
RIGHT OR PRIVILEGE: INDECENT, INCITEFUL AND HATEFUL SPEECH

The First Amendment of the United States Constitution guarantees the right to free speech and to a free press.¹ However, these rights are regularly proscribed when applied to certain forms of speech that have been held to have no, or less than absolute, First Amendment protection.² Speech that is indecent,³ incites unlawful action,⁴ and “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”⁵ represents three areas where a constant tension exists between the First Amendment’s protection of speech and the Government’s responsibility to the public to protect it from substantial harm.⁶

How broadly are the guaranteed First Amendment protections applied when they conflict with the government’s compelling interests? Does the protection of the First Amendment relieve a radio station of responsibility for airing indecent programming? Does the First Amendment, likewise, excuse a magazine that publishes a “gun for hire” advertisement resulting in death? And finally, does the First Amendment protect a cross burner’s “speech” when it victimizes the recipient family?

This Comment explores each of these three issues in turn. Beginning with an examination of the evolution of indecency regulation, this Comment will bring into focus the status of indecent speech today and the questions this issue poses for the future. Next, the media’s liability for harm resulting from

the exercise of its First Amendment right to commercial speech will be addressed. Finally, the constitutionality of city ordinances and university codes that attempt to regulate “hate speech” following the decision in *R.A.V. v. City of St. Paul* is discussed.⁷ This Comment concludes by underscoring the continuing need to strike a balance between First Amendment guarantees and liabilities.

I. INDECENCY AND THE FIRST AMENDMENT: SAVE IT ‘TIL AFTER MIDNIGHT

A. The Evolution of Indecency Regulation

Originally, federal law prohibited the broadcast of any obscene, indecent, or profane language.⁸ However, the Supreme Court has subsequently held that broadcast indecency is afforded constitutional protection as long as it is subject to the restriction of being “channeled” to air time that reduces the risk of children being in the listening audience.⁹ To enforce that restriction, the Federal Communications Commission (“FCC” or “Commission”) relied on 18 U.S.C. § 1464, which empowered the Commission to take regulatory action when it determined that a broadcast contains indecent material.¹⁰ Although the Commission may exercise some prosecutorial discretion, generally it is obligated to act on indecency complaints generated by the public. The Commission

¹ Specifically, the Constitution mandates that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I.

² Even Justice Hugo Black, a First Amendment “absolutist,” balanced the protection of speech with community interests. See, e.g., *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969); *Brown v. Louisiana*, 383 U.S. 131, 165 (1966).

³ See *Miller v. California*, 413 U.S. 15 (1973). See also *Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1282 (1992)[hereinafter *ACT II*]; *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988)[hereinafter *ACT I*]; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁴ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(advocacy of imminent lawless behavior); *Chaplinsky v. New Hampshire*,

315 U.S. 568 (1942)(fighting words).

⁵ *R.A.V. v. City of St. Paul*, Minnesota, 112 S. Ct. 2538, 2541 (1992).

⁶ For the purpose of this Comment, “Government” refers to agencies of the federal government, such as the Federal Communication Commission, and state government as well.

⁷ 112 S. Ct. 2538 (1992).

⁸ 18 U.S.C. § 1464 (1988). Specifically, the statute states that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than 2 years, or both.” *Id.*

⁹ *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, *Notice of Proposed Rule Making*, 7 FCC Rcd. 6464, para 4 (1992)[hereinafter *Enforcement of Prohibitions Notice*]; see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁰ 18 U.S.C. § 1464 (1988).

exercises this regulatory power by assessing monetary forfeitures or, in extreme cases, revoking a station's broadcast license.¹¹ However, the Commission may not engage in censorship or promulgate regulations "which shall interfere with the right of free speech by means of radio communication."¹²

In 1975, the Commission defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."¹³ In analyzing whether particular material meets that definition, the Commission examines the "context" in which the language is presented.¹⁴ "Context" encompasses a "host of variables," including: an examination of the words to determine if they are "vulgar" or "shocking," a review of the circumstances in which the language is portrayed, an analysis of whether the material is isolated or fleeting, a consideration of the ability of the medium to separate adult listeners from children, a determination of the presence of children in the listening audience, and the merits of the work.¹⁵

In *FCC v. Pacifica Foundation*,¹⁶ the Supreme Court upheld the Commission's generic definition of indecency under section 1464 as applied to a radio

station's afternoon broadcast of a George Carlin comedy monologue entitled "Filthy Words."¹⁷ Enforcement was restricted to broadcasts before 10:00 p.m. containing words "identical" or "similar" to those in the Carlin "Filthy Words" monologue that were aired strictly for shock value.¹⁸ After *Pacifica*, not one broadcast was found actionable under the Commission's narrow interpretation of its indecency policy until 1987.¹⁹ Having determined that the "highly restrict[ive] enforcement standard" employed since the *Pacifica* holding "was unduly narrow as a matter of law and inconsistent with [the FCC's] enforcement responsibilities under section 1464," the Commission issued three rulings declaring material indecent.²⁰ Because that same material would not have violated the "Filthy Words" test, the Commission clarified that its definition of indecency went beyond repeated expletives and that those violations fit squarely within its revised standard.²¹

KPFK-(FM) Los Angeles, California, received a warning for its 10:00 p.m. broadcast of excerpts from the *Jerker*, a play which addressed coping with the acquired immune deficiency syndrome and facing death.²² KCSB-(FM) Santa Barbara, California, was cited for its broadcast of a sexually graphic song

¹¹ Enforcement of Prohibitions Notice, *supra* note 9, para. 3 (citing 47 U.S.C. 312(a)-(b), 503(b)(1)(D) (1988)).

¹² 47 U.S.C. § 326 (1988). Specifically, the statute states that "[n]othing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." *Id.*

¹³ *In re Pacifica Found.*, 56 F.C.C.2d 94, 98 (1975). The Commission's definition of indecency has been upheld most recently in *ACT II*, relying on the court's prior decision in *ACT I* and the Supreme Court decision in *Pacifica*, 438 U.S. at 749-50.

¹⁴ *In Re Infinity Broadcasting Corp. of Pennsylvania, Memorandum Opinion and Order*, 3 FCC Rcd. 930, 932, paras. 16, 17 (1987) [hereinafter *Infinity*], *aff'd in part and remanded in part sub nom. ACT I*, 852 F.2d 1332 (D.C. Cir. 1988).

¹⁵ *Id.* paras. 16, 17.

¹⁶ 438 U.S. 726 (1978).

¹⁷ *Pacifica*, 438 U.S. at 738-41. The monologue had been broadcast on a Tuesday afternoon on Pacifica Foundation's New York radio station, WBAL-(FM), preceded by only a disclaimer that listeners might find the broadcast offensive and they should change the station for fifteen minutes. *Id.* Included in the monologue:

The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits . . . [A]nd now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck . . .

Id. at 751.

¹⁸ *Id.*

¹⁹ *ACT II*, 932 F.2d 1504, 1506 (D.C. Cir. 1991).

²⁰ *Infinity*, *supra* note 14, para. 5 at 930. The Commission found that KPFK-(FM), KCSB-(FM) and WYSP-(FM) had broadcast indecent materials during a time when there was a reasonable risk that children were in the audience. See *Pacifica Found.*, 2 FCC Rcd. 2698 (1987)(KPFK-(FM)); *The Regents of the University of California*, 2 FCC Rcd. 2703 (1987)(KCSB-(FM)); *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd. 2705 (1987)(WYSP-(FM)). Upon finding that the licensees reasonably believed that it was permissible to air their broadcasts, the Commission declined to take any enforcement action, and instead limited itself to warning licensees that future broadcasts would be actionable under the revised enforcement standards. *Infinity*, *supra* note 14, para. 6 at 931.

²¹ *ACT II*, 932 F.2d at 1506. The Commission found two of the broadcasts indecent despite the fact that they were aired after 10:00 p.m. The FCC justified that finding stating that "midnight was its 'current thinking' as to when the risk of children in the broadcast audience could reasonably be minimized." *Id.* (quoting *Infinity*, *supra* note 14, at 937 n.47). See *Pacifica Found.*, 2 FCC Rcd. 2698 (1987); *The Regents of the University of California*, 2 FCC Rcd. 2703 (1987); *Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd. 2705 (1987). See also *New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd. 2726 (1987).

