

THE HARD CASE OF BROADCAST INDECENCY

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INTRODUCTION

In 1951, a television station in Houston caused a public outcry when it planned to air a bedding commercial showing a husband and wife in a double bed.¹ Radio broadcasts of rock music during the 1950s led to such outrage that the Everly Brothers' *Wake Up, Little Susie* was banned in Boston.² The phrase "let it all hang out" raised eyebrows at the Federal Communications Commission (FCC) during the 1960s and led to the dismissal of the South Carolina disc jockey who uttered it on the air.³ In 1967, the Ed Sullivan Show required the Rolling Stones to perform *Let's Spend the Night Together* as *Let's Spend Some Time Together*.⁴ And, in the early 1970s, the FCC succeeded in eliminating a popular radio call-in format, known as "topless radio" for its attention to sexual themes, by the simple expedient of having the agency's chairman publicly denounce it as "a new breed of air pollution."⁵

1. J. FRED MACDONALD, *ONE NATION UNDER TELEVISION: THE RISE AND DECLINE OF NETWORK TV* 105 (1990).

2. LINDA MARTIN & KERRY SEGRAVE, *ANTI-ROCK: THE OPPOSITION TO ROCK 'N' ROLL* 22 (1988).

3. LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 167 (1987); see *Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962), *aff'd sub nom. Robinson v. FCC*, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

4. PETER FORNATALE & JOSHUA E. MILLS, *RADIO IN THE TELEVISION AGE* 129 (1980).

5. FORNATALE & MILLS, *supra* note 4, at 84-85 (describing Dean Burch's speech to the National Association of Broadcasters in 1973); Maria T. Regina, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 461-65 (same). Ever susceptible to such "regulation by lifted eyebrow," broadcasters immediately toned down their talk shows and dispensed with the topless radio format. FORNATALE & MILLS, *supra* note 4, at 84-85; see also *infra* text accompanying notes 87-90. The origin of the now-famous reference to regulation by lifted or raised eyebrow is often attributed to Commissioner John Doerfer in his dissent in *Miami Broadcasting Co. (WQAM)*, 14 Rad. Reg. 125 (1956).

In the decades that followed, social discourse changed remarkably, becoming increasingly liberalized in sexual content. To watch television or listen to the radio today is to immerse oneself in a discourse permeated with references to sex. "Before you dress, Caress," we are instructed by a soap manufacturer, while television soap operas routinely depict couples lying suggestively in bed.⁶ Late-night television is even more salacious, with a plethora of new "relationship" shows whose contestants describe their dates — "[h]e spread his sauce thicker than Chef Boyardee" — and whose hosts muse out loud over which of two men is "most likely to own mink-lined handcuffs[.]"⁷ Mainstream pop radio features songs with barely disguised sexual metaphors, celebrating men with "slow hands" and women with "sugar walls."⁸ Most strikingly, morning radio personalities ask callers "what makes your favorite hiney parts tingle?,"⁹ read tips from magazine articles on "how to spice up lovemaking,"¹⁰ and describe "marathon spanking session[s]."¹¹ The notorious Howard Stern, "shock jock" extraordinaire,¹² warns us not to shake Pee Wee Herman's hand (in light of his arrest for masturbating in a public theatre);¹³ says that "the closest [he] came to making love to a black woman was . . . masturbat[ing] to a picture of Aunt Jemima;"¹⁴ and laments that "it's tragic about Magic and this awful thing, why couldn't it have happened to Larry King[?]"¹⁵ Typical of shock "humor" is the statement that the "best pick-up line at a gay bar" is "[m]ay I push your stool in for you?"¹⁶ Non-commercial broadcasters as well have challenged the limits of traditional discourse. Despite considerable controversy, some non-commercial broadcasters have addressed sexuality in programs such as *Tongues Untied*, a documentary on the

6. See, e.g., Michael Logan, *Why Soaps Are So Sexy*, TV GUIDE, Apr. 4-10, 1992, at 12, 14, 16, 21; Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 344-45 (1991).

7. John J. O'Connor, *For a Date (Wink) or a Tease (Smirk), Try Late-Night TV*, N.Y. TIMES, June 30, 1992, at B1.

8. POINTER SISTERS, *Slow Hand*, on GREATEST HITS (BMG Music 1989); SHEENA EASTON, *Sugar Walls*, on THE BEST OF SHEENA EASTON (EMI-USA 1989).

9. Rusk Corporation, Radio Station KLOL (FM), 5 F.C.C.R. 6332, 6333 (1990) (*Stevens and Pruett Show*).

10. Claudia Puig, *Radio in the Raw*, L.A. TIMES, Feb. 9, 1992, Calendar, at 7 (*Mark & Brian Show*).

11. *Id.* (*Howard Stern Show*).

12. For discussions of shock radio and Howard Stern programming in particular, see, e.g., Steve Daley, *Radio Raunch: Ratings Greed or Free Speech?*, CHI. TRIB., Apr. 26, 1987, Zone C, at 1; Patrick Goldstein, *SHOCK RADIO: Is It Satire or Just Bad Taste?*, L.A. TIMES, Feb. 22, 1987, Calendar, at 3; Dennis McDougal, *FCC Versus Howard Stern; Agency's 'Indecency' Ruling Hasn't Stopped N.Y. Deejay*, L.A. TIMES, Aug. 19, 1987, Part 6, at 1; Mary B.W. Tabor, *Mining Solid Gold on the Radio*, N.Y. TIMES, Nov. 23, 1991, § 1, at 25; see also *infra* notes 58-61 and accompanying text.

13. Greater Los Angeles Radio, Inc. (KLSX(FM)), 1992 FCC LEXIS 6082, 6144 (Oct. 27, 1992).

14. *Id.* at 6147.

15. *Id.* at 6165.

16. Evergreen Media Corp. (WLUP(AM)), 6 F.C.C.R. 3708 (1989).

many forms of discrimination experienced by gay African-American men;¹⁷ and Dr. Ruth Westheimer's instructional programming on sex is far from the only example of the genre.

Against this background of growing liberty for sexual expression, the FCC has quietly taken increasingly activist steps to control the sexual content of broadcast speech in the past five years. After nearly a decade of applying a narrow, formal rule prohibiting only the repeated broadcast of any one of seven specific "dirty" words, the FCC radically reversed course in 1987 and returned to the "generic" definition of indecency that it had articulated in the early 1970s.¹⁸ With sweeping imprecision, the Commission made actionable any sexual or excretory reference that the "average" broadcast viewer or listener would find "patently offensive," so long as the broadcast occurred at a time during which persons under eighteen years of age might be in the audience.¹⁹

An aggressive enforcement policy has accompanied the FCC's change of course. In the past five years, the Commission has levied fines for violations of the new indecency rules on more than twice as many stations as were fined in the previous seventy-odd years of broadcast history.²⁰ In addition to the comparatively large number of stations affected, the enforcement effort stands out for its increasing stringency. The Commission's imposition of an "unprecedented" \$600,000 fine on the licensee of three radio stations that broadcast Howard Stern material,²¹ just one month after it fined another station \$105,000 for broadcasts featuring Mr. Stern,²² conveys a harsh message indeed.

The Commission has attempted to justify its stringent new indecency policy by reference to a governmental interest in the welfare of children and by the implicit assurance that "contextual" application of the new policy will properly balance norms of civility and constitutionally protected interests in open discourse and individual autonomy. Yet the FCC's approach is troubling. By relying on the rhetorical strategy of focusing on the protection of children, and by cloaking its actions in standard references to administrative expertise and discretionary decision making, the Commission has avoided confronting the fundamental complexities, ambiguities, and contradictions implicit in the kind of nuanced contextual analysis promised in its rhetoric.

Obviously, the meaning of "context" will vary dramatically depending on who conducts the analysis. For instance, government agents often apply a

17. See *infra* notes 266, 350.

18. See *infra* text accompanying notes 194-98.

19. See *infra* text accompanying note 189.

20. See generally POWE, *supra* note 3 (describing history of indecency cases); Joe Flint & Harry A. Jessell, *Roaring in the Face of 'Red Lion'*, BROADCASTING, Oct. 19, 1992, at 46.

21. *Largest FCC Fine Ever: Infinity Fined Record \$600,000 for Stern Broadcasts Ruled Indecent*, COMM. DAILY, Dec. 21, 1992, at 2.

22. Greater Los Angeles Radio, Inc. (KLSX (FM)), 1992 FCC LEXIS 6082 (Oct. 27, 1992).

version of contextualist analysis far different from the self-consciously perspectival exploration of the social world envisioned by outsider scholars who seek to expand the horizons of traditional legal discourse.²³ Each interpreter will define the same context differently. The FCC's "context story" shows that claims of sensitivity to context should begin the inquiry rather than conclude it. The FCC's application of its contextual factors is analytically unpredictable, rather *ad hoc*, and not unlikely subject to tilt. In particular, the "contextual" approach hides the extent to which the Commission's processes operate in concert with the programmatic agendas of social conservative pressure groups. Moreover, a reliance on contextual method cannot, in itself, justify any particular decision in socially contested terrain. Even a subtle and detailed exploration of an issue as hotly debated as indecency reveals more ambiguity and contradiction than certainty and resolution.

The lack of complexity and depth in the FCC's analysis is unsurprising. The agency's intervention is taking place against the backdrop of a raging and increasingly polarized public debate on matters relating to sexuality and the proper role of the State in enforcing social morality. On one side are social conservatives, often of a religious bent, who believe that stringent regulation of sexual discourse is necessary for the integrity of the social fabric.²⁴ The press has devoted substantial coverage over the past several years to the controversy, sparked by the deeply conservative Senator Jesse Helms, over the availability of public funding for sexually explicit expression.²⁵ In a similar vein, both Senator Helms and socially conservative religious groups have sought to sweep the airwaves clean of sexualized expression in order to promote their perception of general social welfare. These "pro-family" and "pro-decency" groups have imposed pressure on Congress, the FCC, and product advertisers

23. Reliance on contextual approaches to legal problems marks an important new trend in legal theory. Whether described as pragmatism, empathetic discourse, or narrative method, much of contemporary legal theory is context-oriented and anti-foundationalist. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing feminist narrative methods); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (applying critical race theory to characterize the underlying racist nature of neutral rules); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987) (discussing the role of empathy in legal discourse); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) (featuring various articles on pragmatism and the role of context in legal thought); *Symposium, Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (including several articles on narrative).

24. For definitions of the terms I use to characterize participants in the debate over indecency regulation (social conservatives, pluralists, libertarians, and progressives), see *infra* note 38.

25. See, e.g., Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2088-89, 2092-96 (1991); Jesse Helms, *Art, the First Amendment, and the NEA Controversy: Tax-Paid Obscenity*, 14 NOVA L. REV. 317 (1990); Kim M. Shipley, *The Politicization of Art: The National Endowment for the Arts, the First Amendment, and Senator Helms*, 40 EMORY L.J. 241 (1991); *John Frohnmayer's Noisy Exit*, N.Y. TIMES, Mar. 25, 1992, at A22. See generally KATHLEEN M. SULLIVAN, *ART ON TRIAL: THE NEA & THE BATTLE FOR FREE EXPRESSION* (W.W. Norton & Co., forthcoming 1993).

to rid the airwaves of "garbage," "trash," and "filth."²⁶

On the other side of the debate, libertarians and pluralists decry the censorship they find inherent in the FCC policy on indecency. The ACLU speaks out to protest the FCC's indecency standard and its imposition of hefty fines for Howard Stern's shock programming;²⁷ and broadcasters challenge the FCC's standard on First Amendment grounds. Without focusing on the particulars of the sexual discourse currently permeating the airwaves, these proponents of free speech reject any governmental role in its suppression. Pluralists who oppose governmental regulation of sexual speech base their view on the notion that such speech is an affirmatively liberating and empowering element of social life.²⁸ This position rests on the assertedly liberating subversiveness of sex talk, on its capacity to arouse the passion and desire overly repressed by mainstream norms of rationality, and on the communicative opportunities it provides for members of non-mainstream groups. Pluralists also decry government prohibition of sexually-referential speech on the ground that such censorship undermines socially enriching diversity while promoting a stultifying cultural homogeneity.²⁹ From this perspective, the particular harm of "acute ethnocentric myopia"³⁰ is that it falsely assumes a culturally homogeneous audience offended by the same sorts of sexual references and constitutes governmental adoption of a partisan and culturally biased position on value. Pluralists fear that the failure to recognize cultural heterogeneity unfairly burdens the speech of minority groups whose cultures tolerate more inclusive linguistic, conversational, and artistic norms.

Neither of the polar, absolutist positions on the regulation of indecency is fully realistic or persuasive; each unduly simplifies a far more complex reality. The socially conservative position is both unrealistic in seeking to put the genie back in the bottle, and oppressive in attempting to impose on society generally the dictates of a small, homogeneous group of people intolerant of significant social diversity. Yet this does not mean that pluralist paeans to broadcast sex talk are any more satisfactory. If the Commission really were to engage in the kind of interpretive, contextual method it purports to have adopted, its inquiry into indecency would reveal a contradictory, Janus-faced social form rather than the conveniently optimistic pluralist view.

A look at the specifics and the social meanings of broadcast sex talk

26. 134 CONG. REC. S9913 (daily ed. July 26, 1988) (statement of Sen. Helms); Doug Halonen, *Court Hits FCC Over 'Indecency'*, ELECTRONIC MEDIA, Aug. 1, 1988, at 1; see also *infra* note 246.

27. Aleene MacMinn, *Morning Report: Radio*, L.A. TIMES, Dec. 18, 1992, at 2.

28. Many of the narrowly libertarian arguments against government regulation of indecent broadcast content reflect market-oriented reactions to the popularity of sexually explicit speech and are grounded in principles of individual autonomy. These arguments, although most common in the literature, do not figure largely in this Article which focuses on an examination of the opposing points of view of social conservatives and pluralists.

29. *FCC v. Pacifica Found.*, 438 U.S. 726, 775 (Brennan, J., dissenting), *reh'g denied*, 439 U.S. 883 (1978).

30. *Id.*

reveals both a broader range and a greater multiplicity of messages than either the prototypical pluralist or socially conservative characterizations would suggest. Broadcast sex talk is not necessarily a danger to the republic; but, in contrast to pluralist claims, it is equally unclear that the broadcast of sexual discourse per se necessarily functions as a challenge to power, especially in light of the extensive mainstream appropriation of sexual imagery. The use of sex to sell consumer goods casts doubt on the extent to which sexualized discourse either fundamentally subverts standardizing, mainstream values or facilitates the development of the liberated self. Similarly, as the concrete examples in this Introduction themselves should suggest, sexual discourse can affirm misogyny, racism, and other oppressive stereotypes while being characterized as liberating and empowering. Just as a focus on the culturally empowering and expressive character of rap music can distract from the misogyny and homophobia of some of its lyrics, Howard Stern can cloak his insulting and demeaning images of women, African Americans, and gays by using the FCC's actions against his programming to transform himself into a modern anti-hero.³¹

In addition, the classic pluralist celebration of diversity and cultural multiplicity does not tell us how to deal with the problem of groups whose self-definitions are intolerant and anti-pluralistic; how to understand the contradictory character of discourses that are simultaneously affirming and disempowering; how to resolve conflicts between different disempowered groups; or even how to define the concept of minority viewpoints in light of their cultural appropriation and transformation by the mainstream over time. Concepts such as diversity and pluralism are in themselves too abstract and incomplete to deal with many of the concrete oppositions and contradictions in social life.

