CENSORSHIP AND FREE EXPRESSION: A PRACTITIONER’S GUIDE
TO THE EVOLVING LIMITS OF FREE EXPRESSION

I. OBSCENITY
A. Two big questions:
   1. Should it be a crime (particularly when it involves consenting adults)?
   2. If so: •can we make it a crime w/i limits of DP (adequate notice)?
      •can we define it so it doesn’t chill protected expression?
B. Background of obscenity law:
   1. Relatively new area of law until about 150 years ago (1850-70’s). Started w/ issues of heresy and
      sacrilegious issues – blasphemy. Historians trace the law back to a 1600’s case – Sir Charles
      Sedley arrested fro throwing his own urine onto crowd – 1st obscenity charge.
   2. Fanny Hill author arrested on obscenity charges.
   3. The DP issue is a serious issue. Need to make sure you have a definition of obscenity which gives
      adequate notice of what is and is not illegal.
   4. “Obscenity” defined:
      i. Queen v. Hickland (1838 British ct): “Whether the tendency of the matter charged as
         obscenity is to deprave and corrupt those whose minds are open to such immoral influences,
         and into whose hands a publication of this sort may fall.”
         a. [This standard was used to ban many classic novels, such as Ulysses.]
      ii. Roth v. US (1957 US SC): “Whether to the average person, applying contemporary
          community standards, the dominant theme of the material taken as a whole appeals to the
          prurient interest.”
         a. Must look at the work as a whole.
         b. Focuses on average person, not most sensitive person.
      iii. Memoirs v. Massachusetts (1996 US SC) – Fanny Hill case. It must be established that: (a)
          the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b)
          the material is patently offensive because it affronts contemporary community standards
          relating to the description or representation of sexual matters; and (c) the material is utterly
          w/o redeeming social value.
         a. This lasted maybe a month before being abandoned by SC. For the next 7 years, SC
            judged obscenity on a case by case basis.
         b. In 1973, SC took two new cases which indicated they might be ready to lay down a new
            standard: Miller v. California and Paris Adult Theatre.
      iv. Miller v. California (1973) – last significant attempt by SC to define obscenity.
         a. The basic guidelines for the trier of fact must be:
            1. whether ‘the average person, applying contemporary community standards’ would
               find that the work, taken as a whole, appeals to the prurient interest,
            2. whether the work depicts or describes, in a patently offensive way, sexual conduct
               specifically defined by the applicable state law; and
            3. whether the work taken as a whole, lacks serious literary, artistic, political, or
               scientific value.
         b. The ct gave examples of acceptable state statutes:
            1. Patently offensive representations or descriptions of ultimate sexual acts, normal or
               perverted, actual or simulated.
2. Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

c. *Miller* ct, as opposed to *Memoirs* ct, tried to establish a definition which would limit DP concerns by establishing adequate notice.

d. In *Miller*, C.J. Burger makes it clear that obscenity is not protected by the First Amendment (an idea established in *Roth*).

e. The Ct employs contemporary community standards because “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation.”

f. Ct remanded a conviction for mailing unsolicited sexually explicit material in violation of a CA statute to be decided under these new First Am standards.

g. J. Douglas dissents, arguing that this new test still does not give adequate warning about which material is obscene until it has gone through the test with a jury applying community standards. Still no fair warning of potential criminal conduct. Thinks the 1st Am doesn’t permit punishment for the ideas that a judge or jury find offensive.

h. Brennan also dissents, arguing the statute is overbroad.


i. SC (C.J. Burger) held that nothing in the Const precluded Georgia from the regulation of obscene materials at adult theaters, even when only viewed by consenting adults.

a. Ct sees legitimate st interests in stemming the tide of commercialized obscenity: quality of life, tone of commerce, public safety (fear that porno will cause sex crimes and other antisocial behavior), social interest in order and morality.

b. Ct defers to legislature’s rationale, even though there is no conclusive proof of a connection between antisocial behavior and obscene materials.

c. Ct says it is accepted that good books and art “lift the spirit, improve the mind, enrich the human personality, and develop character.” Feels that legislature may “act on the corollary assumption that commerce in obscene books...have a tendency to exert a corrupting and debasing impact leading to antisocial behavior.”

d. Points to civil rights cases which have held movie theaters to be public places, not private (therefore subject to regulation).

e. Ct says it is not controlling people’s thoughts – we can’t control a drug addicts fantasies but we can regulate the use of drugs – this is the same thing.

f. Ct says there is no right for consenting adults to do what they want behind closed doors. Can’t duel or prostitute in private.

ii. J. Brennan dissents, conceding that laws against obscenity have existed for a long time. His concern: is that price too much? He would draw a line between consenting adults and others.

a. The justifications for consenting adults are not the same as the justifications when consenting adults are in the picture: while I can’t say the interests of the State are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and the judicial machinery that inevitably result from the state efforts to bar distribution even of unprotected material to consenting adults.

b. Says obscenity standard still too vague, resulting in no adequate notice, chilling effect, and institutional stress.
c. “[T]he effort to suppress obscenity is predicated on unprovable …assumptions about human behavior, morality, sex, and religion.”

iii. Douglas (dissent): obscenity no exception to 1st Am; to personal to define and too emotional and vague to apply.

   
   i. Statute defining pornography (as distinct from obscenity) as the graphic sexually explicit subordination of women, whether in pictures or words, also including one or more of 6 listed characteristics (p.32). These characteristics were held to be discriminatory to women by IL ordinance.

   ii. 7th Cir overrules the statute, holding it unconst. The test doesn’t take into account any artistic value of the work. J. Easterbrook says when a regulation involves content, its no good.

   a. Const forbids the st to declare one perspective right and silence opponents.

   b. Cites *Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

   c. Ct says the image of pain is not necessarily pain, just as a book about slavery is not itself slavery.

   d. Under the 1st Am, there is no such thing as a false idea, so the gov’t may not restrict speech on the ground that in a free exchange truth is not yet dominant.

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II. INDECENCY ON THE AIRWAVES, AND ELSEWHERE

A. Issues:

   1. Should there be an indecency category?
   2. What is indecent?
   3. What penalties?
   4. Where and how is it regulated?


   1. Ct says FCC can regulate George Carlin’s monologue for indecency. This case involves the broadcast of patently offensive vulgarities, which offend for the same reason as obscenity offends – “it reduces people to their basic functions.” Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission’s action was constitutionally permissible.

   2. Ct holds broadcasting requires special treatment because:

      i. Uniquely accessible to children.
      ii. Radios are in the home, a place where people’s privacy interest is entitled to extra deference (can’t avert ears)
      iii. Unconsenting adults may tune into a station w/o any warning of offensive language
      iv. There is a scarcity of spectrum space, which the gov’t must therefore license in the public interest (But this has clearly changed, hasn’t it?)

   3. Ct says no appeal to prurient interest to find indecency.
4. Says the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. \textit{(Pacifica is limited to its facts.)}

5. Ct just holds that FCC can limit the broadcast to certain times, not that it can ban it completely.

6. Brennan (dissent): “Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the “off” button, it is surely worth the candle to preserve the broadcaster’s right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.”

7. Policy during Pacifica. Likely incoming democratic leader. Person who made complaint was very conservative – why was his kid not in school and listening to liberal Pacifica radio? Must have been a setup. The FCC knew they might soon be the minority rather than the majority.

8. Should gov’t or parents be responsible for protecting children? Ginsberg established the line of obscene as to minors (a category of restricted speech beyond obscenity).

C. \textbf{Golden Globe Awards} (2004 FCC)

1. FCC received numerous complaints because Bono said “This is really, really fucking brilliant” during live broadcast of GG Awards. FCC holds this was violation of applicable indecency and profanity prohibitions.