²² *Pacifica Found.*, 2 FCC Rcd. at 2700-1 paras. 19-23. Despite a station warning to listeners that the broadcast might be found disturbing, the FCC declared that future broadcasts of similar material would be actionable under the new indecency standard. *Id.* The material found indecent included excerpts such as, "[y]eah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking." *Id.*

called "Makin' Bacon" which was aired without warning just after 10:00 p.m.²³ The FCC warned that even airing objectionable programming after 10:00 p.m. was no longer sufficient to ensure that children were not listening to the broadcast.²⁴ And WYSP-(FM) Philadelphia, Pennsylvania, was warned for a number of Howard Stern morning show broadcasts containing sexual innuendo.²⁵

Those actions taken by the Commission culminated in *Action for Children's Television v. FCC* ("ACT I"),²⁶ where the U.S. Court of Appeals for the District of Columbia Circuit reaffirmed the Commission's generic definition of indecency.²⁷ Having concluded that a reasonable "safe harbor" rule was constitutionally mandated, the court remanded ACT I so that the Commission could conduct a hearing to determine the hours at which indecent material could be broadcast.²⁸ However, before the Commission could act on the remand, President George Bush signed into law an appropriations bill that mandated a twenty-four hour ban on all indecent broadcasts.²⁹ Pursuant to that law, the Commis-

sion promulgated a new rule under section 1464 prohibiting all broadcasts of indecent material.³⁰ As a result, the Commission abandoned its notice and comment proceedings to determine a "safe harbor" period, thereby denying the public a right to express its views.³¹ Lead by Action for Children's Television,³² seventeen media citizen groups seeking to stay the beginning of the indecency ban successfully appealed the FCC order to the District Court of Columbia Circuit.³³

Meanwhile, the Supreme Court in *Sable Communications of California, Inc. v. FCC*³⁴ held that a blanket ban on indecent commercial telephone message services was unconstitutional.³⁵ Despite the majority's intimation in *Sable* that a blanket ban on indecency was unconstitutional, the Commission nevertheless interpreted dictum in Justice Scalia's concurrence as suggesting that a twenty-four hour ban on a particular medium (here radio) might be upheld if it could be shown that there was no feasible alternative for protecting minors.³⁶

Beginning with a solicitation of public comments,

para. 20 at 2700.

²³ The Regents of the University of California, 2 FCC Rcd. 2703 (1987). The lyrics of "Makin' Bacon," aired shortly after 10:00 p.m. without any warning of indecency included, "[A] ten-inch cropper with a varicose vein. Makin' bacon is on my mind. Come here baby, make it quick, Kneel down there and suck my dick." *Id.* para. 4 at 2703.

²⁴ *Id.* at 2704.

²⁵ Infinity Broadcasting Corp., 2 FCC Rcd. 2705, 2706 (1987). The FCC found that sexual innuendo and double entendre may be actionable if they are "intermingled with explicit references that make the meaning of the entire discussion clear or capable only of one meaning." *Id.* para. 9 at 2706. For example, an excerpt from Stern's morning radio show:

Howard Stern: Have you ever had sex with an animal?

Caller: No.

Howard Stern: Well, don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds? . . . Baaaah. That's where I was thinking that Sherrie Lewis instead of like sodomizing all the people at the Academy to get that shot on the Emmy's she could've had Lambchop do it.

Id. para. 11 at 2706.

²⁶ 852 F.2d 1332 (D.C. Cir. 1988).

²⁷ *Id.* at 1343. In ACT I, broadcasters petitioned the court for review of an order of the Commission adopting a generic definition of indecency. They also challenged the decision of the Commission to channel broadcasting of indecent materials between midnight and 6:00 a.m. The court upheld the definition of indecency, but stated that the Commission did not adequately justify its new, more restrictive approach to curtailing the hours at which indecent material could be broadcast. *Id.* at 1341-42. The court concluded that the Commission must give broadcasters

clear notice of when indecent material may be broadcast. *Id.*

²⁸ See ACT II, 932 F.2d at 1506 (quoting ACT I at 1343). The court also vacated the Commission ruling that the two post-10:00 p.m. broadcasts were indecent. *Id.*

²⁹ Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

³⁰ See *In re Enforcement of Prohibition Against Broadcast Obscenity and Indecency* in 18 U.S.C. § 1464, 4 FCC Rcd. 457 (1988)[hereinafter *Enforcement of Prohibition Order*]. In a separate statement, Commissioner Patricia Diaz Dennis stated that prior rulings "suggest that the courts would not uphold an outright ban on the broadcast of indecent speech." *Id.* at 458. Dennis questioned the constitutionality of the mandated appropriations bill. Nevertheless, because it was a congressional mandate, she concurred in the Commission's decision. *Id.*

³¹ ACT II, 932 F.2d at 1507 (citing *Enforcement of Prohibition Order*, 4 FCC Rcd. at 457).

³² Action for Children's Television ("ACT") is a national nonprofit organization that works to encourage diversity in children's television and to eliminate commercial abuses targeted at children. See generally Action for Children's Television's mission. ACT initiates legal reforms and promotes awareness of children's television issues through public education campaigns, publications, national conferences and speaking engagements.

³³ Richard G. Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited-What Does the Future Hold for the Seven "Dirty" Words?*, 65 TUL. L. REV. 131, 147 (1990).

³⁴ 492 U.S. 115 (1989).

³⁵ *Id.* In *Sable*, the Commission imposed a blanket prohibition on indecent and obscene interstate commercial telephone messages. The Supreme Court upheld the prohibition on obscenity, but held, denial of adult access to indecent messages was overbroad in that it far exceeded what was necessary to limit a minor's access. *Id.* at 131.

³⁶ *Id.* at 132 (Scalia, J., concurring).

the Commission, on July 12, 1990, issued a report concluding that a twenty-four hour prohibition on indecent broadcasts was constitutional under the standard enunciated in *Sable*.³⁷ The Commission determined that since children aged seventeen and under listen to radio and view television at all times without parental supervision, no alternative to a total ban would effectuate the government's compelling interest in protecting children from broadcast indecency.³⁸

One year later, on May 17, 1991, the District of Columbia Circuit found the congressionally mandated twenty-four hour ban on indecency unconstitutional in *Action for Children's Television v. FCC* ("ACT I").³⁹ Although the Commission's generic definition of indecency comported with constitutional vagueness and overbreadth requirements, the court concluded that broadcast material that was indecent, but not obscene, was protected by the First Amendment.⁴⁰ The court concluded that its decision in *ACT II* effectively returned the Commission to the position it briefly held after *ACT I* and prior to the congressional adoption of the appropriation rider and the twenty-four hour ban.⁴¹ Simply put, the government could not ban indecent broadcasts altogether; rather, it had to find a time period, a "safe harbor," during which the risk of exposure to children was minimized and such broadcasts would be permitted.⁴²

B. Indecency in Flux

Indecency regulation was once again in flux, requiring new routes of action to resolve the indecency "safe harbor" question. The Supreme Court denied certiorari in *ACT II*, letting stand the decision that a twenty-four hour ban on indecency was unconstitutional.⁴³ While Congress tried to construct a new law restricting the times during which one could broadcast indecency, the Commission increased the

frequencies of fines levied in administrative proceedings for violations of 18 U.S.C. § 1464.

1. *Judicial, Legislative and Executive Action: The Indecency Merry-Go-Round*

On March 2, 1992, the Supreme Court denied certiorari in *Children's Legal Foundation v. Action for Children's Television*,⁴⁴ thus leaving in effect the decision in *ACT II* holding a twenty-four hour ban on indecency unconstitutional. Despite the combined holdings of *ACT I* and *ACT II*—that a 6:00 a.m. to midnight ban and a twenty-four hour ban were both unconstitutional unless and until the FCC could justify the government's compelling interest in protecting minors from indecent broadcasts—the Senate on June 3, 1992, passed S. 1504.⁴⁵ This bill, entitled the Public Telecommunications Act of 1991 ("the Act"), included an amendment that once again proposed a "safe harbor" indecency ban on all commercial broadcast stations and many non-commercial stations between 6:00 a.m. and midnight.⁴⁶ Section 16(a) of the Act authorized the Commission to promulgate regulations prohibiting the broadcasting of indecent programming between 6:00 a.m. and 10:00 p.m. on stations going off the air by midnight and between 6:00 a.m. and 12:00 a.m. for all other stations.⁴⁷

Incorporating the Senate amendments, the House of Representatives passed the same bill on August 4, 1992.⁴⁸ On August 26, 1992, President Bush signed the Public Telecommunications Act of 1991 into law.⁴⁹ On September 17, 1992, the FCC began a proceeding to implement the congressionally mandated regulations prohibiting the broadcasting of indecent programming.⁵⁰ The focus of the proceeding was "confined to the matter of updating the Commission's [factual] record with regard to the presence of children in the viewing and listening audience."⁵¹

³⁷ *In re Enforcement of Prohibition Against Broadcast Indecency* in 18 U.S.C. § 1464, 5 FCC Rcd. 5297, para. 2 (1990) [hereinafter 1990 Report]. The Commission received over 92,500 formal and informal submissions. Enforcement of Prohibitions Notice, *supra* note 9, para. 7.

