

**THE FCC AND PROFANE LANGUAGE: THE
LUGUBRIOUS LEGACY OF A MORAL PANIC AND A
GROSSLY OFFENSIVE DEFINITION THAT MUST BE
JETTISONED**

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ABSTRACT

This Article examines the Federal Communications Commission's ("FCC") regulation of profane language since 2004. That year is when the FCC, facing a moral panic, radically altered its profanity tack. Unlike obscenity and indecency, profanity—a third content category over which the Commission holds statutory authority—is seldom analyzed.

This Article argues that the FCC's current definition of profane language not only strips its meaning from its religious roots, but also: (1) is both unconstitutionally vague and overbroad; and (2) violates core First Amendment principles against censoring speech that merely offends. The U.S. Supreme Court's reinvigorated emphasis on safeguarding offensive expression in cases such as *Matal v. Tam* and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* further portends the unconstitutionality of the FCC's profanity classification.

In brief, when the Commission abruptly gutted its old definition of profane language fifteen years ago, that term became an empty vessel. The FCC then poured into it an unconstitutionally nebulous effort to censor sexual speech that is neither obscene nor indecent. This Article concludes that Congress should jettison the FCC's statutory power over profane language if the Commission fails to readily articulate a new definition that is narrow and clear.

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INTRODUCTION

Shortly after Ajit Pai became chairman of the Federal Communications Commission¹ (“FCC” or “Commission”) in January 2017,² he observed that “the law that is on the books today requires that broadcasters keep it clean so to speak.”³ The FCC’s Enforcement Bureau now can put that law to the test. That is because the Parents Television Council⁴ (“PTC”), which boasts a long history of “[h]olding the FCC’s metaphorical feet to the fire to enforce the law,”⁵ filed a complaint against a Washington, D.C.-area television station over a May 2018 episode of ABC’s *Good Morning America* that featured the word “fuck.”⁶

As Melissa Henson, the PTC’s program director, described it in a letter to Rosemary Harold, chief of the FCC’s Enforcement Bureau,⁷ *Good Morning America* broadcast “a prerecorded piece about disgraced movie mogul Harvey Weinstein.”⁸ The segment incorporated an audio clip of SiriusXM satellite radio host Howard Stern interviewing actress Gwyneth Paltrow about an encounter she had with Weinstein.⁹ In that clip, Stern—referencing Paltrow’s then-boyfriend, actor Brad Pitt—exclaims “[w]hen you tell Brad, Brad says, ‘Fuck this

¹ The FCC “regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories. An independent U.S. government agency overseen by Congress, the [C]ommission is the United States’ primary authority for communications law, regulation and technological innovation.” *About the FCC: What We Do*, FED. COMM. COMMISSION, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Mar. 1, 2018). The FCC was created in 1934. See 47 U.S.C. § 151 (2012) (providing an overview of the FCC’s authority and mission).

² See *About the FCC: Leadership, Ajit Pai*, FED. COMM. COMMISSION, <https://www.fcc.gov/about/leadership/ajit-pai> (last visited Mar. 1, 2019) (noting that Pai “was designated Chairman by President Donald J. Trump in January 2017”).

³ John Eggerton, *FCC’s Pai on Broadcast TV: ‘Keep It Clean’*, BROAD. & CABLE (Feb. 16, 2017), <https://www.broadcastingcable.com/news/fccs-pai-broadcast-tv-keep-it-clean-163412>.

⁴ The Parents Television Commission describes its mission as protecting “children and families from graphic sex, violence and profanity in the media, because of their proven long-term harmful effects.” *The PTC Mission*, PARENTS TELEVISION COUNCIL, <http://w2.parentstv.org/main/About/mission.aspx> (last visited Mar. 1, 2018).

⁵ Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with Its President*, Tim Winter, 33 HASTINGS COMM. & ENT. L.J. 293, 295 (2011).

⁶ John Eggerton, *PTC Files Indecency Complaint Against Sinclair’s WJLA Over ‘GMA’ F-Bomb*, BROAD. & CABLE (June 11, 2018), <https://www.broadcastingcable.com/news/ptc-files-indecency-complaint-against-sinclairs-wjla-over-gma-f-bomb>.

⁷ Letter from Melissa Henson, Program Director of the Parents Television Council, to Rosemary Harold, Chief of the Enforcement Bureau of the Federal Communications Commissions (May 30, 2018) (on file with author).

⁸ *Id.*

⁹ *Id.*

guy I'm going to go over and confront him.”¹⁰ Henson's missive, copied to all five FCC commissioners, pointed out that Stern's utterance of fuck “occurred during a taped and edited package segment. The network had every opportunity to edit the word out before it went to air.”¹¹

What can the FCC do about such language? It lacks the power to forbid or censor speech on the broadcast airwaves in advance of publication.¹² That rule squares with the time-honored First Amendment¹³ doctrine that prior restraints on expression are presumptively unconstitutional.¹⁴ Yet when it comes to subsequent punishments¹⁵—sanctions imposed on over-the-air broadcast stations for sexually explicit expression they have already carried¹⁶—the FCC wields a regulatory trident.

Specifically, Congress vests the Commission with statutory authority under 18 U.S.C. § 1464 to punish broadcasters via license revocation,¹⁷ monetary forfeitures¹⁸ and cease-and-desist orders¹⁹ for carrying three types of content: obscenity, indecency and profanity.²⁰ Although, the FCC

¹⁰ *Id.*

¹¹ *Id.*

¹² The Communications Act of 1934 provides that:

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

47 U.S.C. § 326 (2012).

¹³ The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁴ *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”).

¹⁵ *See generally Alexander v. United States*, 509 U.S. 544, 550 (1993) (noting “the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments”); *WXIA-TV v. Georgia*, 811 S.E.2d 378, 386 (2018) (“In the context of the First Amendment, the courts traditionally have distinguished between prior restraints and subsequent punishments, and they usually have subjected prior restraints to more exacting scrutiny.”).

¹⁶ *See generally Barrett v. Walker City Sch. Dist.*, 872 F.3d 1209, 1223 (11th Cir. 2017) (noting that subsequent punishments “regulate a given type of speech by penalizing the speech only *after* it occurs”) (emphasis in original).

¹⁷ 47 U.S.C. § 312(a)(6) (2012).

¹⁸ 47 U.S.C. § 503(b) (2012).

¹⁹ 47 U.S.C. § 312(b) (2012).

²⁰ *See* 18 U.S.C. § 1464 (2012) (“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.”).

punishes stations for airing obscenity at all times of the day,²¹ it penalizes them for indecency and profanity only during a sixteen-hour period stretching from 6 a.m. to 10 p.m.²² Of these three categories, profanity—in the parlance of our times²³—is the ugly (and ignored) stepchild. It also is this Article’s focus.

While the United States Supreme Court has addressed both obscenity²⁴ and indecency,²⁵ it has not directly analyzed the

²¹ See 47 C.F.R. § 73.3999(a) (2018) (“No licensee of a radio or television broadcast station shall broadcast any material which is obscene.”).

²² See 47 C.F.R. § 73.3999(b) (2018) (“No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”); *Obscenity, Indecency & Profanity—FAQ*, FED. COMM. COMMISSION, <https://web.archive.org/web/20170204143249/https://www.fcc.gov/reports-research/guides/obscenity-indecency-profanity-faq> (last visited Mar. 1, 2019) (“FCC decisions also prohibit the broadcast of profane material between 6 a.m. and 10 p.m.”).

²³ The ugly stepchild, although perhaps politically incorrect, is a common phrase in the news media. See, e.g., Rachel Abrams, *Can Taco Bell Architect Duplicate Success at Chipotle?*, N.Y. TIMES, Feb. 16, 2018, at B3 (“Instead of being the ugly stepchild, Taco Bell became frequently cited as one of the top chains in the Yum Brands empire, which also includes Pizza Hut and KFC.”); Gary Stoller, *Hotel Schools Are in With Inn Crowd*, USA TODAY, Jan. 8, 2008, at 1B (“Hospitality schools have long been regarded as the ugly stepchild on many campuses where teaching students how to serve hotel and restaurant customers has been perceived as inferior to other academic fields.”); Michael Upchurch, *Real-Life Drama of Homicide Detectives*, WASH. POST, June 12, 2016, at B8 (quoting journalist Del Quentin Wilber for the proposition that “[h]igh crime rates and underperforming schools have cast Prince George’s County as the ugly stepchild of the Washington region”).

²⁴ The U.S. Supreme Court held more than sixty years ago that obscenity is not protected by the First Amendment’s guarantee of free speech. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”). The current three-part test for obscenity, which was fashioned forty-five years ago, asks the factfinder to decide if the content at issue: (1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; (2) is patently offensive, as defined by state law; and (3) “lacks serious literary, artistic, political or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

²⁵ The U.S. Supreme Court first upheld the FCC’s regulatory authority over indecent speech in the face of a First Amendment challenge in 1978. *FCC v. Pacifica Found.* 438 U.S. 726, 728 (1978) (holding that “§ 326 does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting”). The Court there confronted the issue of “whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.” *Id.* at 729. The Court concluded that the First Amendment does not bar the FCC from regulating indecent speech in particular contexts and circumstances, such as the time of day and composition of the audience, when it would constitute a nuisance. *Id.* at 750–51. In reaching its decision, the Court emphasized that “broadcast media have established a uniquely pervasive presence in the lives of all Americans.” *Id.* at 748. It also focused on the fact that “broadcasting is uniquely accessible to children, even those too young to read.” *Id.* at 749. On this latter factor, the Court noted that indecent language on the broadcast airwaves can “enlarge[] a child’s vocabulary in an instant.” *Id.* In 2012, the Supreme Court passed on an opportunity to reconsider its holding in *Pacifica Foundation*, finding it “unnecessary . . . to address the constitutionality of the current indecency policy.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 258 (2012). The Court advised the FCC, however, that it was “free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.” *Id.* at 259. In brief, the Court in *Fox Television Stations*

FCC's power over, or its current definition of, profane language. Scholarly articles concentrating on the FCC's definition of profanity, in turn, are scant and now dated.²⁶

This Article examines the FCC's problematic efforts to conceptualize profane language since it abruptly announced in 2004 it would no longer "limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation" ²⁷ Blasphemy "is generally defined as the act of insulting or showing contempt or a lack of reverence for God or something considered sacred."²⁸ To paraphrase a song title by the band R.E.M., the FCC's definition of profane language lost its religion fifteen years ago.²⁹

That switch was somewhat odd, at least at first blush, because the historical nexus between profanity and blasphemy is longstanding.³⁰ For example, the Supreme Court of South Carolina noted more than a century ago that "profane language is language irreverent toward God or holy things."³¹ In 1931, the U.S. Court of Appeals for the Ninth Circuit found that irreverently using the phrase "By God"³² and calling "down the curse of God upon certain individuals"³³ during a radio broadcast constituted "profane language within the meaning of

in 2012 "sidestepped the longstanding question of whether the First Amendment, given today's multifaceted media landscape, no longer permits the Federal Communications Commission to regulate broadcast indecency on the nation's airwaves." Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631, 631 (2012).

²⁶ See, e.g., Keith Brown & Adam Candebub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1496-98 (2005) (addressing the FCC's decision to expand its definition of profane language and calling the Commission's action an "aggressive interpretation" of its statutory authority); Edward L. Carter et al., *Broadcast Profanity and the "Right to Be Let Alone": Can the FCC Regulate Non-Indecent Fleeting Expletives Under a Privacy Model?*, 31 HASTINGS COMM. & ENT. L.J. 1, 46 (2008) (providing a dated but excellent review of the FCC's regulation of profane language through 2008, and arguing that "the FCC could, without offending the Constitution, directly regulate profanity as one of the objects of Congressional intent in 18 U.S.C. § 1464").