2. \textbf{FCC’s definition of indecency:}
   i. Depict sexual or excretory activities or organs
   ii. in terms patently offensive as measured by community standards for the broadcast medium.

3. In making indecency determinations, the full context in which the material appeared is critically important. Three principle factors for this contextual analysis (ad-hoc balancing test):
   i. The explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
   ii. Whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;
   iii. Whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

4. FCC concludes the work “fucking” falls within indecency because it does depict or describe sexual activities, even when used, as here, as an intensifier. Passes first prong of definition.

5. “Fucking” is patently offensive because it is one of the most vulgar descriptions of sex in the English language and its use on national awards ceremony was shocking and gratuitous. Passes second prong of indecency definition.

6. FCC says NBC knew presenters might swear during live broadcast, and could have taken steps to ensure offending language was not broadcast.

7. FCC holds portion of Pacifica declaring that an isolated or fleeting use of the F-word is not indecent is no longer good law for commission decisions. Says the mere fact that specific words are not sustained or repeated does not mandate a finding that material is otherwise patently offensive to the broadcast medium is not indecent.

8. FCC does not fine broadcasters, but puts them on notice that this action will subject them to fines in the future.

D. \textbf{Super Bowl Halftime Show} (2006 FCC)

1. CBS sought reconsideration of $550,000 FCC fine for Janet Jackson incident.
2. CBS argued:
   i. The material broadcast was not actionably indecent under Commission’s existing case law.
      a. CBS argues it was not graphic and explicit (1st prong of contextual analysis)
         1. FCC disagrees. The exposure of the breast was the central focus of the scene. While
            it was brief, it was still explicit.
      b. CBS argues 3d prong of contextual analysis must be focused on whether there was intent
         to pander, titillate, or shock the audience.
         1. FCC says no. In evaluating whether material is indecent, we examine the material
            itself and the manner in which it is presented, not the subjective state of mind of the
            broadcaster.
      c. CBS argues fine is contrary to “contemporary community standards for the broadcast
         medium” because available info shows that the community at large was not upset by the
         broadcast.
         1. FCC doesn’t buy CBS’ polls. Points to public uproar following the broadcast.
   ii. The broadcast of the breast was accidental, and therefore not willful.
      a. CBS challenges finding that itself acted willingly.
         1. FCC says CBS acted willfully because it consciously and deliberately broadcast the
            halftime show and consciously and deliberately failed to take reasonable precautions
            to ensure that no actionably indecent material was broadcast.
         2. CBS knew MTV was up to something sketchy, but didn’t investigate further or
            employ adequate delay mechanisms.
         3. Even if standard industry delay practice was inadequate to alleviate the concerns
            under the circumstances, CBS was obligated to do more.
      b. CBS challenges finding of vicarious liability for the willful actions of the performers
         under doctrine of respondeat superior.
         1. FCC applied trad’l agency principles making principles liable for acts of their agents
            in the scope of their employment.
         2. Halftime show was subject to exacting control by CBS.
         3. CBS was obligated to ensure that its broadcast programming served the public
            interest, and was not free to confer this obligation on another by contract.
   iii. The Commission’s indecency framework is unconstitutionally vague and overbroad, both on
        its face and as applied to the halftime show.
      a. FCC adheres to its initial determinations that its indecency standard has been
         constitutionally upheld in a series of decisions and has not been invalidated by
         subsequent developments in the legal or technological landscape.
   iv. CBS asks FCC to reduce its fine for 3 reasons:
      a. CBS asks to eliminate fine for any station which did not receive complaint.
         1. FCC says no. It is enough that viewers in each market complained.
      b. CBS says FCC has provided no logically consistent explanation for why fines were
         imposed on CBS-owned stations, but not those owned by others.
         1. FCC says CBS’ culpability was far greater than any other owners of CBS stations.
      c. CBS argues fine should be reduced because of long record of compliance with broadcast
         standards
         1. FCC says, given CBS’ size and resources, a lesser fine would not serve as a
            significant penalty or deterrent.
         2. Fine larger because broadcast to enormous nationwide audience.
E. “Without a Trace” Broadcast (2006 FCC)
1. FCC held CBS-affiliated and CBS O&O stations liable for fine for broadcasting indecent material.
2. In applying the “community standards for the broadcast medium” criterion, FCC says the standard is of an average broadcast viewer, not the sensibilities of any individual complainant.
3. FCC applies indecency test:
   i. Meets 1st prong: No nudity as shown, but it depicts numerous sexual activities.
   ii. Meets 2d prong: Looks to contextual analysis, finds the scene to be explicit and graphic, dwells on and repeatedly depicts sexual material, and is pandering, titillating, and shocking to the audience.
4. FCC fines each licensee who broadcast the show prior to btwn 6am and 10pm.
5. Concurring Statement of Commissioner Adelstein:
   i. Says FCC need not apply indecency regulations only to those stations against which a complaint is specifically lodged.
   ii. Draws distinction btwn blues documentary and Saving Private Ryan – both require certain material to accurately reflect viewpoint and emotions of subject matter.

F. Broadcast Decency Enforcement Act of 2005
1. Increased penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecere, and profane language. Limit raised to $325,000 for each violation or each day of continuing violation provided total doesn’t exceed $3M for continuing violation.
2. Many argue a clear definition of indecency is needed now that fines are so high.
3. This was a Senate bill. House bill wanted to make fines $500,000 and force broadcasters to air PSA’s to counteract indecency. Also would have allowed fines for performers and encompassed a 3 strikes license-revocation rule.

G. More on the FCC
1. What specific rules or guidelines can be extracted from Pacifica and following cases?
   • Graphic intensity
   • Length
   • Focus
   • Indispensable v. Gratuitious
   • Encompasses more than 7 dirty words
   • Is innuendo safe? Depends.
   • Context (very subjective)
   • National community standards
   • Consider complaints
2. How much should the FCC monitor complaints? More complaints, more sanctions?
3. Violence is not considered indecent by FCC. Should it be?
4. Should we change standards as pervasiveness changes? If the internet becomes free through municipal wifi systems, should it become regulate like broadcast media?
5. Client asks for practical pointer for limiting liability. What do you say?
   i. Cut down on live events, or add delay
   ii. Ask if a parent would be offended
   iii. Take special care in broadcasting btwn 6am and 10pm
   iv. Show a good faith effort to meet the standards
   v. For radio: avoid dirty words
     For television: no excretory functions, nudity, sexual acts, suggestiveness, gestures, watch what’s in background

1. Public high school student delivered speech in terms of an elaborate and explicit sexual metaphor. Punished under school disciplinary rule prohibiting profane and obscene language and gestures which materially and substantially interfere with the educational process. Ct held that the First Am did not prevent the school district from disciplining the respondent for giving the indecent speech.

2. “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”

3. Ct says same latitude afforded adults in expressing obscene ideas need not be extended to children in a public school.

4. Focuses on fact that audience included 14-year old children, and school’s need to maintain order in educational process.

5. CJ Burger categorized Fraser’s speech as obscene. But it wasn’t obscene under *Miller* or *Pacifica*. This was innuendo, not nudity or foul language.

6. Kahn argued against statute in amicus brief. Focused on fact that free speech is so important to adults that is should be narrowly regulated when it comes to children. Showed numerous examples of “obscene” and sexually-suggestive material in classic literary works.

I. *Take-Two Interactive Software* (2006 FCC)

1. FCC’s complaint stated that TT’s failure to notify the Entertainment Software Rating Board (ESRB) of explicit hidden content in *Grand Theft Auto* constituted unfair or deceptive act or practices in or affecting commerce in violation of FTC Act.