It is by no means clear what ideally should be done about broadcast sexualized discourse. In constitutional law, the free speech precedent is not dispositive: although vagueness and overbreadth claims are reflexively invoked to resolve the indecency issue, both depend on prior normative decisions about what should be constitutionally protected. Analogies to hate speech are similarly problematic, in no mean part because of the complex and equivocal nature of broadcast sex talk itself. Doctrinal answers are equally scarce in administrative law; litigants' challenges both to the FCC's procedures and to the reasonableness of its change in policy are subject to criticism as simply restating the uncertainties invoked by the indecency standard.

The broadcast of indecency presents a truly difficult problem. We could reclaim doctrine and argue that, because of the social complexity of sex talk, the inherent ambiguity and vagueness of the matter should compel an untroubled call for government to stay out of the fray. Yet, precisely because the social meanings of sexually explicit discourse are more ambiguous and contra-

31. See, e.g., HOWARD STERN, CRUCIFIED BY THE FCC (1991); see *infra* text accompanying note 92.

dictory than the abstract arguments of either pluralists or social conservatives would suggest, neither regulatory intervention nor deregulation is, as a categorical solution, wholly satisfying. The double bind³² suggests that any regulatory position will be imperfect. In turn, this places us in the position of grappling with problems of prescription in a non-ideal world in which partial answers will have to do. In that spirit, and provisionally, this Article proposes a deregulatory approach. It does so not because of the affirmative virtues of deregulation, but as the lesser of two evils, given the institutional realities and dangers of the Commission's crackdown on indecent speech.

The regulatory net as currently constituted may well snare more important and potentially liberating versions of sexual expression than would be socially desirable. In the end, deregulation might allow for transformations in technology, in the aesthetic forms most subject to the indecency critique, or in the particular ambiguities posed by sex talk in our culture today. Even though we cannot count on such affirmative results with deregulation, the context of the FCC's most recent approach to indecency itself suggests the reason for a change.

The full irony of the FCC's imposition of a ban on indecency can be appreciated only by comparing it with the extraordinarily deregulatory character of the rest of the FCC's agenda in the last decade.³³ Since the first Reagan administration, the FCC has taken a decidedly deregulatory approach to broadcast issues, reasoning that the private sector is a better judge of the public interest than either career civil servants or political appointees. Given the otherwise deregulatory bent of the Reagan-era Commissions, the competitive character of the modern communications landscape,³⁴ and the increasing fragmentation of broadcast programming,³⁵ the Commission's attempts to rein in popular discourse over the airwaves cannot be understood fully without refer-

32. I owe this terminology to Professor Margaret Jane Radin. See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699-1704 (1990).

33. See, e.g., JONATHAN W. EMORD, *FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT* 233-34 (1991). See generally ROBERT B. HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS* (1989). The deregulatory bent has led the Federal Communications Commission (FCC or the Commission) to revisit regulations ranging from the structural prescriptions of the multiple ownership rules to the content-based intrusions of the fairness doctrine. See, e.g., *In re Revision of Radio Rules and Policies*, 71 Rad. Reg.2d (P & F) 227 (1992) (adopting new national ownership limits for radio); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) (affirming FCC decision to cease enforcement of fairness doctrine); *In re Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74 (1985) (amending national ownership limits for radio and television); Jonathan W. Emord, *The First Amendment Invalidity of FCC Content Regulations*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 93, 171-90 (1992) (describing FCC's deregulatory approach to broadcast content).

34. See, e.g., *In re Revision of Radio Rules and Policies*, 7 F.C.C.R. 2755, 2756-61 (1992), modified on reconsideration, 71 Rad. Reg.2d (P & F) 227 (1992) (resting relaxation of national ownership limitations for radio on the increasingly competitive communications marketplace); Richard Zoglin, *The Big Boys' Blues*, TIME, Oct. 17, 1988, at 56.

35. See *infra* text accompanying notes 365-66.

ence to the political pressure exerted by social conservatives. The deployment of FCC processes by such organized groups has resulted in pressure on broadcasters by what amounts to a semi-private governmental process.³⁶ The accession to power of a Democratic administration should not make us too sanguine about the matter.

Part I explores the broadcast indecency problem, first situating it in the larger social debate and then laying out the double-edged character of sexualized discourse over the airwaves. Part II describes the doctrinal aspects of the FCC's current approach to indecency and their historical antecedents, sketches the political background of the new policy, and provides a thematic overview of its application. The Part then turns a critical lens on the FCC's assertedly contextual inquiry, questioning the extent to which the agency's articulated definition of indecency is predictable and consistent in application and noting the potentially conservative regulatory tilt of the Commission's decisional factors. Part III addresses the doctrinal arguments, based on constitutional and administrative law, that have been made in response to the agency's indecency actions. It ultimately concludes that these arguments can be deployed most usefully in light of and by reference to the socially situated ambiguity and complexity of broadcast indecency suggested in Part I. Finally, asserting that there is no single, unalterable, and unproblematic response to indecent expression, the conclusion contingently proposes a deregulatory policy.

I

THE UNDERLYING DILEMMA: THE AMBIGUOUS SOCIAL MEANING OF BROADCAST SEX TALK³⁷

Broadcast sex talk is part of a larger current debate on a number of social issues revolving around diversity, privacy, sexuality, and reproduction. Talk about sex is a social reality and often a popular aspect of entertainment in today's society, yet there is no social consensus on the extent, if any, to which public sex talk is appropriate. The debate might be viewed merely as a stand-off between liberals and conservatives, respectively opposing and supporting governmental regulation.³⁸ Much of the popular discourse in fact tends to

36. For an account of the political background of the Commission's adoption of its indecency policy in 1987, see John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 359, 361-63 (1989); see also Lili Levi, *The History and Politics of Broadcast Indecency Regulation* (forthcoming) (offering a detailed study of the history and development of such a quasi-public, quasi-private administrative process affecting public discourse but occurring outside its purview).

37. I use the phrase "sex talk" as a convenient catch-phrase for the kind of expression targeted by the FCC's current indecency standard: the broadcast, whether on radio or television, of depictions or descriptions of sexual or excretory organs or activities. See, e.g., *In re Pacifica Found., Inc. (KPFK-FM)*, 2 F.C.C.R. 2698, 2699 (1987).

38. This reference to liberals and conservatives is intended to capture the rough distinction often drawn in popular discourse. In the rest of this discussion, I use the terms libertarian, pluralist, social conservative, and progressive as category markers. By "libertarian," I mean

assume a bipolar character, pitting social conservatives like Jesse Helms, who decry the assault of smut on the family, against absolutist civil libertarians, who warn against the dangers of governmental intervention into speech. This depiction is in keeping with some social observers' characterization of modern American society as a polity poised on the horns of a dilemma, divided between conflicting progressivist and orthodox moral visions.³⁹ However, such simple antinomies — conservatives versus liberals or progressivists versus the orthodox — understate the complexity of the arguments made and alliances forged in connection with the morality debates. Both conservative and progressive rationales can be used to justify either regulatory or deregulatory outcomes in the context of broadcast indecency. For example, concerns about promoting equality and protecting subordinated groups can ally political progressives with morality-seeking social conservatives in support of governmental regulation of broadcast sex talk.⁴⁰ Similarly, libertarians who condemn regulation in the name of individual autonomy find good company both in market-oriented economic conservatives and in pluralists who tout the benefits of social diversity and self-realization afforded by free expression. What

viewpoints concerned with ensuring a minimally interventionist state and protecting individual autonomy. Socially libertarian viewpoints are consistent with economically conservative, free market approaches designed to reduce governmental intervention into individual consumption choices. By "pluralist," I mean those who would discourage governmental regulation in the indecency context not because of principles of individual choice per se, but because of the view that broadcast sex talk has affirmative social benefits in a culturally heterogeneous society. For discussions of pluralism as grounded in the social benefits of diversity and tolerance, see, e.g., Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1188-89 (1990); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 CAL. L. REV. 297, 301-05 (1988) [hereinafter Post, *Cultural Heterogeneity*]. The term social conservatives refers to those who encourage governmental regulation of all sex talk for substantive reasons ranging from a desire to reinstate "family values" and eliminate the approving public discussion of homosexuality to a more general view that public sex talk breaches the civilized distinctions between public and private. I sometimes label such social conservatives as "fundamentalists," referring generally to holders of orthodox (and primarily Christian) religious viewpoints rather than to particular doctrinal strands of Christianity. Finally, by "progressive," I mean those who favor governmental regulation in the area because of the view that broadcast sex talk is, in large part, disempowering and demeaning to women and other oppressed groups.

39. In fact, some suggest that disagreements about sex-related matters rest on fundamental and apparently intractable oppositions in America today with respect to the bases of moral discourse. See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991) (positing a new breakdown in the assertedly traditional moral consensus in America, succeeded by intractably opposed progressivist and orthodox viewpoints). On this view, people hewing to progressivist moral visions look with favor upon norms of tolerance, cultural pluralism, and social diversity while an ever-growing cadre of conservative, religious groups seeks to reform decaying social life and unify society around some orthodox Christian tenets. See also STEVEN SEIDMAN, *EMBATTLED EROS: SEXUAL POLITICS AND ETHICS IN CONTEMPORARY AMERICA* (1992) (describing an "impasse" between "libertarians" and "romanticists" on sexuality issues).

40. We have seen this kind of alliance before in the debate on pornography, in which feminists and social conservatives took similar regulatory positions, albeit for radically different reasons. See, e.g., DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 26-32 (1989).

joins all these boundary-crossing positions is that they conveniently characterize the phenomenon of broadcast indecency in unidimensional terms.

In contrast, a close look at the social role of sex talk reveals its equivocal nature. The paradoxical character of broadcast sex talk consists of its ambiguous message: it is both liberating and oppressive in ways not recognized in the traditional debate on the subject. In contrast to the arid and oversimplified dichotomies invoked in the current debate, a rich description of the current social context of indecent broadcast speech uncovers much ambiguity and contradiction in the social meaning of talk about sex. Having transformed the way in which to think of broadcast indecency, we then are left with the far more difficult question of which institutional regime can deal most satisfactorily with the paradoxical and contrary character of sex talk in our current cultural conditions. As to that, it is this Article's contention that a reassuring single answer would not be true to the realities of sex talk today.

In the parallel context of the legal treatment of outrageous speech, Professor Robert Post has insightfully characterized public discourse as paradoxical, torn by conflicting demands of tolerance and civility. The "paradox of public discourse," according to Professor Post, rests on the fact that the critical and free interaction required for fruitful public discourse by our cultural heterogeneity at some point must be bounded by community-based civility norms, lest untrammelled diversity render impossible the rational deliberation for which we rely on public discourse in the first place.⁴¹ Professor Post criticizes contemporary First Amendment doctrine, not because it does not propose a tenable solution to the paradox of public discourse, but because it does not clearly enough admit and articulate the conflicting claims of democratic self-governance and community values that are at stake in defining public discourse. He wisely reminds us that all boundaries to the domain of public discourse are ideologically determined and subject to the push and pull of claims both of democracy and of community life. The context of sex talk is a particularly useful one in which to see how such conflicting claims play out.

A. *On the Liberating Character of Sexualized Discourse*

At one extreme of opinion on the propriety of public talk about sex are those who see sexual expression as both a personal and social good because of its liberating and empowering character.⁴² At the opposite extreme are those

41. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 642-44, 682-83 (1990) [hereinafter Post, *The Constitutional Concept*]. The paradox of public discourse is that, "[t]o the extent that a constitutional commitment to critical interaction prevents the law from articulating and sustaining a common respect for the civility rules that make possible the ideal of rational deliberation, public discourse corrodes the basis of its own existence." *Id.* at 643.

42. Characterizations of this view have surfaced most frequently in the legal academic literature in the context of the debate over pornography. See, e.g., Eric Hoffman, *Feminism, Pornography, and Law*, 133 U. PA. L. REV. 497, 506 (1985); William K. Layman, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J. 1475, 1485, 1505-06

who see the public penchant for sexually-oriented speech as a fundamental social evil, evidencing the disintegration of moral values in our society. As the following discussion demonstrates, neither pole in this debate captures the full complexity of the context of broadcast indecency.

1. Sex Talk as a Challenge to Power: Subversion; Sexual Liberation; Communication

One of the arguments against sweeping “indecency” regulation is that such censorship inappropriately inhibits and represses people. Holders of this position believe that talk about sex is fundamentally unshackling and empowering: by subverting social control over the individual (through challenging governmental power, shocking settled expectations, and undermining traditional views of civilized public discourse), arousing sexual desire, and communicating the stories of disempowered groups to the mainstream, sex talk can assertedly allow people to define, constitute, and fulfill themselves.

First, sex talk can be liberating and empowering through its very subversive and taboo-smashing character.⁴³ This argument, in its broadest form, posits that an individual transgresses the strictures of power anytime she says something forbidden. Under this view, if the FCC’s rules precluded broadcasters from airing much talk about sex on the radio but broadcasters managed to circumvent the rules by innuendo or *double entendre*, their circumvention would constitute a challenge to the State’s power.⁴⁴ Indeed, Howard Stern’s broadcast challenge to the FCC — in the form of the statement: “Hey, F.C.C.: Penis” — is an explicit version of such anti-authoritarianism.⁴⁵

(1987); David A.J. Richards, *Free Speech and Obscenity Law: Towards a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 81 (1974); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 19 (1992) (hereinafter Sunstein, *Neutrality*). The equation of sexuality with freedom is also commonly found — whether implicitly or explicitly — both in popular sex manuals like THE JOY OF SEX and other celebratory literature for the mass market and in more sophisticated works on sexology and history. See, e.g., PAUL ROBINSON, THE MODERNIZATION OF SEX: HAVELOCK ELLIS, ALFRED KINSEY, WILLIAM MASTERS AND VIRGINIA JOHNSON (1976); SEIDMAN, *supra* note 39, at 5.

43. Cf. SIMON GAUNT, TROUBADOURS AND IRONY 52, 59 (1989) (exploring the thrill of transgressing accepted rules by ironic sexual metaphors and the way in which such euphemisms both respect and violate society’s restrictions on sexual references); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1626-33 (1988) (adopting a moral skepticism model for the First Amendment and challenging the suppression of pornography by arguing for the subversive and socially deviant character of the form).

