

COMMENTS

In response to FCC Public Notice, Released 4/1/13, GN Docket No. 13-86 “FCC Seeks Comment on Adopting Egregious Cases Policy”

Submitted electronically on June 18, 2013 by:

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I. Overview of the problem

Political and ideological factors are clearly a big part of the explanation of why the broadcast indecency law has not been enforced effectively since the 1978 *Pacifica* decision. For almost a decade following *Pacifica*, the FCC interpreted that case in the narrowest possible way and did not enforce the law at all.²

Under President George H.W. Bush, the FCC aggressively enforced the broadcast indecency law against radio “shock jocks” but did not enforce the law against broadcast TV networks. Under President Bill Clinton, enforcement of the law became lax against the “shock jocks,” and there was still no enforcement against network TV programming. Under President George W. Bush, the FCC not only aggressively enforced the law against radio “shock jocks” but for the first time in history also enforced the law against the broadcast TV networks. Under President Barack Obama, there has been no enforcement of the law.

But it isn’t just the President who influences whether and how the indecency law is enforced. The ideological views and priorities of the FCC Chairman are also important; and on more than one occasion a President thought to be a social conservative (Ronald Reagan and George W. Bush) appointed a libertarian (Mark Fowler and Michael Powell) to head the FCC, with predictable results.³

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² *Fox TV Stations*, 489 F.3d at 449, n.4 (“At the time, the FCC interpreted *Pacifica* as involving a situation ‘about as likely to occur again as Haley’s Comet.’”).

³ To their credit, both Mark Fowler and Michael Powell ultimately decided to enforce the broadcast indecency law, but only after outside organizations put pressure on the President.

In addition to the FCC Chairman, the Chief of the Enforcement Bureau also plays an important role if for no other reason than that the Commissioners often rely on the Enforcement Bureau. In 1999 Chairman Kennard appointed David Solomon to be the first Chief of the Enforcement Bureau; and Mr. Solomon continued in that position until after Chairman Powell resigned. The *2001 Policy Statement*⁴ was issued under Mr. Solomon's watch, and Mr. Solomon determined in 2003 that Bono's utterance of the "f-word" during the *Golden Globe Awards* program did not violate the indecency law.⁵ Under his watch, other indecency complaints regarding network TV programming were also routinely denied.⁶

The most important question that is being asked in the *Public Notice* (GN Docket No. 13-86) is whether the FCC should follow the *2001 Policy Statement*, unmodified by subsequent adjudications. Short of having the broadcast indecency law declared unconstitutional, nothing would make the TV networks happier.

The FCC, however, is not charged with the responsibility of making the TV networks happy. It is charged with the responsibility of ensuring that the networks and other broadcasters serve the public interest, and the public interest is not served by allowing broadcasters to turn the public airwaves into a public sewer.

II. General Considerations

When Congress enacted a law in 1927 to prohibit the broadcast of obscene, indecent or profane language, it could not have had in mind broadcasting's "uniquely pervasive presence in the lives of all Americans."⁷ By 1930, only 40% of U.S. households had purchased radio receivers⁸ and car radios were not mass produced until 1930.⁹ Even in 1927, however, Congress was surely concerned that "indecent material presented over the airwaves confronts the

⁴ *In the Matter of Industry Guidance on the Commission's Case Law Interpretation of 18 U.S.C. 1464*, 16 FCC Rcd 7999 (2001) (hereinafter *2001 Policy Statement*).

⁵ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards Program,"* File No. EB-03-IH-0110 (October 3, 2003).

⁶ "Obscene, Profane & Indecent Broadcasts: Complaint Denial Orders," available at <http://www.fcc.gov/encyclopedia/obscene-profane-indecnt-broadcasts-complaint-denial-orders>.

⁷ *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (hereinafter *Pacifica*).

⁸ Steve Craig, "How America adopted radio: Demographic differences in set ownership in the 1930-1950 U.S. Censuses," *Journal of Broadcasting & Electronic Media*, Vol. 48, No. 2, 2004.

⁹ "September 26, 1928: First day of work at the Galvin Manufacturing Corp.," in *This Day in HISTORY: Automotive*, www.history.com ("On this day in 1928, work begins at...Galvin...In 1930, Galvin would introduce...the first mass-produced commercial car radio.").

citizen, not only in public, but also in the privacy of the home,”¹⁰ and that “prior warnings cannot completely protect the listener or viewer from unexpected program content”¹¹ and that “[d]uring most of the broadcast hours...the broadcaster cannot reach willing adults without also reaching children.”¹²

Former Federal Communications Commissioner George Henry Paine described the broadcast indecency problem in the 1930s this way:¹³

“The radio is in the home, it is easily turned on, and if the vigilant parent turns it off, it comes down the pipeline from the apartment above. I received a...letter from a lady...who said:”

A few evenings ago my grandchildren were listening to gentle music which was suddenly broken into...and a loud voiced speaker talked at length about a certain brand of gin...Billy—aged seven—said, “Grandma, let’s get some of that. It sounds like a nice drink, doesn’t it?” Right into our living room...comes this plea...In a mixed family of grown-ups and half-grown boys and girls, these things...are openly and rudely discussed by a stranger who thrusts his loud voice into our home.