²⁷ In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4981 (2004) [hereinafter Golden Globe Awards II].

²⁸ Kalman v. Cortes, 723 F. Supp. 2d 766, 770 (E.D. Pa. 2010).

²⁹ R.E.M., LOSING MY RELIGION (Warner Brothers 1991).

³⁰ The Supreme Court of Florida observed in 1944 that practically all of the state courts of last resort that had considered the meaning of profanity "define it as the use of words importing 'an imprecation of Divine vengeance,' of 'implying Divine condemnation,' or words denoting 'irreverence of God and holy things,'—blasphemous." Cason v. Baskin, 20 So. 2d 243, 247 (Fla. 1944). See also Carter et al., *supra* note 26, at 3-4 (noting that the Latin roots of "profane" carry a "blasphemy-related meaning").

³¹ City of Georgetown v. Scurry, 73 S.E. 353, 354 (S.C. 1912).

³² Duncan v. United States, 48 F.2d 128, 134 (9th Cir. 1931).

³³ *Id.*

that term as used in the act of Congress prohibiting the use of profane language in radio broadcasting.”³⁴

But, as author S.E. Hinton might put it, that was then, this is now.³⁵ Today, the FCC defines profane language on its website as “‘grossly offensive’ language that is considered a public nuisance.”³⁶ Might Howard Stern’s utterance of “fuck” on the *Good Morning America* segment mentioned earlier meet this definition?³⁷ And what about an over-the-air radio or television station that uses the word “shithole” as allegedly uttered by President Donald J. Trump in early 2018 to describe Haiti and African countries whose citizens immigrate to the United States?³⁸

This definition of profane language, untethered from its religious roots, lingers today in a bizarre state of legal limbo. In 2007, the U.S. Court of Appeals for the Second Circuit declared the FCC’s 2004 secularized approach to profane language invalid under the Administrative Procedure Act (“APA”).³⁹ The court’s holding was due to the Commission’s failure to offer any “independent reasons that would justify its newly-expanded definition of ‘profane’ speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition.”⁴⁰ But in 2009, the Supreme Court reversed that decision in *FCC v. Fox Television Stations, Inc.*⁴¹

On remand to the Second Circuit, the FCC abandoned its contention that the broadcasts at issue were profane, thus depriving the Second Circuit in 2010 of another opportunity to

³⁴ *Id.* When *Duncan* was decided, the relevant legislation was Section 29 of the Radio Act of 1927, which provided, in pertinent part, that “[n]o person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.” *Id.* at 129. The enforcing authority, in turn, was the Federal Radio Commission, the forerunner agency to the FCC. *See Gen. Elec. Co. v. FRC*, 31 F.2d 630, 631–32 (1929) (“The act established the Federal Radio Commission, with power . . . to make such regulations not inconsistent with law.”).

³⁵ S.E. HINTON, *THAT WAS THEN, THIS IS NOW* (1971).

³⁶ *Obscene, Indecent and Profane Broadcasts*, FED. COMM. COMMISSION, <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> (last updated Sept. 17, 2017).

³⁷ *See* Eggerton, *supra* note 6 (addressing the *Good Morning America* segment described here).

³⁸ *See* John Hendel, *Trump ‘Shithole’ Coverage Prompted More Than 160 Indecency Complaints*, POLITICO (Apr. 3, 2018), <https://www.politico.com/story/2018/04/03/trump-shithole-media-coverage-indecency-complaints-454928>.

³⁹ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§551–559, 701–706 (2012)); *see* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009).

⁴⁰ *Fox Television Stations*, 489 F.3d at 461.

⁴¹ 556 U.S. 502, 530 (2009).

address the profanity issue.⁴² This suggested, at least to one First Amendment scholar, that the FCC “appeared to have retired profanity as an independent category for indecency violations.”⁴³

“Appeared” is the operative word in that last sentence. This is because: (1) the FCC continues in 2019 to identify and define profane language on its website as a brand of speech over which it possesses authority;⁴⁴ (2) the FCC’s statutory power over profane language remains on the federal code books;⁴⁵ and (3) the FCC, in fact, still considers if content is profane when asked to do so.

For example, in December 2014, the FCC “reject[ed] the argument that the word ‘Redskins’ falls within the Commission’s definition of profanity.”⁴⁶ In doing so, the Commission simply reasoned that its definition of profanity does not stretch to racial or religious epithets.⁴⁷ Remarkably, the FCC offered no clarification of what its definition of profane language is.⁴⁸ In brief, the Commission merely defined profanity in the negative by stating what profane language is *not*.⁴⁹ In March 2015, the Commission made a point of noting that “[e]nforcing the statute and Rule restricting indecent, obscene, or profane broadcasts is an important part of the Commission’s overall responsibility for regulating broadcast radio and television operations.”⁵⁰

Despite such relatively recent indications that the FCC’s consideration of profane language is alive and well, it has not issued a single Notice of Apparent Liability for profanity (in contrast to indecency) since the Second Circuit decision in 2007

⁴² Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 327, n.7 (2d Cir. 2010), vacated, 567 U.S. 239 (2012).

⁴³ Lili Levi, “Smut and Nothing But”: *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 509, 547 n.160 (2013).

⁴⁴ See *Obscene, Indecent and Profane Broadcasts*, supra note 36 (providing a link to the FCC’s current articulation of profane language).

⁴⁵ See 18 U.S.C. § 1464 (2012).

⁴⁶ Red Zebra Broad., 29 FCC Rcd. 15495, 15497 (2014).

⁴⁷ *Id.*

⁴⁸ See *id.* (noting only that the Second Circuit in 2007 had invalidated its secularized and offensiveness-based nuisance definition that the FCC was confining to words involve a sexual or excretory meaning).

⁴⁹ The FCC explained in *Red Zebra*:

While the Commission has “recognize[d] that additional words, such as language conveying racial or religious epithets, are considered offensive by most Americans,” it made clear its intent “to avoid extending the bounds of profanity to reach such language given constitutional considerations.” Accordingly, we reject the argument that the word “Redskins” falls within the Commission’s definition of profanity.

Id. (internal citation omitted).

⁵⁰ In the Matter of WDBJ Television, Inc., 30 FCC Rcd. 3024, 3027 (2015) (emphasis added).

declared the Commission's definition invalid under the APA.⁵¹ In fact, with the exception of one high-profile incident in which it found in 2015 that a newscast briefly showing an erect penis was indecent,⁵² the FCC has been largely dormant⁵³ in penalizing obscene, indecent and profane content since the Supreme Court invited it "to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements."⁵⁴ In a variation of the parlor game of guessing whether a former celebrity is dead or alive,⁵⁵ one might reasonably wonder today if the FCC's policing of profane language is dead, dying, or dormant.

Sadly, all of this confusion and consternation easily could have been avoided and the answer could be a definitive "dead." That is because, as described later,⁵⁶ the FCC asked Congress in 1976 to eliminate its statutory power over profane language due to some of the same issues that now crop up in 2019. Congress, however, failed to heed the FCC's recommendation, as evidenced by the presence today of the "profane language" clause in 18 U.S.C. § 1464.⁵⁷

To further explore and unpack this muddle, Part I reviews several key judicial opinions involving profane language.⁵⁸ Part II then examines the FCC's March 2004 decision to change its definition of profane language, contextualizing that shift within the framework of a moral panic highlighted by the Super Bowl halftime show featuring Janet Jackson just one month earlier.⁵⁹ Next, Part III analyzes several problems with the FCC's current definition of profane language, including its susceptibility to challenges under the vagueness and overbreadth doctrines, as well as its direct contravention of the general First Amendment

⁵¹ *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007), *rev'd*, 556 U.S. 502 (2009).

⁵² *See generally* *WDBJ*, 30 FCC Rcd. 3024; Clay Calvert et al., *Indecency Four Years After Fox Television Stations: From Big Papi to a Porn Star, an Egregious Mess at the FCC Continues*, 51 U. RICH. L. REV. 329 (2017) (criticizing the FCC's Notice of Apparent Liability for Forfeiture issued against WDBJ Television, Inc.).

⁵³ The word "largely" is purposefully chosen because the FCC has issued a few orders regarding indecency in the past half-dozen years. *See* *Border Media Bus. Tr.*, 29 FCC Rcd. 9488, 9489 (2014) (involving a \$37,500 settlement over indecency allegations stemming from a radio broadcast); *KRXA, LLC.*, 29 FCC Rcd. 3482, 3487 (2014) (involving a \$15,000 settlement over allegations involving violations of both sponsorship identification and indecency regulations); *Liberian Broad. Inc.*, 28 FCC Rcd. 15397, 15404 (2013).

⁵⁴ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 259 (2012).

⁵⁵ *See, e.g.*, Erin Chack, *Quiz: Is This Celebrity Dead or Alive?*, BUZZFEED (Aug. 22, 2013), <https://www.buzzfeed.com/erinchack/quiz-is-this-celebrity-dead-or-alive>.

⁵⁶ *Infra* notes 318–328 and accompanying text.

⁵⁷ 18 U.S.C. § 1464 (2012) ("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.").

⁵⁸ *Infra* Part I.

⁵⁹ *Infra* Part II.

rule against censoring speech merely because it offends.⁶⁰ Finally, Part IV concludes that Congress should repeal the FCC's statutory authority over profane language unless the FCC acts immediately to redraft its definition in a more concise and constitutional manner.⁶¹

I. REGULATING THE PROFANE IN THE FACE OF THE FIRST AMENDMENT: A PRIMER

In 1792, all fourteen states that had ratified the U.S. Constitution “made either blasphemy or profanity, or both, statutory crimes.”⁶² That, of course, was more than 225 years ago—long before the U.S. Supreme Court launched its modern First Amendment free-speech jurisprudence “in the early twentieth century”⁶³ with the case of *Schenck v. United States*⁶⁴ in 1919.⁶⁵

So, if it seems as if profanity is among the few categories of speech not protected⁶⁶ by the First Amendment, then the likely culprit is a “famous passage”⁶⁷ in the Supreme Court's 1942 decision in *Chaplinsky v. New Hampshire*.⁶⁸ There, the Court made the “highly problematic assertion”⁶⁹ that:

[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.

⁶⁰ *Infra* Part III.

⁶¹ *Infra* Part IV.

⁶² *Roth v. United States*, 354 U.S. 476, 482 (1957).

⁶³ David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 77 (2017).

⁶⁴ 249 U.S. 47 (1919).

⁶⁵ See Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 732 (2000) (“Modern First Amendment jurisprudence began with *Schenck v. United States*.”).

⁶⁶ See *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (identifying categories of unprotected expression as incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats and “speech presenting some grave and imminent threat the government has the power to prevent”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (“The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”).

⁶⁷ Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1534 (1993).

⁶⁸ 315 U.S. 568 (1942).

⁶⁹ Burton Caine, *The Trouble With “Fighting Words”: Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 457 (2004). This passage is highly problematic because it “invented the theory that entire categories of speech are denied First Amendment protection.” *Id.* at 456.

These include the lewd and obscene, *the profane*, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁷⁰

The above-quoted language is perhaps best known for creating the “fighting words” exception to the First Amendment.⁷¹ It also was favorably cited by the Court in *Roth v. United States*⁷² to buttress the notion that obscenity falls outside the ambit of First Amendment protection.⁷³ And, most significantly for this Article, profane expression also is placed by *Chaplinsky* among the “classes of speech as [falling] outside of the First Amendment’s coverage.”⁷⁴

Yet, the passage is largely dicta.⁷⁵ Dicta, as Professor Michael Dorf notes, “typically refers to statements in a judicial opinion that are not necessary to support the decision reached by the court.”⁷⁶ In other words, dicta are “comprised of statements

⁷⁰ *Chaplinsky*, 315 U.S. at 571–72 (emphasis added).

