

On Commercial Speech and the Advertised Mind

by Florent Boucharel

“The US Court of Appeals for the Third Circuit rejected a public-school district’s decision to ban pink wristbands featuring the phrase ‘I ♥ Boobies!’ as part of a breast cancer awareness month fund raiser and educational project. The public-school district’s rationale was that the speech was indecent and, under *Morse* [*Morse v. Frederick*, US 2007] and *Fraser* [*Bethel School District No. 403 v. Fraser*, US 1986], indecent speech is presumptively disruptive regardless of its actual effects on the school’s operations. The 9-5 en banc Third Circuit did not disagree with the school’s district legal claim that indecent speech is inherently disruptive but rejected the school district’s characterization of the bracelets as indecent. Had the judges found the speech to be indecent, the school district would have prevailed over the students.

“One should also keep in mind that five members of the en banc court disagreed with this characterization – finding the message to be indecent and therefore proscribable. As much as one would like to dismiss the dissenting judges’ views on this point as complete and utter nonsense, the *Fraser/Morse* framework makes the characterization of the speech as ‘lewd’ outcome determinative. The problem with this analysis is that a student wearing a breast cancer awareness wristband featuring this phrase simply does not present a serious risk of disruption to a middle school’s core pedagogical mission.”

Ronald J. Krotoszynski, Jr. (University of Alabama School of Law), *The Disappearing First Amendment*, Cambridge University Press, 2019, p. 115.



I ♥ Boobies! bracelets on sale on Amazon

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The decision here discussed is *BH ex rel. Hawk v. Easton Area School District*, 3rd Cir. 2013. The US Supreme Court declined to take the case. – I will explain why the “complete and utter nonsense” of the five dissenting judges is actually the correct point of view in this case.

The reader has understood at this stage that the point on which I will dwell is not the main issue discussed by Prof. Krotoszynski. The point he makes is that lewdness in the context of students wearing wristbands on their campus should not be “outcome determinative” in deciding a free speech issue, because the regulatory powers of school authorities aim at preventing disruption inside the educational context and such behavior is not disruptive whether one construes the message on the wristbands as lewd or not.

Therefore, when Prof. Krotoszynski calls the dissenting judges’ view “complete and utter nonsense,” it is only a side comment. That is, to begin with, a singular rhetorical figure to reserve one’s most pungent and bellicose remarks to alleged side aspects of a problem. Compare the sharply dismissive “complete and utter nonsense” with the rest of the passage and you’ll find the phrase is isolated in the argument. It is as if Prof. K. were willing to go out of his mind for a problem he alleges not even to be discussing. Far from being a rhetorical figure, it betrays Prof. K.’s true mind: He is incensed that some judges, even in the minority, could have found the speech obscene. Of course, having asserted that the point is only incidental, he does not tell his readers why it is “complete and utter nonsense.” It just goes without saying, seemingly.

Precisely this point will I discuss, leaving aside the question whether that particular speech should be deemed disruptive or not, but at the same time agreeing with *Fraser* that lewd speech is subject to the regulatory power of school authorities. That this agreement of mine is the consequence of my views on obscenity will become, I think, crystal clear from the reasoning.

i

“Affirming, the Court held that, under the First Amendment, the students’ bracelets could not be categorically banned by the school district. The bracelets were part of a nationally recognized breast-cancer-awareness campaign and were not plainly lewd and because (*sic*) they commented on a social issue. The Court also held that the school district failed to show that the bracelets threatened to substantially disrupt the school.” (LexisNexis website on *BH ex rel. Hawk v. Easton Area School District*)

Contrary to Prof. K., LexisNexis presents the court’s decision as based on two seemingly separate issues: on the one hand, the court found that the bracelets were not “plainly lewd” and on the other hand there was no evidence that the bracelets were disruptive. However, Prof. K. is certainly correct to state that the wristbands would have been disruptive *ipso facto* if found lewd, because this is the substance of the *Fraser* precedent. Therefore, the school authorities had intended their claim according to which the wristbands are obscene as proof that the wristbands are disruptive; the issues are not separate (although there may be several possible sources of disruption besides obscenity). The last sentence in LexisNexis’s quote should be, therefore: “The Court also held that the school district failed to show that the bracelets threatened to substantially disrupt the school IN OTHER WAYS,” in order to be quite consistent with *Fraser*.