“I received a letter from Bishop S. Arthur Huston...:”

It would seem to anyone outside the Commission that the Government has the same right to set up adequate standards of decency in radio programs as it evidently has in matters that have to do with the mechanical operation of stations...One may, of course, stay away from an indecent picture if he suspects it beforehand—but how can anyone dodge the... ‘dirty crack’ which drift[s] in over the radio? Unless some standards of decency are required, upon pain of losing the license to broadcast, it would seem...we shall go from bad to worse.

Congress was surely also concerned about the public nature of broadcasting. In many respects, broadcasting partook of the nature of a state or county fair with

¹⁰ *Pacifica*, 438 U.S. at 748; *id.* at 759 (Powell, J., concurring) (“A second difference...is that broadcasting...comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds”).

¹¹ *Id.* at 748.

¹² *Id.* at 758-759 (Powell, J., concurring).

¹³ “Standards in Broadcasting,” in *The Fourth Estate and Radio and Other Addresses 77-78* (Forward by Robert Emmet MacAlarney, The Microphone Press, Boston, 1936).

various exhibits and events. Just as a state or county fair was open to all regardless of age who could find transportation to get there, so broadcasting was available to all regardless of age who could get (or found themselves) within earshot of a radio. And just as a state or local government could punish indecent language at a state or county fair, so Congress could also punish indecent language in broadcasting.

It should go without saying that a law proscribing indecent language would have applied even if the fair charged an admission fee and even if younger children had to be accompanied by a parent. It should also go without saying that had a fair provided free live entertainment each evening, which could be seen and heard by persons of all ages, the following “entertainment” would not have been permitted:

- A man disrobing and saluting the crowd before exiting the stage
- A woman disrobing and waiving at the crowd before exiting the stage
- An woman flashing her bare breasts for a second or two
- An man exposing his bare butt for a second or two
- An man describing his private parts as part of a comedy routine
- An adult using the word “‘f—k—g’ as an adjective or expletive to emphasize an exclamation.”¹⁴

When Congress enacted the Radio Act of 1927, Congress did not give broadcasters a right to use the public airwaves to curse at least once or twice in each program (or however often). That Act made it unlawful to “utter *any* obscene, indecent, or profane language.” [*Italics added*]

While little is known about what prompted regulation of obscene, indecent or profane language in broadcasting, it is highly unlikely that it was the airing of anything comparable to the George Carlin “Seven Dirty Words” monologue. In her monograph, “The origins of the ban on obscene, indecent or profane language of the Radio Act of 1927,”¹⁵ Milagros Rivera Sanchez stated:

The earliest complaint dates back to March 1920. The Radio inspector S.W. Edwards asked the Commissioner of Navigation A.J. Tyrer if the amateur license of E. Ferguson...should be suspended for three months. Ferguson admitted telling another amateur to “go to hell over the air.” [pp.7-8]
Ms. Rivera Sanchez also observed:

¹⁴ *Complaints Against Various Broadcast Licensees Regarding Their Airing of the ‘Golden Globe Awards,’* 18 FCC Rcd 19859 (Enforcement Bureau 2003).

¹⁵ *Journalism & Communication Monograph* 149 (February 1995).

The Congressional records and debates do not provide any evidence that members of Congress were concerned about the First Amendment implications of banning the use of obscene, indecent or profane language from the airwaves...The fact that there was little discussion...is perhaps an indication that at least some free speech advocates did not consider offensive language deserving of First Amendment protection. [p.21]

There is another explanation for the lack of “discussion” – namely, that Members of Congress and just about everyone else back then understood that the “main purpose” of the freedom of speech clause was “to prevent all such *previous restraints* upon publications” and not to “prevent the *subsequent punishment* of such as may be deemed contrary to the public welfare.”¹⁶ They would also have understood that when the Supreme Court said that the prevention and punishment of the “lewd and obscene, the profane” had “never been thought to raise a Constitutional problem,”¹⁷ those terms encompassed indecent language.¹⁸

Perhaps it would be unwise to now roll back the clock and insist that when Congress said “*any* obscene, indecent or profane language,” it meant what it said. But it would be downright foolish to now determine that broadcasters have a right to utter at least one expletive, *regardless of circumstances*. There is a middle road between prohibiting all expletives and allowing *at least one* expletive regardless of circumstances – namely, when utterance of an expletive amounts to a nuisance, it is actionable. In *Chaplinsky*,¹⁹ the Supreme Court twice cited a book written by First Amendment scholar Zechariah Chafee, Jr.,²⁰ in which Chafee stated:

But the law punishes a few classes of words like obscenity, profanity ...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, *indecent talk and pictures*...have a very slight social value as a step towards truth, which is...outweighed by the social interest in order, morality, the training of the young and the peace of mind of those

¹⁶ *Near v. Minnesota*, 283 U.S. 697, 714 (1931); *Pacifica*, 438 U.S. at 735-738.

