide-spread public support for the ACT proposals, the NAB voluntarily adopted some of those proposals. *Id.* at 463-64. The FCC accepted ACT's submission as a petition for rulemaking, and invited public comments on the proposal. *Id.* at 462. Public response to the FCC Notice was "overwhelming" (by its own description), and the FCC received over 100,000 comments and held hearings during 1972 and 1973. *Id.* at 463. The FCC decided not to adopt certain rules proposed by ACT. *Id.* at 465. ACT filed a petition for review of the FCC decision. *Id.* at 461. The U.S. Circuit Court of Appeals for the District of Columbia affirmed the FCC's decision. *Id.*

[211] In 1945, there were probably fewer than 10,000 television sets in the U.S.A., but five years later, the number of television sets was up to about 6 million. *Number of Televisions in the U S* (Glenn Elert ed.), HYPERTEXT BOOKS, http://hypertextbook.com/facts/2007/TamaraTamazashvili.shtml (last visited Feb. 22, 2010). A decade later, in 1960, there were approximately 60 million television sets. *Id.* In June 1955, about one-third of all U.S. households had no television set; 65% had one set; and 2% had two or more sets. *Id.* By May 1959, those numbers had changed to 14 per cent had no television set; 78 per cent of U.S. households had one television set; and 8 % had two or more sets. *Id.* By 1960, 87.3 % of U.S. households had at least one television set. Andy Serwer, *Movie Theaters: Extreme* Makeover, CNNMONEY.COM (May 23, 2006), http://money.cnn.com/2006/05/19/magazines/fortune/theater_futureof_fortune/.

[212] In 2001, 98.2% of households in the U.S. had at least one television set. The average number of television sets per home in 2001 was 2.4 sets. *See* HYPERTEXT BOOKS, *supra* note 211; Eric Olsen, *T.V. U.S.A.*, BLOGCRITICS (Mar. 18, 2004, 11:36 AM), http://blogcritics.org/video/article/tv-usa/.

[213] The days of families gathering in front of the television set to take in an evening show after supper are about over, according to a Swedish study. *See* Galia Myron, *Not Suitable for Family Viewing*, DEMO DIRT (Jan. 21, 2010, 4:13 PM), http://www.demodirt.com/index.php/global-trends/334-not-suitable-for-family-viewing. The study found that social viewing, watching television together, accounted for 45% of viewing in 1999. *Id.* By 2008, it had dropped to 37 percent. *Id.* Experts agree that the same trends are found in the U.S. *Id.*

or their by-products.[214] This raises some issues as to whether the "plain meaning" of ordinary words is being subverted by use of "technical definitions" and whether this itself violates due process.[215]

The available research clearly indicates that children are not learning so-called "dirty words" from exposure to fleeting profanities on television.[216] Therefore, one of the rationales (and the most emotionally powerful one) for the FCC rules on profanities during prime time (i.e., we must protect the children) fails factually to be the case. Moreover, the FCC provides an exception/exemption for the news under its rules for "fleeting profanities."[217] Such an exception seems to indicate that fleeting exposure is okay so long as it is news but not if it is found in live entertainment.

2. Let's Modify an Existing Model for Regulating Speech. Under FCC guidelines for the regulation of commercial speech promoting a lawful product (such as the ban on cigarette advertising on television), the U.S. Government must show the following to uphold its limitations on such speech:

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[214] Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-34 (1996), *amended by* PROTECT Act of 2003, Pub. L. No. 108-21, § 603, 117 Stat. 650, 687 (2003).

[215] The general rule is that an agency "interpretation" of legislative language is exempt from notice and comment requirements. However, an "agency is required to use notice and comment if it wishes to adopt an interpretation that is inconsistent with a *prior interpretation of a legislative rule*." GELLHORN & LEVIN, *supra* note 173, at 318 (citing Shell Offshore, Inc. v. Babbitt, 238 F.3d 622 (5th Cir. 2001)). The argument is that the FCC with U.S. Supreme Court help in *Pacifica* "interpreted" the Federal Communications Law, and that now the FCC in the *Fox Television Stations* and *CBS* cases is "re-interpreting" its order. S*ee generally* FCC v. Pacifica Found., 438 U.S. 726 (1978); "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, N.Y., 59 F.C.C. 2d 892 (1976). Both "plain meaning be given to plain words" and "technical meaning be given to technical words" are common interpretive rules. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 122 n.38 (2d ed. 1977) (citing RESTATEMENT OF CONTRACTS, §§ 230, 233).