Again, it isn't the articulation between obscenity and disruption in the legal treatment of such free speech cases that I want to discuss primarily, but mainly the claim itself that the bracelets are not obscene.

The bracelets read "I ♥ Boobies!" I love boobies. Where in the world is such an utterance as this not a serious breach of etiquette, is the simple question one must ask from the outset. And the answer is, in sum: Nowhere.

If one male student at that school had told a female student he vaguely knew: "I love your boobies," that would have been a horrible outrage. This was so before feminism existed, will still be so if feminism ceases to exist, and such as feminist sensitivity now exists it is indeed a *horrible* outrage. It is more than a gaffe, it is the reprobate endorsement of the womanly body's sexual objectification. One must simply never utter such words except, perhaps, in the intimacy of one's sexual life. The normal reaction to such words in a social setting is a slap in the face, and if the woman has a brother the latter may have a few words to say too: "Did you say 'I love your boobies' to my sister?" and after the slap comes a punch. Even assuming that such reactions could be somewhat extreme, everybody feels the truth of what I'm saying, and if we don't hear of such slaps and punches more often it is probably because most people know they must not say such words and avoid saying them. (Among groups of teenage boys and girls, this kind of speech may be more frequent, as boys want to test girls, want to know how much girls can take, with an escalation to be expected for those girls who, in order to remain part of a group, accept to be talked like that; for these, unwanted pregnancies are perhaps the least of various foreseeable evils.)

Even if not addressed to one or some women in particular, the words 'I love boobies,' when not merely reported for some purpose, will be found a serious breach of etiquette in about all social settings. The only exceptions I can think of are conversations either (a) between people who are on the most intimate footing or (b) in groups where members agree beforehand they will be talking of those things, namely the members' sexual tastes. In both cases, the general rules of etiquette are suspended and new ones apply on which all participants in the interaction agree as a result of long acquaintance or accepted intimacy, in a, or of stipulated rules ("we'll be talking of our sexual tastes"), in b. In other situations, where an idiosyncratic micro-etiquette is not agreed upon tacitly or expressly, the general etiquette of society at large obtains, and let me tell Prof. K. that according to that etiquette neither sexual objectification nor hinting at the underlying impulses toward it as natural therefore normal, is accepted. It is not accepted because it is *obscene*. In a nutshell no one wants to hear 'I love boobies' without prior agreement which cannot be presumed.

One will pass me the use of the word *etiquette*, which perhaps has an elitist or snobbish flavor about it, even as I deal with customs that I describe as enjoying full recognition in the society at large. The notion that I merely would be talking of upper-class standards that are nothing to the rest of the people, if not a target of endless jokes, is what I will be dealing with now. This notion is entertained by what I shall call 'advertised minds' (Du Plessis) and rests on a distorted perception of the real world.

(From Erik Du Plessis's book, *The Advertised Mind: Groundbreaking insights into how our brains respond to advertising* [Millward Brown, 2008], an insider's account of the neuroscience of advertising, I am only borrowing the phrase 'advertised mind' –advertised in

the sense I figure of shaped by advertisement– as the book has little to say on legal and sociological implications of advertising outside the market researcher’s perspective.)

ii

What I have been describing in *i* is a *taboo*. We may, in the western world, fancy ourselves free from taboos and there is in our midst a whole sector of speech agency that has set a rule of making people believe there is no such thing as taboos, a speech agency named *commercial speech*. It has made this attitude a rule because, short of making us believe this way, it could not use taboos to its own ends. The utterance ‘I love boobies’ is taboo and commercial speech vindicates a right to use taboos as sales pitch. Obviously, the power of such a pitch must be great, *it cannot fail to attract people’s attention*.

Furthermore, commercial speech cannot do this without a convention that when it, and it alone, makes use of taboos, read obscenity, it is not taboos and obscenity but something quite different. When commercial speech is obscene, *by convention* it is not obscene. Admittedly, the convention does not extend (yet) over the whole field of possible obscene speech; there are limits.

