

2005

The First Amendment, the Media and the Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy

Clay Calvert
Pennsylvania State University

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Recommended Citation

Calvert, Clay (2005) "The First Amendment, the Media and the Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy," *California Western Law Review*. Vol. 41 : No. 2 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol41/iss2/2>

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CALIFORNIA WESTERN LAW REVIEW

VOLUME 41

SPRING 2005

NUMBER 2

THE FIRST AMENDMENT, THE MEDIA AND THE CULTURE WARS: EIGHT IMPORTANT LESSONS FROM 2004 ABOUT SPEECH, CENSORSHIP, SCIENCE AND PUBLIC POLICY

CLAY CALVERT*

INTRODUCTION

Battles to regulate and censor media content—television programs, radio shows, violent video games, music recordings and adult videos—raged across the United States in 2004, placing both the First Amendment right of free speech¹ and the entertainment industries under siege. The Federal Communications Commission (FCC), for instance, launched an all-out assault on indecent speech conveyed on the public airwaves, issuing three high-profile opinions in 2004 that went against broadcasters and levied record-breaking fines.² State and local legislative bodies proposed more than twenty different bills and measures affecting video games depicting images of violence.³ The adult

* Associate Professor of Communications & Law and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A., 1987, Communications, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California.

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

2. *See* discussion *infra* Part I.

3. *See, e.g.*, A.B. 1793, 2004 Cal. Legis. Serv. 630 (West 2004) (enacted). For in-

entertainment industry continued to face attacks, both in Congressional hearings⁴ and in communities across the country, where efforts to zone adult stores and clubs continued with a vengeance.⁵ And the

stance, California Governor Arnold Schwarzenegger signed into law in September 2004 a bill that requires video game retailers “to post a sign providing information about a video game rating system or notifying consumers that a rating system is available to aid in the selection of a game.” *Id.* This new measure is part of the California Business and Professions Code. *See* CAL. BUS. & PROF. CODE § 20650 (West 2005) (codifying Assembly Bill 1793). Another bill introduced in the California legislature in 2004, which failed to become law, would have prohibited the sale or rental to a minor of “any violent video game,” with that critical term defined to mean a game that:

[T]aken as a whole, to the average person, applying contemporary statewide standards, appeals to minors’ morbid interest in violence, that enables the player to virtually inflict serious injury upon human beings or characters with substantially human characteristics in a manner that is especially heinous, atrocious, or cruel, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

A.B. 1792, 2003 Reg. Sess. (Cal. 2004).

Across the country from California, one measure proposed in both the New York State Assembly and Senate would have prohibited the sale or rental “to any person under the age of eighteen years any video game that has a mature or violent rating” and further would have required such games be segregated in retail stores from other games “in a location designated for persons over the age of eighteen.” A.B. 10107, 227 Ann. Leg. Sess. (N.Y. 2004); S.B. 6346, 227 Ann. Leg. Sess. (N.Y. 2004). Another bill introduced in 2004 in both the New York State Assembly and Senate would have prohibited the sale or rental “to any person under the age of eighteen years any video game that has a rating containing racist stereotypes, derogatory language and/or actions toward a specific group or groups of persons.” A.B. 10108, 227 Ann. Leg. Sess. (N.Y. 2004); S.B. 6347, 227 Ann. Leg. Sess. (N.Y. 2004).

Censorship of video games wasn’t just a problem on the West and East coasts, however. In Illinois, Governor Rod Blagojevich closed the year 2004 by calling for two bills that “would make it a crime for retailers to rent or sell such violent or sexually graphic material to minors, policing video games in much the same way as cigarettes and alcohol.” P.J. Huffstutter, *Illinois Seeks to Curb Explicit Video Games*, L.A. TIMES, Dec. 16, 2004, at A1, 2004 WL 55955714. His move came on the heels of an ordinance proposed earlier in December 2004 by Aldermen Edward M. Burke and Isaac Carothers in the City Council of Chicago, Illinois, that would both segregate the location in retail and rental stores of video games rated “Teen” and “Mature” to “a restricted place” and restrict the sale or rental of such games “to adults who must show proof of age at time of purchase or rental.” Chicago, Ill., Municipal Code, Sale and Rental of Video Games § 8-8-125 (proposed 2004).

4. *See infra* Part IV and accompanying text (describing the Congressional hearings in question).

5. *See, e.g.*, Jackie Crosby, *St. Paul Fight with Sex Novelty Store Over After Licensing Rules Met*, STAR TRIB. (Minneapolis, Minn.), Aug. 19, 2004, at 2B (describing a zoning battle in St. Paul, Minnesota, over a store called the Love Doctor that sells “lingerie and bachelorette gifts as well as porn videos and sex toys”); Jim Mason, *Regulating Sexual Businesses Pondered*, RICHMOND TIMES DISPATCH (Va.), Aug. 25, 2004, at L-1 (describing efforts of officials in Goochland County, Virginia, to create and adopt an ordinance to “regulate businesses such as strip clubs and adult bookstores”); Jill Rosen, *Zoning Board Delays Decision on Fells Point X-rated Theatre*, BALT. SUN, Dec. 22, 2004, at 5B (describing a zoning battle over a proposal to change an adult theater into a strip club in Maryland, and the efforts to prevent this transformation by some government officials); V. David Sartin, *Video Store, Officials Settle X-rated Dispute, but Deal Soon Unravels*, PLAIN DEALER (Cleveland, Ohio), Dec. 15, 2004, at B1 (describing a zoning dispute affecting “a video store under fire for offering X-rated movies and sex toys on the Cleveland-Parma border” in Ohio).

music business faced persistent criticism for its song lyrics and videos.⁶ The question for legal scholars, First Amendment advocates and the entertainment industries is simply this: What can be learned from these battles fought on so many different fronts?

This article culls and distills from these and other 2004 conflicts eight important lessons about free speech and public policy as they affect the entertainment industries in the United States. They are lessons that should not be forgotten in 2005 and beyond, as the same issues will, almost inevitably, arise again and again unless notice is taken of them now. The eight lessons are:

1. A vocal, minority viewpoint can trump the majority's speech rights;
2. Politicians and precedent do not mix;
3. No good deed goes unpunished;
4. Science and surveys serve sexual censorship;
5. The vaguer the definition, the greater the government censorship;
6. Corporate self-censorship and self-preservation squelch speech;
7. Some media entities are, sadly, their own worst enemies; and
8. Fight or flight: Put up or move on to new marketplaces.

Taken together and viewed collectively, these lessons all suggest that the metaphorical marketplace of ideas on which so much free speech theory is premised⁷ is never allowed to function properly. It is subjected, instead, to growing—if not constant—threats from government agencies, pandering politicians, well-organized associations, social scientists and doctors, trial attorneys and the internal actions of

In addition to the zoning battles described above, adult video and bookstores faced a new fight in 2004 over billboard signage near highways. In particular, Missouri passed a law in 2004 that provides in relevant part that:

No billboard or other exterior advertising sign for an adult cabaret or sexually oriented business shall be located within one mile of any state highway except if such business is located within one mile of a state highway then the business may display a maximum of two exterior signs on the premises of the business, consisting of one identification sign and one sign solely giving notice that the premises are off limits to minors.

MO. REV. STAT. § 226.531 (2004). See S.B. 870, 92 Gen. Assemb., 2d Reg. Sess. (Mo. 2004) (setting forth the bill that gave rise to the law).

6. See, e.g., Barbara F. Meltz, *Rap Music is Parents' Proof Their Teens Need Their Help*, BOSTON GLOBE, July 22, 2004, at H1 (discussing rap lyrics and contending that “[m]ost are so offensive, we can’t print them here”). Once again, Eminem was a frequent target of criticism. See Jeff Miers, *Call it Slim Shady's Razor-Edged Revenge*, BUFFALO NEWS (N.Y.), Nov. 13, 2004, at C1 (describing some of the “offensive lyrics” on the artist’s 2004 CD, “Encore”).

7. See generally MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 12-15 (6th ed. 2000) (describing the marketplace of ideas as the “dominant metaphor for the value of free speech”).

some media entities. The purpose of this article is to explore and analyze each of these eight lessons, based on actual incidents that took place in 2004. By understanding the lessons today, free speech advocates may learn from them in order to better prepare for First Amendment challenges and controversies in the future. Ignoring the lessons, however, may lead to further incursions on freedom of expression.

I. A VOCAL MINORITY VIEWPOINT CAN TRUMP THE MAJORITY'S SPEECH RIGHTS

The year 2004 was not a good one for the broadcast television networks when it came to FCC actions taken against them under the Commission's statutory authority to regulate indecent content on the airwaves.⁸ First, the FCC declared in March 2004 that the spontaneous and fleeting use of a single, unscripted expletive by Bono, the lead singer for the group U2, during the 2003 Golden Globe Awards program on NBC made the entire live broadcast both indecent and profane.⁹ The FCC next slapped Viacom, owner of the CBS television network, in September of 2004 with an aggregate fine of a then-record \$550,000 for the breast-baring incident involving Janet Jackson during the February 1, 2004, halftime show at the Super Bowl.¹⁰ Although the FCC determined Jackson's right breast was exposed for only 19/32 of one second,¹¹ the Commission nonetheless found that the fleeting peek was "clearly graphic"¹² and "designed to pander to, titillate and shock the viewing audience."¹³

The one-two punch of the *Golden Globes* and *Super Bowl* decisions was bad enough for broadcasters, but the FCC didn't stop there. It went for a knock-out punch when it issued a new, record-breaking total proposed forfeiture of \$1,183,000 in October of 2004 against 169

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

9. See Complaints Regarding the Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4980-82, 4983 n.4 (FCC Mar. 18, 2004) (memorandum and opinion order) [hereinafter *Golden Globes Memorandum*]. See generally Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61 (2004) (describing and criticizing the FCC's opinion declaring the broadcast indecent and profane).

10. Complaints Concerning the February 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230, 19235, 19242 (FCC Sept. 22, 2004) (notice of apparent liability for forfeiture) [hereinafter *Super Bowl Notice*].

11. *Id.* at 19235.

12. *Id.*

13. *Id.* at 19236.

Fox Television Network stations based on the airing of a single episode of a reality TV program called "Married by America" on April 7, 2003.¹⁴ The episode in question included, among other things, "scenes in which party-goers lick whipped cream from strippers' bodies in a sexually suggestive manner"¹⁵ and another scene featuring "a man in his underwear on all fours being spanked by two topless strippers."¹⁶ The FCC observed in its Notice of Apparent Liability for Forfeiture that, despite the pixilation of all nudity, "the sexual nature of the scenes is inescapable,"¹⁷ and that "even a child would have known that the strippers were topless and that sexual activity was being shown."¹⁸

Why then, in 2004, the sudden aggressive approach to indecency determinations? After all, a federal appellate court in 1988 admonished the FCC that it may regulate indecent expression "only with due respect for the high value our Constitution places on freedom and choice in what people say and hear."¹⁹ The same court had called for the FCC's "restrained enforcement"²⁰ of its indecency policy.