³⁸ 1990 Report, *supra* note 37, para. 65 at 5297, 5306.

³⁹ *ACT II*, 932 F.2d at 1510.

⁴⁰ *Id.* at 1506.

⁴¹ *Id.* at 1510.

⁴² Enforcement of Prohibitions Notice, *supra* note 9, para. 4.

⁴³ *Action for Children's Television v. FCC*, 112 S. Ct. 1282 (1992).

⁴⁴ *Id.*

⁴⁵ S. 1504, 102d Cong., 1st Sess. (1991).

⁴⁶ *Id.*

⁴⁷ *Id.* § 16(a).

⁴⁸ H.R. 2977, 102d Cong., 1st Sess. (1991).

⁴⁹ Public Telecommunications Act of 1991, Pub. L. No. 102-356 (1992).

⁵⁰ Enforcement of Prohibitions Notice, *supra* note 9, para. 9.

⁵¹ *Id.* para. 12. To quote Commissioner Sherrie P. Marshall, "this statute and our proposed rules fully comport with existing judicial interpretations of the First Amendment." *Id.* However, until factual support to substantiate that claim is collected, it remains to be seen whether or not a midnight to 6:00 a.m. ban is constitutional.

2. Commission Action: You Can't Say That on the Radio

Following *ACT I*, the Commission embarked on an "anti-indecency campaign" in which it increased its review of indecency complaints.⁵² Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934,⁵³ the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The process begins when the FCC is notified of an alleged violation. The Commission drafts and sends a letter of inquiry to which a station has thirty days to respond with comments and questions.⁵⁴ If the Commission determines a violation exists, it usually issues a Notice of Apparent Liability ("NAL") for a monetary forfeiture with the standard fine being \$12,500.⁵⁵ A Notice of Forfeiture ("NOF") follows, and a licensee who ultimately fails to pay the forfeiture may face prosecution by the Department of Justice.⁵⁶

On January 28, 1991, the Mass Media Bureau found Evergreen Media Corporation, licensee of WLUP-(AM), Chicago, Illinois ("Evergreen"), in violation of section 1464 and imposed a monetary forfeiture of \$6,000 which Evergreen ultimately refused to pay.⁵⁷ On October 10, 1991, the Commission denied Evergreen's petition for reconsideration, finding that a segment of the "Steve and Garry [talk]

Show . . . describing sexual activities of Vanessa Williams as depicted in *Penthouse* magazine" was "vulgar material presented in a pandering and titillating manner . . ."⁵⁸ The Commission rejected Evergreen's contention that its broadcast was no more indecent than National Public Radio's "All Things Considered" newscast on "an underworld figure whose wiretapped conversations included [repeated] expletives."⁵⁹ On August 19, 1992, the Commission, through the Department of Justice, initiated a civil proceeding against Evergreen for failure to pay its \$6,000 forfeiture.

During that same period, the FCC initiated a multitude of slap-on-the-wrist fines against radio stations nationwide. Goodrich Broadcasting, Inc., licensee of WVIC-(FM) East Lansing, Michigan, received a forfeiture of \$2,000 for a segment on the "Michaels in the Morning Show" where "[o]n-air personalities used explicit, vulgar language and repeatedly solicited audience contributions in the same vein."⁶⁰ Similarly, WYBB-(FM) Folly Beach, South Carolina, was fined \$3,750 for a broadcast where the station's morning team repeatedly said "crap" and "shit" on the air.⁶¹ And KFMH-(FM) Muscatine, Iowa, and WWZZ-(FM) Knoxville, Tennessee, received letters of inquiry for alleged indecent broadcasts. KFMH was cited for two jokes aired August 30, 1991 on its morning program—one about oral sex and the other about female genitalia.⁶² WWZZ

⁵² Harry A. Jessell, *FCC Puts Broadcasters on Notice for Indecency*, BROADCASTING, March 2, 1992, at 29. Each year the Commission receives thousands of complaints from viewers. However it only considers the few complaints that are accompanied by tapes or transcripts of the alleged offense. The Commission has received 53 such complaints in the past six months. *Id.*

⁵³ 47 U.S.C. § 312(a)-(b), § 503(b)(1)(D).

⁵⁴ Jessell, *supra* note 52, at 29.

⁵⁵ 47 U.S.C. § 503(b)(2); Policy Statement on Standards for Assessing Forfeitures, 6 FCC Rcd. 4695, appendix (1991).

⁵⁶ See 47 U.S.C. § 503(b)(3)(B). Instead of initiating action by the Justice Department to collect a forfeiture, the Commission may hold a forfeiture hearing before an Administrative Law Judge, or, in appropriate cases, hold a license revocation hearing.

⁵⁷ *In re Liability of Evergreen Media Corp. of Chicago, AM, Memorandum Opinion and Order*, 6 FCC Rcd. 502, para. 1 (1991). Evergreen argued the forfeiture was time-barred, and challenged the Commission's findings of indecency. On March 30, 1989, at 5:10 p.m. *de jure* Steve Dahl stated, "[Vanessa Williams] went down on that other woman and oh God, you had your tongue in her vagina . . . It was fabulous . . ." *Id.* at Attachment 1.

⁵⁸ *In re Petition for Reconsideration Concerning the Liability of Evergreen Media Corp. of Chicago, AM, Memorandum Opinion and Order*, 6 FCC Rcd. 5950, para. 9 (1991).

⁵⁹ *Id.* The Commission distinguished the "Steve and Garry

Show," a politically and socially oriented talk show, from a news program, concluding that in that context NPR's newscast was not indecent. See Letter to Peter Branton, 6 FCC Rcd. 610 (1991).

⁶⁰ *In re Liability of Goodrich Broadcasting, Inc., Memorandum Opinion and Order*, 6 FCC Rcd. 7484, para. 6 (1991). The Commission determined that the material did not constitute news programming, nor was it presented in a manner that was either pandering or titillating. *Id.* On September 27, 1989, at 6:00 a.m., *de jure* Michaels aired "Maybe a listener has an idea for a headline because this [news story] really didn't have one . . . Michael Aleman . . . was having his honeymoon . . . [a]nd he was plunged into terror when his left testicle was sucked into a hot tub drain . . ." *Id.* at Attachment 2.

⁶¹ Letter from Roy J. Stewart, Chief MM, to L.M. Communications of South Carolina, Inc. (WYBB-(FM)), 7 FCC Rcd. 1595 (1992). The Commission held that "[the] deliberate and repetitive use of the word 'crap' to heighten the audience's awareness of and attention to the subsequent use of the term 'shit' by the announcer," was wilfully focused and not an incidental remark. *Id.*

⁶² See Jessell, *supra* note 52, at 29. In that situation callers with jokes had passed through a pre-screening process. However, once on the air, the callers changed their jokes. The station quickly apologized and afterwards prerecorded callers' jokes prior to airing them. *Id.*

was cited for a station promotion that ridiculed the "shrinking 'testicles' of a rival station," announcing, "It takes balls to rock hard; Z-93—we keep it harder, longer."⁶³

As these examples illustrate, initially forfeitures involved such small amounts of money that most stations likely considered them a cost of doing business. However, this trend of moderately priced punitive forfeitures was soon to change.

