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Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television

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NOTE

Avoiding Slim Reasoning and Shady Results: A Proposal for Indecency and Obscenity Regulation in Radio and Broadcast Television

Jacob T. Rigney*

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EDITOR'S NOTE: This Note contains material in some footnotes that may be offensive to some readers.

* B.A., Franklin College of Indiana, 2000; J.D. candidate, Indiana University School of Law—Bloomington, 2002. The Author wishes to thank his parents, Joseph F. and Jamie L. Rigney, for their immeasurable contribution throughout the years. The Author also wishes to thank Michael Cooley, Carrie Miller, Brett M. Haworth, and Kimberly L. Jana for keeping him sane by proving that everyone's a little bit crazy. The Author would also like to thank Rebecca Hockett for her support over the years.

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I. INTRODUCTION

A. *The Citadel Case*

On June 1, 2001, the Federal Communications Commission (“FCC” or “Commission”) released a Notice of Apparent Liability (“NAL”) written by Enforcement Bureau Chief David Solomon which fined the Citadel Broadcasting Co. and KKMJ-FM of Pueblo, Colorado, \$7000 for

“willfully broadcasting indecent language”¹ in violation of federal law.² The indecent material consisted of lyrics from the controversial rapper Marshall Mathers, known as Eminem, from his single, “The Real Slim Shady.”³ The station claimed that the version of the song they aired was a radio-edited version, which they rendered decent through the use of muting devices and sound effects.⁴ The FCC ruled, however, that even with editing, the single was indecent,⁵ and further that the attempt to edit the song did not even warrant a reduction in the fine.⁶

Rather than simply pay the fine, Citadel challenged the NAL.⁷ This led to a January 8, 2002, opinion, again authored by FCC Enforcement Bureau Chief David Solomon, declaring that the radio-edited version of the

1. Citadel Brdcast. Co., *Notice of Apparent Liability for Forfeiture*, 16 F.C.C.R. 11839, para. 1 (2001) [hereinafter *Citadel I*], *rev'd by Memorandum Opinion and Order*, 17 F.C.C.R. 483 (2002) [hereinafter *Citadel II*].

2. 47 C.F.R. § 73.3999 (2001) (prohibiting the broadcast of indecent material between 6 A.M. and 10 P.M. by both radio and television stations).

3. The following are the cited lyrics in the *Citadel I* decision:

Feminist women love Eminem

(Eminem's vocal turntable sound effect: “sicka sicka sicka”)

Slim Shady, I'm sick of him.

Look at him, walking around grabbing his you know what,
flippin' the you know who

“Yeah but he's so cute, though”

Yeah, probably got a couple of screws up in my head loose

But the worse is what's going on in your parents' bedroom

Sometimes I want to get on TV and just let loose, but can't

But it's cool for Tom Green to hump a dead moose:

“My bum is your lips

My bum is on your lips”

And if I'm lucky you might just give it a little kiss

And that's the message we deliver to little kids

And expect them not to know what a woman's BLEEP is

Of course, they're gonna know what intercourse is

by the time they hit fourth grade

They got the Discovery Channel, don't they?

“We ain't nothin' but mammals”

Well, some of us cannibals. . . .

It's funny cause at the rate I'm goin'

When I'm 30 I'll be the only person in the nursing home flirting

Pinching nurses asses when I'm BLEEP or jerkin'

Said I'm jerkin' but this whole bag of Viagra isn't workin'.

Citadel I, *supra* note 1, app. at 11843.

4. *Id.* para. 3.

5. *Id.* para. 6.

6. *Id.* para. 9.

7. *Citadel II*, *supra* note 1, para. 4.

song was not indecent and revoking the fine.⁸ The Commission reversed its decision despite the introduction of no new facts in the case.⁹ The new opinion made mention of the prior NAL only to say that it was rescinded and did nothing to explain why such a reversal was warranted.¹⁰

It is within this context of administrative half-truth and constitutional gray area that judges and attorneys have been playing their roles for years. As the Citadel cases prove, what is or is not indecent is hardly clear. But a larger issue looms: If the government is so ill-equipped to answer the required questions, why do we keep letting them decide?

B. *The Road Ahead*

This Note will explore the relevant law regarding the issue of indecency and obscenity, with particular focus on a 2001 Policy Statement released by the FCC. It will continue by examining the major problems with the regulatory scheme as it now exists, and offer an alternative. Finally, this Note argues that leaving the subjective decisions regarding indecency to market forces, leaving parents to determine what should or should not be indecent, and leaving the FCC free to pursue obscenity with greater zeal is the most appropriate course of action for the future.

II. THE CONSTITUTION, OBSCENITY, AND INDECENCY

A. *The Constitution*

The Constitution reads, in relevant part, "Congress shall make no law . . . abridging the freedom of speech."¹¹ The Supreme Court, however, never interpreted the amendment to afford absolute protection to all speech. Incitement,¹² fighting words,¹³ and child pornography¹⁴ are all speech-related activities that are not protected by the First Amendment. Defamation jurisprudence balances the First Amendment interest in speech with the government's interest in protecting citizens' reputations against false attack by modifying the protection depending on the public or private nature of the plaintiff and the nature of the defendant.¹⁵ Even at the apex of

8. *Id.* paras. 9, 13.

9. Compare *id.* with *Citadel I*, *supra* note 1.

10. See *Citadel II*, *supra* note 1.

11. U.S. CONST. amend. I.

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

13. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

14. See *New York v. Ferber*, 458 U.S. 747, 763 (1982).

15. Compare *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

its power in the defamation context, the First Amendment requires only a showing of actual malice by the plaintiff, which is a step short of the absolute protection one might expect from the wording of the First Amendment.¹⁶ The Constitution also protects some other speech, such as commercial speech, but to a lesser extent.¹⁷

B. Obscenity

Obscenity falls into the category of completely unprotected speech.¹⁸ Indecent speech falls into the category of lesser protected speech.¹⁹ The definitions of and differences between such legal terms of art are not, however, so easily outlined.

In *Roth v. United States*, the Supreme Court held explicitly that obscene speech was not protected by the First Amendment.²⁰ The Court went on to explain, however, that “sex and obscenity are not synonymous.”²¹ Taking a cue from Webster’s Dictionary, the *Roth* Court suggested that obscenity “deals with sex in a manner appealing to prurient interest.”²² The Court also held that this standard would be based on the average person, rather than the most impressionable person, rejecting the standard previously announced in *Regina v. Hicklin*.²³ The *Roth* test for obscenity can be summarized as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”²⁴

The Court, however, encountered a much more difficult task than it imagined in interpreting *Roth* consistently. In *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, the Court invalidated a New York statute that prohibited the showing of a film if it portrayed sexual immorality in a positive light.²⁵ In *Paris Adult Theatre I v. Slaton*, however, the Court seemed to take a step in the

16. See *Sullivan*, 376 U.S. at 279-80.

17. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

18. See *Miller v. California*, 413 U.S. 15 (1973).

19. See *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978).

20. *Roth v. United States*, 354 U.S. 476, 485 (1957).

21. *Id.* at 487.

22. *Id.*

23. *Id.* at 489.

24. *Id.*

25. See *Kingsley Int’l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959).

opposite direction, upholding an injunction prohibiting the display of adult films even if there was no chance that any minor would see it.²⁶

A few years after *Kingsley*, but prior to *Slaton*, the plurality opinion in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* redefined obscenity. There, the Court held that a work was obscene when:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.²⁷

In *Miller v. California*, however, the Court expressed misgivings about the ability of a state to ever prove that material was "utterly" without redeeming social value.²⁸ The Court settled on a definition of obscenity similar to, albeit more complicated than, the standard enunciated in *Roth*, with more clearly defined exceptions to promote First Amendment values. The test, which still controls today, is:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether 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.²⁹

C. Indecency

Indecency law is administrative in nature and is enabled under 18 U.S.C. § 1464. The justifications for indecency law and its intrusion into the area of the First Amendment, however, are set out in *FCC v. Pacifica Foundation*.³⁰

1. *Federal Communications Commission v. Pacifica Foundation*

FCC v. Pacifica Foundation was the first case in which the Supreme Court considered the issue of indecency in the broadcast setting. The case arose from the broadcast of a George Carlin monologue entitled "Filthy

26. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

27. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass.*, 383 U.S. 413, 418 (1966).

28. *See Miller v. California*, 413 U.S. 15, 24-25 (1973).

29. *Id.* (citations omitted).