The answer largely lies in the power of a vocal minority that has flooded the FCC with record numbers of indecency complaints in both 2003 and 2004. According to official documents on the FCC's website, the Commission received only 111 total complaints in 2000 about allegedly indecent content and a slightly higher 346 complaints in 2001.²¹ But then the numbers ratchet up significantly and dramatically, first to 13,922 in 2002, then to 202,032 in 2003, and, finally, to a whopping 1,068,802 complaints regarding allegedly indecent content in 2004.²²

But has television really become that much worse in terms of sexual content in the past three years? Are masses of American television viewers finally fed up with content that they deem is too sexual in nature? The sheer success and popularity of ABC's racy "Desperate Housewives" series in late 2004 would seem to answer both questions

14. Complaints Regarding the Program "Married by America," 19 F.C.C.R. 20191, 20191 (FCC Oct. 12, 2004) (notice of apparent liability for forfeiture) [hereinafter *Married by America Notice*].

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Action for the Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988).

20. *Id.* at 1340 n.14.

21. FCC, INDECENCY COMPLAINTS & NALS: 1993-2004 (Jan. 3, 2005), at <http://www.fcc.gov/eb/broadcast/ichart.pdf> (last visited Mar. 28, 2005).

22. *Id.*

with a resounding no.²³ The show has been described as a “perverse and randy satire of being married with children in the suburbs.”²⁴ It is, however, incredibly popular. In fact, its “tales of adultery, suicide, murder and maternal misgivings made it the fastest-starting hit in years—No. 2 in the Nielsen ratings for the season.”²⁵ Beyond this particular show, it is clear that “risqué programs draw tens of millions of viewers.”²⁶

So, if the public really is not so outraged by sexual content on shows like “Desperate Housewives,” then what is the source of the increase in the volume of complaints? It is a tiny but vociferously vocal minority of the population. As *The New York Times* reported in December of 2004, “[i]n all but the [Janet] Jackson incident . . . 99 percent of the complaints have been traced to the Parents Television Council, an advocacy group that fights what it sees as sex, violence and profanity on television and in movies.”²⁷ The Parents Television Council (PTC) has been correctly described by the *Washington Post* as the “conservative group that keeps the FCC hopping these days with its various campaigns to flood the agency with indecency complaints.”²⁸

According to the FCC, “in 2003, the Parents Television Council was responsible for filing all but 267 of the 202,032 indecency complaints received by the agency, or 99.86 percent.”²⁹ And it only became worse in 2004, as “excluding protests about Janet Jackson’s exposed breast during the Super Bowl halftime show, the nonprofit group again filed 99.9 percent of 442,899 complaints to the FCC as of Oct. 7 [2004]. The Super Bowl incident generated about half a million complaints, 65,000 from the Parents Television Council.”³⁰ As television columnist Rick Kushman of the *Sacramento Bee* observed about the Super Bowl halftime show, “groups looking to leverage the

23. See Rick Kissell, *Unblinking Eye Net*, DAILY VARIETY, Dec. 22, 2004, at 4 (dubbing the show “ABC’s Sunday smash”). The series ranked first in the Nielsen ratings during the week of December 13-19, 2004. *Id.*

24. Noel Holston & Diane Werts, *The Best of 2004/TV*, NEWSDAY, Dec. 26, 2004, at C26.

25. *Id.*

26. Joanne Ostrow, *Television: All Because of a “Wardrobe Malfunction” Indecency Police and FCC Team Up to Spark Self-Censorship*, DENVER POST, Dec. 26, 2004, at F-03.

27. Stephen Labaton, *Indecency on the Air, Evolution at F.C.C.*, N.Y. TIMES, Dec. 23, 2004, at E1.

28. Lisa de Moraes, *A Controversy of Olympic Proportions? Well, Not Exactly*, WASH. POST, Dec. 16, 2004, at C07.

29. Deborah Caulfield Rybak, *A Single Group Filed Almost All Complaints*, STAR TRIB. (Minneapolis, Minn.), Dec. 5, 2004, at 10A.

30. *Id.*

incident for their own power waged campaigns to lodge complaints with the Federal Communications Commission about everything that moved on TV.”³¹

The lesson from this is that well-organized and concerted efforts by a few groups are beginning to dictate the public policy debate on expression, at least when it comes to FCC actions. The Parents Television Council is just one of the groups involved in these efforts. For instance, “the less powerful and more right-wing American Family Association filed a complaint with the FCC condemning” ABC’s unedited broadcast in 2004 of the movie “Saving Private Ryan.”³²

The PTC does not hide its agenda, but rather puts it out in public for all to see. It describes its purpose on its Web site as trying “to ensure that children are not constantly assaulted by sex, violence and profanity on television and in other media.”³³ It contends that “[t]he gratuitous sex, foul language, and violence on TV (along with stories and dialogue that create disdain for authority figures, patriotism, and religion) are having a negative effect on children.”³⁴ Most significantly, the PTC allows people to complete and file online complaints with the FCC about allegedly indecent content.³⁵

No use of an expletive is too trivial or brief in nature not to catch the PTC’s attention and have it call, in turn, on the FCC to take action against a broadcaster. For instance, in October 2004, it filed a complaint after NBC aired “Dale Earnhardt Jr.’s S-word expletive” after a NASCAR race.³⁶ Never mind that the airing of this one word was unintentional and fleeting. L. Brett Bozell, the president of the PTC, contended that:

NBC knows that NASCAR has a huge family audience. NBC and its affiliates should be fined for airing the S-word at a time when millions of children were likely to be in the viewing audience[.] . . .

31. Rick Kushman, *Best of 2004—Television: As Sitcoms Go Quiet, Engaging Dramas Capture Television’s High Ground*, SACRAMENTO BEE, Dec. 26, 2004, <http://www.sacbee.com/content/lifestyle/kushman>.

32. Kay McFadden, *Dirty Shame: FCC’s Real Intentions Are Showing*, SEATTLE TIMES, Nov. 22, 2004, at E1.

33. Parents Television Council, About Us, at <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Mar. 28, 2005).

34. *Id.*

35. Parents Television Council, FCC Campaign, at <https://www.parentstv.org/fcc/fcccomplaint2.asp> (last visited Mar. 28, 2005).

36. Press Release, Parents Television Council, PTC Files Indecency Complaint over NBC’s Airing of Dale Earnhardt Expletive, (Oct. 18, 2004), at <http://www.parentstv.org/ptc/publications/release/2004/1018.asp> (last visited Mar. 28, 2005).

After the fact, NBC announced they would be putting all future NASCAR race coverage on a 5-second tape delay. But frankly, NBC should have taken this action long before the Earnhardt incident, especially given NBC's past problems with indecent language during live broadcasts, including Bono's utterance of the F-word during the 2003 Golden Globe awards.³⁷

How do such incidents come to the attention of the PTC? One answer is that the organization uses so-called entertainment analysts who "work in a row of modest gray cubicles at the group's Alexandria [Va.] office"³⁸ and spend their days reviewing hours and hours of videotapes of network and cable programs.³⁹ It also doesn't hurt that the organization's operating budget is \$5 million.⁴⁰

The actions of well-organized and well-funded groups like the PTC provide the FCC with the appearance—and that may be all that it really is—of massive public support for the Commission's crackdown on allegedly indecent content in 2004. And the sheer numbers of complaints are, indeed, important to the FCC. For instance, in its October 2004 "Notice of Apparent Liability for Forfeiture" totaling \$1,183,000 against 169 Fox Television Network stations for an episode of "Married by America," the FCC specifically noted that it "received 159 complaints alleging that the 'Married by America' episode contained indecent material."⁴¹ That would seem, at first glance, like a large number of complaints for one episode of any television series—a large enough number that might, indeed, justify some serious FCC scrutiny. But digging a little bit behind the number of 159 complaints reveals the true story.

In its formal opposition to the FCC's proposed forfeiture, attorneys for Fox write:

Initially, the NAL [Notice of Apparent Liability] reported that the Commission received 159 "complaints" about *Married by America*. In response to a FOIA request, however, the Commission confirmed that in fact only 23 people (from just 13 states) had filed 90 complaints (since several individuals submitted duplicate complaints to multiple Commission staff). All but four of the complaints were identical (apparently generated from the same web site) and *only one complainant professed even to have watched the program*. The Fox Television Network received only 15 viewer comments directly, while stations that aired the program also

37. *Id.*

38. Bob Thompson, *Fighting Indecency, One Bleep at a Time; Only Popular Culture and Big Media Stand in the Parent's Television Council's Way*, WASH. POST, Dec. 9, 2004, at C01.

39. *See generally id.*

40. *Id.*

41. *Married by America Notice, supra* note 14.

received only 19 viewer comments—a miniscule total for a show that had a national audience of 5.1 million households.⁴²

Later in the same opposition, Fox attorneys shed more light on the complaints, writing:

The Parents Television Council posted instructions on its Web site on how to fill out and send form email complaints to the Commission concerning the *Married By America* episode. The vast majority of the 90 complaints received by the Commission appear to have been generated by the Parents Television Council's email campaign.⁴³

The real danger here is that the Parents Television Council and groups of its ilk are being used, in grossly disproportionate fashion, by the FCC to define and discern the contemporary community standards for the broadcast medium. Why is this important? Because the FCC definition of indecency, used in cases like the *Married by America* dispute, defines the concept “as language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by *contemporary community standards* for the broadcast medium.”⁴⁴ The PTC is not representative of the broadcast community, but its numbers are being used by the FCC in the name of censorship as if it were a major or central component of the community. As television critic Tim Goodman of the *San Francisco Chronicle* observed, “a small group of highly mobilized conservative watchdogs has essentially driven the ‘moral values’ campaign directed at the FCC.”⁴⁵ For Goodman, “a small group of reactionary conservatives set the agenda”⁴⁶ in 2004.

The irony of this situation and Lesson No. 1 should be obvious: the First Amendment right of free speech, which was intended to protect minority viewpoints against suppression by majority opinions,⁴⁷ is

42. Fox Broadcasting Company and The Licensees of the Television Broadcast Stations Affiliated with the Fox Television Network, FCC 04-242, File No. EB-03-IH-0162, at v (Oct. 12, 2004) (opposition to notice), available at http://www.fcc.gov/eb/broadcast/Pleadings/Fox_Broadcasting_Company.pdf [hereinafter Fox Opposition]

43. *Id.* at 38 n.122.

44. *Married by America* Notice, *supra* note 14 (emphasis added).

45. Tim Goodman, *Couch Potatoes, It's Time to Drop the Remote. E-mail the FCC. Stop the Parents Television Council Before it Gets Beyond the TV*, S.F. CHRON., Dec. 13, 2004, at E1, 2004 WL 58615655.