2. FCC orders TT to:
   i. Clearly and prominently disclose, on the game’s packaging and on any advertising of the game, content relevant to the rating.
   ii. Not misrepresent the rating or content descriptors
   iii. Establish, implement, and maintain a comprehensive system reasonably designed to ensure that all content in an electronic game is considered and reviewed by respondents in preparing submissions to a rating authority.

3. Prior to this, video game rating had been done on a volunteer basis. Here, the FCC makes it mandatory.

III. POLITICAL EXPRESSION, THE ULTIMATE FOUR-LETTER WORD, AND JERRY FALWELL’S MOM

A. We started with Obscenity → Indecency → Political Speech:

1. Obscenity (not protected) – Works or portions of works whose intent is to appeal to people sexually.
   i. Ct never really explained reasons for prohibiting it. Why are we even regulating material to begin with? Why bother regulating certain types of sexual material? Trad’l justification is to protect children (but *Paris* involved only consenting adults).
   ii. Other justifications?
      a. Choice not to be exposed to obscene material.
      b. Belief that obscenity has no value in marketplace of ideas.
         1. Moral tone
2. Lower-valued expression
3. Harmful – some obscenity leads to violent crime
c. Slippery slope of immorality.

iii.
2. Indecency (FCC) – smaller category of speech concerned w/ vulgar expression. Centers around concern for children and general privacy interests (pervasiveness). Speech that would otherwise be fully-protected.
i. Applies really only to the gov’t regulated airways.
ii. Why do we allow this regulation?
a. To protect children.
b. To protect sensitive adults.

3. Political Speech – core of free speech doctrine; receives the highest level of protection.
i. 3 cases involving collision btwn political speech protection and notions of vulgarity and indecency: Cohen (speech intended to shock), Hustler (speech intended to hurt), and Becker (speech intended to horrify).

1. “Fuck the Draft” jacket in courthouse. The statute prohibiting offensive conduct applies anywhere, not just courthouse.
2. This is not an obscenity case. Not a fighting words case. Not even a disturbing the peace case (no one reacted hostilely. Singling in on this word in the context of purely political speech.
3. Prosecutor followed argument of offensive conduct and disturbing the peace. Argues:
i. The speech has the potential for disruption, even in the absence of disruption.
a. Counterargument: But there was no disruption here.
ii. Cohen didn’t have to use the word “fuck”. (Could have said “I am strongly opposed to the draft.”)
a. J. Harlan: Sometimes words are chosen for their emotional impact. The state cannot be the grammar police anymore than it can be the truth police.
iii. If you can regulate the airways, you can regulate public places.
a. Counterargument: Should the gov’t be able to regulate words used in political debate? If we let gov’t decide what is offensive, they can start severely limiting speech.
b. Unwilling viewers can avert their eyes.
c. J. Harlan: The word offensive is too vague. Can’t let cops start arresting people under what they consider offensive.

1. Fake campari ad. Suit btwn two private individuals. We are missing the gov’t as a player in this case. Falwell filed 3 claims against Flynt: (1) Invasion of Privacy (commercial appropriation); (2) Defamation; and (3) IIED.
2. Ct threw out invasion of privacy claim, and dismissed defamation claim because no jury would reasonably believe the article was true (defamation tort requires false statement of fact). This left only the IIED claim for the SC to resolve (jury had found for Falwell on this claim).
3. IIED requires showing of: (1) Intentional or reckless conduct; (2) that offends generally accepted standards of decency or morality (i.e. is outrageous); and (3) that causes severe emotional distress.
4. Does the 1st Am protect speech that not only intends to harm, but also does harm? Here, ct holds that satirizing public figures has been allowed throughout history – political cartoons. Falwell argues this ad is more “outrageous” than trad’l political cartoons.

5. In *Cohen*, ct refused to use the word “offensive” as a guidepost.
   In *Hustler*, ct refuses to use the word “outrageous” as a guidepost.

6. Ct holds that public figures and public officials may not recover for IIED by reason of publications such as the one here w/o showing in addition that the publication contains a false statement of fact which was made with actual malice (knowledge that it was false or reckless disregard as to whether it was false).


1. Guy ran for office on pro-life platform. Ran ads depicting aborted fetuses. They were found to be psychologically damaging to children, and FCC said they could be channeled.
   i. Nowhere does the opinion mention the First Am.
   ii. Issue presented to FCC: Whether a broadcaster may channel a political advertisement by a legally-qualified federal candidate to a safe harbor when children are not generally present in the audience if the broadcaster determines in good faith that the proposed advertisement is indecent or otherwise unsuitable for children.
   iii. This is not an indecency case – no dirty words or pictures.
   iv. The statutes at issue say license may be revoked if equal time not given to political ads, and that political ads may not be censored.
   v. Ultimately the ct holds that the station may not channel the ads – they must be broadcast in primetime. The ct says that channeling is indirect censorship. (If only one candidate can advertise in primetime, he will reach a larger audience than channeled candidate – unfair. Only other option is for channeled candidate to self-censor his ad so it can be shown in primetime – also unfair.)

2. What if a candidate had actual indecent material (such as explicit nudity) in his ad? You could make an argument under *Becker* that it must be allowed. Sensitivities of children seem to give way to speech re political election.

IV. GOVERNMENT REGULATION OF NEW MEDIA, INCLUDING THE INTERNET…AND HOW LAWYERS HANDLE THESE ISSUES


1. Court invalidates two sections of the Communications Decency Act of 1996 designed to protect minors from indecent and patently offensive communications on the internet. § 223(a) made it illegal to communicating indecent material to someone under 18, and § 223(d) dealt with sexual or excretory activities or organs to people under 18. Held, these sections are invalid. (1) It is not like Pacifica b/c accessing things on the internet requires affirmative steps; (2) It’s ambiguous language would confuse many people; and (3) It’s overbroad.
   i. Ct says internet is like a newspaper, not a radio station. It gets high protection, therefore can’t regulate its content. Ct says more like telephone than radio because it takes affirmative steps to access.
   ii. Ct reiterates that keeping public discourse at an adult level is more important than protecting children even if there is no less restrictive means.
2. What approach did these lawyers take?
   • Focused on fact that, at the time, you had to more actively search out pornography on the internet.
   • Talked about available “blocking” programs. Shows potential for less restrictive alternatives.
3. Potential arguments:
   i. Battle of analogies – This is a new medium. ACLU could argue it is more like print than broadcast. Gov’t could argue opposite. Other analogies: like a telephone, or dance hall, or newsstand.
   ii. Purely legal arguments – do scholarly work to show why regulation would be theoretically adverse to the First Am.
4. What was the ACLU’s theory (theme or themes)?
   i. Not intrusive like broadcasting.
   ii. Better parental control
   iii. Age verification won’t work
   iv. Chilling effect (fuzzy line btwn what is and is not protected)
   v. Regulation would be ineffective because of global nature of internet
   vi. Future of internet (much potential for good)
5. How did ACLU’s witness advance these themes?
   i. She vouched for parental control. Talks about nonintrusive nature (must take several affirmative steps to access internet). Good strategy having a mother as a key witness before female chief judge.
6. Government’s themes:
   i. Lots of porn – can’t keep up.
      • Screening software won’t work.
   ii. Dangers
   iii. Defends protected speech
   iv. Compared to zoning
   v. Alternative channels exist (newsgroups)
      • ACLU argued that these alternative channels are not equivalent.
7. What about the govt’s witness?
   i. He was poorly prepared. Hinted about indecent stuff on the internet, but never really showed any of it. Got to some websites with address from Playboy mag, but failed to take into account that a child couldn’t get Playbot to begin with. Admitted chances were slim of child coming across indecent material (SC relied on this in reaching conclusion).
   ii. Gov’t should have focused on explosive potential of the internet.
8. Waxman’s (gov’t atty) oral argument: he focused on similarities btwn internet and broadcasting.
9. Ennis’ (ACLU atty) oral argument: He effectively laid out 4 arguments in his opening, hitting on the main ACLU themes. He also focused on the democratizing effects of speech.