Whereas common sense has it that taboos are arbitrary conventions, in truth it is the exception for which we make room by waiving to treat obscene commercial speech as taboo like any other public speech, that is the most obvious convention of the two, because it lacks the thinnest link with our essence whereas the reason why we do not want to be reminded daily of our biological processes is self-evident as we see ourselves as free agents only partially determined by natural impulses.

To take an example, the s- and f-words are vulgar precisely because they remind us of our biology. It is only an apparent paradox that they are used all the time – as cursing words. We often curse, true enough, and at the same time these are the words no one wants to hear, vulgar words. Their use has become so widespread in informal speech, anyway, that we have become blind to the actual biological processes they depict when we hear the words, most of the time.

Yet I deny commercial speech the right to use obscene language with people not minding.

I love boobies, therefore I fight breast cancer: What is indecent in this? – It is twice indecent, compounded indecency. (1) Appropriation of obscenity for some social or commercial goal does not cancel the obscenity. Disrespect for a woman’s character is not mitigated by the fact that it comes in a double entendre; on the contrary, it is aggravated by underhandedness. (2) When, therefore, underhandedness is given out as a valid defense, the aggravating factor parading as its opposite is all the more outrageous.

Admitting that ‘I love boobies’ is not proper talk among people, that is to say, will elicit among listeners at best embarrassment and more often than not displeasure and anger (save in the circumstances I described), then considering the usual effect as obviated when and because it comes from commercial speech is to load an illegitimate burden on people at the receiving end. As a matter of fact, this is making people inferiors in an unequal relationship with commercial speech. In an unequal relationship, the inferiors have no choice but to repress their natural reactions when the superiors disregard the inferiors’ feelings. Yet I see no reason why people should be treated as inferior to the agencies entitled to making commercial speech.

Failing to perceive the situation in this way is a sign of being an ‘advertised mind,’ a mind whose general notions are shaped in large part or entirely by pervasive commercial speech.

That it is a nonprofit, such as a “breast-cancer-awareness” organization perhaps, which uses marketing techniques borrowed from private business advertising makes no difference. That would very odd if the law allowed "nationally recognized campaigns" to use methods it considers inappropriate for private pursuits. In fact, as commercial speech is not as fully protected by the First Amendment to the US Constitution as, say, political speech, campaigns, no matter how nationally recognized, relevant and important, that make use of commercial speech methods, are equally limited by the Constitution in the attention-calling, neuroscience techniques they may use. The question, in *BH ex rel. Hawk v. Easton Area School District*, really boils down to this: Is “I ♥ Boobies!” indecent? Justifying indecency by the goals aimed at (the end justifies the means), namely breast cancer awareness, is a clandestine extension of commercial speech’s constitutional rights.

Same as LexisNexis has, perhaps correctly as to the 3rd cir. court’s reasoning, described *Hawk* as having two separate issues, (1) lewdness and (2) disruptiveness of speech, whereas *Fraser* coalesces the two in one lewd-disruptive characterization, it also make separate issues of (1) the national campaign ("The bracelets were part of a nationally recognized breast-cancer-awareness campaign") and (2) lewdness (“AND were not plainly lewd”), whereas it seems obvious the majority has excused the lewdness on the national campaign: It cannot be obscene *because* we are talking of breast cancer – not breast grabbing.

When commercial speech makes use of obscenity, by convention we are supposed to take it as a form of irony (*au second degré*). A nonprofit organization or business has no natural, biological motive to say it loves boobies, therefore it is humor, a humorous, cheeky wink. Well, no. If a business exhibited penises on posters to sell goods, we would find it obscene regardless of whether someone in the advertising agency is a pathological exhibitionist or not. The trick is to attract attention through the intrusive, obstreperous display of what no one wants to see or hear. Find a taboo, usually in the field of the obscene, plaster all walls with it under a conventional label of irony and the jig is up. The deed will be positively valued, as defiance against the constraints of etiquette, usually by the frustrated who believe their natural impulses are held in fetters by inimical, unnatural social forces, and by the young who still have no sex life. For those, commercial speech dons the guise of liberators.