¹⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

¹⁸ See, *Bethel School District v. Fraser*, 478 U.S. 675, 678-679 (1986) (where a prohibition on “use of obscene, profane language” was applied to a student speech that was deemed “indecent, lewd and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly.”); see also, *Rosenfeld v. New Jersey*, 408 U.S. 901, 911 (1973) (Rehnquist, J., dissenting) (use of the f word is “‘lewd and obscene’ and ‘profane’ as those terms are used in *Chaplinsky v. New Hampshire*... the leading case in the field”).

¹⁹ 315 U.S. at 571-572, notes 4-5.

²⁰ *Free Speech in the United States* 149-150 (Harvard University Press, 1941).

who hear and see... *The man who swears in a street car is as much of a nuisance as the man who smokes there.* [Italics added]

In 12 Am. Jur. 2d, Blasphemy and Profanity, Section 10 (“As common-law nuisance”) we also find the following:

In view of the requirement of a public nuisance, a single act of profane swearing is generally insufficient as a basis of the offense under the common law, although it is conceivable that under particular circumstances even a single oath may amount to such a nuisance. The use of profane and vulgar words in a public place on a single occasion, whereby the public at large was offended and annoyed, may amount to a public nuisance rendering profanity punishable under the common law.

The *Pacifica* Court also recognized that broadcast indecency could amount to a “nuisance” and upheld the FCC’s authority to regulate indecent language when it does.²¹ While *Pacifica* emphasized the “narrowness” of its holding, it did not hold that a single expletive could never be actionable.²² For one thing, *unlike* the indecent language that has proliferated on primetime TV,²³ the George Carlin monologue was an aberration.²⁴ For another, *unlike* a prime time program airing on a national broadcast TV network, the one-time afternoon airing of the Carlin monologue on a local radio station wasn’t likely to attract children. Furthermore, while the FCC may have chosen to interpret *Pacifica* in the narrowest possible manner,²⁵ most broadcasters took a different view of *Pacifica*:

²¹ 438 U.S. at 750; *id.* at 761 (Powell, J., concurring in Part IV-C).

²² 438 U.S. at 750 (“This case does not involve a two-way radio conversation...or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction.”); *id.* at 755 (Powell, J., concurring in Part IV-C).

²³ See, e.g., Release, “PTC finds increase in harsh profanity on TV,” Parents Television Council, 10/29/08 (“[N]early 11,000 expletives...were aired during primetime on broadcast TV in 2007 – nearly twice as many as in 1998...The f-word aired only once on primetime...in all of 1998 – yet it appeared 1,147 times on primetime...in 2007...The s-word, which appeared only two times in 1998, aired 364 times in 2007...”).

²⁴ *Fox Television Stations v. FCC*, 489 F.3rd 444, 449, n.4 (2nd Cir. 2007) [“At the time, the Commission interpreted *Pacifica* as involving a situation ‘about as likely to occur again as Haley’s Comet.’ Br. Of Amici Curiae Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broadcasting Assoc., Boston, Mass, 7/21/78)”].

²⁵ After the Supreme Court’s *Pacifica* decision, the FCC did not enforce the broadcast indecency law again for almost a decade.

“When it was the ‘Seven Dirty Words,’ we knew what they were and we didn’t say them,” says Rick Cummings, president of Emmis’s radio division, referring to the forbidden words made famous by the comedian George Carlin uttering them...²⁶

In 1978, the FCC ruled that piss and six other words were indecent and forbidden when children are likely among a broadcast station’s audience.²⁷

One doesn’t have to stretch one’s imagination far to think what some entertainers might say during a live program OR what some directors might have an actor say in a TV sitcom or drama OR what a radio shock jock might say if broadcasters can air at least one curse word in each program.

In determining what constitutes an “occasional expletive,”²⁸ there is also the matter of what time period is most relevant. Does it make sense to focus on a single program when many children watch hours of primetime programs most evenings of the week and when networks promote blocks of programming?

When Congress enacted the Radio Act of 1927, Congress did not provide broadcasters with a “safe harbor” to air indecent content. That Act on its face applied 24 hours a day and was understood to so apply until 1988 when a panel of the D.C. Circuit determined that a “safe harbor” was necessary:²⁹

Facing the uncertainty generated by a less than precise definition of indecency plus the lack of a safe harbor for the broadcast of (possibly) indecent material, broadcasters surely would be more likely to avoid such programming altogether than would be the case were one area of uncertainty eliminated. We conclude that, in view of the constitutionally protected expression interests at stake, the FCC must afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired...A securely-grounded channeling rule would give effect to the government's interest in promoting parental supervision...without intruding excessively upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech. Such a rule would present a clearly-stated

²⁶ Ann Marie Squeo, “Firing of ‘Love Sponge’ Signals Cleanup of Shock Radio,” *Wall Street Journal*, 2/25/04, p. B1

²⁷ Bill McConnell, “Seven provisionally dirty words? Damn!” *Broadcasting & Cable*, 7/8/02.

²⁸ *Pacifica*, 438 U.S. at 750.