B. Gonzales v. Google (2006 N.D. Cal)
   1. In Reno v. ACLU, SC focused on overbreadth (chilling effect) of the regulation. Congress has since rewritten the bill more narrowly. It is now being argued. This is the context in which Google was subpoenaed to show search results – led to huge public outcry. Google fought it. Ct ultimately said Google must produce the info
      i. Ct does not think these search queries are entirely irrelevant to the creation of a test set on which to test the effectiveness of search filters in general.
      ii. Technological burden of production did not excuse compliance w/ subpoena.
iii. The govt’s need for the information outweighs Google possible burden resulting from potential loss of user trust.

2. Google subpoenas were an attempt to find out what is really on the internet (where Schmidt failed in ACLU testimony).

3. New case would come out quite differently w/ this Google info.

V. TRADEMARK AND COPYRIGHT: PRETTY WOMEN, KINKY BARBIES, AND DEBBIE DOING DALLAS

A. Trademark = brand.

1. A word, symbol, name, slogan or design that is used to:
   • identify the source of the product or
   • otherwise distinguish a particular product or service from others in the market.
   • Word Trademarks: Big Mac, Energizer, Budweiser
   • Slogan Trademarks: We Try Harder, Just Do It
   • Symbol Trademarks: Nike Swoosh

2. The Trademark Hierarchy:
   i. Generic Terms (no protection). Ex.- Apple, chocolate, aspirin
   ii. Descriptive Terms (some protection if proof of secondary meaning). Ex.- Sports Illustrated
   iii. Suggestive Terms (more protection). Ex.- Vanish (for toilet bowl cleaners)
   iv. Arbitrary Terms (has nothing to do with the product. Highest protection). Ex.- Apple (for computers)
   v. Fanciful or Coined Terms (highest protection). Ex.- Kodak.

3. You don’t have to register a trademark to use it. ™ = not registered. ® = federally registered.

4. Lots of reasons for denying trademarks.
   i. Not distinct
   ii. Immoral or scandalous matter. (§2 of Trademark Act, p.1, Book 2)
      a. Why does gov’t care about w/holding fed registration from scandalous or immoral trademarks? Don’t want it to appear as if gov’t endorses such obscenity.
      b. Glory Condom Corp., Boulevard Entertainment

5. If trademark denied, you can still use it, just can’t get it federally registered. But there are business advantages to federal registration.

6. Trademark Infringement is the use of a trademark sufficiently similar to another’s trademark to cause likelihood of consumer confusion as to the source of the goods or services being offered. (Focus: Protecting the public.)

7. Trademark dilution is the use of a famous trademark in a manner that dilutes its distinctiveness – no confusion required. Two types:
   i. “Blurring” – “Buick” aspirin or Xerox cigarettes
   ii. “Tarnishment” – Toys “R” Us v. Adults “R” Us
      a. See Dallas Cowboy Cheerleaders, L.L. Bean

8. Trademark Fair Use – when you are allowed to use someone else’s trademark. Includes:
   i. Use of Competitor’s Trademarks in a comparative ad. (Ex.- Subway ads using Big Mac.)
ii. **Nominative Fair Use** – defendant’s use of plaintiff’s trademark to identify plaintiff’s product. (Ex.- Terri Welles using “Playboy Playmate of the Year” on her website. Critically inefficient to explain her status w/o using these words.)

a. **The Nominative Fair Use Test:**
   1. Not Easy to identify the product without using the trademark.
   2. Using only enough of the trademark needed to identify the product.
   3. No suggestion of sponsorship or endorsement by the trademark owner.

b. Ex. *Volkswagenwerk Aktiengesellschaft v. Church*, (9th Cir. 1969): held automobile repair shop could use Volkswagen mark to communicate the kind of cars it repairs provided that it did not suggest authorization or sponsorship by the manufacturer.

iii. **Dilution** and Fair Use.

a. Rule under Fed Trademark law: Protected = “non-commercial” uses, such as parody, satire, and editorial commentary. (*Mattell v. MCA Records* )

B. A **copyright** is a bundle of exclusive rights in an “original work of authorship” that is “fixed in a tangible form of expression

1. US Const Art I §8 cl. 8: “The Congress shall have the Power…to promote the Progress of Science and Useful Arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

2. Copyrighted Works of authorship include: TV show “Seinfeld”, Class notes, blueprints.

3. Who owns the copyright? The author, with the exception of work made for hire. Independent contractors own the copyrights in their creations unless they transfer by signed written agreement.

4. How long does a copyright last? For works created after Jan 1, 1979, copyright protection lasts for the life of the author plus 70 years; or for anonymous and pseudonymous works and works made for hire, 95 years after first publication or 120 years from creation, whichever is the shortest.

5. The Kahn Rules: •Copyrights are for when things go right.
   •Contracts are for when things go wrong.

6. 17 USC §106. Exclusive rights in copyrighted works:
   The owner of a copyright has the exclusive rights to do an authorize any of the following:
   i. to reproduce the copyrighted work
   ii. to prepare derivative works based upon the copyrighted work (ex.- movie based on book)
   iii. to distribute copies of the copyrighted work to the public by way of sale or other transfer of ownership
   iv. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly
   v. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
   vi. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

7. What is **copyright infringement**? The plaintiff must prove that the defendant copied original elements of the copyrighted work, i.e. that the defendant:
   i. Had access to plaintiff’s work, and
   ii. Created something that is substantially similar to the copyrightable portion of plaintiff’s work.
   *Copyright is a true property right.
8. What is not protected by copyright?
   i. Titles, names, short phrases, and slogans; familiar symbols or designs.
   ii. Mere variations of typographic ornamentation, lettering, or coloring.
   iii. Mere listings of ingredients or contents.
   iv. Facts.
   v. Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices.
   vi. Clichés and Stock Scenes. (scene a faires – cliché stuff, like car chases in a film)


10. Copyright Fair Use
   i. 17 USC §107. Limitations on exclusive rights: Fair Use
      The fair use of a copyrighted work, including such use by reproduction in copies…for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work is any particular case is a fair use the factors to be considered shall include:
      1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
      2. the nature of the copyrighted work;
      3. the amount and substantiality of the portion used in relation to the copyrighted works as a whole (qualitative, not quantitative test); and
      4. the effect of the use upon the potential market for or value of the copyrighted work.
   ii. Transformative Use
      a. Ex.– 2 Live Crew’s use of “Pretty Woman”
      b. But in Dr. Suess Enterprises v. Penguin Books USA, ct said no fair use. Held not a parody, just a ripping off of Dr. Suess.
      c. “The Wind Done Gone” – prevailed on fair use as a commentary on “Gone with the Wind”.

C. In Re Old Glory Condom Corp. (1993 Trademark Trial and Appeal Board)
   1. Tries to get trademark registration for condom with American flag on it. Trademark rejected as scandalous or immoral, and case taken to Trademark Appeal Board (TAB). Petitioner argued it isn’t scandalous.
      i. Petitioner argued the condom was patriotic and for a good cause (to fight AIDS). Talked about survey showing low negative reaction (but he did not submit survey or mention it in appellate brief). A survey would help measure contemporary community standards.
      ii. Petitioner tried to make it a First Am case, but TAB ducked this. But petitioner did preserve the issue for later appeal to fed ct.
      iii. Respondent argues that it is scandalous to associate nat’l symbol w/ sex. Talks about failed amendment allowing flag burning and mentions negative reaction to Madonna wrapping her dune body in a flag. But the respondent provides no hard evidence.
   2. Whether a mark is scandalous is to be determined from the standpoint of a substantial composite of the general public. TAB here looks to changes in societal attitudes as to what is scandalous now, as opposed to twenty or thirty years ago.
3. Whether applicant’s mark would be likely to offend must be judged not in isolation but in the entire context of the mark’s use.
4. Just as the issuance of a trademark registration by this office does not amount to a gov’t endorsement of the quality of the goods to which the mark is applied, the act of registration is not a gov’t pronouncement that the mark is a “good” one in an aesthetic sense.
5. TAB ultimately reverses refusal to register, finding mark is not scandalous.