44. The modern incidence of indecent broadcast speech cannot be fully understood except against its regulatory background and a history of FCC investigations and sanctions for far milder speech. See POWE, *supra* note 3, at 162-90. In light of the presence of the anti-indecency rule on the statute books as at least a sleeping threat since before the Federal Communications Act of 1934, even non-explicit broadcast talk about sex in these circumstances necessarily must be construed as challenging to power.

45. Jon Pareles, *Shock Jocks Shake Up Uncle Sam*, N.Y. TIMES, Nov. 15, 1992, § 2, at 32, col. 4.

Such subversive effects can be achieved in two ways. First, using sex words for their form and not their meaning can challenge mainstream mores. "Dirty" words are often used not for their substantive sense but for their usefulness as place markers or grammatical signs.⁴⁶ By using sexual words in ways divorced from their literal meanings, people liberate themselves from traditional conceptions of polite discourse, make the political point that there is no reason *not* to use such language, and publicly recognize the increasing infiltration of such language into public life.

Second, sexual references can be thought to challenge power when they are made to shock the listener or viewer — in other words, when they are made self-consciously and substantively. For example, expletives are often used for their emotive character, as emphases or ways of expressing depth of feeling.⁴⁷ Indeed, the use of expletives is sometimes self-consciously political. As Justice Brennan noted in his dissent in *Federal Communications Commission v. Pacifica Foundation*⁴⁸ and Justice Harlan recognized in *Cohen v. California*,⁴⁹ ideological messages often are inseparable from the shocking words used to express them.⁵⁰ The critical factor is that the challenge works only when the object under attack is viewed as somehow sacred by at least some significant part of the social community.⁵¹

Shocking effects are also achieved through the use of explicit or coded sexual references in humor.⁵² Humor can be subversive in a variety of ways.⁵³

46. See, e.g., *In re WUHY-FM*, 24 F.C.C.2d 408, 409 (1970) (imposing a fine on Philadelphia's non-profit, alternative Eastern Education Radio for the broadcast of an interview with Jerry Garcia of the Grateful Dead in which Garcia peppered his comments (about matters ranging from the environment to philosophy) with expletives used as adjectives, as introductory emphases, or instead of "et cetera").

47. See *id.*

48. *FCC v. Pacifica Found.*, 438 U.S. 726, 775-76 (1978) (Brennan, J., dissenting) (addressing the FCC's authority to limit the broadcast of comedian George Carlin's expletive-riddled monologue "Filthy Words"); see *infra* notes 188-93 and accompanying text (discussing *Pacifica*).

49. 403 U.S. 15 (1971). In *Cohen*, the Court held unconstitutional the defendant's conviction for wearing, in a courthouse corridor, a jacket displaying the words "fuck the draft." *Id.* at 16.

50. *Id.* at 25-26; *Pacifica*, 438 U.S. at 773-74 (Brennan, J., dissenting); see also Fiss, *supra* note 25 (discussing the self-consciously political character of Robert Mapplethorpe's explicit photographs, designed to shock conventional sensibilities). Neither "fuck the draft," in *Cohen*, nor its more modern bumper sticker counterpart, "fuq iraq," use the expletive literally.

51. Extolling a post-modern celebration of the subversive character of artistic expression, Professor Nahmod recently has argued that First Amendment protection hinges excessively on the political character of expression, to the improper exclusion of matters aesthetic. Sheldon Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221, 249-53. Indeed, one of the defining characteristics of art in the modern world is the perception that it pushes both the boundaries of respectability and prior conceptions of artistic merit. See *infra* note 387.

52. See *infra* notes 83-85 and accompanying text (discussing the complex social role of humor).

53. See, e.g., LANCE OLSEN, *CIRCUS OF THE MIND IN MOTION: POSTMODERNISM AND THE COMIC VISION* 15-35 (1990) (examining the power-structure-subverting character of postmodern humor). Codes and innuendo are subversive because they cannot be understood by

Puns and word plays emphasize the multiplicity and uncertain character of language, thereby testing its powers,⁵⁴ and allow for the building of *esprit de corps* among those who understand them.⁵⁵ They can be directly subversive if they are political and indirectly so if they are sexual.⁵⁶

The argument in this subsection focuses only on the subversive effect of humor that relies on shocking mainstream expectations by its frankness about matters sexual.⁵⁷ For instance, the 1980s saw the development of free-wheeling talk and music formats that have come to be commonly known as "shock radio" and "morning zoo" or "personality" programs.⁵⁸ Such programs came to be known generically as "shock" radio because announcers tried to generate controversy by shocking and offending their audiences and mentioning the previously unmentionable on the air. When pressed on their often-abusive approach, these announcers generally justified themselves by claiming that they reflected what people were feeling; that they were irreverent, humorous, and not to be taken seriously; that it was necessary for people to make fun of themselves; and that they were equally offensive to all groups (thereby allegedly removing the sting of their controversial comments).⁵⁹ Accordingly, much of the attempted humor in shock radio is intended to provoke nervous laughter and give vent to people's anti-social, aggressive impulses.⁶⁰ It is no surprise that this type of shock radio show is generally scheduled during morning drive time when people are alone, dealing with the vagaries and frustrations of rush-hour traffic, on their way to stressful and often unsatisfying

all listeners and have different meanings in different cultures. Even innuendo, which is often penetrable, allows people to talk about what has been forbidden. See, e.g., WALTER REDFERN, PUNS 30, 91, 180 (1984) (discussing puns and *double entendres* as means of circumventing taboos with apparent innocence: "[t]he pun seems funny or shocking because it challenges a taboo which ordinarily forbids us to recognize that the sound pattern is ambiguous"). It may be that the very existence of the FCC's rules preventing open talk about sex leads to the development of innuendo and coded references.

54. REDFERN, *supra* note 53, at 14 (discussing puns as "agents of disorder" which "can ruin lazy expectations, subvert the inertia of language and thought").

55. *Id.* at 30, 180.

56. *Id.* at 171.

57. See, e.g., DAVID MARC, COMIC VISIONS: TV COMEDY AND AMERICAN CULTURE 24-25 (1989) (discussing the extent to which stand-up comedy depends on taboo violation by frank and intimate accounts of sex and "toilet" talk).

58. See, e.g., Paul D. Colford, *This Is Radio Crass*, NEWSDAY (Nassau & Suffolk ed.), Jan. 9, 1991, at 52; *Radio Special Report*; CHICAGO, BROADCASTING, Sept. 10, 1990, at 40, 46 (describing WLUP's "irreverent" personality-driven rock programs); *Special Report: Radio: The Sound of Music and More*, BROADCASTING, June 12, 1989, at 35, 35-38 (describing narrow-casting in radio and the various different formats). Shock radio became the top-rated programming in many markets during its time slots. See, e.g., Julia Reed, *In the Fight for Ratings, Filth Leads the Charts; Raunch 'n' Roll Radio is Here to Stay*, U.S. NEWS & WORLD REP., May 4, 1987, at 52.

59. Colford, *supra* note 58.

60. Shock radio can be seen as a very Freudian interpretation of humor in which the release of aggression plays a central role in the sexual and excretory references. See generally SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS 98-100 (James Strachey trans., W.W. Norton & Co., Inc. 1960) (1905).

jobs.⁶¹

Sexualized speech also can be thought to be substantively liberating through its arousing and exciting effects on sexual desire. Akin to this view is the criticism, often leveled against the suppression of pornographic speech, that sexualized discourse is liberating in affirming an area of private space in which individuals can fulfill themselves outside the purview of the State. According to this view, such aroused desire releases people from their excessive and rationalist repressions, replacing the deliberative process of citizens in their social selves with the instinctual responses of their natural, pre-social beings.⁶² It thus challenges the rationalist ideal of social life and undermines the authority of the State.⁶³ Many who see passion as liberating agree that some level of repression of "natural" impulses might be necessary to civilized society, but they do not view the enhancement of a sexually open discourse, untrammelled by the State, as incompatible with that principle. Indeed, even supporters of sexual restraint might argue that the self-control required of social actors is premised on overcoming, and not avoiding, temptation.

Finally, sex talk can liberate and empower by pointing out gender inequality and representing the sexualities of gay men and lesbians.⁶⁴ The "mak-

61. The success of a format based on "saying the unmentionable," challenging pious beliefs, and shocking hearers through humor provides evidence of the hostility and alienation in our society. See Daley, *supra* note 12 (quoting views of shock radio as an "outlet" and "voyeurism" for people who "have a lot of restraint built into their own lives"). Such aggressive humor is part of a significant comedic ancestry. The nihilistic, hostile, iconoclastic humor epitomized by the "sick" comedians of the 1950s — such as Lenny Bruce and Mort Sahl — constitutes the underlying pedigree of today's shock radio. Commentators opine that the 1950s version of the genre resulted from the difficulty of making sense of the decades after World War II. Sarah Blacher Cohen, *Introduction: The Variety of Humors*, in *COMIC RELIEF: HUMOR IN CONTEMPORARY AMERICAN LITERATURE 3* (Sarah Blacher Cohen ed., 1978). Comedians such as Lenny Bruce, "who gleefully mentioned the unmentionable — the drug abuse, sexual perversion, bigotry and gratuitous violence of respectable folks," served as "the lunatic commentators on our collective lunacy." *Id.* Their use of scatological and sexual language was both cynical and "deflationary." *Id.* In turn, these taboo-breaking comedians became the comedic background against which producers such as Norman Lear could create television shows in the 1960s and 1970s to showcase grossly caricatured characters who could say socially unacceptable things about race, sex, and politics, assertedly without implicating the viewer (and even, perhaps, promoting the audience's self-irony). See, e.g., ROBERT SKLAR, *PRIME-TIME AMERICA: LIFE ON AND BEHIND THE TELEVISION SCREEN 6-7* (1980).

62. See, e.g., Sunstein, *Neutrality*, *supra* note 42, at 19 & n.76 (describing this viewpoint in connection with the pornography question).

63. It is precisely because of its non-deliberative, affective character that theorists such as Frederick Schauer have taken the position that pornography should not be treated as speech for constitutional purposes. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY 180-88* (1982). For an important critique of the First Amendment as embodying a reason-based civic deliberation model, see Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95.

64. This is not to say that graphic descriptions of sex involving gays is in any way necessary to communication of gay identity; I am only suggesting that such sexualized presentations affect the more general discourse by at least requiring that they be addressed. For a critique of essentialist views that equate the totality of being gay with particular sexual conduct, see Marc A. Fajer, *Can Two Real Men Eat Quiche Together?: Storytelling, Gender-role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

ing public” of such matters has a number of effects, both short- and long-term. First, the public naming of homosexuality and gender oppression requires that they be addressed in public discourse, rather than simply being swept under the social rug.⁶⁵ This does not mean that the depictions must be approved, only that they cease to be ignored and thereby spark a change in public discourse. Second, and in a related vein, such talk can challenge distastes born of unfamiliarity, ignorance, and perceptions of essential difference.⁶⁶ Members of the religious right, who are ideologically opposed to homosexuality, will probably not change their minds about gay relationships when public discourse is opened up to include sexually explicit gay voices; nor will they be likely to moderate their positions through the process of articulating their views against the background of a more liberal or permissive culture. Nevertheless, the communication of non-mainstream views to the mainstream might well affect the perspectives of the ideologically “non-aligned” and, in any event, is in itself liberating and self-affirming for the speakers. Accordingly, opening public discourse to non-mainstream sex and gender issues at least enhances social diversity and the likelihood of state neutrality as between divergent conceptions of morality.

2. *Sex Talk as Impermissibly Corrupting*

In stark contrast to those who argue for the social benefits of sexually unrepressed discourse, a growing cadre of social conservatives challenges the value of public sexual expression on any level. These people argue for governmental control of sexually-oriented speech, whether in news or entertainment, because public speech about sexuality is immoral, reflects a disintegrating social fabric, and injects “garbage” into public discourse.⁶⁷ Some holders of this view base their concerns on the harm that commercialized sexual discourse poses to the sacredness and purity of sex within marriage.⁶⁸ Others focus on the social approval generated by such sex talk for what they consider to be

65. It was not very long ago that homosexuality was referred to as “the love that dare not speak its name.” On the invisibility and concealment of gay life in non-gay society, see *id.* at 584-91 and sources cited therein. Arguing for the importance of the visibility of their sexual identities to gay men and lesbians, see Karst, *supra* note 63, at 117-22.

66. See, e.g., Karst, *supra* note 63, at 116-17; Steve Weinstein, *Back into the Closet*, L.A. TIMES, Apr. 7, 1991, at 5. Cf. Post, *The Constitutional Concept*, *supra* note 41, at 636-37 (positing that diversity in a public discourse not tilted toward any one community norm can lead to clashes of opinion and resulting modification and moderation).

67. A reference to any of the public speeches of Senator Helms on the issue makes this point. See, e.g., *supra* note 26 and *infra* note 246. For conservative academic arguments in support of the suppression of obscenity, see, e.g., WALTER BERNS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT (1965). For conservative arguments on indecency before the FCC, see, e.g., *In re The Regents of the University of California (KCSB-FM)*, 2 F.C.C.R. 2703 (1987), *reconsideration denied*, 3 F.C.C.R. 930, 931 (1987) for the comments of Morality in Media in the FCC’s first reconsideration of its 1987 indecency rulings.

68. See, e.g., SEIDMAN, *supra* note 39, at 64-65; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983); Sunstein, *Neutrality*, *supra* note 42, and sources cited therein; Karst, *supra* note 63, at 106-07.

“perverted” lifestyles.⁶⁹ Social conservatives agree that the broad public dissemination of sexually explicit speech undermines their traditional views of social civility, decency, and community.

Taking the position that the larger community must be saved from the undisciplined desires and self-indulgence of atomistic individuals running amok in a far-too-permissive marketplace, these social conservatives seek a return to homogeneous values and distinct boundaries between private and public life. Just as libertarians argue for the benefits of public sex talk because of its asserted power to liberate, subvert, and communicate, social conservatives justify the elimination of broadcast sexuality on the very same grounds. In contrast to libertarians who support an open and unregulated marketplace in broadcast sex talk, fundamentalist conservatives have no difficulty enlisting the aid of the government in their attempts to reshape social conceptions of the acceptable.

3. *An Alternative Account*

A searching look at the specific context of sexual speech over the airwaves reveals a more complex story than that advanced either in the Comstockian resistance of conservative moralists to sexual frankness on the air or by pluralists in their Dionysian paean to sex as liberation and sex talk as empowerment. Social conservatives' desire to return to a mythic notion of a homogeneous and unified Christian America is unrealistic, anti-democratic, and profoundly oppressive.⁷⁰ Few would dispute the fact that sexuality is, for most people, an important matter relating both to personal identity and social life. Sex talk and sexual depictions are common and popular. They *can* serve to liberate and empower.

