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Fuck

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FUCK

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FUCK

I. INTRODUCTION

Oh *fuck*. Let's just get this out of the way. You'll find no f-word, f*ck, f—k, @$!%, or other sanitized version used here.[1] This is quite a change from Professor Allen Walker Read's 1934 scholarly treatment of the word, *An Obscenity Symbol*—fifteen pages and eighty-two footnotes penned without once printing the word *fuck* anywhere in the article.[2] I won't even cleanse my title as Dr. Leo Stone did with his landmark piece, *On the Principal Obscene Word of the English Language*.[3] And why should I? This isn't

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[1] Several of my colleagues counseled me that I would never be able to get this piece published unless I altered the title. Whether it reflects courage or folly on the part of the editorial board of this law review, I am grateful for their support in my decision to use the word still viewed through the lens of taboo by so many others. I am well aware that I risk offending some readers. I view this as my duty. As my former professor Sandy Levinson recently explained, "Teachers in particular may be guilty of evading part of their own responsibilities if they become too fastidious in 'avoiding . . . words that shock.'" Sanford Levinson, *The Pedagogy of the First Amendment: Why Teaching About Freedom of Speech Raises Unique (and Perhaps Insurmountable) Problems for Conscientious Teachers and Their Students*, 52 UCLA L. REV. 1359, 1360 (2005). Discussing offensive speech requires that one be willing to breach standard norms and run the "risk of offending. I think it is as simple as that." *Id.* at 1390. On this matter, I cannot agree more with Professor Levinson.

[2] *See generally* Allen Walker Read, *An Obscenity Symbol*, 9 AM. SPEECH 264 (1934).

[3] Leo Stone, *On the Principal Obscene Word of the English Language*, 35 INT'L J. OF PSYCHO-ANALYSIS 30 (1954). There are now commentators who would disagree with Dr. Stone's title. In their eyes, *nigger* or *cunt* have replaced *fuck* as our most offensive terms. RICHARD DOOLING, BLUE STREAK 18 (1996) ("For centuries, *fuck* was the most objectionable word in the English language, but now *nigger* and *cunt* are probably tied for that distinction, and *fuck* has at long last stepped down."). One British study recently ranked *fuck* in third place behind *motherfucker* (second) and *cunt* (first). *See* History of the Word "Fuck," Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/History_of_fuck (last visited Jan. 14, 2006) (describing the results of a study, *Delete Expletives?*, conducted in 2000 by Andrea M. Hargrave for the BBC's Advertising Standards Authority). *But see* Llewellyn J. Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(A) Trademark Law after* Lawrence v. Texas, 9 MARQ. INTELL. PROP. L. REV. 187, 221-22 (2005) (describing how some lesbians have embraced *cunt* as a term of acceptance and empowerment); Suzanne Moore, *Why Do Newspapers Use Asterisks? When Readers Read F*****g, I Imagine*

the first time you've seen the word and, if you keep reading, it certainly won't be the last. Let me explain the genesis of this piece.

A trilogy of events motivated me to start this project. The first occurred during my second year of law teaching. In my Professional Responsibility course, the lesson for the day was attorney racist and sexist behavior. The case[4] I assigned from a leading casebook[5] was liberally sprinkled with *fuck*, *cunt*, *shit*, *bitch* and the like. Sensitive to the power of language, I recited the facts myself rather than ask a student as was my norm. After the course was over, I was reviewing my student evaluations and discovered this: "I was a little disturbed by the way he seemed to delight in saying 'cunt' and 'fucking bitch' during class. I think if you're going to say things like that in class, you should expect it to show up on the evaluation."[6] Now I was the one a little disturbed. How could any educated adult, much less a graduate student in a professional program, be offended by hearing these words read from a court opinion? I decided then to explore this topic. However, early in my career and armed with other safe, doctrinal projects on my research agenda, this one had to wait.

The idea resurfaced a year later when I read about the plight of Timothy Boomer. While canoeing on the Rifle River in Michigan, Boomer fell overboard letting forth a

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*They Know What it F*****g Means*, NEW STATESMAN, Aug. 16, 1999, at 14 (noting reclamation of *cunt* by women); *see generally* INGA MUSCIO, CUNT: A DECLARATION OF INDEPENDENCE (1998).

[4] In re Jordan Schiff, Docket No. HP 22/92, Departmental Disciplinary Comm. for the First Judicial Dep't (N. Y. Sup. Ct. Feb. 2, 1993), *sanction ordered*, 190 A.D.2d 293 (N.Y. App. Div. 1993).

[5] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 861 (6th ed. 2002).

[6] Anonymous Student Evaluation, Professional Responsibility Course (Autumn 2001) (on file with author).

fuck or two.[7] As if his day wasn't bad enough, the nearby sheriff gave him a ticket—and not for unsafe canoeing. Instead, he was cited for violating an 1897 statute forbidding cursing within earshot of women and children.[8] Then he was convicted.[9] Amazed that this could happen in the 21st century, my curiosity about the legal implications of *fuck* was rekindled.[10] I decided to dedicate one of my research assistants to exploring the area.

While this background research was on-going, the third event crystallizing my intention to write this article occurred. A federal district judge[11] was reported as sending federal marshals to arrest a man for contempt of court for sending the judge an email containing the word *fuck*.[12] Now I could understand contempt charges if this happened in open court, or if the man had been a lawyer involved in the case.[13] However, the facts recounted by the newspaper implicated none of these reasons. It was a private email sent

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[7] Steve Chapman, *Free Speech Rights Cover Even Those Naughty Words*, CHI. TRIB., Apr. 2, 2002, sec 2, at 9.

[8] The Michigan statute stated: "Any person who shall use any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of ant woman or child shall be guilty of a misdemeanor." *Id*.

[9] Boomer was sentenced to a $75 fine and four days of community service.

[10] I was even more flabbergasted by the fact that Boomer was convicted. His story surfaced during the appeal of the conviction. *See* People v. Boomer, 250 Mich. App. 534 (2002).

[11] United States District Court Judge Algenon L. Marbley.

[12] Kevin Mayhood and Mark Niquette, *Expletive Lands Critic of Ruling in Court*, COLUMBUS DISPATCH, Apr. 1, 2004, at 01C (describing the plight of Robert Dalton who was arrested by federal marshals after calling Judge Marbley a "fuck up" in an email).

[13] This scenario is a far cry from pornographer Larry Flynt's outburst during oral argument in *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770 (1984), when he shouted "Fuck this Court! [You're] nothing but eight assholes and a token cunt." Chief Justice Burger arrested Flynt for contempt, but the charge was later dismissed. *See* Larry Flynt, Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/Larry_Flynt (last visited Jan. 14, 2006).

from the man to the judge criticizing his handling of the settlement of a consumer class action lawsuit of which the man was not even a party.[14]

I don't profess to be a constitutional scholar, but I always thought the heart of the First Amendment was the right to criticize the government—federal judges included. In my mind, the guy should have been able to yell "fuck the judge" at the top of his lungs from his rooftop if he wanted to. While Judge Marbley ultimately withdrew the contempt charge,[15] I now knew this Article had to be written—after I was tenured.[16]

Three legally trained minds—a law student, a law enforcement officer, and a federal judge—each heard the word *fuck* and suddenly lost the ability to calmly, objectively, and rationally react. If *fuck* has power over these people, what are the limits of its influence? Three consonants and a vowel ordered one way—"fcuk"—is a multi-million dollar designer label coveted by many worldwide.[17] With the slightest of

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[14] Dalton is a longtime critic of a local car dealer which was the defendant in the class action settlement. *Id.*

[15] It is clear that Judge Marbley was solely concerned with the actual use of language. After Dalton was dragged into court, Marbley reportedly said: "As an articulate man, you could have found another way to express yourself." Only after Dalton conceded this point ("In retrospect, I could have used other creative words to express the strong sentiment I have."), did the judge withdraw the contempt charge. *Id.*

[16] I want to be clear: no one at the College of Law or the University has ever, in any way, tried to limit my academic freedom. Instead, I have experienced exactly the opposite; the faculty and administration have generously supported my research efforts. Still, FUCK made me skittish. I believe it is the force of taboo, central to my thesis that led to this self-censorship. *See infra* Part III.

[17] The provocative logo *fcuk*® is the acronym and trademark of fashion company French Connection United Kingdom. *See* A History of FCUK Advertising, http://www.fcuk.com/fcukadvertising/ (last visited Mar. 5, 2006). Founded in 1969, French Connection began using the distinctive logo in 1997, which immediately resulted in an 81% spike in profits. *See id.* The company began exploiting the similarity with *fuck* by printing t-shirts with messages like: "hot as fcuk," "cool as fcuk," "fcuk me," "fcuk fear," "too busy to fcuk," "lucky fcuk," and "fcuk this." *See id.*; French Connection (clothing), Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/French_Connection_(clothing) (last visited Jan. 14, 2006).

alterations, f-u-c-k becomes so forceful that its utterance can land you in jail. What transforms these four letters into an expletive of such resounding power?

This Article explores the intersection of the word *fuck* and the law. In four major areas, *fuck* impacts the law: First Amendment, broadcast regulation, sexual harassment, and education. The legal implications from the use of *fuck* vary greatly with the context. However, to fully understand the legal power of *fuck*, the nonlegal sources of its power must be tapped. Drawing upon the research of etymologists, linguists, lexicographers, psychoanalysts, and other social scientists, the visceral reaction to *fuck* can be explained by cultural taboo.[18]

Fuck is a taboo word. According to psycholinguists, its taboo status is likely due to our deep, subconscious feelings about sex.[19] The taboo is so strong that it compels many to engage in self-censorship. However, refraining from the use of *fuck* only reinforces the taboo. In the process, silence empowers small segments of the population to manipulate our rights under the guise of reflecting a greater community. Taboo is then institutionalized through law, yet at the same time is in tension with other identifiable legal rights. Understanding this relationship between law and taboo ultimately yields

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In October 2005, the company announced plans to reduce the use of the fcuk® logo, as profits dropped an estimated 69% to £5.1 million GBP, from £16.2 million GBP in 2004. *See* CNN.com, Fashion Firm Drops "fcuk" Slogans (Oct. 3, 2005), http://www.cnn.com/2005/BUSINESS/10/03/fcuk.slogan/index.html. Nonetheless, one million fcuk® t-shirts have been sold. *See* FCUK goes flaccid, Posting of William Lozito to Strategic Name Development Product Blog, http://www.namedevelopment.com/blog/archives/2005/10/fcuk_goes_flacc.html (Oct. 5, 2005, 11:45 AM).

[18] *See infra* part III.

[19] *See infra* part III.B.

fuck jurisprudence.[20] However, all the attempts to curtail the use of *fuck* through law are doomed to fail. Fundamentally, *fuck* persists because it is taboo, not in spite of it.[21]

II. FUCK HISTORY

A. *Etymology*

Dr. Leo Stone's 1954 lamentation that "scholarly information about this important word is remarkable for its scarcity" remains true today.[22] The first recorded use is disputed.[23] Some sources point to the poem "Flen flyys"—a Latin and English mix

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[20] *See infra* part IV.

[21] A brief note about the limits of this project: I am interested solely in the word *fuck* and its variations and why this particular four-letter word has such a robust intersection with the law. While I find interesting the scholarly work of those who strive to understand the power relationships expressed by "who fucks" and "who gets fucked," this article does not address the issue of gendered language. *See, e.g.*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 124 (1989) ("Man fucks woman; subject verb object."); Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 690 (1990) ("But why is it the end of the world 'to be fucked?' Why do we think of all forms of oppression in terms of 'getting fucked?'"). Those with similar scholarly interests, not in the word *fuck* but in the act of *fucking*, such as my colleague and friend, Marc Spindelman, will also find that this piece offers no insight into their topic. *See, e.g.*, Marc Spindelman, *Sex Equality Panic*, 13 COLUM. J. GENDER & L. 1, 32 (2004) (exploring queer theory's understanding of "the pleasures of sexual hierarchy" and pondering "[w]hat's sexy about a woman acting like a man by fucking a man thus being treated like a woman"). Finally, those interested in other offensive words, such as *nigger*, may see some parallels, but I have deliberately not tried to fashion an ambitious understanding of all offensive and hurtful speech. *See generally* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002); Randall Kennedy, *"Nigger!" as a Problem in the Law*, 2001 U. ILL. L. REV. 935 (2001). Rather, I have tried to keep my *fuck* focus.

[22] Stone, *supra* note 3, at 31.

[23] The quest for the earliest recorded use is an example of historical lexicography. Historical lexicography is the study of the etymology, chronology, and meaning of words by means of an historical method that traces the meaning of the word back to its earliest appearance in print. All later developments in the word's usage are then illustrated by dated and documented quotations using the word. *See* Fred R. Shapiro, *The Politically Correct United States Supreme Court and the Motherfucking Texas Court of Criminal Appeals: Using Legal Databases to Trace the Origins of Words and Quotations*, *in* LANGUAGE AND THE LAW 367, 368 (Marlyn Robinson ed. 2003).

satirizing the Carmelite friars of Cambridge composed before 1500.[24] Others claim the first known use of *fuck* is in a Scottish poem by William Dunbar, "Ane Brash of Wowing," in 1503.[25] However, it took nearly another century for *fuck* to make its lexicographic debut in John Florio's 1598 Italian-English dictionary.[26]

Not surprisingly, the etymology of *fuck* is unclear. Some etymologists trace *fuck* to Germanic languages with an original meaning of "to knock" and cognates such as Old Dutch *ficken*, Middle High German *vicken*, and German *ficken*.[27] This widely accepted derivation, however, has its critics.[28] Another possible etymology is through the French

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[24] *See, e.g.*, fuck, THE F-WORD 117 (Jesse Sheidlower ed., 2d ed. 1999) (noting the initial citation as the poem attacking the Carmelite Friars of Ely and dating it as early as 1450-75); Fuck, http://dictionary.reference.com/search?q=fuck, (last visited Jan. 14, 2006). The line containing *fuck* is actually encoded: "Non sunt in coeli, quia gxddbov xxkxzt pg ifmk." Translating the Latin and code yields: "They are not in heaven, since they fuck wives of Ely." Fuck, Wikipedia: The Free Encyclopedia, http://en.wikipedia.org/wiki/Fuck (last visited Jan. 14, 2006).

[25] *See, e.g.*, Read, *supra* note 2, at 268; Stone, *supra* note 3, at 31. The line is: "Yit be his feiris he wald haif fukkit:/Ye brek my hairt, my bony ane." History of the Word "Fuck," *supra* note 3.

[26] The word "fucke" appears in the definition of *fottere* along with *jape*, *sard*, *swive*, and *occupy*. *See* Stone, *supra* note 3, at 31.

[27] *See* Read, *supra* note 2, at 267-68; *see also* Jesse Sheidlower, *Introduction* to THE F-WORD xx, xxv (Jesse Sheidlower ed., 2d ed. 1999) ("Fuck is a word of Germanic origin."); DOOLING, *supra* note 3, at 32 (noting probable German origin). According to Read, the Latin cognates are *pungo* (to prick) and *pugil* (boxer) which comes from the root *pug-* (to thrust). *See supra* note 2, at 267-68. *But see* Stone, *supra* note 3, at 32 (noting Read's etymology and that his "strong opinion about unilateral etymology is stated somewhat arbitrarily, without documentation of intermediate sources"). Germanic origin, however, is also seen from an Indo-European etymology. *See* William Whallon, *Wicked Cognates*, *in* MALEDICTA XII, at 25, 25 (1996) (explaining Indo-European etymology of *fuck* using Grimm's Law). The sound of *p* in ancient Indo-European came to be pronounced *f* by Germanic tribes as in Greek *pod* with English *foot*. The Indo-European *g* became pronounced *k* as in Greek *gonu* and English *knee*. Thus the Indo-European *pug* becomes *fuck*. *Id*.

[28] According to Dr. Stone, the general trends of vowel sound change in English fail to account for the evolution of *ficken* to *fuck*. Stone, *supra* note 3, at 42; s*ee also* James M. Ogier, *Sex and Violence in the Indo-European Languages*, *in* MALEDICTA XII, at 85, 86-88 (1996) (describing the relationship between *fuck* and ficken as spurious).

foutre and Latin *futuere*,[29] but there are similar doubts and an absence of lineage for this derivation as well.[30] Possibly there is a hybrid derivation where *foutre* participated with *ficken* to produce *fuck*.[31] Still other etymologies suggest a Celtic derivation.[32] Of particular interest to the lawyer-lexicographer is the suggestion of an Egyptian root *petcha* (to copulate).[33] During the last Egyptian dynasties, legal documents were sealed with the phrase, "As for him who shall disregard it, may he be *fucked* by a donkey." The hieroglyphic for the phrase—two large erect penises—makes the message clear.[34]

Understanding the etymology of *fuck* is hampered because the word did not appear in any widely-read English dictionary from 1795 to 1965.[35] The exclusion of *fuck* from the leading dictionaries illustrates a deliberate attempt to cleanse the language of this word.[36] There is no consensus if *fuck* was ever acceptable or precisely when it became considered offensive.[37] However, by the late 17th century a deliberate purge

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[29] Fuck, *supra* note 24 (noting the possible connection to *futuere* and *foutre*). Stephen Skinner's 1671 *Etymologicon Linguæ Anglicanæ* is targeted as introducing etymological confusion with derivation through the French *foutre* ultimately to Greek. *See* Read, *supra* note 2, at 268 (noting and criticizing Skinner for "mistakenly trac[ing] the word through the French").

[30] *See* Sheidlower, supra note 24, at xxvi ("The relevance of structurally similar words in more distantly related languages (Latin *futuere*, for example), is unlikely."); Stone, *supra* note 3, at 42 (expressing doubts concerning the vowel change); Fuck, *supra* note 24 ("However, there is considerable doubt and no clear lineage for these derivations.").

[31] Stone, *supra* note 3, at 42 (describing the combination of *foutre* and *ficken*).

[32] Fuck, *supra* note 24.

[33] *Id.*

[34] G. Legman, *A Word for It!*, *in* THE BEST OF MALEDICTA, at 9, 12 (Reinhold Aman ed. 1987); DOOLING, *supra* note 3, at 13.

[35] History of the Word "Fuck," *supra* note 3; *see* Read, *supra* note 2, at 268-74 (detailing the absence of *fuck* from dictionaries). The absence of old citations to *fuck* makes the etymology hard to trace. DOOLING, *supra* note 3, at 24.

[36] DOOLING, *supra* note 3, at 18 ("*Fuck* was kept out of print and out of dictionaries for hundreds of years for being the dirtiest, filthiest, nastiest word in the English language.").