D. In re The Boulevard Entertainment, Inc. (2003 5th Cir.)
1. Applicant tried to get trademark registration for “1-800-JACK-OFF”. Refused as scandalous. Appeals all the way to fed ct of appeals. Ct ultimately upholds judgment that it is scandalous.
   i. Patent and Trademark Office (PTO) atty looks up word “jack off” in dictionary, which lists it as vulgar.
      a. A showing that a mark is vulgar is sufficient to establish that it consists of an immoral or scandalous matter.
      b. Ct holds dictionary definitions to be more than just a reflection of the individual views of the PTO atty.
      c. Ct here looks at context of the mark to find that it clearly refers to masturbation.
   ii. Applicant argues the dictionary is old and outdated, but fails to provide a newer dictionary with a different definition. Instead, uses affidavits from business people saying they don’t think the word is vulgar.
2. Whether the mark consists of or comprises scandalous matter must be determined from the standpoint of a substantial composite of the general public (although not necessarily a majority) and in the context of contemporary attitudes.
3. Ct distinguishes from registration of “JACK OFF JILL” because that was a double entendre reference to the nursery rhyme. Plus, prior registration decision are not binding precedent.

E. Mitchell Brothers Film Group v. Cinema Adult Theater (1979 5th Cir.)
1. π made porn movie. Δ started showing π’s movie in their theater w/o permission. π sued for copyright infringement. Ct holds obscenity is not affirmative defense to infringement.
   i. Δ argued that the film is obscene and not protected by First Am, therefore doesn’t receive copyright protection. Also argued unclean hands defense (π has made this horrible film and can’t now argue infringement).
2. Const Art I §8 cl.8 gives Congress power to issue copyrights and patents to promote progress of science and useful arts. Ct says this means Congress has power to promote science and arts by granting copyrights, not that everything they copyright has to verifiably promote science or art.
3. Ct holds: (1) copyright statute contains no explicit or implicit bar to copyrighting obscene material and provides for a copyright of all creative works, obscene or nonobscene, that otherwise meet req’mts of the Copyright Act.
   (2) protection of all writing, w/o regard to their content, is a constitutionally permissible means of promoting science and useful arts under Congress’ copyright power.
4. Ct looks to history of obscenity and point to many now classic works which were once considered obscene. The pursuit of creativity requires freedom to explore into the gray areas.

F. Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd. (1979 2d Cir.)
1. Tarnishment (trademark dilution) case. Owner of Dallas Cowboy cheerleaders got injunction of exhibition or distribution of “Debbie Does Dallas” on grounds of trademark infringement.
2. Ct held that:
   i. Combination of white boots, white shorts, blue blouse, and white star-studded vest and belt was an arbitrary design which made otherwise functional uniform worn by π’s cheerleading group trademarkable despite claim by distributor and exhibitor of allegedly infringing film that uniform was a purely functional item.
   ii. A likelihood of confusion was sufficiently established to entitle π’s cheerleading group to a preliminary injunction where it was hard to believe that anyone who had seen film could ever thereafter disassociate it from π’s cheerleaders, and association results in confusion which had a tendency to injure π’s business reputation.
      a. In order to be confused, a consumer need not believe that the owner of the mark actually produced the item and placed in on the market. The public’s belief that the mark’s owner sponsored or otherwise approved the use of the trademark satisfies the confusion req’m’t.
      b. The trademark laws are designed not only to prevent consumer confusion but also to protect the synonymous right of a trademark owner to control his product’s reputation.

3. Ct says it is unlikely fair use doctrine applies to trademark infringements. Besides, no parody here.

4. Judges here likely pushed towards finding of tarnishment because of adverse reaction to content of film.

1. High Society magazine published a prurient parody of Bean’s catalog. The article, labeled as a parody, portrayed facsimile of Bean’s trademark. District ct granted summary judgment to Bean on claim of trademark dilution.
2. Ct of appeals held that application of Maine’s antidilution statute to the magazine’s noncommercial parody of trademark violated the First Amendment.
3. The sweep of a trademark owner’s rights extends only to injurious, unauthorized commercial uses of the mark by another. Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.
4. A trademark owner may obtain relief under an antidilution statute if his mark is distinctive and there is a likelihood of dilution due to:
   i. Injury to the value of the mark caused by actual or potential confusion,
   ii. Diminution in the uniqueness and individuality of the mark, or
   iii. Injury resulting from use of the mark in a manner that tarnishes or appropriates the goodwill and reputation associated with π’s mark.
5. Neither First Am nor theory of anti-dilution law permit a finding of tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used w/o authorization.
6. If the anti-dilution statute were construed as permitting a trademark owner to enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct.
7. The central role which trademarks occupy in public discourse makes them a natural target of parodists. Trademark parodies, even when offensive, do convey a message.

H. Mattel, Inc. v. MCA Records, Inc. (2002 9th Cir.)
2. Trademark dilution issue: Does title of song violate the Federal Trademark Dilution Act (FTDA)?
i. Held: The song falls under noncommercial use exception to the act, because, even though primarily created for commercial use, its commercial purpose was inextricably intertwined with expressive elements of humor and editorial comment (lampooning of Barbie image). Basically, it is a parody and is protected.

3. Trademark infringement issue: Does the song infringe Mattel’s trademark?
   i. Held: Literary titles don’t infringe “unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or content of the work.”
   ii. Here, neither exception applies.

I. Mattel, Inc. v. Walking Mountain Productions (2003 9th Cir.)

1. Mattel sued photographer (Forsyth) for copyright, trademark, and trade dress infringement. Δ argues fair use of copyright.
2. Ct goes through 4 factors of copyright fair use:
   i. The purpose and character of the use
      a. The threshold question in the analysis of this first factor is whether a parodic character may reasonably be perceived.
      b. Ct looks to see if it is a transformative use making some commentary on the original.
      c. Mattel performs survey to show most people didn’t think it was a parody, therefore no transformative use. But ct says they will not base whether something is a parody on majority public opinion, it is a question of law.
      d. That a parody is in bad taste is not relevant to whether it constitutes fair use.
      e. Given the extremely transformative and parodic quality of Forsyth’s works, its commercial qualities become less important.
   ii. The nature of the copyrighted work.
      a. This factory typically has not been terribly significant in the overall fair use balancing.
   iii. Amount of the portion used in relation to the copyrighted work as a whole.
      a. Forsyth did not simply copy the work verbatim with little added or changed.
      b. Because copyrighted material here was doll design, was hard for Forsyth to use less than the entire thing.
      c. Ct does not require parodic works to take the absolute minimum amount of the copyrighted work possible. Once enough is taken to assure identification, how much more is reasonable will depend, say, on the extent to which the work’s overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.
   iv. Effect of the use upon the potential market for or value of the copyrighted work.
      a. This inquiry attempts to strike a balance btwn the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit need be shown to justify the use.
      b. Because of the parodic nature of Forsythe’s work, it is highly unlikely that it will substitute for products in Mattel’s markets or the markets of Mattel’s licensees.
      c. This fourth factor does not recognize a decrease in value of a copyrighted work that may result from a particularly powerful critical work.
      d. The public benefit in allowing artistic creativity and social criticism to flourish is great.
3. Trademark and trade dress infringement and dilution claims:
i. A Δ’s use is classic fair use where a Δ has used the π’s mark only to describe his own product, and not at all to describe the π’s product.
   A Δ’s use is nominative use where the Δ has used the π’s mark to describe the π’s product, even if the Δ’s ultimate goal is to describe his or her own product.

ii. Nominative use becomes nominative fair use when a Δ proves:
   a. The π’s product or service in question must be one readily identifiable w/o use of the trademark;
   b. Only so much of the mark or marks may be used as is reasonably necessary to identify the π’s product or service; and
   c. The user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

*Critical works are much less likely to have a perceived affiliation w/ the original work.

iii. Tarnishment caused merely by an editorial or artistic parody which satirizes π’s product is not actionable under an anti-dilution statute because of free speech protections of 1st Am.

iv. A dilution action only applies to purely commercial speech. Parody is a form of noncommercial expression if it does more than propose a commercial transaction.