The reality of public talk about sex is multi-faceted. Pluralist naiveté about the benefits of sex talk should be tempered: by attention to the potentially enmeshing character of commercially sexualized consumer culture; by recognition of the misogyny of much of the sex talk pervading both the society and the airwaves; and by a refusal to foreclose scrutiny of challenged material simply because it can be characterized as subversive humor.⁷¹

a. *Sexuality and the Mainstream*

Some social observers argue that a focus on sexuality through sexualized discourse, far from challenging mainstream mores and liberating the individ-

69. Both Jesse Helms and various social conservatives have faulted the Commission for allowing the broadcast of sexually explicit speech that approvingly depicts homosexuality. See SARA DIAMOND, *SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT* (1989) (discussing the homophobia of many religious social conservatives); SEIDMAN, *supra* note 39.

70. HUNTER, *supra* note 39, at 312 (“Authority imposed from the top down without regard for the sensitivities of those dominated is . . . a recipe for oppression and, in turn, widespread popular discontent.”).

71. Of course, subversiveness is not necessarily a good in itself and must at least be argued for in context.

ual, serves as a palliative forestalling any real resistance to existing power conditions.⁷² In a version of the classic "bread and circuses" argument, these observers would suggest that the increasingly sexualized character of public and broadcast discourse plays directly into the hands of the politically powerful by promoting a shift from political and collective action to the realm of the personal.⁷³

Under this view, a focus on the personal reinforces, and is in turn reinforced by, the connection between sexuality, desire, and the consumption of products.⁷⁴ The dominant consumer culture is said to be based in large part on a separation between work and leisure, with the latter serving as the arena for freedom, self-expression, and individual pleasure.⁷⁵ At the same time, however, much of consumer culture operates by selling a particular, pre-packaged idea of a "lifestyle."⁷⁶ Sexuality plays a key role in fostering this realm of pleasure and consumption.⁷⁷ Thus, far from distinguishing the individual and

72. See, e.g., HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 73-78 (1964) (referring to "repressive desublimation").

73. See generally PATRICK BRANTLINGER, *BREAD & CIRCUSES: THEORIES OF MASS CULTURE AS SOCIAL DECAY* 19, 22 (1983) (characterizing "bread and circuses" as an allusion to Juvenal, appropriated as a modern metaphor for the ways in which mass culture assertedly has served as the opiate of today's masses); RICHARD SENNETT, *THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM* 337-40 (1974) (making the argument in the context of intimacy in general rather than sexual discourse per se); see also MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* 120-67 (1944) (characterizing the culture industry as eliminating impulses to emancipation).

74. On the linkage between modern "imaginative hedonism," consumer culture, and their roots in the Romantic movement, see generally COLIN CAMPBELL, *THE ROMANTIC ETHIC AND THE RISE OF MODERN CONSUMERISM* (1987).

75. See, e.g., STEWART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* 57-108, 196 (1988); Alan Tomlinson, *Introduction: Consumer Culture and the Aura of the Commodity*, in *CONSUMPTION, IDENTITY & STYLE: MARKETING, MEANINGS, AND THE PACKAGING OF PLEASURE* 6-12 (1990); see also Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 *STAN L. REV.* 347, 385-89 (1993) and works cited therein.

76. See EWEN, *supra* note 75; Schnably, *supra* note 75, at 388-89; Tomlinson, *supra* note 75, at 12-13. But see DAVID HOROWITZ, *THE MORALITY OF SPENDING: ATTITUDES TOWARD THE CONSUMER SOCIETY IN AMERICA, 1875-1940* (1985) (calling for a "more reciprocal" model of the interaction between goods and consumers than the one held by either traditional or modern moralists); Schnably, *supra* note 75, at 392-94 (describing resistance to commodification).

77. Legal commentators have noted the "increasingly explicit use of sex to sell books, magazines, movies, perfumes, cars and jeans." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955, 961 n.19 (1984) (questioning the claim that such discourse is liberating); see also WOLFGANG FRITZ HAUG, *CRITIQUE OF COMMODITY AESTHETICS: APPEARANCE, SEXUALITY AND ADVERTISING IN CAPITALIST SOCIETY* 55 (1986); Schnably, *supra* note 75, at 391. Examples of such "eroticized" advertising are legion, from Calvin Klein jeans to Harley Davidson motorcycles and mythical Swedish bikini teams touting beer. Susan Sward, *Sex in Ads — Defining the Limits*, *S.F. CHRON.*, Jan. 30, 1992, at A1; Ronald K.L. Collins, *Perspective on Advertising*, *L.A. TIMES*, Nov. 20, 1991, at B7. Such advertising is based on the very assumptions about the centrality of sexuality that have come to be associated with pluralist views about the liberating character of sex. Moreover, much of the sexual referentiality in product advertising is sexist and directed at male consumption. The Swedish bikini team ad, for example, adopted a strictly male vantage point, celebrating the exclusive use of female

challenging the status quo, the predominant sexual discourse of consumer culture serves to promote the development of cookie-cutter identities.⁷⁸

In addition, social observers might well point to the difficulty of determining when sexualized discourse is in fact "authentically" subversive and when it is a "co-opted" part of a manufactured message. The history of rock 'n' roll puts this issue into bold relief. In its inception, rock shocked mainstream culture and promised to liberate the young with its raw sexuality; however, much of it quickly was rendered non-threatening by sanitized cover versions and American Bandstand. Rock was transformed from a society-subverting musical form to one manufactured and controlled by the insiders in the music industry.⁷⁹ Certain aspects of the current idiom of rap raise similar issues about subversiveness, at least in light of their increasing appeal to white suburban listeners.⁸⁰

Much of the rhetoric underlying the belief that sex talk is liberating relies on a notion of sexuality as pre-social, natural, and fundamental to identity.⁸¹

sexuality to service men's needs. So clear was this message that some employees of the manufacturer filed a lawsuit based on the ad, claiming that it created a hostile work environment for them. Meryl Davids, *Trouble Brewing With Beer Ads*, WORKING WOMAN, Mar. 1992, at 17.

The connection between desire, sexuality, and consumption extends beyond using sex to sell products. Whether for men or women, the images of consumer culture are said to promote a commodification of the body. See Schnably, *supra* note 75, at 391 ("[S]elf-image becomes enmeshed in the larger system of commodification . . . not because we buy and sell our bodies, but because we come to view them in the same terms of display and competition that we apply to the goods and services through which we are constantly invited to recreate ourselves."). This commodified body has to live up to the particular visions of desirability and sexuality offered in connection with product and style marketing. See ROSALIND COWARD, *FEMALE DESIRES: HOW THEY ARE SOUGHT, BOUGHT AND PACKAGED* (1985).

78. Theorists have challenged the suggestion that consumer culture is a monolithic phenomenon which simply constructs unresistant victims into a single image. See, e.g., HOROWITZ, *supra* note 76; Schnably, *supra* note 75, at 392-94; Tomlinson, *supra* note 75, at 17-35. Similarly, some students of mass media reject a "hypodermic" model of media influence (in which the media are thought simply to inject material and attitudes into unresisting, uncritical viewers), in favor of interpretations that attribute more power to viewers to construct and resist the media texts. For an approach focusing on the empowering characteristics of mass culture and popular resistance to the purported messages of mass media, see JOHN FISKE, *TELEVISION CULTURE* 38-41, 45-47, 314-19 (1987).

79. See, e.g., FORNATALE & MILLS, *supra* note 4, at 38, 40-42; MARTIN & SEGRAVE, *supra* note 2, at 9-11, 13-26; ARNOLD SHAW, *BLACK POPULAR MUSIC IN AMERICA: FROM THE SPIRITUALS, MINSTRELS, AND RAGTIME TO SOUL, DISCO, AND HIP-HOP* 197-203 (1986). Even though parents and decency leagues complained about the sexual character of the music, the form of rock 'n' roll popular from the mid-'50s to the early '60s — the sanitized version of the music broadcast over American Bandstand — in fact was not too threatening. For charges that the most widely disseminated rock 'n' roll was a manufactured phenomenon cynically crafted by the record companies in order to capture a growing teenage market, see, e.g., SHAW, *supra* this note, at 200-01. On the denaturing commercialization of rock, see generally SIMON FRITH, *MUSIC FOR PLEASURE: ESSAYS IN THE SOCIOLOGY OF POP* (1988); Simon Frith, *The Industrialization of Popular Music*, in *POPULAR MUSIC AND COMMUNICATION* 53 (James Lull ed., 1987).

80. David Samuels, *The Rap on Rap: the 'black music' that isn't either*, NEW REPUBLIC, Nov. 11, 1991, at 24-25, 29; see also discussion *infra* at text accompanying notes 161-64.

81. See Sunstein, *Neutrality*, *supra* note 42, at 19 for a recognition of this aspect of the view opposing governmental regulation of pornography.

Indeed, the FCC's imposition of tighter restraints on sexual expression is itself likely to give heightened force to the sense that sexuality is pre-social and necessarily challenging to power. Yet this "naturalistic" notion of sexuality has come under increasing challenge from social theorists in recent years.⁸² While it is beyond the scope of this Article to address such challenges substantively, it at least can be said that they serve to force a more searching examination of assumptions about the generally empowering consequences of eliminating governmental intervention into sex talk.

b. *The Underside of Humor*

The characterization of at least some humorous discourses as iconoclastic and subversive does not mean that these discourses are uniformly liberating. While humor may challenge the social norms out of which it arises, it simultaneously reflects them.⁸³ Since sexual humor contains and reflects the underlying attitudes of the society in which it develops, the gendered and discriminatory character of much sexually explicit and "dirty" humor replicates and spreads such attitudes. Demeaning but humorous references to sexuality might be even worse, as a social matter, than serious references because the notion that they should not be taken literally or seriously undermines resistance to the spread of such ideas. A classic and silencing critique of feminists is that we have no sense of humor.⁸⁴ This is particularly problematic in light of the extraordinary prevalence of sexual harassment in the workplace and the difficulty of distinguishing between forms of sexual humor in that context.⁸⁵

82. For a currently popular and influential challenge to the notion of sexuality as "natural" and naturally fundamental to one's personality, see MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY VOLUME I: AN INTRODUCTION* (1978) (arguing against the "repressive hypothesis"). Such challenges have influenced recent law review literature on issues relating to sexuality and privacy. See, e.g., Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991).

83. Commentators on American humor have noted a close connection between humor and the social context in which it operates. See, e.g., Sarah Blacher Cohen, *Introduction: The Variety of Humors*, in COMIC RELIEF, *supra* note 61, at 1.

84. See, e.g., MICHAEL MULKAY, *ON HUMOR: ITS NATURE AND ITS PLACE IN MODERN SOCIETY* 137, 152 (1988). As Mulkay argues, women are discouraged from criticizing sexist remarks when they are presented in the guise of "mere" jokes. We are thus in the classic double bind — either we make a big "to-do" about the sexist underpinnings or assumptions of the joke, at which point we are stigmatized as humorless harpies, or we simply laugh along with the joke, which preserves the appearance of a jointly held sense of humor but which makes us complicit in the perpetuation of sexist and demeaning ideas about women. The following line I once read sums it up rather well: "I find jokes about you funny. Why don't you find jokes about you funny?" See also MAHADEV L. APTE, *HUMOR AND LAUGHTER: AN ANTHROPOLOGICAL APPROACH* 67-81 (1989).

85. Of course, this set of objections has very little to do with notions of keeping sex private. Whether sexual humor shocks or titillates, traditionalist conservatives might object to it on the ground that sexuality is an important, serious, and perhaps even sacred subject which is appropriately left to the meaningful and private contemplation of married couples. In contrast, some feminist approaches object to sexualized discourse primarily because of its demeaning and disempowering effects on women. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST*

c. *Sex Talk and Misogyny*

Characterizing sex as naturally fundamental to the self and sex talk as necessarily in tension with power makes it easy to ignore anti-feminist stereotypes in broadcast sex talk. The mainstream adoption of leering sexual references in shock radio is often right-wing and sexist.⁸⁶ The anti-hero status that "censorship" by government confers on misogynistic shock jocks distracts from a recognition of the sexist character of sexual speech currently on the air.

The troublingly sexist aspects of such broadcast discourse have historical antecedents. The early 1970s saw the development — and FCC-prompted demise — of "topless radio," in which women called in to talk about their sex lives on mainstream commercial radio stations.⁸⁷ The format illustrated the dual nature of public talk about sexuality. At that time, topless radio was the only broadcast forum in which women could talk about their sexuality. It provided them with an opportunity to legitimate sexual activity beyond the missionary position, acquainted them with non-mainstream ideas about sex, and might well have assisted female pleasure.⁸⁸ However, the ability to sexualize and objectify oneself is far from evidence that one has achieved any of the feminist goals of empowerment for women. Liberation is not simply a matter of women choosing to engage in sexually exploitative discourse.⁸⁹ Topless radio's "pandering and titillating" references to sexuality are suspect from this point of view.⁹⁰ Today's "relationships shows," with their male hosts and their coy attempts to extract sexual revelations to the point of humiliation, usually from women, represent the passing of topless radio's baton.⁹¹

Despite the demeaning aspects of some broadcast sex talk, the very fact of FCC intervention transforms the matter into an example of censorial govern-

THEORY OF THE STATE 195-214 (1989); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 51-52 (1979).

86. See, e.g., Pareles, *supra* note 45.

87. *Sonderling Broadcasting Corp.*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975). The "topless radio" format was inaugurated in 1971 by Bill Ballance of KGBS, Los Angeles, a Storer Broadcasting station. His call-in show, called *Feminine Forum*, was extremely popular and syndicated to 30 markets. FORNATALE & MILLS, *supra* note 4, at 84-85; POWE, *supra* note 3, at 182-83; see also *supra* note 5.

88. See FISKE, *supra* note 78, at 184-92 (on interpretations of soap opera sexuality as empowering) and at 232-33 (on Madonna).

89. Indeed, Professor MacKinnon has taken the position that women's experience of sexual pleasure or intimacy with men cannot be liberating in the context of the extensive gender inequality against which sexuality is currently constructed. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 218 (1987).

90. For one thing, the programs censored by the FCC involved women advising others on how to minimize their own "hangups" about fellatio, indicating a focus on their male partners' satisfaction. See HAL HIMMELSTEIN, *TELEVISION MYTH AND THE AMERICAN MIND* 296 (1984) (criticizing topless radio as "disingenuous[ly] . . . prey[ing] upon the insecurities of these women who wanted so much to hear themselves talking"). In addition, the format always involved male hosts interviewing the callers, often subjected callers to abuse for their sexual confessions, and exploited women's sexual experiences for commercial gain. *Id.* at 294.

91. See O'Connor, *supra* note 7, at B1.

mental intrusion, seen as problematic regardless of the substantive content of the censored broadcasts. The successful marketing of a tape of Howard Stern's censored radio shows — under the self-aggrandizing title *Crucified by the FCC* — demonstrates the sanitizing recharacterization of a forum for sexism into a free speech *cause célèbre*.⁹² Similarly, those stations (such as college stations) that seek to challenge the status quo by playing sexually explicit rap are often providing a forum for highly misogynistic fare.⁹³ The more they perceive themselves as challenging power by referring to sex, the less likely they are to question the extent to which much sex talk and many sexual interactions implicate fundamentally unequal power relations between men and women. The context of a conservative FCC's vigilance against sexually explicit material does not provide a propitious atmosphere in which to try to get the audiences of either a sexist shock jock or a misogynistic rap group to see how their attitudes are marked by disrespect for women.