²⁹ *Action for Children’s TV v. FCC*, 852 F.2d 1332, 1342-1344 (1988) (hereinafter *ACT I*).

position enabling broadcasters to comprehend what is expected of them and to conform their conduct to the legal requirement.³⁰

Notwithstanding that the very notion of a “safe harbor for indecency” is inane and that 10 pm is too early for the start of any such safe harbor,³¹ the D.C. Circuit in *ACT I* did have the worthy intention of *also* providing a *safe harbor for children* during which children could listen to or view broadcasting without being exposed to indecency. The notion of a *safe harbor for children*, however, seems not to have caught on at the FCC. How else do we explain reasoning like that found in *Matter of Complaints by Parents TV Council against various broadcast licensees regarding their airing of allegedly indecent material??*³²

In *Pacifica*, the Supreme Court stated, “the Commission's decision rested entirely on a nuisance rationale...The concept requires consideration of a host of variables. *The time of day was emphasized by the Commission.*”³³ In routinely dismissing TV indecency complaints, however, the FCC seems indifferent to the fact that most complaints involve programming that airs during primetime. In *Pacifica*, the Court was also clearly concerned about the adverse impact that indecent programming had on children.³⁴ In routinely dismissing TV indecency complaints, however, the FCC seems indifferent to the impact on children.

The FCC seems to have lost sight of the fact that unlike in the realm of enforcement of federal obscenity laws, where ordinarily “children are not to be included...as part of the ‘community,’”³⁵ children should be included in the determination of community standards where there is “evidence that children were the intended recipients of the [programming]...or that [the broadcaster] had reason to know children were likely to receive the [programming].”³⁶

³⁰ One cannot help but wonder why Circuit Court Judge Ruth Bader Ginsburg, who wrote the opinion in *ACT I*, did not in her capacity as a Supreme Court Justice express similar concerns about the less than precise definition of “hostile” in the context of a work environment. See, *Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993) (“This is not, and by its nature cannot be, a mathematically precise test.”); *id.* at 25 (Ginsburg, J. concurring). See also, E. Volokh, “What speech does ‘hostile work environment’ harassment law restrict?” 85 *Geo L.J.* 627 (1997).

³¹ Congress attempted to extend the hours during which indecent language would be prohibited until 12 midnight, but that law was invalidated on equal protection grounds in *Action for Children's TV v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. den.*, 516 U.S. 1043 (1996).

³² 20 FCC Rcd 1931 (2005) -and- 20 FCC Rcd 1920 (2005).

³³ 438 U.S. at 750 (*italics* added).

³⁴ *Id.* at 749-750.

³⁵ *Pinkus v. United States*, 436 U.S. 293, 297 (1978) (content in [] added by author).

³⁶ *Id.* at 298.

There can be no doubt that between 7 pm and 10 pm children are either “intended recipients of” or “likely to receive” broadcast TV programming. And ABC’s *NYPD Blue* program is proof positive that a program that contains “mature content” and is intended for adults can succeed when aired *after 10 pm*.

III. FCC 2001 Policy Statement was both unnecessary and unwise

For reasons hard to fathom then and now, in 1994 the FCC agreed to clarify its indecency standard as a result of a lawsuit brought in the U.S. District Court for the Northern District of Illinois.³⁷ It is hard to fathom because both the Supreme Court and the D.C. Circuit had already declined invitations to invalidate the FCC’s indecency definition on vagueness grounds.³⁸ In her dissent from the issuance of the *2001 Policy Statement*, FCC Commissioner Gloria Tristani stated in part:

The Statement perpetuates the myth that broadcast indecency standards are too vague and...that a Policy Statement is necessary to provide further guidance... First, settlement of a case involving a single licensee should not compel the FCC to adopt our most significant industry-wide Policy Statement on this subject... Second, there is nothing in the record demonstrating that Evergreen Media failed to understand the FCC's, or the U.S. Supreme Court's, cases on broadcast indecency. In fact Evergreen agreed to issue to its employees a “policy statement” that was to be based upon “the FCC's definition of broadcast indecency.”...Moreover, I am aware of no rush of inquiries by broadcast licensees seeking to learn whether their programs comply with our indecency case law. In the absence of such requests, this Statement... may lead to responses to future enforcement actions that cite the Statement as establishing false safe harbors.³⁹

³⁷ *United States v. Evergreen Media Corp.*, Civ. No. 92 C 5600 (N.D. Ill. 1994).

³⁸ See, *Action for Children's TV v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995), *cert. den.*, 516 U.S. 1043 (1996) (“[W]e dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *ACT II*, where we stated that “the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission’s] definition” as did our holding in *ACT I*... Petitioners fail to provide any convincing reasons why we should ignore this precedent.”); see also, *Rosen v. United States*, 161 U.S. 29, 42 (1896) (“Everyone one who uses the mails...for carrying papers and publications must take notice of what, in this enlightened age, is meant by decency...in social life.”).

³⁹ Not long after the FCC agreed to clarify its indecency standard as a result of the *Evergreen Media Corp.* case, the author of these Comments called the FCC to determine if Morality in Media could submit Comments. The spokeswoman unequivocally stated that no decision would be made without outside input. Years passed and then without advance notice and without outside input, the FCC’s Enforcement Bureau released the *2001 Policy Statement*.