J. **GTFM LLC v. Universal Studios, Inc.** (2006 S.D.N.Y.)
   1. FUBU sued film company for saying BUFU in film *How High*, alleging trademark infringement and dilution.
   2. Ct said summary judgment appropriate, because BUFU was used as a parody, which is entitled to full protection under the 1st Am and pursuant to the substantial body of case law establishing safe harbors for this form of comical expression. Also, no likelihood of confusion.

VI. **PROTECTION OF CHILDREN**

   1. Child pornography criminalization statute. SC says it is allowable, even though it prohibits speech not held obscene.
   2. In *Hudnut* (pornography as violence against case), ct held speech which was not obscene under Miller to be protected. So why was speech outside of Miller held unprotected here? What special interests exist?
   3. SC goes back to *Chaplinsky* – the beginning of First Am analysis. Held certain categories of speech unprotected: fighting words, obscenity, libel. SC realized *Ferber* was a landmark case in which they were creating a new category of unprotected speech. Wanted to lay groundwork for their decision.
   4. Value of speech weighed against social interest in order and morality.
   5. What are the interests advanced in preventing child pornography here?
      i. Will help stop production of child porno
      ii. Helps prevent indelible mark left on child participant
      iii. The speech has little or no value
      iv. Ct sees legitimate gov’t objective, to which they defer.

      [Why didn’t they do the same in *Hudnut*? No possibility of consent w/ children. More harm to children participating in porno than women.]
6. If child porn really has no redeeming social value, would it be covered under *Miller*? J. White, in *Ferber*, says it has no value. But in *Ashcroft*, J. Kennedy says we are fascinated by children.

7. Ct holds the statute valid because it sufficiently describes prohibited categories, and it has a knowledge (scienter) req’m’t.

8. **Case Facts**: Proprietor was convicted of selling a film of young boys masturbating to undercover police officers. The statute prohibited promoting or exhibiting films that depict a sexual performance by a child under 16. **Held**, pornographic depictions of children is unprotected by the 1st amendment. (1) The state has a compelling interest in safeguarding the physical and psychological health of its children – and the use of children as subjects of porn is harmful to the mental health of the child. (2) The distribution of these films is related to the sexual abuse of children b/c (a) the materials produce a permanent record of the harm to the child and (b) the distribution must be shut down if the production of these films are to be controlled; (3) The value of these movies is low. (4) The standard is to adjust *Miller*: no need to find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material need not be considered as a whole.

   i. The film is held not obscene, but illegal under NY child porn statute. SC says, even if not obscene, child porn is not protected for several reasons.

   ii. This is just categorical balancing (ad hoc) – it concludes that this doesn’t get any protection. Weighs general costs v. value. (Same approach for obscenity and libel.)

   iii. Ct says this is low value (not no value) speech. If needed, could use people who pretend to be younger than they are. This protects the slight social value of the speech.

   iv. Here, the harm at issue is a creation harm, not a consumption harm. The harm in making child porn is held to be enough to justify regulation of its relatively unharmful viewing. [Ct dismisses these arguments with regard to regular porno.]


1. Statute criminalizing virtual child porn. Here, ct says interest in order and morality are outweighed by value of speech (looks to Romeo and Juliet, American Beauty, etc.)

2. Statute punishes alleged depictions of minors that are either adults that look like children or made using computer imaging. Congress felt that these pictures were problematic because: (a) they might be used by pedophiles to encourage children to participate in the activity – or the pedophile may “whet his sexual appetite” with the images; or (b) as computer imaging becomes more sophisticated, it will become too difficult to distinguish those people who use real minors with those that do not. **Held**, statute that criminalizes making pornography that appears to depict minors, but does not use real children, is invalid. (1) This violates *Miller*: The sexual abuse of children is a serious crime, but the prospect of crime does not justify laws suppressing speech. (2) The first amendment must be judged by considering the work as a whole – or we would be eliminating some great works of art (Romeo & Juliet, Traffic, American Beauty). (3) The harms sought to be prevented by the statute does not necessarily flow from the speech, but depends on some unquantifiable potential for subsequent criminal acts. It does not protect the same harms that *Ferber* sought to protect. (4) We cannot suppress speech because pedophiles will use it inappropriately because many other things can be used inappropriately also (candy, cartoons, etc.), and also we don’t punish ideas that people have (like the pedophiles idea). Finally, the government
cannot suppress lawful speech as a means to suppress unlawful speech – so the govn’t can’t ban because it will be difficult to discern between lawful and unlawful speech.

1. Court invalidates a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives.
2. Ct says it will not harm information appropriate for adults in the slight interest in protecting children. The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable in a sandbox.
3. The fact that protected speech may be offensive to some persons does not justify its suppression, and in any even, recipients of objectionable mailings can avoid further offensiveness by simply averting their eyes or disposing of the mailings in a trash can.
4. Ct holds advertising for contraceptives implicates substantial individual and societal interests in the free flow of commercial information. Denies parents truthful info bearing on their ability to discuss birth control and to make informed decisions in this area.

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VII. **SLUTS AND WORSE: INFLECTING PSYCHIC, REPUTATIONAL, AND PERSONAL PRIVACY HARM ON INDIVIDUALS**

A. *Libel*
1. Elements of a Libel Claim:
   i. Publication
   ii. of a false statement of fact
   iii. of and concerning plaintiff
   iv. defamatory
   v. fault

   i. Penthouse published fictional story about Miss Wyoming in which her fellatio made people levitate. Real Miss Wyoming sued for defamation. Court breaks issue down into two parts:
      a. Whether the publication was about the π
      b. Whether the story must reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff.
   ii. At trial, focus of jury was whether story was concerning π. Jury said yes.
   iii. At ct of app, Δ focuses on false statement of fact element. Argues the story is not fact. Levitation is an impossibility; no one would think the story factual.
   iv. *Greenbelt* case said characterizing someone’s actions as “blackmail” is not an actual accusation of a crime, therefore no libel. No reasonable person would see this other than as hyperbole. Same with “scab” case (*Letter Carriers*).
v. Ct relies on *Greenbelt* to hold that even the most careless reader must have perceived that the story was a complete fantasy, or rhetorical hyperbole.

vi. Dissent says harm comes not from the levitation aspect, but from the accusation of fellatio. Levitation is false, but fellatio is a fact.