46. *Id.*

47. Cf. Rodney A. Smolla, *Free the Fortune 500! The Debate Over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1284 (2004) (“Freedom of speech may be conceptualized as grounded in notions of David and Goliath, a constitutional guarantee aimed at protecting minority viewpoints against the tyrannies of majorities, at facilitating dissent, and at empowering the dispossessed to make their case against those in possession.”).

now being turned on its head and used by a minority in an attempt to squelch the free speech rights of the majority. Put more bluntly, today there is a distinct tyranny of the minority when it comes to speech liberties, at least with regard to expression conveyed on the broadcast medium.

The antidote to Lesson No. 1—that a vocal, minority viewpoint like that of the PTC can trump the majority’s speech rights—is for the silent majority of viewers of programs like “Married by America” to organize similar write-in or email-in campaigns of their own. Parsed differently, members of the 5.1 million households that viewed the episode of “Married by America” and enjoyed it must co-opt for themselves the same strategies and tactics employed so well and effectively by groups like the PTC. They must flood the Commission with notices lauding and praising the programs they enjoy. This is the essence, after all, of the First Amendment doctrine of counterspeech.⁴⁸ The FCC, in turn, should create a link on its Web site called, perhaps, “Programs Worth Praising,” at which viewers that enjoy a show can email the FCC and its commissioners with their positive responses about a particular show. Such a link would constitute a positive government step that would serve free speech.

In closing this part of the article, it is helpful to recall an old cliché—the squeaky wheel gets the grease. The PTC is now that squeaky wheel—a very squeaky one indeed—and the FCC currently is greasing the PTC’s complaints with censorial actions never before seen in broadcasting. It now is time for the majority of television viewers—those that have made “Desperate Housewives” the top-rated new series that it was in 2004—to play the role of the squeaky wheel to demonstrate to the FCC that much of the broadcast content damned by the PTC deserves to be aired without the fear of monetary liability and forfeiture.

II. POLITICIANS AND PRECEDENT DO NOT MIX

The second lesson could easily be called, “If at first, or second, or third you don’t succeed, then try, try again.” That appears to be the maxim for some politicians that never seem to let judicial precedent, grounded in constitutional concerns for the First Amendment protection of free speech, get in the way of proposing new legislation that

48. See generally Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (2000) (describing the counterspeech doctrine and illustrating its application with recent examples of its use).

has a slim-to-none chance of standing up in court. A wall of insurmountable precedent is never too high, it seems, for some politicians to try to hurdle in order to heap more legislative litter on courts, with taxpayers left to pay the bill of defending the new laws.

The most conspicuous example from 2004 involved the regulation of video games depicting images of violence that allow players to engage in fantasy and storyline-driven violent acts. Precedent is firmly stacked against laws that attempt to deny minors access to such games.⁴⁹ For instance, in 2001, Judge Richard Posner and a unanimous United States Court of Appeals for the Seventh Circuit granted a preliminary injunction to a video game manufacturer challenging the constitutionality of an Indianapolis, Indiana, ordinance that sought “to limit the access of minors to video games that depict violence.”⁵⁰ This blow to censorship was succeeded in 2003 by the Eighth Circuit’s decision declaring a St. Louis County, Missouri, ordinance, which made it “unlawful for any person knowingly to sell, rent, or make available graphically violent video games to minors, or to ‘permit the free play of’ graphically violent video games by minors, without a parent or guardian’s consent,” unconstitutional, in violation of the First Amendment.⁵¹ And then, in 2004, a federal judge held both unconstitutionally vague and unsupported by sufficient evidence a Washington state law that restricted minors’ access to “‘video or computer game[s] that contain[] realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.’”⁵²

That is three laws and three judicial strikes against them. By any reasonable measure, politicians should be declared “out,” or at least thrown out of court in the future if they try to fashion access-based legislation again. But, as Lesson No. 2 demonstrates, politicians and precedent don’t mix.

Thus, in December of 2004—the heart of the toy-buying season—Illinois Governor Rod Blagojevich proposed a measure that “would make selling violent or sexual games to anyone under 18 a misde-

49. See *infra* notes 50-53 and accompanying text.

50. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 572 (7th Cir. 2001). See generally Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids’ Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1 (2002) (analyzing, critiquing and lauding the opinion in *Kendrick*).

51. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 954 (8th Cir. 2003).

52. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190 (W.D. Wash. 2004).

meanor punishable by up to a year in prison or a \$5,000 fine.”⁵³ Never mind the fact that the proposal might be unconstitutional; it was a politically popular and astute move. As the *Los Angeles Times* opined in an editorial, “It’s always tempting to chisel away at the 1st Amendment when confronted with offensive material, but Blagojevich’s proposal, as a legal matter, is a nonstarter. Of course, as a political matter, give Blagojevich points for being a Democrat positioning himself as a defender of family values.”⁵⁴ The latter point is certainly well taken, as Blagojevich scored major national press for himself with the proposal in *The New York Times*,⁵⁵ the *Washington Post*,⁵⁶ and the *Los Angeles Times*.⁵⁷ That may be the payoff for politicians during the feel-good holiday season when parents are busy purchasing toys for their children, but it sacrifices free speech rights at the altar of good press coverage.

Blagojevich was not alone in Illinois with either his proposal or its holiday-season timing. Aldermen Edward M. Burke (14th) and Isaac Carothers (29th) also made a call for local legislation in the City Council of Chicago “to force retailers to keep violent games behind the counter.”⁵⁸ An American Civil Liberties Union spokesperson said the legislation “appears to be a straightforward kind of censorship. . . . This kind of proposal really amounts to just an overreach. It substitutes the views or beliefs of a governmental body for parental autonomy.”⁵⁹ Such advice, of course, is likely to go unheeded.

In New York, in December of 2004, there were calls for similar access-restriction based legislation on video games.⁶⁰ State Assemblyman Brian Kolb (R-Canandaigua) said at the time, “We’re not trying to censor free speech or prevent anyone from making these things, just restrict the access”⁶¹ While such an effort may be well intended, it goes against the solid weight of judicial precedent from across the country, as described above.

53. Amanda Paulson, *A Battle over Sale of Violent Video Games*, CHRISTIAN SCI. MONITOR, Dec. 31, 2004, at 1.

54. *Parental Advisory*, L.A. TIMES, Dec. 24, 2004, at B12.

55. Gretchen Ruethling, *Technology Briefing Software: Illinois: Regulating Videos for Minors*, N.Y. TIMES, Dec. 17, 2004, at C3.

56. Peter Slevin, *A Push to Restrict Sales of Video Games; Illinois Governor Seeks to Prevent Minors from Purchasing “Adult Material,”* WASH. POST, Dec. 16, 2004, at A08.

57. Huffstutter, *supra* note 3.

58. Fran Spielman, *Daley Backs Shielding “Sicko” Video Games; Burke, Carothers Want Parents’ OK Before Kids Can Buy Them*, CHIC. SUN-TIMES, Dec. 9, 2004, at 20.

59. *Id.*

60. Derek Rose & Celeste Katz, *Council Speaker Urges Curbs On Kids’ Access to Grisly Video Games*, N.Y. DAILY NEWS, Dec. 19, 2004, at 14.

61. *Id.*

None of these efforts are likely to dissipate in 2005 and beyond. Why? Because video games are incredibly popular;⁶² the more they sell, the more attention they will attract from politicians, and precedent be damned. It also will not matter to politicians that video game players increasingly are aging and are no longer limited to the teen and pre-teen demographics that seem to attract so much controversy.⁶³ Video games are now a “\$24 billion global industry,”⁶⁴ and that is quite a large and impressive target for politicians to aim to hit.

III. NO GOOD DEED GOES UNPUNISHED

Wal-Mart sometimes finds itself the target of criticism for coming into a community and allegedly driving local stores and shops out of business via its low-cost goods.⁶⁵ But in 2004 and in the area of expression, it was the giant chain’s well-intentioned voluntary efforts to help parents with song lyrics that backfired and resulted in a lawsuit against it. The lesson, as this part of the article illustrates, is that no good deed goes unpunished and, more specifically, that voluntary efforts at self-regulation and self-policing of media content may be more hassle and headache than they are worth. And, as this part of the article also makes clear later, the voluntary efforts of the video game industry to rate its content and to help parents are beginning to be used against it by state and local legislatures.

Wal-Mart stores voluntarily have adopted a “family-friendly policy of refusing to stock CDs and DVDs that carry parental advisory labels warning about explicit lyrics.”⁶⁶ Not only is Wal-Mart’s policy of not selling such music a voluntary corporate effort to help parents shield their children from potentially offensive content, but the “[r]ecording companies voluntarily label their music.”⁶⁷ Put differ-

62. See, e.g., Matt Richtel, *Game Sales Thrive Thanks to the Big Kids (In Their 20's)*, N.Y. TIMES, Dec. 27, 2004, at C1. “The video game industry is poised to enjoy a record-breaking holiday season.” *Id.* The violent video game “Grand Theft Auto: San Andreas”—a favorite target of politicians—“sold more than 3.3 million copies in the last two months.” *Id.*

63. *Id.* (“The average age of game-console users is 24; the average age is 29 if people playing on computers are included.”)

64. Nick Wingfield & Robert A. Guth, *Videogame Makers Are Playing “Takeover 2005,”* WALL ST. J., Dec. 29, 2004, at C1.

65. Cf. Ken Garcia, *Wal-Mart Starts to Pay the Price*, S.F. CHRON., Apr. 12, 2004, at B7 (describing Wal-Mart’s tactics when moving into communities and “Wal-Mart’s often debilitating effect on local and state economies”).

66. Marilyn Gardner, *Parents Say Wal-Mart Hit Wrong Note*, CHRISTIAN SCI. MONITOR, Dec. 20, 2004, at 12.

67. *Id.*

ently, the ratings themselves are voluntary, as is Wal-Mart's policy of not carrying and selling compact discs with parental advisory stickers.

However, Wal-Mart's following of the same family-friendly policy ultimately resulted in a lawsuit filed against it by a Maryland attorney named John Pels in 2004.⁶⁸ As the Associated Press reported in December of that year, the lawsuit claims that Wal-Mart "deceived customers by stocking compact discs by the rock group Evanescence that contain the f-word."⁶⁹

But the Evanescence CD in question, "Anywhere But Home," does *not* carry a parental advisory label, and thus Wal-Mart stocks the CD without violating its own policy of excluding only CDs that have such labels.⁷⁰ In brief, then, the selling of the CD by Wal-Mart did not violate its own policy.