Decades ago, the broadcast TV networks had an industry code and self-imposed internal standards that generally reflected community standards. Those days are long gone. Despite their protestations, however, the problem is not that the networks can no longer discern community standards. The problem is that they long ago stopped caring about community standards. If they did care, they would revitalize their standards departments, work with Nielson to get feedback from viewers, and work with mainstream advertisers who don't want to offend viewers with programming they sponsor. They could also pick up a copy of the *N.Y. Times* or *Wall Street Journal*, both of which are nationally⁴⁰ circulated newspapers that inform and entertain their readers without trampling on standards of decency.

The TV networks would also (*gasp*) make a concerted effort to exercise common sense, because even assuming that adults have become as jaded as the networks want us to think, much of their audience consists of children. Instead, the networks push the envelope and then complain they don't know whether the FCC will deem this or that transgression of community standards actionable.

In addition to issuing an *unnecessary* statement, with the issuance of its *2001 Policy Statement*, the Commission also retreated from a "nuisance rationale"⁴¹ and moved in the direction of guidelines all too similar to the three-part obscenity test enunciated in *Miller v. California*, 413 U.S. 15 (1973).⁴²

As I understand the three "factors" enunciated in the *2001 Policy Statement*, the first factor (explicitness or graphic nature) is similar to the 2nd prong (hardcore sexual conduct) of the *Miller* test; the second factor (dwells on or repeats at length) is similar to the 1st prong (prurient appeal) of the *Miller* test; and the third factor (pander or used to titillate) is similar to the 3rd prong (serious value) of that test.

*This is not to say that the three factors are objectionable as such,*⁴³ but by limiting the determination of indecency to these factors, the *2001 Policy Statement* in good measure changed the broadcast indecency law into a lewdness law.⁴⁴ This

⁴⁰ In enforcing the broadcast indecency law, the FCC does not apply local community standards.

⁴¹ *Pacifica*, 438 U.S. at 750 ("The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables.").

⁴² In *Pacifica*, 438 U.S. at 742, the Supreme Court rejected the argument that unless broadcast content is obscene, "the Constitution forbids any abridgment of the right to broadcast it..."

⁴³ The three factors might be just what are needed for the hours 10 pm to 6 am.

⁴⁴ The difference between public *lewdness* (see, NY Penal Law, Section 245) and public "indecency" (see, NY Penal Law, Section 245.01) is the difference between copulating on a

explains why in the *Golden Globe Awards* case⁴⁵ the Enforcement Bureau thought it was OK to use the “f-word,” since that vulgarity wasn’t meant to be taken literally when uttered during the *Golden Globe Awards* program.

In *Pacifica* the Supreme Court observed that the FCC’s “decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables.”⁴⁶ These variables include:

1. The time of day and nature of the program,⁴⁷ both of which will affect the composition of the audience
2. Whether the offensive content itself, when heard or viewed in context, has *serious* artistic, literary, political or scientific value
3. For expletives, the particular expletive that is used (some expletives are more offensive than others) and how the particular expletive is used (literally or figuratively) and whether the use is deliberate or extempore and how often one or more expletives are used
4. For nudity, whether the nudity is intended or likely to be sexually arousing and what private part(s) is visible (the public display of some parts is more offensive than of other parts) and how much of the part is visible and how long the part(s) is visible (fraction of a second or seconds)
5. For network promotions and sponsor advertisements, whether it airs in conjunction with a program intended for children or family viewing
6. For live programming, the degree of risk that indecent content might air and the difficulty (cost) if any of delaying transmission to prevent the airing

It should go without saying that determining what is indecent as broadcast is not the only area of law where a person is required to determine the lawfulness of an action or course of action by applying various factors. Consider, for example:

- What constitutes a “lascivious” exhibition⁴⁸

public beach and strolling nude on a public beach. It is also the difference between using the “F-word” *literally* and using it “as an adjective or expletive to emphasize an exclamation.”

⁴⁵ *Golden Globe Awards*, 18 FCC Rcd. 19859 (EB 2003).

⁴⁶ *Pacifica*, 438 U.S. at 750.

⁴⁷ The nature of the program can affect audience composition in one of two ways. If a program is known or is promoted as “family friendly,” parents will watch it with their children or turn it on for their children. If a program is known or is promoted for its vulgar or sexually charged content, curious, mischievous and older children will want to watch it and often succeed.

⁴⁸ *United States v. Dost*, 636 F. Supp. 828 (S.D.Cal.1986), *aff’d sub nom. United States v. Wiegand*, 812 F.2d 1239 (9th Cir.), *cert. den.*, 484 U.S. 856 (1987).

- What constitutes a “hostile” work environment?⁴⁹
- What constitutes “immoral or scandalous matter?”⁵⁰
- What constitutes “fair use.”⁵¹

I would also be remiss if I did not state (1) that in *FCC v. Fox Television Stations*⁵² the Supreme Court did not require the FCC to abide by the letter of the *2001 Policy Statement* and (2) that the *2001 Policy Statement*, as modified by subsequent adjudications,⁵³ is a major improvement over the *Statement* itself.