⁷¹ William C. Nevin, “Fighting Slurs”: *Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets*, 14 FIRST AMEND. L. REV. 127, 129 (2015) (noting that *Chaplinsky* “established the ‘fighting words’ exception to the First Amendment in American jurisprudence”); Robert M. O’Neil, *Hate Speech, Fighting Words, and Beyond—Why American Law Is Unique*, 76 ALB. L. REV. 467, 472 (2012) (observing that *Chaplinsky* “has been persistently cited with sufficient deference to imply that uttering ‘fighting words’ remains a recognized exception to First Amendment freedoms”).

⁷² 354 U.S. 476 (1957).

⁷³ Specifically, the *Roth* Court cited *Chaplinsky*, among other decisions, to support its assertion that “numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.” *Id.* at 481.

⁷⁴ Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499, 500 (2012).

⁷⁵ See P. Brooks Fuller, *The Angry Pamphleteer: True Threats, Political Speech, and Applying Watts v. United States in the Age of Twitter*, 21 COMM. L. & POL’Y 87, 87 n.1 (“The Supreme Court of the United States outlined several categories of unprotected speech under the First Amendment in dicta in *Chaplinsky* . . .”) (citing *Chaplinsky*, 315 U.S. at 571–72)).

⁷⁶ Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994).

that do not constitute the court's holdings.”⁷⁷ *Chaplinsky's* observation that profane language falls beyond the purview of the First Amendment, therefore, is nonbinding.

The notion *Chaplinsky* carved out a new category unprotected of speech for profane language—at least to the extent that the term, as noted above, involved denigrating God or religion⁷⁸—was put to rest one decade later in *Burstyn v. Wilson*.⁷⁹ There the Court considered the constitutionality of a New York statute banning certain “motion picture films on the ground they are ‘sacrilegious.’”⁸⁰ In declaring the law unconstitutional, Justice Tom Clark wrote for the Court:

from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.⁸¹

To the extent that profanity was stripped of its religious connotations and now simply encompasses vulgar words that might offend, the Supreme Court's 1971 decision in *Cohen v. California* affords First Amendment protection to such vulgar language.⁸² There the Court held government entities, “acting as guardians of public morality,”⁸³ could not permissibly punish a man for peacefully wearing a jacket emblazoned with words “Fuck the Draft” in a Los Angeles courthouse.⁸⁴ In its opinion, the Court noted that California “has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”⁸⁵ Intimating the vagueness issues

⁷⁷ Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 *DRAKE L. REV.* 75, 92 (2008).

⁷⁸ See, e.g., *Kalman v. Cortes*, 723 F. Supp. 2d 766, 770 (E.D. Pa. 2010).

⁷⁹ 343 U.S. 495 (1952).

⁸⁰ *Id.* at 497.

⁸¹ *Id.* at 505.

⁸² 403 U.S. 15 (1971).

⁸³ *Id.* at 22.

⁸⁴ *Id.* at 15.

⁸⁵ *Id.* at 25.

plaguing the contested statute, which attempted to regulate “offensive conduct,”⁸⁶ Justice John Marshall Harlan II reasoned for the majority that:

while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.⁸⁷

In a nutshell, the Court in *Cohen* gave First Amendment protection to “the mother of all words commonly labeled lewd or profane” in the years since *Chaplinsky*.⁸⁸ As Rodney Smolla explains, “the fate of the ‘F Word,’ now constitutionally protected in many circumstances notwithstanding *Chaplinsky*, is one of many examples of *Chaplinsky* as an overstatement of current outcomes in free speech cases.”⁸⁹

The bottom line today is that “profanity’s categorical exclusion from the First Amendment is no more.”⁹⁰ In fact, “[n]ot one of the Court’s opinions over the last half a century has mentioned profane utterances as uncovered by the First Amendment. Rather, profanity today is often protected from government sanctions.”⁹¹

Yet secularized profanity—profanity as a term for vulgar curse words, regardless of any religious overtones or implications—is not absolutely protected by the First Amendment. It can still be regulated in specific circumstances, such as when it is uttered by students in public high schools,⁹²

⁸⁶ *Id.* at 16 n.1.

⁸⁷ *Id.* at 25.

⁸⁸ Smolla, *supra* note 74, at 501.

⁸⁹ *Id.* at 502.

⁹⁰ Charles W. “Rocky” Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 412 (2014).

⁹¹ *Id.*

⁹² See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678, 682 (1986) (upholding a public high school student’s punishment for giving a speech that centered on “an elaborate, graphic, and explicit sexual metaphor,” and distinguishing the Court’s protection of profanity in *Cohen v. California*, by noting that “[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school”).

when it rises to the level of fighting words⁹³ or when it targets airline personnel in an intimidating fashion.⁹⁴

In the last category, consider a federal statute that stipulates a punishment for “intimidating a flight crew member or flight attendant of the aircraft.”⁹⁵ In *United States v. Lynch*,⁹⁶ an apparently intoxicated first-class passenger shouted “[f]uck] this airline”⁹⁷ and repeatedly yelled “[f]uck] you, c[unt]”⁹⁸ after a flight attendant stopped serving him alcoholic drinks.⁹⁹ In upholding the passenger’s conviction under 49 U.S.C. § 46504, the U.S. Court of Appeals for the Tenth Circuit reasoned the statute “sets out a content-neutral prohibition on conduct in a specific time, place, and manner.”¹⁰⁰ The Court added: “nothing in the statute prohibits profanity or any other content, per se.”¹⁰¹

Anti-profanity statutes still exist.¹⁰² Despite some scholars’ contention that these laws are facially unconstitutional,¹⁰³ they may be permissible if narrowly construed to apply only to situations where profanities are uttered as fighting words.¹⁰⁴ Fighting words are those involving “a direct personal insult or an invitation to exchange fisticuffs.”¹⁰⁵ As the Supreme Court wrote in *Cohen v.*

⁹³ See *Gooding v. Wilson*, 405 U.S. 518, 518 (1972) (affirming the unconstitutionality of a statute targeting “opprobrious words or abusive language” because its scope was not narrowed or limited in construction to fighting words scenarios). Anti-profanity statutes, in turn, are sometimes deemed constitutional if they are narrowly construed to apply only to fighting words scenarios. *Johnson v. Quattlebaum*, 664 F. App’x. 290, 291 (4th Cir. 2016). For instance, a South Carolina statute makes it a misdemeanor to use “profane language on any highway or at any public place or gathering or in hearing distance of any schoolhouse or church.” S.C. CODE ANN. § 16-17-530 (2018). In 2014, Krystal Johnson was prosecuted under the statute for uttering the decidedly nonreligious-based phrase “[t]his is some motherfucking shit.” *Johnson*, 664 F. App’x. at 291. The Fourth Circuit upheld the statute because a South Carolina intermediate appellate court had construed it “to require fighting words for a conviction.” *Id.* at 294.

⁹⁴ See *United States v. Lynch*, 881 F.3d 812 (10th Cir. 2018).

⁹⁵ 49 U.S.C. § 46504 (2012).

⁹⁶ 881 F.3d 812 (10th Cir. 2018).

⁹⁷ *Id.* at 814.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 818.

¹⁰¹ *Id.*

¹⁰² See David L. Hudson Jr., *Fighting Words: Can Anti-Profanity Laws and the Fighting Words Doctrine Be Squared with the First Amendment?*, 104 A.B.A. J. 18, 18 (2018).

¹⁰³ See *id.* (quoting Professor Jennifer Kinsley for the proposition that “laws banning profanity are unconstitutional on their face” and for her observation that “[t]he sole justification for these laws is morality-based, which the Supreme Court has held insufficient to justify laws regulating fundamental rights”).

¹⁰⁴ See *id.* (noting that “[t]he reason why such laws are sometimes considered constitutional is the fighting words doctrine”); S.C. CODE ANN. § 16-17-530 (2018) (providing an example an anti-profanity statute in South Carolina that was deemed constitutional because, as judicially construed, it was limited in scope to fighting words situations).

¹⁰⁵ *Texas v. Johnson*, 491 U.S. 397, 409 (1989).

California,¹⁰⁶ fighting words take the form of “a direct personal insult”¹⁰⁷ and “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”¹⁰⁸ Mental offense or discomfort sustained by hearing profanity, as one federal district court recently observed, does not give rise to a fighting words situation.¹⁰⁹

However, in the absence of either a statute such as the one in *Lynch*¹¹⁰ or a fighting words scenario, secular profanity uttered by adults is generally protected by the First Amendment. For instance, the Supreme Court of Connecticut recently tossed out the breach-of-the-peace conviction of Nina Baccala for calling a female supermarket manager “a ‘fat ugly bitch’ and a ‘cunt.’”¹¹¹ The Nutmeg State’s high court conceded that Baccala, a customer, had “invoked one or more of the most vulgar terms known in our lexicon”¹¹² to refer to the store manager’s gender. Yet, the Court reasoned that, per the fighting words doctrine, “[u]ttering a cruel or offensive word is not a crime unless it would tend to provoke a reasonable person in the addressee’s position to immediately retaliate with violence under the circumstances.”¹¹³ Baccala was protected, the Supreme Court of Connecticut reasoned, because “the natural reaction of an average person in [the store manager’s] position who is confronted with a customer’s profane outburst, unaccompanied by any threats, would not be to strike her.”¹¹⁴

With this background on profanity rulings in mind, the Article next turns to the FCC’s decision in 2004 to change its definition of profane language and its subsequent effort in 2006 to refine that new definition. Part II contextualizes the Commission’s decision within the framework of a moral panic then facing the FCC.

¹⁰⁶ 403 U.S. 15 (1971).

¹⁰⁷ *Id.* at 20.

¹⁰⁸ *Id.*

¹⁰⁹ In *Pomicter v. Luzerne County Convention Center Authority*, the court held unconstitutional a ban on profanity and vulgarity during protests held in areas outside of the Mohegan Sun Arena, observing that “the vulgarity ban is not aimed at curbing ‘fighting words’ so much as words that may make the listener uncomfortable” and concluding that “potential discomfort alone does not elevate offensive speech to ‘fighting words.’” 332 F. Supp. 3d 558, 577 (M.D. Pa. 2018), *amended by*, 2018 U.S. Dist. LEXIS 86338 (M.D. Pa. May 22, 2018). The court also added that “[w]ithout more concrete evidence, the Arena cannot justify its broad ban based on speculation of violence that may be incited by profanity.” *Id.* at 579.

¹¹⁰ See *United States v. Lynch*, 881 F.3d 812 (10th Cir. 2018).

¹¹¹ *State v. Baccala*, 163 A.3d 1, 4 (Conn. 2017), *cert. denied sub nom. Connecticut v. Baccala*, 138 S. Ct. 510 (2017).

¹¹² *Id.* at 13.

¹¹³ *Id.*

¹¹⁴ *Id.* at 16.

II. REFLECTING ON A MORAL PANIC FIFTEEN YEARS LATER: THE MOVE TO ALTER PROFANE LANGUAGE AT THE FCC

Moral panics are “over-heated periods of intense concern.”¹¹⁵ They arise when many people harbor “intense feelings of concern about a given threat which a sober assessment of the evidence suggests is either nonexistent or considerably less than would be expected from the concrete harm posed by the threat.”¹¹⁶ The concept was coined by British sociologist Stanley Cohen more than forty-five years ago.¹¹⁷ Central to a moral panic is an “overreaction”¹¹⁸ or “a highly exaggerated response to the original negative event.”¹¹⁹

Violence in movies, comic books, and video games has sparked moral panics, resulting in censorship efforts.¹²⁰ For example, the music of rapper Marshall Mathers, better known as Eminem, spawned a moral panic more than fifteen years ago.¹²¹ New forms of media that are alien to older adults trigger moral panics.¹²² Perhaps more than any variety of media content, it is sexual expression that launches moral panics in the United

¹¹⁵ Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOC. 149, 149 (1994).