30. *See FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

Words.”³¹ The Court explained that indecency is not the same as obscenity in that indecent material does not necessarily appeal to the prurient interest.³² Indecency, the Court said, need only be in “nonconformance with accepted standards of morality.”³³ Additionally, the Court recognized that it had traveled far from its jurisprudence in print media cases, explaining why much stricter regulation of broadcast media was required:

(1) [C]hildren have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.³⁴

In dicta, the Court, through *Pacifica*, also authorized channeling. Channeling, for the Court’s purposes in *Pacifica*, allowed the FCC to penalize stations for airing indecent material when children would be in the audience, but not during other time periods:

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the law generally speaks to *channeling* behavior more than actually prohibiting it. . . . [T]he concept of “indecent” is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.³⁵

After a battle between the courts and Congress, the issue of channeling was decided in a set of complicated cases known as *Action for Children’s Television v. FCC*, where the Court agreed to allow a “safe harbor” from 10 P.M. to 6 A.M. for indecent material.³⁶

31. *See id.* at 729.

32. *Id.* at 739-40.

33. *Id.* at 740.

34. *Id.* at 731 n.2 (citation omitted).

35. *Id.* at 731-32.

36. *See Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

2. *Sable Communications of California, Inc. v. Federal Communications Commission*

Sable Communications of California, Inc. v. FCC further defined the lines between the competing First Amendment and regulatory interests.³⁷ The plaintiff, a distributor of dial-a-porn telephone services, challenged federal statutes prohibiting such distribution, whether indecent or obscene.³⁸ The Supreme Court, per Justice White, held that the government could enact an outright ban on obscene speech.³⁹ In the same breath, however, the Court held that indecent speech was constitutionally protected, and the government could only “regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”⁴⁰ In constitutional law, this level of scrutiny is generally known as “strict scrutiny.”⁴¹

3. The Commission’s Guidance

On April 6, 2001, the FCC released a policy statement regarding indecency designed to guide the broadcasters in their endeavors to avoid indecency fines.⁴² The statement purports “to provide guidance to the broadcast industry regarding [their] case law interpreting 18 U.S.C. § 1464 and [their] enforcement policies with respect to broadcast indecency.”⁴³ Section 1464 enables the Commission to regulate indecency.⁴⁴ The statement also notes that the guidance proffered is only applicable to broadcast indecency (radio and local television), as opposed to cable, telephone, or amateur radio indecency.⁴⁵

37. *See Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

38. *Id.* at 117.

39. *Id.*

40. *Id.* at 126. The government generally advances the protection of children from exposure to such material as the “compelling interest” for indecency regulation, and the Supreme Court generally agrees. *See id.*; e.g., *New York v. Ferber*, 458 U.S. 747 (1982); *Pacifica*, 438 U.S. 726; *United States v. Playboy Entm’t Group Inc.*, 529 U.S. 803 (2000). The “least restrictive means” analysis, on the other hand, will differ depending on the type of regulation. *Compare Pacifica*, 438 U.S. 726, with *Playboy Entm’t Group*, 529 U.S. 803.

41. *Playboy Entm’t Group*, 529 U.S. at 813.

42. *See Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, *Policy Statement*, 16 F.C.C.R. 7999, para. 1, 23 Comm. Reg. (P & F) 857 (2001) [hereinafter *Industry Guidance*]. Note that the subheadings used under this Section are taken directly from the Commission’s Policy Statement regarding indecency.

43. *Id.*

44. 18 U.S.C. § 1464 (2000).

45. *Industry Guidance*, *supra* note 42, para. 1.

a. *Statutory Basis/Judicial History*

The Commission cites *Pacifica* for the definition of indecency, explaining that indecent material is that which “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”⁴⁶ The Commission further explains that the Court quoted the Commission’s definition with “apparent approval.”⁴⁷ The Commission goes on to explain the *Action for Children’s Television* cases and their significance in shaping the “channeling” of indecent material to late-night hours.⁴⁸ The Commission also notes that the Circuit Court of Appeals for the District of Columbia upheld its definition of indecency in those cases.⁴⁹ The Commission further notes that the Supreme Court, in striking down indecency regulations on Internet communication, took care to distinguish the Internet from broadcasting generally because of the “special justifications for regulation of the broadcast media that are not applicable to other speakers.”⁵⁰

b. *Indecency Determinations: Case Comparisons*

The Commission’s guidance in explaining indecency regulation continues as it further breaks down the components of indecency, explaining that indecent material “[f]irst . . . must describe or depict sexual or excretory organs or activities.”⁵¹ “Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.”⁵² The Commission further explains that the “*full context* in which the material appear[s] is critically important,”⁵³ and that no specific words or phrases are automatically patently offensive.⁵⁴ Further, the Commission explains that because of the fact-specific nature of differing contexts, it is “difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent

46. *Id.* para. 4.

47. *Id.*

48. *Id.* para. 5.

49. *Id.*

50. *Id.* para. 4 (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

51. *Id.* para. 7 (citing WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, para. 9, 19 Comm. Reg. (P & F) 422 (2000) (explaining that full frontal adult nudity, such as that which appears in *Schindler’s List*, fulfills this element)).

52. *Id.* para. 8 (citing WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, para. 13, 19 Comm. Reg. (P & F) 422 (2000) (explaining that full frontal adult nudity, such as that which appears in *Schindler’s List*, does not fulfill this element)).

53. *Id.* para. 9.

54. *Id.*

offensiveness of particular material.”⁵⁵ The Commission believes, however, that by examining FCC case law, it might ascertain a set of determinative factors.⁵⁶

The Commission then delves into a series of lengthy case comparisons⁵⁷ that are designed to show the following three factors are principally significant in indecency decisions:

(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.⁵⁸

Again, however, the Commission urges that the context is critical in each of the factors.⁵⁹ Further, these factors are not exclusive, meaning that factors not listed above may play an important or even determinative role in an indecency determination.⁶⁰ Additionally, “[n]o single factor generally provides the basis for an indecency finding.”⁶¹

i. Explicitness/Graphic Description versus Indirectness/Implication

One factor that will play a role in an indecency determination is explicitness or graphicness of the material. “The more explicit or graphic the description or depiction, the greater the likelihood that the material will be considered patently offensive.”⁶² The use of innuendo and double entendre does not guarantee a finding of decency, however, “if the sexual or excretory import is unmistakable.”⁶³ The Commission deemed several

55. *Id.*

56. *Id.*

57. The Commission notes that the case comparisons reproduced (and to some extent summarized subsequently in this Note)

should not be taken as a meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide Moreover, in cases where material was included in a complaint but not specifically cited in the decision based on the complaint . . . [the Commission] caution[s] against relying on the omission as if it were of decisional significance. For example, if portions of a voluminous transcript are the object of an enforcement action, those portions not included are not necessarily deemed not indecent.

Id. para. 11.

58. *Id.* para. 10.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* para. 12.

63. *Id.*

Howard Stern Show discussions indecent because they were “vulgar and lewd references to the male genitals and to masturbation and sodomy broadcast in the context of . . . ‘explicit references to . . . sexual intercourse . . . oral-genital contact . . . sodomy, bestiality . . . and testicles.’”⁶⁴ In another case, discussion of oral and anal sex “describe[d] sexual activities in patently offensive terms and [was] therefore indecent.”⁶⁵ A less explicit description of oral sex was also deemed indecent, because “the song’s sexual import [was] lewd, inescapable and understandable.”⁶⁶ Innuendo that only refers to the size of sexual organs may also be indecent.⁶⁷ In addition, attempts to cover up words through the use of

64. *Id.* para. 13 (quoting Infinity Brdcast. Corp. of Pa., *Warning*, 3 F.C.C.R. 930, 64 Rad. Reg.2d (P & F) 211 (1987)). The text of some of the material cited includes:

God, my testicles are like down to the floor . . . you could really have a party with these . . . Use them like Bocci balls. . . . (As part of a discussion of lesbians) I mean to go around porking other girls with vibrating rubber products . . . Have you ever had sex with an animal? Well, don’t knock it. I was sodomized by Lambchop.

Id.

65. *Id.* (quoting State Univ. of N.Y., *Notice of Apparent Liability*, 8 F.C.C.R. 456, 71 Rad. Reg.2d (P & F) 1319 (1993)). Cited material in this case includes:

The only thing that was on my mind, was just shoving my dick up this bitch’s behind. I looked at the girl and said, babe, your ass ain’t nothing but a base hit. I’m going to have to get rid of your ass, yeah, ‘cause you’re on my dick, dick, ding-a-ling. Popped my dick in her mouth, and we rocked it back and forth. Now that she sucked my dick and Tony fuck you in the ass. I pulled out my dick, popped it in her mouth, and she sucked it.

Id.

66. *Id.* (quoting WQAM License Ltd. P’ship, *Notice of Apparent Liability*, 15 F.C.C.R. 1475 (1999)). The song included the following lyrics:

I don’t want to grow up, I’m a uterus guy. I want to spend a week or so right here between your thighs. Inhale your clam, with my head jammed by your quivering, crushing gams. No, I don’t want to get up or get a towel to dry, cause I wouldn’t be a uterus guy. I don’t want to get up, I’m a uterus guy and I know where to lick and chew exactly where you like. You’ll have more fun when I make you come, with my nose between your thighs.