B. *On Sex Talk, Diversity, and Cultural Pluralism*

Parallel to the debate about the empowering character of publicly explicit sexual references is an argument about the relationship between sexually explicit speech, diversity, and cultural pluralism. Pluralists object to government censorship of sex talk on the grounds that it improperly implicates government in the role of selecting among diverse, competing values and that it unfairly burdens the speech of minorities and the disempowered. The socially conservative view challenges both the value of diversity per se and the notion that the desire to empower minorities should lead the government to permit the public broadcast of immorality. Neither vision is adequately rooted in the reality of modern sexual discourse. While the conservative position is unacceptably rigid and exclusionary, the pluralist celebration of diversity does not take sufficient account of the difficult problems raised by casual references to cultural pluralism.

1. *Censorship and Governmental "Ethnocentric Myopia"*

Justice Brennan's dissenting opinion in *Pacifica*, in which the Court upheld the FCC's decision to ban Pacifica Station WBAI-FM from broadcasting a George Carlin monologue during hours when children would likely be in the audience,⁹⁴ asserts that because "in our land of cultural pluralism, there are many who think, act, and talk differently" from the members of the Supreme Court (and, presumably, the FCC), approval of regulations on the broadcast of indecency constitutes nothing more than "acute ethnocentric myopia."⁹⁵ In the pluralist perspective, the danger of discretionary standards such as the

92. See *supra* note 31.

93. See *infra* text accompanying notes 157-60.

94. *In re Pacifica Found.*, 56 F.C.C.2d 94 (1975), *reh'g granted*, 59 F.C.C.2d 892 (1976), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd sub nom.* *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

95. *FCC v. Pacifica Found.*, 438 U.S. 726, 775 (1978) (Brennan, J., dissenting).

indecent definition is that they can easily be used by government officials (or by government with the aid of conservative citizen groups) to silence dissenting voices, undermine diversity, and impose upon society particular orthodoxies about normal and desirable behavior.⁹⁶

At the very least, this result is inconsistent with one of the central metaphors of the First Amendment: the "marketplace of ideas," with its diverse and antagonistic voices undisturbed by the governmental selection of value, viewpoint, or expression.⁹⁷ What makes such homogeneity most troubling, according to this view, is that it excludes the voices of the "innumerable subcultures that compose this Nation," and falls particularly heavily on "low-brow" and minority speech.⁹⁸ Thus, what makes governmental interventions such as the indecency standard problematic is not so much that an excerpt of *Ulysses* or other recognized and elite works will be lost to the broadcast audience, but that the standard will have an exclusionary impact on under-represented voices that add to social diversity. For evidence of governmental bias, holders of this pluralist view refer to the historically chilling effect of the FCC's indecency enforcement on non-mainstream, politically challenging, and minority speech.⁹⁹

96. As Justice Brennan eloquently observed in *Pacifica*: "In this context [of a predictable chilling effect on those who flout majoritarian conventions], the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking." *Id.* at 777. If Justice Brennan could make this argument about the FCC's narrow prohibition on George Carlin's seven dirty words, he surely would find it even more powerful in the context of today's far more diffuse and broad indecency enforcement standard.

97. For the first statement of the marketplace metaphor in First Amendment jurisprudence, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

"[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . ."

See also THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 7-8 (1966); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 82-89 (1948). Of course, the marketplace metaphor as the ground of the First Amendment has been subject to searching critique. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 17-24 (1989); Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1. For accounts of the role of the marketplace metaphor in the development of First Amendment jurisprudence and the ways in which its modern meaning differs from its claimed origin in the free speech metaphors of Milton's *Areopagitica*, see David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 876, 886 (1986); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1188-89 (1989).

98. *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting).

99. See, e.g., POWE, *supra* note 3, at 162-90 (characterizing FCC indecency enforcement as nothing more than "cultural reactionism" and an attempt to maintain white, middle-class morality over the airwaves). Of course, proponents of the pluralist or even the libertarian view

a. *The Multivalent Character of Sex Talk*

In arguing for the recognition of diversity as implicated in sex talk, pluralists contend that language must be understood as part of lived experience. As Justice Holmes once said: “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.”¹⁰⁰ What language means — and whether it is offensive — depends on its larger social context.¹⁰¹ Communicative activity, including watching television and listening to the radio, is an interactive process through which the audience participates in the construction of meaning.¹⁰² Thus, the ways in which people use and understand language are dependent on cultural conventions and community understandings.¹⁰³

This is easiest to see in the context of words that have generally recognized multiple meanings both in their slang and official, dictionary forms. The *double entendre* is a particularly apt case in point. George Carlin’s infamous *Filthy Words* monologue, for example, derives much of its humor from the multiple meanings of words.¹⁰⁴ The context of a word’s use provides cues for

would not suggest that every indecency enforcement by the Commission has been a crude attempt by the government to quell dissenting voices. The salient fact is that the enforcement of the FCC’s standards in fact has the effect of censoring some non-mainstream and minority voices. Cf. FISKE, *supra* note 78, at 227 (suggesting that the traditional critiques of television rely both on morality and aesthetics “in order to displace their origins in class-based social power”).

100. *Towne v. Eisner*, 245 U.S. 418, 425 (1918), *quoted in* *FCC v. Pacifica Found.*, 438 U.S. 723, 776 (1978) (Brennan, J., dissenting).

101. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2566 (1992) (Stevens, J., concurring). Cf. Post, *The Constitutional Concept*, *supra* note 41, at 623-26, 646-47 (characterizing outrageous expression as community-based assessment).

102. Whether or not we consign authorial intention to complete irrelevance, it surely remains the case that meaning is constructed to a large extent in the interplay between audience and text and that audience understandings of texts are grounded in cultural content and, consequently, vary across audiences. For this point in connection with television viewing, see, e.g., Mary Ellen Brown, *Introduction: Feminist Cultural Television Criticism — Culture, Theory and Practice*, in *TELEVISION AND WOMEN’S CULTURE: THE POLITICS OF THE POPULAR* 15 (Mary Ellen Brown ed., 1990); Caren J. Deming, *For Television-Centered Television Criticism: Lessons From Feminism*, in *TELEVISION AND WOMEN’S CULTURE* 45-46, 49.

103. See, e.g., JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984) (discussing the interpenetrations and interdependence of language and culture/community); FISKE, *supra* note 78, at 78 (on the community-based character of oral culture). With regard to this point in the context of humor, see Gary Alan Fine, *Sociological Approaches to the Study of Humor*, in *HANDBOOK OF HUMOR RESEARCH* 164 (Paul E. McGhee & Jeffrey H. Goldstein eds., 1983) (“Humor, like all interpersonal behavior, is socially situated. That is, it is embedded in a particular social environment. For humor to work — that is, to be funny — it must be responsive to the immediate situation and to [sic] be appropriate to the normative properties of the more general social circumstances. Participants must define these behaviors or speech events as humorous, and this evaluation is socially constructed (or negotiated) in context.”).

104. This monologue, which served as the basis for the Supreme Court’s decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), is remembered for the seven “words you couldn’t say on the public airwaves.” As a satirical look at “dirty” words, the monologue made liberal use of the *double entendre*. For example, Carlin mused on the different meanings of the word

understanding its meaning, and shared cultural referents enable people to interpret such contextual cues.

Similarly clear is the importance of shared cultural context to an understanding of group-specific coded languages. Particularly in non-mainstream or oppressed subcultures, communication often operates by the use of codes or signs that are shared within the culture but resistant to outside understanding.¹⁰⁵ The use of coded words allows for private communication within the code-sharing group and fosters the sense of liberation that comes from speaking one's own language, especially in a hostile environment. For instance, coded language consistently has found a home in African-American music — presumably in part to promote intra-group communication while thwarting understanding by the oppressive larger society.¹⁰⁶ Much of the blues is said to consist of coded references to otherwise taboo subjects. Similarly, those who have written about rap or hip hop have focused on the forms' contextual origins and culturally-determined meanings.¹⁰⁷ One can also find in-group codes within the American gay community. Just as gay men developed coded forms of self-reference,¹⁰⁸ gay communities transformed the meanings of conventional images and references into codes.¹⁰⁹ Slang, commonly used by youth, also serves such coding functions. The "generation gap" exists in part because teenagers develop whole series of idiomatic expressions that are not easily understood by their parents.¹¹⁰

"prick" when used in the phrase "pricking your finger" by contrast to the phrase "fingering your prick."

105. The need to speak in codes depends in part on social status. See, e.g., FISKE, *supra* note 78, at 192 (describing theorists' claims that "women in patriarchy necessarily learn to use double-voiced discourse").

106. See, e.g., JOHN BAUGH, *BLACK STREET SPEECH* 27 (1983) ("[S]lavery . . . created a climate where it was necessary to devise communication strategies that allowed blacks to preserve their self-respect while not offending the whites interacting with them"); MARY ELLISON, *LYRICAL PROTEST: BLACK MUSIC'S STRUGGLE AGAINST DISCRIMINATION* 106 (1989); *THE SOCIAL IMPLICATIONS OF EARLY NEGRO MUSIC IN THE UNITED STATES: WITH OVER 150 OF THE SONGS MANY OF THEM WITH THEIR MUSIC* xv-xvi (Bernard Katz ed., 1969); BOOKER T. WASHINGTON, *UP FROM SLAVERY* 19-20 (1901).

107. See, e.g., DAVID TOOP, *THE RAP ATTACK: AFRICAN JIVE TO NEW YORK HIP HOP* (1984); Henry Louis Gates, Jr., *2 Live Crew, Decoded*, N.Y. TIMES, June 19, 1990, at A23; Tricia Rose, *Orality and Technology: Rap Music and Afro-American Cultural Resistance*, *POPULAR MUSIC & SOC'Y*, Winter 1989, at 35, 37, 39-40; see also NELSON GEORGE, *THE DEATH OF RHYTHM & BLUES* 188-94 (1988) (positing that rap is today's authentic Black music).

108. Calling oneself and other gay men "friends of Dorothy" was one common (and coded) identifying reference. See ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* 86-87 (1990) (discussing camp slang, including references to gay men in jail as "sisters in distress" and sailors as "seafood"); MICHAEL BRONSKI, *CULTURE CLASH: THE MAKING OF GAY SENSIBILITY* 43 (1984) (discussing the camouflage effect of "camp talk," including gay men's references to one another with women's names).

109. See, e.g., FISKE, *supra* note 78, at 71 (discussing the transformation of *Dynasty* into a cult show among some American gays, with the show's characters coming to represent more than the literal images).

110. Adults cannot keep up with the development of teenage slang because it constantly changes. See, e.g., *Yo Dude, Teachers Say Your Slang Can Be Real Cool*, CHI. TRIB., Mar. 17,

Culture even influences audiences' interpretations of whole texts that otherwise seem uncoded and unidimensional in meaning. Those who reflect on mass culture, for example, have observed that television programming has an extremely polysemic character, with video images and texts "read" differently depending on the viewer's culture.¹¹¹

How does all this apply to sexually expressive speech? First, an analogy to close dances like the merengué suggests that context often determines whether things are even perceived as sexually expressive or explicit. The ritualized steps of ballroom dances are publicly acceptable when accompanied by music but are potentially intimate and erotic when performed without musical accompaniment.¹¹²

Second, and more importantly, both the level of sexual expressiveness that is considered publicly acceptable and the meaning of sexual references in different expressive forms often vary by culture. As Justice Brennan recognized in his *Pacifica* dissent, the expletives condemned by the Court and the FCC in that case "may be the stuff of everyday conversation" in some American cultures.¹¹³ The acontextual and extra-cultural readings of sexual references may therefore silence significant elements of minority expression and serve to privilege mainstream understandings of meaning and offensiveness without explanation. In *Pacifica* itself, Justice Brennan referred to studies suggesting the presence and acceptability of expletives in many contexts in Black speech.¹¹⁴ More recently, Professor Henry Gates' testimony as an ex-

1991, at 24. We date ourselves by our use of slang: a Valley Girl who used the term "tubular" in 1985 would understand neither my reference to feeling "groovy" nor her younger brother's assessment of something wonderful as "sick" or "killer."

111. See generally FISKE, *supra* note 78, and sources cited *supra* in note 102. As Fiske puts it: "one program can stimulate the production of many texts according to the social conditions of its reception." *Id.* at 14; see also *id.* at 71-72, 206 (characterizing the differences in the ways in which *Dallas* is understood as a text in different cultures and describing the different cultural readings of the images of gold chains on "The A-Team").

112. Indeed, close dancing has become popular again as a "yuppie" pastime. See, e.g., Sandy Coleman, *Ballroom Dancing Bows Back into Vogue in Suburbs*, BOSTON GLOBE, Sept. 3, 1989, at 10; Kelly P. Kissel, *Couples Take Step Back to Romance*, L.A. TIMES, May 6, 1990, at E2.

Admittedly, the high level of acceptance of certain ballroom dancing forms is a relatively new phenomenon. Ministers and other respectable folk inveighed against the "indecent" of the waltz and polka in the 1830s, see RICHARD G. KRAUS, *HISTORY OF THE DANCE IN ART AND EDUCATION* 109, 117 (1969), and the Charleston in the 1920s, see ARNOLD SHAW, *THE JAZZ AGE: POPULAR MUSIC IN THE 1920S* 3-10 (1987), and the daughters of the pre-Castro Cuban *haute bourgeoisie* apparently were not allowed to merengue at all. Time, too, has an effect on social perceptions. The foxtrot was considered an improvement over the Black Bottom in the 1920s, and the lambada is far more controversial today than is the lindy hop. On the sexual underpinnings of dancing, see, e.g., KRAUS, *supra* this note, at 11 (characterizing some dancing as expressive of sexual drive in the context of courtship rituals).

113. *FCC v. Pacifica Found.*, 438 U.S. 726, 776 (1978) (Brennan, J., dissenting); see also Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 282-85 (1978) (arguing that freedom of speech requires wide latitude for choice of language).