But according to the lawsuit, "Wal-Mart knew about the explicit lyrics in the song, 'Thoughtless,' because it censored the word in a free sample available on its Web site and in its stores."⁷¹ As attorney Pels told a reporter for the *Christian Science Monitor*, "We believe Wal-Mart knew it was offensive. If you went to the website to sample the song, you would hear no explicit language. When you go to [a store], the words are not dubbed out on the CD."⁷² However, a Wal-Mart spokesperson explained:

It wouldn't be possible to eliminate every word or image that an individual finds objectionable. What is objectionable to you might not be objectionable to me. So we rely on the industry to put these parental advisory labels on the music. This was an incident where there was not a label on it.⁷³

The irony, of course, should be clear. Had Wal-Mart not voluntarily created a policy of self-regulation in the form of not selling CDs with parental advisory stickers, then it never would have been sued by plaintiffs Melanie and Trevin Skeens and their attorney, John Pels. But, only because Wal-Mart tried to do the right thing, did it create a situation that now is being exploited for financial gain, as "the suit seeks damages up to \$74,500 for customers who bought the CD in Wal-Mart's Maryland stores."⁷⁴ The threat and reality of being sued

68. David Dishneau, *Wal-Mart Sued over Evanescence Lyrics*, ASSOCIATED PRESS NEWSWIRE, Dec. 11, 2004.

69. *Id.*

70. *Id.*

71. *Id.*

72. Gardner, *supra* note 66.

73. *Id.*

74. *Id.*

for actually following one's own policy of self-regulation is tragic. What is the incentive to voluntarily police oneself if that self-policing can be turned against you in court? The answer, unfortunately, is there is no incentive. It is a classic case of the biting maxim that "no good deed goes unpunished."

But the Wal-Mart example, bizarre though it may be, is not the only one from 2004 in which well-intentioned efforts at self-regulation are being turned against media content providers and distributors. The video game industry now is having its own voluntary ratings system turned against it as a legal weapon by state legislative bodies.

The Entertainment Software Rating Board (ESRB) has created its own rating system in order to help "parents and other consumers choose the games that are right for their families."⁷⁵ The system includes both rating symbols, such as "AO"⁷⁶ and "M,"⁷⁷ which suggest the age-appropriateness of a particular video game, and "content descriptors that indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern."⁷⁸ Examples of content descriptors are "Intense Violence"⁷⁹ and "Strong Sexual Content."⁸⁰ Using such ratings and content descriptors, the ESRB now "rates over 1,000 games per year."⁸¹ It has "has rated more than 10,000 games since 1994" when the ESRB was organized.⁸²

But today, legislatures are now turning this voluntary ratings system into law by incorporating it into bills and measures that restrict minors' access to video games or require retailers to post and display the ratings in their stores. For instance, California Governor Arnold Schwarzenegger signed into law in September of 2004 a measure pro-

75. Entertainment Software Rating Board, Check the Rating, at <http://www.esrb.org> (last visited Mar. 28, 2005).

76. *Id.* The "AO" rating stands for "Adults Only" and states "[t]itles in this category may include graphic depictions of sex and/or violence. Adult Only products are not intended for persons under the age of 18." *Id.*

77. *Id.* The "M" rating means "Mature," including games with "content that may be suitable for persons ages 17 and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language." *Id.*

78. *Id.*

79. *Id.* This term is defined by the Entertainment Software Rating Board as "[g]raphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death." *Id.*

80. *Id.* This term is defined by the Entertainment Software Rating Board as "[g]raphic references to and/or depictions of sexual behavior, possibly including nudity." *Id.*

81. Entertainment Software Rating Board, ESRB Game Ratings: Frequently Asked Questions, at http://www.esrb.org/esrbratings_faqs.asp (last visited Mar. 28, 2005).

82. Entertainment Software Rating Board, About ESRB: Fast Facts, at http://www.esrb.org/about_facts.asp (last visited Mar. 28, 2004).

viding that “[e]very video game retailer shall post a sign providing information to consumers about a video game rating system or notifying consumers that a rating system is available to aid in the selection of a game. The sign shall be posted within the retail establishment in a prominent area.”⁸³ The new law also requires that “[a] video game retailer shall make available to consumers, upon request, information that explains the video game rating system.”⁸⁴ As *The Hollywood Reporter* observed, “[t]he bill essentially turns the voluntary ratings that the game industry has instituted through the ESRB since 1994 into a mandatory retail initiative.”⁸⁵

Importantly, the original bill proposed in California would have gone much farther, as it would have “included a \$2,000 fine and a year in jail to anyone caught selling M-rated games to minors”⁸⁶ and “would have required M-rated games to be displayed in back rooms where many rental stores keep pornography, even though the M-rating that the Entertainment Software Rating Board gives to games is the equivalent of an R rating in film.”⁸⁷ It was only strong lobbying efforts by the video game industry that caused these provisions to be removed from the bill before it came before Governor Schwarzenegger for signage.⁸⁸

In New York, Senate Bill 6347 was introduced in March 2004 that would prohibit the sale to minors of certain rated video games containing a rating that reflects content of various degrees of profanity, racist stereotypes or derogatory language, and/or actions toward a specific group of persons.⁸⁹ The key here is that this law taps into the word rating and the rating system employed by the ESRB.

All of this, sadly, should not come as a surprise to the video game industry. Why? Because the Motion Picture Association of America (MPAA) has already seen its voluntary ratings system turned into law in some states.⁹⁰ For instance, a Florida statute provides that:

83. CAL. BUS. & PROF. CODE § 20650 (West 2004) (codifying Assembly Bill 1793).

84. *Id.*

85. John Gaudiosi, *Columns: Playing Games; Retooled Vid Game Bill Regulates Sales in Calif.*, HOLLYWOOD REP., Sept. 29, 2004, <http://www.hollywoodreporter.com>, on file with *California Western Law Review*.

86. *Id.*

87. *Id.*

88. *Id.*

89. S.B. 6346, 227 Ann. Leg. Sess. (N.Y. 2004).

90. Motion Picture Association of America, Voluntary Movie Rating System, at <http://www.mpa.org/movieratings> (last visited Mar. 28, 2005).

It is unlawful for a person to sell at retail, rent to another, attempt to sell at retail, or attempt to rent to another, a video movie in this state unless the official rating of the motion picture from which it is copied is clearly displayed on the outside of its cassette, case, jacket, or other covering. If the motion picture from which the video movie is copied has no official rating or if the video movie has been altered so that its content materially differs from the motion picture, such video movie shall be clearly and prominently marked as "N.R." or "Not Rated." Any person who violates the provisions of this section is guilty of a misdemeanor of the first degree. . . .⁹¹

Other states with similar laws that incorporate and transform the MPAA's voluntary guidelines into law include Georgia,⁹² Illinois,⁹³ Maryland⁹⁴ and West Virginia.⁹⁵ It is no surprise, then, that California may be starting a trend with its 2004 law incorporating and transforming the ESRB's voluntary video game guidelines into law.

To summarize Lesson No. 3—that no good deed goes unpunished—the voluntary efforts of self-regulation by retailers and media organizations to help consumers are now being turned against them by trial attorneys and state legislative bodies. If there were no voluntary ratings systems for video games or movies, the laws that penalize retailers would be rendered nugatory. Moreover, given the strong likelihood of First Amendment challenges to government regulation, voluntary guidelines trump unnecessary and unworkable state and federal initiatives. But the incentive to self-regulate is no longer there when actions like that filed against Wal-Mart become the norm.

IV. SCIENCE AND SURVEYS SERVE SEXUAL CENSORSHIP

There is an "increasing normalization of pornography in America."⁹⁶ Witness the proliferation of adult stores in rural Midwest communities⁹⁷ and the success in 2004 of books such as adult video star Jenna Jameson's "How to Make Love Like a Porn Star: A Cautionary Tale."⁹⁸ The *San Francisco Chronicle* reported in 2004 that sex is now "a multibillion-dollar industry nationwide. Adult video

91. FLA. STAT. ANN. § 847.202 (West 2004).

92. GA. CODE ANN. § 16-8-61 (2004).

93. 720 ILL. COMP. STAT. ANN. 395/3 (West 2005).

94. MD. CODE ANN., COM. LAW § 14-1602 (2003).

95. W. VA. CODE ANN. § 61-8E-3 (Michie 2004).

96. Dan Thanh Dang, *Racy Books Face Exposure Issues*, L.A. TIMES, Oct. 20, 2004, at E11.

97. See Stephanie Simon, *We're Not in G-Rated Kansas Anymore; Porn "Superstores" Are Thriving near Rural Offramps, Causing the Locals to Debate Obscenity and Privacy, Sometimes in Court*, L.A. TIMES, Dec. 6, 2004, at A16.

98. Dang, *supra* note 96.

business alone generates \$11 billion a year, by some estimates. And it's not just for the kinky or perverse. Almost everyone, it seems, has watched an adult movie."⁹⁹ And as the film critic for another newspaper reported in November of 2004, "[t]urn on the television, go to the movies, peruse the book racks, and one thing is bound to get your attention: Sex, explicit sex, is everywhere."¹⁰⁰

Advertising Age magazine reported in 2004 that "adult entertainment could be pulling in anywhere from \$8 billion to \$11 billion a year, which, at the high end, would make it bigger than Hollywood's feature film business. Trade magazine *Adult Video News* reported that sales and rentals of adult videos alone racked up \$4 billion last year."¹⁰¹ About 4,000 adult video titles are produced each year in the Los Angeles area.¹⁰² Adult pay-per-view and video-on-demand services are booming.¹⁰³ As Larry Flynt,¹⁰⁴ the publisher of *Hustler* magazine, wrote in 2004:

The adult film industry in Southern California is not being run by a bunch of dirty old men in the back room of some sleazy warehouse. Today, in the state, XXX entertainment is a \$9-billion-to-\$14-billion business run with the same kind of thought and attention to detail that you'd find at GE, Mattel or Tribune Co.¹⁰⁵

Despite these facts, as well as the opinion of at least one veteran obscenity litigator that gaining convictions for obscenity is becoming increasingly difficult today for mainstream adult videos,¹⁰⁶ the year

99. John Koopman, *Skin; Sex: Its [sic] Not Just Fun. Its [sic] About Politics, Identity, Freedom and Big Business*, S.F. CHRON., Apr. 1, 2004, at E1.

100. Deborah Hornblow, *We Can Embrace It, or We Can Censor It. It Doesn't Matter. It's Always a Subject that Holds Our Imagination*, HARTFORD COURANT (Conn.), Nov. 7, 2004, at G1.

101. T.L. Stanley, "Surreal Life": *Porn Crosses over to Media Mainstream*, ADVERTISING AGE, Jan. 26, 2004, at 4.

102. Nick Madigan, *Sex Videos on Pause, and Idled Actors Fret*, N.Y. TIMES, Apr. 25, 2004, § 9, at 1.

103. See R. Thomas Umstead, *Cable's Sexy Revenue Stream; Erotic Programming Is More Lucrative than MSOs Let on*, MULTICHANNEL NEWS, June 14, 2004, at 41 ("The adult PPV [pay-per-view] category has been a consistently strong revenue source for operators since the mid 1990s, posting impressive gains over the last five years as operators expanded adult offerings with the growth of digital cable. Adult revenue has nearly tripled from \$263 million in 1998 to \$609 million in 2002.").