[37] Fuck, *supra* note 24 (describing some evidence of acceptability as late as the 17th century and other evidence of vulgarity as early as the 16th century).

emerges that becomes well entrenched by the 18th century.[38] By the late 18th century most dictionaries were being produced for use in schools; *fuck* was excluded over concerns of corrupting young minds.[39] Not surprisingly, when the first American dictionary was published by Samuel Johnson, Jr. in 1798, it omitted *fuck* in order to inspire modesty, delicacy, and chastity of language.[40] Noah Webster's crusade against vulgar words sealed *fuck*'s fate in America: exclusion from his dictionaries of 1806, 1807, 1817, 1828, and 1841.[41] This Websterian tradition was carried back across the Atlantic when in 1898 the authoritative *Oxford English Dictionary* deliberately excluded *fuck*.[42] Indeed, its first appearance in the *OED* was not until 1972 where it gives the guarded "ulterior etymology unknown."[43]

Whatever its origins, *fuck*'s longevity in English is surprising given the condemnation and concerted efforts to stamp out its use that continued throughout the 20th century. It's hard for me to believe that *fuck* was barely tolerable in print until the 1960s.[44] The saga to preserve access to D.H. Lawrence's classic, *Lady Chatterley's*

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[38] *See* Stone, *supra* note 3, at 31 ("[T]he attack on obscene words in literature began even in Elizabethan times, and apparently increased in severity thereafter."); Read, *supra* note 2, at 269 (describing the strong current against use of low terms which started in the Elizabethan period and how the "hold of speech taboo became firmer" in the 18th century).
[39] Read, *supra* note 2, at 271.
[40] *Id*. at 272.
[41] *Id*. at 273.
[42] *Id*. at 274. On this score, Read is particularly critical and labels it a "lasting shame" that the editors would not be true to the scientific spirit of the project and "offset the remissness" of the earlier lexicographers. *Id*.
[43] History of the Word "Fuck," *supra* note 3. *Fuck* still does not appear in most dictionaries or gets only an entry or two. DOOLING, *supra* note 3, at 20.
[44] While Jesse Sheidlower recounts that the earliest openly printed use of *fuck* in the United States was in 1926, a published 1846 case from the Supreme Court of Missouri states, "The slanderous charge was carnal knowledge of a mare, and the word "fuck" was used to convey the imputation." Shapiro, *supra* note 23, at 370; *see* Sheidlower, *supra*

Lover, which unfolds on three continents, illustrates this point.[45] The print media continues to agonize over the appropriate use of the word today.[46] Similarly, most English-speaking countries still censor it on radio and television.[47] *Fuck*'s continued vitality is even more amazing when compared to the fate of its 16th century synonyms: *jape* and *sarde* are virtually unknown; Chaucer's *swive* is archaic; and *occupy* returns to English with a nonsexual meaning.[48] Why then is *fuck* so resilient?

B. *Modern Usage*

Fuck is a highly varied word. While its first English form was likely as a verb meaning to engage in heterosexual intercourse,[49] *fuck* now has various verb uses,[50] not to

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note 27, at xxi-xxii (identifying first printed example of *fuck* in U.S. as 1926). Shapiro also notes the 1889 use of "motherf-----g" by the Texas Court of Appeals and the 1897 use of "mother-fucking" by the Texas Court of Criminal Appeals. Shapiro, *supra* note 23, at 371.

[45] *Lady Chatterley's Lover* was originally published in Florence in 1928. Because of D.H. Lawrence's use of *fuck*, it was banned in the United Kingdom until 1960 when publisher Penguin Books won an obscenity trial. In Australia, not only was the book banned, but even a book describing the British obscenity trial was banned. *See* Lady Chatterley's Lover, http://en.wikipedia.org/wiki/Lady_Chatterley%27s_Lover (last visited Jan. 18, 2006). In the United States, Grove Press published the book in 1959. After confiscation by the U.S. Post Office, the publisher successfully challenged the order and the Second Circuit held that the work was not obscene. *See* Grove Press, Inc. v. Christenberry, 276 F.2d 433, 439 (2d Cir. 1960).

[46] In June 2004, Vice President Dick Cheney told Senator Patrick Leahy to "fuck yourself" during a heated exchange on the Senate floor. Helen Dewar & Dana Milbank, *Cheney Dismisses Critic with Obscenity*, WASH. POST, June 25, 2004, at A04. While The Washington Post reported the exact use of the phrase, The Washington Times avoided the word altogether by reporting that Cheney "urged Mr. Leahy to perform an anatomical sexual impossibility." Fuck, *supra* note 24; *cf* Moore, *supra* note 3, at 14 (describing newspapers' struggles with printing the word). *But see* Sheidlower, *supra* note 27, at xx (contending that few publications still refuse to print *fuck*).

[47] History of the Word "Fuck," *supra* note 3; *see infra* Part IV.B (detailing FCC censorship).

[48] *See* Stone, *supra* note 3, at 35 (summarizing the fate of the early synonyms of *fuck*); *see also supra* note 26 (listing synonyms).

[49] *See supra* note 24 and accompanying text.

mention utility as a noun, adjective, adverb, and interjection.[51] Testimony to the varied nature of the word is the definitive source on its use, Jesse Sheidlower's dictionary, *The F-Word*.[52] Now in its second edition, the reference book is devoted exclusively to uses of the word *fuck* and now spans 272 pages with hundreds of entries from *absofuckinglutely* to *zipless fuck*.[53]

Linguists studying *fuck* identify two distinctive words. *Fuck*[1] means literally "to copulate."[54] It also encompasses figurative uses such as "to deceive."[55] *Fuck*[2], however, has no intrinsic meaning at all. Rather, it is merely a word of offensive force that can be substituted in oaths for other swearwords or in maledictions.[56] The fact that *Fuck*[2] can be substituted for either *God* or *hell* illustrates the lack of any intrinsic meaning.[57] This linguistic distinction is crucial. As I develop later in this Article, the legal treatment of *fuck* is inconsistent due in part to the lack of recognition of this linguistic difference.[58]

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[50] *See* THE F-WORD, *supra* note 24, at 117-33 (identifying fourteen different verb uses).
[51] *See id.* at 105-12 (listing ten separate noun uses); 116 (defining *fuck* the adjective as "describing, depicting, or involving copulation; pornographic; erotic.—used before a noun"); 141 (showing use as interjection); 168-70 (noting adjective use of *fucking*); 171-72 (noting the adverbial use as "exceedingly; damned").
[52] *See generally id.* Jesse Sheidlower, who compiled the book, was the Principal Editor of the *OED*'s North American Editorial Unit. *See* Shapiro, *supra* note 23, at 370.
[53] For the curious, *absofuckinglutely* is an adverb meaning absolutely; *zipless fuck* is a noun meaning an act of intercourse without an emotional connection. *See* THE F-WORD, *supra* note 24, at 1, 272.
[54] *See* Alan Crozier, *Beyond the Metaphor: Cursing and Swearing in Ulster*, *in* MALEDICTA X, at 115, 122 (1988-89).
[55] *Id.*
[56] *Id.* at 122-23. *Fuck*[2] as a distinct word also has various uses as a part of speech. It can be used as a noun as in "you're as lazy as *fuck*," as a verb as in "I'm *fucked* if I know," as an adjective as in "You think you're *fucking* smart," and as an adverb as in "You know *fucking* well what I mean." *Id.* at 123.
[57] *Id*. at 124.
[58] *See, e.g.*, *infra* note 222 and accompanying text.

Suffice it to say, *fuck* is everywhere.[59] As author Roy Blount, Jr. puts it: "the f-word is a fact of life. It thrives."[60] One recent Internet search revealed that *fuck* "is a more commonly used word than mom, baseball, hot dogs, apple pie, and Chevrolet."[61] It is present in movies,[62] television programs,[63] and popular music.[64] Our President reportedly uses it with aplomb.[65] The Vice President embraces it as well.[66] But if you wear a t-shirt imprinted with pictures of Bush, Cheney, and Secretary of State Condoleeza Rice labeled "Meet the Fuckers," intended as a parody of the popular

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[59] Some commentators believe that "verbal satiation"—where a taboo word heard often enough loses its effect—is the fate of *fuck*. *See, e.g.*, Hugh Kenner, *What Ever Happened to Profanity?*, NAT'L REV., Jan. 20, 1978, at 90, 91. The incidents described in the introduction of this Article and that of Lorrie Heasley, *infra* notes 67-68 and accompanying text, lead me to believe otherwise.

[60] Roy Blount, *Foreward to* THE F-WORD xv (Jesse Sheidlower ed., 2d ed. 1999). For more on Roy Blount, Jr. see his self-penned biography at http://www.roybloutjr.com.

[61] *See* Eric Vanatta, *The F-Motion*, 21 CONST. COMMENT. 285, 288-89 (2004) (noting *fuck* had 24.9 million hits compared to *baseball*, its closest competitor, with only 13.6 million hits).

[62] The use of *fuck* in R-rated movies intended for adult audiences is now common. It found exceptional use in SCARFACE (1983), BLUE VELVET (1986), and PULP FICTION (1994). *See* History of the Word "Fuck," *supra* note 3 (describing use of *fuck* in these films). The use of *fuck* is not limited to the dark side of cinema either. Hugh Grant repeatedly uttered *fuck* in the comedy FOUR WEDDINGS AND A FUNERAL (1994). *See* Moore, *supra* note 3 (noting Grant's humorous use).

[63] Despite attempts at censorship, *fuck* pops up on television. *See* Robert S. Wachal, *Taboo or not Taboo: That is the Question*, 77 AM. SPEECH 195, 204 (identifying "What the fuck was that?" as an ad lib on Saturday Night Live, April 12, 1997 and the use of *fuck* the next week to explain the prior accidental use); Sheidlower, *supra* note 27, at xxi (describing use on "Saturday Night Live" and Grammy Awards show). Of course, when *fuck* is broadcast over television today, the offending stations can be subjected to FCC fines. *See infra* Part IV.B.

[64] *See* History of the Word "Fuck," *supra* note 3 (outlining mainstream musical use).

[65] *See* Doug Thompson, *Bush's Obscene Tirades Rattle White House Aides*, http://www.capitolhillblue.com/artman/publish/article_7267.shtml (Aug. 25, 2005) (detailing President Bush's use of "who gives a flying fuck" and "go fuck yourself").

[66] *See supra* note 46 and accompanying text (describing Dick Cheney telling Patrick Leahy to *fuck* himself). Historically, public figures, like the rest of us, have used the word. *See, e.g.*, Fuck, *supra* note 24 (describing Prince of Wales Albert Edward's exclamation, "Fuck it, I've taken a bullet" after being shot at a Brussels train station in 1900).

comedy "Meet the Fockers,"[67] get ready to be kicked off an airplane.[68] *Fuck* remains a word "known by all and recognized by none."[69] To understand this dichotomy over "our worst word," I turn to the realm of psychoanalysts, linguists, and sociologists. The answer lies in taboo.

III. FUCK AS TABOO

Just as trying to piece together the etymology of *fuck* is hampered by its conscious exclusion from dictionaries, understanding taboo language is hindered by taboo itself. In other words, taboo speech is so taboo that it hasn't been regarded as a legitimate topic for scholarship.[70] Saying *fuck* is a cultural taboo; studying *fuck* is a scholarly taboo. This failure, of course, only serves to perpetuate and strengthen taboo within the culture. It's

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[67] MEET THE FOCKERS (Universal Pictures 2004) is the sequel to MEET THE PARENTS (Universal Pictures 2000). The running joke in both movies is the similarity between the protagonist's last name "Focker" and *fucker*.

[68] Such was the plight of Lorrie Heasley. In October 2005, she was flying Southwest Airlines from Los Angeles to Portland and wanted to give her Democratic parents a laugh by wearing the t-shirt. *See* Michelle O'Donnell, *Passengers Check Your T-Shirt Before Boarding*, N.Y. TIMES, Oct. 9, 2005, sec. 4, at 14. Some passengers complained to the flight attendants who asked Heasley to change, turn the shirt inside out, or leave the plane at a stop in Reno, Nevada. On the promise of a refund, Heasley got off the plane, but Southwest Airlines reportedly reneged on the refund offer. *Id.* Southwest spokesperson Beth Harbin explained: "We support free speech. But when it comes down to things that are patently offensive or threatening or profanity or just lewd then we do have to get involved in that." Todd Murphy, *Clothes Call*, PORTLAND TRIB., Oct. 7, 2005 (quoting Harbin), *available at* http://www.portlandtribune.com/achview.cgi?id=32068. Harbin claimed that Southwest's contract of carriage specifies that passengers can be banned for wearing clothing that is "lewd, obscene or patently offensive." Harbin punctuated the fear: "The basis for our concerns was the actual word used." *Id.*

[69] EDWARD SAGARIN, THE ANATOMY OF DIRTY WORDS 136 (1962); Rei R. Noguchi, *On the Historical Longevity of One Four-Letter Word: The Interplay of Phonology and Semantics*, *in* MALEDICTA XII, at 29, 29 (1996); *see* A. Ross Eckler, *A Taxonomy for Taboo-Word Studies*, *in* MALEDICTA IX, at 201, 201 (1986-87) ("Taboo words: nearly everybody from the age of ten onward knows what they are . . . .").

[70] *See* TIMOTHY JAY, WHY WE CURSE 10 (2000) (noting the absence of scholarship and the relationship to taboo).

therefore not surprising that a variety of labels exist for what one is studying when one focuses on the use of words like *fuck*: cursing, swearing, dirty words, profanity, obscenity, and the like.[71] However, where meaningful distinctions have been developed, taboo is both central and common.[72]

A. *Understanding Taboo Language*

In every culture, there are things that we are not supposed to do and things we are not supposed to say: taboo acts and taboo words.[73] Sometimes there's a correlation, such as Western society's taboos relating to sex. While sex is not entirely forbidden, it is regulated by a set of conscious and unconscious rules; given the appropriate time, place, and person, sex is not taboo.[74] Incest, however, is taboo—so is the word *motherfucker*.[75]

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[71] *See* SAGARIN, *supra* note 69, at 31 ("Tabooed words are today known as obscene language, dirty words, four-letter words, and by a variety of other names, some misleading and some complimentary."); JAY, *supra* note 70, at 9 (defining cursing as the utterance of emotionally powerful, offensive words such as *fuck*), at 10 (linking lack of research to difficulty finding appropriate term for offensive speech), at 191 (noting that profanity is a special category of offensive speech that means to be secular or indifferent to religion as in *Holy shit*).

[72] For example, swearing is defined as a type of language use in which the expression refers to something that is taboo in the culture; should not be interpreted literally; and can be used to express strong emotions. LARS ANDERSSON & PETER TRUDGILL, BAD LANGUAGE 53 (1990).

[73] *See* JAY, *supra* note 70, at 193 ("Every culture has domains of thought that are *taboo*. Taboos are sanctions on thoughts and behaviors that a society finds too powerful, dangerous, or mysterious to consider openly."). While it may be tempting to our modern minds, it is wrong to place taboo language solely within so-called primitive cultures. *Cf* Read, *supra* note 2, at 266 (finding taboo language present among "savages"—Australian aborigines); ARIEL ARANGO, DIRTY WORDS: PSYCHOANALYTIC INSIGHTS 3-6 (1989) (stating that while all primitive societies have taboo words, "our own sophisticated, contemporary culture" has forbidden words too). Similarly, it would be error to think of taboo as a modern social construct. *See* Read, *supra* note 2, at 266 (stating verbal taboo is not the product of cultural refinement).

[74] ANDERSSON & TRUDGILL, *supra* note 72, at 55-56.

[75] *Id*. at 55; see JAY, *supra* note 70, at 165 ("Sex is a taboo topic in many cultures, and words denoting sexual activity become taboo"). Such a correlation doesn't always make

While some taboo acts have corresponding taboo words, others do not.[76] Cannibalism is one of our taboo acts. However, there are no unprintable English words—taboo words—referring to cannibalism.[77] There are also purely linguistic taboos. For example, Thai speakers in an English environment do not use certain Thai words because they sound like taboo English words, such as the Thai words *fâg* (sheath), *fág* (to hatch), and *phríg* (chili pepper).[78] Similarly, Thai speakers avoid English words, such as *yet*, that sound similar to taboo Thai words, such as *jéd*, a taboo Thai word for sexual intercourse.[79]

The Polynesian word *taboo* itself has two precisely opposite meanings: one that is "sacred or consecrated" and the other "impure, prohibited, dangerous, and disgusting."[80] Generally, taboo words fall into one of these two broad categories.[81] Due to its sacred nature, the Hebrews would not say their word for *God*.[82] For our Germanic ancestors, the names of fearsome animals were taboo. Their word for *bear* is unknown because it was never recorded.[83] Similarly, in parts of West Africa, the word for *snake* is taboo. The

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sense. As one commentator notes, this would be as if Prohibition banned not only the sale of whiskey, but the reading of the label as well. ARANGO, *supra* note 73, at 4.

[76] ANDERSSON & TRUDGILL, *supra* note 72, at 57 ("It is tempting to look at this very simply and to suggest that, for every behavioral taboo, there will be a taboo word. However, this simple description seems to be false.").

[77] *Id*. at 58.

[78] *Id*. at 57.

[79] *Id*. at 58.

[80] ARANGO, *supra* note 73, at 4. Freud was apparently the first to point out this duality in the definition of taboo. *See* DOOLING, *supra* note 3, at 4.

[81] *See* Thomas Nunnally, *Word Up, Word Down*, NAT'L FORUM, Spr. 1995, at 36 ("All societies, it would seem, proscribe, or place a taboo upon, the unrestricted use of certain words, such as those relating to the sacred and to certain body functions and body parts.").

[82] DOOLING, *supra* note 3, at 42.

[83] *Id*.

reptile is referred to euphemistically as a stick or piece of rope.[84] Of course, taboo words relating to body functions are also commonplace[85]—which leads us to *fuck*.