114. *Pacifica*, 438 U.S. at 777 (citing various studies of Black English and African American oral poetry).

pert in the obscenity trial of the rap group 2 Live Crew suggested that the group's lyrics should be understood in light of their debt to African-American narrative traditions of boasting, toasts, and other storytelling forms resting on exaggeration, humor, and braggadoccio.¹¹⁵ Without such a culturally anchored view, the controlling white society might hear and understand the group's highly sexual and explicit lyrics in very different (and perhaps far more literal) ways than would its intended audience of African-American youth.¹¹⁶ A related argument, that the meaning and offensiveness of sexual discourse must be assessed culturally and in context, was made by Professor Orlando Patterson in connection with Professor Anita Hill's testimony in the Clarence Thomas confirmation hearings.¹¹⁷

b. The Exclusion of Blues, Rap, and Punk

A good indication of the culturally-skewing character of overly prudish approaches to sex talk is the extent to which blues, rap, and punk rock have been absent from mainstream broadcasting in light of their often sexually referential content. The virtual exclusion of the sexually frank forms of this music from mainstream listening has led, in effect, to class- and race-based censorship. The blues¹¹⁸ and rap are two of the most significant forms of Afri-

115. See Gates, *supra* note 107, and other sources cited therein; Jon Pareles, *An Album is Judged Obscene; Rap: Slick, Violent, Nasty, and Maybe Hopeful*, N.Y. TIMES, June 17, 1990, § 4, at 1. The cultural background of rap includes narrative poems, called toasts, which are often "[v]iolent, scatological, obscene, misogynist [and] . . . used for decades to while away time in situations of enforced boredom." TOOP, *supra* note 107, at 29.

116. See, e.g., Charles-Edward Anderson, *2 Live Crew Acquitted*, A.B.A. J., Dec. 1990, at 29 ("[Professor Henry Gates] testified that the music of 2 Live Crew is a 'genius' artistic parody on the lifestyle of young American black males.").

117. Orlando Patterson, *Race, Gender and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, Week in Review, at 15. In assessing (and criticizing) Professor Hill's charges of sexual harassment against now-Justice Thomas, Patterson made a culture-specific and contextual argument, suggesting that while feminists and cynical politicians disapprove of obscenities per se, "to everyone else . . . an obscene expression, whether in Chaucerian Britain or the American South, has to be understood in context." *Id.* Such an allegedly contextual approach led Professor Patterson to conclude that because Professor Hill "perfectly understood the psycho-cultural context in which Judge Thomas allegedly regaled her with his Rabelaisian humor (possibly as a way of affirming their common origins)," her raising the issue of harassment was "disingenuous because she has lifted a verbal style that carries only minor sanction in one subcultural context and thrown it in the overheated cultural arena of mainstream, neo-Puritan America, where it incurs professional extinction." *Id.* Of course, apart from the obvious feminist objections to this account, I would also note that Professor Patterson himself makes the potentially inaccurate assumption that Professor Hill and Justice Thomas share a cultural and linguistic context.

118. Any number of scholarly and popular studies have addressed the phenomenon of the blues and its meaning in the lives of African-Americans. See, e.g., IMAMU AMIRI BARAKA, *BLUES PEOPLE: NEGRO MUSIC IN WHITE AMERICA* (1963); JAMES H. CONE, *THE SPIRITUALS AND THE BLUES: AN INTERPRETATION* (1972); GARY GIDDINS, *RIDING ON A BLUE NOTE: JAZZ AND AMERICAN POP* (1981); MICHAEL HARALAMBOS, *RIGHT ON: FROM BLUES TO SOUL IN BLACK AMERICA* (1974); DAPHNE DUVAL HARRISON, *BLACK PEARLS: BLUES QUEENS OF THE 1920s* (1988); PAUL OLIVER, *SCREENING THE BLUES: ASPECTS OF THE BLUES TRADITION* (1968) [hereinafter OLIVER, *SCREENING THE BLUES*]; PAUL OLIVER, *BLUES FELL THIS MORNING: MEANING IN THE BLUES* (1990) [hereinafter OLIVER, *BLUES FELL THIS MORNING*]; ROBERT PALMER, *DEEP BLUES* (1981). In this Article, I will focus on

can-American musical expression.¹¹⁹ The blues, historically considered "devil's music,"¹²⁰ was not the music of the middle class African-American culture; rather, it was the music to which rural and working class African Americans danced in juke joints.¹²¹ Blues lyrics, habitually dealing with every day topics such as personal stories of love and loss, often revolved around earthy themes.¹²² Indeed, there is a history of lightly veiled sexual references in the blues,¹²³ in contexts ranging from male boasting about sexual prowess¹²⁴ to flirtatious female vocals about what it would take to satisfy the singer.¹²⁵

The blues, as well as its successor, rhythm & blues, consistently has been

the nature of sexual references in blues lyrics without trying to make any generalizations about the particular role of the blues in African-American culture.

119. See discussion *infra* at text accompanying notes 137-42.

120. See, e.g., CONE, *supra* note 118, at 110-11 (suggesting, however, that in fact there was little disjunction between spirituals and blues in the Black experience); OLIVER, SCREENING THE BLUES, *supra* note 118, at 23.

121. See JOACHIM BERENDT, THE JAZZ BOOK: FROM NEW ORLEANS TO ROCK AND FREE JAZZ 140 (1975) (describing the blues as the music of the proletariat); HARRISON, *supra* note 118, at 99 (suggesting that blues erotica reflected the more relaxed attitudes toward sex in the Black working class community); OLIVER, SCREENING THE BLUES, *supra* note 118, at 3, 12. As Harrison and others indicate, some of the sexually explicit blues was performed in brothels and other like locales. See HARRISON, *supra* note 118, at 109 (explaining that raunchy blues usually was performed only at "parties, midnight rambles, bawdy houses, or clubs"). This was in part because the performers of blues and jazz music could more easily find work for better pay and more creative freedom in such places than elsewhere. See KATHY J. OGREN, THE JAZZ REVOLUTION: TWENTIES AMERICA AND THE MEANING OF JAZZ 33-35, 56-86 (1989). The famous W.C. Handy and Jelly Roll Morton were both "sporting house" pianists in their day. OLIVER, SCREENING THE BLUES, *supra* note 118, at 169; PALMER, *supra* note 118, at 18.

122. See, e.g., CONE, *supra* note 118, at 108-11, 120-21, 128-32.

123. The veiled references usually consisted of metaphors and symbols whose sexual meanings were not difficult to decipher. See, e.g., ELLISON, *supra* note 106, at 113-14 (referring to Bessie Smith's *Nobody in Town Can Bake a Sweet Jelly Roll Like Mine*, Kitchen Man, Susie Edwards' *I Want a Hot Dog for My Roll*, Victoria Spivey's *Black Snake Blues*); GIDDINS, *supra* note 118, at 5-9; OLIVER, SCREENING THE BLUES, *supra* note 118, at 24-25 (referring, for example, to the following song titles from blues of the 1920s and 30s: *Whip it to a Jelly*, *What's That Smells Like Gravy?*, *Somebody's Been Using that Thing*, *Let Me Play With Your Poodle*, *Shake it Down*, *Hair Parted in the Middle*, *Let Me Squeeze Your Lemon*, *Jackass for Sale*); PALMER, *supra* note 118, at 110. Some of the early blues were far more explicit in their sexual references. Faye Barnes' *Do It a Long Time, Papa*, and Ida Cox's *One Hour Mama* are only two examples of a large body of quite explicit sexual lyrics in the blues. See, e.g., ELLISON, *supra* note 106, at 113-14. For a recently released compilation of previously unissued blues songs, see RAUNCHY BUSINESS: HOT NUTS & LOLLIPOPS (Sony Music Entertainment, Inc. 1991).

124. See, e.g., OLIVER, BLUES FELL THIS MORNING, *supra* note 118, at 103-05; PALMER, *supra* note 118, at 115-16, 125.

125. As Bessie Smith sang: "I need a little sugar in my bowl, I need a little hot dog between my roll." HARRISON, *supra* note 118, at 106; see, e.g., ELLISON, *supra* note 106, at 113-14; HARRISON, *supra* note 118 at 99-100 (setting out the lyrics of *My Man-of-War*); OLIVER, SCREENING THE BLUES, *supra* note 118, at 23-24, 164-261. Unlike much other popular music, the blues allowed women to talk of themselves and their expectations in ribald and highly charged, sexual ways. See ELLISON, *supra* note 106, at 111-14 (writing on the sexually explicit music of Black women singers as reflecting their independence); HARRISON, *supra* note 118, at 100, 103-11 (same). Indeed, "[w]omen also employed the bragging, signifying language of

the subject of censorship of various kinds. Some scholars have charged that we do not have an accurate picture of the original blues because collectors exercised censorship in eliminating the more obviously sexual music of the time.¹²⁶ The blues did lead to opposition in the Black community, particularly because of its lower-class performance contexts and “unrefined” lyrics.¹²⁷ The “dirtiness” of blues lyrics was not generally considered a problem by mainstream white society, however, so long as the music was available only on “race” records¹²⁸ and African-American radio stations.¹²⁹ Indeed, vernacular jazz and the smuttier blues songs were “cleaned up” before they were made available to a mainstream white audience.¹³⁰ Once blues and rhythm & blues

males to boast of fine physical attributes and high-powered sexual ability.” HARRISON, *supra* note 118, at 106.

126. See, e.g., OLIVER, SCREENING THE BLUES, *supra* note 118, at 24, 164-66, 181-82. Oliver contends that a comparison of recorded blues and unissued or privately recorded blues songs indicates that a wealth of traditional, sexually explicit blues have been withheld from the public for reasons of morality. Such songs include *Sweet Patunia*, *Shave 'Em Dry*, *Dirty Mother Fuyer*, and *The Dirty Dozens*. *Id.* at 24; see also THE SOCIAL IMPLICATIONS OF EARLY NEGRO MUSIC IN THE UNITED STATES: WITH OVER 150 OF THE SONGS, MANY OF THEM WITH THEIR MUSIC xi-xii (Bernard Katz ed., 1969) (suggesting similarly that the early collectors of Black music did not hear or catalogue many profane or vulgar songs or songs of secular social comment during the last years of slavery and the subsequent years of Reconstruction.) Cf. VANCE RANDOLPH, ROLL ME IN YOUR ARMS: “UNPRINTABLE” OZARK FOLKSONGS AND FOLKLORE (Legman ed., 1992).

127. See, e.g., HARRISON, *supra* note 118, at 106 (describing the existence of community activities within the Black community in the 1920s seeking to ban blues with prurient lyrics and specifically charging that “black newspapers waged the battle against performers who included them in their repertoire and accused them of using lewd lyrics as a substitute for talent”); OGREN, *supra* note 121, at 111; PALMER, *supra* note 118, at 18. Ogren points out the characterization of jazz and blues as devil’s music because of the “shady” places in which they were performed. OGREN, *supra* note 121, at 113. This is not to say, however, that the sexual associations of this music were the only — or even the main — reasons for some of the Black communities’ objections to it. *Id.* at 114-38 (describing other reasons). Indeed, Ogren specifically points to the generally class-based reasons for objections to jazz and blues in the Black community. *Id.* at 115.

128. The term refers to the label imposed by the record companies on their releases by Black artists designed to appeal to the Black public. See BERENDT, *supra* note 121, at 143; OGREN, *supra* note 121, at 91; PALMER, *supra* note 118, at 98; SHAW, *supra* note 79, at 165. Led by the June 25, 1949 issue of BILLBOARD magazine, the reference was dropped by the industry in the 1950s in favor of the term “rhythm & blues.” SHAW, *supra* note 79, at 165.

Paul Oliver reads the relatively sparse historical evidence to indicate that sexually explicit blues music was primarily made available to the Black market in strictly segregated record catalogues in the 1920s and 1930s. Moreover, he posits that suggestive material was probably always a part of blues songs, but that it was effectively censored by the record companies until the economic pressures of the Depression forced them to try to revive flagging record sales and to broaden their markets by issuing more blues of the raunchy, metaphor-filled variety. OLIVER, SCREENING THE BLUES, *supra* note 118, at 181.

129. While there were historically few Black-owned radio stations, some stations, under white ownership, nevertheless played music that was thought primarily to appeal to the Black audience. See FORNATALE & MILLS, *supra* note 4, at 69.

130. OGREN, *supra* note 121, at 87; DAVID P. SZATMARY, ROCKIN’ IN TIME: A SOCIAL HISTORY OF ROCK AND ROLL 25 (1987) (discussing the fact that mainstream “cover” versions of rhythm & blues songs were often “cleaned up”).

In a debate paralleling discussions of blues (and its progeny, rhythm & blues), the development of jazz sparked controversy in the 1920s in the white community. OGREN, *supra* note 121,

became popular in record stores in white neighborhoods and began receiving airplay on stations with wider audiences, they caused a furor and led to the public ire of the decency leagues.¹³¹ The expanding white audience for such African-American-influenced music thus led to a racist protective response. Racial discrimination and the fear of “race mixing” clearly underlay many of the complaints about the sexual content of rhythm & blues and its successor form, rock ‘n’ roll.¹³² The broadcast industry responded by increasing its level of self-regulation on the “morals” front. *Variety* decried rock ‘n’ roll’s “leer-ics,”¹³³ an official of the American Society of Composers, Authors, and Publishers (ASCAP) characterized the music as obscene,¹³⁴ and radio stations proclaimed that they would screen objectionable rock ‘n’ roll.¹³⁵ Even many of the African-American stations — not to mention African-American record companies — refused to carry the more controversial and earthy blues and rhythm & blues music in response to the rise of modern Comstockery on the

at 139-61. The basis of at least some of the white community’s disapproval of the jazz form was the concern that it would lead to “uncontrolled” behavior. *Id.* Nevertheless, the strength of the morality-based objections to jazz had decreased significantly by the 1930s when “[t]he growth of recordings and radio broadcasts made jazz performance a household commodity rather than an adventurous foray into an exotic world.” *Id.* at 162-63.

131. Indeed, given that many of the most powerful radio stations refused to play records by African-American artists, it may have been the practice of white artists “covering” Black rhythm and blues songs — and setting the stage for the development and eventual mainstream acceptance of rock ‘n’ roll — that led to the increasing attention of the decency leagues. See SHAW, *supra* note 79, at 192-96; SZATMARY, *supra* note 130, at 25 (discussing the practice of covering records in the 1950s). On the developing white audience for rhythm & blues in the early to mid-1950s, see *id.* at 19; MARTIN & SEGRAVE, *supra* note 2, at 15-26.

Analysis suggesting that social problems arise from the interpenetration of ideas between otherwise separate groups is reminiscent of Walter Kendrick’s approach to the derivation of what we now call pornography. Kendrick suggests that sexually explicit material came to represent the modern problem of pornography when it escaped the elite and secret museums of aristocratic men to become available to the masses. See generally WALTER KENDRICK, *THE SECRET MUSEUM* (1987). The fact that the spread of blues lyrics hinged on the escape of “dirty” lyrics from lower class Blacks to upper class whites at first seems to be inconsistent with (indeed, contradictory to) the Kendrickian explanatory approach; however, closer inspection suggests a parallel concern about the spread into the white middle class of material thought acceptable only for the white aristocracy and the Black working class.

132. See SZATMARY, *supra* note 130, at 22-24; see also FORNATALE & MILLS, *supra* note 4, at 42-43 (quoting religious leaders’ likening of rock to “jungle tom toms” which would “inflame and excite youth,” the choice of words making clear the racist objections to rock n’ roll (and, presumably, to its Black predecessor, rhythm & blues)).