104. See generally Clay Calvert & Robert D. Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM'LAW CONSP'CTUS 159 (2001) (providing both background on Flynt and an interview with the controversial publisher).

105. Larry Flynt, *Commentary; Porn World's Sky Isn't Falling—It Doesn't Need a Condom Rule*, L.A. TIMES, Apr. 23, 2004, at California 13.

106. See generally Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Ad-*

2004 revealed what may be a new tactic of those seeking to squelch First Amendment rights and turn back the clock on the mainstreaming of sexual content in the media. That tactic is the deployment of social science evidence in front of legislative bodies to convince lawmakers that free speech rights must now give way and be trumped by “research” showing that the consumption of sexually explicit speech products causes harm to society.

As the author of this law journal article and a colleague observed in an opinion commentary in the *Boston Globe* about the goings on in Congress in November of 2004:

[T]he U.S. Senate Committee on Commerce, Science, and Transportation held a hearing called “The Science Behind Pornography Addiction.” It featured four antipornography activists—each with “Dr.” before his or her name—testifying about the horrors of viewing adult content. No one from the adult entertainment industry, according to the *Adult Video News*, was notified in advance by the committee’s staff.

The battle is now being framed as one of science versus speech.¹⁰⁷

The hearings, which took place on November 18, 2004, focused on “brain science related to pornography addiction and the effects of such addiction on families and communities.”¹⁰⁸ The four witnesses were: 1) Judith Reisman, Ph.D., president of the Institute for Media Education and the California Protective Parents Association;¹⁰⁹ 2) Dr. Mary Anne Layden, co-director of the Sexual Trauma and Psychopathology Program at the Center for Cognitive Therapy of the University of Pennsylvania;¹¹⁰ 3) Dr. James B. Weaver III, professor, Virginia Polytechnic Institute and State University;¹¹¹ and 4) Dr. Jeffrey Sati-
nover.¹¹²

vocate, 6 VAND. J. ENT. L. & PRAC. 147 (2004). Paul Cambria, general counsel for LFP, Inc., states that “[t]he Flynts, the Vivids, VCAs, and Wicked—all those mainstream companies—are safer because their movies are hugely popular with couples.” *Id.* at 154.

107. Robert D. Richards & Clay Calvert, *The Politics of Porn*, BOSTON GLOBE, Dec. 27, 2004, at A15.

108. *The Science Behind Pornography Addiction: Hearing Before the U.S. Senate Committee on Commerce, Science & Transportation*, 109th Cong. (2004), <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1343> (last visited Mar. 28, 2005).

109. *The Science Behind Pornography Addiction: Hearing Before the U.S. Senate Committee on Commerce, Science & Transportation*, 109th Cong. (2004) (testimony of Dr. Judith Reisman), http://commerce.senate.gov/hearings/testimony.cfm?id=1343&wit_id=3910 (last visited Mar. 28, 2005) [hereinafter Reisman Testimony].

110. *The Science Behind Pornography Addiction: Hearing Before the U.S. Senate Committee on Commerce, Science & Transportation*, 109th Cong. (2004) (testimony of Dr. Mary Anne Layden), http://commerce.senate.gov/hearings/testimony.cfm?id=1343&wit_id=3912 (last visited Mar. 28, 2005) [hereinafter Layden Testimony].

111. *The Science Behind Pornography Addiction: Hearing Before the U.S. Senate Com-*

The Free Speech Coalition, the leading trade association of the adult entertainment industry¹¹³ that already has its name on one recent precedent-setting United States Supreme Court decision,¹¹⁴ decried the hearings in an official press release.¹¹⁵ According to Jeffrey Douglas, chair of the Coalition's Board of Directors:

No one in the adult video or Internet industries was given any notice that the hearing would take place. . . .

Every story has two sides. Our side never got told because the hearing was off the radar of public events. The result was a one-sided proceeding with biased witnesses who gave the Subcommittee poorly-researched results.¹¹⁶

Douglas asserted in the press release that if the Free Speech Coalition "had known about the hearing, we could have suggested other researchers with better credentials and much more credible data than the four witnesses whom the committee apparently solicited to testify."¹¹⁷ The individuals on the other side of the debate, according to the Coalition, include Dr. Vern Bullough of University of Southern California and Dr. Daniel Linz, Professor of Communication and Law & Society at the University of California.¹¹⁸

And what were the specifics of the one-sided testimony that the U.S. Senate Committee on Commerce, Science and Transportation heard on the topic of pornography addiction? Dr. Reisman testified that "pornographic visual images imprint and alter the brain, triggering an instant, involuntary, but lasting, biochemical memory trail, arguably, subverting the First Amendment by overriding the cognitive

mittee on Commerce, Science & Transportation, 109th Cong. (2004) (testimony of Dr. James B. Weaver III), http://commerce.senate.gov/hearings/testimony.cfm?id=1343&wit_id=3913 (last visited Mar. 28, 2005).

112. *The Science Behind Pornography Addiction: Hearing Before the U.S. Senate Committee on Commerce, Science & Transportation*, 109th Cong. (2004) (testimony of Dr. Jeffrey Satinover), http://commerce.senate.gov/hearings/testimony.cfm?id=1343&wit_id=3911 (last visited Mar. 28, 2005). Background on Dr. Satinover can be found on his own Web site, at <http://www.satinover.com/main.htm> (last visited Mar. 28, 2005).

113. Free Speech Coalition, Mission Statement, at <http://www.freespeechcoalition.com/missionstatement.htm> (last visited Mar. 28, 2005).

114. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down, on First Amendment grounds, portions of the Child Pornography Prevention Act of 1996 that regulated so-called virtual child pornography).

115. Press Release, Free Speech Coalition, First Amendment Group Blasts Senate For Secret, Biased Hearing (Dec. 6, 2004) at http://www.freespeechcoalition.com/press_release_12-6-04.htm (last visited Mar. 28, 2005).

116. *Id.*

117. *Id.*

118. *Id.*

speech process.”¹¹⁹ What does this mean? Apparently the contention is that physical changes caused by speech products—in this case, “pornographic visual images”—take precedence over the First Amendment interest of free speech that allows those same images to be created in the first place. Being careful to drop in a few large and impressive sounding terms, Dr. Reisman told the committee that “[p]ornography psychopharmacologically imprints young brains—thereby invalidating notions of informed consent.”¹²⁰

Apparently based upon her data and studies, Dr. Reisman went on to contend that “[a]n offensive strategy should be planned, mandating law enforcement collection of all pornography data at crime sites and judges, police, lawyers and law schools should receive training in the hard data of sexology fraud and erototoxins as changing brains absent informed consent.”¹²¹ She blasted what she called “educational institutions that train students with bogus Kinseyan academic pornography and/or that teach pornography as harmless.”¹²²

Dr. Reisman was not the only witness to employ such rhetorical hyperbole in her comments to the committee. For instance, Dr. Layden stated that pornography is an “equal opportunity toxin.”¹²³ Dr. Layden went so far as to compare sexually explicit material with cocaine, telling the committee that “[r]esearch indicates that even non-sex addicts will show brain reactions on PET scans while viewing pornography similar to cocaine addicts looking at images of people taking cocaine [sic].”¹²⁴ Then, completely abandoning the pretext and cloak of objective science, Dr. Layden directly attacked the adult entertainment industry with the usual stories of how adult actresses were molested as children. In dramatic language, Layden stated:

Those who now work in the porn industry were often little girls who got into their beds each night, rolled themselves into a fetal position and each night he came in a [sic] pealed her open. They work in the porn industry with its physical invasion and visual invasion because it feels like home.¹²⁵

All of this provides an important lesson for the adult entertainment industry, specifically, and First Amendment proponents, gener-

119. Reisman Testimony, *supra* note 109.

120. *Id.*

121. *Id.*

122. *Id.*

123. Layden Testimony, *supra* note 110.

124. *Id.*

125. *Id.*

ally. That lesson is that science and surveys will be used increasingly to serve the censorship of sexual content. The tactic of holding Congressional hearings where only one side of the debate is invited to participate is not surprising at all; what U.S. Senator or Representative wants to be known as the politician who invited and gave scientists *supportive* of the adult entertainment industry an official forum in Congress in which to spread their views to the public at large? No politician wants to be associated with or tarred by the adult entertainment industry.

Why the new tactic by censorship advocates of using the science of so-called pornography addiction in 2004? Perhaps because courts keep striking down, on First Amendment free speech grounds, laws that target sexually explicit speech in cyberspace.¹²⁶ For instance, in June of 2004, the United States Supreme Court upheld a preliminary injunction prohibiting enforcement of the federal Child Online Protection Act,¹²⁷ the second failed effort by Congress to make the Internet safe for minors by criminalizing certain Internet speech relating to sexual content.¹²⁸ With both judicial precedent and the increasing public popularity and mainstreaming of adult content stacked firmly against them, the censorship advocates now have turned to science (and a good-size dose of hyperbole) in what might just be a last-ditch source of ammunition to thwart the First Amendment and sexually explicit content. It is a lesson that groups such as the Free Speech Coalition must heed and be ready to defend against—that is, if they are given notice of future Congressional hearings—in 2005 and beyond.

Adult entertainment, however, was not the only area of media content in 2004 in which the efforts of social scientists were being used to thwart free speech rights. In particular, research on the supposed effects of viewing and playing violent video games was being cited by legislators in order to justify measures and bills designed to limit minors' access to those games. For instance, an ordinance proposed in December 2004 in the City Council of Chicago, Illinois, provides the following in its legislative findings section: "according to psychologist Craig Anderson from Iowa State University, violent video games account for a 13 to 22 percent increase in violent behavior among adolescents."¹²⁹ The same measure also provides, as an official legislative finding, that "psychologists agree that violent games

126. See, e.g., *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004).

127. 47 U.S.C. § 231.

128. *ACLU*, 124 S. Ct. at 2788.

129. Chicago, Ill., Municipal Code, Sale and Rental of Video Games, § 8-8-125 (proposed 2004).

are more harmful to children than vicious movies because players are actively involved in perpetrating violence and are often rewarded for such behavior.”¹³⁰

Legislation proposed by the California legislature in 2004 targeting minors’ access to video games also cited social evidence. In particular, Assembly Bill 1792 provides in relevant part that “[t]he Legislature finds and declares” that “[v]iolent video games have the capacity to produce more serious psychological damage in minors than other forms of violent entertainment because of the involvement of the player in the infliction of injury and the satisfaction induced by these games from successfully performing violent acts.”¹³¹

A similar attempt to use social science to justify censorship of video games in 2004 was rebuked, however, by a federal judge in Washington state. In *Video Software Dealers Ass’n v. Maleng*,¹³² U.S. District Court Judge Robert S. Lasnik wrote that “the current state of the research cannot support the legislative determinations that underlie” the Washington law restricting minors’ access to video games.¹³³ Social science evidence and, in particular, a study by the same Craig Anderson cited in the legislative findings of the 2004-proposed Chicago ordinance, was similarly rejected by Judge Richard Posner and the United States Court of Appeals for the Seventh Circuit in 2001 in striking down an Indianapolis, Indiana, law restricting minors’ access to video games depicting violence.¹³⁴ But as Lesson No. 2 identified earlier in this article illustrates,¹³⁵ such precedent against the effective use of social science evidence in the context of video games is likely to go unheeded by politicians.