"In the entire language of proscribed words, from slang to profanity, from the mildly unclean to the utterly obscene, including terms relating to concealed body parts, to excretion and excrement as well as to sexuality, one word reigns supreme, unchallenged in its preeminence."[86] *Fuck*. Nobody really knows whether *fuck* is taboo because it falls into the category of "sacred and consecrated" or "prohibited and disgusting."[87] Nonetheless, the fact that the earliest recorded use of the word from the 15th century was in code indicates that *fuck* has been taboo for a very long time.[88]

B. *Psycholinguistics and Fuck*

An understanding of *fuck* as taboo language begins with Columbia University English Professor Allen Walker Read's groundbreaking work in 1934. Read combined both linguistic and psychoanalytic principles to understand the nature of obscenity in general and the taboo status of *fuck* in particular. He viewed obscenity as a symbolic construct: "obscenity lies not in words or things, but in attitudes that people have about words and things."[89] The deep psychological motivation for taboo, according to Read,

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[84] *Id*.
[85] ARANGO, *supra* note 73, at 9 ("Basically, we notice that dirty words always refer to parts of the body, secretions, or behavior patterns that arouse sexual desire.").
[86] SAGARIN, *supra* note 69, at 136. Sagarin's prose is delightful: "It sits upon a throne, an absolute monarch, unafraid of any princely offspring still unborn, and by its subjects it is hated, feared, revered and loved, known by all and recognized by none." *Id*. Richard Dooling also creates a vivid image of the offensiveness of *fuck*: "[T]he f-word plays upon our sensibilities like a meat cleaver scoring a harpsichord." DOOLING, *supra* note 3, at 45.
[87] DOOLING, *supra* note 3, at 42.
[88] *See supra* note 24 and accompanying text (describing earliest use).
[89] Read, *supra* note 2, at 264. Read's definition of obscenity differs greatly from the legally constructed definition familiar to students of the First Amendment best articulated

"probably has its roots in the fear of the mysterious power of the sex impulse."[90] Because primitive man found that the force of passion could so disorder life, he hedged it with prohibitions.[91] The taboo persists because there is an emotional reaction, or "fearful thrill," that generates from speaking the forbidden word.[92] If you use the word to insult someone or to feel the thrill of doing something that is forbidden, you are actually observing the taboo; this is often labeled as "inverted taboo."[93] Thus, both silence and use of the taboo word perpetuate it.

It took twenty years before another psycholinguist, Dr. Leo Stone, returned to the study of *fuck*. With his inquiry, all the tools of psychoanalysis were brought to bear on the taboo word. To Stone, the application of psychoanalysis to *fuck* was natural: "Since language is the chief instrument of psycho-analysis, and sex is a major field of its scientific and therapeutic interest, the investigation of an obscene word would seem a natural psycho-analytic undertaking[.]"[94] His 1954 article was in response to one of his patient's persistent use of the word *fuck* during analysis sessions.[95] Determined to better understand both his patient's use and the taboo status of *fuck*, Stone provides both an encyclopedic narrative of the history and etymology of *fuck* and his own theory explaining its use. Stone concluded that "based on inferences from clinical observation,

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in *Miller v. California*, 413 U.S. 15 (1973). *See infra* notes 146-148 and accompanying text (discussing *Miller* and obscenity).

[90] Read, *supra* note 2, at 266.

[91] *Id*. at 266-67.

[92] *Id*. at 264.

[93] *Id*. at 274.

[94] Stone, *supra* note 3, at 30.

[95] Stone describes the clinical experience as follows: "Mary S., married, usually in sudden pauses of her free association, would state that there came to her mind, without affect or impulse, the phrase 'I want to fuck the analyst.' This was usually entirely out of context, at first gave rise to mild embarrassment, and later came to be reported with slight bored irritation as a sort of recrudescent mild nuisance." *Id*. at 32.

the opinion is established that the important and taboo English word 'fuck' bears at least an unconscious rhyme relation to the word 'suck' within the framework of considerations that determine the general phenomenon of obscenity, including the anal emissive pleasure in speech."[96] Thus Stone "developed the preliminary idea that the rhyme with the word 'suck' may have been an important unconscious determinant in the linguistic fixation and taboo of our word in general usage."[97]

Whether you are willing to fully embrace Read or Stone's hypotheses or not, these early psycholinguists provide us with two keen insights. First, *fuck* persists not in spite of taboo, but because of it. As Read aptly put: "A word is obscene not because the thing named is obscene, but because the speaker or hearer regards it, owing to the interference of a taboo, with a sneaking, shame-faced, psychopathic attitude."[98] Having set aside the word *fuck* as an obscenity symbol, we work hard to maintain the sacredness of the symbol.[99] This is done primarily by implanting the taboo in our children. Children are taught a language of discourse—"this is a cat" and "this is a tree." However, they are not offered the words to describe sex.[100] A split world remains: "a world of things with legitimate official names" and a world of silence—taboo.[101]

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[96] *Id*. at 53.
[97] *Id*. at 35. While paying deference to the early work of Stone, Richard Dooling criticizes both the ultimate conclusion that *fuck* and *suck* are related, as well as Stone's potential naiveté concerning his patient's proclivity to say "I want to fuck the analyst." *See* DOOLING, *supra* note 3, at 47-51.
[98] Read, *supra* note 2, at 277; *see* DOOLING, *supra* note 3, at 45 ("It's vulgar, that's all, because we have made it so.").
[99] Read, *supra* note 2, at 267.
[100] ARANGO, *supra* note 73, at 184-85; *see* Read *supra* note 2, at 266.
[101] ARANGO, *supra* note 73, at 185. In this sense, what is taboo is out of the speaker's control because taboo is culturally defined. JAY, *supra* note 70, at 153.

The second contribution of the psycholinguists is that *fuck* is taboo because of our buried, subconscious feelings about sex. Read held this belief and more recent commentators, like Richard Dooling, concur:

> Perhaps, as Read suggests, we carefully and subconsciously gather all the indelicate and unseemly associations we have with the brute act of reproduction, incest, sex outside of marriage, sex without love, selfish sex, child sexual abuse, fatal venereal diseases—and assign them all to a single unspeakable word. When the word is uttered, it stirs up all these unconscious, unspeakable aspects of sexual congress, which we don't like to think about because they threaten the social order in a terrifying way.[102]

Even if you do not find Stone's *fuck*/*suck* hypothesis compelling, the psychoanalytic link to sex he espouses is widely accepted. It finds expression in those researchers who explain *fuck*'s taboo status as a reflection of the Oedipus complex.[103] According to Dr. Ariel Arango in his book *Dirty Words: Psychoanalytic Insights*, "the 'dirty' word, *to fuck*, always means, at root, to *fuck* one's mother; to go back to her womb. Such is the universal Oedipus longing."[104] Everyday use of the word would awaken the "sleeping dogs" among fathers and sons. Therefore, a ban on the word *fuck* is essential to bury the universal incestuous desire.[105]

The importance of psychoanalysis to an understanding of *fuck* is not to the exclusion of other disciplines. Etymologists provide us with a valuable historical account of usage and taboo.[106] Linguists point out that the phonological pattern of consonant+vowel+hard consonant+consonant may explain why *fuck* survived while 16th

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[102] DOOLING, *supra* note 3, at 46; *see* JAY, *supra* note 70, at 153 (explaining that there is no freedom of speech where sex is concerned due to cultural taboo).
[103] *See* ARANGO, *supra* note 73, at 183 ("[A]ll obscene words stimulated, or threaten to stimulate, reminiscences of incestuous anguish and pleasures.").
[104] *Id.* at 157.
[105] *Id.*
[106] *See supra* Part II.A (etymology).

century contemporaries like *swive* and *jape* did not.[107] Sociologists note the cultural influences on offensive speech. For example, use of *fuck* may be appropriate for some contexts (like a dorm room) but not others (like the Dean's office).[108] Still other social scientists search for an integrated theory to explain *fuck*.[109] Despite these contributions, psycholinguistics offers the fullest explanation of *fuck* as taboo, as well as an insight into how to counteract its effects.

C. *Effects of Taboo*

Word taboo is irrational.[110] It is one thing to ban certain acts; as a society we are probably better off.[111] But to proscribe naming those same acts makes no sense. Yet that is precisely what we do. In the case of *fuck*, the taboo is also unhealthy. Emerging from an unhealthy attitude about sex, *fuck* is an example of what Read calls a "word fetish."[112] The extreme emotional response to the word only serves to perpetuate negative attitudes toward sex. Yet the taboo is so strong many engage in individual self-censorship. Some

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[107] *See* Rei R. Noguchi, *On the Historical Longevity of One Four-Letter Word: The Interplay of Phonology and Semantics*, *in* MALEDICTA XII, at 29, 38-40 (1996) (explaining fuck's longevity over its rivals based upon its phonological pattern CV(C)C).
[108] JAY, *supra* note 70, at 148.
[109] *See generally* JAY, *supra* note 70 (developing the NPS or neurological, psychological, and social theory of cursing).
[110] *See* ARANGO, *supra* note 73, at 4 ("We accept the banning of certain actions, but not a ban on naming them.").
[111] In this context, consider NAMBLA, the North American Man/Boy Love Association. NAMBLA's stated goal is "to end the extreme oppression of men and boys in mutually consensual relationships by: building understanding and support for such relationships [and] educating the general public on the benevolent nature of man/boy love[.]" An Introduction to NAMBLA: Who We Are, http://216.220.97.17/welcome.htm (last visited Feb. 16, 2006). Irrespective of my position on free speech, I see wisdom in criminalizing pedophilia. However, NAMBLA and its members certainly have a protected speech right in providing factual information to "help educate society about the positive and beneficial nature of man/boy love." *Id.*
[112] *See* Allen Walker Read, *Introduction to* EDWARD SAGARIN, THE ANATOMY OF DIRTY WORDS 9, 9-10 (1962).

overzealous adherents extend their own sense of "good words" and "bad words" to limit the use of *fuck* by others. The taboo effect is institutionalized when offensive language leads to legal prosecutions or censorship. An understanding of the intersection of *fuck* and the law must begin with an appreciation for our individual reactions to taboo.

Psycholinguistics provides the insight into the way we react to the taboo nature of *fuck*. Taboo effect is so strong we engage in self-censorship. However, refraining from using the stigmatized word doesn't reduce the taboo effect. Deliberate silence actively abets the taboo rather than ignores it.[113] Even those of us with the tools to understand the taboo effect often capitulate. For example, teachers who avoid using shocking words in the classroom when the topic involves speech certainly perpetuate taboo, as well as shirk their pedagogical responsibilities.[114] How can you teach the "Fuck the Draft" case[115] without using the word? But there are those who do.[116]

A corollary of self-censorship is the use of euphemisms. The "f-word" surely is our most common *fuck* euphemism. Presumably, it allows the speaker to both communicate the precise word intended, while at the same time conforming to the cultural taboo. This just seems silly.[117] Everyone versed in the English language

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[113] Read, *supra* note 2, at 277.
[114] *See* Levinson, *supra* note 1, at 1362 (noting pedagogical responsibility).
[115] Cohen v. California, 403 U.S. 15 (1971).
[116] Professor Levinson recounts with disappointment an anecdote about a former student of his who, while teaching government to undergraduates at The University of Texas, taught *Cohen* using the f-word euphemism. Levinson, *supra* note 1, at 1384. If it is any consolation, my use of *fuck* in this piece alone will surely help restore balance to the use of the word in academia.
[117] Kudos to Fred Shapiro who entitled his article on the value of electronic research in historical lexicography—*The Politically Correct United States Supreme Court and the Motherfucking Texas Court of Criminal Appeals: Using Legal Databases to Trace the Origins of Words and Quotations.* *Supra* note 23, at 367. In contrast, shame on Professor Robert Bloomquist's capitulation to euphemism entitled *The F-Word: A*

immediately knows that the f-word is *fuck*. In fact, if the meaning were not universal the euphemism wouldn't work. So the only rationale for using the f-word instead of *fuck* is that those who are well-mannered simply don't say words in public that they wouldn't say in front of their parents or grandparents.[118] This, of course, is merely another way of describing how taboo is passed from one generation to the next.

Those who give in to the pressure of taboo not only serve to reinforce it, but also empower the self-appointed guardians of speech to restrict *fuck*'s use by others.[119] I'm not talking about real "speech police" (the FCC), but ordinary citizens or private businesses that want to impose their version of what is appropriate speech on others. The complaining passengers, flight attendants, and Southwest officials who combined to eject the woman wearing the "Meet the Fuckers" t-shirt from her flight, all create a classic example of moralists overstepping their bounds.[120] Almost daily, I encounter invisible others trying to control my use of language through email. The popular Eudora email program rates the use of *fuck* with its highest "three chili pepper" rating and a juvenile attempt at a humorous message.[121] Still, the intent is to make me engage in self-censorship.

Popular music has also been a fertile ground for this type of vigilante censorship. The quintessential punk group the *Sex Pistols* felt the censorship of others as record

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Jurisprudential Taxonomy of American Morals (in a Nutshell), 40 SANTA CLARA L. REV. 65 (1999). Bloomquist uses the f-word euphemism in place of *fuck* when he writes, but ironically uses *fuck* when describing what others have written. *See, e.g.*, *id.* at 68-69.

[118] *See* Levinson, *supra* note 1, at 1384.

[119] *See* Read, *supra* note 112, at 10 (describing the way "respectable" society members try to enforce the taboo).

[120] *See supra* notes 67-68 and accompanying text (describing the incident).

[121] The message is: "Your message . . .is the sort of thing that might get your keyboard washed out with soap, if you get my drift. You might consider toning it down."

labels played "hot potato" with them over the lyrics to their songs in the late 1970s.[122] In 1984, the *Dicks* released a 7" record (back in the days of vinyl) entitled "Peace?" that included the song "No Fuckin' War."[123] However, the company that printed the record jacket was offended and blacked-out "Fuckin" from the cover leaving only "No _____ War."[124] Recently, some radio stations took self-censorship one more step by banning the pop group *Black-Eyed Peas*' hit, "Don't Phunk with my Heart," apparently in an attempt to eliminate even euphemisms for *fuck*.[125] The music industry's concern over *fuck* in lyrics could also be due to fear of institutionalized taboo—government censorship.

Institutionalized taboo takes many forms. State anti-obscenity statutes, like the archaic one from Michigan used against Timothy Boomer, are examples.[126] There are federal statutes, such as Title VII, designed for different purposes that are being used to clean up workplace dialogue.[127] There are even institutional organizations, like the FCC,

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[122] Offensive band names were rare until the late 1970s and the Sex Pistols formed with the explicit goal to offend the public. Joe Salmons & Monica Macaulay, *Offensive Rock Band Names: A Linguistic Taxonomy*, *in* MALEDICTA X, at 81, 82 (1988-89).

[123] *See* DICKS, PEACE? (R Radical Records 1984). In their taxonomy of offensive alternative rock band names, Salmons and Macaulay classify the *Dicks* as a "taboo band name" in the category of Sex, subdivision Genitalia. *See* Salmons & Macaulay, *supra* note 122, at 84-85.

[124] Both the lyrics sheet and the label of the record include *Fuckin'*; only the jacket is censored. Ironically, fear of censorship by alternative rock bands can lead to self-censorship. *See* Salmons & Macaulay, *supra* note 122, at 91 ("In order to avoid even more censorship than they would already encounter, several bands have used asterisks for vowels in particularly taboo words (*C*nts, Sic F*cks*). Similarly, some taboo words occur with non-standard orthography (*Scumfucks*) and a few other groups have chosen euphemistic forms (*FU's, F-word*)."). In the universe of taboo band names, "[n]otice the predominance of *fuck* over all other vulgarities." *Id.*

[125] History of the Word "Fuck," *supra* note 3. The song was also released as "Don't Mess with my Heart."

[126] *See supra* notes 7-10 and accompanying text.

[127] *See infra* Part IV.C.

that are used for censorship in this country.[128] However, all of these manifestations of institutionalized taboo are empowered by our Supreme Court—a Court constrained by the effects of taboo. The resulting *fuck* jurisprudence is characterized by inconsistent treatment of *fuck*, unnecessary conflicts, and uncertainties.

IV. FUCK JURISPRUDENCE

A. *The First Amendment: From Fighting Words to "Fuck the Draft"*

The First Amendment may say that Congress shall make no law abridging the freedom of speech, but of course it doesn't really mean that.[129] Whole categories of expression are carved out of protectable speech. Defamation, fraudulent misrepresentation, and incitement to violence are all types of speech that can be punished.[130] Political speech cannot. In this dichotomous world of protected and unprotected speech, where does *fuck* fall? One commentator laments that a person "with four lifetimes and a burning desire to find out whether he may scream 'Fuck!' in a crowded theater will come away in confusion if he looks for his answer in the opinions of the Supreme Court."[131] To be sure, the Court's categorical approach, compounded by *fuck*'s utility, makes the task complicated; but it's doable. Generally, *fuck* is protected "offensive speech" straddling two pillars of unprotected speech—"fighting words" and "obscenity."

In the regrettable 1942 decision, *Chaplinsky v. New Hampshire*,[132] the Supreme Court carved out of the First Amendment so-called "fighting words." At issue was

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[128] *See infra* Part IV.B.
[129] U.S. Const. Amend. I.
[130] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002).
[131] DOOLING, *supra* note 3, at 57.
[132] 315 U.S. 568 (1942).

whether the states could punish a speaker for calling a city marshal offensive names such as "God damned racketeer" and "damned Fascist."[133] Noting that there has always been limited classes of unprotected speech, the Court described this universe as including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their utterance inflict injury or tend to incite an immediate breach of the peace."[134] Thus, the use of "threatening, profane, and obscene revilings"[135] could be punished if it was likely to provoke a violent reaction. With rhetoric from the Court that lewd, profane, and insulting speech could be punished, *fuck* would appear in jeopardy.

Lucky for *fuck*, the Supreme Court hasn't used *Chaplinsky* as a blunderbuss against taboo language. Instead, fighting words doctrine has been narrowed to require that the speech be a direct personal insult likely to provoke retaliation from the average person.[136] Consequently, the Court protects speech and reverses convictions premised on the fighting words doctrine even when streams of dirty words are uttered in anger. You can call teachers "mother-fuckers" at a school board meeting.[137] A mother can yell "god-damn—mother fucker police" as they arrest her son.[138] And even though a Jehovah's Witness can't call the city marshal a "damned fascist," a Black Panther can call the police

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[133] *Chaplinsky*, 315 U.S. at 569.
[134] *Id.* at 572.
[135] *Id.* at 573.
[136] *See* Street v. New York, 394 U.S. 576, 592 (1969) (reversing conviction where it was conceivable that defendant's words might have moved listeners to retaliate because speech was not inherently inflammable); Cohen v. California, 403 U.S. 15, 20 (1971) (discarding fighting words doctrine because it was not personally directed in a provocative fashion).
[137] *See* Rosenfeld v. New Jersey, 408 U.S. 901 (1972). Rehnquist's dissent stated that Rosenfeld used the adjective "M- - - - - f- - - - -" four times. 408 U.S. at 910.
[138] *See* Lewis v. City of New Orleans, 408 U.S. 913 (1972). Justice Rehnquist wrote in dissent: "G- - d- - m- - - - - f- - - - - police." 408 U.S. at 909.