Id.

67. *Id.* para. 14 (quoting Rusk Corp. (KLOL-(FM)), *Notice of Apparent Liability*, 8 F.C.C.R. 3228, 72 Rad. Reg.2d (P & F) 1183 (1993) (explaining that “[W]hile [the licensee] may have substituted innuendo and double entendre for more directly explicit sexual references and descriptions in some instances, unmistakable sexual references remain that render the sexual meaning of the innuendo inescapable”). An example of indecent material of this nature includes:

The doctor was talking about size. The man complained earlier that he was so large that it was ruining his marriages. Big is good if the guy knows how to use it. She is so big she could handle anything. Some of these guys, a very few of them, a hand full are like . . . two hands full. Twelve inches, about the size of a beer can in diameter. So, now could you handle something like that? It’s actually ruined marriages. A big organ for a big cathedral. Somebody big is just going to have to find somebody that’s big.

Id.

editing may not save material from an indecency ruling where “the words [are] recognizable, notwithstanding the editing.”⁶⁸

On the other hand, a fairly clear, albeit passing, reference to homosexual sodomy may not be indecent.⁶⁹ Additionally, veiled references that exaggerate about the size of male sex organs may also not be considered indecent.⁷⁰ These are the only two examples of non-indecency material offered in this portion of the 2001 Policy Statement.⁷¹

ii. Dwelling Repetition versus Fleeting Reference

The “[r]epetition of and persistent focus on sexual or excretory material” also will play a role in an indecency determination.⁷² For instance, the Commission found a program making slang references to

68. *Id.* para. 16 (quoting Back Bay Brdcast. (WWKX(FM)), *Notice of Apparent Liability*, 14 F.C.C.R. 3997, 3998 (1999)). The following was cited as ineffective editing: “Douche bag, hey what’s up, fu(Bleep)ck head? . . . You his fuck (Bleep) ho or what? You his fuck (Bleep) bitch man, where you suck his dick every night? . . . Suck some di(Bleep)ck make some money for Howard and pay your pimp okay?” *Id.*

69. *Id.* para. 15 (quoting Great Am. TV & Radio Co., *Letter*, 6 F.C.C.R. 3692, 68 Rad. Reg.2d (P & F) 686 (1990)). Great American Television and Radio Company argued, and the FCC accepted, that the following excerpt—“So you talk to Dick Nixon, man you get him on the phone and Dick suggests maybe getting like a mega-Dick to help out, but you know, *you remember the time the King ate mega-Dick under the table at a Q95 picnic.*”—is not indecent because “no sexual meaning was intended and that no such meaning would be reasonably understood from the material taken as a whole.” (italics added).

70. *Id.* (quoting Great Am. TV & Radio Co., *Letter*, 6 F.C.C.R. at 3693). The FCC deemed the following excerpt not indecent:

Power! Power! Power! Thrust! Thrust! Thrust! First it was Big Foot, the monster car crunching 4x4 pickup truck. Well, move over, Big Foot! Here comes the most massive power-packed monster ever! It’s Big Peter! (Laughter) Big Peter with 40,000 Peterbilt horsepower under the hood. It’s massive! Big Peter! Formerly the Big Dick’s Dog Wiener Mobile. Big Peter features a 75-foot jacked up monster body. See Big Peter crush and enter a Volvo. (Laughter) . . . strapped himself in the cockpit and put Big Peter through its paces. So look out Big Foot! Big Peter is coming! Oh my God! It’s coming! Big Peter! (Laughter)

Id. The FCC reasoned, “[Great American Television and Radio Co.] . . . explained the regional humor of the Power, Power, Power excerpt and the context in which it was broadcast. The Mass Media Bureau held that the material was not indecent because ‘the surrounding contexts do not appear to provide a background against which a sexual import is inescapable.’” *Id.*

71. *See id.*

72. *Id.* para. 17.

female genitalia 15 times in 166 words indecent.⁷³ The Commission also found a 120-word recitation of attempts at excretory functions indecent.⁷⁴

But “fleeting and isolated” references may not be indecent.⁷⁵ For example, instances of even the most flagrant word usage may not be indecent because such a broadcast is within the context of spontaneous programming.⁷⁶ The Commission also may not rule a broadcast indecent if the “‘use of [a] single expletive’ does not ‘warrant further Commission consideration in light of the isolated and accidental nature of the broadcast.’”⁷⁷

On the other hand, some very brief references will be found indecent when “other factors contribute to a finding of patent offensiveness.”⁷⁸ The Commission found even brief suggestions of sexual relations with children

73. *Id.* (citing Citicasters Co., *Notice of Apparent Liability*, 13 F.C.C.R. 15381, 14 Comm. Reg. (P & F) 54 (1998)). The Commission cited part of the program’s transcript as follows:

Could you take the phone and rub it on you Chia Pet? Oh, let me make sure nobody is around. Okay, hang on a second (Rubbing noise). Okay I did it. . . . Now that really your little beaver? That was mine. Your what? That was my little beaver? Oh I love when a girl says beaver. Will you say it again for me honey please? It was my little beaver. . . . Will you say, Bubba come get my beaver? Bubba, would come get my little beaver? . . . tell me that doesn’t do something for you. That is pretty sexy. . . . bring the beaver. It will be with me. We got beaver chow. I can’t wait, will you say it for me one more time? Say what? My little beaver or Bubba come get my little beaver? Okay, Bubba come get my beaver. Will you say, Bubba come hit my beaver? Will you say it? Bubba, come hit my beaver. That is pretty sexy, absolutely. Oh, my God, beaver.

Id.

74. *Id.* (quoting Citicasters Co., *Letter*, 13 F.C.C.R. 22004, 14 Comm. Reg. (P & F) 54 (1998)). The material at issue included the following:

Well, it was nice big fart. I’m feeling very gaseous at this point but there, so far has been no enema reaction, as far as. There’s been no, there’s been no expelling? No expelling. But I feel mucus rising. . . . Can’t go like. (Grunting sound) Pushing, all I keep doing is putting out little baby farts. . . . on the toilet ready to go. . . . Push it, strain it. It looks normal. Just average, average. Little rabbit one. Little rabbit pellets. I imagine maybe, we’ll break loose. Push hard Cowhead. I’m pushing, I got veins popping out of my forehead. Go ahead, those moles might pop right off. You can tell he’s pushing. I’m out of breath. One more, last one. One big push.

Id.

75. *Id.* paras. 17-18.

76. The Commission found that a single utterance of the words “[t]he hell I did, I drove mother-fucker, oh. Oh.” was not indecent. *Id.* para. 18 (citing LM Comm. of S.C., Inc., *Letter*, 7 F.C.C.R. 1595, 70 Rad. Reg.2d (P & F) 1140 (1992)).

77. *Id.* The Commission also found that a single utterance of the phrase “[o]ops, fucked that one up” was not indecent. *Id.* (citing Appl’ns of Lincoln Dellar, for Renewal of the Licenses of Stations KPRL(AM) and KDDB(FM), *Memorandum Opinion and Order*, 8 F.C.C.R. 2582, para. 26 (1993)).

78. *Id.* para. 19.

indecent.⁷⁹ Also, the Commission found extremely intense, yet brief, insults of a sexual nature to be indecent.⁸⁰

iii. Presented in a Pandering or Titillating Manner or for Shock Value

The intent or “apparent purpose for which material is presented” also plays a key role in indecency findings.⁸¹ The Commission quotes *Pacifica* for the proposition that presentations that are designed solely to shock, or are the equivalent to “verbal shock treatment,” are indecent.⁸² Material that panders or is designed to titillate is similarly actionable.⁸³ The Commission also explains that the manner and purpose of a presentation may also “preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding.”⁸⁴

For example, the Commission found a radio survey regarding sex indecent because it “focused on sexual activities in a lewd, vulgar, pandering and titillating manner.”⁸⁵ Descriptions of sex in apparently immoral situations are also actionably indecent.⁸⁶ The Commission has also

79. The Commission found that the joke, “What is the best part of screwing an eight-year-old? Hearing the pelvis crack” indecent, despite the fleeting nature of the reference, because “the language clearly refers to sexual activity with a child and was found to be patently offensive.” *Id.* (quoting Tempe Radio, Inc., *Letter*, 12 F.C.C.R. 21828 (1997)). The Commission also found the following joke indecent: “What’s the worst part of having sex with your brother? . . . You got to fix the crib after it breaks and then you got to clean the blood off the diaper.” *Id.* (quoting EZ New Orleans, Inc., *Letter*, 12 F.C.C.R. 4147, 7 Comm. Reg. (P & F) 984 (1997)).

80. The Commission found that a response of “Suck my dick you fucking cunt” was indecent. *Id.* (quoting LBJS Brdcast. Co., *Letter*, 13 F.C.C.R. 20956, app. (1998)).