[216] *See* sources cited *supra* note 201.

[217] *See Pacifica Found.*, 438 U.S. at 732-33 (citing "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, Station WBAI(FM), New York, N.Y., 59 F.C.C. 2d 892 (1976)).

> A. The Government has a compelling state interest in regulating such speech; and
>
> B. The regulation promotes that State interest; and
>
> B. The rules do so in the least intrusive manner possible; and
>
> D. No other alternative approach can be found that would do so without regulating the subject speech/expression.

We think that a new regimen is overdue for First Amendment jurisprudence, at a minimum in the cases involving regulation of so-called profanities and so-called "fleeting profanities," to wit:

There should be a *strong presumption in favor of free expression* (and possibly all other First Amendment freedoms); and the Government, which obviously includes all federal agencies such as the FCC, must *demonstrate a compelling governmental interest* in regulating such expression and that interest cannot be advanced in any other fashion; and the regulation or outright ban (potentially) must be the least intrusive manner for accomplishing the Governmental objective.

In banning certain types of speech, this burden has historically been carried. For instance, we would *not* necessarily want anyone to have to *re-litigate* the need to punish or ban:

> A. Speech or expression that incites others to riot; and
>
> B. Defamatory speech or expression that is slanderous or libelous; and
>
> C. The so-called "Fighting Words" case.[218]

A compelling governmental interest in regulating speech or expression would normally fall into several well-established categories, such as:

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[218] Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (upholding the constitutionality of a state statute prohibiting "fighting words," i.e., face-to-face words "likely" to cause a breach of the peace).

A. Avoiding harm to the general welfare;

B. Preventing or reducing crime;

C. Avoiding injury to persons or property; and

D. Promoting social stability or public health.

Banning vulgar speech about sexual or excretory organs, their functions, or their by-products should be re-examined and tried from the beginning. Whether such a ban actually promotes a significant governmental interest is questionable, perhaps even doubtful. Such an issue may be resolved by the ruling of which party bears the burden of proof. In this setting, we urge that the First Amendment be assisted by assigning free expression a strong presumption against regulation.[219]

Moreover, promoting good manners (polite speech) does not rise to the level of a significant public interest. We can, on prime time, without penalty talk about the malodorous residue of digestive assimilation.[220] But we cannot without penalty utter

[219] When the founders wrote "Congress shall make no law abridging freedom of speech or of the press," we find it highly reasonable to declare that such freedom, at a minimum, is entitled to a presumption in its favor. If we continue to grant "deference" to FCC rulings, especially in close cases, this deference will decide the case. That is a result we find difficult to reconcile with the spirit of freedom and civil liberties embraced by James Madison, Thomas Jefferson, Samuel Adams, and the other founders. *But see* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1814 (2009) (Scalia, J.) ("But even in the absence of evidence, the agency's predictive judgment (*which merits deference*) makes entire sense." (emphasis added)).

[220] *See* Robert B. Carney, Rear Admiral and Chief of Staff to Admiral William F. "Bull" Halsey, Commander in Chief of U.S. Navy Forces in the South Pacific, "TALK", General Order to all U.S. Naval Forces in the South Pacific (Mar. 27, 1943) (on file with author, whose father served on Admiral Haley's staff at that time). It stated:

> Prolonged absence from normal restraining and refining influence is resulting in an increase of senseless obscenity that does no credit to the ship, the offending individual, nor the home and stock from which he hails. The nature and character of our enemies are such that considered use of such terms as "son-of-a-bitch" and "bastard" are not without considerable merit at appropriate times; but continuous loud and pointless reference to the malodorous residue of digestive assimilation certainly shows a dreary lack of

the word "shit."[221] We can, likewise, discuss sexual congress between consenting adults, but we cannot say "fuck."[222] Consequently, it seems clear that ideas are not being prohibited and views are not taboo, but certain words are taboo[223] and subject to huge (with the 2006 amendments), even confiscatory, penalties.