This is how I read the phrase “plainly lewd.” When something is “not plainly lewd,” that means *it is lewd* (but not plainly so here by virtue of the irony). However, the *Fraser* precedent does not ask that speech be “plainly lewd” for authorities to step in. I believe the majority in *Hawk* has found the lewd speech excusable *in the context* of commercial speech for breast cancer awareness. Yet judges should know that, with obscenity, context is often immaterial, for sometimes courts exclude the public from hearings when the case is too risqué; that is, even sheer reporting, even reporting with the express intention to condemn and condemn what must be condemned, is deemed potentially offensive.

Another problem with such finding is that speech tends to be arbitrarily defined according to the speaker. When it is our good friend Mr. Commercial Speech, best known for his delightful epigram “I love boobies, therefore I fight breast cancer,” it is not obscene, whereas a rap singer who loves boobies is at risk of prosecution (well, maybe not all of them).

In sum, conventions declaring indecency innocuous in the context of commercial speech cannot be valid, they are unacceptable, as is every mental process based on such unwritten conventions. Therefore, the five dissenting justices in *BH ex rel. Hawk v. Easton Area School Dist.* were in the right.

According to a note in Krotoszynski’s book, one dissenting judge argued the bracelets were lewd because “I ♥ Boobies!” can reasonably be interpreted as inappropriate sexual double entendre.” This, to be sure, borders on “complete and utter nonsense,” however not, as K. would have it, because the message cannot reasonably be interpreted as inappropriate sexual double entendre but because it cannot be interpreted otherwise except by the blind, unreasoned following of a convention. It is true the message can reasonably be interpreted as sexual but this is not the relevant aspect of it, which is, in fact, that it cannot *reasonably* be interpreted otherwise.

The national breast awareness campaign used the techniques of commercial speech and most certainly contracted with an ad agency that came off with the ‘I love boobies’ pitch. A change of judicial state of mind regarding commercial speech is long overdue. When a double entendre dawns upon one in commercial speech, I suggest not to treat it as a blunder or mistake but as *intentional save proof to the contrary*, because advertisers are professionals whose task is to design messages and the rational expectation is therefore that the content they produce is intentional; but again this goes against the irrational convention that prevails among us regarding commercial speech, where lewd (or other taboo-ridden content) is not lewd.

Besides, it should be of concern that vindication of student free speech revolves around commercial speech. The media *Slate* called *BH ex rel. Hawk v. Easton Area School Dist.* the case that “could decide student free speech” (Aug 9, 2013); that is, student free speech could be decided by a case where students’ speech consists in *passively* adopting some commercial pitch made by others.

Another group psychology phenomenon might be at play with the wristbands. As they are worn by women, and females are the natural object of lewd remarks on breasts by males,

there would be some sexism awareness campaign too about the bracelets. When a group of people is the habitual object of some pejorative image and associated words, members of the group may adopt figures of the stereotype among themselves as a defense mechanism. I think the typical example is the use of the n-word among blacks. More recently we have seen followers of candidate and then President Donald Trump call themselves ‘deplorables’ after Hillary Clinton had used the word in a dismissive comment. Other examples may be found. – Understood in this way the bracelets would be integral speech. However, such message, admitting it were there (which I am willing to grant), is *adulterated* by its commercial speech origin, and even if it deflected its intrinsic lewdness by being a message from victims, actual or in solidarity, of lewd unwanted remarks about breasts –deflected it as far as the victims themselves are concerned–, it cannot cancel the inherent obscenity of the message save by virtue of an irrational convention forced upon the society by commercial speech.

Furthermore, if male students wore the bracelets, it would be hard to determine if they embraced the same feminist cause or rather intended a reversal to the primary meaning, this time as a reaction to a feminist campaign. The disruptive potential of the wristbands understood in this way is far from negligible, considering the accessory could throw students into a renewed embittered battle of the sexes on the campus. Complaints would arise such as: “He flashed his bracelet at me!”, bracelet flashing would become a rampant form of sexist bullying. Even seen in this light, the school authorities were right to step in.

(The dissenting judge quoted in *iii* may have had such thoughts in mind when he wrote that the message can reasonably be interpreted as sexual double entendre, for instance if the bracelets were worn by male students in reaction to a feminist campaign, in which case I owe the judge an apology.)

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