PROTECTING THE INNOCENT WHILE PRESERVING SPEECH: A BALANCING ACT OF MEDIA REGULATION[†]

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I am intrigued by the title of this Symposium—the intersection of media and the law. When does government regulation go too far? As you might imagine, this is a question we ask every day in Congress. It is always the interpretation of when and how much, and how it fits into the construct of the Constitution. It is always a big discussion for us, and on the Judiciary Committee, it is one we tackle all of the time.

The question is generally one of deciding where certain regulations belong along the private/public spectrum. Which things are properly addressed by government, and which things are properly addressed by the private sector? Focusing in on regulation of the media, we must first realize that television has been commercially available for almost eighty years,[1] and radio has been widely available and utilized for even longer.[2] By now we know that problems arise from an unregulated media. Take, for example, the abuse of children in the creation of child pornography—something made profitable only through pervasive use of mass media channels.[3]

Once we identify those problems—and they usually become readily apparent over time—then those of us in government are given the charge to try to work to provide the most effective solution that we can in the law. If we grant that a regulation could be effective in any given circumstance, then we must begin our problem solving analysis with the question of authority. Is the regulation permissible under the construct of the Constitution? Does the government have the final authority to restrict the activity in question? Any responsible policymaker or regulator should tell you that the first step in answering the question of where the law and the media should intersect is to determine the

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[1] 15 THE NEW ENCYCLOPEDIA BRITANNICA 213 (15th ed. 2007).

[2] *Id.* at 210.

[3] *See* RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PROBLEM-SPECIFIC GUIDES SER. NO. 41, CHILD PORNOGRAPHY ON THE INTERNET 8 (2006) ("The Internet has escalated the problem of child pornography by increasing the amount of material available, the efficiency of its distribution, and the ease of its accessibility.").

constitutional parameters of the proposed regulation. But some regulators seem loathe to observe *any* restrictions, and even among those who do, it seems that there is an endless number of opinions on the question of what those parameters are or should be.

Now it's interesting to note that most of the prominent issues impacting today's topic involve the Fairness Doctrine[4] and various forms of indecency regulation. Those are pretty disparate concepts. It strikes me that these two issues have at least one core ingredient in common, however, and that is paternalism. Paternalism in the American psyche is an ugly, ugly word. *Paternalism* is defined as the practice of managing or governing individuals, businesses, or nations in the manner of a father dealing benevolently and often intrusively with his children.[5] Paternalism is the burdening of those who are not fully liberated. And the American impulse is to want neither a benevolent dictator nor an intrusive, meddling father.

We Americans in particular have a low tolerance for government interference in our lives. So why do we have these paternalistic laws? And in the case of the Fairness Doctrine, why *did* we have this paternalistic law? Why on earth would we even discuss resurrecting it? Should there be a place for paternalism at all? I think that perhaps *that* should be the focus of today's topic.

The answer varies, of course, by circumstance. Proponents argue that any of the indecency regulations, and obviously the child pornography laws, are drafted to protect children—not to oppress adults. From the perspective of many legislators, legislating with the goal to

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[4] The "Fairness Doctrine" was a policy that originated in a 1949 Federal Communications Commission ("FCC") report requiring broadcast media licensees to "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations" and to provide the public with "a reasonable opportunity to hear different opposing positions" on such issues. Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1257–58 (1949). A corollary to this rule, applying specifically to the endorsement of political candidates, was enacted in 1967 and still remains on the books to this day. *See* 47 C.F.R. §§ 73.1910, 73.1940, 73.1941 (2009). Despite the fact that the Supreme Court upheld the constitutionality of the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969), the FCC discarded the rule in 1987 because, contrary to its purpose, it failed to serve the public interest by encouraging "access to diverse opinions on controversial issues." Complaint of Syracuse Peace Council Against Television Station WTVH, 2 F.C.C.R. 5043, 5052, 5057 (1987) (expressing concerns that the doctrine violated First Amendment free speech principles), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989) (affirming the decision of the FCC without reaching the constitutional issues). Some Democrats in the current Congress have called for the revival of the Fairness Doctrine. Jim Puzzanghera, *Democrats Speak Out for Fairness Doctrine*, L.A. TIMES, July 23, 2007, at C1.

[5] *See* BLACK'S LAW DICTIONARY 1241 (9th ed. 2009) (defining *paternalism* as "[a] government's policy or practice of taking responsibility for the individual affairs of its citizens, esp[ecially] by supplying their needs or regulating their conduct in a heavyhanded manner").

protect children is a completely different enterprise than simply legislating the activity of adults. But almost any single regulation that deals with that will do some of both. When I was still in my twenties, I became the cabinet-level Director of the Arizona Governor's Office for Children, and I oversaw all of the children's programs for Arizona.[6] One thing that should remain clear to all of us, ladies and gentlemen, is that children are almost always dependent entirely upon others for their well-being. The moral impulse that we should have in that regard is profoundly important for the cause of the human race, for it is the harm inflicted upon us when we are children that can have the most lasting and damaging effect upon our lives.