Protecting the children is the one powerful argument advanced in favor of this FCC regulation.[224] Yet, what research we can find suggests strongly that exposure to fleeting expletives is *not* a cause of children learning vulgar words.[225] Consequently, since fleeting exposure on television and radio does not teach children foul language, the FCC regulation fails to promote the valid interest of protecting our society's youth.

> imagination, and as a means of emphasis is not convincing. By the same token, repetitious and wholly inappropriate mention of the procreative function adds nothing to conversational clarity.
>
> That sort of language is not useful, forceful, expressive, nor amusing. I hope that I will in future hear less about bodily excretions, such manifest absurdities as rain squalls or swabs indulging in the sexual act, and illegitimate and depraved shipmates of canine descent on the distaff side.

[221] *See Pacifica Found.*, 438 U.S. at 750-52.

[222] *See id.*

[223] Note that Rear Admiral Carney's order indicated clearly that use of obscenities (as he termed them) reflected badly of the speaker, his family of origin, and his ship. Carney, *supra* note 220. This indication of "reflecting badly" is a mark of poor manners and bad etiquette – not criminal or civil law violations. *Id.* The words are "taboo" – meaning they carry social stigma, not necessarily legal sanctions. *Id.*

[224] *See, e.g.*, 18 U.S.C.A. § 1464 (West, Westlaw through P.L. 111-311); *Pacifica Found.*, 438 U.S. at 729-30 (Stevens, J.), 755-62 (Powell, J., concurring in part) (restricting decision to playing of the recording in the afternoon – when chances of children listening were greatest); Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 4 FCC Rcd. 8358, 8358 para. 2 (1989).

[225] *See* Kaye & Sapolsky, *supra* note 201 (citing two 1992 studies that found it unlikely that children under the age of 12 years suffer negative effects from hearing sexual language and innuendo). *See also* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1839 (2009) (Breyer, J., dissenting) (citing Kaye & Sapolsky, *supra*).

Additionally, we could ask the courts to take judicial notice of the low and vulgar language that is the staple of most playground exchanges – even at the grade school level.

Linguistic theory has for a long time held that words are merely symbols. They are the map, but they are not the territory.[226] Symbols, as such, have no meaning. We give them meaning when we place them in a context and provide an intention.

Thus, "x" – a common symbol – can be set equal to any number of things or other symbols. For instance, let x equal y. Let x, this time, equal a verb transitive for sexual congress between two consenting adults. In an intimate, romantic setting with candlelight and music playing softly in the background, one of two lovers whispers to the other, "I want to 'x' you." In that context, the intent is not offensive but one of desire that is hopefully reciprocated. But in a hot and angry exchange between two politicians, one shouts at the other, "I'm going to 'x' you over and completely 'x' up your life." That statement is threatening and offensive and might even rise to the level of a terroristic threat. In light of the above argument, the U.S. Supreme Court's decision that the word "fuck" is always sexual[227] is just plain wrong.

Perhaps not as plainly and maybe not as clearly, the same court's decision that the FCC did not violate the requirements of the APA is just as wrong.

VI. FREE SPEECH PRESUMPTION AND AMERICAN HISTORY

> "*The censorial power is in the people over the Government, and*

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[226] "[T]he map is *not* the territory . . . ." S. I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 19 (3d ed. 1972). For work done in this field of study, *see* ALFRED KORZYBSKI, SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS (4th ed. 1958).

[227] *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812-13 (2009). Justice Scalia's majority opinion cited the statement of the FCC decision to the effect that "because the F-word 'is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language,' . . . '[i]ts use invariably invokes a coarse sexual image.'" *Id.* at 1808. Initially, the FCC had held that Bono's singular use of the f-word in the Golden Globe Awards program was an intensifier rather than a literal descriptor. *Id.* at 1807.