"mother-fucking fascist pig cops."[139] While rulings like this seem to leave little of *Chaplinsky* intact, it has still never been overturned.[140]

Obscenity is another First Amendment doctrine with a relationship to *fuck* and taboo. Long recognized as a category of unprotected speech, obscenity is hard to define. In the 19th century, American courts embraced the British standard that focused on the sexual nature of the material and its tendency to corrupt those susceptible to it such as youths.[141] Such a standard, of course, reflects the taboo nature of sexual conduct and language prevalent at the time. Even in the mid-20th century, the Supreme Court's definition of obscenity as "material which deals with sex in a manner appealing to prurient interests"[142] still has taboo at its core. One could legitimately write about sex, but characteristics such as "utterly without redeeming social importance" and tendency to "excite lustful thoughts" or "prurient interests" would still support an obscenity conviction.[143] Justice Potter Stewart's classic line—"I know it when I see it''—seems to

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[139] *See* Brown v. Oklahoma, 408 U.S. 914 (1972). According to Justice Rehnquist, "[d]uring a question and answer period [Brown] referred to some policemen as 'm- - - - - f- - - - - fascist pig cops.'" 408 U.S. at 911.

[140] If fighting words doctrine merits retention, it would be valuable to draw upon social science research to determine which words, in fact, do provoke a reasonable person to react. *See* JAY, *supra* note 70, at 217-19. While federal courts realize the limits of *Chaplinsky*, Professor Caine's recent work includes a survey of state-court cases where he found significant on-going convictions used primarily to punish racial minorities for talking back to the police. *See* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 548-50 (2004).

[141] *See* Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868); *see also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 12-16, at 658 (1978).

[142] Roth v. United States, 354 U.S. 476, 480 (1957).

[143] *Id.* at 484 ("utterly without redeeming social importance"), 486 ("excite lustful thoughts"), 487 ("prurient interests").

sum up the definitional difficulty.[144] Apparently, the Court didn't see it very often from 1967 through 1973 when it overturned 32 obscenity convictions without opinion.[145]

Finally in *Miller v. California*,[146] the Court reaffirmed the unprotected nature of obscene material and articulated a now well-known three-part test that: (1) the average person, applying community standards, would find the work, taken as a whole, appeals to the prurient interest; (2) 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.[147] This test, however, essentially guarantees that *fuck* is not legally obscene.[148]

Recall the linguists' categorization of *Fuck*^{1} and *Fuck*^{2}. Only *Fuck*^{1} relates to the act of sex.[149] By defining obscenity as inherently relating to sexual conduct, any use of *Fuck*^{2}—which has no intrinsic definition at all—cannot be obscene.[150] Similarly, the figurative use of *Fuck*^{1} as to deceive would be outside of obscenity doctrine's reach as well.[151] Even if the term is used in a plainly sexual sense, the likelihood that the additional burdens of the *Miller* test, such as holistic review, community standards, and lack of value, could be met. While *fuck* may be commonly mislabeled as an "obscenity,"

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[144] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[145] *See* H. Franklin Robbins, Jr.& Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 ST. THOMAS L. REV. 517, 526-27 n.82 (2003) (collecting cases).
[146] 413 U.S. 15 (1973).
[147] *Miller*, 413 U.S. at 24.
[148] *See* DOOLING, *supra* note 3, at 61 ("Because of the well-established 'prurient' requirement, foul language and profanity are almost never considered obscene . . . .").
[149] *See supra* note 54 and accompanying text. *But see* Bloomquist, *supra* note 117, at 98 (claiming "all F-word usage has at least an implicit sexual meaning"). Bloomquist's statement, however, is inconsistent with his four-page discussion on varied use of *fuck* and the many examples provided with plainly non-sexual meanings. *See id*. at 70-74.
[150] *See supra* notes 56-57 and accompanying text.
[151] *See supra* note 55 and accompanying text.

modern obscenity doctrine reinforces sexual taboo, but poses little threat to the use of the taboo word itself.

By far, the most important victory for breaking the word taboo comes in *Cohen v. California*[152]—the "Fuck the Draft" case—where the Court comes to terms with this four-letter word. In protest of the Vietnam War and the draft, Paul Cohen wore a jacket bearing the phrase "Fuck the Draft" while in the Los Angeles County Courthouse.[153] Cohen didn't threaten to or engage in violence or make any loud or unusual noises.[154] All he did was walk through the corridor of a public building wearing the jacket.[155] He was arrested, convicted, and sentenced to thirty days in jail for violating a California statute prohibiting malicious and willful disruption of the peace by offensive conduct.[156] The Supreme Court reversed holding "the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."[157]

To reach this result, the Court first found that Cohen's use of *fuck* didn't fall into other categories of proscribed speech. This was not a fighting words case because there was no direct, provocative personal insult.[158] This was not an obscenity case either. "Whatever else may be necessary to give rise to the State's broader power to prohibit

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[152] 403 U.S. 15 (1971).
[153] *Cohen*, 403 U.S. at 16.
[154] *Id*. at 16-17.
[155] Interestingly, Cohen had no problem entering the courthouse wearing the jacket. Once in, he actually removed it and draped it over his arm. Only after a bailiff alerted a municipal court judge of Cohen's jacket was Cohen arrested as he was leaving the building. *See* FCC v. Pacifica Found., 438 U.S. 726, 747 n.25 (1978) (describing facts of *Cohen*).
[156] *Cohen*, 403 U.S. at 16.
[157] *Id*. at 26.
[158] *Id*. at 20.

obscene expression, such expression must be, in some significant way, erotic."[159] There was nothing erotic with "Cohen's crudely defaced jacket."[160] Nor was this a captive audience case. "Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[161]

Cohen was about "punishing public utterance of this unseemly expletive."[162] To the Court, the stakes were high as our political system rests on the right to free expression. "To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength."[163] Although alert to the divisiveness in the country, the Court would not allow discord to silence debate. With the elegant prose of Justice Harlan, *fuck* was protected: "For while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another man's lyric."[164]

While I speak of "the Court" as a monolithic oracle, the men who judged *fuck* in 1971 brought to the bench not only their vision of the First Amendment, but also their blind spot of taboo. They were not all of like mind on this case with four justices dissenting. Blackmun, joined by Chief Justice Burger and Black, wrote "Cohen's absurd

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[159] *Id*.
[160] *Id*. The Court's opportunity to fully explore the parameters of obscenity was still a couple of years away in *Miller*.
[161] *Id*. at 21.
[162] *Cohen*, 403 U.S. at 23.
[163] *Id*. at 24-25.
[164] *Id*. at 25.

and immature antic, in my view, was mainly conduct and little speech."[165] Blackmun further dissented due to an alternative construction of the California statute; Justice White concurred in this portion of the dissent.[166] But thanks to Bob Woodward's and Scott Armstrong's inside account of the Supreme Court, *The Brethren*, we can witness the effect of word taboo on the high court's 5-4 decision.[167]

Ironically, Harlan originally called the *Cohen* case a "peewee" while Black initially found the conviction so outrageous he supported summarily reversing without oral argument.[168] It was Harlan's opposition that led to oral argument and allowed for the most triumphant blow against word taboo imaginable. On February 22, 1971, Chief Justice Burger, obviously gripped by his own view of *fuck* as taboo, called the case for

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[165] *Id.* at 27 (Blackmun, J., dissenting). Blackmun's *fuck* as conduct argument is hard to understand. He cites the troubling case of *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), which states that First Amendment protection doesn't extend "to speech or writing used as an integral part of conduct in violation of a valid criminal statute." As Professor Volokh recently pointed out:

> Likewise, uttering words that may cause a fight would also be constitutionally protected today, unless the words are specifically targeted at the offended party. This distinction in modern fighting words law between unprotected speech "directed to the person of the hearer ("Fuck you" said to a particular person) and protected speech said to the world at large ("Fuck the draft" said on a jacket) may be sound. But the *Giboney* principle that speech may be punishable when it carries out an illegal course of conduct doesn't help justify that distinction.

Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1323 (2005). For those generally interested in the speech-as-conduct issue, Professor Volokh's article provides not only a comprehensive summary of the law and commentary in this area, but also a warning that we should avoid the temptation of resorting to labels when confronted by troubling speech and its First Amendment implications. *See id*. at 1347-48.

[166] *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting), 28 (White, J., dissenting).

[167] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 147-54 (Avon Books 1981) (1979).

[168] *Id*. at 148.

oral argument, but admonished petitioner's counsel to keep it clean: "the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you . . . to dwell on the facts."[169] Paul Cohen's lawyer, Professor Melville Nimmer, responded: "At Mr. Chief Justice's suggestion, I certainly will keep very brief the statement of facts. . . . What this young man did was to walk through a courthouse corridor . . . wearing a jacket on which were inscribed the words 'Fuck the Draft.'"[170] The Chief was irritated; the rest of the Court refused to say *fuck*, referring instead to "that word."[171] Nimmer was brilliant, and in that tête-à-tête, Cohen won. If Nimmer had acquiesced to Burger's word taboo, he would have conceded that there were places where *fuck* shouldn't be said like the sanctified courthouse.[172] The case would have been lost.

Woodward and Armstrong provide additional accounts of the Justices' word taboo and the influence of taboo on their votes.[173] Not surprisingly, Burger relied on euphemism and referred to the case as the "screw the draft" case; he voted to uphold Cohen's conviction.[174] Black—who had always been viewed in absolutist no-law-means-no-law First Amendment terms—said it was unacceptable conduct, not speech. Black's clerks recount that it was word taboo that led to the about-face: "What if [Black's wife] Elizabeth were in that corridor. Why should she have to see that word?"[175] Harlan, who had triumphed over his initial *fuck* fears, now wanted to reverse the conviction: "I

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[169] *Id*. at 149.
[170] *Id*.
[171] *Id*.
[172] *See id.* (recounting Nimmer's thought that he would lose if he didn't say *fuck* at least once); Levinson, *supra* note 1, at 1365-66 (describing making the concession as malpractice).
[173] *See* WOODWARD & ARMSTRONG, *supra* note 167, at 149-53; Levinson, *supra* note 1, at 360-62.
[174] WOODWARD & ARMSTRONG, *supra* note 167, at 150.
[175] *Id*. at 151.

wouldn't mind telling my wife, or your wife, or anyone's wife about the slogan."[176] With that, Harlan became the fifth vote of the new *fuck* majority and was assigned the opinion. The Chief, however, never rose above the grip of taboo. When Harlan was to deliver the opinion in open court, Burger begged: "John, you're not going to use 'that word' in delivering the opinion, are you? It would be the end of the Court if you use it, John."[177] Harlan laughed. The Chief waited. Harlan delivered the opinion—without saying *fuck*.[178] Even in guaranteeing the right to say *fuck*, the word taboo was too strong for Justice Harlan.

One would think that is the end of it. The Supreme Court says you can say *fuck*. It's not obscenity. Its use—without more—isn't fighting words. But the taboo effect of a word like *fuck* isn't going to be broken by a 5-4 vote. So, if you say *fuck* on television, in the workplace, or in the classroom, you better hope that one of Nimmer's disciples is available to take your case.

B. *Fuck and the FCC*

Despite the strong rhetoric in *Cohen*, it didn't take long for the Supreme Court[179] to create another category of lesser-protected speech to contain *fuck*—indecency. With the approval of administrative regulation of indecent speech, the Court elevates another player in the censorship game, the Federal Communications Commission (FCC).

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[176] *Id*. at 151-52.
[177] *Id*. at 153-54.
[178] *Id*. at 154.
[179] The Court's composition changed dramatically from *Cohen* in 1971 to *Pacifica* in 1978. Justice Harlan (the author of *Cohen* and its deciding vote), Justice Douglas (another *Cohen* majority vote), and Justice Black (of "no-law-means-no-law" fame) are all gone. They were replaced by Justices Powell, Rehnquist, and Stevens—all part of the majority upholding FCC action against indecency in *Pacifica*.

However, the FCC treats *fuck* inconsistently. The resulting arbitrariness of decision-making chills speech. FCC procedures compound concerns that new speech vigilantes are influencing the entire direction of broadcast discourse. With taboo language at issue, the concentration of power over words into the hands of speech zealots guarantees greater restriction. Simply ask comedian George Carlin.

1. *Pacifica and a pig in the parlor*

George Carlin's now infamous monologue "Filthy Words" spawns indecent speech regulation in *FCC v. Pacifica Foundation*.[180] At 2:00 pm on Tuesday, October 30, 1973, a New York City radio station played a recording of Carlin's comedy routine about the seven "words that you can't say."[181] *Fuck* and *motherfucker* made his short list.[182] One parent, who was driving with his son, heard the broadcast and wrote a letter complaining to the FCC. The complaint was forwarded to the radio station for a response. In its response, Pacifica defended the monologue as a program about contemporary society's attitude toward language.[183] Additionally, the station had advised listeners of the "sensitive language" to be broadcast.[184] The FCC issued an order granting the complaint and holding that the station "could have been the subject of administrative

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[180] 438 U.S. 726 (1978).
[181] *Pacifica*, 438 U.S. at 729-30.
[182] The other five were: shit, piss, cunt, cocksucker, and tits. *Id*. at 751 (appendix containing transcript). There were originally only six dirty words when Carlin debuted the routine in Milwaukee, Wisconsin at a lakefront festival. On July 21, 1972, Carlin was arrested and charged with disorderly conduct. The complaint alleged that Carlin used the following words (fuck, fucker, mother-fucker, cock-sucker, asshole, and tits) while performing before a large gathering including minor children ranging from infancy to the upper teens. The complaint also alleged that Carlin used language tending to create or provoke a disturbance by stating "I'd like to fuck every one of you people out there." *See George Carlin's Milwaukee Six*, *in* MALEDICTA II, at 40, 40-41 (1978).
[183] *Pacifica*, 438 U.S. at 729-30.
[184] *Id*. at 730.

sanctions."[185] Seizing upon its statutory authority to restrict "any obscene, indecent, or profane language," the Commission characterized the Carlin monologue as "patently offensive," though not obscene.[186] As "indecent" speech, the Commission concluded it could regulate its use to protect children from exposure to such patently offensive terms relating to sexual or excretory activities and organs.[187] This conclusion is a perfect example of institutional taboo.

The Supreme Court agreed holding that it was permissible for the FCC to impose sanctions on a licensee because the offensive language was indecent—that is, nonconforming with accepted standards of morality.[188] The Court differentiated unprotected obscenity (requiring prurient appeal) from lesser-protected indecent speech.[189] The Carlin monologue was unquestionably speech within the meaning of the First Amendment; the FCC's objection to it was unquestionably content based.[190] Justice Stevens, writing for the majority, even gets the rhetoric right: "But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it

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[185] *Id.*
[186] *Id*. at 731. The Commission's statutory authority provided at that time 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 two years, or both." 18 U.S.C. § 1464 (1976).
[187] *Pacifica*, 438 U.S. at 732.
[188] *See id.* at 739-40. In an attempt to keep the Supreme Court's courtroom clean, Chief Justice Burger tells counsel for the Commission at oral argument that he need not lay out the specific language at issue as the Chief did to Nimmer in *Cohen*. This time it worked because it was precisely the position of the FCC that the words were socially unacceptable and need to be restricted. *See* Levinson, *supra* note 1, at 1365.
[189] *Pacifica*, 438 U.S. at 740.
[190] *Id.* at 744.

constitutional protection."[191] While words like *fuck* "ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment."[192]

However, in the context of broadcasting, twin concerns of privacy and parenting trump the First Amendment. Patently offensive, indecent material broadcast "over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[193] Additionally, broadcasting is uniquely accessible to children. "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[194] Consequently, the Commission's special treatment for indecent broadcasting was reasonable under the circumstances. "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[195]

The Court's justification for regulation of indecent speech is transparent—word taboo. The Court, through the FCC, imposes its own notions of propriety on the rest of us. The dissenters recognized the inconsistency with Cohen immediately.[196] The privacy interests within your home are not infringed when one turns on a public medium, like the radio.[197] Instead, this is an action to take part in public discourse by listening. The voluntary act of admitting the broadcast into your own home, and inadvertently confronting Carlin saying *fuck*, is no different from walking through the courthouse

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[191] *Id.* at 745.
[192] *Id.* at 746.
[193] *Pacifica*, 438 U.S. at 748
[194] *Id.* at 749.
[195] *Id*. at 750-51.
[196] Justice Brennan wrote a dissent joined by Justice Marshall. Justice Stewart also dissented and was joined by Justices Brennan, White, and Marshall.
[197] *Pacifica*, 438 U.S. at 764-65 (Brennan, J., dissenting).

corridor and seeing Cohen wearing *Fuck*.[198] Just as you can avert your eyes from the offensive jacket, you can hit the off button on the radio.