133. FORNATALE & MILLS, *supra* note 4, at 43.

134. It has been posited that the American Society of Composers, Authors, and Publishers’ (ASCAP) objections to rock n’ roll were motivated largely by a desire to cause economic harm to Broadcast Music, Inc. (BMI), ASCAP’s only competitor and the license holder of most of the rock and blues repertoire. See FORNATALE & MILLS, *supra* note 4, at 47-49; MARTIN & SEGRAVE, *supra* note 2, at 12, 20; DAVID SEAY & MARY NEELY, *STAIRWAY TO HEAVEN* 116-17 (1986).

135. FORNATALE & MILLS, *supra* note 4, at 43; ED WARD, GEOFFREY STOKES & KEN TUCKER, *ROCK OF AGES: THE ROLLING STONE HISTORY OF ROCK & ROLL* 129, 183 (1986); see also SZATMARY, *supra* note 130, at 47 (discussing disc jockeys who refused to play Elvis records because of the offensive character of the music).

subject.¹³⁶

Some who have decried what they see as the resulting co-optation and mainstreaming of rhythm & blues recently have pinned their hopes on rap as the musical form to fill a perceived void in African-American music.¹³⁷ Rap, whose popularity has steadily increased, is currently a highly sexually explicit form of music.¹³⁸ While practitioners of a virtually mainstream version of the genre, like the popular Hammer, seem to avoid open sexual references, sexuality is a common thread running from party groups like 2 Live Crew to hard core "gangsta" rap. One common explanation for the explicit character of rap is that the music simply represents reality, that it is a tableau of African-American ghetto life and reflects the anger and frustration of urban African-American youths.¹³⁹ According to this view, rap is raw and realistic. It does not try to sugar-coat reality or pretend to middle-class, traditional standards of style.¹⁴⁰ Rap's use of "nasty" language and talk about sex is simply an attribute of its truth: because people use such language, it would distort and misrepresent reality for rap not to do so as well. The mirror metaphor has been used to characterize rap as a mere reflector of what exists in the African-American community.¹⁴¹ Many rap artists have interpreted this mirroring function as self-consciously political, meant as both a liberating message to the African-American underclass and a threat to the oppressive white regime.¹⁴² Despite this political aspect and the form's current social prominence, rap in its sexually explicit form has found little fertile soil in commercial radio.¹⁴³

136. See, e.g., MARTIN & SEGRAVE, *supra* note 2, at 15-18, 20; MARK NEWMAN, *ENTREPRENEURS OF PROFIT AND PRIDE: FROM BLACK-APPEAL TO RADIO SOUL* 115 (1988). In addition, indirect pressure was brought to bear on rock 'n' roll by the exposure of payola scandals and subsequent Congressional hearings sparked by disclosures that disc jockeys extorted money from record companies in return for air play. Some observers of the scene suggest that the payola scandals were a convenient way to contain rock 'n' roll in the late 1950s. See, e.g., FORNATALE & MILLS, *supra* note 4, at 47-53; SEAY & NEALY, *supra* note 134, at 117-18.

137. See, e.g., GEORGE, *supra* note 107, at 188-94 (1988).

138. A quick scan of many popular rap albums will reveal some sexually explicit material. The controversial AS NASTY AS THEY WANNA BE by 2 Live Crew, found obscene at the trial court level, represents only one example of a form that, on the whole, does not eschew sexually explicit references. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990), *rev'd sub nom. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). This generalizing characterization of rap's sexual content is not meant to suggest that the form is definable in a monolithic manner. Reviews in the recent BRING THE NOISE suggest variations in style and subject preferred by modern rappers. See generally HAVELOCK NELSON & MICHAEL A. GONZALEZ, *BRING THE NOISE: A GUIDE TO RAP MUSIC AND HIP-HOP CULTURE* 108 (1991).

139. See, e.g., Gil Griffin, *Strong Words from Ice-T and N.W.A.*, WASH. POST, June 12, 1991, at F7.

140. NELSON & GONZALEZ, *supra* note 138, at 81; Harry Allen, *Hip Hop Madness: Rap Music is Our Music*, ESSENCE, Apr. 1989, at 78 [hereinafter Allen, *Hip Hop Madness*].

141. Allen, *Hip Hop Madness*, *supra* note 140, at 114.

142. See, e.g., ELLISON, *supra* note 106, at 5-6, 31-32, 71-73 (1989) (discussing the political character of rap as well as the subversive, protest-oriented lyrics of other African-American music); NELSON & GONZALEZ, *supra* note 138, at 107-09, 178-84 (describing the work of politicized rappers Ice Cube, N.W.A., and Public Enemy).

143. See, e.g., Phyllis Stark, *Modern Rockers Ponder Absence of Black Acts*, BILLBOARD, Jan. 12, 1991, at 132; see also Dick Hebdige, *What is Soul?*, in VIDEO ICONS AND VALUES 121-

Social and governmental censorship have a tendency to suppress not only the expressions of minority groups per se but also the *avant garde* speech of those who consider themselves iconoclasts. Punk rock, for example, was a musical form designed to shock existing sensibilities and challenge the requirement of musical expertise for public performance. It reached its apogee in the late 1970s and served as the anthem of alienated youth.¹⁴⁴ Punk was the music of nihilism and despair with which young people turned their backs on the rock elite.¹⁴⁵ Although punk songs typically were screamed at the audience without any attempt to assure comprehension, their lyrics often referred explicitly to sexual matters. In part because of such lyrics, commercial American radio virtually boycotted punk, and many of the punk songs were never played in their original form on the mainstream band.¹⁴⁶

c. *The Social Benefits of Diversity*

The fact that dissenting, subversive expression and minority speech such as blues and rap are repressed by government censorship and mainstream cultural norms does not alone explain what is wrong with limiting the voices of disempowered groups when those voices are offensive to mainstream culture. The pluralist response to this question posits a two-fold harm in restricting such expression. First, the regulatory process enlists government in reducing or eliminating the possibility of intra-group communication over the airwaves without a principled justification. Second, it minimizes the possibility of cross-cultural exchange for those people who wish to expand their horizons. After all, it is easy to argue that whatever one thinks of the "marketplace of ideas," it must rationally entail a marketplace of culture as well. While pluralists would not force people to listen to material they might find objectionable, the pluralist focus on tolerance and the social benefit of reducing parochial world-views would support an ethnically and culturally inclusive governmental speech policy.¹⁴⁷ At the very least, pluralists might consider the dissemina-

33 (Alan Olson, Christopher Parr & Debra Parr eds., 1991) (discussing the absence of African-American rap from MTV in the 1980s).

144. See, e.g., JOHN STREET, *REBEL ROCK: THE POLITICS OF POPULAR MUSIC* 174-76 (1986) (describing the politics of punk as the politics of anarchy). In Britain, punk became the music of the young, white working class.

145. JOE STUESSY, *ROCK AND ROLL: ITS HISTORY AND STYLISTIC DEVELOPMENT* 312-13 (1990); SZATMARY, *supra* note 130, at 175 (1987).

146. Some rock historians dismiss the history of punk after the 1970s, suggesting that it became co-opted as a style or fad after that decade. See, e.g., SZATMARY, *supra* note 130, at 191-94, 198. Punk has been succeeded by a number of different permutations of rock, including heavy metal. Currently, heavy metal is a musical form in which the shock factor has become integral, with overt references to sex, drugs, violence, and satanism. See STUESSY, *supra* note 145, at 375-78.

147. The revival — and reinterpretation — of civic republicanism stresses the development of dialogic social relations in which interlocutors' perceptions will be challenged by different points of view. See, e.g., Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1531 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 48-85 (1985). (Professor Sunstein would exempt pornography from the dialogue, however. See Sunstein, *Neutrality*, *supra* note 42.)

tion of offensive material socially desirable not for itself, but for the possibility that it allows society to develop and practice the virtue of tolerance.¹⁴⁸

2. *The Conservative Challenge to Diversity and Multi-Culturalism*

Social conservatives entirely reject the pluralists' view of cultural and sexual diversity as a social good.¹⁴⁹ Hewing to an often-religious moral absolutism, they see a fundamental social evil in the moral relativism entailed by pluralism.¹⁵⁰ They also reject pluralism on utilitarian grounds, believing that a certain level of social cohesion is necessary in order to maintain stability and social order. They further assert that the problems in our disintegrating American society suggest that the level of diversity tolerated today is destabilizing.

With regard to sexuality, these social conservatives completely deny any value to public portrayals of sex and think they should be banned outright. They are particularly troubled by presentations of sexualized expression regarding groups, such as homosexuals, whose members' affectional preferences they deem immoral. They accordingly challenge the value of social diversity, at least to the extent that it entails an acceptance of such "immoral" expression. Those who believe in such orthodox conservatism see no reason to privilege speech simply because it is unrepresented in the mainstream — on the contrary, they are interested in cleaning up and maintaining mainstream expression. For members of the far right, tolerance of the public flaunting of sexuality itself is intolerable.

3. *An Alternative Account*

As in the discussion of the relationship between sex talk and power,¹⁵¹ the way in which sexualized discourse is implicated in questions of diversity and pluralism is more complex than either polar position would have it. Contrary to the oppressive, exclusionary, and unrealistic stance of the extreme right, it is safe to say that most Americans see diversity as desirable. Consistent with that assumption, some level of pluralism historically has been a mainstay of our constitutional interpretation, especially in the area of the First Amendment.¹⁵² At least in theory, our conception of democracy includes counter-majoritarian safeguards for the protection of minority groups. Our system might even be said to place affirmative value on minority voices for the benefit

148. See generally LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986) (arguing that the virtue of tolerance can be promoted by protecting freedom of expression).

149. HUNTER, *supra* note 39, at 311.

150. Cf. David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067 (1991) (criticizing, from a fundamentalist point of view, Perry's suggestion that what he calls ecumenical political dialogue must be grounded on principles of fallibilism and pluralism).

151. See discussion *supra* at § I.A.3.

152. See Post, *Cultural Heterogeneity*, *supra* note 38, at 297, 299-305 (1988) (discussing the existence of assimilationist, pluralist, and individualist strains in the American legal order).

of society in general. However, references to the desirability of pluralism and diversity per se have come under attack on the ground that neither concept is adequate to resolve the concrete problems raised by multi-cultural societies retaining legacies of oppression.

The FCC's much-touted commitment to norms of diversity has not always withstood conflicts with other perceived values under the agency's enabling statute.¹⁵³ Even when the Commission has acted to protect diversity, its chosen methods have not always passed judicial scrutiny.¹⁵⁴ First, progressive thinkers have recently argued that diversity and pluralism, rather than requiring government to remain neutral in the marketplace of ideas (particularly in connection with sexual expression), in fact support affirmative restrictions on certain sorts of expression.¹⁵⁵

Second, there are a number of communities whose norms, values, and languages the Commission could choose to endorse and promote in the name of diversity and multi-culturalism. Some of them, such as the ultra-conservative critics of modern society's permissiveness, embrace values that sanctify intolerance and exclusion. The abstract reference to pluralism alone does not provide a workable standard by which to decide which communities we should be prepared to recognize and how we should deal with exclusionary voices. Furthermore, the recognition that some communities attach different meanings to language and expression — particularly of a sexual nature — does not necessarily define the extent to which those meanings should be promoted by government.¹⁵⁶

Third, a superficial agreement as to the social benefits of diversity in the abstract does not answer the question of how to deal with conflicts between different disempowered groups in society. For example, what should we make

153. Communications Act of 1934, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 35, 151-55, 201-21, 301-29, 401-41, 501-05, 601-09 (1988)). For example, the Commission's deregulatory moves in connection with structural regulations (such as the multiple ownership rules) and content regulations (such as the fairness doctrine), and the lack of rights of access on broadcast stations, are all subject to criticism for potentially undermining diversity. See, e.g., Stanley Ingber, *The First Amendment in Modern Garb: Retaining System Legitimacy — A Review Essay of Lucas Powe's American Broadcasting and the First Amendment*, 56 GEO. WASH. L. REV. 187, 211-12 (1987). See generally Owen M. Fiss, *Why the State?*, 110 HARV. L. REV. 781, 786-90 (1987) (calling for an affirmative role for the State in the First Amendment arena to respond to market distortions); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) (suggesting that libertarian free speech tradition can skew public debate in modern conditions).

154. See, e.g., *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (upholding an equal protection challenge to the Commission's policy of awarding an extra, diversity-based credit to female applicants for broadcast licenses).

155. The feminist attack on pornography represents one instance in which progressive women were aligned with the fundamentalist right to decry exploitative and subordinating sexual depictions. See DOWNS, *supra* note 40, at 25-143 (1989); see also Ehrenreich, *supra* note 38.

156. See Post, *Cultural Heterogeneity*, *supra* note 38, at 314 (discussing the ways in which efforts to establish pluralism often shade into assimilationism), 332 (describing Zachariah Chafee's view that the evolving character of group identity in America does not provide "natural brakes" for claims of group protection).

of the sexist character of many rap lyrics, with their images of violence and disrespect toward women?¹⁵⁷ On the one hand, their often-virulent misogyny further marginalizes an already-silenced group.¹⁵⁸ On the other hand, should their sexism, shared as it is by other musical forms, be considered sufficient justification for indecency regulations that would ban the material from the airwaves? Or is it enough that oppositional voices by Black women have been raised, challenging some rap's overt misogyny?¹⁵⁹ The facile argument that misogynistic gangsta rap lyrics merely reflect the brutal realities of life for young Black men in the ghettos does not, as a result, immunize the music either from perpetrating harms on women — themselves oppressed — or from

157. Much has been said about the misogyny and homophobia in rap lyrics. For an extremely thoughtful approach to the issues raised by rap misogyny, see Kimberlé Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, BOSTON REV., Dec. 1991, at 6, 30 [hereinafter Crenshaw, *Beyond Racism*].

Some rap groups are quite explicit in their sexist attitudes and connect their graphic discussions of sex with images of violence or disrespect toward women. See NELSON & GONZALEZ, *supra* note 138, at xxi (recognizing “the vein of misogyny that runs like a fat gold chain through some artists’ work”); Tony Van Der Meer, *Introduction, in TOOP, supra* note 107, at 5 (describing the sexist and homophobic attributes of some hip hop music). This seems particularly prevalent in the lyrics of what has come to be called “gangsta” rap (in reference to Los Angeles youth gangs.) *Id.* at 81, 112, 184. For example, one of the raps from an N.W.A. album contains the following representative lyrics:

This is the bitch that did the whole crew. She did it so much we made bets on who the ho would love to go through . . . And she lets you videotape her. And if you got a gang of niggers the bitch'll let you rape her.

Jay Cocks, *A Nasty Jolt for the Top Pops*, TIME, July 1, 1991, at 78 (quoting the lyrics of EFIL4ZAGGIN).