IV. ‘Serious value’ is an important but not a determinative variable

Since the 1970s,⁵⁴ the FCC has in enforcing the broadcast indecency law attempted to find a balance between protecting children and protecting freedom of speech; and in *Act I*⁵⁵ the D.C. Circuit held that while “merit is properly treated as a factor in determining whether content is patently offensive...it does not render such material *per se* not indecent.” In *Action for Children's TV v. FCC*,⁵⁶ the D.C. Circuit again rejected the notion that broadcasters’ “free speech rights” should always trump concerns about the impact of indecent content on children.

Were it not so, broadcasters could air content that appealed to the prurient interest *and* depicted hardcore sexual conduct in a patently offensive manner, as long as the content, taken as a whole, had serious value of some sort.⁵⁷

⁴⁹ See, e.g., *Harris v. Forklift Systems*, 510 U.S. 17, 22-23 (1993) (“This is not, and by its nature cannot be, a mathematically precise test...[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances...”); see also, “Understanding Workplace Harassment (FCC Staff): Workplace Harassment is a Form of Discrimination,” available at <http://www.fcc.gov/encyclopedia/understanding-workplace-harassment-fcc-staff>.

⁵⁰ See, e.g., Anne Gilson LaLonde & Gerome Gilson, “Trademarks laid bare: Marks that may be scandalous or immoral,” 101 *Trademark Reporter* 1476 (2011).

⁵¹ See, e.g., Christopher C. Collie & Eric D. Gorman, “Digital sampling of music and copyrights: Is it infringement, fair use, or should we just flip a coin?” *Boston College Intellectual Property & Technology Forum*, December 2011.

⁵² 132 S. Ct. 2307 (2012).

⁵³ See, *In the Matter of Complaints Regarding Various TV broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664 (2006); *Complaints Against Various Broadcast Licensees Regarding Their Airing of the 'Golden Globe Awards' Program*, 19 FCC Rcd 4975 (2004).

⁵⁴ *Pacifica*, 438 U.S. at 731-732.

⁵⁵ 852 F.2d at 1340.

⁵⁶ 58 F.3d 654, 667-668 (D.C. Cir. 1995) (en banc), *cert. den.*, 516 U.S. 1043 (1996).

⁵⁷ See, Paul J. McGeady, Esq., “Obscenity Law and the Supreme Court,” in *Where Do You Draw the Line*, at 102-103 (Victor B. Cline, ed., BYU Press, 1974).

In cases where broadcast content has the power both to cause offense/harm and to inform, however, society may *at times* choose to tilt the balance in favor of freedom of speech, even though offense/harm can still result. This is not per se irrational, despite what two 2nd Circuit judges in *FOX TV Stations v. FCC*⁵⁸ may have implied. However, to the extent that the FCC glibly ignores the offense/harm part of the balance or equation, the two judges had a point.

There are other reasons why the FCC should reject claims that freedom of speech is threatened whenever the law is enforced. As Justice Stevens observed in *Pacifica*:⁵⁹ “A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.” And as Justice O’Connor observed in *City of Erie v. Pap’s A.M.*,⁶⁰ “Being ‘in a state of nudity’ is not an inherently expressive condition.”

Furthermore, even if in a particular context the utterance of one or more expletives has serious value,⁶¹ there is a means by which some of the impact of the word(s) can be conveyed without adding to the vocabulary of two-year-olds. It’s called “bleeping.” Similarly, even if in a particular context a depiction of nudity has serious value,⁶² there is a means by which some of the impact can be conveyed without providing twelve-year-olds with an eyeful. It’s called blurring.

Most mainstream newspapers do a *far, far better* job of keeping the public informed than the TV networks; and they do it by using a variant of “bleeping” (to wit, using symbols such as #@*%, or skipping letters as in s--t) and by blurring the nudity. If newspapers can communicate much of the impact of cursing and nudity, without corrupting children in the process, so can TV broadcasters.

And lastly, just as there are different quality grades of meat, there are also different quality grades of serious value. Comparing the gratuitous cursing⁶³ and

⁵⁸ 489 F.3d 444, 458-459 (2nd Cir. 2007).

⁵⁹ 438 U.S. at 743, n.18.

⁶⁰ 529 U.S. 277, 289 (2000).

⁶¹ The author of these Comments assumes that Steven Spielberg’s purpose in airing extreme vulgarity in *Private Ryan* was laudable – namely, to depict the reality and horror of war.

⁶² The author of these Comments assumes that Steven Spielberg’s purpose in showing full frontal nudity in *Schindler’s List* was laudable – namely, to depict the humiliation of forced nudity experienced by those who suffered in Nazi concentration camps.

⁶³ David Hinckley, “Potty-mouths filling the air,” *NY Daily News*, 5/2/03 (“Guess which *NYPD Blue* character will say the S-word this week. It’s a lock to happen. Every new episode of the

nudity⁶⁴ in ABC's *NYPD Blue* to the battlefield cursing in *Private Ryan* and the concentration camp nudity in *Schindler's List* is like comparing all-beef franks to porterhouse steaks. In all too many primetime network TV programs, gratuitous vulgarity, sex talk and sex action serve *as substitutes for* serious value.