What of the potential presence of children rationale? The interests of the "unoffended minority" who want to hear the dirty words are ignored in favor of majoritarian tastes.[199] Justice Brennan clearly understood the folly of this. He notes that parents, not the government, have the right to decide what their children should hear. "As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words."[200] FCC censorship protects neither privacy nor parental rights while sacrificing First Amendment rights. As Brennan reminds us, even though a pig may be in the parlor, you don't have to burn down the house to roast it.[201]

2. *Powell, profanity, and the new speech vigilantes*

Following *Pacifica* and the Supreme Court's abdication of indecency to the FCC, the Commission has tried to keep our parlors "swine-free" for over thirty years. However, the inherent problem of proscribing speech based on its content, the Commission's inconsistent rulings, the resilience of broadcast personalities, and the rise

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[198] *Id.* at 765.
[199] *Id.* at 767.
[200] *Id.* at 770. This is certainly the parenting approach I have taken in raising my daughter with no cataclysmic effects.
[201] *Id.* at 766.

of new forms of media, all contribute to the FCC's inability to eradicate indecency. The speech vigilantes are still at it though—armed with new weapons to extinguish *fuck*.[202]

With the so-called shock jocks of morning radio trending toward more explicit programming, the FCC released a revised Policy Statement on Indecency in 2001.[203] The Policy Statement retains FCC regulatory basics such as: the safe harbor period from 10:00 P.M. to 6:00 A.M., concern for children, and empowering parental supervision over them.[204] The Policy Statement also articulates a two-part test to define indecent broadcasting. First, the material must relate to sexual or excretory organs or activities.[205] If so, then the FCC determines if the material is patently offensive as measured by community standards for the broadcast medium.[206] The subjectivity involved in applying a standard made up of vague terms that are in turn defined by equally vague terms certainly chills speech.[207] Moreover, the process is subject to manipulation by a vocal minority that can fashion a community standard for the broadcast medium that doesn't reflect the true measure of tolerance for taboo language.[208]

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[202] *See* Clay Calvert, *The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 about Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325, 325 (2005) (describing the FCC as launching an "all out assault on indecent speech" in 2004 with major opinions and record-breaking fines); John Garziglia & Micah Caldwell, *Warning: Not for the Kids*, LEGAL TIMES, Apr. 11, 2005, at 54.
[203] *See* Industry Guidance on the Commissions Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, File No. EB-00-IH-0089, FCC 01-90, Policy Statement (adopted Mar. 14, 2001).
[204] *Id.* at 2-3.
[205] *Id*. at 4.
[206] *Id.*
[207] Professor Calvert squarely identifies this basic principle: the vaguer the definition, the greater the government censorship. *See* Calvert, *supra* 202, at 347-49; *see also* Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 GA. ST. U. L. REV. 671, 701 (2002) (stating vague terms such as "indecency" and "offensive" chill free expression).
[208] Because the FCC pegs indecency to a contemporary community standard, it often uses

You only need to look at two recent examples of television broadcasting of the word *fuck* to appreciate the problems of FCC indecency regulation—Bono at the Golden Globe Awards and Tom Hanks at Normandy. The poster child for subjectivity of the FCC and *fuck* incidents is U2's lead singer Bono. During the 2003 Golden Globe Awards, Bono accepted the award for Best Original Song in a Motion Picture[209] with excitement: "This is really, really *fucking* brilliant."[210] The statement was delivered live on the East coast, but was bleeped later on the West coast.[211] Initially, there were few complaints to the FCC. Of the 234 total complaints received, 217 were part of an organized campaign launched by the Parents Television Council (PTC).[212] FCC

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the number of citizen complaints against a broadcast as a strong indicator that the contemporary community standard was breached by indecent material. If a well-funded pro-censorship group, like the Parents Television Council, churns the numbers of complaints both the community standard and speech regulation are not truly representative. For example, in an FCC action against Fox in 2004 based upon an episode of "Married by America," the FCC specifically noted 159 complaints against a single episode. This large number, however, actually turned out to be only 90 because duplicates were sent to multiple staff members. All but 4 of the 90 were identical. Only one complaint mentioned actually seeing the program. The vast remainder of the 90 was generated by a PTC email campaign. *See* Calvert, *supra* note 202, at 332-33. In 2004, FCC Chairman Michael Powell publicly justified increased indecency enforcement due to growing concerns expressed by the large numbers of complaints filed. *See* FCC Chairman Michael K. Powell, Testimony on Indecency, Before the S. Comm. on Commerce, Science, and Transp., Feb. 11, 2004, at 2, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A2.pdf.

[209] The song was "The Hands That Built America." The film was GANGS OF NEW YORK (Miramax Films 2002).

[210] *See* Susan Crabtree, *Banning the F-Bomb*, DAILY VARIETY, Jan. 14, 2004, at 66 (quoting Bono).

[211] *See* Jim Rutenberg, *Few Viewers Object as Unbleeped Words Spread on Network TV*, N.Y. TIMES, Jan. 25, 2003, at B7.

[212] *Id.*; *see* In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, FCC 04-43, 2003 WL 22283544, at *1 n.1 (F.C.C.), 18 F.C.C.R. 19859 (Oct. 3, 2003) [hereafter "Golden Globe I"]. The PTC is a perfect example of the way word taboo is perpetuated. The group's own irrational word fetish—which they try to then impose on others—fuels unhealthy attitudes toward sex that then furthers the taboo status of the word. *See supra*

Enforcement Bureau Chief David Solomon issued a decision of no liability on the part of the broadcasters because the Policy Statement, as a threshold matter, requires indecent speech to describe sexual or excretory organs or activities.[213] Solomon concluded that Bono used *fucking* as an adjective. His use did not describe sex or excretory matters, but was a use of *Fuck*[2] having no intrinsic definition at all.[214] Moreover, a fleeting use of *fuck*—even if intended in a sexual way—was considered nonactionable under FCC precedent.[215]

Despite the reasonableness of Solomon's decision, special interest groups like the PTC lobbied the Commissioners to reverse the opinion and cleanse the airwaves of this type of taboo language. The PTC quickly had the ear of FCC Chairman Michael Powell.[216] Powell made repeated public statements that *fuck* was coarse, abhorrent, and profane.[217] On March 18, 2004—over a year after the incident—the Commission granted

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notes 119-121 and accompanying text (describing this taboo effect). The PTC has even created a pull-down, web-based form that allows people to file an instant complaint with the FCC about specific broadcasts, apparently without regard to whether you actually saw the program or not. *See, e.g.*, FCC Indecency Complaint Form, https://www.parentstv.org/ptc/action/sweeps/main.asp (last visited Feb. 10, 2006) (allowing instant complaints to be filed against episodes of NCIS, Family Guy, and/or The Vibe Awards). This squeaky wheel of a special interest group literally dominates FCC complaints. Consider this data. In 2003, the PTC was responsible for filing 99.86% of all indecency complaints. In 2004, the figure was up to 99.9%. Calvert, *supra* note 202, at 330.

[213] *See Golden Globe I*, *supra* note 212, ¶ 5.

[214] *Id.*; *see supra* notes 54-58 and accompanying text (describing *Fuck*[1] and *Fuck*[2]).

[215] *Golden Globe I*, *supra* note 212, ¶ 6.

[216] *See* Clay Calvert, *Bono, The Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Decency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 71-71 (2004) (describing personal correspondence between Powell and PTC President Brent Bozell).

[217] *See, e.g.*, Susan Crabtree, *You Say It, You Pay*, DAILY VARIETY, Jan. 15, 2004, at 8 (quoting Michael Powell: "I personally believe that it is abhorrent to use profanity at a time when we are very likely to know that children are watching TV. It is irresponsible for our programmers to continue to try to push the envelope on a reasonable set of

the PTC's application for review and concluded that Bono's use of *fucking* was not only indecent, but also profane.[218] In reaching both conclusions, the Commissioners reversed former FCC determinations further mucking up indecency law.

In order to find Bono's statement indecent, the Commissioners had to find that the phrase "really *fucking* brilliant" both described sexual activities and was patently offensive.[219] On both these elements, the Commissioners do an about-face from previous FCC rulings. First, they find that any use of the word *fuck* is *per se* sexual: "[W]e believe that, given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[220] This conclusion is—of course—*per se* wrong. Given the research by linguists distinguishing between *Fuck*[1] and *Fuck*[2], the conclusion that the sentence—This is really, really *fucking* brilliant—"depict[s] or describe[s] sexual activities"[221] is simply not credible.[222] It does, however, reflect the psycholinguists' contention that the taboo status of *fuck* is linked at a subconscious level to buried feelings about sex, regardless of how the word is actually used.[223]

Nonetheless, having cleared the first part of their own definition of indecency, the Commissioners turned to the second part of indecency and a finding that based on three

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policies that try to legitimately balance the interests of the First Amendment with a need to protect our kids."); Levinson, *supra* note 1, at 1383 (according to Powell, "if the F-word isn't profane, I don't know what word in the English language is.").

[218] In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, FCC 04-43, 2004 WL 540339 (F.C.C.), 19 F.C.C.R. 4975 (Mar.18, 2004) (hereafter "Golden Globe II").

[219] *Id.* ¶ 6.

[220] *Id.* ¶ 8.

[221] *Id.*

[222] *See supra* notes 54-58 and accompanying text (describing *Fuck*[1] and *Fuck*[2]).

[223] *See supra* notes 102-105 and accompanying text (explaining the psycholinguists' position that fuck is taboo because of subconscious feelings about sex).

factors, the use of *fucking* was patently offensive.[224] First, the description was "explicit or graphic" apparently by the Commissioners' fiat: "The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language."[225] How Chairman Powell can say this when *Justice* Harlan said the opposite in *Cohen* is nothing short of amazing.[226] But there was no need for wordsmithing on the second factor, whether the use was repeated. The Commission simply reversed itself: "While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."[227] Having eviscerated its own law of indecency, the FCC finding that the use of *fucking* was "shocking"—the final element of patent offensiveness—is not.[228]

The permanent damage inflicted to the already shaky foundation of indecency law remains to be seen. Whatever its reach, the Commissioners were so determined to stop people from saying *fuck* on TV that they applied a whole new, independent ground for punishment—profanity.[229] This misapplication is, of course, inconsistent with our understanding of both language and law. According to linguistics, profanity is a special category of offensive speech that means to be secular or indifferent to religion as in

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[224] Three principal factors govern a finding of patent offensiveness: (1) the explicit or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells or repeats at length description or depiction; and (3) whether the material appears to pander, titillate, or be presented for shock value. *Golden Globe II*, *supra* note 218, ¶ 7.
[225] *Golden Globe II*, *supra* note 218, ¶ 9.
[226] *See Cohen*, 403 U.S. at 25 ("[I]t is nevertheless often true that one man's vulgarity is another man's lyric.").
[227] *Golden Globe II*, *supra* note 218, ¶ 12.
[228] *Id.* ¶ 9.
[229] *See id.* ¶¶ 14-16.

"Holy shit," "God damned," or "Jesus Christ!"[230] The Commissioners even recognized that their own "limited case law on profane speech has focused on what is profane in the sense of blasphemy."[231] Nonetheless, the Commissioners found *fuck* profane on the strength of common knowledge that profanity means "vulgar, irreverent, or coarse language"[232] and the Seventh Circuit's "most recent decision defining profane," a 1972 pre-*Pacifica* case![233] Luckily, the Commissioners threw in the last definition of profane from *Black's Law Dictionary* or one might have thought they were stretching.[234] From now on broadcasters are on notice that *fuck* is also profanity—at least between 6:00AM and 10:00PM.[235]

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[230] *See* JAY, *supra* note 70, at 191; Levinson, *supra* note 1, at 1389.
[231] *Golden Globe II*, *supra* note 218, ¶ 14; *see also* Statement of Chairman Michael K. Powell, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 2004 WL 540339 (F.C.C.), 19 F.C.C.R. 4988, 4988 (Mar. 18, 2004) (noting this was the first time the profanity section was applied to *fuck* and stating that "today's decision clearly departs from past precedent"); Statement of Commissioner Kathleen Q. Abernathy, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 2004 WL 540339 (F.C.C.), 19 F.C.C.R. 4989, 4989 (Mar. 18, 2004) ("Rather, 'profane' language has historically been interpreted in a legal sense to be blasphemy.").
[232] *Golden Globe II*, *supra* note 218, ¶ 13.
[233] *See* Tallman v. United States, 465 F.2d 282, 286 (7th Cir. 1972) ("'Profane' is, of course, capable of an overbroad interpretation encompassing protected speech, but it is also construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance."). That the Commissioners were compelled to dig up this stale definition of profane based on nuisance and offer it as authority is nothing short of amazing.
[234] *See Golden Globe II*, *supra* note 218, ¶ 13 n.34 (citing *Black*'s last definition of profane). Legitimate concerns about lack of fair notice could make the FCC's new profanity definition subject to void-for-vagueness challenges. *See* Calvert, *supra* note 202, at 348.
[235] *Id.* ¶ 14. Professor Levinson kindly refers to the miscategorization of *fuck* as "profane" as a "mistake." *See* Levinson, *supra* note 1, at 1389. Professor Calvert finds it symptomatic of our broader culture wars and political opportunism. *See* Calvert, *supra* note 216, at 75-85.

There you have it. Word taboo drives the FCC's final conclusion that Bono's single use of the phrase "really *fucking* brilliant" is indecent because any use of *fuck* is *per se* sexual and patently offensive; it is patently offensive because it is *per se* vulgar and shocking. It is also profane because it is vulgar and coarse. Luckily, the broadcasters, while subject to an enforcement action, escape a penalty because of a lack of notice.[236] But there is nothing fortunate about what is really going on here. To enforce their preference, the Commissioners engage in bizarre word-play. "Indecent," "patently offensive," "vulgar," and "profane" are loosely defined in an interlocking fashion that blurs any real distinction except the obvious one.[237] The Commissioners censor *fuck* because it's a word that they don't like to hear.[238] That is, unless it's in a good movie or on cable.

Compare *Golden Globe II* with the Commissioners' recent treatment of *fuck* in *Saving Private Ryan*[239] to see the arbitrariness in their decision-making and the chilling effect it generates. On November 11, 2004, the ABC Television Network decided to air

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[236] *Golden Globe II*, *supra* note 218, ¶ 15.

[237] *See* Michael Botein, *FCC's Crackdown on Broadcast Indecency*, N.Y.L.J., Sept. 13, 2005, at 4 (describing the FCC's penchant for piling one inference upon another to imply indecency). With profanity in particular, there is also the danger that the category will sweep more broadly than indecency given its link to vague terms such as "vulgar" and "coarse." *See* Calvert, *supra* note 216, at 87.

[238] As if this regulatory word play needs punctuation, consider this exclamation point. Buried in footnote 22 of the Commissioners' Opinion and Order is the statement: "we agree with the Bureau's conclusion that the language was not obscene since it did not meet the three-prong test set forth in Miller v. California . . .holding that . . . the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law." *Golden Globe II*, *supra* note 218, ¶ 8 n.22. Yet the Commissioners found *fucking* "does depict or describe sexual activities" and was "patently offensive." The internal inconsistency is amazing. *Id*. ¶¶ 8-9.

[239] SAVING PRIVATE RYAN (DreamWorks SKG, Paramount Pictures Corp., & Amblin Entertainment, Inc. 1998).

the award-winning World War II film as a special Veterans Day presentation.[240] The movie's realistic re-creation of a military mission to rescue a young soldier included violent visuals and many taboo words such as *fuck*. In the wake of the Commission's reversal on *fuck*'s treatment at the Golden Globe Awards, 66 ABC affiliates refused to broadcast the film because of the chilling effect of potential FCC penalties.[241]

As expected, following the broadcast the American Family Association and others filed complaints with the FCC about the repeated use of *fuck* in the film.[242] This should have been a no-brainer given the Commissioners' treatment of Bono's *fucking* slip less than a year before. Applying *Golden Globe II*, the FCC found the complained-of use of *fuck* in *Saving Private Ryan* to be *per se* sexual and therefore within the scope of indecency regulation.[243] *Fuck* as used in the film was also patently offensive because (1) it was *per se* explicit and graphic (once again because the Commissioners say so) and (2) *fuck* was used repeatedly.[244] However, the opinion "saves" *Private Ryan* from censorship because its use of *fuck* did not pander, titillate, or reflect shock value. Rather, the expletives uttered by these actor/soldiers were in the context of realistic reflections of

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[240] In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," Memorandum Opinion and Order, FCC 05-43, ¶ 1, 2005 WL 474210 (F.C.C.), 20 F.C.C.R. 4507 (Feb. 28, 2005) [hereafter *Saving Private Ryan*].

[241] *See id.* ¶ 4; Botein, *supra* note 237, at 4 (noting confusion from FCC decisions as the reason the 66 ABA affiliates decided not to show the movie); Calvert, *supra* note 202, at 350 (noting fear of fines and puritanical media environment as reason for dropping the film). Who could blame them? With the Commissioners' conclusion in *Golden Globe II* that any use of *fuck* was inherently descriptive of sexual activities and patently offensive as vulgar and shocking language, airing the film with its repeated use of *fuck* and other taboo words would literally be taunting the FCC to fine them.

[242] *Saving Private Ryan*, *supra* note 240, ¶¶ 1, 4.

[243] *Id*. ¶ 8.

[244] *Id*. ¶13 (assuming *arguendo* that first and second components of patently offensive test were met).

their reactions to unspeakable conditions and peril—or so said the Commissioners.[245] Compelled to distinguish, the Commissioners wrote that the context of Bono's utterance of the word *fucking* during a live awards show was shocking, while the same language—only more of it—in *Saving Private Ryan* was not.[246]

This position is incredible. The "shock" factor of the patent offensiveness inquiry is already the most subjective of the indecency elements and bound to yield differences of opinion.[247] Each of us hearing the word *fuck* come out of the television set is either shocked or not.[248] It shouldn't matter whether *fuck* is said by an activist or an actor, rock star or soldier, Grammy or Oscar winner, Bono or Tom Hanks. And it shouldn't matter whether it's said on an awards show or in a war movie—*fuck* should be treated the same. Otherwise, it's the five FCC Commissioners, imposing their personal tastes and preferences, proclaiming when *fuck* has value and can be heard and when it doesn't and is banned. This type of arbitrary process is subject to abuse and should not be applied to protected speech.[249]

The FCC's renewed interest in *fuck* illustrated by *Golden Globe II* and *Saving Private Ryan* also illuminates the structural problems of speech regulation. A single

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[245] *See id*. ¶¶ 13-14.
[246] *Id*. ¶ 18; *see* Botein, *supra* note 237, at 4 (describing FCC's vague rationale).
[247] *See* Jacob T. Rigney, *Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 FED. COMM. L.J. 297, 324 (2003) (describing how the third offensiveness factor on pander, titillate, and shock is the most subjective of all).
[248] I think the answer here is "not." As others have noted, "common discourse in our society, for better or worse, has moved far beyond what the FCC indecency standard appears to require for television and radio." Garziglia & Caldwell, *supra* note 202, at 54.
[249] The arbitrariness of *Saving Private Ryan* only serves to further chill speech by increasing uncertainty as to when taboo language can be used. *See id.*

informal complaint—even one without supporting documentation triggers the process.[250] After forwarding the complaint to the broadcaster for response, the FCC then decides the indecency case without formal pleadings or hearings, based upon non-record evidence.[251] Because there is no hearing requirement when the FCC imposes a fine, it can simply issue a notice of apparent liability; the broadcaster must either pay it or refuse to obey triggering the Justice Department to file a civil suit to collect the fine.[252] Given the explosion of complaints that have been lodged in recent years,[253] the litigation option is unattractive to both the FCC and broadcasters.