81. *Id.* para. 20.

82. *Id.* (citing FCC v. *Pacifica Found.*, 438 U.S. 726, 757 (1978) (Powell, J., concurring in part and concurring in the judgment)).

83. *Id.* paras. 20-21.

84. *Id.* para. 20.

85. *Id.* (citing Rusk Corp. (KLOL(FM)), *Letter*, 5 F.C.C.R. 6332, 68 Rad. Reg.2d (P & F) 692 (1990)). An example of the survey’s content:

Sex survey lines are open. Today’s question, it’s a strange question and we hope we have a lot of strange answers. What makes your hiney parts tingle? When my husband gets down there and goes (lips noise). . . . I love oral sex. . . . Well, my boyfriend tried to put Hershey kisses inside of me and tried to lick it out and it took forever for him to do it.

Id.

86. One transcript of such a program describing sexual activity reads:

All I can say is, if you were listening to the program last night you heard Amy and Stacy . . . come in here, little lesbians that they are. Little University of Cincinnati ho’s [sic] and basically that we could come over and watch them. We got over to the house. . . . They start making out a little bit. They go to bed. They get, they start, they’re starting like a mutual 69 on the bed. Guido all of a sudden whips it out. . . . Rather than take care of each other . . . Guido is like knee deep with the

found instructing callers to perform lewd activity over the phone indecent.⁸⁷

On the other hand, the “[b]roadcast of portions of a sex education class in a local high school that included very realistic sex organ models” was not indecent under Commission standards because “the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner.”⁸⁸ The Commission also found an *Oprah* program on sex not actionably indecent, explaining that “[s]ubject matter alone does not render material indecent.”⁸⁹ The Commission reached

butch bitch and all of a sudden here is the fem bitch looking at me. Hot. I get crazy. I hook up a little bit. Then Guido says, hey, I done got mine, how about we switching? So I went into the private bedroom with the butch bitch and then got another one.

Id. (citing Jacor Brdcast. Corp. (WEBN(FM)), *Letter*, 13 F.C.C.R. 4152, 8 Comm. Reg. (P & F) 943 (1997)).

87. *Id.* One example includes:

Take the phone and I want you to rub it on it hard. I want to hear the telephone, okay? Okay honey. (Rubbing noises) You hear that? A little bit longer though please. I'm on the edge right now. A little bit faster. (Rubbing noises) You get that? That's nice. Could you do it again and then scream my name out, please? Like you're having an orgasm? Yeah. Go ahead. Okay. (Rubbing noises) Mm mm. That's it? It's got to be longer than that Ginny, come on work with me. Be a naughty girl. Be a little slutty bitch that you are. One more time. Okay. (Rubbing noises).

Id. (citing Citicasters Co. (WXTB (FM)), *Letter*, 13 F.C.C.R. 15381, para. 20 (1998)).

88. *Id.* para. 21 (quoting King Brdcast. Co. (KING TV), *Memorandum Opinion and Order*, 5 F.C.C.R. 2971, 67 Rad. Reg.2d (P & F) 1124 (1990)).

89. *Id.* (citing Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, FCC, to Chris Giglio (July 20, 1994)). The program included the following segment:

Okay, for all you viewers out there with children watching, we're doing a show today on how to make romantic relations with your mate better. Otherwise known as s-e-x. . . . I'm very aware there are a number of children who are watching and so, we're going to do our best to keep this show rated "G" but just in case, you may want to send your kids to a different room. And we'll pause for a moment while you do that. . . . According to experts and recent sex surveys the biggest complaints married women have about sex are . . . their lovemaking is boring . . . American wives all across the country have confessed to using erotic aids to spice up their sex life and . . . thousands of women say they fantasize while having sex with their husbands. . . . And most women say they are faking it in the bedroom. [Quiz:] I like the way my partner looks in clothing. . . . I like the way my partner looks naked. . . . I like the way my partner's skin feels. . . . I like the way my partner tastes. . . .

[Psychologist and panelists:] Do you know that you can experience orgasm, have you experienced that by yourself? No, I have not. . . . Okay, one of the things that, well, you all know what I'm talking about. . . . You need to at least know how to make your body get satisfied by yourself. Because if you don't know how to do it, how is he going to figure it out? He doesn't have your body parts, he doesn't know.

Id.

a similar result with a similar program on *The Geraldo Rivera Show*.⁹⁰ The Commission also found no actionable indecency in repeated explicit language in a bona fide newscast on National Public Radio.⁹¹ Another example of the Commission ruling in favor of the licensee arose after the airing of the movie *Schindler's List*, which contains full frontal nudity.⁹² The Commission decided against an indecency finding because “the ‘full context’ of the nudity [was] controlling” and because of “the subject matter

90. *Id.* para. 21 (citing Letter from Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, FCC, to Gerald T. McAtee (Oct. 26, 1989)). This program included the following segment:

We have seen such a slew of sex books . . . “Your G-spot,” “How to Have Triple Orgasms.” One of the biggest myths . . . either we go all the way or we do nothing. . . . He just missed an opportunity to make love, not all the way . . . but to share a moment of passion and a moment of closeness. . . . It’s important that a man learn to use the penis the way an artist uses a paintbrush . . . and if a woman is also willing to learn how to move her vagina. . . . With good control of PC muscles, a man can separate orgasm from ejaculation and have more than one orgasm. . . . Really great sex is always based on feeling safe enough with your partner to open up. Passion is just the expression of a tremendous sense of connection you feel. If you think sex is pleasurable, try making love and having sex at the same time for turning pleasure into ecstasy.

Id.

91. *Id.* (quoting Letter from Donna R. Searcy, Secretary, FCC, to Peter Branton, 6 F.C.C.R. 610, 68 Rad. Reg.2d (P & F) 1134 (1991)). An excerpt from the newscast reads:

M[ike] S[chuster]: This is an excerpt from a wiretap. One conversation Gotti had with an associate some years ago before heading the Gambino family. The tape has been played in court. Gotti is browbeating the associate for not returning his phone calls. The other man claims his wife didn’t pass along Gotti’s messages. Gotti’s threats are extremely profane.

J[on] G[otti]: (Unintelligible) fucking (unintelligible) you understand me?

O[ther] V[oice]: (Unintelligible)

JG: Listen, I called your fucking house five times yesterday. Now if you want (unintelligible) fuck (unintelligible). Now if you want to disregard my fucking phone calls I’ll blow you and the fucking house up.

OV: I never disregarded anything.

JG: Are you, call your fucking wife or will you tell her.

OV: All right.

JG: This is not a fucking game I (unintelligible) how to reach me days and nights here, my fucking time is valuable.

OV: I know that.

JG: Now you get your fucking ass (unintelligible) and see me tomorrow.

OV: I’m going to be here all day tomorrow.

JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I’ll fucking kill you.

MS: As head of the Gambino family, Gotti controlled vast crime activities including gambling, loan sharking, labor racketeering and gasoline bootlegging. Author Gene Mustane says Gotti has worked hard during the past three years to consolidate his control and defend the mob from the onslaught of federal and state prosecutions that the Mafia suffered.

Id.

92. *Id.* para. 21.

of the film, the manner of its presentation, and the warnings that accompanied the broadcast.”⁹³ Additionally, the Commission found no indecency in radio announcers’ criticism of the owner of a competing radio station made through veiled sexual and excretory references.⁹⁴

The Commission, however, found that a program in which announcers read and commented on published descriptions of sexual episodes of religious leaders was indecent because the program “was . . . presented in a pandering manner,” was “exceptionally explicit and vulgar,” and was “patently offensive.”⁹⁵ In *Agape Broadcasting*, the Commission found a song called “I Want to Be a Homosexual” to be indecent, even if, as the respondent radio station argued, the broadcast was valuable “public affairs programming.”⁹⁶ The Commission also may consider and reject the argument that a given broadcast is valuable as a means of arriving at an

93. *Id.*

94. *Id.* “Announcers allegedly referred to complainant, Chuck Harder, as ‘Suck Harder,’ ‘Suck,’ and ‘Suckie’ throughout the broadcast and called the complainant a ‘useless piece of crap.’ Also referred to complainant’s network, the Sun Radio Network as ‘Suck Harder Radio Network.’” *Id.* (citing Jacor Brdcast. of Tampa Bay, Inc., *Memorandum Opinion and Order, WFLA(AM)*, 7 F.C.C.R. 1826, para. 13, 70 Rad. Reg.2d (P & F) 1191 (1992)).