¹¹⁶ *Id.*

¹¹⁷ Cohen explained that a moral panic occurs when:

[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible.

STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF MODS AND ROCKERS 1* (Routledge Classics 2011) (1972).

¹¹⁸ Carol A. Stabile, *Conspiracy or Consensus? Reconsidering the Moral Panic*, 25 J. COMM. INQUIRY 258, 259 (2001).

¹¹⁹ Perry Howell, *Early Radio News and the Origins of the Risk Society*, 10 RADIO J. 131, 138 (2012).

¹²⁰ See William E. Lee, *Books, Video Games, and Foul-Mouthed Hollywood Glitteratae: The Supreme Court and the Technology-Neutral Interpretation of the First Amendment*, 14 COLUM. SCI. & TECH. L. REV. 295, 352 (2013).

¹²¹ See Gilbert B. Rodman, *Race . . . and Other Four Letter Words: Eminem and Cultural Politics of Authenticity*, 4 POPULAR COMM. 95, 99 (2006) (noting “the midst of the moral panic that surround[ed] Eminem”).

¹²² See Christopher J. Ferguson & John Colwell, *Understanding Why Scholars Hold Different Views on the Influences of Video Games on Public Health*, 67 J. COMM. 305, 310 (2017) (“Moral panics often focus on newer forms of media that may not yet have been embraced by large swaths of society, particularly older adults. As a key element, a negative social narrative forms about this new media, initially based on moral repugnance, rather than data.”).

States. The country, as Professor Bruce Burgett observes, “has been characterized from the outset as . . . shaped through a history of recurring sex panics.”¹²³ That remains true today. For example, concern over teen sexting¹²⁴ a few years ago constituted a moral panic.¹²⁵ And consistent with all moral panics that “eventually fade,”¹²⁶ Professor Kimberlianne Podlas notes “it appears the moral panic about teen sexting has faded. Reporting on teen sexting had declined significantly.”¹²⁷

What are the key ingredients of moral panics? First, the media generally play a major role in fanning the flames of fright, be it intentionally or otherwise.¹²⁸ As a 2016 article in *Journalism Practice* notes, “[j]ournalists and the media outlets they work for can contribute to moral panic by exaggerating events, publishing unsubstantiated claims, or giving preference to certain groups or individuals and ignoring others.”¹²⁹ Second, the role of interest groups is important, with one article noting that a moral panic involves “the unanticipated and unintended outcome of moral crusades undertaken by particular interest groups (e.g., professional associations, the police, parent organizations) in an effort to draw public attention to, and curtail, a specific set of actions.”¹³⁰ Other key players in moral panics include “the politicians, the experts, and the legislators.”¹³¹ Third, “moral

¹²³ Bruce Burgett, *Sex, Panic, Nation*, 21 AM. LITERARY HIST. 67, 67 (2009).

¹²⁴ See Lawrence G. Walters, *How to Fix the Sexting Problem: An Analysis of the Legal and Policy Considerations for Sexting Legislation*, 9 FIRST AMEND. L. REV. 98, 99 (2010) (“Sexting, a combination of the words ‘sex’ and ‘texting,’ is the term coined to describe the activity of sending nude, semi-nude, or sexually explicit depictions in electronic messages, most commonly through cellular phones.”).

¹²⁵ Clay Calvert, *Legislating the First Amendment: A Trio of Recommendations for Lawmakers Targeting Free Expression*, 35 CARDOZO ARTS & ENT. L.J. 279, 284–85 (2017).

¹²⁶ Kimberlianne Podlas, *Media Activity and Impact*, in *SEXTING AND YOUTH: A MULTIDISCIPLINARY EXPLANATION OF RESEARCH, THEORY, AND LAW* 123, 143 (Todd C. Hiestand & W. Jesse Weins eds., 2014).

¹²⁷ *Id.*

¹²⁸ See Shahira Fahmy & Thomas J. Johnson, *Mediating the Anthrax Attacks: Media Accuracy and Agenda Setting During a Time of Moral Panic*, 15 ATLANTIC J. COMM. 19, 23 (2007) (“Several studies have indicated the media play a major role in producing moral panics, which are when media or politicians sensationalize a social problem and present them as a threat to the social order, causing the public to have an exaggerated fear of the nature of the problem.”); Angela McRobbie & Sarah L. Thornton, *Rethinking ‘Moral Panic’ for Multi-Mediated Social Worlds*, 46 BRITISH J. SOC. 559, 560 (1995) (“Moral panics, once the unintended outcome of journalistic practice, seem to have become a goal.”).

¹²⁹ Tom Morton & Eurydice Aroney, *Journalism, Moral Panic and the Public Interest*, 10 JOURNALISM PRAC. 18, 27 (2016).

¹³⁰ Sean P. Hier, *Thinking Beyond Moral Panic: Risk, Responsibility, and the Politics of Moralization*, 12 THEORETICAL CRIMINOLOGY 173, 176 (2008).

¹³¹ Julia Laite, *Justifiable Sensationalism: Newspapers, Public Opinion and Official Policy About Commercial Sex in Mid-Twentieth-Century Britain*, 20 MEDIA HIST. 126, 127 (2014).

panics often emanate from a key event.”¹³² All of these factors may coalesce to produce a response from the legal system.¹³³

This Article argues that a slowly simmering moral panic over racy broadcast content suddenly boiled over with a single event—the CBS-televised, MTV-produced halftime show of Super Bowl XXXVIII on February 1, 2004, featuring the uncovering of singer Janet Jackson’s right breast by Justin Timberlake.¹³⁴ The very next month, the FCC radically changed and expanded its definition of profane language in pro-censorial fashion.¹³⁵

The game was watched by approximately ninety million people and, perhaps more importantly from a moral panic perspective, “as many as one in five American kids between the ages of 2 and 11 years caught that halftime show.”¹³⁶ In vivid color, they witnessed Timberlake, reaching across Jackson’s “chest, pulling off the right cup of her bodice – which clearly was designed to break away easily, like a nursing bra, only black and with metal studs and rivets – and revealing her breast, which was adorned with a silver ‘nipple guard.’”¹³⁷ In brief, the halftime show’s “wardrobe malfunction,”¹³⁸ as Timberlake termed it, likely spawned the FCC’s definitional malfunction on profane language.

Professor Jeremy Harris Lipschultz notes that the Janet Jackson incident “sparked numerous calls for media decency in the United States.”¹³⁹ However, problems were already festering

¹³² Bryan E. Denham, *Folk Devils, News Icons and the Construction of Moral Panics: Heroin Chic and the Amplification of Drug Threats in Contemporary Society*, 9 JOURNALISM STUD. 945, 946–47 (2008).

¹³³ See Stabile, *supra* note 118, at 259 (“Rumor, mass media hype, and the institutional response to these cause people to panic about crime, which in turn causes them to support more stringent law and order measures.”).

¹³⁴ See generally Gary Mihoces, *Half Provides Kind of Exposure NFL Doesn’t Want*, USA TODAY, Feb. 2, 2004, at 1C (reporting that “singer Janet Jackson’s breast was exposed on national TV during the Super Bowl XXXVIII halftime show,” and quoting an MTV statement for the proposition that “[t]he tearing of Janet Jackson’s costume was unrehearsed, unplanned, completely unintentional and was inconsistent with assurances we had about the content of the performance”); Daman Hack, *Patriots Win 2nd Super Bowl in 3 Years*, N.Y. TIMES, Feb. 2, 2004, at A1 (reporting that “Janet Jackson’s right breast was exposed at the end of her duet with Justin Timberlake when he pulled off part of her top”).

¹³⁵ The FCC’s March 2004 change of its enforcement policy regarding indecency and its conceptualization of profane language are discussed later in this section. See generally Golden Globe Awards II, 19 FCC Rcd. 4975 (2004).

¹³⁶ Lisa de Moraes, *CBS Gave 90 Million an Eyeful*, WASH. POST, Feb. 3, 2004, at C1.

¹³⁷ *Id.*

¹³⁸ This was the term used by Justin Timberlake in a statement to describe what happened. See Kelefa Sanneh, *Pop Review, During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D4 (“Timberlake released a statement, too: ‘I am sorry if anyone was offended by the wardrobe malfunction during the halftime performance of the Super Bowl. It was not intentional and is regrettable.’”).

¹³⁹ JEREMY HARRIS LIPSCHULTZ, BROADCAST AND INTERNET INDECENCY: DEFINING FREE SPEECH 1 (2008).

with broadcast content before the “wardrobe malfunction.” As Ann Oldenburg summed it up in *USA Today*, “[t]hough television has been pushing the sexual-innuendo envelope for decades, this flash of breast, on national television during a beloved annual sporting event seen by millions of families, suddenly became a culminating moment in a long-simmering culture clash.”¹⁴⁰ Thus, while Jackson’s breast-baring was “[t]he flashpoint for conservative critics”¹⁴¹ over televised indecency, trouble had been brewing with salty language and racy images on the broadcast airwaves in the two years immediately before it.

For example, during her acceptance speech at the Billboard Music Awards in 2002, singer and movie star Cher proclaimed she “had my critics for the last forty years saying that I was on my way out every year. Right. So f*** ’em.”¹⁴² Her words were broadcast on Fox network stations.¹⁴³ In 2003, when the Billboard Music Awards were again broadcast on Fox, reality-television personality Nicole Richie queried before presenting an award, “[h]ave you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”¹⁴⁴ Additionally that year, ABC television stations aired an episode of *NYPD Blue* that “showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.”¹⁴⁵ Furthermore, during an acceptance speech at the 2003 Golden Globe Awards show on NBC, singer Bono of the Irish band U2 uttered the phrase “really, really, fucking brilliant.”¹⁴⁶ And finally, just one week before the Janet Jackson fiasco, actress Diane Keaton said “shit” during a speech at the 2004 Golden Globes Award show.¹⁴⁷

It was these incidents that both primed the pump for the moral panic¹⁴⁸ and later provided the FCC with the vehicle for

¹⁴⁰ Ann Oldenburg, *A Cultural Clash . . . In a Nation a Flutter*, USA TODAY, Feb. 3, 2004, at 1A.

¹⁴¹ Geraldine Fabrikant, *Need ESPN but Not MTV? Some Push for That Option*, N.Y. TIMES, May 31, 2004, at C6.

¹⁴² FCC v. Fox Television Stations, Inc., 567 U.S. 239, 247 (2012).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 247–48.

¹⁴⁶ In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards”, 18 FCC Rcd. 19859, 19859 (2003) [hereinafter Golden Globe Awards I].

¹⁴⁷ *Diane Keaton Had a Memorable Golden Globes Moment*, ENT. WKLY. (Jan. 27, 2004), <http://ew.com/article/2004/01/27/diane-keaton-had-memorable-golden-globes-moment/> (reporting that Ms. Keaton “dropped the s-word”).

¹⁴⁸ See Chuck Barney, *Super Bowl Furor Fuels Culture War*, CONTRA COSTA TIMES (Cal.), Feb. 7, 2004, at A1 (reporting that prior to the Janet Jackson incident, “[a] furor over . . . foul-mouthed episodes had been building since October [2003], when the FCC ruled that Bono’s profanity was not a punishable offense”).

changing its definition of profane language in March 2004.¹⁴⁹ Bono's speech gave the public, as well as crusading interest groups such as the Parents Television Council,¹⁵⁰ a propitious opportunity to apply enhanced pressure on the FCC to better police the broadcast airwaves in the months leading up to the halftime show at Super Bowl XXXVIII.