Not in the Government over the people."

--James Madison (1794)[228]

James Madison, later the fourth President of the United States, was the author of the Bill of Rights.[229] In relevant part, the First Amendment is straightforward: "*Congress shall make no law . . . abridging the freedom of speech, or of the press . . .* ."[230] In multiple dissents from various U.S. Supreme Court decisions[231] over the years, Justices Hugo Black and William O. Douglas argued that "no law" meant literally "no law."[232] We believe that this activity by two superb Justices can best be understood as a quasi-bargaining tactic designed to pull the Court to the left and create larger civil liberties under free expression for the American people.

However, the point that Justices Black and Douglas make should not be discarded. Although the First Amendment is not absolute,[233] the First Amendment was not intended as a "first suggestion" either. Under traditional administrative law, decisions of federal agencies are entitled to *special deference*.[234] The underlying philosophy seems to be that the agency has *special knowledge* in its administrative jurisdiction.[235] This

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[228] 4 ANNALS OF CONG. 934 (1794), *quoted in* CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA xi (2007).

[229] *See* FINAN, *supra* note 228, at 214.

[230] U.S. CONST. amend. I (emphasis added).

[231] *See, e.g.*, Stone, *supra* note 90, at 275 n.8 (citing, inter alia, Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting); HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 43-63 (1968)).

[232] *See* Stone, *supra* note 90, at 275.

[233] *See, e.g.*, Stone, *supra* note 90, at 274-76.

[234] *E.g.*, Fed.-Mogul Corp. v. United States, 63 F.3d 1572, 1579 (Fed. Cir. 1995); Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd., 830 F.2d 331, 333-34 (D.C. Cir. 1987).

[235] *See Fed.-Mogul*, 63 F.3d at 1582.

would be true if we were talking about the I.C.C. and trucking regulations, or about the F.T.C. and unfair and deceptive trade practices, or the SEC and securities law violations. When it comes to the FCC and the First Amendment, no deference is justified, and none should be awarded. Granting judicial deference to the FCC in the area of the First Amendment commits two unwarranted acts: (a) it puts the federal judiciary, who are the experts and natural guardians of the First Amendment, in a subordinate role to political appointees; and (2) it *reverses* the natural burden of proof that should be imposed on any attempt by any government agency to regulate, outlaw, or censor free expression – as indicated in 1794 by James Madison.[236]

Professor Steve Shriffin, a leading First Amendment scholar, has written that there is "no general framework rooted in first amendment principle," but "[f]or the most part, the first amendment social engineer just balances the relevant interests and comes to a decision."[237] Our suggestion for resolution of these cases is that the Supreme Court establish a "strong presumption" in favor of free expression that the FCC must overcome with proof of a significant governmental interest that is being directly advanced by the restriction or outlawing of certain words or ideas. As in the *Central Hudson* case, the FCC or any other branch or agency of the federal government should have to prove:

> (a) That, if the speech is otherwise lawful, the FCC/government has
>
> (b) a significant governmental interest;
>
> (c) that is directly advanced by the restrain on expression;

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[236] *See supra* note 228 and accompanying text.

[237] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 13 (1990). *See also* Stone, *supra note* 90, at 276 ("[T]here is no unified field theory of the First Amendment – no single test that can apply to all cases.").

> (d) and that interest can be advanced in no less restrictive manner. [238]

Otherwise, the presumption in favor of free expression (which we are urging) will result in the law/regulation being stricken for violating the First Amendment. We need to "put some teeth" into the words, "Congress shall make no law abridging the freedom of speech."[239]

As Justice William Brennan wrote in 1964:

> Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.[240]

Without changing the meaning at all, *we can substitute terms and get*: "Obscenity and indecency can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."[241]

CONCLUSION

Many legal scholars agree that law and morality overlap.[242] Indeed, from that perspective, one would say that the tension about exactly where to draw the line between the legal

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[238] *See* Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[239] U.S. CONST. amend. I.