Two California stations, KGB and KMEL, received NAL's of \$25,000 each. On May 26, 1992, KGB, licensee of KGB-(FM) San Diego, California, was given an NAL for two songs broadcast during its "Friday Morning Blow-Out Show" on February 23, March 16, and April 13, 1990, at 8:00 a.m.⁶⁴ The Commission, in justifying that substantial forfeiture, maintained "the violation in this case [was] exacerbated . . . because the broadcast of indecent material was repeated and, with respect to the broadcast of the song 'Candy Wrapper,' was egregious, given the prior Commission determination that that particular material was indecent."⁶⁵ Likewise, on July 24, 1992, an NAL was issued to San Francisco radio station KMEL-(FM) for broadcasting indecent material during the "Rick Chase" show

on various dates between August 20 and September 16, 1991.⁶⁶

Those costly monetary forfeitures were just the beginning. On October 27, 1991, Greater Media, owner of KLSX-(FM) Los Angeles, California, was issued an NAL in the amount of \$105,000 for indecent broadcasts aired during various Howard Stern morning shows.⁶⁷ On January 4, 1993, KLSX sent a thirty-six page response to the FCC contending that the NAL was issued without giving KLSX an opportunity to respond to the complaint.⁶⁸ KLSX argued that the Commission standard was vague and did not indicate what portion of the transcript it found to be indecent.⁶⁹

Most recently, on December 18, 1992, by a unanimous Commission vote, Infinity Broadcasting was informed of its apparent liability of \$600,000 for simultaneously broadcasting the same material for which KLSX had received an NAL earlier in October 1992.⁷⁰ Three Infinity owned stations, Philadelphia's WYSP-(FM), New York's WXRK-(FM) and Washington's WJFK-(FM), were issued NAL's of \$200,000 each.⁷¹ Interest groups favoring the indecency restrictions lobbied the Commission for the harsher penalty of preventing Infinity's purchase of

⁶³ *Id.*

⁶⁴ Letter from Donna R. Searcy, Secretary, to KGB, Inc., San Diego, California, 7 FCC Rcd. 3207 (1992). The "Candy Wrapper" song had been previously found indecent by the Commission. See Letter from Roy J. Steward, Chief, Mass Media Bureau, WIOD, Inc., 6 FCC Rcd. 3704 (1989). Aired February 23, 1990 at 8:37 a.m., the lyrics of the "Candy Wrapper" included this excerpt:

It was another Pay Day and I was tired of being a Mr. Goodbar, when I saw Miss Hershey standing behind the Powerhouse on the corner of Clark and Fifth Avenue, I whipped out my Whopper and whispered, Hey Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? . . . [I]t was all I could do to hold back a Snicker and a Krackle as my Butterfinger went up her tight little Kit Kat, and she started to scream Oh, Henry! . . .

Id. at 3208.

⁶⁵ Letter from Donna R. Searcy, Secretary, to KGB, Inc., San Diego, California, 7 FCC Rcd. 3207 (1992).

⁶⁶ Letter from Donna R. Searcy, Secretary, to San Francisco Century Broadcasting, San Francisco, California, 7 FCC Rcd. 4858 (1992). Forfeiture for \$25,000 was imposed for the full amount in response to broadcasts from 2:00 to 6:00 p.m. during the months of August and September 1991. *Id.* To one caller, dee Jay Rick Chase inquired, "Have you ever had oral sex? . . . Maybe you're too ugly to have oral sex." *Id.* at 4858.

⁶⁷ Claudia Puig, *KLSX Owner Responds to FCC's Howard Stern Fine*, LOS ANGELES TIMES, Jan. 1, 1993 at F-2. Twelve alleged instances from October through December 1991 brought

on the costly forfeiture. *Id.* The broadcasts in contention included repeated references to masturbation, rape, erections, penises, homosexual and heterosexual sexual activity, Santa Claus fondling children, a technique for elongating the male sexual organ, a concoction by Stern of a fictional rape, and a castration of two Los Angeles radio competitors. Paul Farhi, *FCC's Stern Punishment; Radio Group to Be Fined, Purchases May Be Delayed*, WASH. POST, Nov. 25, 1992 at p. E1. Although \$12,500 is the standard fine, the FCC may impose fines of \$25,000 per day up to \$250,000. *In re Standards for Assessing Forfeitures*, Policy Statement, 6 FCC Rcd. 4695, 4697, appendix (1991).

⁶⁸ *Largest Fine Ever*, COMMUNICATIONS DAILY, December 21, 1992, Vol. 12, No. 245, p.2.

⁶⁹ *Id.*

⁷⁰ Pat Widder, *'Shock Jock' Stern lands record fine for Infinity Broadcasting*, CHIC. TRIB., Dec. 19, 1992, at p. 1-C. Infinity had received a letter of inquiry from the FCC regarding broadcasts of three Infinity-owned stations to which Infinity replied affirmatively that it had broadcast the material in question. See also Letter from Donna R. Searcy, Secretary, to WSUC-FM, Cortland, N.Y., 8 FCC Rcd. 2 (1993). In that situation, State University of New York was issued an NAL for \$23,750 on January 1, 1993, for a broadcast of rap music that contained alleged vulgar language including "no joking, my tongue just keeps on poking, and the best type of oochie coochie is the type that tastes like sushi, eat it, watch your girl get frisky and then wash it down with a shot of whiskey . . ." *Id.*

⁷¹ *Largest Fine Ever*, *supra* note 68, at 2. After issuing an NAL, the FCC can reduce or eliminate the proposed forfeiture. *Id.*

three new stations.⁷² However, by a four-to-one vote, the Commission approved the pending sale because the seller, Cook Inlet Radio Partners of Alaska, was a minority-owned and controlled company that was never before in trouble with the FCC.⁷³

Infinity has asked the Commission to reconsider its finding of indecency.⁷⁴ Like Evergreen, however, non-payment by Infinity may ultimately lead to action by the Justice Department to collect the fine.⁷⁵ Even so, Infinity is determined to defend its non-payment of the forfeiture on two grounds.⁷⁶ First, Infinity hopes to show that the material focused on is not indecent and second, it hopes to prove through a Gallup Poll that the Stern broadcast audience does not include any unsupervised child listeners.⁷⁷

The outcome in both Evergreen and Infinity will be greatly determinative of the future of broadcast indecency. Monetary forfeitures were intended to lead to increased self-regulation by radio stations. If forfeitures continue to rise in cost, radio stations will have to weigh the benefit they receive in airing potentially indecent broadcasts against the money they are expending in forfeitures. Although "shock jocks,"⁷⁸ such as Howard Stern, appear to be contributing to higher ratings, stations repeatedly forced to put "their money where their [dee jay's] mouth is" may encourage stricter adherence to indecency standards. However, when shock jocks collect \$3,000 for every sixty second commercial advertisement aired during their show — which is broadcast four to five hours daily, five days a week — forfeitures in the hundreds of thousands of dollars may be deemed as just another cost of doing business.

3. *Indecency on the Horizon: What's Next?*

There is speculation that the composition and mission of the FCC will change as replacements are appointed for Republican Chairman Alfred Sikes and Commissioner Sherrie Marshall.⁷⁹ Some contend that unlike former President Bush, President Clinton will not face the same conservative pressures, thus

allowing indecency to be dealt a more liberal hand. However, others maintain that Vice President Gore and his wife Tipper will perpetuate the conservative agenda followed during Chairman Sikes' tenure.⁸⁰

How will the future Commission respond to the emerging pattern of refusals to pay forfeitures, where stations are forcing the FCC's hand by taking the questions of indecency to federal court? Once in court, the FCC may no longer rely on the subjective interpretations of the five-member Commission, but rather, the FCC itself must prove the material is indecent. Previously, stations have avoided court battles with the Commission, in part, because they may have feared the subtle powers of the FCC who control license renewals, as well as other important services. Additionally, going to court is not particularly attractive where the expense of litigation may exceed the fine itself. However, the cases of *Evergreen* and *Infinity* may indicate a trend toward reducing such conflicts in the courtroom. First, with the indecency definition unsettled, they have nothing to lose in court. Secondly, as the size of fines steadily increases, litigation may become the cheaper alternative. If the courts do not resolve the onslaught of alleged indecency violations, the future Commission, as suggested by Commissioner James Quello, may institute proceedings to consider revoking "all or some" of a station's broadcasting licenses if an aggravated pattern of repeated violations occurs.⁸¹

In light of the extensive involvement of the FCC, the Congress and the courts, the following question has yet to be answered: where is the line to be drawn regarding the broadcaster's First Amendment right to air material of his choice and the listener's right to receive uncensored broadcasts versus the government's compelling interest in prohibiting indecency over the public airwaves?

The FCC's present paternalistic objective to protect children from indecent broadcasts through the five commissioners may no longer be a valid exercise of its discretion. The "harm to children" argument's time has seemingly passed. Where parents, and for

⁷² *Id.*

⁷³ *Id.* Other, more traditional reasons for upholding the sale were discussed in the opinion. *Id.*

⁷⁴ Widder, *supra* note 70, at 1-C.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ "Shock jock" is a slang term used to describe dee jays who air provocative, controversial, and often-times indecent programming.