That is because in October 2003, David Solomon, chief of the FCC's Enforcement Bureau, concluded that Bono's statement "really, really, fucking brilliant" was *not* indecent.¹⁵¹ The FCC's definition of indecency requires that speech "depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."¹⁵² Solomon reasoned that Bono's deployment of "fucking" was not indecent because it "did not describe sexual or excretory organs or activities. Rather, the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation."¹⁵³ Solomon, however, did not consider whether the language was profane; he found only it was neither indecent nor obscene.¹⁵⁴

The decision, as Frank Ahrens wrote in the *Washington Post*, "was criticized and derided."¹⁵⁵ Multiple members of the U.S. Senate proposed a resolution condemning it.¹⁵⁶ The ruling also "elicited strong opposition from the Parents Television Council."¹⁵⁷ Professor Ira Robbins, in fact, contends it was the PTC that "convinced the Commission to review the decision."¹⁵⁸

Indeed, as one article noted in December 2003, Solomon's conclusion did not sit "well with some, from the Parents Television Council (which organized most of the Bono complaints) to congressmen to FCC Chairman Michael Powell himself, who played no part in the ruling and deemed it 'reprehensible' that children might hear the F-word in any form on the air."¹⁵⁹ Powell, in fact, reportedly circulated a draft proposal in January 2004 designed to overturn Solomon's

¹⁴⁹ See Golden Globe Awards II, 19 FCC Rcd. 4975 (2004).

¹⁵⁰ See *The PTC Mission*, *supra* note 4; Calvert & Richards, *supra* note 5.

¹⁵¹ See Golden Globe Awards I, 18 FCC Rcd. 19859 (2003).

¹⁵² *Id.* at 19860–61.

¹⁵³ *Id.* at 19861.

¹⁵⁴ *Id.* at 19861–62.

¹⁵⁵ Frank Ahrens, *Over the Line? Only If Over the Air; FCC's Reach Doesn't Extend Beyond Broadcast*, WASH. POST, Feb. 3, 2004, at E1.

¹⁵⁶ Frank Ahrens, *Nasty Language on Live TV Renews Old Debate*, WASH. POST, Dec. 13, 2003, at A1 [hereinafter Ahrens, *Nasty Language*]

¹⁵⁷ Paul Davidson, *FCC: OK, Maybe You Shouldn't Say That . . .*, USA TODAY, Jan. 14, 2004, at 4D.

¹⁵⁸ Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1443 (2008).

¹⁵⁹ John T. McWhorter, *Oh, R-o-ob, the Bad Words Won't Go Away*, WASH. POST, Dec. 28, 2003, at B1.

decision.¹⁶⁰ During a talk that same month at the National Press Club in Washington, D.C., Powell called it “irresponsible for our programmers to continue to try to push the envelope on a reasonable set of policies that try to legitimately balance the interests of the First Amendment with a need to protect our kids.”¹⁶¹ Even Comedy Central’s animated show *South Park* spoofed Solomon’s decision in an episode in which students are puzzled as “a teacher is shown saying that students can use a common swear word ‘only in the figurative noun form or the adjective form.’”¹⁶²

While the October 2003 Bono ruling garnered the attention of FCC commissioners, Congress and the PTC, it was the February 1, 2004 airing of the Super Bowl halftime show that got “seemingly all of America”¹⁶³ contemplating what it means to go too far in airing explicit content. Indeed, “callers flooded CBS affiliate offices with complaints”¹⁶⁴ the same night the game aired.

As Frank Rich of the *New York Times* waggishly summed it up, “Janet Jackson’s breast (not even the matched set!) would lead to one of the most hysterical outbreaks of Puritanism in recent, even not-so-recent, American history.”¹⁶⁵ In a nutshell, if the October 2003 ruling by Solomon on Bono’s exclamation lit the kindling, then “Janet Jackson’s Super Bowl exposure poured more fuel on the fire.”¹⁶⁶ The latter incident, simply put, “brought indecency to the center of the national political discussion.”¹⁶⁷

In accord with the notion that moral panics feature interest groups on crusades,¹⁶⁸ the one sparked by Janet Jackson involved the Parents Television Council. As media defense attorney Robert Corn-Revere writes, “policy entrepreneurs like Brent Bozell, who then led the Parents Television Council – and the FCC – immediately pounced on the 9/16-second flash of bejeweled breast flesh as a sign of the End of Days and a call to

¹⁶⁰ Susan Crabtree, *That’s Enough Smut*, DAILY VARIETY, Jan. 14, 2004, at 6. See Jeff Korbek, *Trash Talk*, LINCOLN J. STAR, Feb. 1, 2004, at K1 (noting that “FCC chairman Michael Powell asked fellow commissioners to reverse their decision not to take any action against the network for the Bono expletive”).

¹⁶¹ Susan Crabtree, *FCC: You Say It, You Pay It*, DAILY VARIETY, Jan. 15, 2004, at 8.

¹⁶² Ahrens, *Nasty Language*, *supra* note 156, at A1.

¹⁶³ Gail Pennington, *No Way Is That Over the Line*, ST. LOUIS POST-DISPATCH, Feb. 8, 2004, at B1.

¹⁶⁴ Daniel Rubin, *Janet Jackson Apologizes; Says Stunt Went Awry*, PHILA. INQUIRER, Feb. 3, 2004, at E1.

¹⁶⁵ Frank Rich, *Après Janet, A Deluge*, N.Y. TIMES, Mar. 21, 2004, at Section 2, 1.

¹⁶⁶ Susan Crabtree, *Pols Pump Up Indecency Toll*, DAILY VARIETY, Mar. 4, 2004, at 2.

¹⁶⁷ Brown & Candeub, *supra* note 26, at 1494.

¹⁶⁸ Hier, *supra* note 130 and accompanying text.

arms.”¹⁶⁹ Indeed, just days after the Super Bowl incident, Bozell stated: “[w]e do not accept the apology of CBS, nor do we accept the statements of regret by MTV. . . It is absolutely reckless for CBS to claim it had no prior knowledge that such activity was likely to take place.”¹⁷⁰

FCC chairman Michael Powell immediately declared being “outraged at what I saw”¹⁷¹ during the Super Bowl, adding that “[o]ur nation’s children, parents and citizens deserve better.”¹⁷² He announced the FCC would investigate the halftime show,¹⁷³ dubbing it “a classless, crass and deplorable stunt.”¹⁷⁴

The halftime-show incident also fits neatly within the framework of a moral panic because, as Erich Goode and Nachman Ben-Yehuda point out, “many moral panics are about sex.”¹⁷⁵ Indeed, Janet Jackson and Justin Timberlake certainly served up a saucy, sexually-charged performance.

With panic swirling, the FCC on March 18, 2004—less than seven weeks after Super Bowl XXXVIII—reversed the Enforcement Bureau’s October 2003 indecency ruling regarding Bono’s acceptance speech.¹⁷⁶ Specifically on the indecency issue, all five commissioners concluded that: (1) Bono’s speech “is within the scope of our indecency definition because it does depict or describe sexual activities;”¹⁷⁷ (2) any variation of “fuck” used in any context “inherently has a sexual connotation;”¹⁷⁸ (3) it is irrelevant in an indecency determination that a network did not intend to broadcast the language;¹⁷⁹ and (4) “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”¹⁸⁰

But more significantly for purposes of this Article, the FCC did not end its review there. It also decided to address,

¹⁶⁹ Robert Corn-Revere, *Certainty and the Censor’s Dilemma*, 45 HASTINGS CONST. L.Q. 301, 303 (2018).

¹⁷⁰ Phil Kloer, *Halftime Incident Sparks Inquiry*, ATLANTA J. CONST., Feb. 3, 2004, at 1A.

¹⁷¹ De Moraes, *supra* note 136, at C1.

¹⁷² *Id.*

¹⁷³ See Sally Jenkins, *NFL Exposed for What It Is*, WASH. POST, Feb. 3, 2004, at D1 (reporting that “the Federal Communications Commission is launching an inquiry into the halftime show” and asserting there is “[n]o doubt FCC Chairman Michael K. Powell is determined to follow the facts wherever they lead”).

¹⁷⁴ Kloer, *supra* note 170, at 1A.

¹⁷⁵ ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 18 (2d ed. 2009).

¹⁷⁶ Golden Globe Awards II, 19 FCC Rcd. 4975 (2004).

¹⁷⁷ *Id.* at 4978.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* at 4979 (“The fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language.”).

¹⁸⁰ *Id.* at 4980.

independent from its indecency determination,¹⁸¹ whether Bono's speech was profane under 18 U.S.C. § 1464. As noted earlier, Enforcement Bureau Chief David Solomon never considered the profane-language issue in his October 2003 ruling, having only analyzed questions of indecency and obscenity.¹⁸² But that did not prevent the Commission from considering the issue *sua sponte* the month following the Super Bowl halftime show debacle.

In particular, the Commission in March 2004 acknowledged its "limited case law on profane speech has focused on what is profane in the context of blasphemy."¹⁸³ It told broadcasters, however, they were now "on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation."¹⁸⁴ The Commission asserted it was free to expand its definition because none of its prior cases suggested "that the statutory definition of profane is limited to blasphemy."¹⁸⁵ It also cited favorably the U.S. Seventh Circuit Court of Appeals' 1972 decision in *Tallman v. United States*.¹⁸⁶ The Seventh Circuit there opined that profane can be understood as "denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance."¹⁸⁷ The Commission in March 2004 reasoned that there was nothing in its prior case law regarding profane language that held it "could not also apply the definition articulated by the Seventh Circuit"¹⁸⁸ in *Tallman* thirty-two years earlier.

So, what precisely would constitute profane language going forward? Unfortunately, the FCC "did not provide specific guidance for its new definition of profanity."¹⁸⁹ It merely announced profane language would now include not only "fuck," but also "words (or variants thereof) that are as highly offensive as"¹⁹⁰ it when "broadcast between 6 a.m. and 10 p.m."¹⁹¹ and "depending on the context."¹⁹²

¹⁸¹ See *id.* at 4981 ("We also find, as an independent ground, that the use of the phrase at issue here in the context and at the time of day here constitutes 'profane' language under 18 U.S.C. § 1464.").

¹⁸² Golden Globe Awards I, 18 FCC Rcd. 19859, 19861–62 (2003).

¹⁸³ *Golden Globe Awards II*, 19 FCC Rcd. at 4981.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ 465 F.2d 282 (1972).

¹⁸⁷ *Id.* at 286.

¹⁸⁸ Golden Globe Awards II, 19 FCC Rcd. 4975, 4981 (2004).

¹⁸⁹ Robbins, *supra* note 158, at 1443.

¹⁹⁰ *Golden Globe Awards II*, 19 FCC Rcd. at 4981.

¹⁹¹ *Id.*

¹⁹² *Id.*

It was not until March 2006 that the Commission offered up its own definition of profane language.¹⁹³ In considering multiple cases involving alleged broadcast indecency and profanity, the Commission announced that “as a general matter, we will analyze potentially profane language with respect to whether it is ‘*so grossly offensive as to constitute a nuisance.*’”¹⁹⁴ It drew part of that italicized language from the decades-old, Seventh Circuit decision in *Tallman* noted earlier.¹⁹⁵

The Commission also concluded that some words are presumptively profane.¹⁹⁶ The presumption, it noted, applies only to “the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home.”¹⁹⁷

The Commission added, however, that even presumptively profane language may be protected in “rare cases.”¹⁹⁸ These include scenarios where the language “is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”¹⁹⁹ It also explained that the written word “fuck” is protected when it appears so briefly on screen that it “would not have been noticed by the average viewer.”²⁰⁰ In summary, the presumption that certain words are profane is rebuttable in special circumstances.