I would be remiss if I did not state that in *Pacifica* the Supreme Court recognized a second important governmental interest that is furthered by enforcement of the broadcast indecency law – to wit, protecting the privacy of the home.⁶⁵ In a related context, the Court enunciated a third important interest that is furthered by enforcement of the indecency law – to wit, “maintain[ing] a decent society.”⁶⁶

V. The FCC should clarify the definition of ‘indecent’

The FCC has defined broadcast indecency as:

Language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.⁶⁷

In *ABC, Inc. v. FCC*,⁶⁸ ABC argued that that the “buttocks are not a sexual or excretory organ;” and if that is true, the pubic area is presumably also not a sexual or excretory organ. Questions have also been raised as to whether the female breast is a sexual organ.⁶⁹ One way to cure this problem is to delete the

long-running ABC series, you can absolutely count on it, usually right around 10:30. The S-word is such a regular character, you half-expect to see it get a screen credit...For *NYPD Blue* viewers...the S-word isn't a big leap. Ten years ago, “a-h-” was unheard on prime-time TV. Now, thanks largely to [*NYPD Blue*], it's as common as lottery ads...”).

⁶⁴ Alan Sepinwall, “Farewell to *NYPD Blue*: Best Moments Ever” (“...I didn't have room to mention it in the Best Nude Scenes list for *The Star-Ledger*, so I'll slip it in here: Theo walking in on a stark-naked Connie in the Sipowicz family bathroom was arguably the show's most explicit nude scene (even with her hands trying to cover the naughty bits, I think we saw more of Charlotte than we ever saw of Kim or Amy or anyone else”), available at www.stwing.upenn.edu/~sepinwal/bestmoments.htm.

⁶⁵ 438 U.S. at 748-749; *id.* at 759 (Powell, J., concurring); see also, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (“State's interest in protecting the...privacy of the home is certainly of the highest order in a free and civilized society.”).

⁶⁶ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59-60 (1973).

⁶⁷ See, e.g., <http://www.fcc.gov/guides/obscenity-indecency-and-profanity>.

⁶⁸ 404 Fed. Appx. 530 (2d Cir. 2011) (Brief for Petitioner, p.14).

⁶⁹ *Opposition to Notice of Apparent Liability for Forfeiture 20* [FCC File No. EB-04-IH-0011, NAL/Acct. No. 200432080212], CBS Broadcasting, Inc. (Nov. 5, 2004)] (“The Super Bowl broadcast does not violate the test for indecency as it is defined by the FCC. According to the

words “organs or” from the existing definition and add the words “or nudity” at the end of the definition. The term “nudity” could then be defined as follows:

The showing of a portion of or the entire human genitals, pubic area, anus, anal cleft, buttocks or female breast with less than a fully opaque covering.

VI. Conclusion

Most Americans still understand the difference between right and wrong. They understand the difference between cherished liberty and ruinous license. They understand that children are affected by the media they consume and that if the entertainment industry has a right to distribute whatever it wants, wherever and whenever it wants, children will be the losers. They also still understand that law is necessary to maintain a decent society for all Americans.

Enforcement of the broadcast indecency law is not the whole answer to the problem of offensive and injurious broadcast programming. Not everything that offends and harms is indecent. Furthermore, because indecency is determined by applying community standards, individual viewer discretion is still necessary.

If the FCC is to fulfill its statutory responsibility to maintain standards of decency in broadcasting, however, the FCC must diligently and consistently enforce the indecency law; and it is clear that the FCC has failed miserably when it comes to enforcing this law in a diligent and consistent manner. I am not alone in my assessment. As the following surveys show, the majority of the American people (parents in particular) are offended by TV sex and vulgarity, are concerned about its impact on children, and are supportive of a role for government.

According to a survey conducted for Parents Television Council (Release, 4/7/11), 75% of adults agree “that there is too much sex, violence and coarse language on television.”

According to a survey conducted for the First Amendment Center (Release, 9/17/08), 62% of adults said the “government should be allowed to fine television

Commission, a finding of indecency involves two fundamental determinations. The broadcast in question must (1) depict or describe sexual or excretory organs or activities, and (2) be patently offensive...[footnote omitted] Here, the Commission concluded without discussion that the first criterion was met, although that facile assertion is far from certain.”), available at <http://transition.fcc.gov/eb/broadcast/Pleadings/Viacom.pdf>

broadcasters who air profane or obscene words that are scripted prior to the broadcast;” 50% said “government should be allowed to fine television broadcasters who air profane or obscene words spoken as part of spontaneous, unscripted material.”

According to a poll conducted by Harris Interactive for Morality in Media (Release, 7/12/07), 52% of adult Americans said the FCC should have authority to fine any of the major broadcast TV networks, such as NBC, ABC, CBS and FOX, for airing a single expletive or “four letter word.”