The regulation of online child pornography is one prominent example. In a recent House Judiciary Committee examination of six partisan bills to fight online child exploitation, we learned that a recent study—the first in-depth study of online sexual behavior—found that eighty-five percent of offenders who downloaded child pornography also committed abusive sexual acts against children.[7] *Eighty-five percent*.

The policy implications of that study are so significant because they firmly link pornography and sexual predation. Our job in the Committee is to protect our citizens in their constitutional rights first and foremost, especially those who are defenseless. So when persons claim that they have a First Amendment right to consume child pornography, we have to weigh this against the child's right to live free from harm. For me—and certainly most legislators—it is not a close call.

Oftentimes, discussions of regulation of child pornography and related forms of abuse focus on the rights, or the lack thereof, of the persons seeking to obtain the restricted material. But there is more than one human entity with rights in this picture—that entity being the child. Few legislators tend to craft legislation with the rights of both the exploiter and the exploited equally in mind. Instead, legislators end up favoring the rights of one over the other—either the exploiter's supposed First Amendment rights or the child's right to be free from harm—which causes us to sometimes get out of balance

Those of you in the legal community know our legal system has a long tradition of making special provision in the law for protecting children because often children do not have the ability or the judgment to make wise decisions without guidance. The law accommodates greater intrusion in the area of personal autonomy when children are involved

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[6] House.gov, Biography of Congressman Trent Franks, http://franks.house.gov/pages/biography (last visited Apr. 14, 2010).

[7] *Sex Crimes and the Internet: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Rep. J. Randy Forbes, Member, House Comm. on the Judiciary).

because paternalism is justified for the protection of little human beings who are not able to control their environment or to advocate on their own behalf when something in that environment is very harmful to them.

We should also remember that children share many rights with adults and are full citizens under our Constitution.[8] This paternal approach to children's issues explains our car seat laws, compulsory vaccinations, and (sometimes) indecency legislation. If there were ever a place for paternalism, most can agree that it is in the area of protecting children because of the irreversible harm and impact pornography and other forms of child abuse can have on those children.[9]

So, what about cases of paternalism where there is no discernable right or harm for the affected persons—such as in the case of discriminating adults? The most prominent example of such paternalism is the Fairness Doctrine. The Fairness Doctrine, a 1949 creation of the Federal Communications Commission, requires broadcasters to air viewpoints on controversial issues.[10] Simply put, the Fairness Doctrine appoints government as an umpire, or nanny if you will, to decide whether what American adults are hearing is politically desirable. The Fairness Doctrine assumes that an average adult is unable to critically consume information or to discern the appropriate degree of messaging where there are divergent views.[11] Is there such a thing as an appropriate degree or amount of messaging on any given issue? Who gets to decide what that message is going to be? Perhaps other adults who count themselves as capable of discriminating appropriately?

Astute political observers on both sides of the aisle will sometimes state plainly that the Fairness Doctrine is a weapon against conservative hegemony on talk radio. Both sides of the political aisle understand and acknowledge that talk radio is a conservative stronghold. Some have suggested in so many words that wherever there is competition, conservatives have the advantage—such as with radio, books, or blogs. But this is not really a partisan comment on my part; it's just to pose the

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[8] *See, e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 513–14 (1969) (holding that children, as "persons" under the Constitution, are afforded the right to freedom of expression).

[9] Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 164–67, 173 (1993) (concluding, based on the results of forty-five studies, that "sexual abuse is serious and can manifest itself in a wide variety of symptomatic and pathological behaviors").

[10] *Supra* note 4.

[11] *See* Thomas G. Krattenmaker & L. A. Powe, Jr.*, The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151, 159–60 (arguing that the Fairness Doctrine "substitutes monolithic governmental choice for the programs that otherwise would result from broadcasters' competition for viewers' and listeners' time and attention").

question: Could competitiveness of a forum determine how the parties align on issues related to the intersection of media and the law?

So let me just close here. Is the Fairness Doctrine actually a sword to be used against the First Amendment? Would it only be a sword if placed into the hands of unscrupulous regulators? Can regulators ever be trusted to be scrupulous? Maybe competition isn't the linchpin. Maybe, as is argued in the case of children, a true regard for harm to the innocent animates that debate. Surely the First Amendment is not meant to be a safe haven for child pornographers, as was argued unsuccessfully in the 1982 case of *New York v. Ferber*.[12] But there are groups like the North American Man/Boy Love Association ("NAMBLA")[13] who might still argue that it is. It has been my honor to be with you all here today. Coming up, we have a very impressive panel of experts who are some of the most learned it their fields. Perhaps our distinguished panelists will have some thoughts to share regarding these issues that I have addressed. I sincerely look forward to hearing from them.

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[12] New York v. Ferber, 458 U.S. 747, 749–50, 774 (1982).

[13] NAMBLA.org, Who We Are, http://www.nambla.org/welcome.htm (last visited Apr. 14, 2010). NAMBLA is a "liberation movement" that was formed in 1978 with the "goal to end the extreme oppression of men and boys in mutually consensual relationships." *Id.* In support of that goal, NAMBLA condemns "age-of-consent laws and all other restrictions which deny men and boys the full enjoyment of their bodies and control over their own lives." *Id.*