What words are presumptively profane? “Fuck” and “shit.” Specifically, the Commission wrote that “fuck” is “a vulgar sexual term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. It is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.”²⁰¹ It concluded that “shit” also fits this same definition,²⁰² adding that it “invariably invokes a coarse excretory image.”²⁰³

Significantly, the Commission in 2006 also attempted to somewhat confine the scope of its new profanity definition by adopting “a presumption that our regulation of profane language

¹⁹³ In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664 (2006).

¹⁹⁴ *Id.* at 2669 (emphasis added).

¹⁹⁵ *Tallman v. United States*, 465 F.2d 282, 286 (1972).

¹⁹⁶ In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664 (2006).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2709.

²⁰¹ *Id.* at 2685.

²⁰² *Id.* at 2686.

²⁰³ *Id.* at 2684.

will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms.”²⁰⁴ It thus found words such as “bitch,” “hell,” and “damn,” as well as variants thereof, are not presumed to be profane.²⁰⁵ While the words “ass” and “piss” “do describe sexual or excretory activities,”²⁰⁶ they are not *presumptively* profane but may fall within the definition of profane language depending on the context in which they are used.²⁰⁷

The problem, however, with this sexual-or-excretory limitation on profane language is that it duplicates the Commission’s definition of indecency, which also requires that the words or images in question “describe or depict sexual or excretory organs or activities.”²⁰⁸ Indecency and profanity become redundant. Finally, the Commission in 2006 suggested that its use of “nuisance” within its new definition of profane language was on “sound constitutional footing”²⁰⁹ because the U.S. Supreme Court upheld the Commission’s reliance on a nuisance rationale in approving its authority over indecent content.²¹⁰

The Commission’s 2006 ruling was the last time it attempted to offer a definition and clarify the meaning of profane language after it decided to expand that concept in its 2004 Bono ruling. As noted earlier,²¹¹ the Second Circuit in 2007 struck down the FCC’s changes to profane language as unsupported under the Administrative Procedure Act, but the Supreme Court later reversed the Second Circuit’s opinion and on remand the FCC did not pursue a profane-language theory. That left the FCC’s definition of profane language in a state of legal limbo.²¹²

If moral panics involve “exaggerated responses to deviant acts,”²¹³ then the FCC’s decision to radically alter its conceptualization of profane language in March 2004 was an exaggerated response to a deviant act of breast-baring witnessed

²⁰⁴ *Id.* at 2669.

²⁰⁵ *Id.* at 2713.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *In re WDBJ Television, Inc.*, 30 FCC Rcd. 3024, 3027 (2015).

²⁰⁹ *In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 2664, 2669 (2006).

²¹⁰ *See FCC v. Pacifica Found.*, 438 U.S. 726, 750–51 (1978) (observing that the FCC’s decision to penalize the radio station for indecency “rested entirely on a nuisance rationale under which context is all-important,” and illustrating the nuisance theory with a pig-in-the-parlor comparison).

²¹¹ *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009); Levi, *supra* note 43.

²¹² *See supra* Introduction (providing and discussing examples of the ambiguities in the FCC’s definition of profanity).

²¹³ Bryan E. Denham, *Functional Forms of Symbolic Crises in the News: Implications for Quantitative Research*, 31 COMM. RES. REPS. 365, 366 (2014).

by kids.²¹⁴ Reconsideration of the Bono incident simply afforded the Commission a ready-made opportunity to quickly prove its mettle to the public and to the Parents Television Council that it would aggressively police the airwaves after the Super Bowl and, in turn, restore the moral and social order. The FCC's reaction to the one-two punch combination of Bono and Janet Jackson thus fits snugly within the notion that the response to threats sparking moral panics "is likely to be a demand for greater social regulation or control and a demand for a return to 'traditional' values."²¹⁵

The FCC's March 2004 decision broadening its definition of profane language was an overreaction in the immediate aftermath of the Janet Jackson incident. The Commission, as noted above, adjusted its indecency policy in that same ruling to reach unintentional and fleeting instances of sexual content in the future.²¹⁶ It thus already had at its disposal regulatory power over indecency sufficient to punish broadcasters for fleeting and supposedly unscripted instances of sexual content on the airwaves. It simply did not need to alter its definition of profane language to do so. Expanding the definition of profane language thus amounted to agency overkill.

Ultimately, the reaction to the Janet Jackson incident falls in line with what Robert Corn-Revere calls "a historical context of successive panics about the latest scourge affecting our children."²¹⁷ And, consistent with the pattern that moral panics disappear,²¹⁸ Professor Lipschultz observes that "[t]he furor that was the post-Janet Jackson 2004 Super Bowl era had calmed by 2006."²¹⁹

What remains more than a decade later, however, is a muddle regarding profanity. It is a muddle provoked by a "less than one-second baring"²²⁰ of a breast—more precisely, "nine-sixteenths of one second"²²¹—and created in the crucible of an awards show containing a single, unscripted expletive uttered by an Irish singer. In brief, the moral panic may have died, but its lugubrious legacy—a troubling FCC conceptualization of profane language that is questionable under the First

²¹⁴ See De Moraes, *supra* note 136 and accompanying text (referencing the large number of young children who watched the Super Bowl halftime show during which Janet Jackson's breast was exposed).

²¹⁵ KENNETH THOMPSON, *MORAL PANICS* 8–9 (1998).

²¹⁶ See Golden Globe Awards II, 19 FCC Rcd. 4975, 4978–80 (2004).

²¹⁷ Robert Corn-Revere, *Moral Panics, the First Amendment, and the Limits of Social Science*, 28 COMM. LAW. 4, 4 (2011).

²¹⁸ See Denham, *supra* note 213, at 366 (noting that "moral panics are volatile, arising and fading in a relatively short amount of time") (emphasis omitted).

²¹⁹ LIPSCHULTZ, *supra* note 139, at 183.

²²⁰ Susan Crabtree, *FCC Poke in the Eye*, DAILY VARIETY, Sept. 23, 2004, at 6.

²²¹ *CBS Corp. v. FCC*, 663 F.3d 122, 125 (3d Cir. 2011).

Amendment—lingers on. Key flaws with that conceptualization are addressed in the next part.

III. A FATALLY FLAWED EFFORT TO RESTRICT SPEECH: ANALYZING PROBLEMS WITH THE FCC'S DEFINITION OF PROFANE LANGUAGE

This Part has two sections, each concentrating on a different weakness or defect with the FCC's definition of profane language. Initially, Section A analyzes problems with the definition under both the void-for-vagueness and overbreadth doctrines.²²² Section B then explores how the Supreme Court's reenergized defense of offensive expression in recent cases hammers another metaphorical nail into the legal coffin of profane language at the FCC.²²³

A. Vagueness and Overbreadth Challenges

The FCC's definition of profane language articulated today on its website is readily susceptible to facial challenges for both vagueness and overbreadth. This section initially analyzes that definition for vagueness problems. It then examines overbreadth issues. Importantly, these issues were never addressed by the U.S. Court of Appeals for the Second Circuit in its now-overruled 2007 decision in *Fox Television Stations, Inc. v. FCC*.²²⁴ The Second Circuit merely held that, under the Administrative Procedure Act, the FCC had failed to provide a reasoned analysis sufficient to justify changing its definition of profane language.²²⁵

Under the void for vagueness doctrine, as Professor Cristina Lockwood notes, “the Court's concern has been whether the law at issue provides notice of what it allows or prohibits.”²²⁶ Thus, as Frank LoMonte explains, “[a] regulation may be declared void for vagueness if it fails to give intelligible notice of the behavior that will result in penalties.”²²⁷ Vague laws are therefore dangerous largely because “the uncertainty regarding how a speech regulation will be applied . . . creates a basis for self-censorship.”²²⁸ Self-censorship is tantamount to a chilling effect on speech under which individuals voluntarily

²²² *Infra* Part III.A.

²²³ *Infra* Part III.B.

²²⁴ 489 F.3d 444 (2d Cir. 2007), *rev'd*, 556 U.S. 502 (2009).

²²⁵ *Id.* at 461–62.

²²⁶ Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 268 (2010).

²²⁷ Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 6–7 (2014).

²²⁸ Jennifer M. Kinsley, *Chill*, 48 LOY. U. CHI. L.J. 253, 262 (2016).

silence themselves due to the fear of prosecution or liability based upon what they otherwise might say.²²⁹

In addition to fostering self-censorship, vague laws are problematic because they give too much leeway to those charged with enforcing them and thus can be applied unfairly and unevenly. As the Supreme Court wrote in 2018, the vagueness “doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges.”²³⁰

In brief, as the Court put it in 2012 when examining the FCC’s regulation of broadcast indecency, due process “requires the invalidation of laws that are impermissibly vague.”²³¹ It went on to say that “the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.”²³² The Court added that “[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”²³³

A law thus will be declared unconstitutionally vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”²³⁴ The key is that a law must provide “the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”²³⁵

Is the FCC’s current definition of profane language unconstitutionally vague under these principles? The Commission defines profane language today on its website as “‘grossly offensive’ language that is considered a public nuisance.”²³⁶ Although that definition is concise in terms of brevity, problems abound. First, the FCC offers no guidance on what it means by “offensive.” Second, it provides no description of what it means by “grossly.” Third, it is hard to fathom how

²²⁹ See ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 5 (5th ed. 2016) (“Vague laws relating to speech are unacceptable because they may chill or discourage speech by individuals who may choose not to speak rather than risk running afoul of an unclear law.”).

²³⁰ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

²³¹ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

²³² *Id.*

²³³ *Id.* at 253–54.

²³⁴ *United States v. Williams*, 553 U.S. 285, 304 (2008).

²³⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²³⁶ *Obscene, Indecent and Profane Broadcasts*, *supra* note 36.

using the word “grossly” to modify “offensive” adds clarity for a broadcaster seeking guidance and fair notice on how to avoid a possible civil penalty for airing profane content. All “grossly” does is ratchet up the level of offensiveness, but to an unspecified and nebulous degree. Modifying “offensive” with “grossly” thus does nothing to save the FCC’s definition from vagueness problems. The FCC’s use of “grossly” harkens back to, at least in the author’s mind, a humorous scene from the movie *A Few Good Men*.²³⁷ There, Lieutenant Commander Joanne Galloway futilely adds the word “strenuously” to modify the word “object” after her initial objection to a judge is overruled. A flippant colleague later mockingly tells Galloway: “‘I strenuously object?’ Is that how it works? Hm? ‘Objection.’ ‘Overruled.’ ‘Oh, no, no, no. No, I STRENUOUSLY object.’ ‘Oh. Well, if you strenuously object then I should take some time to reconsider.’”²³⁸

Even if one goes back to the Commission’s 2006 attempt to define the scope of profane language,²³⁹ problems persist. The Commission wrote then that it would confine profane language “to the universe of words that are sexual or excretory in nature or are derived from such terms.”²⁴⁰ If one cobbles this limitation onto the current definition on the FCC’s website, then profane language appears to mean grossly offensive sexual and excretorial words that amount to a public nuisance. The Commission also added in 2006 that *presumptively* profane words were “the most offensive words in the English language”²⁴¹ that are “likely to shock the viewer and disturb the peace and quiet of the home,”²⁴² seemingly adding flesh to the concept of a public nuisance. After combining this into a cohesive definition that arguably construes profane language in a narrow manner to save it from vagueness and overbreadth problems, one is left with this possibility: *Profane language encompasses the most grossly offensive sexual and excretorial words that cause shock and disturb the peace and quiet of the home.*

Beyond making the questionable assumption that the atmosphere in American homes is one of peace and quiet, the words “shock” and “disturb” are equally as vague as “grossly offensive.” What may shock one listener may not shock another

²³⁷ A FEW GOOD MEN (Castle Rock Entertainment 1992).