95. *Id.* para. 22 (citing Pac. & S. Co. Inc., *Letter*, 6 F.C.C.R. 3689, 68 Rad. Reg.2d (P & F) 690 (1990)). The transcript of the program included the following:

I’ve got this Jessica Hahn interview here in Playboy. I just want to read one little segment . . . the good part. “[Jim Bakker] has managed to completely undress me and he’s sitting on my chest. He’s really pushing himself, I mean the guy was forcing himself. He put his penis in my mouth . . . I’m crying, tears are coming, and he is letting go. The guy came in my mouth. My neck hurts, my throat hurts, my head feels like it’s going to explode, but he’s frustrated and determined, determined enough that within minutes he’s inside me and he’s on top and he’s holding my arms. He’s just into this, he’s inside me now. Saying, when you help the shepherd, you’re helping the sheep.” (followed by air personality making sheep sounds) This was rape. Yeah, don’t you ever come around here Jim Bakker or we’re going to cut that thing off.

Id.

96. *Id.* (quoting *Agape Brdcast. Found., Inc., Letter*, 9 F.C.C.R. 1679, 75 Rad. Reg.2d (P & F) 128 (1994)). An excerpt from the song reads:

But if you really want to give me a blowjob, I guess I’ll let you as long as you respect me in the morning. Suck it baby. Oh yeah, suck it real good. . . . Are you sure this is your first rim job? . . . Stick it up your punk rock ass. You rub your little thing, when you see phony dikes in Penthouse magazine. . . . Call me a faggot, call me a butt-loving fudge-packing queer . . . You rub your puny thing, when you see something (?) pass you on the street.

Id.

indecent claim.⁹⁷ Further, the Commission announced that material that does not pander or titillate may still be patently offensive.⁹⁸

c. Enforcement Process

The Commission does not monitor radio and television waves for indecent material.⁹⁹ Rather, the road to an FCC indecency fine begins with a public complaint.¹⁰⁰ The Commission generally requires three elements of a complaint before they consider it: “(1) a full or partial tape or transcript or significant excerpts from the program; [footnote omitted] (2) the date and time of the broadcast; and (3) the call sign of the station involved.”¹⁰¹ When complaints do not meet the above criteria, or when complaints involve broadcasts that fall within safe harbor hours¹⁰² or contain material that the Commission deems is not indecent, the complaints are generally dismissed by a letter to the complainant explaining the nature of the deficiency.¹⁰³

97. In this instance, the Commission rejected the argument that the material was valuable:

“. . . she should go up and down the shaft about five times, licking and sucking and on the fifth swirl her tongue around the head before going back down. . . .”
 “‘Show us how its done’ (evidently the guest had some sort of a prop).”
 “Well, if this was a real penis, it would have a ****ridge, I would like (sic) around the ridge like this . . .”
 [laughter, comments such as “oh yeah, baby”].

Id. (quoting Citicasters Co. (KSJO-FM), *Notice of Apparent Liability for Forfeiture*, 15 F.C.C.R. 19095 (2000) (parenthetical information added by Commission) (noting that the announcer’s response of “oh yeah, baby” suggested that the “material was intended to be pandering and titillating, as opposed to a clinical discussion of sex.”)).

98. *Id.* para. 23. An example of patently offensive material that does not pander or titillate:

If I had a penis, . . . I’d stretch it and stroke it and shove it at smarties . . . I’d stuff it in turkeys on Thanksgiving day. . . . If I had a penis, I’d run to my mother, Comb out the hair and compare it to brother. I’d lance her, I’d knight her, my hands would indulge. Pants would seem tighter and buckle and bulge. (Refrain) A penis to plunder, a penis to push, ‘Cause one in the hand is worth one in the bush. A penis to love me, a penis to share, To pick up and play with when nobody’s there. . . . If I had a penis, . . . I’d force it on females, I’d pee like a fountain. If I had a penis, I’d still be a girl, but I’d make much more money and conquer the world.

Id. (quoting WIOD, Inc. (WIOD(AM)), *Letter*, 6 F.C.C.R. 3704 (1989)).

99. *Id.* para. 24.

100. *Id.*

101. *Id.* (citation omitted).

102. For an explanation of the “safe harbor provisions,” see generally *Action for Children’s TV v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

103. *Industry Guidance*, *supra* note 42, para. 25.

If the Commission's staff believes the complaint may have merit, however, it is referred to the FCC's Enforcement Bureau.¹⁰⁴ The Enforcement Bureau will run the complaint through its own indecency analysis, whereupon the Bureau may:

(1) [deny] the complaint by staff letter based upon a finding that the material, in context, is not patently offensive and therefore not indecent; (2) [issue] a Letter of Inquiry (LOI) to the licensee seeking further information concerning or an explanation of the circumstances surrounding the broadcast; (3) [issue] a Notice of Apparent Liability (NAL) for a monetary forfeiture; and (4) formal[ly] [refer] the case to the full Commission for its consideration and action.¹⁰⁵

A formal referral to the full Commission, however, generally only occurs "where issues beyond straightforward indecency violations may be involved or where the potential sanction for the indecent programming exceeds the Bureau's delegated forfeiture authority of \$25,000."¹⁰⁶

If the Enforcement Bureau issues a LOI, the Commission receives comment from the broadcaster regarding the broadcast.¹⁰⁷ Up until that point, however, a radio or television station may be totally unaware of the complaint.¹⁰⁸ In some cases, the Enforcement Bureau determines that no further action beyond the LOI is required, and the Commission informs both the complainant and the station.¹⁰⁹ In other cases, where the Bureau decides preliminarily that material is indecent, it issues a NAL, such as it did in the *Citadel* case.¹¹⁰ Further, when a station broadcasts material that the Commission previously found indecent, higher fines may ensue.¹¹¹

After the NAL is issued, a radio or television station may respond again.¹¹² After further consideration, the Commission may rescind its NAL, freeing the station of liability, or it may issue a forfeiture order.¹¹³ The fine is still flexible, however, in that the Commission or its staff may consider mitigating circumstances and reduce the amount of the fine.¹¹⁴ A station may challenge such a forfeiture order through the Commission's

104. *Id.* para. 26.

105. *Id.* (noting in a footnote that "[t]his section discusses the typical process. The Commission also has authority to send forfeiture cases to a hearing, in which case the procedures discussed here differ." (citing 47 U.S.C. § 503(b)(3); 47 U.S.C. § 312(b))).

106. *Id.* (citing 47 C.F.R. § 0.311).

107. *Id.* para. 27.

108. *Id.* para. 25.

109. *Id.* para. 27.

110. *Id.*

111. *Id.*

112. *Id.* para. 28 (citing 47 U.S.C. § 503(b), which requires that a station be given a chance to respond to a NAL).

113. *Id.*

114. *Id.*

administrative process or by simply failing to pay the fine.¹¹⁵ After such a refusal, the U.S. Department of Justice may file suit in U.S. District Court, wherein the trial court may completely re-adjudicate the issue of indecency.¹¹⁶ If the trial court affirms the Commission, the station may lodge an appeal in one of the twelve Circuit Courts of Appeals, and if the Commission is affirmed there, the Supreme Court may or may not hear the case, depending on whether it grants certiorari.¹¹⁷

d. Conclusion

The Commission offers the 2001 Policy Statement as guidance to broadcast licensees to aid in compliance with the Commission's indecency standards.¹¹⁸ The Commission explains that the statement should provide insight into the analytical framework of broadcast indecency so that broadcast stations "can assess the legality of airing potentially indecent material."¹¹⁹ The Commission notes, however, that the case comparisons discussed are not "an all-inclusive summary of every indecency finding issued by the Commission."¹²⁰ The Commission concludes by suggesting that "a complete understanding of the material . . . requires review of the tapes or transcripts and the Commission's rulings thereon."¹²¹

4. The Separate Statement of Commissioner Susan Ness

The separate comments of Commissioner Susan Ness follow the footnotes that accompany the Commission's Policy Statement.¹²² Commissioner Ness begins by suggesting that indecency regulation is essentially a battle between "competing fundamental obligations."¹²³ The first obligation is the government's interest in "ensur[ing] the airwaves are free of indecent programming material during prescribed hours when children are most likely to be in the audience," and the second is the government's interest in "respect[ing] the First Amendment rights of broadcasters regarding program content."¹²⁴ Commissioner Ness then notes the "delicate line" the Commission must walk as it tempers its response to

115. *Id.* para. 29 (noting that stations have a "legal right to refuse to pay the fine").

116. *Id.*

117. *See generally* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE (3d ed. 2002).

118. *Industry Guidance*, *supra* note 42, para. 30.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 8018 (Separate Statement of Comm'r Susan Ness).