Increasingly, the FCC relies on consent decrees with broadcasters after issuing a notice of apparent liability.[254] However, if the Commissioners don't like the results, as in *Golden Globe I*, they can rehear the matter and reverse—along with long-standing procedural precedents such as the fleeting utterance and live utterance doctrines and justified reliance on previous staff precedents.[255] The long, expensive, and arbitrary process pressures broadcasters to settle rather than defend speech.[256] When the only

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[250] *See* Botein, *supra* note 237, at 4 (describing the simple process and the post-2004 elimination of documentation requirement).
[251] *See id.* ("[I]n many situations [the FCC] simply relies upon the complaint—usually without a tape or transcript—and finds the material indecent or not, and enters an order.").
[252] *Id.*
[253] The FCC received only 111 total indecency complaints in 2000 and a slightly higher 346 complaints in 2001. Then there was a dramatic upsurge in 2002 (13,922), 2003 (202,032) and in 2004 an amazing 1,068,802 complaints. Calvert, *supra* note 202, at 329.
[254] *See* Botein, *supra* note 237, at 4.
[255] *See id*. (describing recent erosion of recognized defenses); *Golden Globe II*, *supra* note 218, ¶¶ 12 (fleeting and live utterances), 15 (profanity precedents).
[256] Calvert, *supra* note 216, at 65 ("Broadcasters also may be more willing to rapidly settle disputes with` the FCC over alleged instances of indecent broadcasts rather than contest and fight the charges in the name of the First Amendment's protection of free speech."); *see* Calvert, *supra* note 202, at 352-53 (describing Viacom's capitulation to a

potential defenders of *fuck* and free speech engage in self-censorship, the intended balancing of speech interests erodes. This is magnified by the rise of special interest groups with word fetish and web platforms to make instant filing of documented complaints quick and easy, allowing a small minority to impose their speech preferences on the rest of us.[257]

Of course, there is also a glaring underinclusiveness with any attempt at speech regulation by the FCC. Its indecency regulations only apply to free, broadcast media.[258] The rise of cable television and satellite radio provide attractive alternatives to broadcast personalities like Howard Stern who want to be free of FCC harassment.[259] Given the dramatic number of new subscriptions to Sirius Satellite Radio[260]—Stern's new media host—the FCC's preoccupation with *fuck* is out of step with the perceptions of millions of Americans. In fact, commentary by the Commissioners themselves identifying increased media tolerance of taboo words as justification for increased FCC vigilance[261]

$3.5 million dollar consent decree rather than fight the dispute for free speech); Botein, *supra* note 237, at 4 (noting settlement pressure).

[257] *See* Calvert, *supra* note 202, at 328-35 (discussing at length the power of a vocal minority to flood the FCC with indecency complaints).

[258] *See* Garziglia & Caldwell, *supra* note 202, at 54 (noting that competing media like cable, satellite, and Internet are not subject to indecency regulation); see also Denver Area Educ. Telecomm. Consortium Inc. v. FCC, 518 U.S. 727 (1996).

[259] Stern reportedly left broadcasting subject to regulation for the new satellite radio domain to escape the FCC. *See* Calvert, *supra* note 202, at 357. The existence of these media alternatives may also contribute to the rise in *fuck* use. University of Colorado Professor Lynn Schofield Clark argues that "in an era when many Americans receive all TV programming via cable, the wider latitude enjoyed by cable TV channels has 'put pressure' on broadcast channels, contributing to the word's spread." Aucoin, *supra* note 407, at B13. Media flight, however, is the ultimate self-censorship.

[260] As of December 31, 2005, Sirius reported it had exceeded its target subscriptions with 3.3 million, up from 1.1 million at the end of 2004. *Sirius cash: Lots of stock for shock jock*, NEWSDAY, Jan. 6, 2006, at A13.

[261] *See, e.g.*, FCC Chairman Michael K. Powell, Testimony on Indecency, Before the S. Comm. on Commerce, Science, and Transp., Feb. 11, 2004, at 1, *available at*

further demonstrates that the Commission is out of touch: most people are simply not shocked by *fuck* anymore.[262]

The new speech vigilantism reflected in the FCC's recent treatment of *fuck* also finds friends in Congress. After the Bono *fuck* incident and initial Bureau opinion, Congressmen Doug Ose[263] (R-Cal.) and Lamar Smith (R-Tex.) introduced a bill that would define as profane and give authority to the FCC to punish any use of the words *shit*, *piss*, *fuck*, *cunt*, and *asshole*, and "phrases" *cock sucker*, *mother fucker*, and *ass hole*.[264] While this bill never emerged from committee, the FCC apparently decided to seize this power anyway—at least over *fuck* and *motherfucker*.[265] While the role of

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http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A2.pdf (citing the coarseness of TV and radio creating public outrage thereby justifying "punishing those who peddle indecent broadcast programming").

[262] Professor Lynn Schofield Clark contends, "It is becoming more common in everyday conversation." Aucoin, *supra* note 407, at B13. Other commentators on American culture agree. Lance Morrow contends that it is possible for *fuck* to become permissible. Morrow said, "I think that might happen. Somehow the whole sociology of *fuck* has changed." *Id.*

[263] It is interesting that Ose only objects to the language when used in free broadcast media. "When I'm subscribing to cable, I get it, OK. But when I watch free broadcast TV, me and my kids should not have to hear it." Crabtree, *supra* note 210, at 66 (quoting Ose).

[264] *See* H.R. 3687, 108th Cong. (2003) (defining "profane to include: shit, piss, fuck, cunt, asshole, cock sucker, mother fucker, and ass hole, compound use (including hyphenated compounds) of such words and phrases with each other or with other words or phrases, and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms"). Interestingly, George Carlin's list of filthy words at issue in *Pacifica* differs only in the inclusion of "tits." The so-called Clean Airwaves Act appears to have died in Congress—a fitting end to censorship—though not all would agree with me. *Compare* Stephanie L. Reinhart, Note, *The Dirty Words You Cannot Say on Television: Doe the First Amendment Prohibit Congress from Banning All Use of Certain Words?*, 2005 U. ILL. L. REV. 989 (2005) (concluding Clean Airwaves Act is unconstitutional), *with* Jennifer L. Marino, Comment, *More "Filthy Words" But No "Free Passes" for the "Cost of Doing Business": New Legislation is the Best Regulation for Broadcast Indecency*, 15 SETON HALL J. SPORTS & ENT. L. 135 (2005) (taking the opposite position).

[265] *See supra* notes 229-235 and accompanying text (discussing FCC extension of

censor may not be palatable for Congress, there was broad support for last year's legislation that bumped up FCC indecency fine capacity.[266] The power to impose increasingly crippling fines on broadcasters for even inadvertent use of *fuck* is yet another FCC tool to extort self-censorship.[267]

What then does the law permit? *Fuck* the Draft.[268] *Fuck* Hitler.[269] *Fuck* the ump.[270] *Fucking* orders.[271] *Fucking* brilliant.[272] *Fucking* genius.[273] *Fuck* the FCC.[274] The easier question is what *should* it protect—all of them. However, the powerful effect of word taboo is at work. There is no accurate way to gauge where Everyman is on the scale of indecent language. Nonetheless, five unelected FCC Commissioners—each individually affected by word taboo—police our radios and televisions supposedly in our interests. They are empowered by a procedural system that exaggerates a handful of complaints into a frenzied mandate. The FCC then institutionalizes the taboo through an arbitrary

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profanity definition to *fuck*).

[266] *See* Garziglia & Caldwell, *supra* note 202, at 54 (noting congressional support raising FCC fine to $500,000 per violation).

[267] *See* Calvert, *supra* note 202, at 351-52 (listing self-censorship examples induced by fear of FCC fines).

[268] Yes, says the Supreme Court in *Cohen*.

[269] Yes, says the FCC in *Saving Private Ryan*. Steamboat Willie has the line in the movie. Memorable Quotes from Saving Private Ryan (1998), http://www.imdb.com/title/tt0120815/quotes

[270] No, says the Supreme Court in *Pacifica.*

[271] Yes, says the FCC in *Saving Private Ryan*. Tom Hanks aka Captain Miller says: "We're not here to do the decent thing, we're here to follow fucking orders!". Memorable Quotes, *supra* note 269.

[272] No, says the FCC in *Golden Globe II.*

[273] Yes, says the FCC in *Saving Private Ryan*. Memorable Quotes, *supra* note 269 ("Lt. Dewindt: Yeah, Brigadier General Amend, deputy commander, 101st. Some fucking genius had the great idea of welding a couple of steel plates onto our deck to keep the general safe from ground fire.").

[274] I certainly hope so.

process that either censors *fuck* outright or chills broadcasters into self-censorship.[275] What the regulators don't appreciate is that *fuck*, as taboo, is only strengthened by their actions.

C. *Genderspeak and Fuck in the Workplace*

The use of *fuck* in the workplace impacts the law in some interesting ways. Quite simply, men swear more than women. This means, of course, men say *fuck* more—especially on the job. Depending upon the variant of *fuck* that is used, anti-discrimination law can be implicated. This leads to a potential legal conflict: protected speech versus protecting workers. Just as with the uncertainty created by the FCC's *fuck* regulation, ambiguity over Title VII's reach risks our language rights being diluted by word taboo.

Men and women communicate differently. Analyzing these differences has produced a flurry of contemporary literature focusing on so-called "genderspeak"[276] and sociolinguistic research into language and gender.[277] Some genderspeak differences are subtle.[278] Others, like the use of taboo language, are hard to ignore. Gender-ly speaking,

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[275] Commentators who conclude that restrictions on the use of *fuck* do not amount to chill because "these words and phrases can be substituted with less offensive ones that still convey the intended message" or that "their use will not be 'chilled' because they are not used" commonly now on television, fundamentally misunderstand what chill is (and probably have a future on the FCC). *See, e.g.*, Marino, *supra* note 264, at 169-71.

[276] *See generally* DIANA IVY & PHIL BACKLUND, GENDERSPEAK: PERSONAL EFFECTIVENESS IN GENDER COMMUNICATION (3d ed. 2004); SUZETTE H. ELGIN, GENDERSPEAK: MEN, WOMEN AND THE GENTLE ART OF VERBAL SELF-DEFENSE (1993).

[277] Language and gender research is often referred to as "LGR" in linguistics literature. As feminist approaches to the study of law have greatly enriched our discipline, recent feminist approaches to LGR demonstrate the complexity of the language-gender relationship. Karyn Stapleton, *Gender and Swearing: A Community Practice*, WOMEN & LANGUAGE, Fall 2003, at 22, 22.

[278] For example, research shows that women are more tentative in their communication than men, often through the use of intonation, tag questions, qualifiers, and disclaimers. *See* IVY & BACKLUND, *supra* note 276 at 184-86.

men use more taboo language than women.[279] Research conducted among Midwest college students yields this non-stunning conclusion: "Female students recognize fewer obscenities, use fewer obscenities, and use them less frequently than males."[280] In particular, men use *fuck* more than women—significantly more.[281] There was a 40% greater use of *fuck* by men and 60% greater use of *motherfucker*.[282]

The explanation for this gender difference is harder to pinpoint. One proffered reason is a link to the military. Professor Allen Read linked the disorganization of modern life caused by World War I to the explosion in the use of *fuck* by soldiers.[283]

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[279] *See* Stapleton, *supra* note 277, at 22-23 (surveying linguistic literature and noting general belief that women swear less as well as more recent studies exploring "the complex and situation specific nature of 'women-swearing.'"); Jean-Marc Dewaele, *The Emotional Force of Swearwords and Taboo words in the Speech of Multilinguals*, 25 J. OF MULTILINGUAL & MULTICULTURAL DEV. 204, 206 (2004) (reporting research on "S-T words" (swearwords and taboo words) finding males and those under 35 used more taboo words); Robert A. Kearney *The Coming Rise of Disparate Impact Theory*, 110 PENN ST. L. REV. 69, 89-90 ("Men, in fact, simply may be more vulgar and profane than women. In all-male work environments, men often use sexual profanity as a means of emasculating each other. In other words, sexuality is the language of insult."); IVY & BACKLUND, *supra* note 276 at 171 (summarizing research from 2000 showing that men in the study were more likely than women to use highly aggressive terms to refer to sexual intercourse).

[280] Wayne J. Wilson, *Five Years and 121 Dirty Words Later*, MALEDICTA V, at 243, 248 (1981).

[281] *See* Blount, *supra* note 60, at xiv-v ("Women use fuck . . . a lot more than they used to, but men still use it more often.").

[282] *See* Wilson, *supra* note 280, at 252 tbl.1 (Frequency of Using Dirty Words expressed in percentages). Wilson conducted two surveys, one in 1975 and another in 1980, where he asked college students to rate their personal use of certain taboo words. *Id*. at 244. Male use of *fuck* was 84% use in 1975 and 82% in 1980 compared to female use of *fuck* at 47% in 1975 and 50% in 1980. Male use of *motherfucker* was constant at 67% in both 1975 and 1980; female use was similarly constant, but at 26% in 1975 and 28% in 1980. By way of comparison, *cunt* clearly came out the more taboo word in these surveys. Male use of *cunt* dropped from 1975 to 1980 from 53% to 45% whereas female use of *cunt* rose slightly from a mere 5% to 7%. *Id.* at 252 tbl.1.

[283] Read, *supra* note 2, at 274; s*ee* DOOLING, *supra* note 3, at 9 (describing increased use stems from military and WWI); SAGARIN, *supra* note 69, at 142 ("In all male circles, and in the armed services, the number of times in which the word [fucking] could be worked into a conversation would be the criterion by which one would judge the masculinity, the

"[T]he unnatural way of life, and the imminence of a hideous death, the soldier could find fitting expression only in terms that according to teaching from his childhood were foul and disgusting."[284] Gender identity and male power have also been linked to men using more taboo language.[285] While women are expected to exhibit control over their thoughts, men are free to "exhibit hostile and aggressive speech habits."[286] Whatever the ultimate reason for the gender difference, it impacts the workplace.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[287] Interestingly, the statute doesn't expressly prohibit sexual (or racial) harassment. However, with its landmark decision in *Meritor Savings Bank v. Vinson*,[288] the Supreme Court recognized that a hostile or abusive work environment could establish a Title VII violation of discrimination based on sex.[289] Title VII is violated when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

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sophistication, or the freedom from taboos of the speaker.").

[284] Read, *supra* note 2, at 275.

[285] JAY, *supra* note 70, at 165 ("Ultimately, cursing depends on both gender identity and power; males tend to have more power to curse in public than females."); Stapleton, *supra* note 277, at 22 ("Given that taboos play an important role in maintaining the status quo of a society, women have traditionally been more fully subject to their effects than have men.").

[286] JAY, *supra* note 70, at 165; *see* ELGIN, *supra* note 276, at 218-19 (noting "decent women" would never soil their lips with such foul words); Stapleton, *supra* note 277, at 22 ("Firstly, swearing, or use of expletives is perceived as an intrinsically forceful or aggressive activity.").

[287] 42 U.S.C. § 2000e-2(a)(1).

[288] 477 U.S. 57 (1986).

[289] *Meritor*, 477 U.S. at 64-65.

working environment."[290] Further attempts by the Court to precisely define the parameters of a hostile work environment claim have proved problematic. Nonetheless, from *Meritor* on, a conceptual model of sexual harassment emerges of male workforce domination and female vulnerability to harassment.[291]

This is where *fuck* comes into play. Hostile environment claims under Title VII often include allegations of use of taboo words. Because men use the word *fuck* more often than women, hostile environment allegations involving *fuck* and its variants follow a standard model: a male harasser directs *fuck* comments at a female employee.[292] Title VII, however, is not the "Clean Language Act"[293] "designed to purge the workplace of vulgarity."[294] How then do courts treat claims of verbal sexual harassment involving *fuck*? In general, three specific doctrines are used by the federal courts to determine if words amount to actionable conduct: a gender-specific/gender-neutral test, a sexual/nonsexual test, and a specifically-directed/generally-directed test.[295]

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[290] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
[291] *See* Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 145-49 (2005) (describing MacKinnon's role in advancing sexual harassment theory and law and influence on the Court). Even the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75 (1998), that recognizes the potential for same-sex discrimination, raises the standard of proof in same-sex cases effectively destroying their viability. *See id*. at 159-62.
[292] *See* Kearney, *supra* note 279, at 90 ("Though the evidence is anecdotal, the difference in the way men and women use language is hard to ignore. The legal consequence is also significant. If women are less likely than men to use profanity in the workplace (at least for the reason that they do not choose to use it as the language of insult), is it such a stretch to say that they are also more likely to be offended by it when they witness it?").
[293] Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).
[294] Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (Posner, J.).
[295] *See* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 492-92(1991) (noting the use of "gender-specific terms" and "general sexual terms"); Jamie Lynn Cook, Comment, *Bitch v. Whore: The Current Trend to Define the Requirements of an Actionable Hostile Environment Claim in Verbal Sexual Harassment Cases*, 33 J. MARSHALL L. REV. 465,

The gender-specificity test focuses on whether an offensive verbal statement is gender specific. That is, the comment must be targeted at one gender. If the comment is capable of being directed at either gender, no harassment claim is stated. For example, if a female plaintiff is called a *whore* or *cunt*, such terms are gender-specific and could fall in the actionable category.[296] In contrast, offensive words that could be targeted at either men or women, such as *asshole*, are gender-neutral and would not support a sexual harassment claim.[297]

The sexual/nonsexual test focuses on the sexual nature of verbal harassment. In this sense, sexual does not equate with gender. Rather, it means sexual activity.[298] If the statements were of a nonsexual nature, such as "dumbass" or "pull your head out of your ass," the nonsexual nature would render them nonactionable.[299] Conversely, suggestions that a female employee was in the habit of having oral sex for money, comments about her anatomy, or expressing a desire to have sex with her fall into the sexual nature category and could support a harassment claim.[300]

The third test used by some courts focuses not on the nature of the statement, but to whom it is directed. Offensive comments that are generally directed reflect at best a

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475-83 (2000) (identifying the "gender relation test," a "sexual nature test," and a "personal animosity test").

[296] *See* Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993) (finding obscene name-calling including *bitch*, *slut*, and *cunt* was based on gender); Illinois v. Human Rights Comm'n, 534 N.E.2d 161, 170 (Ill. App. Ct. 1989) (finding *cunt*, *twat*, and *bitch* were gender specific terms). *But see* Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1167 (7th Cir. 1996) (finding repeated "sick bitch" comment not gender-related term).

[297] *See* Browne, *supra* note 295, at 492-93 (providing examples of gender neutral and gender specific language).

[298] *See* Cook, *supr*a note 295, at 479-80 (describing sexual nature test).

[299] *See* Hardin v. S.C. Johnson & Sons, Inc., 167 F.3d 340, 345 (7th Cir. 1999).