²³⁸ *Quotes: A Few Good Men*, IMDB, <http://www.imdb.com/title/tt0104257/quotes> (last visited Mar. 1, 2019); *Strenuously Object*, YOUTUBE, <https://www.youtube.com/watch?v=bOnRHAyXqYY> (last visited Mar. 1, 2019).

²³⁹ In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664 (2006).

²⁴⁰ *Id.* at 2669.

²⁴¹ *Id.*

²⁴² *Id.*

and, in fact, may be entertaining. What might disturb one home might not another. Furthermore, the more one hears words like “shit” and “fuck” uttered in everyday life, it stands to reason the shock and disruption power of those words decreases when they are repeatedly heard on the broadcast airwaves. In other words, the power of words to offend, shock and disturb is fluid and constantly evolving, thus denying broadcasters the fair notice that due process requires and that the void-for-vagueness doctrine demands for knowing what words, in fact, are profane.

We now live in a world in which the President of the United States discusses grabbing women by the pussy²⁴³ and refers to some countries as shitholes.²⁴⁴ To some this may offend, but to others this may make Trump more authentic and real. More than forty-five years later, *Cohen’s* maxim that “one man’s vulgarity is another’s lyric”²⁴⁵ illustrates why regulating speech based on its supposed offensiveness, as the FCC now attempts to do with profane language, is unconstitutional because it is plagued by vagueness issues. In brief, “some viewers take offense to cursing on television whereas others barely notice.”²⁴⁶

In addition to problems with vagueness, the FCC’s definition of profane language has overbreadth issues. In 2008, in *United States v. Williams*,²⁴⁷ the Court crisply explained the overbreadth doctrine in scenarios where free speech lies in the balance. Writing for the *Williams* majority, Justice Antonin Scalia wrote, “[a]ccording to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.”²⁴⁸ He added, “we have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”²⁴⁹

The first step in an overbreadth analysis, Scalia explained, “is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.”²⁵⁰ The second step is determining if the

²⁴³ See Alexander Burns et al., *Tape Reveals Trump Boast About Groping Women*, N.Y. TIMES, Oct. 8, 2016, at A1 (discussing how Trump was caught on tape bragging “of a special status with women: Because he was ‘a star,’ he says, he could ‘grab them by the pussy’ whenever he wanted”).

²⁴⁴ See Hendel, *supra* note 38.

²⁴⁵ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁴⁶ Barry S. Sapolsky et al., *Rating Offensive Words in Three Television Program Contexts*, 14 MASS COMM. & SOC’Y 45, 46 (2011).

²⁴⁷ 553 U.S. 285 (2008).

²⁴⁸ *Id.* at 292.

²⁴⁹ *Id.* (emphasis in original).

²⁵⁰ *Id.* at 293.

statute penalizes “a substantial amount of protected expressive activity.”²⁵¹

If the FCC’s definition of profane language is construed narrowly in the manner suggested above to encompass only *the most grossly offensive sexual and excretorial words that cause shock and disturb the peace and quiet of the home*, this still is overbroad because it is not hemmed in by the fighting words exception to the First Amendment. As addressed earlier, statutes targeting profanity are only permissible today if narrowly construed to apply in fighting words scenarios.²⁵² Given that broadcast television inherently does not involve the in-person utterance of personally abusive epithets targeting a specific individual, the FCC’s definition of profane language fails an overbreadth analysis.

B. The Growing Wall of Protection for Offensive Expression

The FCC’s current definition of profane language centers directly on the alleged offensiveness of words.²⁵³ As this section illustrates, that focus strongly militates against the definition’s constitutionality under the First Amendment. That is especially true given the Supreme Court’s protection of offensive expression in multiple contexts under the leadership of Chief Justice John Roberts.

As discussed earlier, the Supreme Court in *Cohen v. California*²⁵⁴ made it clear that secularized profanity—in *Cohen*, the word was “fuck”—is sometimes protected by the First Amendment.²⁵⁵ Paul Robert Cohen’s conviction, the Court wrote, involved a statute that targeted “offensive conduct”²⁵⁶ and rested squarely “upon the asserted offensiveness of the *words* [he] used to convey his message to the public.”²⁵⁷

Suggesting precisely the type of vagueness problems addressed in Section A that plague regulating speech based on offensiveness, the Court in *Cohen* wrote “one man’s vulgarity is another’s lyric.”²⁵⁸ In rejecting the argument that states such as California can punish the use of “fuck” in an effort “to maintain what they regard as a suitable level of discourse within the body politic,”²⁵⁹ the Court queried: “How is one to distinguish this from any other offensive word?”²⁶⁰ In brief, it concluded that

²⁵¹ *Id.* at 297.

²⁵² *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

²⁵³ See *Obscene, Indecent and Profane Broadcasts*, *supra* note 36 (“Profane content includes ‘grossly offensive’ language that is considered a public nuisance.”).

²⁵⁴ 403 U.S. 15 (1971).

²⁵⁵ *Id.* at 16–26 (1971).

²⁵⁶ *Id.* at 16 (citing CAL. PENAL CODE § 415 (1971)).

²⁵⁷ *Id.* at 18 (emphasis added).

²⁵⁸ *Id.* at 25.

²⁵⁹ *Id.* at 23.

²⁶⁰ *Id.* at 25.

regulating speech because of its supposed offensiveness “seems inherently boundless”²⁶¹ and “governmental officials cannot make principled distinctions in this area.”²⁶²

Subsequent to *Cohen*, the Court protected offensive speech in the 1980s in cases involving a man who burned an American flag in political protest²⁶³ and a magazine which suggested, in an advertisement parody, that a famous reverend had sex with his mother in an outhouse and was drunk while preaching.²⁶⁴ In the former case, *Texas v. Johnson*,²⁶⁵ Justice William Brennan opined for the majority that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁶⁶ In the latter decision, *Hustler Magazine v. Falwell*,²⁶⁷ Chief Justice William Rehnquist called the speech in question “offensive”²⁶⁸ to plaintiff Jerry Falwell and “doubtless gross and repugnant in the eyes of most.”²⁶⁹ Nonetheless, a unanimous Court protected pornographer Larry Flynt’s flagship publication against a tort claim for intentional infliction of emotional distress based on its parodic speech.²⁷⁰ Rehnquist wrote that a jury could not be allowed “to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”²⁷¹

In much more recent cases, the Court has reiterated the principle that speech must not be squelched simply because it offends—continuing a movement that spells additional trouble for the FCC’s definition of profane language that pivots on offensiveness.²⁷²

For example, in penning the majority opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,²⁷³ Justice Anthony Kennedy observed in 2018 that “it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.”²⁷⁴ Justice Clarence Thomas, in a concurrence joined by Justice Neil Gorsuch, added in

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ See *Texas v. Johnson*, 491 U.S. 397 (1989).

²⁶⁴ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

²⁶⁵ 491 U.S. 397 (1989).

²⁶⁶ *Id.* at 414.

²⁶⁷ 485 U.S. at 46.

²⁶⁸ *Id.* at 50.

²⁶⁹ *Id.*

²⁷⁰ See *id.* at 57.

²⁷¹ *Id.* at 55.

²⁷² See *Obscene, Indecent and Profane Broadcasts*, *supra* note 36 and accompanying text (setting forth the FCC’s current definition of profane language on its website).

²⁷³ 138 S. Ct. 1719 (2018).

²⁷⁴ *Id.* at 1731.

Masterpiece Cakeshop that “[s]tates cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified.”²⁷⁵ Thomas emphasized that a rule allowing the government to squelch speech because it is offensive or disagreeable “would allow the government to stamp out virtually any speech at will.”²⁷⁶

In 2017—just one year before *Masterpiece Cakeshop*—the Court protected offensive speech in *Matal v. Tam*.²⁷⁷ The Court in *Tam* struck down part of a federal statute that allowed the U.S. Patent and Trademark Office to deny registration for marks that “may disparage . . . persons, living or dead, institutions, beliefs, or national symbols.”²⁷⁸ In delivering the Court’s judgment, Justice Samuel Alito concluded that this provision, known as the disparagement clause, “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”²⁷⁹ Alito added that “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”²⁸⁰

Concurring in *Tam*, Justice Kennedy buttressed this point, writing that “the Court’s cases have long prohibited the government from justifying a First Amendment burden by pointing to the offensiveness of the speech to be suppressed.”²⁸¹ Kennedy intimated that the marketplace of ideas²⁸² provides the remedy for offensive speech, not government censorship, when he opined that:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s

²⁷⁵ *Id.* at 1746 (Thomas, J., concurring).

²⁷⁶ *Id.*

²⁷⁷ 137 S. Ct. 1744 (2017).

²⁷⁸ *Id.* at 1765 (citing 15 U.S.C. § 1052(a) (2017)).

²⁷⁹ *Id.* at 1751.

²⁸⁰ *Id.* at 1764 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

²⁸¹ *Id.* at 1767 (Kennedy, J., concurring).

²⁸² See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992) (“The ‘marketplace of ideas’ is perhaps the most powerful metaphor in the free speech tradition.”); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 *DUKE L.J.* 967, 998 (2003) (“The marketplace of ideas locates the value of free speech in finding the truth, and it makes the market the arbiter of truth or falsity.”).

benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.²⁸³

Tam thus reaffirms “there is no categorical carve-out from First Amendment protection for either offensive or hateful speech.”²⁸⁴ In a nutshell, and as encapsulated by *New York Times* Supreme Court reporter Adam Liptak, *Tam* stands for the proposition “that the government may not refuse to register potentially offensive names.”²⁸⁵

The Supreme Court also protected offensive speech in 2011 in *Snyder v. Phelps*.²⁸⁶ There, an eight-justice majority shielded the defendants from tort liability for expressing offensive messages including “‘God Hates Fags,’ ‘You’re Going to Hell’ and ‘God Hates You.’”²⁸⁷ Writing for the majority, Chief Justice John Roberts remarked that “[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt,”²⁸⁸ particularly when it involves matters of public concern.²⁸⁹ He added that “[i]n most circumstances, ‘the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.’”²⁹⁰ In a grand rhetorical flourish closing his opinion that explains why such offensive expression must be protected, Roberts wrote:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on

²⁸³ *Tam*, 137 S. Ct. at 1769 (Kennedy, J., concurring).

²⁸⁴ Clay Calvert, *Beyond Trademarks and Offense: Tam and the Justices’ Evolution on Free Speech*, 2016–2017 CATO SUP. CT. REV. 25, 31 (2017).

²⁸⁵ Adam Liptak, *Law Barring Disparaging Trademarks Is Rejected in a Unanimous Decision*, N.Y. TIMES, June 20, 2017, at A14.

²⁸⁶ 562 U.S. 443 (2011).

²⁸⁷ *Id.* at 448.

²⁸⁸ *Id.* at 458.

²⁸⁹ *See id.* at 454 (noting that the speech at issue “plainly relates to broad issues of interest to society at large” and to “matters of public import”).

²⁹⁰ *Id.* at 459 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975)).

public issues to ensure that we do not stifle public debate.²⁹¹

Snyder, as Professor Joseph Russomanno summarizes it, fell in line with “the Supreme Court’s long-established tradition of favoring speech protection even in cases involving offensive speech.”²⁹²

Beyond safeguarding offensive words, the Roberts’ Court has struck down statutes targeting graphic images some people might deem offensive. Specifically, in *United States v. Stevens*,²⁹³ the Court refused to carve out a new exception from First Amendment protection for images depicting animal cruelty.²⁹⁴ In the process, it declared as unconstitutionally overbroad a federal statute regulating such images.²⁹⁵ One year later, in *Brown v. Entertainment Merchants Association*,²⁹⁶ the Court struck down a California statute limiting minors’ access to video games depicting images of violence.²⁹⁷ Writing for the majority, Justice Antonin Scalia noted that there is no exception to First Amendment protection for “whatever a legislature finds shocking.”²⁹⁸

The Court has also protected statements at which one might take offense (offense in the sense of umbrage at the fact that someone would utter such a statement), even though the words used do not involve profanity or swearing. In particular, in *United States v. Alvarez*,²⁹⁹ the Court struck down a federal law that criminalized lies about having won a Congressional Medal of Honor.³⁰⁰ Justice Kennedy wrote there for a four-justice plurality that

[t]he Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find

²⁹¹ *Id.* at 460–61.