According to a poll conducted by the Kaiser Family Foundation (Release, 6/19/07), 66% of parents said they favored government regulations to limit the amount of sex and violence on TV during the early evening hours, a proportion that was virtually unchanged from 2004.

According to a survey released by the Culture and Media Institute (“The Media Assault on American Values,” 2007), 73% of adults said the “entertainment media” have a negative impact on moral values.

According to an Associated Press/IPSOS poll (Associated Press, 2/23/06), 66% of adult Americans thought there was “too much sex on television;” 68% thought there was “too much violence.”

According to a poll conducted by Harris Interactive for Morality in Media (Release, 4/25/05), 53% of adult Americans said the FCC is doing a “poor job” of maintaining community standards of decency on broadcast TV, particularly during the evening hours from 8 pm to 10 pm.

According to a poll by the Pew Research Center (4/19/2005), 69% of adults favored “increasing fines on broadcasters,” 60% favored having “cable follow same rules as broadcast,” and 75% favored “stricter enforcement of rules when children likely to watch.” 86% of adults were concerned about “what children see or hear on TV;” 61% were “personally” bothered by “adult language;” 56% by “sexual content.”

According to a *Time Magazine* poll (3/18/05), 53% of adults said that in controlling the amount of sex and violence on TV, the government should be “more strict;” 49% said, “government’s regulations over program content should be extended to cover basic cable like MTV and E;” 58% said there was “too much cursing and sexual language” on broadcast TV; 50% said there was “too much

explicit sexual content, such as nudity” on broadcast TV; 63% said, “implied fictional sex between two actors, but with no actual nudity on screen,” was “suitable only after 10 pm” or “never suitable” on broadcast TV. In response to the question, “Do you believe that the entertainment industry, including Hollywood and TV producers, is in touch with your moral standards, or not?” 68% responded, “No.”

According to a CBS News/*NY Times* poll (11/23/04), 70% of adults were worried that “popular culture – that is, television, movies and music – is lowering the moral standards of the country.”

According to a survey released by the Kaiser Family Foundation (9/23/04), 89% of parents were “concerned about children’s exposure to inappropriate content in entertainment media, especially on TV;” 60% were “very concerned” that their children were being exposed to too much sexual content on TV; 49% were “very concerned” that their children were being exposed to too much “adult language” on TV; 83% thought exposure to sexual content on TV contributed “to children becoming involved in sexual situations before they are ready;” 63% favored “new regulations” to limit sex and violence on TV during early evening; 52% said cable should be subject to the same standards as broadcast TV.

According to a survey by the Barna Group (7/26/04), only 15% of adults felt that “allowing “the ‘F-word’ on broadcast TV” was acceptable; 83% of adults dismissed this as inappropriate.

According to a *Chicago Tribune* poll (“Free Speech: Do Americans really believe in it?” 7/4/04), 55% of adults said government should restrict violence and sexual content on cable TV.

According to a survey conducted for the First Amendment Center (6/30/04), 65% of adults thought “government should have the power to regulate during the morning, afternoon and early evening hours those broadcast television programs that contain references to sexual activity;” 55% said government officials should have “the power to regulate during the morning, afternoon and early evening hours those cable television programs that contain references to sexual activity.”

In a survey conducted by Nielsen (4/29/04), 78% of American families who had recently been part of the Nielsen “People Meter” panel wanted more shows “without profanity or swear words.”

According to a Gallup Poll (Release, 2/12/04), 75% of adult Americans said the entertainment industry should make a serious effort to reduce the amount of sex and violence in its movies, television shows and music; 61% said they were offended by violence on TV; 58% by profanity; 58% by sexual content.

In an opinion poll for *TV Guide* (8/2/03), 57% of TV viewers said they “noticed an increase in offensive material on television lately” but only 8% had *ever* bothered to call a TV network to make a complaint.

In an opinion poll for Common Sense Media (“New Attempt to Monitor Media Content,” *NY Times*, 5/21/03), 64% of parents with at least one child between the ages of 2 and 17 believed media products in general were inappropriate for their families; only 1 in 5 “fully trusted” the industry-controlled ratings.

In a survey by Public Agenda (“Parent’s feel they’re failing to teach values,” *USA TODAY*, 10/30/02), “about 90% [of parents] say TV programs are getting worse every year because of bad language and adult themes in show that air from 8 to 10 p.m.”

In a *Family Circle* poll (10/8/02), 67% of those surveyed said they were worried about the amount of sex on TV; 69% believed TV sex is increasing. When asked about specific scenes in programs such as *Sopranos*, *The Shield*, and *Sex in the City*. From 48% to 76% found the scenes “unacceptable.”

In a study from Universal McCann Media Research (*Media Wire*, 8/21/00), 35% of adults, regardless of whether they lived with children, reported viewing TV content “in the past few weeks” that they found personally offensive or morally objectionable, and such material was more commonly reported as “profane language, sexually suggestive language and situations and excessive violence.”

In an opinion poll for Annenberg Public Policy Center (6/26/2000), “more parents” were concerned about children’s TV use than any other medium, and 43% of families with children 2-17 could not name one TV program they encouraged their children to watch.