123. *Id.*

124. *Id.*

“an onslaught of on-air smut” in the face of “the constitutional bulwark of our free society,” the First Amendment.¹²⁵

a. Recommended Procedural Improvements

Commissioner Ness suggests first that the FCC needs to make its indecency complaint procedures more “user-friendly.”¹²⁶ She suggests the Commission could do this by forwarding all complaints to the offending stations prior to acting on them.¹²⁷ She suggests that such a policy would aid both listeners and stations, because listeners would be less likely to believe that the Commission mechanically dismisses their complaints and stations would receive desired feedback.¹²⁸

b. Broadcasters Are Part of a National Community

Commissioner Ness further suggests that broadcasters alone can solve the “festering problem of indecency on the airwaves.”¹²⁹ She suggests that broadcasters should “[reinstat]e a voluntary code of conduct” with regard to indecent material.¹³⁰ Commissioner Ness concludes by suggesting that the public deserves a “family friendly medium” that will elevate the “cultural tone of our society.”¹³¹

5. The Separate Statement of Commissioner Harold W. Furchtgott-Roth

The separate statement of FCC Commissioner Harold W. Furchtgott-Roth follows Commissioner Ness’s statement.¹³² Commissioner Furchtgott-Roth begins by explaining that the FCC is releasing the Policy Statement “under a settlement agreement, to issue guidance on its broadcast indecency policies.”¹³³ He later notes that the Commission has taken seven years to fulfill its end of the settlement.¹³⁴ Commissioner Furchtgott-Roth

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 8018-19 (noting that “I do not believe that broadcasters’ First Amendment rights would be threatened if we were to send broadcasters a courtesy copy of complaints filed with the FCC”).

129. *Id.* at 8019.

130. *Id.* (noting that “[i]t is not a violation of the First Amendment for broadcasters on their own to take responsibility for the programming they air”).

131. *Id.*

132. *Id.* at 8020 (Separate Statement of Comm’r Harold W. Furchtgott-Roth).

133. *Id.* The agreement arose after Evergreen Media Corp. of Chicago and the FCC settled a dispute regarding indecency. *See* Evergreen Media Corp. of Chicago, *Letter*, 8 F.C.C.R. 1226, 72 Rad. Reg.2d (P & F) 135 (1993) (vacated by settlement).

134. *Id.* at 8021.

goes on to explain that the statement “establishes necessary boundaries for this elusive and highly subjective area of law.”¹³⁵

Commissioner Furchtgott-Roth, however, is apparently uneasy with the Commission’s reliance on *Pacifica*, noting that “[t]o be sure, [*Pacifica* has] not yet been overruled. Nevertheless, [its] continuing validity is highly doubtful from both an empirical and jurisprudential point of view.”¹³⁶ Commissioner Furchtgott-Roth explains that the changing marketplace for radio and television may well have rendered the old justifications for regulating indecency obsolete.¹³⁷ Additionally, Commissioner Furchtgott-Roth believes that those same marketplace changes have lessened the ability of the broadcast industry to regulate itself,¹³⁸ and he suggests that a change is on the horizon.¹³⁹

6. The Dissenting Statement of Commissioner Gloria Tristani

In another portion of the 2001 Policy Statement, Commissioner Gloria Tristani declines to adopt the Statement and issues a dissenting statement.¹⁴⁰ First, she argues that the Policy Statement does not, in fact, satisfy the conditions of the settlement agreement.¹⁴¹ Second, Commissioner Tristani declines to adopt the statement because it “perpetuates the myth that broadcast indecency standards are too vague and compliance so difficult that a Policy Statement is necessary to provide further guidance.”¹⁴² Commissioner Tristani clearly rejects the idea that licensees do not understand indecency regulation, noting that Evergreen itself agreed to issue a policy statement on broadcast indecency to its employees.¹⁴³ Commissioner Tristani concludes this point by noting: “No

135. *Id.* at 8020.

136. *Id.*

137. *See id.* at 8020-21.

138. *Id.* at 8021.

139. *Id.* (writing that “the bases for challenging broadcast indecency [have] been well laid, and the issue is ripe for court review”).

140. *Id.* at 8023 (Dissenting Statement by Comm’r Gloria Tristani).

141. *Id.* While the merits of Commissioner Tristani’s arguments on this issue are persuasive, they have little to do with the regulation of indecency itself, and thus will not be discussed further in this Note, except to point out that the 1994 agreement between the Commission and Evergreen Media Corp. required the Commission to release this statement within nine months. *Id.* The Commission, however, did not release the statement until 2001. *Id.* at 7999.

142. *Id.*

143. *Id.* at 8024 (noting “it [is] difficult to understand how Evergreen could both issue a policy statement containing the FCC’s definition of indecency to its employees *and* simultaneously be unable to understand the FCC’s definition”).

factual basis exists for concluding that confusion about the standards or overreaching enforcement by the FCC requires this Statement.”¹⁴⁴

Finally, Commissioner Tristani believes that there is “no rush of inquiries by broadcast licensees seeking to learn whether their programs comply with [the FCC’s] indecency caselaw.”¹⁴⁵ Commissioner Tristani expects that the Policy Statement itself, rather than aiding stations seeking to be in compliance, will become a “‘how-to’ manual for those licensees who wish to tread the line drawn by [the FCC’s] cases.” Further, because the Statement fails to address “concerns supported by the FCC’s history of enforcement,” Commissioner Tristani calls the statement “nothing more than a remedy in search of a problem.”¹⁴⁶ Commissioner Tristani concludes her dissent by suggesting that the FCC is not serious about enforcing indecency standards, and would better serve the public if it did so.¹⁴⁷

III. ANALYSIS

The broadcast community is one that spans every conceivable human boundary. It reaches us in our homes, our vehicles, and at work. In a very real sense, from the moment we are born until we die, humans are swimming in a sea of modulated information.

As a conduit for information, broadcasting is only capable of amplifying the essence of the humans that control it. Accordingly, broadcasting can only be as bad as the worst of us, or as good as the best of us. The best broadcasters have brought us together in times of tragedy, given us hope in times of despair, and informed us in times of ignorance. On the other hand, the worst broadcasters have splintered us unnecessarily, instilled fear in us where none was warranted, and misinformed us when we needed the truth.

Of course, the abysmal and virtuous traits of humanity run in step with our inability as a collective to distinguish between them. The follies and successes of human theory are well documented. So in this case, we are left to decide whether government regulation of indecency is virtuous, whether it is abysmal, or whether the government is incapable of discerning the virtue from the abyss to begin with. This Note will argue that the latter conclusion is the wisest concerning broadcast indecency.

144. *Id.*

145. *Id.* at 8025.

146. *Id.*

147. *Id.*

A. *The Commission and Indecency*

Indecency law problems arise from two basic areas. First, procedural difficulties severely hamper any attempt to modify or improve the existing law. Second, the substance of indecency law is so subjective on so many fronts that principled enforcement is difficult, if not impossible.

1. Procedural Concerns

Taken to its procedural limits, the government will consider a broadcast program indecent when: (1) a listener complains to the FCC; *and* (2) the complaint contains either an excerpt or tape of the offensive broadcast, the date and time of the broadcast, and the identity of the station; *and* (3) a low-level FCC Enforcement Bureau staff member decides it might “describe or depict sexual or excretory organs or activities” and “be patently offensive as measured by contemporary community standards for the broadcast medium,”¹⁴⁸ as determined by the non-exclusive factors of explicitness, repetition, and intent to pander, titillate, or shock;¹⁴⁹ *and* (4) it was aired between 6 A.M. and 10 P.M.; *and* (5) another FCC Enforcement Bureau staff member decides it actually is indecent and accordingly issues an NAL or LOI; *and* (6) after the offending broadcaster responds to the NAL or LOI, the Enforcement Bureau still believes the program is indecent; *and* (7) on appeal, the full Commission believes the program is indecent; *and* (8) upon full review, a federal trial court agrees with the Commission that the program is indecent; *and* (9) upon Appellate review, a majority of judges in a U.S. Circuit Court agrees with the trial court that the program is indecent; *and* (10) four Justices in the Supreme Court agree to hear the case and grant certiorari; *and* (11) five of the Justices of the Supreme Court agree that the program is indecent. Note that once an NAL has been issued, a licensee may simply pay the fine at any time, rather than challenging the decision. Also, the licensee may succeed at any one of these stages, and the FCC would reject the complaint.¹⁵⁰

To the FCC, this cumbersome procedure no doubt seems appropriate; however, to a station operator, it sounds like more trouble than it is worth—the legal fees involved in challenging the indecency determination quickly exceed the fine itself in most cases.¹⁵¹

One aspect of our governmental system, particularly with respect to congressional action, is that it is exceedingly difficult to actually get

148. *See id.* paras. 7-8.

149. *Id.* para. 10.

150. *See infra* Section II.C.3.c.

151. Note that *Industry Guidance*, *supra* note 42, cites no cases, with the exception of *FCC v. Pacifica Foundation*, that were heard by any federal District Court.

anything accomplished. Our system of checks and balances exists so that we may avoid the passage of hasty or ill-reasoned laws at the behest of a small but motivated group or in the fervor of a moment of high emotion. Such benefits, however, are not nearly as enticing where a quasi-judicial administrative body passes judgment on individual broadcasters. If the goal of the FCC is to more clearly define broadcast indecency, as the Policy Statement suggests it is, the FCC should abandon procedure that favors settlement over obtaining the truth.