**B. Right of Publicity**

1. The Right to Privacy:
   i. Dates back to 1890 Harvard Law Review article by Brandeis. Led to 4 different torts, one of which is right of publicity

2. Publicity is a property right.

3. First Am protections:
   i. Is the use an “expressive” use or a “commercial” use? [news = expressive use] [false endorsement = commercial use]

4. Elements of a claim for **Commercial Appropriation:**
   i. Any person who knowingly uses another’s name, voice, photograph, or likeness, in any manner,
   ii. on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services,
   iii. without such person’s prior consent.

   i. DC published comic book series containing the Autumn brothers, obvious parody of the Winter brothers. Winter sued for commercial appropriation. No libel because no reasonable person would believe this work of fantasy was fact. Issue is whether it is right to allow DC to use the Winter’s likeness w/o their consent.
   a. *Comedy III* (3 Stooges image used on T-shirt) held that depictions of celebrities amounting to little more than the appropriation of the celebrity’s economic value are not protected expression under First Am. But transformative works not only especially worthy of First Am protection, but also less likely to interfere w/ economic rights protected by right of publicity.
   b. *Comedy III transformative use test*:
      1. The inquiry is whether the celebrity likeness is one of the raw materials from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.
      2. When an artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist’s right of free expression is outweighed by the right of publicity.
   c. Two cautionary observations:
      1. The right of publicity cannot, consistent with the 1st Am, be a right to control the celebrity’s image by censoring disagreeable portrayals.
2. In determining whether the work is transformative, cts are not to be concerned w/ the quality of the artistic contribution – vulgar forms of expression fully qualify for First Am protection.

d. The distinction btwn parody and other forms of literary expression is irrelevant to the Comedy III transformative test. What matters is whether the work is transformative, not whether it is parody or satire.

e. Cts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the persons portrayed.

iii. Ct says right of publicity threatens two purposes of the First Am:
   a. Preserving an uninhibited marketplace of ideas; and
   b. Furthering the individual right of self-expression.

C. Privacy Torts

1. Public Disclosure of Embarrassing Facts:
   i. Public disclosure;
   ii. Of a private fact;
   iii. That would be offensive and objectionable to a reasonable person;

   *Newsworthiness defense: courts balance (a) social value of facts published, (b) depth of intrusion, and (c) extent to which party acceded to a position of public notoriety

2. False Light:
   i. Publication of false information about plaintiff that placed her in false light;
   ii. The false light would be highly offensive to a reasonable person;
   iii. Defendant knew or acted in reckless disregard of the falsity and the false light.

3. Commercial Appropriation (Fla. Stat. § 540.08):
   i. Publication of name, image or likeness “of any natural person”;
   ii. For trade, commercial or advertising purposes;
   iii. Without the express written or oral consent of such person.

   i. “Relationships go bad, but videotape is forever.” Internet company wanted to publish Pam Anderson/Bret Michaels sex tape. Michaels sued for 3 claims (2 privacy torts):
      a. Copyright infringement
         1. Pam and Bret created the tape, therefore have copyright for it. They actually got it registered before filing suit.
         2. Ct says Δ has no evidence of license to distribute.
         3. Copying of tape constitutes infringement.
         4. Δ argues fair use doctrine allows them to show small clips. Ct says no. No fair use for commercial use, as here. Fails all factors of fair use test.
      b. Right of publicity
         1. Ct says 3 elements of publicity claim are satisfied. Says harm will come to their public personae if video is published.
      c. Invasion of privacy/Public disclosure of embarrassing facts
1. Ct says the content of the tape constitutes a set of private facts whose disclosure would be objectionable to a reasonable person.

2. Δ argues that Pam’s privacy has not been invaded because she has built her career out of portraying herself as a sex symbol. Ct disagrees, her real sex life is not open to the public. Plus, Michaels is a rock star, not sex symbol.

3. Ct says no newsworthiness privilege:
   - no social value
   - very intrusive
   - voluntary accession to fame does weigh somewhat towards newsworthiness, but not enough to outweigh first two factors.

5. *Lane v. MRA Holdings, LLC* (2002 M.D.Fla.)
   i. Girl sued *Girls Gone Wild* for using her image in TV commercial. Sues for:
      a. False Light
         1. Ct says although a reasonable jury could conclude that the use of her image and likeness in this video is highly offensive, no reasonable jury could that GGW or its marketing campaign w/ *Sexy Sorority Sweethearts* placed her in a false light.
         2. The depiction of her was reasonable, accurate, and truthful.
         3. No suggestion, implication, or innuendo connecting her with the more offensive and sexually explicit scenes of *Sorority Sweethearts*.
      b. Commercial Appropriation
         1. She loses this claim. Ct says the use was not for trade or advertising purposes. [Why did case where girl was on cover of GGW video succeed on commercial appropriation claim?]
            • Ct says, while here image and likeness were used to sell copies of GGW, her image and likeness were never associated with a product or service unrelated to that work. She is shown not as endorsing or promoting a product, but rather as participating in an expressive work.
         2. Ct also says she consented to her use. Doesn’t buy her argument that she couldn’t consent because she was under 18. Ct says legislature would have written in no underage consent in commercial appropriation claim if it wanted to. [But there was still no express consent. Judge overlooks this.]
            • Ct looks to fact that her interactions w/ the cameraman took place on public street.
            • Also, she did not know the cameraman. It is unreasonable to expect that a stranger would limit the viewing of such a video to only those persons present at the filming.
            • Plus, her friend had already been in GGW and knew the consequences.
   ii. Seems like this case could have easily come out differently in another jurisdiction.

VIII. **Art, Nudity, and Censorship**

   1. Court upholds an ordinance prohibiting “nudity” in any public place. Also, the requirement that such dancers wear G-strings and pasties doesn’t violate the 1st amendment because the nudity statute was not directed at nude dancing, and thus only had an “incidental effect” on 1st amendment protected activity.
2. Ct says there is some element of speech in nude dancing, but not enough to invalidate regulation here. It is on the outer fringes of speech.

3. Because this is a mix of conduct and speech, ct applies 4-part O’Brien test. Gov’t regulation justified if:
   i. It is w/i the constitutional power of the gov’t
   ii. If it futhers an important or substantial governmental interest
   iii. If the governmental interest is unrelated to the suppression of free expression (content neutral)
   iv. And if the incidental restriction on alleged 1st Am freedoms is no greater than is essential to the furtherance of that interest (narrowly tailored).

4. Test applied here:
   i. Clearly w/i govt’s const power.
   ii. Substantial interest in protecting societal order and morality furthered by the statute.
   iii. Not facially related to free expression: We cannot accept the view that an apparently limitless variety of conduct can be labeled speech when the person engaging in the conduct intends thereby to express an idea. While the dancing to which it was applied had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.
   iv. Req’t of g-string and pasties is modest, and the bare minimum necessary to achieve the state’s purpose.

5. Scalia (concurrence) says no 1st Am protection at all for nude dancing, because it is conduct, not speech.

6. Dissent argues the nudity is an essential part of the dancer’s message, therefore deserving of 1st Am protection. “That the performance in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine.

7. Student Presentation on Barnes: The defense focused on the fact that public nudity is not allowed in any forum, not just strip clubs. Defense disregarded the fact that strip clubs expose only consenting adults to the nudity.

B. Student presentation on City of Eerie v. Pap’s A.M.:
   1. Court upholds ordinance that prohibits public nudity because it finds it creates a bad environment (crime, violence, intoxication, prostitution, etc.). Justifies it under the same principles as Barnes, but notes that trying to prevent the secondary effects of nude dancing is allowable.
   2. π Atty argued on both state and fed grounds. Should have kept it in state ct because st cts were sympathetic but fed cts weren’t.
   3. Plus, π atty argued against mootness when strip club first closed, but he tried to argue for mootness at SC level. His earlier argument made this difficult.
   4. PA SC overruled US SC and said ordinance against nudity was invalid.