V. THE VAGUER THE DEFINITION, THE GREATER THE GOVERNMENT CENSORSHIP

Federal law, enforced by the FCC, prohibits the utterance of “any obscene, indecent or *profane* language by means of radio communication.”¹³⁶ In its March 2004 *Golden Globes* opinion, the FCC wrote that the Commission “in the future will not limit its definition of profane speech to only those words and phrases that contain an element

130. *Id.*

131. A.B. 1792, 2003 Reg. Sess. (Cal. 2004).

132. 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

133. *Id.* at 1188.

134. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001).

135. *See supra* notes 48-64 and accompanying text.

136. 18 U.S.C. § 1464 (2004) (emphasis added).

of blasphemy or divine imprecation.”¹³⁷ While not providing a clear definition of profane language at that time, the FCC did note that the “‘F-Word’ in the context at issue here is also clearly the kind of vulgar and coarse language that is commonly understood to fall within the definition of ‘profanity.’”¹³⁸

So how, during the rest of 2004, did the FCC come to define profane language? By the end of the year, the Commission wrote on its official Web site that “[p]ropane material is defined as including language that denotes certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”¹³⁹

The FCC, however, gave no indication of what might constitute “those personally reviling epithets.” Likewise, the Commission failed to define what it means by the term “grossly offensive.”

This is important because, as one federal court recently observed, “First Amendment analysis is particularly prone to words and phrases being taken out of context.”¹⁴⁰ Legal concern about vague laws, like the FCC’s vague definition of profanity, is based on “two basic concerns: 1) concerns about fair notice, and about the related danger of chilling expression, and 2) concerns about excessive discretion being invested in administering and enforcing officials.”¹⁴¹ Thus, under the void-for-vagueness doctrine, a law will be declared unconstitutional if its terms are “so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.”¹⁴²

The FCC’s new definition of profane language clearly is ripe for judicial challenge under the void-for-vagueness doctrine. The Commission’s definition can easily be abused by the FCC in the name of cleaning up the airwaves. Thus, Lesson No. 5 provides, to paraphrase the heading of this part of the article, that the vaguer the legal definition employed by a government agency, the greater is the possibility for censorship. The broadcast networks must contest this new defini-

137. Golden Globes Memorandum, *supra* note 9, at 4981.

138. *Id.*

139. FCC, Parents’ Place: Obscenity, Indecency, & Profanity, at <http://www.fcc.gov/parents/content.html> (last visited Mar. 28, 2005) [hereinafter FCC Parents’ Place].

140. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 94 (1st Cir. 2004).

141. *Id.* at 93.

142. *United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003).

tion of profane language, much as Fox is now doing in contesting the FCC's definition of indecent speech.¹⁴³

In particular, in its Opposition to Notice of Apparent Liability for Forfeiture that was filed in December of 2004 in response to the FCC's decision declaring indecent an episode of "Married by America," the Fox Broadcasting Company decries what it calls "the Commission's inherently vague indecency definition."¹⁴⁴ Fox points out, among other things, that the definition of indecency "incorporates the concept of a national community standard for the broadcast medium, but the Commission has never defined that standard with any degree of precision, let alone the kind of precision necessary to survive a constitutional review."¹⁴⁵

Moreover, Fox draws attention to, in an effort to illustrate the elusiveness of a clear interpretation of the indecency standard, the FCC's seemingly contradictory rulings in 2004 about what constitutes either sexual activities or the depiction of sexual organs.¹⁴⁶ These terms are important because the FCC considers indecent speech, as it wrote in its opinion targeting "Married by America," to be "language that, in context, depicts or describes *sexual or excretory activities or organs* in terms patently offensive as measured by contemporary community standards for the broadcast medium."¹⁴⁷ To demonstrate the FCC's failure to consistently interpret the meaning of sexual activities, Fox points to a 2004 FCC opinion¹⁴⁸ declaring *not* indecent an episode of "Will and Grace" that depicted a scene involving so-called dry humping.¹⁴⁹ In that case, the FCC defined dry humping as "commonly understood to consist of two people rubbing their clothed bodies together for sexual stimulation."¹⁵⁰ Yet the FCC wrote in its "Will and Grace" opinion that "[i]t is not clear that the material aired during the 'Will and Grace' program identified by the complainants depicts sexual activities and, therefore, warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards."¹⁵¹ But with the "Married by America" episode, Fox argues

143. See generally Fox Opposition, *supra* note 42.

144. *Id.* at 4.

145. *Id.* at 5.

146. *Id.* at 26-27.

147. Married by America Notice, *supra* note 14 (emphasis added).

148. *In re KSAZ License, Inc.*, 19 F.C.C.R. 15999, 15999 (FCC Aug. 9, 2004) (memorandum and opinion order).

149. Fox Opposition, *supra* note 42, at 27.

150. *KSAZ License*, 19 F.C.C.R. at 16002 n.3.

151. *Id.* at 16001.

that the FCC found that a scene in which a man, wearing underwear and positioned on all fours while being spanked by strippers, was of such a sexual nature as to constitute sexual activity.¹⁵²

Were it not for the serious First Amendment concerns at stake, the FCC's contrasting rulings in "Will and Grace" and "Married by America" would be almost comical. The rule appears to be this: It's okay to show a dry hump among situation comedy characters, but not to show a spanking by a stripper on a reality TV show. The fact that the FCC has reduced itself to splitting such hairs (let alone taking upon itself the task of defining terms such as dry hump) indeed demonstrates the vagueness with its own indecency standard.

In summary, vague concepts like profane language and indecency lend themselves to censorship and abuse. They must be challenged swiftly to prevent such actions in the future.

VI. CORPORATE SELF-CENSORSHIP AND SELF-PRESERVATION SQUELCH SPEECH

"[T]he 'chilling effect' of self-censorship is in the air."¹⁵³ That is how one television critic put it as the year 2004 came to a close.

The indicators of this troubling situation were everywhere. Most notably, 66 ABC stations declined to air the Steven Spielberg movie "Saving Private Ryan" in November 2004 "for fear of fines in an increasingly puritanical media environment."¹⁵⁴ As Raymond Cole, president of the ABC affiliate in Des Moines, Iowa, put it:

We regret that we are not able to broadcast a patriotic, artistic tribute to our fighting forces like 'Saving Private Ryan.' . . . Can a movie with an 'M' rating, however prestigious the production or poignant the subject matter, be shown before 10:00 p.m.? . . . With the current FCC, we just don't know.¹⁵⁵

And that timidity, indeed, was a major problem with the FCC's aggressive approach to indecency enforcement in 2004¹⁵⁶—an approach that leads to Lesson No. 6: Corporate self-censorship and self-preservation squelch speech. In order to avoid potential liability and monetary forfeiture at the hands of the FCC, the safe path is to steer

152. Fox Opposition, *supra* note 42, at 28.

153. Ostrow, *supra* note 26.

154. Tim Cuprisin, *Inside TV & Radio: FCC Chief Would Clear "Ryan" for Broadcast*, MILWAUKEE J. SENTINEL, Dec. 16, 2004, at B10.

155. Richard Huff, *Fear Over "Private" Parts*, N.Y. DAILY NEWS, Nov. 11, 2004, at 111.

156. See *supra* notes 9-18 and accompanying text (describing three FCC decisions from 2004 showing its aggressive new approach to indecency).

far clear of danger. In the case of “Saving Private Ryan,” the ABC network had the best intentions in mind in showing the movie—it was “in honor of Veterans Day.”¹⁵⁷ Yet some affiliates chose the safe path of not showing it, and it would be hard to blame them, given the FCC’s record of punishment in 2004. The sad irony is that most of the affiliates that chose to pull the telecast of the movie in 2004 “ran it, unedited, to commemorate Veterans Day in 2001 and 2002.”¹⁵⁸ What a difference a year or two—as well as an about-face by the FCC—can make when it comes to broadcast content and self-censorship.

Interestingly, it is important to note that the self-censorship had nothing to do with the graphic violence in “Saving Private Ryan,” since the FCC’s definition of indecency does not cover violent content but only sexual or excretory activities or organs.¹⁵⁹ Rather, the self-censorship was triggered by the language in the movie—in particular, the word “fuck” and its multiple variations—in light of the FCC’s ruling in the March 2004 *Golden Globes* case¹⁶⁰ that nearly any use of the “f-word” is grounds for liability.¹⁶¹

The “Saving Private Ryan” self-censorship was not the only example to rear its head after the *Golden Globes* decision in 2004. As *New York Times* columnist Frank Rich observed:

[F]ive commercial TV channels, fearing indecency penalties, refused to broadcast a public service spot created by Los Angeles County’s own public health agency to counteract a rising tide of syphilis. Nationwide, the big three TV networks all banned an ad in which the United Church of Christ heralded the openness of its 6,000 congregations to gay couples.¹⁶²

Self-censorship, as these examples illustrate, was a major fallout of the FCC’s actions in March 2004. Other examples included NBC eliminating from an episode of *ER* “a glimpse of an 80-year-old pa-

157. Robert Bianco, *Critic’s Corner*, USA TODAY, Nov. 11, 2004, at 10D.

158. Lisa de Moraes, “*Saving Private Ryan*”: A New Casualty of the Indecency War, WASH. POST, Nov. 11, 2004, at C01.

159. See Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8001 (FCC Apr. 6, 2001) (policy statement). “[T]he material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities.” *Id.*

160. *Golden Globes Memorandum*, *supra* note 9.