Commissioner Ness supports this point in her separate statement, which calls for changes in the procedural process to make it more “user-friendly.”¹⁵² Unfortunately, however, Commissioner Ness’s suggestions are unlikely to delineate more clearly what is and is not indecent. If the government forwards letters of complaint to licensees upon receipt, stations will simply retain counsel sooner, leading to higher legal fees, and a heightened desire on the part of the licensee to settle the dispute by paying the fine without challenging it. In short, it would exacerbate rather than mitigate current procedural deficiencies, in that it would further encourage settlement rather than litigation of what is and is not indecent.

2. The Subjective Nature of Indecency Regulation

Another difficulty with the current indecency scheme is that it employs terms that are far too subjective to be enforced on a national scale. As the Policy Statement essentially explains, the FCC defines indecency as material that: (1) “describe[s] or depict[s] sexual or excretory organs or activities” and is (2) “patently offensive as measured by contemporary community standards for the broadcast medium,”¹⁵³ as determined by the non-exclusive factors of explicitness, repetition, and intent to pander, titillate, or shock.

a. *The First Prong*

The first prong of the indecency definition creates only slight problems on its own. Everything that is broadcast either depicts or describes, so the only issue that arises from this prong is simply whether the depiction or description is of a sexual or excretory nature. But innuendo can make it very difficult to decide whether or not something actually deals with sex, or to a lesser extent, the excretory function. The FCC suggests in *Great American Television and Radio* that indecency only occurs where the

152. See *Industry Guidance*, *supra* note 42 (Separate Statement of Comm’r Susan Ness).

153. *Id.* paras. 7-8.

sexual import is “inescapable.”¹⁵⁴ The “inescapable” standard only muddles the analysis, however, because it requires two subjective determinations as opposed to one. Now, in addition to deciding whether a sexual or excretory act or function is described or depicted, the FCC has to decide whether that is the *only* thing depicted or described.¹⁵⁵ This layering of subjective determinations only serves to blur the line between what is and is not depicting and describing sexual or excretory functions.

b. The Second Prong

The second prong of the indecency definition is even more subjective. First, the material must be “patently offensive as measured by contemporary community standards.”¹⁵⁶ Of course, there are probably as many different definitions of what is patently offensive as there are people to espouse them. So, in order to add a measure of objectivity to what otherwise would be far too vague to guide licensees or the Commission staff members, the definition also says the material is to be judged by “contemporary community standards.”¹⁵⁷

This purportedly objective approach, however, only compounds the problem. Instead of determining whether material is patently offensive, Commission staff and licensees must determine whether that patent offensiveness rises (or falls) to a level that is patently offensive to the contemporary standards of the community. Unfortunately for the FCC—but fortunately for those who want diversity or change in American broadcast programming—contemporary community standards vary among members of a community and within the community as a whole as time progresses. For example, it is very likely that the local preacher and the local pornographer, assuming both exist in a community, have very different community standards. In addition, a city such as Seattle likely has very different community standards than it did in the 1970s. So using a contemporary community standard only layers temporal and value subjectivities on top of the existent definitional problems.

In seeking to correct the further problems it created, the FCC held that there was only one “contemporary community standard,” and it applied to the whole country.¹⁵⁸ At best, this solution erases the value subjectivity of

154. See *id.* paras. 14-15 (citing Great Am. Radio, *Letter*, 6 F.C.C.R. 3692, 68 Rad. Reg.2d (P & F) 686 (1990)).

155. The FCC decided that “Big Peter” (purportedly a monster truck) crushing and entering a Volvo, followed by laughter, was not an inescapable reference to sex. See *supra* note 70.

156. FCC v. Pacifica Found., 438 U.S. 726 (1978).

157. *Id.*

158. See WPBN/WTOM License Subsidiary, Inc., *Memorandum Opinion and Order*, 15

the definition, but does nothing to further explain what is patently offensive or to correct the possibility of inconsistent judgments based on changing societal standards over time. In reality, however, even that seems more than we can hope for here. In fact, this holding makes the definition worse by replacing one type of subjectivity with an even more elusive subjectivity. Such is the case because a regional community standard, however difficult to ascertain, will always be easier to determine (and thus less subjective) than a national community standard, since the vast expansion of population in moving from a regional to national standard undoubtedly expands the variables that must be considered.

c. "For the Broadcast Medium"

Further subjectivity is cast on the definition of indecency by the application of this standard strictly to broadcast media. This is because in addition to the essentially subjective determination regarding contemporary community standards, the Commission must also determine what those standards are with regard to broadcast media, as opposed to other media. This further, necessarily opinion-based, element adds another layer of subjectivity to the definition.

d. The Three Non-exclusive Factors

The FCC also applies three non-exclusive factors in determining the second prong of the indecency test: The first is explicitness. What is and is not explicit enough to warrant liability, however, undoubtedly differs from person to person, even within the Commission. This is further compounded by subjectivity in severity. In other words, if the FCC put all broadcast material on a continuum, ranging from most indecent to least indecent, it would still have two problems. First, where the Commission should draw the line is unclear, and an additional problem is where the Commission should place any one example on the continuum. Just as two different people (or Commission staffers) might draw the line in a different place, two people might rate material different as compared to other material.

The second factor is repetition. This factor has the potential for objective application, in that the FCC could adopt a policy where any program with more than a certain number of offensive references is indecent, and a lower number of references is not indecent. Because the

F.C.C.R. 1838, para. 10, 19 Comm. Reg. (P & F) 422 (2000) (noting that "[t]he determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant").

Commission uses these factors in a nondeterminative and non-exclusive manner, however, such objectivity is impossible. This is so because the Commission, in finding a program indecent, may ignore this factor altogether should it deem it appropriate.

The third factor is intent to pander, titillate, or shock. This factor is probably the most subjective of all. The question of what panders, titillates, or shocks one person as opposed to another has as many answers as there are people to ask. But to further muddle this factor, the Commission staffer who employs it must look beyond whether it actually panders, titillates, or shocks, to decide whether or not the material was intended to do so. It is also unclear whether such intent must reside in the broadcaster, producer, or creator of the program. And it is further unclear, whether we should determine that the broadcaster's intent is key, whether it must be the intent of the disc jockey, the programming director, the general manager, a combination of two, or all of them.

e. The Citadel Case

The *Citadel* case, mentioned at the beginning of this Note, is a great example of how the subjective nature of indecency regulation leads to inconsistent results. In the NAL issued to Citadel, the Enforcement Bureau decided that the edited version of "The Real Slim Shady" "contain[s] unmistakable offensive sexual references," and "appear[s] intended to pander and shock."¹⁵⁹ The Commission does not explain in its opinion why it is offensive, what contemporary community standard the song offends, or what indicates an intention to pander or shock. Further, the Enforcement Bureau makes no mention of either the explicitness or repetition factors in making its determination.

In its reversal, however, the Enforcement Bureau notes that "[a]lthough the song, as edited, refers to sexual activity, these references are oblique."¹⁶⁰ The Commission's reference to the "oblique" nature of the lyrics clearly points to the explicitness factor of the Policy Statement, a factor wholly ignored by the first opinion. Also, the opinion gives no explanation of what, in the future, will or will not be considered "oblique."

The reversal also notes "the sexual references contained in the 'radio edit' version, in the context presented, do not appear to pander to, or to be used to titillate or shock its audience. Thus, the sexual references do not have the effect of a 'verbal shock treatment.'"¹⁶¹ This is clearly a reference

159. *Citadel I*, *supra* note 1, para. 6.

160. *Citadel II*, *supra* note 1, para. 10.

161. *Id.* para. 11 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 757 (1978) (Powell, J., concurring in part and concurring in the judgment)).

to the third factor, which strangely enough, is the lone factor on which the original decision was based. This further suggests that these factors can be manipulated to serve the subjective motivations of the Commission. In each case, the Commission makes no mention of the repetition factor, which the Commission could have used to support the original finding, since the radio station played “The Real Slim Shady” dozens of times prior to the complaint.¹⁶² This is particularly telling of the conclusory and potentially contradictory decisions the FCC can reach under its definition of indecency.

f. The Sarah Jones Case

Another example of the subjective nature of FCC indecency determination lies in the case of Sarah Jones. Jones is a poet, spoken word performer, actress, and playwright who has worked with the likes of Paul Simon, Russell Simmons, and Spike Lee.¹⁶³ When a listener filed a complaint about a radio station airing her poem “Your Revolution,” which criticizes rap lyric misogyny, the FCC issued an NAL to the radio station.¹⁶⁴ Other radio stations have apparently refused to play her poem on the air as a result of the finding, likely in fear of more FCC action, and the higher fines that come with airing material that the FCC previously deemed indecent.¹⁶⁵ Jones countered by suing the FCC in federal court,¹⁶⁶ but the suit was dismissed for lack of final agency action and lack of jurisdiction.¹⁶⁷

The NAL itself, issued to KBOO in Portland, Oregon, rejects the argument that merit alone exempts broadcast material from indecency findings, explaining that “[m]erit is one of the variables that are part of the

162. See *Citadel I*, *supra* note 1, para. 7; *Citadel II*, *supra* note 1, para. 2.

163. See <http://www.sarahjonesonline.com>.

164. KBOO Found., *Notice of Apparent Liability for Forfeiture*, 16 F.C.C.R. 10731 (2001) [hereinafter *KBOO Found.*] An audio rendition of “Your Revolution” is available at <http://www.yourrevolutionisbanned.com>. The poem reads, in part:

Your revolution will not find me in the backseat of a jeep
With LL hard as hell, you know
Doing’ it and doing’ it and doing’ it well, you know
Doing’ it and doing’ it and doing’ it well
Your revolution will not be you smacking’ it up, flipping’ it or rubbing’ it down
Nor will it take you downtown, or humping’ around
Because that revolution will not happen between these thighs

Id. at 10736 attach.