   1. Ct upholds regulation requiring art to maintain standards of decency to receive gov’t funding. Respondents argued this is viewpoint-discrimination. The law isn’t saying Finley can’t cover herself w/ chocolate, just that she can’t get gov’t funding to do so. Counterargument that lack of funding is viewpoint-discrimination and makes it much harder for her to do so.
   2. Ct says any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it
must deny the majority of the grant applications that it receives, including many that propose
“artistically excellent” projects.
3. Ct focuses on fact that when the gov’t is acting as patron rather than sovereign the consequences of
imprecision (such as determination of “decency”) are not constitutionally severe. Gov’t can award
scholarships and grants on the basis of subjective criteria such as “excellence.”
4. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a
penalty on disfavored viewpoints, then we would confront a different case.
5. J. Scalia (concur) says this is viewpoint-discrimination, but it is allowed because this is a subsidy,
not a prohibition.
6. Dissent argues that Congress doesn’t have to choose to spend public funds in this manner, but if it
does, it cannot discriminate on the basis of viewpoint in deciding who gets the money.

D. Brooklyn Institute of Arts and Sciences v. City of New York (1999 E.D.N.Y.)
1. Sensation exhibit at NY museum, w/ elephant dung Madonna. Giuliani said no right to gov’t
subsidy to desecrate someone’s religion. Called it “sick stuff.” Threatened to eject museum from
city-owned land. Museum brought case for injunction prohibiting termination of funding.
2. Background for this case:
   i. Rust case said gov’t need not fund abortion programs. Gov’t subsidies are not in violation of
      Const for viewpoint discrimination. Held not to be viewpoint discrimination, just gov’t
electing to give money to one program over another.
3. Museum’s Theory: City’s action was an attempt to punish or retaliate against the Museum for
displaying Sensations. Violation of First Am and Equal Protection.
4. City’s Defenses:
   i. Violation of contract/lease provisions
      a. Imposition of admission fee w/o approval
      b. Violation of educational obligation
      c. Offensive to children
      d. Furthered commercial interests
   ii. Objection to contents of “Sensations”
      a. Offensiveness to citizens
      b. Endorsement by city
5. The First Amendment Issues:
   i. Lawfulness of Speech
      a. No one claimed the Ofili painting was obscene or otherwise unlawful.
   ii. Content-Based Censorship
      a. Barnette: “fixed star” that gov’t shall not prescribe what is orthodox.
      b. Johnson: “bedrock principle” that gov’t may not prohibit expression simply because it
         finds the idea itself offensive or disagreeable.
   iii. Means of Government Influence
      a. Speiser: indirect actions designed to censor forbidden as well as direct actions
      b. Buckley: fact that some taxpayers may object to use of gov’t funds does not justify
         suppression of speech
   iv. Are subsidies different?
      a. Rust: gov’t need not fund abortion programs
      b. Finley: gov’t may set standards for award of funds to artists.
   v. Is gov’t endorsement different?
a. Establishment Clause Cases: gov’t must remain neutral and manifest only neutrality.

b. Facts regarding Brooklyn Museum: Neither display of trad’l not non-trad’l Madonnas are taken as endorsements.

d. Is retaliation different?

a. Cuban Museum case: Court prohibited city’s eviction of museum in response to criticism from Cuban-American community because of display of art by Cuban artists.

6. Where does “Sensations” fit?

<table>
<thead>
<tr>
<th>Rust</th>
<th>Finley</th>
<th>Cuban Museum</th>
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<tbody>
<tr>
<td>Congress can choose what activities to support guidelines for grant awards</td>
<td>City may not retaliate based on content</td>
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7. Ct says the decision to w/hold an already appropriated general operating subsidy from an institution which has been supported by the City for over one hundred years, and to eject it from its City-owned building, because of the Mayor’s objection to certain works in a current exhibit, is, in its own way, to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.

8. How come regulation allowed in Finley but not in Brooklyn Museum?

Here, the city has acknowledged that its purpose is directly related, not just to the content of the Exhibit, but to the particular viewpoint expressed. There can be no greater showing of a 1st Am violation.

9. No contract violation because nothing in lease that all exhibits must be suitable for children, and no provision for city to veto works chosen for exhibition.

10. If anything, it is the Mayor and the City who by their actions have threatened the neutrality required of government in the sphere of religion.

11. Could Giuliani have w/drawn funding 6 mos after the exhibit w/ no Const problems? Could still argue pretextual viewpoint discrimination. What about 18 mos later? When does retaliation theory run out?

12. Student presentation on Brooklyn Museum:

i. Museum’s Bd rec’d letter explaining the exhibit beforehand. Mayor has seat on Bd staffed by representative.

ii. Museum rec’d $2M grant from NYC apart from usual custodial grant.

iii. Case was largely won through pre-trial procedure:

<table>
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<tr>
<th>The Museum</th>
<th>The City</th>
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<tr>
<td>• wanted fed ct</td>
<td>• wanted st ct</td>
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<tr>
<td>• argued 1st Am issue only</td>
<td>• argued l’lord-tenant issue</td>
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<tr>
<td>• sought injunction from removal of funding</td>
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<td>• after 10/1, claimed actual damages of $400K</td>
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v. The city tried to make the case about money rather than about speech.

vi. But ct granted the injunction, finding showing of irreparable harm, and likelihood of success on the merits.
IX. STUDENT PRESENTATIONS

A. *Ulysses*
   1. Atty posted critical praise inside the seized book.
   2. Morris, the atty, also got important literary figures to comment on the importance of the book.
   3. Both sides agreed to a bench trial, which Morris wanted.
   4. Morris’ wife came to court. Prosecutor was too nervous to use language in front of a woman and had to change strategy.
   5. Morris tried to show that 4-letter words are the words of the common people and are honest.
   6. Also stressed importance of stream of consciousness perspective. Showed how someone could rapidly change thoughts midstream.
   7. Novel was held non-obscene.

B. *Memoirs of a Woman of Pleasure*
   1. Atty (Rembar) argued Roth standards (then governing rule). Rembar focused on proving the book wasn’t utterly w/o redeeming social value.
   2. He conceded the book was erotic, deflating prosecution’s central argument. Focused on the constitutional question of free speech.
   3. Brought parade of witnesses to show literary value, not leaving the resolution to the judge’s personal opinion of merit.
   4. Also put publisher on stand to show they supported the book’s publication.
   5. NY case was successful, MA case was not. Brought MA case to US SC.
   6. Didn’t allow amicus briefs because he wanted ct to focus on his theory (odd strategy).
   7. He argued not obscene because of its literary value (pointed to expert testimony).

C. *Jacobellis v. Ohio*
   1. French film had sex scene. Ohio obscenity law held petitioner guilty for possessing and distributing the film.
   2. SC decision was fractured – only a plurality. Said Roth test wasn’t adequate but would suffice.

D. *Johnson v. County of Los Angeles Fire Dept.*
   1. Nudie mags banned from fire dept dorms.
   2. First had to frame the magazines as speech, not private conduct. Focused on content of Playboy, with prominent authors.
   3. Ct held magazines to be speech.
   4. Balancing btwn free speech and harm to women in fire dept.
   5. Some women testified the magazines were offensive. Others testified they were not.
   6. Ct invalidated the rule. Fire dept rewrote the policy so that the mags could be read quietly in public.

E. *Penguun case*: Prime minister of Turkey sued political cartoonist in Penguun mag. Ct found for Penguun.

F. *Hazlewood v. Kuhlmeier*
   1. Controversial artices removed from high school newspaper. Paper had interviewed pregnant students.
   2. Students focused on right to write.
   3. School focused on protection – protecting immature audience and privacy of those interviewed (father mentioned in article re divorce had no opportunity to respond).
   5. Dist ct thought school’s witness more objective and less biased.
   6. Dist ct held no constitutional violation.