161. See Tim Feran, *Station Owners Lack Backbone with “Private Ryan,”* COLUMBUS DISPATCH (Ohio), Nov. 15, 2004, at 8D.

162. Frank Rich, Arts and Leisure Desk, *The Plot Against Sex in America*, N.Y. TIMES, Dec. 12, 2004, § 2, at 1.

tient's breast."¹⁶³ In another instance, one newspaper reported that "a CBS affiliate in Phoenix curtailed its live coverage of a memorial service for ex-football star Pat Tillman because of some mourners' language."¹⁶⁴ Tillman had played for the Phoenix Cardinals before giving up millions of dollars and retiring to join the military, where he was killed in Afghanistan by what some accounts have termed friendly fire.¹⁶⁵ Finally, a far less serious and clearly more sexual fare also was cancelled by self-censorship in 2004, as CBS killed "plans for any future Victoria's Secret lingerie show special."¹⁶⁶

On the radio, a talk show host named Mike McGee was suspended in December of 2004 because, in the heat of the moment, he used the word "fuck" one time on his show when referring to state lawmakers.¹⁶⁷ McGee used the word, he said, to say that the "legislators were stupid."¹⁶⁸ In defending his move against McGee, station owner Jerrel Jones freely admitted, "I'm walking on eggshells with the FCC."¹⁶⁹ About the only type of radio content, in fact, that did not feel the effects of the FCC in 2004 was Spanish-language programming in cities like Los Angeles where offensive language went on as before.¹⁷⁰ And the reason for the lax approach by the FCC may simply be a matter of numbers; the Commission has "only two Spanish-speaking investigators to deal with 705 Spanish radio and TV outlets in the U.S."¹⁷¹

But it is not just in lost content where the chilling effect could be seen in the broadcast realm in 2004. It was also observed and measured in the massive settlement actions of some giant media conglomerates. For instance, in November of 2004, Viacom entered into an enormous \$3.5 million consent decree with the FCC to resolve and conclude multiple disputes and investigations involving the radio air-

163. Scott Collins et al., *Pulled into a Very Wide Net: Unusual Suspects Have Joined the Censor's Target List, Making for Strange Bedfellows (Wait—Can We Say That?)*, L.A. TIMES, Mar. 28, 2004, at E26.

164. Lynn Smith, *Profanity Rules Bother News Shows; CBS Affiliates Seek FCC Exceptions, Saying They Might Have to Cut Live Coverage Rather than Risk Violations*, L.A. TIMES, May 6, 2004, at C1.

165. See David Zucchino, *Account of Tillman's Killing Is Challenged*, L.A. TIMES, Dec. 6, 2004, at A1.

166. Roger Catlin, *With FCC Cracking Down, Networks Are Forced to Clean up Their Acts*, PITTSBURGH POST-GAZETTE, Aug. 1, 2004, at E4.

167. See Steve Schultze, *Talker McGee Suspended for On-Air Obscenity*, MILWAUKEE J. SENTINEL, Dec. 4, 2004, at B1.

168. *Id.*

169. *Id.*

170. See generally Agustin Gurza, *Television & Radio: Can They Say That?: Spanish-Language Radio is Rife with Shock Jocks*, L.A. TIMES, Aug. 20, 2004, at E1.

171. *Id.*

ing of allegedly indecent and profane content.¹⁷² Rather than fight the disputes, a time consuming and costly venture, in the name of the First Amendment protection of free speech, Viacom chose to fold its tent and offer up cash in order to clear its slate, save for the Super Bowl broadcast.

Viacom was not, however, the only media entity to settle disputes quickly in 2004 in light of the FCC's ratcheted-up approach to indecency that began in March that same year with its *Golden Globes* decision.¹⁷³ In particular, "[t]he FCC settlement with Viacom follows a \$1.7 million June deal with Clear Channel Communications Inc. and a \$300,000 August agreement with Emmis Communications Corp. to settle indecency fines and complaints against each company's radio stations."¹⁷⁴ The June 2004 settlement reached by Clear Channel, which owns about 1200 radio stations in the United States,¹⁷⁵ was foreshadowed in February 2004, shortly after the Super Bowl halftime controversy, when it "knocked Howard Stern's radio show off stations in six cities."¹⁷⁶ The same week it took self-censorial actions against Stern, Clear Channel also "fired Tampa-based shock jock Bubba the Love Sponge Clem."¹⁷⁷ Corporations will take such action in order to prevent further wrath from the government—in this case, the FCC and Congress. The latter held hearings about indecency on the public airwaves less than two weeks before Clear Channel booted Stern from its stations.¹⁷⁸ The self-censorship exhibited by Clear Channel was clearly self-serving.

In summary, as long as the FCC continues down its current indecency path, one can expect the impact of Lesson No. 6 to be felt in 2005 and beyond. The only point at which it might stop will be when,

172. Viacom Inc., Infinity Radio, Inc. & Infinity Broadcasting East, Inc., 19 F.C.C.R. 23100 (FCC Nov. 23, 2004) (consent decree).

173. See *Golden Globes Memorandum*, *supra* note 9 and accompanying text.

174. Frank Ahrens, *Viacom Settles Outstanding FCC Fines: \$3.5 Million Agreement Erases Proposed Radio Indecency Penalties*, WASH. POST, Nov. 24, 2004, at E01; see also Clear Channel Communications, Inc., AMFM Radio Licenses, L.L.C., Clear Channel Broadcasting Licenses, Inc. & Capstar TX Ltd. P'ship, 19 F.C.C.R. 10880, 10883 (FCC June 9, 2004) (consent decree); Emmis Communications Corp., & Emmis Radio License Corp., 19 F.C.C.R. 16003, 16007 (FCC Aug. 12, 2004) (consent decree).

175. See Clea Simon, *Stations Set to Reduce Ad Time*, BOSTON GLOBE, Dec. 16, 2004, at C22.

176. David Montgomery & Frank Ahrens, *Howard Stern Booted in Clear Channel Indecency Crackdown*, WASH. POST, Feb. 26, 2004, at C01.

177. Eric Deggans, *Clear Channel Becomes Conveniently "Responsible,"* ST. PETERSBURG TIMES (Fla.), Feb. 27, 2004, at 2B.

178. See Ann Oldenburg, *TV Indecency Draws Congress' Icy Stare*, USA TODAY, Feb. 12, 2004, at 1D.

if they choose to do so, media companies say that enough is enough and, in turn, decide to fight the FCC at every turn.

VII. SOME MEDIA ENTITIES ARE, SADLY, THEIR OWN WORST ENEMIES

While it was fictional movie character Forrest Gump who gave the world the phrase “stupid is as stupid does,”¹⁷⁹ some segments of the entertainment industry embraced this motto in 2004 as their own and engaged in short-sighted—if not stupid—moves that kept them under the watchful eye of politicians and censorship advocates.

As noted earlier in Part I, the FCC issued a record-setting fine of more than \$1 million in October 2004 against Fox affiliates for a broadcast of “Married by America” that involved sexually suggestive content.¹⁸⁰ One might think that the major networks would take this as a serious blow to their content and, in turn, try to lie low, as it were, for a while, rather than risk further FCC wrath. This, however, was not the case with ABC. Indeed, just one month later, ABC was forced to apologize “for its sexually suggestive opening”¹⁸¹ to a Monday Night Football game that involved Nicollette Sheridan, an actress in the ABC hit series “Desperate Housewives,” and Philadelphia Eagles receiver Terrell Owens. As described by one newspaper, the taped spot, which drew complaints to the FCC from some viewers, included Sheridan wearing

only a towel as she tried to seduce Owens in the team locker room. Initially unable to entice him to skip the game for her, she dropped her towel. Owens then said, ‘Aw, hell, the team’s going to have to win without me,’ and she jumped into his arms.¹⁸²

There was no frontal nudity during the bit, as “the camera showed [Sheridan’s] upper body from behind.”¹⁸³

While the spot clearly would not meet the FCC’s definition of indecency, which requires the depiction or description of sexual organs

179. See Rita Kempley, *Movies; “Forrest Gump”: Dimwitty Delight*, WASH. POST, July 6, 1994, at B1. Forrest Gump, who “benefits from a below-average IQ and an even temperament,” is “aided mightily by his mother’s constant faith and homey maxims” such as “stupid is as stupid does” and “life is like a box of chocolates; you never know what you’re going to get.” *Id.*

180. Married by America Notice, *supra* note 14.

181. Rudy Martzke, *ABC Apologizes for Risqué Spot Before “MNF” Game*, USA TODAY, Nov. 17, 2004, at 1A.

182. *Id.*

183. Judy Battista, *ABC Puts N.F.L. in “Desperate” Situation*, N.Y. TIMES, Nov. 17, 2004, at D1.

or activities,¹⁸⁴ the move was particularly dim-witted because it was another stunt during a televised football game—Justin Timberlake’s exposure of Janet Jackson’s breast during halftime of the 2004 Super Bowl—that landed Viacom and CBS in the FCC’s crosshairs.¹⁸⁵ All ABC Sports could muster about the Owens-Sheridan incident, however, was “[w]e agree that the placement was inappropriate.”¹⁸⁶ Such a tepid statement does little to keep the FCC off the back of the television networks; instead, it suggests a kind of arrogance that only will bring further scrutiny to the broadcast networks if such content continues in the future.

The broadcast networks, however, are not the only segments of the entertainment industry that seem to shoot themselves in the foot and then reload for more self-inflicted wounds. Consider what happened in November of 2004, with parents busily shopping for toys for their children for the upcoming holiday season. Thrown into the middle of a time in which hopes and prayers of peace are on the minds of many was the release of a video game called “JFK Reloaded” that allows a player to take on the role of Lee Harvey Oswald in Dallas on Nov. 22, 1963, and fire off shots at the passing motorcade of President John F. Kennedy.¹⁸⁷ To make matters worse for the video game industry’s public relations machine, the game’s release was “timed to coincide with the 41st anniversary of Kennedy’s killing in Dallas.”¹⁸⁸

The company that created the game, a Scotland-based firm called Traffic, issued a statement that “[t]his new form of interactive entertainment brings history to life and will stimulate a younger generation of players to take an interest in this fascinating episode of American history.”¹⁸⁹ While the company that produced the game might not be from the United States, the impact nonetheless was felt here among government officials. It caught the attention of U.S. Senator Joe Lieberman (D. Conn.), a frequent critic of media products, who lamented, that “[t]he fact that the assassination of President Kennedy, which

184. See FCC Parents’ Place, *supra* note 139. The FCC currently defines indecent broadcast speech as “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.” *Id.*

185. See Super Bowl Notice, *supra* notes 10-13 and accompanying text.

186. Battista, *supra* note 183.

187. Jose Antonio Vargas, *JFK Internet Game Assailed; Players Re-Crete Oswald’s Fatal Shots*, WASH. POST, Nov. 23, 2004, at C01.

188. Ben Berkowitz, *Video Game Re-Creates Slaying of Kennedy; Release is Timed to Coincide with 41st Anniversary of President’s Death*, HOUST. CHRON., Nov. 22, 2004, at A10.