²⁹² Joseph Russomanno, “Freedom for the Thought That We Hate”: Why Westboro Had To Win, 7 COMM. L. & POL’Y 133, 172 (2012).

²⁹³ 559 U.S. 460 (2010).

²⁹⁴ *Id.* at 472.

²⁹⁵ *Id.* at 482.

²⁹⁶ 564 U.S. 786 (2011).

²⁹⁷ *Id.* at 805.

²⁹⁸ *Id.* at 793.

²⁹⁹ 567 U.S. 709 (2012).

³⁰⁰ *Id.* at 730. First Amendment scholar Rodney Smolla, writing in 2012, puts *Alvarez*, along with *Snyder v. Phelps* and *United States v. Stevens*, among “[t]he three most high-profile offensive speech cases in recent years.” Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499, 520 (2012).

respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression.³⁰¹

Perhaps the only case under the leadership of Chief Justice Roberts in which the Court failed to protect offensive speech from government censorship came in the five-to-four decision in *Walker v. Texas Division, Sons of Confederate Veterans*.³⁰² In *Walker*, the Court upheld Texas's decision to deny an application for a specialty license plate featuring Confederate battle flag imagery "because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable."³⁰³

Walker, however, is explained away as an outlier by the majority's belief that specialty license plates in Texas constitute government speech, rather than private expression.³⁰⁴ This categorization, in turn, rendered nugatory any First Amendment-based speech challenges to Texas's actions because, as Justice Stephen Breyer wrote for the majority, "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."³⁰⁵ Texas was thus "entitled to refuse to issue plates featuring" Confederate battle flag imagery.³⁰⁶

In summary, the Supreme Court in recent cases including *Masterpiece Cakeshop*, *Tam*, and *Phelps* has reinvigorated its enduring doctrine of protecting offensive expression. As Professor Erica Goldberg recently observed, "America has uniquely expansive free speech protections, even for the most intolerant, offensive speech."³⁰⁷ That certainly is true today, as this subsection indicates. All of this suggests yet another reason why the FCC's definition of profane language revolving around offensiveness is likely unconstitutional in the Roberts' Court era.

³⁰¹ *Alvarez*, 567 U.S. at 729–30.

³⁰² 135 S. Ct. 2239 (2015).

³⁰³ *Id.* at 2245 (quoting the Texas Department of Motor Vehicles Board).

³⁰⁴ *See id.* at 2246 ("In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech.").

³⁰⁵ *Id.* at 2245.

³⁰⁶ *Id.* at 2253.

³⁰⁷ Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 694 (2016).

IV. CONCLUSION

It is important to understand that 18 U.S.C. § 1464, the statute that gives the FCC authority over profane language on the broadcast airwaves, is criminal in nature³⁰⁸ and carries with it a possible prison sentence.³⁰⁹ Specifically, it provides that broadcasters, who carry such content, “shall be fined under this title or *imprisoned* not more than two years, or both.”³¹⁰

Despite the gravity of such sanctions, the FCC’s current definition of profane language: (1) is problematically vague and overbroad;³¹¹ (2) overlaps with the Commission’s definition of indecency;³¹² and (3) has not been invoked by the FCC to punish broadcasters since at least 2012 when the Supreme Court invited the FCC to consider adjusting its indecency regime.³¹³ Therefore, to the extent it penalizes profane language, 18 U.S.C. § 1464 is a prime example of “legal obsolescence”³¹⁴ that should spark both its prompt reconsideration and revision by Congress. Furthermore, and to the point that it now is clear—*Chaplinsky* dicta to the contrary³¹⁵—that profanity is generally protected by the First Amendment,³¹⁶ 18 U.S.C. § 1464’s prohibition on profane language is an example of what Guido Calabresi aptly called “legal petrification.”³¹⁷ Congress must act because, as Calabresi concluded more than thirty-five years ago, “as a single solution to statutory obsolescence, the independent administrative agency and the government bureau have been a dismal disappointment.”³¹⁸

That assessment was not always true when it came to the FCC’s regulation of profane language. In fact, the FCC in August of 1976 recommended that Congress revoke the Commission’s authority over profane language due to concerns

³⁰⁸ See LIPSCHULTZ, *supra* note 139, at 8 (noting that “section 1464 is a criminal statute”).

³⁰⁹ The FCC’s authority under the statute is civil in nature, but “the United States Department of Justice has authority to pursue criminal violations. Violators of the law, if convicted in a federal district court, are subject to criminal fines and/or imprisonment for not more than two years.” *Enforcement: Obscenity, Indecency and Profanity*, FED. COMM. COMMISSION, <https://www.fcc.gov/general/obscenity-indecency-and-profanity>.

³¹⁰ 18 U.S.C. § 1464 (2012) (emphasis added).

³¹¹ See *supra* Part III.A.

³¹² See *In re WDBJ Television, Inc.*, 30 FCC Rcd. 3024, 3027 (2015). See also *supra* Part II.

³¹³ *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444,461 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009).

³¹⁴ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982).

³¹⁵ See *supra* Part I.

³¹⁶ Rhodes, *supra* note 90.

³¹⁷ CALABRESI, *supra* note 314, at 7.

³¹⁸ *Id.* at 45.

that it was likely unconstitutional.³¹⁹ Richard E. Wiley, then chairman of the FCC,³²⁰ explained in a letter to Vice President Nelson Rockefeller and the members of the U.S. Senate that “[b]ecause of the serious constitutional problems involved, we have recommended deletion of the ‘profanity’ provision.”³²¹

In the “Explanation of Proposed Amendment” memorandum that accompanied Wiley’s letter, the FCC justified its effort to have Congress remove its power over profane language by noting, among other things, “the infrequency with which modern courts have construed the word ‘profane,’ and the sparsity of decisions which have upheld it against constitutional attack.”³²² The memo cites the U.S. Supreme Court’s decision in *Burstyn v. Wilson*,³²³ addressed earlier in this Article,³²⁴ as casting doubt on definitions of “profane” involving religious overtones³²⁵ that “are drawn from decisions dating back into the last century.”³²⁶ The memo also contends that definitions “fraught with religious connotations”³²⁷ “raise questions under the Free Exercise Clause of the First Amendment as well as questions of vagueness and overbreadth.”³²⁸ Furthermore, the memo notes that *Chaplinsky’s* language regarding fighting words would not apply to profanities on the broadcast media because “there is no physical contact between speaker and hearer in electronic communication.”³²⁹

Congress, however, failed to take action on Chairman Wiley’s recommendation regarding profane language, as evidenced by the fact that “profane language” remains in 18 U.S.C. § 1464 today. Had Congress heeded his advice more than forty years ago, the muddle today (and this very article, in fact) would not exist.

When the FCC eventually did update its definition of profane language fifteen years ago, it did so only when

³¹⁹ 122 CONG. REC. 26,33359–69 (1976).

³²⁰ After leaving the FCC, Wiley later was appointed in 1980 by President Ronald Reagan to lead the transition team at the Department of Justice shortly after Reagan was elected. T.R. Reid, *Transition Office Chooses 13 ‘Team Leaders’*, WASH. POST, Nov. 14, 1980, at A1. Wiley eventually founded the law firm of Wiley, Rein & Fielding (now known as Wiley Rein) and became “a premier lobbyist and a key behind-the-scenes confidant to top Government officials in the high-stakes arena of telecommunications policy.” Edmund L. Andrews, *Telecommunications’ Ubiquitous Man of Influence*, N.Y. TIMES, June 28, 1992, at F5.

³²¹ 122 CONG. REC. 26,33359 (1976).

³²² 122 CONG. REC. 26,33364 (1976).

³²³ 343 U.S. 495 (1952).

³²⁴ *Id.* at 497–505; see also *supra* Part I.

³²⁵ 122 CONG. REC. 26,33364 (1976).

³²⁶ 122 CONG. REC. 26,33365 (1976).

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

threatened by a moral panic³³⁰ and, as the Second Circuit observed in 2007, set “forth no independent reasons that would justify its newly-expanded definition of ‘profane’ speech, aside from merely stating that its prior precedent does not prevent it from setting forth a new definition.”³³¹ The FCC will likely never, at least on its own volition in today’s political climate, publicly profess to ceasing enforcement of anti-profanity rules on the airwaves. After all, what administrative agency wants to be deemed a *supporter* of profanity? Surely, this would be the rallying cry of family-friendly public interest groups if the Commission announces its decision to engage in wholesale regulatory forbearance³³² when it comes to enforcing its statutory power over profanity.

The phrase “profane language” thus should be eliminated by lawmakers from 18 U.S.C. § 1464 unless the Commission acts immediately to better define that term. Abolishing the Commission’s authority over profanity would still leave it with power over obscenity—a constitutionally troubling clout, as the Supreme Court holds that such speech falls outside the sphere of First Amendment protection³³³—and indecency.

The bottom line is that times change, and the law, in turn, sometimes must change with it. The federal statute that grants the FCC power over profane language was adopted in 1948,³³⁴ while Section 29 of the Radio Act of 1927 gave the Federal Radio Commission (the precursor to the FCC) power over profane language.³³⁵ That is more than seventy years ago if one counts from 1948 and more than ninety years if one starts all the way back in 1927.

Either way, administrative agency statutory power over broadcast profanity has been on the books for decades without being revisited by Congress. It is, in brief, a legislative remnant of a bygone era when the profane was more closely related to

³³⁰ See *supra* Part II.

³³¹ *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007), *rev’d*, 556 U.S. 502 (2009).

³³² Regulatory forbearance, as used here, means “withdrawing from the regulation of certain, previously regulated activities.” Jon Stern, *Regulatory Forbearance: Why Did OfTel Find It So Hard?*, 28 TELECOMM. POL’Y 273, 278 (2004).

³³³ See *Roth v. United States*, 354 U.S. 476, 485 (1957) (writing that “obscenity is not within the area of constitutionally protected speech or press”).

³³⁴ It was in 1948 that Congress transferred the FCC’s power over profane language to 18 U.S.C. § 1464. Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcasting Indecency*, 3 VILL. SPORTS & ENT. L.J. 15, 22 (1996). See *FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978) (“In 1948, when the Criminal Code was revised to include provisions that had previously been located in other Titles of the United States Code, the prohibition against obscene, indecent, and profane broadcasts was removed from the Communications Act and re-enacted as § 1464 of Title 18.”).

³³⁵ See *Pacifica Found.*, 438 U.S. at 735–37 (addressing the history of the power to punish obscenity, indecency and profane language on the broadcast airwaves).

religion and, in turn, does not comport with today's linguistic culture. As this author contended elsewhere, "[a]ny piece of legislation captures only the concerns, agonies and worries of lawmakers, their constituents and, perhaps, the news media at a single point in time, akin to a static legislative snapshot rather than a continually unspooling reel of film."³³⁶ Unless the FCC takes immediate action to redefine profane language in a constitutional manner, Congress itself should amend 18 U.S.C. § 1464 by removing "profane language" and not replacing it with another category of expression. Given that the Supreme Court today protects much speech that offends, adopting a new category of regulated expression to replace the profanity classification would almost inevitably prove to be constitutionally futile.

³³⁶ Clay Calvert, *Legislating the First Amendment: A Trio of Recommendations for Lawmakers Targeting Free Expression*, 35 *CARDOZO ARTS & ENT. L.J.* 279, 283 (2017).