[240] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269, (1964) (citations omitted).

[241] *Cf. New York Times*, 376 U.S. at 269.

[242] *See, e.g.*, EDMUND CAHN, THE MORAL DECISION: RIGHT AND WRONG IN LIGHT OF AMERICAN LAW (1955).

enforcement of morality and the social enforcement of moral norms is the place where many legislative and court battles are fought. Not infrequently, that front line in the culture wars is a battle zone characterized by more heat than light. Good manners or etiquette has seldom, if ever, had the force of law with the possible exception of places in public regulation where "indecent" speech or behavior are subject to penalty; and then we need to have the added weight of "or morals"[243] in order to make a solid case for punishing indecencies.

If we wish to be clear in the values and the etiquette that we seek to model and to instill in our children, we need to understand the differences between swearing, cursing, profanity, obscenity, and mere vulgarity. If we are not clear on what these things are and on the differences between them, how can we possibly explain, teach, or model our values to our children or students? At another level, words are "the skin of a living thought."[244] How do we achieve clarity in our thinking or in our public discourse without having clarity and correctness in our vocabulary? Once we achieve greater clarity of understanding as to what the terms "profane" and "obscene" mean, for instance, we will have a better chance of making a rational and morally justifiable decision on what things are truly profane and truly obscene. Moving our society in such a direction as part of its education might even qualify as progress in our nation's struggle with ignorance.

EPILOGUE

Dateline Fox News Channel, August 20, 2009, 8:38 AM, CST (Fleeting Expletives)

During a live broadcast of the Scottish government's release of the Lockerbie bomber, as the bomber was driven away by the Scottish police to the Glasgow airport, an angry member of the crowd distinctly shouted, "He's a fucking monster!" This exclamation was clearly heard during the broadcast without

[243] *See supra* definition of "indecent" in notes 116-30 and accompanying text.

[244] Towne vs. Eisner, 245 U.S. 418, 425 (1918).

bleeping. The commentators immediately apologized to the audience for the protester's use of the "f-word," but the first blow *was landed during prime viewing hours*[245]

Associated Press (AP) details "Potty-mouth behavior" on Tennis Courts (Sept. 17, 2009)[246]

At Wimbledon, the very epitome of high society and formal manners, two modern tennis stars tarnished their images with outbursts of barracks language.[247] *Roger Federer, during his championship match with Juan Martin del Potro, uttered the English slang term for fecal matter.*[248] *He was fined $1,500.*[249] *His "take" (including bonuses) was $1.1 million for runner-up.*[250]

Serena Williams was fined $10,000 for her tirade against a line judge.[251] *She threatened to "shove a f---ing tennis ball down someone's f---ing throat."*[252] *In an outburst of 1950's style euphemisms, the AP writer described both episodes as instances of "swearing."*[253]

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[245] *Lockerbie Bomber coverage* (Fox News Channel television broadcast Aug. 20, 2009).

[246] Chris Mottram, *Federer Fined for Dropping S-Bomb*, SBNATION (Sept. 17, 2009, 4:44 PM), http://www.sbnation.com/2009/9/17/1035347/federer-fined-for-dropping-s-bomb.

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] Mottram, *supra* note 246.

[252] *Id.*

[253] *Id.; see supra* notes 86-90 and accompanying text (discussing "swearing").

Figure 1

Broadcast Regulation and Descriptive Text of Prohibited Communication

	Obscene	Indecent	Profane	Lewd	Lascivious	Filthy	Patently Offensive	Sexual Activities or Organs	Excretory Activities or Organs
Wireless Ship Act of 1910*									
Radio Act of 1912**									
Radio Act of 1927	†	†	†						
Communications Act of 1934	† ‡	† ‡	†	‡	‡	‡			
Telecommunications Act of 1996	¥	¥		¥	¥	¥	¥	¥	¥

*No mention of communication content **Only prohibited false distress signals and "malicious interference"
†--By radio ‡--By telephone ¥--By "telecommunications device" (or "facility")