⁷⁹ Paul Farhi, *FCC's Stern Rebuke; Infinity Unrepentant; Harsher Actions Loom*, WASH. POST, Dec. 19, 1992, Style, p.

D1.

⁸⁰ Tipper Gore was a principle architect of a national campaign to place warning labels on record albums containing explicit lyrics. In addition, during a 1989 Congressional hearing with FCC nominees Alfred Sikes, Andrew Barrett and Sherrie Marshall, Al Gore was among the most outspoken Senators stating his distaste for broadcast indecency and his hope that the Commission would regulate it according to Congress' mandate. *Congress Asserts Its Dominion Over FCC*, BROADCASTING, Aug. 7, 1989, at 27.

⁸¹ Widder, *supra* note 70, at 12.

that matter, anyone in general, have the power to turn off the radio or change the dial, five commissioners need not subjectively dictate what can and cannot be broadcast. It might be time to acknowledge that if the public owns the broadcast airways and the public votes radio personalities like Howard Stern number one in two cities, with high ratings in eight others, then the public is sending a message to the FCC, the Congress and the courts about our national community's evolving contemporary standards of decency.⁸²

II. BODILY INJURY AND THE FIRST AMENDMENT: GUNS FOR HIRE BULLET THE MEDIA'S RIGHTS

A. Fishing for a Standard

As evidenced above, indecency regulation is still somewhat unsettled. Likewise, it is unclear to what extent the First Amendment's protection of freedom of speech and of the press shields a media defendant from civil liability for damages arising from bodily injuries caused by speech.⁸³ The courts have borrowed from libel law the proposition that the imposition of tort liability by the State is subject to constitutional limitation to prevent the inhibition of free speech.⁸⁴ The courts have also borrowed from the law of incitement, which limits speech "directed to inciting or producing imminent lawless action and . . . likely to produce such action."⁸⁵ Additionally, the "clear and present danger"⁸⁶ standard has been invoked allowing recovery for liability if the injury is foreseeable and the result of a clear and present

danger.

Generally, where the motivation for the harmful act was a television broadcast or movie that was not oriented toward the commission of any specific act by the audience, liability has been barred by the First Amendment.⁸⁷ But, where the media directly encouraged the action that resulted in harm, the courts have refused to invoke the freedoms of speech or press to deny the injured plaintiff recourse.⁸⁸ The distinction is often hard to draw.

1. Liability Barred: Speech Above Injury!

In *Olivia N. v. National Broadcasting Co.*,⁸⁹ the First Amendment protected broadcasters who aired a television drama that resulted in the attack and rape of a girl by minors who were allegedly motivated by having viewed a similar attack depicted in the defendant's film.⁹⁰ In upholding the incitement standard articulated in *Brandenburg v. Ohio*,⁹¹ the court declined to impose a lesser standard of negligence on the broadcasters because "television networks would become more inhibited in the selection of controversial materials."⁹² Furthermore, a negligence standard "would lead to self-censorship, which would dampen the vigor and limit the public variety of debate."⁹³

Likewise, in *Bill v. Supreme Court*,⁹⁴ a minor plaintiff was shot while leaving a movie theater that had aired a violent picture.⁹⁵ Again the court rejected a simple negligence theory and upheld the incitement standard.⁹⁶ The court feared that if the negligence theory was upheld, prospective film producers of violent movies would be required to account for "liability to patrons for acts of violence on the part of third

⁸² Stern, according to Arbitron, is rated number one in New York and Los Angeles. He is number two in Philadelphia and number four in Washington. Ted Koppel, *Raunch Radio: How Far Is Too Far*, ABC NEWS NIGHTLINE, Dec. 17, 1992.

⁸³ Alan Stephens, Annotation, *First Amendment Guaranty of Freedom of Speech or Press as a Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26, at 29 (1991).

⁸⁴ *Id.* at 29 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

⁸⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁸⁶ *Schenck v. U.S.*, 249 U.S. 47 (1919).

⁸⁷ Stephens, *supra* note 83, at 30, 31 (citing *Olivia N. v. National Broadcasting Co.*, 74 Cal. App. 3d 383 (1977)).

⁸⁸ *Id.* at 32 (citing *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975)).

⁸⁹ 126 Cal. App. 3d 488 (1981).

⁹⁰ *Id.* at 492. In defendant's film, "Born Innocent," one scene depicted a young girl entering a shower where she is artificially raped and attacked by four other adolescent girls using a "plumber's helper." *Id.*

⁹¹ Stephens, *supra* note 83, at 494-95.

⁹² *Id.* at 494. The court recognized that the First Amendment was not absolute; however, it held that "Born Innocent" was well within the realm of protected speech. *Id.*

⁹³ *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964)). The court feared that by imposing less than the incitement standard on media defendants would "reduce the U.S. adult population to viewing only what was fit for children." *Id.* at 494-495.

⁹⁴ 137 Cal. App. 3d 1002 (1982).

⁹⁵ Plaintiff sued the producers of the movie for negligence in knowing that the movie was violent, that it was likely to attract violence-prone people who would cause injury to "movie goers," and that the producers negligently failed to warn "movie goers" of those facts. *Id.* at 1005.

⁹⁶ See *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981)(denying relief to a minor who duplicated Mickey Mouse Club Show magic trick and was injured); *DeFilippo v. National Broadcasting Co., Inc.* 446 A.2d 1036 (R.I. 1982)(denying relief to decedents of plaintiff who had hung himself imitating a stunt for fear of censoring broadcast media).

persons over whom the producers have no control.⁹⁷ Furthermore, under a simple negligence theory, producers would be required to predict public reaction to their films, creating, in effect, a "heckler's veto"⁹⁸ of a producer's right to free speech.⁹⁹

2. Liability Upheld: Say It At Your Own Risk

On the other hand, some courts have imposed liability despite First Amendment guarantees. In *Weirum v. RKO General*,¹⁰⁰ a radio station was held liable for the death of a motorist forced off the highway by a listener to the defendant's radio station that was conducting a contest rewarding the first listener to locate the disc jockey.¹⁰¹ Where the issue was civil accountability for the foreseeable results of a broadcast that created an undue risk of harm, the court concluded that "the First Amendment does not sanction the infliction of physical injury merely because it was achieved by word rather than act."¹⁰²

Similarly, in *Norwood v. Soldier of Fortune Magazine*,¹⁰³ the plaintiff sued to recover for personal injuries suffered as a result of several murder attempts on his life made by men whose services were obtained by an advertisement placed in *Soldier of Fortune* ("SoF") magazine.¹⁰⁴ The court rejected the magazine's claim that its advertisements were abso-

lutely privileged by the First Amendment.¹⁰⁵ The court pointed out that:

The First Amendment does not confer an absolute right to . . . publish, without responsibility, whatever one may choose. . . . [T]he First Amendment's guaranty of free speech and press carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly. . . . It does no violence to the value of freedom of speech . . . to impose a duty of reasonable care upon those who would exercise such freedoms¹⁰⁶

Despite the conclusion that the advertisement was commercial speech entitled to First Amendment protection, the court held it could be forbidden and regulated.¹⁰⁷ The court thus upheld liability, emphasizing that "if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity" in publishing the advertisements that led to the injuries.¹⁰⁸

B. The Soldier of Fortune Controversy: Setting a Standard

The First Amendment does not protect commercial speech "related to" illegal activity because there would be no constitutional interest in any action that solicits criminal conduct.¹⁰⁹ Nevertheless, in the instance of magazine publishing, much like broadcast-

⁹⁷ *Bill*, 137 Cal. App. 3d at 1008. Producers would have to forewarn viewers as to the content of their movie, which might deter some viewers from attending the movie. Additionally, producers would have to provide security at great cost. Each of these actions would have a chilling effect upon the selection of subject matter for movies. *Id.*

⁹⁸ The First Amendment means that "when speech is of such a nature as to arouse violent reaction on the part of the lawless, the first obligation of government is to maintain the peace and enforce the law, and not to silence or punish the speaker." *Id.*

⁹⁹ *Id.*

¹⁰⁰ 539 P.2d 36 (Cal. 1975).

¹⁰¹ *Id.* at 37-38.