189. Tara Weiss, *Assassination Video Game Appalls Many*, HARTFORD COURANT, Nov. 23, 2004, at D5.

broke our hearts and altered our history, could become the subject of a video game from which people are making money is just outrageous, it is despicable, it's unbelievable. . . ."¹⁹⁰

The New York Times called the release of the game a "marketing move that risked maximum outrage for maximum exposure."¹⁹¹ Sadly, for First Amendment advocates and the children that play video games, the end result will be maximum exposure for government censorship of the entire video game industry. As a wise reader of one newspaper opined in a letter, "games like this don't help the video game industry's image."¹⁹²

As the Monday Night Football and "JFK Reloaded" incidents of November 2004 illustrate, some segments of the entertainment industry could benefit from a little bit of self-restraint when it comes to keeping their business off of the government's censorial radar screen. And that is the central point of Lesson No. 7—that some media entities are, sadly, their own worst enemies. A quick promotional advertisement for the short-term ratings gain of a show like "Desperate Housewives" may have serious long-term negative consequences for the entire broadcast industry with the FCC.

VIII. FIGHT OR FLIGHT: PUT UP OR MOVE ON TO NEW MARKETPLACES

The final lesson from the intersection of the culture wars and the media in 2004 illustrates the big-picture impact and potential future of censorship campaigns that target content. Some organizations, including both Fox and CBS, launched vigorous fights in late 2004 contesting the FCC's findings of massive monetary forfeitures against them for airing, respectively, an episode of "Married by America" and the broadcast of the Super Bowl halftime show.¹⁹³ Such efforts, from a free speech perspective, must be lauded because they not only serve the corporate self-interests of broadcasters, but, more importantly from the consumer's perspective, protect the audience's right to receive speech via free, over-the-air broadcasting. While it may be true

190. Michael McGough, *Coarse Correction?: Outrage over In-Your-Face Popular Culture, Even When It's Not Hypocritical, Is Hard to Translate into Law*, PITTSBURGH POST-GAZETTE, Nov. 29, 2004, at A-13.

191. Tom Zeller, Jr., *A Sure-to-Be-Controversial Game Fulfills that Expectation Fully*, N.Y. TIMES, Nov. 29, 2004, at C7.

192. Ryan Escalante, Opinion, *JFK Game Poor Example of Genre*, WIS. ST. J., Dec. 2, 2004, at A8.

193. See Fox Opposition, *supra* note 42 (emphasis in original); CBS Broadcasting Inc., FCC 04-209, File No. EB-04-IH-0011 (Sept. 22, 2004) (opposition to FCC notice of apparent liability for forfeiture), available at <http://www.fcc.gov/eb/broadcast/Pleadings/Viacom.pdf>.

that 2004 brought “a further blurring of the lines between broadcast and cable TV,”¹⁹⁴ the fact remains that one does not need to purchase a cable package to receive the content of broadcasters like Fox, CBS, NBC and ABC.¹⁹⁵ Thus, it is important to preserve such free content (and for Fox and CBS to continue to fight) for those that either cannot afford cable or simply choose not to do so, regardless of whether research executives like Turner’s Jack Wakshlag believe that “[p]eople aren’t making distinctions between the broadcast networks and the cable networks anymore.”¹⁹⁶

While some in the media will thus engage in the tactic of “fight,” others will take a very different path—a path that may reconfigure the entire way in which Americans receive media content—of “flight.” In particular, Howard Stern in 2004 led the flight from the realm of over-the-air broadcasting regulated by the FCC to the relatively new domain of satellite radio, which is out of reach of the FCC’s indecency powers.¹⁹⁷ Stern’s move, indeed, was done not only for his financial benefit¹⁹⁸ but to “escape the reach of federal regulators.”¹⁹⁹

It is far from idle speculation to hypothesize that other broadcasters like Stern will make the transition to a different realm. As the *Wall Street Journal* reported in December of 2004, “Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., the two big players in the emerging satellite-radio business, both said they surpassed their subscriber targets for this year, helped by robust holiday sales.”²⁰⁰ In fact, “[p]ay satellite radio services offered by XM Satellite Radio Inc. and Sirius Satellite Radio Inc. passed the 3 million and 1 million subscription marks at the end of 2004, respectively, and both will angle for more talent along the lines of Howard Stern and Bob Edwards in

194. John Dempsey, *Cable Snares Webs: Viewers Keep Turning to Off-Net Offerings*, DAILY VARIETY, Dec. 27, 2004, at 5.

195. Erin Biba, *Digital TV: What Are We Waiting For?; Broadcaster Opposition, Consumer Confusion Are Slowing the Transition from Analog to Digital*, PC World, Mar. 23, 2005 (noting that “[a]ll but the broadcast networks (ABC, CBS, Fox, PBS, and NBC) require cable or satellite service”), <http://www.pcworld.com/resource/article/0,aid,120155,pg,1,RSS,RSS,00.asp>.

196. *Id.*

197. See generally Sarah McBride, *Radio Shock Jock Is Forced to Assume a Low Profile Before 2006 Satellite Debut*, WALL ST. J., Dec. 22, 2004, at B2 (describing how “raunchy shock jock” Stern “shook the radio world by announcing in October that he would join Sirius in 2006”).

198. Frank Ahrens, *Howard from Manhattan: Stern Calls In, Blasts FCC Chief*, WASH. POST, Oct. 27, 2004, at C03. Stern “signed a five-year, \$500 million contract with Sirius Satellite Radio.” *Id.*

199. Ostrow, *supra* note 26.

200. *Sirius Satellite, Radio Rival XM Gain Subscribers*, WALL ST. J., Dec. 28, 2004, at B3.

2005.”²⁰¹ Sirius now boasts “a roster of on-air talent that seems well on its way to becoming a morality patrol’s worst nightmare, including Howard Stern, Eminem and Maxim magazine—all of it unburdened by the Federal Communications Commission decency regulations that govern traditional radio broadcasting, of course.”²⁰² Rival XM now carries “shock jocks Opie and Anthony.”²⁰³ They “recently moved their operation to XM where they host a daily 6-10 a.m. show.”²⁰⁴

The content will be radically different on satellite radio from that now on broadcast radio in the new era of aggressive FCC enforcement. As Howard Stern described the content that he would convey on Sirius, “I guarantee I will reinvent myself, because I can go further than I have ever gone, . . . I can explore anything I want to. You can’t reinvent yourself if you’ve got the government breathing down your neck.”²⁰⁵

But this is more than just about Stern. What could well happen in the near future is that there will be two very different ways to get very different media content. As columnist James Pinkerton recently wrote, “[l]ike the country itself, the media are dividing into a conservative red zone and a liberal blue zone.”²⁰⁶ Pinkerton contends that there will be a “a split in entertainment, based on technology and regulation,”²⁰⁷ one in which “[t]he FCC makes sure broadcasters, both over-the-air radio and TV, stay ‘red.’ Meanwhile, everything else—including, of course, the Internet—gets bluer.”²⁰⁸

All of this is quite plausible, as the FCC in December of 2004 “turned down a request that it start considering whether to regulate the decency content of satellite radio.”²⁰⁹ There could well be, then, a race-to-the-bottom on unregulated venues such as satellite radio, with content becoming more coarse over time. The impact of this would be

201. Frank Ahrens, *New Year, New Gadgets, and Maybe New Rules*, WASH. POST, Jan. 1, 2005, at E01.

202. Jeff Leeds, *The Kid Stays in His Home, Dressed in PJ’s, with a Live Mike*, N.Y. TIMES, Dec. 13, 2004, at C9.

203. Benny Evangelista, *Review: Satellite Radio Carries Itself Well*, S.F. CHRON., Jan. 3, 2005, at F1.

204. Dean Johnson, *Radio: Digital MyFi is Broadcasters’ Bane, Listeners’ Gain*, BOSTON HERALD (Mass.), Jan. 1, 2005, at 028.

205. Peter Johnson, *Stern: Serious Doings on and off the Air; Wiser at 50, Radio Jock Poised for a Risky Move*, USA TODAY, Dec. 16, 2004, at D1.

206. James P. Pinkerton, *American Media: Red and Blue All Over*, NEWSDAY, Nov. 23, 2004, at A37.

207. *Id.*

208. *Id.*

209. Richard Huff & David Hinckley, *Inner Tube*, N.Y. DAILY NEWS, Dec. 16, 2004, at 96.

to siphon more viewers away from the free over-the-air broadcasting now available on both television and radio. The danger of this scenario, in turn, is this: As the audience shrinks for broadcasters, advertisers will funnel fewer dollars to the medium, which, in turn, jeopardizes its continued viability. This, of course, was a real very concern for Congress a decade ago when it implemented its must-carry rules for cable companies, requiring them to carry free over-the-air broadcasters.²¹⁰ Whether Congress will again become so concerned in the future with satellite radio remains to be seen.

For now, however, Lesson No. 8—Fight or Flight—will continue to evolve, as more content providers take what might be dubbed “The Stern Approach” and flee from the Big Brother that the FCC became in 2004 under the leadership of Michael Powell.

CONCLUSION

Media content was challenged in 2004 by a wide variety of agencies, individuals and groups. From the FCC’s concerted and consistent attack on allegedly indecent broadcast content to the actions and campaigns of well-organized and well-funded groups such as the Parents Television Council to the quartet of social scientists that testified before Congress about so-called pornography addiction, it was neither an easy nor a peaceful year for First Amendment free-speech advocates. Viewed collectively, there was a culture war on free speech in 2004.

This article has attempted to identify and explicate eight important lessons from the past year—lessons from which both opponents and proponents of censorship should be able to gain information for the future. FCC Chief Commissioner Michael Powell correctly pointed out in a December 2004 op-ed commentary in *The New York Times* that “the American people have a right to expect that the F.C.C. will continue to fulfill its duty of upholding the law, while being fully cognizant of the delicate First Amendment balance that must be struck.”²¹¹ If groups like the Parents Television Council and the social scientists that testified in Congress regarding addiction to sexual mediated content continue their very well organized efforts, then the balance identified by Commissioner Powell will tilt decidedly in the future toward censorship. They will control the debate.

210. See generally *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (describing the must-carry provisions and Congressional rationales for adopting them).

211. Michael Powell, *Don’t Expect the Government to Be a V-Chip*, N.Y. TIMES, Dec. 3, 2004, at A29.

Free speech advocates must organize now, as never before, in light of the lessons set forth here, to support the fragile First Amendment rights now in the balance. For instance, those who want the FCC to stop meddling with broadcast content should launch massive write-in campaigns supporting the programs they enjoy and letting the FCC know that it should butt out of the audience's First Amendment right to receive speech.²¹² Social scientists that support free speech must generate data to counter that which was testified to in Congress in November of 2004 regarding pornography addiction.²¹³ Media conglomerates must fight the efforts of the FCC and others rather than engaging in self-censorship.

The bottom line is that the men that drafted the Bill of Rights to the U.S. Constitution, including the First Amendment, gave American citizens the right to free speech. Unfortunately and ironically, the ones that took advantage of that right most effectively in 2004 were those that would carve away at it, nicking at broadcast content here, video games there, and adult material elsewhere. That trend must be reversed in 2005.

212. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, *the right to receive*, the right to read." *Id.* (emphasis added).

213. See *supra* Part IV and accompanying text (describing the Congressional hearing testimony at issue).