[300] *See* Torres v. Pisano, 116 F.3d 625, 632-33 (2d Cir. 1997).

vulgar and mildly offensive environment; statements must be personally directed to create an actionable claim.[301] Even after a finding under the gender-specific or sexual-nature test that statements could rise to the level of verbal sexual harassment, a court might still inquire into whether the statements were specifically directed in order to deny a claim.[302]

When these tests are applied specifically to pure verbal sexual harassment claims—that is, where there is no other contaminating harassing contact—*fuck* fares well. Given what we know from linguistics, the general absence of a sexual meaning in all *Fuck*^{2} and many *Fuck*^{1} situations should shield much use of the word from Title VII claims.[303] This is the case. Those courts applying the gender-specific test hold that *fuck* and *motherfucker* are general expletives that are gender-neutral.[304] Uses of *Fuck*^{2} such as "*fucking* idiot," "stupid *motherfucker*," and "dumb *motherfucker*" are neutral, verbal abuse and nondiscriminatory.[305] Even when *fuck*-based, gender-specific insults are found,

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[301] Spencer v. Commonwealth Edison Co., No. 97 C 7718, 1999 WL 14486, at *8-9 (N.D. Ill. Jan. 6, 1999).

[302] *See, e.g.*, Ptasnik v. City of Peoria, Dep't of Police, 93 Fed. Appx. 904, 908-09 (7th Cir. 2004) (failing to reach question of whether foul language and sexual comments were offensive when it was not directed at plaintiff but other women). *But see Torres*, 116 F.3d at 633 (noting that the fact that statements were not made in plaintiff's presence was of no matter because an employee who knows that her boss is saying things behind her back may reasonably fund the working environment hostile).

[303] *See supra* notes 54-58 and accompanying text (describing difference in *Fuck*^{1} and *Fuck*^{2}).

[304] *See* Angier v. Henderson, No. Civ.00-215(DSD/JMM), 2001 WL 1629518, at *2 (D. Minn. Aug. 3, 2001) (*fuck*, shit, and asshole are gender-neutral profanity); Human Rights Comm'n, 534 N.E.2d at 170 (finding *fuck* and *motherfucker* general expletives); *cf* Rose v. Son's Quality Food Co., No. AMD 04-3422, 2006 WL 173690, at *4 (D. Md. Jan. 25, 2006) (*motherfucker* and "*fuck* her up" were not racially hostile). *But see* Hocevar v. Purdue Frederick Co., 223 F.3d 721, 727, 729 (8th Cir. 2000) (Lay, J., dissenting) (stating that using f-word in virtually every sentence, calling clients *fuckers*, routinely using *fuck* in meetings was offensive enough to state a claim).

[305] *See* Ferraro v. Kellwood, No. 03 Civ. 8492(SAS), 2004 WL 2646619, at *10

such as "*fucking* fat bitch," if the alleged harasser also refers to men with *fuck*-based, gender-specific insults, such as the "*fucking* new guy," the complained-of language does not establish a sex harassment claim.[306] The use of foul language in front of both men and women is not discrimination based on sex.[307] However, comments such as "*fucking* bitch," "dumb *fucking* broads," and "*fucking* cunts" were gender-specific.[308] Judge Fletcher of the Ninth Circuit wrote in *Steiner v. Showboat Operating Company*,[309] "[i]t is one thing to call a woman 'worthless,' and another to call her a 'worthless broad.'"[310]

Application of the sexual/nonsexual test to *fuck* also tends to be favorable. For example, the use of *fuck* and "dumb *motherfucker*" are not considered inherently sexual.[311] Recognizing that *fuck* is used frequently, one district court concluded that the fact the plaintiff was offended was indicative of her sensibilities not sexual harassment.[312] Use of "offensive profanities" that have no sexual connotation such as "you're a *fucking* idiot," "can't you *fucking* read," "*fuck* the goddamn memo," and "I want to know where your *fucking* head was at," as a matter of law cannot make a prima facie case for sexual

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(S.D.N.Y. Nov. 18, 2004) (*fucking* idiot and stupid *motherfucker* are neutral and nondiscriminatory); Naughton v. Sears, Roebuck & Co., No. 02 C 4761, 2003 WL 360085, at *7 (N.D. Ill. Feb. 18, 2003) ("dumb *motherfucker*" and "when the *fuck* are you going to get the product out were neutral verbal abuse).

[306] *See* Hocevar v. Purdue Frederick Co., 223 F.3d 721, 737 (8th Cir. 2000) ("Offensive language was used to describe both men and women.").

[307] *Id.*

[308] *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994); Bradshaw v. Golden Road Motor Inn, 885 F. Supp. 1370, 1380-81 (D. Nev. 1995) (stating "*fucking* bitch" was a gender-based insult).

[309] 25 F.3d 1459 (9th Cir. 1994).

[310] *Id.* at 1464.

[311] *See Hardin*, 167 F.3d at 345 (identifying coarse language including "dumb *motherfucker*" and "when the *fuck* are you going to get the product" as not being inherently sexual comments).

[312] *See* Alder v. Belcan Engineering Servs., Inc., No. C-1-90-700, 1991 WL 494528 (S.D. Ohio Nov. 27, 1991) (comments, including *fuck*, were not of a sexual nature).

harassment.[313] Even the phrase to "go *fuck* himself" is not evidence of a sexual criticism.[314] Similarly, in the same-sex context, the harassing comment "*fuck* me" when uttered by men to men, more often than not has no connection whatsoever to the sexual acts referenced.[315] However, a supervisor who repeatedly refers to an employee as a "dumb *cunt*" is making a sexual remark and is subject to a hostile environment claim.[316]

Irrespective of whether the allegation may be gender-related or sexual in nature, courts routinely require offensive comments to be made "to her face" or "within earshot."[317] Consequently, "*fucking* bitch" is a gender-based insult but would not support a plaintiff's claim where the evidence showed that term was used by a supervisor only when talking with others, not to the plaintiff.[318] Similarly, the statement that an employee looked so good "he could *fuck* her" did not support a hostile work environment claim because it was directed at others, not the plaintiff.[319] Neither *fuck* nor *motherfucker* would support a claim either if the complained of language was not specifically directed, even if the plaintiff overheard it.[320]

Considering men use the word *fuck* more in the workplace, it is not surprising that hostile work environment claims based on *fuck* involve male *fuck*-sayers with female

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[313] *See* Stewart v. Evans, 275 F.3d 1126, 1131-34 (D.C. Cir. 2002).
[314] *See* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1544-46 (10th Cir. 1995). The court also found the comments not gender specific. *Id*. at 1546.
[315] *See* Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997) (stating the despite explicit sexual content in a same-sex harassment case that "fuck me," "suck my dick," and "kiss my ass" have no connection with the sex acts referenced); Lack v. Wal Mart Stores, Inc., 240 F.3d 255, 261 n.8 (4th Cir. 2001) (accord).
[316] *See Torres*, 116 F.3d at 632.
[317] *See Bradshaw*, 885 F. Supp. at 1381.
[318] *Id*. at 1380-81.
[319] *See Ptasnik*, 93 Fed. Appx. at 909.
[320] *See Spencer*, 1999 WL 14486, at *8-9 (noting that profanities and crudities were generally directed and not actionable).

fuck-complainants. Nonetheless, *fuck* statements as a basis for Title VII claims are routinely rejected using the methods described above. By itself, *fuck* falls into the category of an "offensive profanity" or "vulgar" language.[321] Verbal sexual harassment claims, however, can't be used to "purge the workplace of vulgarity."[322] Even when *fuck* is used persistently, it doesn't rise to the level of sexual harassment. As the Supreme Court notes, Title VII is not a "general civility code for the American workplace."[323] In fact, only when *fuck* is used as a modifier for gender-specific statements, such as "*fucking* cunt," does it appear to be actionable.[324] Of course, such gender-specific harassing statements could form the basis of a Title VII claim with or without the *fucking* adjective.

Even though *fuck* is not typically actionable under Title VII, its use is still subject to restriction by employers' voluntary anti-harassment plans. Despite the dearth of empirical support that taboo words like *fuck* cause any harm to the listener,[325] employers can—and do—adopt policies designed to curb workplace harassment that are overly broad and unnecessarily and improperly restrict free speech rights in the workplace.[326]

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[321] *See id.* ("Although vulgar and boorish, the use of foul and offensive language and comments without more does not create an actionable hostile environment under present authority.").
[322] *Baskerville*, 50 F.3d at 430.
[323] *Oncale*, 523 U.S. at 80.
[324] *See Steiner*, 25 F.3d at 1461.
[325] *See* JAY, *supra* note 70, at 233 ("Secular-legal decisions implicate curse words as doing psychological and physical harm to listeners, even though these decisions lack empirical support.").
[326] Professor Volokh explains. We start with Title VII law grounded in vague words like severe and pervasive. To comport with this, employers necessarily err on the safe side. Some employers "consequently suppress any speech that might possibly be seen as harassment, even if you and I would agree that it's not severe or pervasive enough that a reasonable person would conclude that it creates a hostile environment." Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627, 635-37 (1997). These zero-tolerance policies are not hypothetical. "Employers are in fact enacting such broad policies and are indeed suppressing individual incidents of

This is another example of word taboo at work. Employers who adopt overly restrictive workplace speech policies engage in self-censorship just as broadcasters avoiding programming containing *fuck* do.[327]

Much law review ink has already been spilled detailing the potential conflict between the First Amendment and Title VII.[328] The pages of the Federal Reporters, however, remain amazingly light on the subject.[329] I can add little to this conversation[330]

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offensive speech." *Id.* at 642. Similarly, Kingsley Browne also develops the thesis that vagueness in Title VII law leads employers to adopt overbroad speech regulation in contravention of the First Amendment. *See* Kingsley R. Browne, *Sexual Harassment in the Workplace: Fifteen Years After Meritor Savings Bank*, 27 OHIO N. U. L. REV. 563, 580-97 (2001).

[327] *See* Debra D. Burke, *Workplace Harassment: A Proposal for a Bright Line Test Consistent with the First Amendment*, 21 HOFSTRA LAB. & EMP. L.J. 591, 621 (2004) (describing how employers can regulate workplace speech yet in the process censor both employee and employer viewpoints).

[328] *See* Browne, *supra* note 326, at 575 n.77 (collecting dozens of citations to law reviews as a "partial list of articles devoted specifically to the First Amendment and workplace speech"); Burke, *supra* note 327, at 612 nn.142-43 (collecting authorities addressing First Amendment violations with Title VII and those showing the lack thereof).

[329] Kingsley Browne and Eugene Volokh have "[t]he most thorough catalogue of cases in which verbal expression formed all or part of a finding of liability under TitleVII." DOOLING, *supra* note 3, at 94. *See* Browne, *supra* note 326, at 574-80 (explaining the dearth of First Amendment analysis in Title VII case law); *see generally* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

[330] Professor Browne makes one suggestion on the future of hostile environment theory that I can't let go without comment. He calls for the use of heightened pleading requirements similar to those in defamation cases where the precise defaming language must be pleaded or risk dismissal. Conclusory allegations should be insufficient. The rationale is to allow defendants to quickly and cheaply extricate themselves from meritless litigation. *See* Browne, *supra* note 295, at 545-46. This is a particularly bad idea—already rejected by the Supreme Court in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). have been roundly critical of the use of heightened pleading whether it is judicially-imposed, statutorily-mandated, and most recently as required under Federal Rule of Civil Procedure 9(b). *See generally* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002) (criticizing judicially-imposed heightened pleading in civil rights cases and statutory heightened pleading under the PSLRA and Y2K Act); Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281 (2004) (advocating an end to Rule 9(b)). If you care to read more

except to say, as to *fuck*, the doctrines of fighting words, obscenity, captive audience, and the like have been explored and rejected.[331] Nothing in Title VII changes this. Only the category of lesser-protected indecent speech (now bastardized by the FCC) remains as a constitutional option.[332] Of course, none of the original *Pacifica* justifications—parental control, child access, and home privacy—have any vitality in the workplace.[333] A better alternative is to simply leave *fuck* alone.[334]

D. *Tinker's Armband but not Cohen's Coat?*[335]

Having spent most of my life in school—either attending or teaching—I know that *fuck* gets plenty of use in educational settings. Given the law's reaction to the presence of children in earshot of taboo language,[336] if there is one area to predict harsh

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about the subject of heightened pleading in the defamation context (or any other), see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

[331] *See* Browne, *supra* note 295, at 510-31 (applying and rejecting First Amendment doctrines as a basis for Title VII speech suppression including, labor speech, captive audience, time-place-manner regulation, defamation, fighting words, obscenity, and privacy); *see also* Volokh, *supra* note 329, at 1819-43 (detailing why harassment law is not defensible under the existing First Amendment exceptions).

[332] In 1991, Professor Browne wrote that indecency theory couldn't be used to contain *fuck*. *See* Browne, *supra* note 295, at 528-29. Unfortunately, the recent maneuvers by the FCC certainly provide a doctrinal basis for restricting *fuck* by labeling it as *per se* sexual and patently offensive as they did in *Golden Globe II*. *See supra* notes 209-238 and accompanying text. Of course, I don't think this is any wiser for sexual harassment than for broadcasting.

[333] *See supra* notes 192-195 and accompanying text (discussing *Pacifica* rationale).

[334] *See, e.g.*, Burke, *supra* note 327, at 605-07 (questioning judicial decisions recognizing a hostile environment based upon words alone).

[335] Credit goes to Chief Justice Burger who credits Second Circuit Judge Jon Newman for this line: "[T]he First Amendment gives a high school student the right to wear Tinker's armband, but not Cohen's jacket." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986) (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

[336] For example, the presence of children drove the Court, FCC, and complainant in *Pacifica* and still plays a role in indecency regulation. Similarly, the Michigan statute used to convict Tim Boomer, the cursing canoeist, required the presence of children as

treatment for offensive language, this is it. Whether based on *in loco parentis* or some other modern need to maintain educational process,[337] schools seek to protect children from taboo language. Surprisingly, there's some unexpected judicial tolerance in this area—but only if you are a teacher.

1. *Fuck in public schools*

It's axiomatic that public school students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[338] At the same time, "the First Amendment rights of students are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special circumstances of the school environment."[339] There are several different taxonomies used by commentators to describe the universe of school speech.[340] Where *fuck* is concerned, I find most useful a categorization dividing school speech into three types: *Tinker*-type, *Fraser*-type, and *Kuhlmeier*-type—based on the trilogy of leading Supreme Court cases in the area.[341]

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well.

[337] *See* Jonathan Pyle, *Speech in Public Schools: Different Context or Different Rights?*, U. PA. J. CONST. L. 586, 602-03 (2002) (describing bases for state parenting power).

[338] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1943).

[339] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

[340] *See* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 643-44 & n.149 (2002) (describing various taxonomies stemming from the trilogy). According to Miller: "The *Tinker* trilogy has established three different categories of speech. One category is lewd or obscene student speech, and *Fraser* governs this category. Another category is school-sponsored speech, over which *Kuhlmeier* reigns. Does *Tinker* apply to everything else? While the courts have not reached an agreement on the issue, [Miller] argues that it does. If student expression is neither lewd nor school-sponsored, then the school cannot regulate it without satisfying *Tinker's* substantial and material disruption test." *Id.* at 653-54.

[341] *See Tinker*, 393 U.S. at 503; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); *Kuhlmeier*, 484 U.S. at 260.

There is student speech or expression that happens to occur on school premises.[342] A school must tolerate it unless it can reasonably forecast that the expression will lead to material and substantial interference with school activities.[343] This is *Tinker*-type-black-armband speech.[344] A second type of speech in the school setting is school-sponsored speech. This is speech that a school affirmatively promotes as opposed to speech that it merely tolerates.[345] Expressive activities delivered through a school-sponsored medium can be regulated so long as the regulation is rationally related to a legitimate pedagogical concern.[346] This is *Kuhlmeier*-type-school-sponsored-student-newspaper speech.

The third type of school speech is vulgar, lewd, and offensive speech. Unlike the core political speech in *Tinker*, sexual innuendo, lewd, or vulgar speech can be constitutionally punished because the offensive speech is contrary to the school's basic educational mission.[347] *Fuck* seemingly falls into this expansive and ambiguous *Fraser*-type-lewd-and-vulgar speech category. *Fraser* involved the suspension of a high school student for giving an election nominating speech that was filled with pervasive, "plainly offensive," sexual innuendo.[348] Despite the opportunity to clarify the boundaries of offensive language, the Court failed to carefully define the speech at issue. It called the

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[342] *See Tinker*, 393 U.S. at 514; Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004).
[343] *Tinker*, 393 U.S. at 509.
[344] In 1969, the Court in *Tinker* upheld the right of middle school students to wear black armbands in protest of the Vietnam War. *See id.* at 510-11.
[345] *See Kuhlmeier*, 484 U.S. at 276.
[346] In *Kuhlmeier*, the Court allowed the school to exercise editorial control over a school-sponsored student newspaper so long as the regulation was legitimately related to an educational concern. 484 U.S. at 273.
[347] In *Fraser*, the Court upheld the right of the school to punish a student for making an elaborate, graphic, explicit, sexual metaphor. *See* 487 U.S. at 685.
[348] *See Fraser*, 487 U.S. at 683.

speech "offensively lewd and indecent," "vulgar and lewd," and "sexually explicit" all in the same opinion.[349]

What then is the difference between the *Fraser*-speech subsets of lewd, indecent, vulgar, offensive, or sexually explicit? For example, "lewd" is often defined as "obscene."[350] However, under a *Miller* definition of obscenity[351] the word *fuck* is not obscene because the word is neither erotic nor contains the essential element of sexuality to be prurient.[352] Consequently, *fuck* is not likely covered by the lewd subcategory. As to indecency, we must return to *Pacifica* and the FCC to understand its contours.[353] As far as *fuck* is concerned, indecency applies only if one makes the erroneous connection to *per se* sexual activity and patent offensiveness.[354] The only remaining subcategories to apply to *fuck* are offensive or vulgar speech, yet confusion also abounds as to what these terms means.[355] In the end, neither classification is helpful in predicting how *fuck* would be treated in public schools.

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[349] *Id*. at 684-85.
[350] *See* Miller, *supra* note 340, at 655.
[351] Under *Miller*, obscenity requires (a) the average person, applying community standards, would find the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.
[352] *See* DOOLING, *supra* note 3, at 61 ("Because of the well-established 'prurient' requirement, foul language and profanity are almost never considered obscene . . . .").
[353] *See supra* notes 219-228 and accompanying text (discussing FCC and indecency definition).
[354] This necessarily requires the finding that the material is patently offensive—that is, explicit, graphic, repeated, and shocking. *See id.*
[355] *See* Miller, *supra* note 340, at 646-49 (discussing confusion and calling for more precise definitional categories in order to create a more workable and understandable framework).