165. See *Industry Guidance*, *supra* note 42, para. 27.

166. Neil Strauss, *Songwriter, Citing First Amendment, Sues F.C.C. Over Radio Sanctions*, N.Y. TIMES, Jan. 30, 2002, at E1.

167. *Jones v. FCC*, 30 Media L. Rep. 2534 (S.D.N.Y. 2002).

material's context, and the Commission has rejected an approach to indecency that would hold that material is not *per se* indecent if the material has merit."¹⁶⁸ The Commission goes on to explain that it sees no reason, beyond its merit, to find it decent.¹⁶⁹ Of the relevant factors listed in the Policy Statement, the intent to pander, titillate, or shock is the only one discussed, and without explaining why, the FCC decided that the performance, "considering the entire song . . . appear[s] to be designed to pander and shock and [is] patently offensive."¹⁷⁰ Because of this ruling, radio stations are free to play misogynistic rap lyrics at any time of the day, but those same stations may only play Jones's criticism of those lyrics between 10 P.M. and 6 A.M. Such a result is almost certainly inconsistent with the Supreme Court's ruling in *R.A.V. v. City of St. Paul*, which prohibited viewpoint discrimination, even among constitutionally unprotected speakers.¹⁷¹

It is clear that the procedure involved in FCC regulation is ill-suited for the determination of what is or is not indecent, and the FCC's definitions regarding what is and is not indecent are too subjective to be effective. An alternative—and a favorable one at that—is available.

B. *The Commission and Obscenity*

The FCC has a fallback position of sorts in the matter of obscenity doctrine. Obscenity is defined by *Miller v. California*.¹⁷² It is undoubtedly true that this definition, particularly parts (a) and (b), has as many subjective qualities as the FCC's indecency definition. It also has a saving grace, however.

Because the Supreme Court wrote this definition as an explanation of speech that is unprotected by the First Amendment, it is essentially a definition of constitutionally valueless sexual speech. Concomitantly, the exceptions to this definition in part (c) define and protect speech with value. Because of the function part (c) serves, its exceptions are the most significant portion of the rule. In short, the importance of the exceptions minimizes the importance of the subjectivities in the rule itself.

Further, because the exceptions to the rule are the essence of protected speech under the First Amendment, this rule is essentially rooted

168. *KBOO Found.*, *supra* note 164, para. 8.

169. *See id.*

170. *Id.*

171. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (Scalia, J., noting that government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules").

172. *See infra* Part II.B.

in principle—i.e., the Constitution—rather than the subjectivity of patent offensiveness and contemporary community standards. The Constitution, unlike the local preacher, pornographer, or FCC staff person, contains principles to which all American citizens strive to abide.

In addition, the procedural concern regarding indecency does not exist here. This is because indecent speech, as protected under the First Amendment, must be balanced against the government's interest in protecting children from exposure to it. No such balancing is necessary with obscenity, where the Constitution has spoken by way of the Supreme Court. In short, because the Supreme Court has already illuminated the legal truth regarding obscenity, procedural goals to that end are significantly less important.

This is not to suggest that implementation of obscenity doctrine would be perfect. Human application of principle to any set of facts will contain a margin of error. But if we truly seek to continue striving toward “a more perfect union,” as Thomas Jefferson once wrote, the Constitution demands the use of a doctrine rooted in its own principles rather than a doctrine that allows the government to balance constitutional principles against its own.

Aside from its philosophical ramifications, obscenity doctrine would be more useful in the suppression of valueless speech. The FCC could probably argue with much success that every example of actionable indecency in its Policy Statement is also obscene. This is true despite the fact that the current obscenity doctrine does not proscribe material pertaining to the excretory function, because the Supreme Court would be unlikely to invalidate an FCC definition of obscenity that included material depicting the excretory function (and perhaps even violence), so long as the ever-important exceptions applied across the board.

Also, note that this ban would not be a partial ban like indecency regulations.¹⁷³ Because obscenity has no First Amendment value, it can be banned around the clock. To use an analogy, fighting the lesser angels of broadcasting with indecency doctrine is like eating soup with a fork. While the fork is clearly designed for eating, there is obviously a much more effective tool for the job. It is time, if we are as “serious” about cleaning up the airwaves as Commissioner Tristani believes we should be,¹⁷⁴ to start using a spoon.

173. Indecency is only banned from 6 A.M. to 10 P.M., presumably when children are likely to be in the audience. *See Action for Children's TV v. FCC*, 58 F.3d 654, 664-65 (D.C. Cir. 1995).

174. *Industry Guidance*, *supra* note 42, at 8025 (Dissenting Statement of Comm'r Gloria Tristani).

Critics may suggest that obscenity doctrine, despite its sharper teeth and brighter line, would be ineffective in controlling the broadcast community because it does not capture enough of the speech, regardless of value, that needs to be filtered away from children. This argument is based on the fear that a good appellate advocate could make any material appear to fit into one of the four exceptions to the obscenity rule. This argument may certainly have been true prior to *Miller*, but the Supreme Court expressly cast doubt on such an interpretation in backing away from its “utterly without redeeming value” standard.¹⁷⁵ Further, such an argument forgets that other forces exist that will help regulate broadcasters.

Parents are the first alternate force. While it is undoubtedly true that children do not always understand the nature or pervasiveness of the broadcast medium, parents almost certainly do. In addition to understanding the broadcast medium, parents have the ability to control children’s access to inappropriate material. They are perfectly capable of changing stations and turning off televisions and radios. Furthermore, as consumers, parents choose both to buy radios and televisions and access the media. In *Pacifica*, Justice Stevens criticized this argument, suggesting that “[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”¹⁷⁶ While the simplicity of this analogy is inviting, it is also deceptive, in that it thoroughly ignores the nature of the broadcast medium. One who assaults does not simultaneously hit thousands of people, with no response from most. Advertisers do not pay those who assault for their actions. Government commissioners have never called upon those who assault to develop their own “voluntary code of conduct” with regard to their actions.¹⁷⁷ Finally, victims of assault must rest knowing that the government will only punish the offender if he or she is convicted beyond a reasonable doubt by a jury of his peers, not if a few government officials in Washington, D.C. believe he or she did it.

Another regulatory force is the market itself. If offensive stations repeatedly broadcast material that offends majorities of its listeners, the audience will stop listening or watching. Radio and television, for the most part, is an industry driven by ratings. Accordingly, when ratings fall, revenues fall. Put simply, if a majority of listeners don’t want risqué programming, it will be in the best interest of broadcasters’ pocketbooks to quit broadcasting it.

175. *Miller v. California*, 413 U.S. 15, 36-37 (casting doubt on whether the government could ever prove that anything was “utterly” without value).

176. *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

177. *Industry Guidance*, *supra* note 42, para. 30.

IV. PROPOSAL

Congress should amend 18 U.S.C. § 1464, deleting the words “indecent” and “profane” from its scope. This would leave the FCC with only obscenity doctrine to build from in regulating broadcast content. In doing so, Congress would be alleviating the subjective enforcement problems inherent in indecency regulation; and when applied appropriately, obscenity doctrine could be applied to keep the airwaves just as clean or cleaner, through a more principled and less arbitrary means.

Further, the FCC should take measures to streamline its procedure with regard to content questions. Such measures would lessen the likelihood of settlement, increase the number of cases that reach the courts, and thereby generate a more principled set of cases under which the FCC and broadcasters can operate.

V. CONCLUSION

Exercise of parental control of children’s viewing, market forces, and governmental regulation of obscenity are enough to reasonably control the flow of objectionably explicit material on the air. Curtailment of the current regulatory scheme is warranted, given the current state of indecency regulation. This Note’s proposal is a concise, yet effective means toward that end.