¹⁰² *Id.* at 40. The court determined that the record supported a finding of foreseeability, which in turn, supported a finding of a duty by the radio station to the plaintiff. Foreseeability was premised on the facts that it was summer, minors were out of school, and there was a monetary prize. It was foreseeable that defendant's youthful listeners would race after the disc jockey in disregard of highway safety. The court further ruled out the possibility that a third party could break the chain of liability where the reckless conduct by minors was a foreseeable result of the broadcast and contest. *Id.*

¹⁰³ 651 F. Supp. 1397 (W.D. Ark. 1987).

¹⁰⁴ *Id.* at 1397. The advertisements read:

GUN FOR HIRE: 37 year-old-professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier, and other special skills. All jobs con-

sidered. Phone (615) 891-3306 (I-03).

GUN FOR HIRE: NAM sniper instructor. SWAT. Pistol, rifle, security specialist, body guard, courier plus. All jobs considered. Privacy guaranteed. Mike (214) 756-5941 (101).

Id. at 1398

Query, whether a man bent on crime would publish a solicitation to murder along with his name and phone number in a magazine read by 60,000 law enforcement officials.

¹⁰⁵ *Id.* at 1398. The defendants claim that if it is determined that the advertisements are legal, then "irrespective of the consequences flowing from them, [they] are absolutely privileged by reason of the provisions of the . . . First Amendment." *Id.*

¹⁰⁶ *Id.* at 1400.

¹⁰⁷ The court further determined that injury was foreseeable where a magazine publisher "allowed an advertisement for a 'gun for hire' by a 'professional mercenary,' and a 'NAM sniper instructor' who would keep all inquiries 'discreet and very private'. . . ." *Id.* at 1402.

¹⁰⁸ *Id.* at 1402 (quoting 34 W. Blackstone Commentaries at 1326). The victim in this instance was not requesting curtailment of the magazine's speech by a prior restraint or censorship. The victim was requesting damages "caused by the magazine's exercise of its free speech right" that led to his injuries. 94 A.L.R. FED. 26, at 37 (1989).

¹⁰⁹ Although "related to" is the language used by the court, a stringent interpretation of such a term would be overbroad in that it would apply with equal force to an advertisement for a gun to be used in self defense from rape or murder. See Central

ing, if state tort law places too heavy a burden on publishers with respect to the advertisements they print, the fear of liability might impermissibly impose a form of self-censorship on the publishers. Two *Soldier of Fortune* magazine cases specifically address the tender balance between the State's interest in providing recourse for harm caused by an advertisement and its duty of protecting expression under the First Amendment.

In *Eimann v. Soldier of Fortune*,¹¹⁰ John Wayne Hearn shot and killed Sandra Black at the behest of her husband Robert Black who contacted Hearn through a classified advertisement Hearn had placed in SoF. The Court of Appeals for the Fifth Circuit reversed the district court's¹¹¹ finding for the plaintiff, holding that the verdict was flawed because as a matter of tort law, the district court had demanded too high a standard of conduct.¹¹² The appeals court reasoned that the facially innocuous advertisement did not indicate that the illegal activity was foreseeable and the publisher could not be held accountable for an ambiguous advertisement. Therefore, it concluded liability would not be found without "a more specific indication of illegal intent."¹¹³

Three years later, the Eleventh Circuit Court of

Appeals in *Braun v. Soldier of Fortune*¹¹⁴ held that the imposition of tort liability on SoF for its breach of duty to refrain from publishing an advertisement that facially presented substantial danger of harm to the public did not violate the First Amendment.¹¹⁵ In *Braun*, like *Eimann*, the murder victim's sons brought a wrongful death action against SoF alleging that it had negligently published a personal service advertisement.

The district court held SoF liable by finding "the advertisement[,] on its face[,] would have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed."¹¹⁶ On appeal, SoF argued that the First Amendment forbids placing liability on a publisher unless it openly solicits criminal activity. Furthermore, it contended that imposing liability on publishers for advertisements they print indirectly threatens core non-commercial speech.¹¹⁷ The Eleventh Circuit disagreed, stating that the First Amendment permits a state to impose liability upon a publisher where the advertisement facially and "without the need for investigation, makes it apparent that there is a substantial danger of harm to the public."¹¹⁸ The court based that finding on law estab-

Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)(holding that the First Amendment does not protect commercial speech "related to illegal activity"); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973). In *Pittsburgh Press*, the Court found no constitutional interest in publishing personal service advertisements that solicit criminal activity. "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Id.*

¹¹⁰ 880 F.2d 830 (5th Cir. 1989), cert. denied, 493 U.S. 1024 (1990). Specifically, the advertisement stated:

EX-MARINES-67-69 'Nam Vets, Ex-DI, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas. (404) 991-2684.

Id. at 831.

Sandra Black's mother and son sued *Soldier of Fortune* for wrongful death, alleging that the magazine negligently published the advertisement without investigating its nature. *Id.* at 832. SOF argued that even if the advertisement was commercial speech, since it did not facially express illegal activity, it was constitutionally protected. *Id.* at 834, n.1. Thus, whether it was commercial or core speech, the result would be the same.

¹¹¹ The district court held that the correct standard for evaluating the magazine's conduct was whether the publisher "knew or should have known of the nature of the advertisement and, thus, should have foreseen the likelihood that criminal conduct would ensue." *Id.* at 833. The jury found that not only did SoF's negligence amount to "conscious indifference," it was also the proximate cause of Sandra Black's death. *Id.* The jury awarded the plaintiffs \$1.9 million in compensatory damages and \$7.5

million in punitive damages. *Id.*

¹¹² *Eimann*, 880 F.2d at 838. The district court's standard of care imposed too heavy a burden in that it allowed liability if a reasonable publisher concluded that the advertisement could be reasonably interpreted as an offer to commit a crime. *Id.* at 837. As observed by the Fifth Circuit, "virtually anything might involve illegal activity and that applying the district court's standard would mean that a publisher 'must reject all [ambiguous] advertisements' or risk liability for any 'untoward consequences that flow from his decision to publish' them." *Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3480 (U.S. Jan. 12, 1993)(citing *Eimann*, at 837, 838).

¹¹³ *Eimann*, 880 F.2d at 838. The Fifth Circuit clearly feared the chilling effect on speech that would occur if a publisher was held liable for every advertisement that it published that reasonably could be found to cause injury. *Id.*

¹¹⁴ *Braun*, 968 F.2d at 1110.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1115. The district court began its examination by finding a duty by SOF to refrain from publishing advertisements that contain a "clearly identifiable unreasonable risk." *Id.* An offer in the advertisement to commit a serious violent crime, including murder, would comport with the district court's standard. *Id.* The district court then relied on the balancing test set forth in *United States v. Caroll*, 159 F.2d 169, 173 (2d Cir. 1947), to balance Georgia's interest in compensating victims for tortious conduct with the First Amendment concern that state law not chill protected speech. *Id.* at 1115.

¹¹⁷ *Id.* at 1114-15, 1118.

¹¹⁸ *Id.* at 1119.

lished in *Gertz v. Robert Welch*,¹¹⁹ which held that as long as a state does not impose liability without fault, it may hold a publisher liable for “defamatory falsehood injurious to a private individual.”¹²⁰ By analogy, the court in *Braun* found that a negligence standard satisfied the First Amendment concerns for non-commercial and core speech in stating,

[t]he absence of a duty requiring publishers to investigate the advertisements they print and the requirement that the substance of the ad[vertisement] itself must warn the publisher of a substantial danger of harm to the public guarantee that the burden placed on publishers will not impermissibly chill protected commercial speech.¹²¹

With similar factual scenarios in *Eimann* and *Braun*, why two different results? The answer lies in the differing jury instructions. In *Eimann*, the jury instructions allowed the jury to impose liability if a reasonable publisher would conclude that the advertisement could be reasonably interpreted as an offer to commit a crime.¹²² Conversely, in *Braun*, the jury could find liability only if the advertisement facially created a clearly identifiable unreasonable risk of harm to the public.¹²³ *Eimann*’s jury instruction was deemed too broad by the court in that it would allow a finding of liability for ambiguous commercial speech. The appellate court in *Eimann* rejected placing a burden on publishers to investigate ambiguous advertisements and thus, SoF was not held liable. However, the jury instruction in *Braun* requiring a publisher to be alert to certain advertisements was upheld by the court and SoF was held liable.