Fuck could find its way into a public school through the mouths of either students or teachers. If it were student-originated, today it would be on a t-shirt.[356] All the recent student action surrounds t-shirt speech and illustrates the difficulty of "offensive" or "vulgar" as useful tools for speech regulation. For example, the Sixth Circuit recently held that an Ohio high school could ban Marilyn Manson t-shirts as vulgar or offensive speech under *Fraser*.[357] The t-shirt starting the brouhaha depicted a "three-faced Jesus" and the words "See No Truth. Hear No Truth. Speak No Truth." On the reverse was the word "BELIEVE" with the L, I, and E highlighted.[358] After being told by the principal to change or go home, the student went home. Defiant, he returned the next three days donning a different Marilyn Manson shirt; each day he was sent home.[359] A split panel of the Sixth Circuit held that under *Fraser* the school could ban merely offensive speech without having to apply *Tinker*'s substantial and material interference test.[360]

What is most troubling is the court's methodology. Rather than explaining why the t-shirts themselves were offensive—where all the court had to offer was that Marilyn Manson appeared "ghoulish and creepy"—the court focused on the "destructive and demoralizing values" promoted by the band through its lyrics and interviews.[361] Using a judicial version of the transitive property, the court found that the band promoted ideas contrary to the school's mission and the t-shirts promoted the band. Ergo the t-shirts

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[356] While I am sure *fuck* is used by many a student, no reported cases explore a student's speech right in this context. Given the outcome with even non-taboo speech, I see little chance that *fuck* would find protection under the current state of the law.
[357] *See* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000).
[358] *Boroff*, 220 F.3d at 467.
[359] *Id.*
[360] *Id.* at 470-71.
[361] *Id.* at 467 (ghoulish and creepy); 469-71 (lyrics and interviews).

were offensive.[362] Because they were offensive, the school could ban them.[363] This type of application of *Fraser* leaves virtually no speech off limits as long as it can be traced back to an ultimate offensive origin.[364] No speech—except the Confederate flag that is. Within months of the Marilyn Manson case, the Sixth Circuit held that a Kentucky high school that suspended two students for wearing t-shirts with the Confederate flag had to meet *Tinker*'s substantial and material interference test before it could prohibit wearing them to school.[365]

This type of inconsistent, if not downright bizarre, application of *Fraser* isn't isolated. Another federal district court upheld the suspension of a middle school student for wearing a t-shirt that said "Drugs Suck!" because the message was vulgar and offensive.[366] The court found "suck" had sexual connotations. After admitting that "suck" was also a general expression of disapproval, the court found that meaning derivative and "likely evolved from the sexual meaning only as recently as the 1970s."[367]

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[362] Following this reasoning, the band's offensive lyrics include *fuck* so I suppose the t-shirts promote *fuck* so they could be banned as if they said *fuck*. Giving credit where credit is due, it is the high school principal William Clifton, who propounds this bonehead argument. See id. at 469-70. The federal district court and two of the Sixth Circuit panelists buy into it unfortunately.
[363] *Boroff*, 220 F.3d at 471.
[364] The court rejected the argument that the t-shirt itself wasn't offensive in comparison to other t-shirts that promoted bands like Megadeath and Slayer, each with equally explicit lyrics. *See id*. at 470; Miller, *supra* note 340, at 647-48 & n.169 (discussing case). Only the dissenter, Judge Gilman, seems to recognize the folly of the majority opinion. Judge Gilman points out the obvious: even if the band's *lyrics* are vulgar or offensive, nothing on the t-shirts was. *Boroff*, 220 F.3d at 472, 473-74 (Gilman, J., dissenting). Unfortunately for *fuck*, Gilman defines vulgar and offensive in terms of *Pacifica* speech and says that if the t-shirts contained those words, the school could ban them. *Id*.
[365] *See* Castorina v. Madison Cty Sch. Bd., 246 F.3d 536, 540 (6th Cir. 2001).
[366] *See* Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526 (E.D. Va. 1992).
[367] *Broussard*, 801 F. Supp. at 1537.

Consequently, "Drugs Suck!" had a prurient element subjecting it to prohibition.[368] The same sort of reasoning led another federal district court to uphold prohibition of an anti-drunk driving t-shirt that proclaimed "See Dick drink. See Dick drive. See Dick die. Don't be a Dick."[369] The court found that the word "Dick" came within a vulgarity exception to the First Amendment.[370] Given this level of confusion among the courts on both linguistics and the legal standard of vulgar and offensive speech, student-initiated use of *fuck* as free speech seems doomed.

However, we might see a different outcome if a teacher used the word in class. Justice Fortas's famous *Tinker* line about not shedding constitutional rights at the schoolhouse gate applied to both students *and teachers*.[371] However, where teacher speech is involved, the *Tinker* trilogy is often supplemented by *Pickering v. Board of Education*.[372] Public school teacher Marvin Pickering criticized the board of education for its handling of fiscal matters in a letter to the local newspaper; he was fired.[373] The Supreme Court held that Pickering's speech was protected by the First Amendment because it was of "public concern."[374] Because *Pickering* so squarely rests on the "interests of the teacher, as a citizen, in commenting upon matters of public concern,"[375] it might appear inapplicable to in-class, taboo language, by a school employee.

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[368] *Id*.
[369] *See* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157 (D. Mass. 1994).
[370] *See id*. at 159. The state court ultimately struck down the vulgarity clause of the school's code on state statutory grounds. *See* Pyle v. S. Hadley Sch. Comm., 667 N.E.2d 869 (Mass. 1996); *see also* Pyle, *supra* note 337, at 586-89 (discussing firsthand involvement in the litigation).
[371] *Tinker*, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.")
[372] 391 U.S. 563 (1968).
[373] *Pickering*, 391 U.S. at 564.
[374] *Id*. at 568.
[375] *Id*.

Nonetheless, five federal appellate circuits apply *Pickering* to the in-class speech of teachers to exclude that speech from any First Amendment protection whatsoever.[376] In these jurisdictions, teachers are obviously stripped of any ability to use First Amendment academic freedom arguments to protect curricular decisions to use *fuck* in class.[377]

In contrast, five other circuits apply *Kuhlmeier* and require a reasonable relationship to a legitimate pedagogical concern before permitting schools to silence teacher curricular choice.[378] However, even before *Kuhlmeier* provided an alternative to *Pickering*, the First Circuit recognized the academic freedom of high school teachers to use the word *fuck* as a curricular decision. A senior English teacher assigned a reading from *Atlantic Monthly* that contained an "admittedly highly offensive . . . vulgar term for an incestuous son"—*motherfucker*.[379] He was suspended, risked discharge, and sought injunctive relief which was denied by the district court. The First Circuit reversed after conducting its own independent review of the article and finding it "scholarly, thoughtful and thought-provoking."[380] Chief Judge Aldrich also included the following assessment: "With regard to the word itself, we cannot think that it is unknown to many students in the last year of high school, and we might well take judicial notice of its use by young radicals and protesters from coast to coast. No doubt its use genuinely offends the

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[376] *See* Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 TENN. L. REV. 597, 625-267 (1999) (discussing the circuit split and identifying the Third, Fourth, Fifth, Ninth, and D.C. circuits as applying *Pickering*).
[377] Professor Weiner makes a persuasive argument for a new legal standard to protect social studies teachers who use sexual explicit material in the context of government or legal system lessons. *See* Weiner, *supra* note 376, at 675-83.
[378] *See* Weiner, *supra* note 376, at 626-27 (identifying the First, Second, Seventh, Eighth, and Tenth circuits as applying *Kuhlmeier*).
[379] *See* Keefe v. Geanakos, 418 F.2d 359, 361 (1st Cir. 1969)
[380] *Keefe*, 418 F.2d at 361.

parents of some of the students—therein, in part, lay its relevancy to the article."[381] Judge Aldrich was able to recognize the value of *fuck* because of its taboo status.

The circuit revisited the issue again in *Mailloux v. Kiley*[382] where another high school English teacher taught a lesson on taboo words that included writing *fuck* on the blackboard. Following a parent's complaint, he was fired for "conduct unbecoming a teacher."[383] While the district court seemed to agree with the testifying experts that the way Mailloux used the word *fuck* was "appropriate and reasonable under the circumstances and served a serious educational purpose,"[384] divided opinion on the issue compelled the court to fashion a test for such situations.[385] Ultimately, the district court held that it was a violation of due process to discharge Mailloux because he did not know in advance that his curricular decision to teach about *fuck* would be an affront to school policies.[386] The First Circuit, after rejecting the route taken by the district court and opting instead for a case-by case analysis, nonetheless affirmed the result because the

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[381] *Id.*; *see also* Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ark. 1970).
[382] 448 F.2d 1242 (1st Cir. 1971), *affirming* 323 F. Supp. 1387 (D. Mass. 1971).
[383] Mailloux v. Kiley, 323 F. Supp. 1387, 1389 (D. Mass. 1971).
[384] *Id*. at 1389. Experts from both Harvard School of Education and MIT testified as to appropriateness of Mailloux's conduct. Additionally, the district court found that: *fuck* was relevant to discussion of taboo words, 11th graders had sufficient sophistication to treat the word from a serious educational viewpoint; students were not disturbed, embarrassed, or offended. *Id.*
[385] *Id.* at 1392. The district court crafted the following test: "[W]hen a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession . . . which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by regulation or otherwise that he should not use the method." *Id.*
[386] *Id.* at 1393.

teacher's conduct was within reasonable, although not universally accepted, standards and he acted in good faith and without notice that the school was not of the same view.[387]

Despite these positive outcomes of reason over taboo, don't draw the wrong conclusion. Courts that apply the *Kuhlmeier* test to a teacher's in-class use of *fuck* might well come out the other way. In *Krizek v. Board of Education*,[388] the district court denied preliminary injunctive relief to an English teacher whose contact was not renewed after showing the movie *About Last Night* to her eleventh graders.[389] The court described the film as containing "a great deal of vulgarity" including "swear words" and quoted the dialogue at length illustrating a liberal use of *fuckin'*, *fucking*, and *fuck*.[390] Applying the *Kuhlmeier* standard, the court found that the school had a legitimate concern over vulgarity and could find the film with its frequent vulgarity inappropriate for high school students.[391] Consequently, the court rejected a preliminary injunction because the teacher was unlikely to prevail on the merits of her First Amendment claim.[392] The vastly different treatment afforded teachers' in-class use of *fuck* undoubtedly reflects the influence of taboo on the parents, administrators, and judges who comprise the front-line of First Amendment confrontation.

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[387] *See Mailloux*, 448 F.2d at 1243.
[388] 713 F. Supp. 1131 (N.D. Ill. 1989).
[389] *Krizek*, 713 F. Supp. at 1132.
[390] *Id.* at 1133-35.
[391] *Id.* at 1139. The court also considered and rejected the standards used in both *Mailloux* and *Keefe*. *Id.* at 1140-41
[392] *Id.* at 1144.

2. *Fuck in higher education*

Surely in the world of higher education, the tolerance afforded by academic freedom[393] must provide a safe haven for the use of *fuck*. I am, of course, banking on some modicum of personal protection—especially in the context of legal education. As Professor Levinson puts it, it would be "especially problematic to say that any speech is off limits when addressing the question of which speech, if any, speech can ever be ruled off limits."[394] Unfortunately, college professors operate in the same void as high school teachers. As the Second Circuit recently lamented: "Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech."[395] Consequently, the higher education landscape is familiar terrain.

Courts that apply *Pickering* strip college professors of in-class speech of constitutional protection. For example, the Fifth Circuit used *Pickering* to reverse the district court's reinstatement of a university teaching assistant who spoke to an on-campus student group and referred to the Board of Regents as "a bunch of stupid *motherfuckers*" and said "how the system *fucks* over the student."[396] In so doing, the Fifth

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[393] Academic freedom is a concept used to defend a variety of speech and conduct activities. "Academic freedom encompasses a professor's freedom to teach, freedom to research, and freedom to publish opinions on issues of public concern. Academic freedom is rooted in European traditions and in our society's recognition that 'institutions of higher education are conducted for the common good ... which depends upon the free search for truth and its free exposition.'" Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 307-08 (2002).
[394] Levinson, *supra* note 1, at 1381.
[395] Vega v. Miller, 273 F.3d 460, 467 (2d Cir. 2001).
[396] *See* Duke v. North Tex. St. Univ., 469 F.2d 829, 832, 836-38 (5th Cir. 1973). The district court had held that the Constitution protected her use of profanity because to prohibit particular words substantially increases the risk that ideas will also be suppressed

Circuit panel gave credence to the testimony of other English professors that "it shows lack of judgment to use four letter words to any group of people" and that one who used such language was "ill fit for my profession."[397] This is, of course, acquiescence to the power of taboo language.

In a more recent example of *Pickering* application, English professor John Bonnell openly and frequently used vulgar language in the classroom including *fuck*, *pussy*, and *cunt*.[398] After being accused of creating a hostile environment, Bonnell defended his use of language on the grounds that none of the terms were directed to a particular student and they were only used to make an academic point concerning chauvinistic degrading attitudes toward women as sexual objects.[399] A female student ultimately filed a sexual harassment complaint based on his offensive comments; Bonnell responded by copying the complaint and distributing a redacted version to all of his students.[400] This led to a disciplinary suspension for routinely using vulgar and obscene language, disruption of the educational process, and insubordination.[401] Bonnell sued and ultimately the district court granted his injunction.

The Sixth Circuit, however, reversed finding that the classroom profanity was not germane to the subject matter taught and was therefore unprotected speech.[402] "Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting where they are not

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in the process. *Id.* at 838.
[397] *Id.* at 839.
[398] *See* Bonnell v. Lorenzo, 241 F.3d 800, 802-03 (6th Cir. 2001).
[399] *Bonnell*, 241 F.3d at 803.
[400] *Id.* at 804-05.
[401] *Id.* at 808.
[402] *Id.* at 820-21.

germane to the subject matter, and in contravention of College's harassment policy."[403] While the court left open the possibility of in-class taboo language that was germane to the subject matter being permissible, don't count on it.[404] Even those jurisdictions that apply *Kuhlmeier* and have the ability to protect in-class use of the word *fuck* often do not.[405]

V. CONCLUSION

Fuck is taboo—deep-rooted and dark. For over half of a millennium, we've suppressed it. If the psycholinguists are right, we've done so for good reason. *Fuck* embodies our entire culture's subconscious feelings about sex—about incest, being unclean, rape, sodomy, disease, Oedipal longings, and the like. The word shoulders an immense taboo burden. Recognizing the role of taboo language, it is easy to understand why there is still such a reaction to the word. Taboo explains the individual reactions to *fuck* of my student, the sheriff, and the judge I mentioned at the start of the Article. It explains the difficulty faced by scholars trying to understand the word whether their discipline is lexicography, linguistics, psychology, law, or another social science. For my

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[403] *Id.* The court relied on *Hill v. Colorado*, 530 U.S. 703 (2000) ("The protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it.") and *Martin v. Parrish*, 805 F.2d 583, 584-85 (5th Cir. 1995) (college professor's captive audience does not allow denigration of students with profanity such as bullshit, hell, damn, God damn, and sucks).

[404] One glimmer of hope comes from *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001). In *Hardy*, a Sixth Circuit panel (including Judge Gilman) affirmed the denial of a motion to dismiss a community college instructor's claim that he was dismissed for using "nigger" and "bitch" in the context of a class discussion on social deconstructivism.

[405] *See Vega*, 273 F.3d at 463-64, 466-68 (denying constitutional protection to a teacher using an in-class clustering exercise that led to students shouting out *clusterfuck*, *fist fucking*, and other taboo words).

purposes, taboo is also the tool that helps me understand why the law acts and reacts to the word *fuck* as it does.

Fuck is all about sex and nothing about sex all at the same time. Virtually none of the uses of the word *fuck* that I recount have anything to do with sex. Boomer's *fuck*!, Cohen's *Fuck* the Draft, Bono's *fucking* brilliant, Keefe's *motherfucker*, the ubiquitous *fuck you*—none of these are sexual in meaning. Nevertheless, the taboo is so strong that we engraft the negative connotation despite the denotation. Viewed this way, Chief Justice Burger's fear that the Supreme Court would collapse if Brother Harlan uttered *fuck* in the courtroom is understandable (as is Justice Black's concern for offending his wife). The individual reaction of parents to spare their children from the inadvertent broadcast or the calculating teacher now has a point of reference. The fanaticism of Chairman Powell and Congressman Ose is really their own disguised fear. As all these individual reactions are writ large, taboo is institutionalized.

Looking at the areas where *fuck* and the law commonly intersect, our progress toward escaping "from the cruel and archaic psychic coercion of taboo"[406] appears limited. From a constitutional vantage point, the First Amendment accommodates vulgar *fuck* when core political speech is involved (although I wonder whether the Justices would have as much patience for "*Fuck* the Court"). Absent that clarity, the law permits taboo to marginalize *fuck* as speech such as when the FCC declares *fuck* per se sexual or applies profanity standards to it. The same process allows private employers and public schools to chill workplace and school speech as judicial uncertainty promotes aggressive speech restrictions as safe institutional havens—for taboo that is.

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[406] ARANGO, *supra* note 73, at 193.

Regardless of its source, when taboo becomes institutionalized through law, the effects of taboo are also institutionalized.[407] If we want to diminish the taboo effect, the solution is not silence. Nor should offensive language be punished. We must recognize that words like *fuck* have a legitimate place in our daily life. Scholars must take responsibility for eliminating ignorance about the psychological aspects of offensive speech and work to eliminate dualistic views of good words and bad words.[408] Taboo language should be included in dictionaries, freely spoken and written in our schools and colleges, printed in our newspapers and magazines, and broadcast on radio and television.[409] *Fuck* must be set free.

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[407] *See* ARANGO, *supra* note 73, at 184 ("Now we understand why censorship falls upon these dreaded words. It is due to the same cause that makes us shiver when we hear them: the taboo of incest.'). *Cf* Don Aucoin, *Curses! "The Big One" Once Taboo, The Ultimate Swear is Everywhere, and Losing its Power to Shock*, THE BOSTON GLOBE, Feb. 12, 2004, at B13 ("[O]ne reason the word may be less taboo today, especially among young people, is that the sexual activity to which it is linked is also less taboo.").
[408] JAY, *supra* note 70, at 250.
[409] *See* ARANGO, *supra* note 73, at 193.