C. Setting Precedents for the Future

The issue of third party liability for speech that causes harm is presently being tested in Congress

and in a district court in Austin, Texas. With the closing of the 102nd Congress, the Pornography Victim’s Compensation Act of 1991 (“Compensation Act”)¹²⁴ died without coming to a final vote. However, as a bill with great support and five years in the making it is extremely likely to reemerge with the new Congress.¹²⁵

The Compensation Act authorized civil suits against producers or distributors of material, including books, films and videos, that inspire foreseeable sexual assaults.¹²⁶ Supporters maintain that the Compensation Act is analogous to product liability law—“[i]f you put out a product that harms someone, you’re liable.”¹²⁷ Opponents, however, argue that distributors of pornographic materials, like distributors of guns, tobacco and alcohol, should be free from liability for the acts of third parties using their products.¹²⁸ Opponents believe that to hold producers and distributors of pornography liable would chill protected speech¹²⁹ because fear of civil damage suits would inevitably shrink public access to constitutionally protected products.¹³⁰

The same issue is simultaneously evolving in a suit in Texas where a nineteen year-old male shot and killed a police officer during a routine stop.¹³¹ Upon a verdict in the pending criminal suit against the defendant, the officer’s wife, Linda Sue Davidson, has also filed a civil suit against Interscope Records and Time-Warner, accusing them of gross negligence for distributing a record that she believes “incited lawlessness” that led to her husband’s murder.¹³²

If the magazine publisher in *Braun* were analogized to Interscope or Time-Warner as record distributor or producer, and a jury instruction similar to the one used in *Braun* were employed, a court could possibly find the defendants negligent.¹³³ Davidson’s suit, *Braun*, and the Compensation Act im-

¹¹⁹ 418 U.S. 323 (1974).

¹²⁰ *Id.* at 347.

¹²¹ *Braun*, 968 F.2d at 1119.

¹²² *Eimann*, 880 F.2d at 833.

¹²³ *Braun*, 968 F.2d at 1115.

¹²⁴ S. 1521, 102d Cong., 1st Sess. (1991).

¹²⁵ Donn Fry, *Banned Books Week Focuses On Censorship’s Sorry Chapters*, THE SEATTLE TIMES, Sept. 28, 1992, at C-3.

¹²⁶ S. 1521, 102d Cong., 1st Sess. (1991).

¹²⁷ Maria Puente, *Bill holds porn producers liable for sex crimes*, USA TODAY, April 15, 1992, at 9-A.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Chuck Philips, *Testing the Limits; The Fatal Shooting of a Texas Trooper During a Routine Traffic Stop Sets Up a*

Conflict Over the Words in a Rap Song that May Wind Up Testing the Limits, LOS ANGELES TIMES, October 13, 1992, at F-1.

In his criminal conviction, Howard is arguing for leniency, alleging that he was provoked by the rap music he was listening to when he pulled the trigger. *Id.* Howard was listening to “Soulja’s Story” by rapper Tupac Amaru Shakur. The lyrics allegedly to blame for the officer’s death were as follows:

Cops on my tail, so I bail till I dodge them,
They finally pull me over and I laugh,
Remember Rodney King And I blast his punk ass
Now I got a murder case What the fuck would you do?
Drop them or let them drop you?
I choose droppin’ the cop!

Id.

¹³² *Id.*

¹³³ Although in past instances, controversial performers—including Ozzy Osbourne and Judas Priest—have been not

ply the scope of third party liability for speech that harms may well be expanding.

III. HATE SPEECH ORDINANCES AND THE FIRST AMENDMENT: BURN A CROSS IN THE NAME OF SPEECH

A. *R.A.V. v. City of St. Paul, Minnesota*¹³⁴

Thus far, two examples have been presented of limitations that restrict the First Amendment's reach in the name of compelling governmental interests. However, the First Amendment gained new ground in *R.A.V. v. City of St. Paul*. In that case, the defendant, R.A.V., allegedly burned a cross on a black family's front lawn and was subsequently charged under St. Paul's Bias-Motivated Crime Ordinance.¹³⁵ The ordinance provided that,

[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹³⁶

R.A.V. moved to dismiss the charge, arguing that the ordinance was overbroad, impermissibly content-based and thus invalid under the First Amendment.¹³⁷ On appeal, the United States Supreme Court adopted a "content-based" analysis and held the city ordinance unconstitutional because the government attempted to single out expression on disfavored topics such as race, while offering no protection to other disfavored subjects.¹³⁸ The ordinance was found facially unconstitutional because it prohibited otherwise permitted speech solely on the basis of the subjects the speech addressed.¹³⁹ The Court

declined to create a new category of proscribable speech—"hate speech"—as had been done to prohibit fighting words and obscenity.¹⁴⁰ Instead, the Court explicitly stated that the "government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."¹⁴¹ Thus, the Court held that the First Amendment imposes "a 'content discrimination' limitation upon a State's prohibition of [even] proscribable speech."¹⁴²

Content-based regulations of speech, like the St. Paul ordinance, are seen as an attempt to censor or restrict a message for its underlying ideas. Governmental censorship of that type is presumptively invalid unless the restriction is narrowly tailored to serve a compelling state interest.¹⁴³ Because there rarely exists a compelling state interest in censorship, restrictions on speech viewed under such strict scrutiny are usually invalidated. Therefore, to save the St. Paul ordinance, the Court in *R.A.V.* examined it within the context of two exceptions to the presumptive prohibition on content discrimination.

Under the first exception, the Court held that no danger of idea or viewpoint discrimination is thought to exist when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable."¹⁴⁴ The Court reasoned that the St. Paul ordinance failed to fall within that first exception.¹⁴⁵ The Court found that "fighting words are categorically excluded from the protection of the First Amendment . . . [because] their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey."¹⁴⁶ By proscribing words that communicate messages of racial, gender, or religious intolerance, the city of St. Paul sought to handicap particular ideas.¹⁴⁷ Had St. Paul "singled out an especially offensive mode of expression . . . for example, . . . prohibit[ing] only

been held liable when accused of being responsible for acts of third parties. *Id.*

¹³⁴ 112 S. Ct. 2538 (1992).

¹³⁵ *Id.* at 2541 (citing St. Paul, Minn. Legis. Code § 292.02 (1990)).

¹³⁶ *Id.* at 2541.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2547. In *R.A.V.*, the ordinance "applie[d] only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender' . . . yet allowed 'displays containing abusive invective . . . unless they are addressed to one of the specified disfavored topics.'" *Id.* at 2547. Abusive invective regarding one's sexual or political orientation, a disability, ancestry or national origin would therefore not be afforded any protection. *Id.*

¹³⁹ *Id.* at 2542. The Court held the ordinance went "beyond

mere content discrimination, to actual viewpoint discrimination." *Id.* at 2547.

¹⁴⁰ The Court recognized that "[c]ontent-based regulations are presumptively invalid," *Id.* at 2542 (quoting *Simon & Schuster, Inc.*, 112 S. Ct. 501 (1991)), unless they fall within one of the previously recognized categorical exceptions such as fighting words or obscenity. *R.A.V.*, at 2543.

¹⁴¹ *Id.* at 2545.

¹⁴² *Id.*

¹⁴³ *Id.* at 2549.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2545.

¹⁴⁶ *Id.* at 2549.

¹⁴⁷ *Id.* The Court further noted that "St. Paul's comments and concessions in this case elevate[d] the possibility to a certainty." *Id.*

those fighting words that communicate ideas in a threatening (as opposed to merely obnoxious) manner,"¹⁴⁸ the ordinance might have been held constitutional.

The ordinance also failed the second exception which stated that if the subclass of proscribable speech is "associated with particular 'secondary effects' of the speech, . . . the regulation is justified without reference to the content of the . . . speech."¹⁴⁹ In *St. Paul*, the Court clarified that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to."¹⁵⁰ The Court found further that "[t]he emotive impact of speech on its audience was not considered a 'secondary effect.'"¹⁵¹

Failing those two alternative methods of upholding the ordinance, the Court applied a "strict scrutiny" standard. And although the government interest in protecting families from racially motivated cross-burning on their lawn is a compelling state interest, a content-based ordinance that proscribes speech ("the means") was not narrowly tailored to meet that end. Many other ways existed to proscribe offensive actions such as cross burning and displaying a Nazi swastika that would not censor the underlying message. In the present instance, the Court contended that *R.A.V.* could have been charged under any number of criminal statutes including a statute for arson, property damage, threats of terrorism or racially motivated assault.¹⁵² Those statutes would have punished *R.A.V.*'s criminal activity, yet preserved his constitutional right to free speech. Thus, the *St. Paul* ordinance was deemed unconstitutional.¹⁵³

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2546 (quoting *Renton*, 475 U.S. 41, 48 (1986)).

¹⁵⁰ *Id.* at 2549 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

¹⁵¹ *Id.* at 2549.

¹⁵² *Id.* at 2541. Other Minnesota statutes that would have punished *R.A.V.*'s crime include an arson statute (Minn. Stat. § 609.713(1) (1987) providing for up to five years in prison; a criminal damage to property statute (Minn. Stat. § 609.563) providing for up to five years and a \$10,000 fine, depending on the value of the property intended to be damaged; a threat of terrorism statute (Minn. Stat. § 609.595 (Supp. 1992)) providing for up to one year and a \$3,000 fine, depending on the extent of the damage to the property; and a racially motivated assault statute (Minn. Stat. § 609.2231(4) (1990 Supp.)). *Id.* at 2541 nn. 1-2.

¹⁵³ *Id.* at 2550.

¹⁵⁴ 721 F. Supp. 852 (E.D. Mich. 1989). *Doe*, a graduate psychology major, feared possible sanctions under the University

B. Application of *R.A.V.* to University "Hate Speech" Codes

One future import of *R.A.V.* is its application to university regulatory speech codes that are proliferating nationwide. Two such codes were struck down prior to the decision in *R.A.V.* The courts in *Doe v. University of Michigan*¹⁵⁴ and *UMW Post, Inc. v. Board of Regents of the University of Wisconsin*¹⁵⁵ expressly held that universities are restricted by the First Amendment in their regulation of the content of speech. The university, at best, may use narrow time, place, and manner restrictions, or may promulgate codes that model already proscribable speech rationales like the obscenity or fighting words doctrines.¹⁵⁶ *R.A.V.* took established precedent one step further. *R.A.V.* affirmed, in the hate speech context, the First Amendment principle that content-based discrimination is presumptively invalid. While the majority of hate speech codes include a list of what will and will not be protected, under the *R.A.V.* rationale, any such list will be invalid. *R.A.V.* eliminates the need to rely on limiting constructions and the like, giving courts a powerful tool for striking content-based regulations.

C. Penalty Enhancement Provisions Also Face an Uncertain Future

Not only will *R.A.V.* likely influence city ordinances and university hate speech codes that attempt to regulate the content of speech, but the ruling will also affect enhancement penalty provisions as well. Presently, there is a split among state supreme courts regarding the validity of such provisions. In *State v. Wyant*,¹⁵⁷ the Ohio State Supreme Court invalidated

of Michigan's newly adopted policy on discriminatory harassment of students for a discussion of biologically based differences among races and sexes. *Id.* at 858.

¹⁵⁶ 774 F. Supp. 1163 (E.D. Wis. 1991). University system's rule prohibiting students from directing discriminatory epithets at individuals based on certain characteristics with the intent to demean them was challenged. *Id.* at 1164-1168.

¹⁵⁸ See *supra* notes 154 and 155.

¹⁵⁷ 597 N.E. 2d 450 (1992), *petition for cert. filed*, (Sept. 29, 1992). Here, two white couples ran a black couple off a state park campsite when the black couple complained about the loud music of the white campers. *Id.* at 450. The white campers called the black campers "nigger" and said that they ought to be shot. *Id.* The Ohio statute that was invalidated following the decision set forth in *R.A.V.* states that "[n]o person shall [commit aggravated menacing, menacing, criminal damaging or endangering, or criminal mischief or certain types of telephone harassment] by reason of the race, color, religion, or national origin of another person or group of persons." *Id.* at 453.

a statute allowing stiffer penalties for people who victimize persons based on race, color, religion or national origin.¹⁵⁸ The court struck down the statute, finding that it was "clearly aimed at punishment of bigoted thought."¹⁵⁹ Similarly, the court in *State v. Mitchell*¹⁶⁰ struck down a Wisconsin statute that included a penalty enhancement provision in an intimidation statute, finding that the "statute punished the defendants's biased thought."¹⁶¹ The court further found that "the statute punished speech, because the element of discriminatory selection of the victim is generally prove[n] by evidence of the defendant's speech."¹⁶² *Mitchell* awaits argument in the United States Supreme Court where the question presented will be, "Does [the] First Amendment prohibit states from providing greater maximum penalties for crimes if fact-finder determines that criminal offender intentionally selected his or her crime victim because of victim's race, color, religion or other specified status?"¹⁶³ The ruling may affect federal legislation including the Federal Hate Crimes Law passed by the House in October and expected to be enacted this coming year.¹⁶⁴ The decision will also bear heavily on thirty states that have similar penalty enhancement provisions for crimes motivated by the victim's race, religion or sexual orientation.¹⁶⁵

Conversely, *Oregon v. Plowman*¹⁶⁶ upheld a statute that included a penalty enhancement provision. The Oregon court distinguished its statute from the one struck down in Wisconsin, concluding that the Oregon statute was a "law directed against conduct, not a law directed against the substance of speech."¹⁶⁷ Because that type of statute was not con-

sidered in *R.A.V.* nor in *State v. Mitchell*, the court in Oregon upheld its constitutionality.

Although *R.A.V.* did not directly address university codes or enhancement penalty provisions, the decision strongly suggested that both types of regulations may be unconstitutional where they require or enhance punishment based on a person's thought or expression.

IV. CONCLUSION

Despite the First Amendment's guarantees of free speech and free press, these rights are in constant tension with the government's obligation to protect citizens from substantial harm. Weighing First Amendment guarantees against government interests often leads to a reduction in First Amendment rights as exemplified by the restrictions recently placed on broadcast indecency and on a magazine's third party liability. Sometimes, however, the balance struck leads to the expansion of First Amendment limits, as in *R.A.V.*

First Amendment rights are constitutional rights of the highest priority. A *de jure*'s right to speak freely, a magazine's right to publish without fear and an individual's right to express even unpopular opinions ensures that our freedoms of speech and press are preserved. Such First Amendment guarantees should not be overcome except in those rare instances in which the government interest is clear, narrow and overwhelming.

Ilene R. Penn

The United States Supreme Court declined to act on *Wyant* on December 14, 1992, likely because they will decide *Mitchell* first.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 463. The court noted that "conduct motivated by racial or religious bigotry can be constitutionally punished under the criminal code without resort to constructing a thought crime." *Id.*

¹⁶⁰ 485 N.W.2d 807 (1992). In *Mitchell*, a fourteen year-old white boy was severely beaten by ten black youths who had just viewed the movie "Mississippi Burning." *Id.* Following the film, Todd Mitchell said, "Do you feel hyped up to move on some white people? . . . There goes a white boy, go get him." *Id.*, at 809. The racial motive in Mitchell's crime doubled his sentence from two years (the maximum sentence for aggravated battery) to four years because of the anti-bias statute with an enhanced penalty provision. *Id.* This case will be reviewed by the Supreme Court in the spring. *State v. Mitchell*, 113 S. Ct. 810 (1992)

¹⁶¹ *Mitchell*, 485 N.W.2d at 809 n.1. The Wisconsin statute increased penalties for certain underlying crimes where the actor "[i]ntentionally select[ed] the person against whom the crime . . . is committed . . . because of the race, religion, color, disability,

sexual orientation, national origin or ancestry of that person." *Id.*

¹⁶² *Id.*

¹⁶³ 61 U.S.L.W. 3431 (Dec. 15, 1992).

¹⁶⁴ Joan Biskupic, *Justices to Review 'Hate Crimes' Case: Ruling Could Affect Numerous Laws, Proposed Federal Legislation*, WASH. POST, Dec. 15, 1992, at A-4.

¹⁶⁵ *Id.* Hate crime legislation first emerged in Massachusetts in the late 1970s. Nancy E. Roman, *High Court to Review Wisconsin Hate-Crime Law*, WASH. TIMES, Dec. 15, 1992, at A-3. It increased in the 1980s. Today, forty-six states have some form of hate crime legislation. *Id.*

¹⁶⁶ 838 P.2d 558 (Or. 1992), *petition for cert. filed*, (Nov. 23, 1992).

¹⁶⁷ *Id.* at 565. Relying on a point made in *R.A.V.*, the Oregon court distinguishes its statute from Minnesota's, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. 2538, 2546-47 (1992). The Oregon court also distinguished its statute from Wisconsin's holding that the Oregon statute required two or more people act together. *Id.*