The debasement of women in the lyrics of some of these songs takes many forms. It does not merely rest in the repeated references to women as “bitches” or “hos” who enjoy rape and objectified sexual activity in which they are said to service the singers. It also legitimates the use of violence against women and, more subtly, suggests that women are manipulative, money-hungry seductresses who deserve to be mistrusted and controlled.

Of course, these visions of the castrating, all-powerful woman are neither new nor limited to a community of Black teenagers. Any music video channel-flipping will demonstrate the prevalence of such images (and sadistic male responses to them) in non-rap rock music. Indeed, such images have a long ancestry, appearing in contexts ranging from medieval church doctrine to the fears of the nineteenth century bourgeois. PETER GAY, 1 THE BOURGEOIS EXPERIENCE VICTORIA TO FREUD: EDUCATION OF THE SENSES 169-71, 192, 200-07 (1984); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1155, 1191-93 (1990). Thus, while sexist rap lyrics find themselves in good company, and while selecting a rap group as the subject of an obscenity prosecution (and not targeting any of the other potential offenders in pop culture) does smack of racism, the harmful content of misogynistic and homophobic rap is no less troubling as a result, as Professor Crenshaw observes. Crenshaw, *Beyond Racism, supra* this note, at 30.

158. *Id.*

159. Female rappers have responded to the misogynistic male rap, favoring two different approaches to the issue. Some, such as Bytches With Problems and Hoes Wit' Attitude, have simply turned the tables on the male rappers' sexism, challenging them on their own terms and being equally sexual, explicit, and derisive. Dennis Hunt, *10 Questions, Queen Latifah*, L. A. TIMES, Sept. 8, 1991, at 54. Other women rappers, such as Queen Latifah, have taken the high road, airing views empowering to women with far less sexually hostile expressions about men. See, e.g., Hunt, *supra* this note, at 54; John Pareles, *Record Brief: Yo-Yo: Make Way for the Motherlode*, N.Y. TIMES, Apr. 14, 1991, at H30.

“glamorizing a social tragedy for profit.”¹⁶⁰

Fourth, the culturally determined meanings of language necessarily undergo transformations when the original cultural forms in which they appear are exported to other contexts.¹⁶¹ What happens to the meaning of rap, for example, when it is incorporated into the mainstream musical and commercial idiom or when it becomes a form used by white singers like Vanilla Ice? Such transformations in turn raise questions about the continuing validity of claims of cultural “authenticity” and diversity on behalf of the expression. In this connection, it should be noted that the more violent and sexist elements of rap have increasingly found a home in mainstream listening by young, white, suburban males.¹⁶² The nature of this appeal is unclear. Some suggest that these listeners identify with the rage and rebelliousness of the music — that they are “rebels without a clue.”¹⁶³ This would suggest that they like the form and affect of the music rather than specifically understanding or identifying with its ghetto themes. Others suggest that the appeal of groups like N.W.A. to young white males is “danger at a safe distance.”¹⁶⁴ Either way, the white audience can convert the minority perspective into something completely different. Indeed, given the changing character of the rap audience, it might be argued that even its producers can come to produce it not as any kind of “authentic” discourse but, cynically, simply to satisfy perceived market needs. Consequently, the meaning of a rap lyric will be different in the inner city, in middle-class Black homes and in the suburban white teenage realm in which it has become popular. This makes the analysis of how to conceive its message much more complicated than might at first appear.

One possible approach to resolving these diversity-related issues would be to require the FCC or courts to make contextual distinctions between the empowering and the oppressive elements of relevant cultures. If, for example, one could argue that certain cultural norms are not in any way necessary or indigenous to a particular culture but, rather, are only defensive and responsive to external, oppressive conditions, then one might suggest that they do not have a high value in the diversity calculus. In fact, simply recognizing and legitimating cultural norms that are forged out of oppression leaves intact the underlying oppressive conditions giving rise to the norms in the first place.

160. See Leonard Pitts, *Too-slick rappers sell rage, despair for profit*, MIAMI HERALD, June 27, 1991, at 1F.

161. See Joe Brown, *The Rap on Vanilla Ice*, NEWSDAY, Feb. 6, 1991, at 56; Perry Lang, *Music and Race: Rap Giving Up its Roots for Riches*, S.F. CHRON., Apr. 4, 1991, at A1; David Mills, *It's a White Thing: Is it Serious Hip-Hop or a Pale Imitation*, WASH. POST, July 14, 1991, at G1; Van Der Meer, *supra* note 157, at 4-5 (“The expression of Black people is transformed when it is repackaged without any evidence remaining of the Black historical experience.”).

162. Samuels, *supra* note 80, at 24-25, 29; see also Cocks, *supra* note 157, at 78. N.W.A.'s EFIL4ZAGGIN soared to number one on the pop charts in the summer of 1991 without any of the usual promotional aids such as MTV videos, extensive radio airplay, or a hit single. *Id.* This account suggests that a major factor in the album's success is its unexpected appeal to white, middle-class teenage males. *Id.*

163. *Id.* (quoting a record store manager).

164. *Id.* (quoting *Billboard* magazine editor).

However, even apart from objections to the notion of leaving these judgements about cultural authenticity to judges or administrative agencies, this exercise seems fundamentally misconceived because it relies on the premise that there is something "natural," indigenous, non-reactive, and ahistorical about culture. At the very least, such essentialist cultural approaches create the danger of further promoting those disempowering stereotypes already in circulation in the dominant culture.¹⁶⁵ In sum, then, a closer look at the realities of sex talk in our culture today, unaligned with either pole of the pluralist/conservative debate, suggests a multi-layered role and set of meanings.¹⁶⁶

II

THE FCC'S TROUBLED REGULATION OF BROADCAST INDECENCY

The prevalence of broadcast sex talk today, whether in PBS specials on gay life or in the locker-room humor of shock jocks, has not gone unnoticed by the FCC. Under color of 18 U.S.C. § 1464,¹⁶⁷ which prohibits the utter-

165. Some scholars of the blues, for example, have celebrated the music and its sexual references for its affirmation of "the authenticity of sex as the bodily expression of black soul." CONE, *supra* note 118, at 132; see also OLIVER, SCREENING THE BLUES, *supra* note 118, at 176-80 (describing and contesting arguments contrasting the "frank" and "direct" sexuality of explicit blues with the "slick" and "shallow" metaphors of the blues that appealed to the "hidden prurience" of white society). These sorts of claims fit right into the context of the sexualized character of racism in this country. See generally CALVIN C. HERNTON, SEX AND RACISM IN AMERICA (1965).

166. Although this Article has focused on the pluralist/conservative axis of the debate about sex talk, I would suggest that absolute versions of the arguments either for or against regulation of broadcast sex talk are all unsatisfactory. The progressive position in favor of regulation, although not intended to be oppressive in the same way as the social conservative rationale for controlling public sex talk, is nevertheless also problematic. It establishes a substantive government orthodoxy and would engage administrative officials in the kinds of refined distinctions about expressive content that can undervalue the popular will and the liberating characteristics of broadcast sex talk, and that present the likelihood of misapplication in practice. "That's what happens when you try to change culture before power in a greatly unequal world." Kathleen M. Sullivan, *The First Amendment Wars*, THE NEW REPUBLIC, Sept. 28, 1992, at 35.

On the deregulatory side, the extreme libertarian position against regulation relies on audience preferences and market determinations of acceptability. It therefore unduly discounts the likely social harms caused by the proliferation of some broadcast sex talk. This posture also conflates descriptive and normative characterizations: it turns an "is" — the proliferation of sex talk — into an "ought" — justifying deregulation. For instance, governmental crackdowns on talk about sex can be said to constitute unrealistic and hypocritical attempts to deny the reality and pervasiveness of sexualized social discourse; yet a descriptive statement about the existence of such material does not necessarily entail a normative conclusion as to its desirability. It might well be argued both by social conservatives and progressives, for example, that the popularity of sexually explicit talk in some segments of society and its consequent persistence as a social fact do not in and of themselves justify its broad dissemination with governmental imprimatur.

167. Initially, § 1464's prohibition against indecent speech was enacted as part of § 29 of the Radio Act of 1927, 44 Stat. 1172-73 (1927). It was subsequently included as part of § 326 of the Federal Communications Act of 1934, 47 U.S.C. § 326 (1934). The FCC also had the power to suspend licenses under § 303(m)(4) and to revoke them under § 312 as punishment for indecent broadcasting. The ban on the use of obscene or indecent speech in broadcasting was

ance of any "obscene, indecent or profane language by means of radio communication," the Commission has embarked on a stringent campaign to clean up the airwaves. In keeping with the history of its regulation in the indecency area, the FCC's approach seeks to have large-scale effects on sexual content in broadcasting without any analysis of the complex and ambiguous character of the material at issue in the debate between moralists and pluralists.

A. *The FCC's Approaches to Regulation*

The FCC's most recent foray into the regulation of indecency commenced in 1987, yet an assessment of the agency's current approach to the subject is most fruitfully undertaken against the backdrop of its history.

1. *The Pre-1987 Standard*

Doctrinally, the Commission's approach to indecency prior to 1987 can be broken down into four eras.¹⁶⁸ The first, best characterized as the era of sweeping rhetoric and little enforcement, began before 1920 and lasted until the 1950s. During this period, the FCC did not articulate any specific definition of actionable indecency and imposed virtually no sanctions for the broadcast of indecent material.¹⁶⁹ Nevertheless, its asserted goal of "insur[ing]" against programs of such character "as may be offensive to the great mass of right-thinking, clean-minded American citizens"¹⁷⁰ suggests a capacious interpretation of the concept of indecency on the Commission's part.¹⁷¹ Whether because of their fears of conservative FCC attitudes or their own perceptions of economic self-interest, radio stations during this period apparently did not

moved from the Communications Act to the general federal criminal law in 1948. The FCC is now empowered by § 503 of the amended Communications Act of 1934 to impose sanctions on stations for violations of § 1464.

168. For a fuller description of the history of the FCC's approach to indecency, see Levi, *supra* note 36.

169. By reference to the FCC here, I mean to include as well its predecessor, the Federal Radio Commission (FRC), during the relevant time frame. In the few instances in which the agency did impose sanctions, the material at issue apparently consisted of profanity rather than sexually explicit speech. See, e.g., *Duncan v. United States*, 48 F.2d 128 (9th Cir. 1931), *cert. denied*, 283 U.S. 863 (1931); see also WILLIAM RAY, *FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION* 70 (1990); HARRY P. WARNER, *RADIO AND TELEVISION LAW* § 34a (1948) for a description of indecency enforcement in the early years.

170. WARNER, *supra* note 169, at 338-39 n.14 (quoting January 14, 1938 letter from FCC Chairman to NBC in connection with Mae West broadcast); see, e.g., *id.* at 336-39; GIRAUD CHESTER, GARNET R. GARRISON & EDGAR E. WILLIS, *TELEVISION AND RADIO* 33 (3d ed. 1963); J. FRED MACDONALD, *DON'T TOUCH THAT DIAL! RADIO PROGRAMMING IN AMERICAN LIFE, 1920-1960* 106-07 (1979); ARTHUR FRANK WERTHEIM, *RADIO COMEDY* 363-66 (1979); Stephen E. Louis, *Broadcasting Offensive Programming Under a New Communications Act*, 15 COLUM. J.L. & SOC. PROBS. 427, 442-43 (1980); Laurence H. Winer, *The Signal Cable Sends, Part II — Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459, 465 n.24 (1987); Knickerbocker Broadcasting Co., Inc. (WMCA), 2 F.C.C. 76, 77 (1935).

171. See, e.g., CHESTER, GARRISON & WILLIS, *supra* note 170, at 33; MACDONALD, *supra* note 170, at 106-07; WARNER, *supra* note 169, at 336-39; WERTHEIM, *supra* note 170, at 363-66; Louis, *supra* note 170, at 442-43; Winer, *supra* note 170, at 465 n. 24; Knickerbocker Broadcasting Co. 2 F.C.C. at 77 (1935).

test the Commission with much sex-referential programming.¹⁷²

In response to developments in both the broadcast and music industries that led to more innuendo-laden material on the air, the 1950s and 1960s heralded a second era in the FCC's approach to broadcast indecency. Although the Commission still avoided articulating any definitions of indecency during this time, it imposed sanctions on a few radio stations that broadcast suggestive material. In the most dramatic of such actions, the Commission denied a license renewal to WDKD, Kingstree, South Carolina, for the broadcast of a radio show whose disc jockey's patter it considered "coarse, vulgar, suggestive, and of indecent double meaning."¹⁷³ Another station was only spared a license revocation in connection with its broadcast of "off color" language in 1959 because, although the Commission found the broadcasts of "utmost concern," it was mollified by the station owner's admission of the "inexcusable" nature of the material, his abject apologies and assurances that he had fired the offending announcer, his "pledge" to devote more personal attention to programming, and his offer to forgo any appeals.¹⁷⁴

The 1960s also saw the beginning of a series of challenges to non-profit, alternative stations.¹⁷⁵ Although, for example, the agency decided in 1964 that a Pacifica station's broadcasts of avant-garde drama, poetry, and a discussion of homosexuality would not justify the ultimate sanction of non-renewal lest the airwaves become entirely "bland,"¹⁷⁶ it nevertheless granted only a

172. See, e.g., MACDONALD, *supra* note 170, at 105 ("[T]here was a general understanding within the broadcast industry that sex appeal would not be used to sell a program. Attractive men and women certainly appeared on radio, and reference was usually made to their beauty; but sexual innuendo was avoided, and explicitness was prohibited."); WERTHEIM, *supra* note 170, at 6-7, 14-15 ("From its inception, radio was considered family home entertainment, so lewd jokes and double entendres were taboo.").

173. Palmetto Broadcasting, 33 F.C.C. 250, 257 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C.Cir. 1964). The suggestive and coarse material on the *Charlie Walker Show* included puns on the names of neighboring towns (like "Ann's Drawers" instead of "Andrews") and phrases such as "let it all hang out." POWE, *supra* note 3, at 167.

174. *In re* Revocation of License of Mile High Stations, Inc., for KIMN 28 F.C.C. 795 (1960); see also POWE, *supra* note 3, at 166 (1987); RAY, *supra* note 169, at 71-72. The targeted programming was a show in which the disc jockey often accompanied his remarks with the sound of a toilet flushing and engaged in mild innuendo, like responding to a listener's assurances that she always took the station with her everywhere she went with the quip: "I wonder where she puts KIMN radio when she takes a bath — I may peek — watch yourself, Charlotte." *Mile High Stations, Inc.*, 28 FCC at 798. See *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 667 (1971) [hereinafter *Morality and the Broadcast Media*]. Even though the Commission consented to the more lenient sanction of a cease and desist order rather than a revocation on the basis of the licensee's representations, this leniency was contested by the Broadcast Bureau and the then-Chairman himself.

175. Most of those challenges involved stations operated by the Pacifica Foundation, a resource for left-wing, pacifist, and controversial programming. POWE, *supra* note 3, at 169; *In re* Pacifica Found., Inc. (KPFK), 36 F.C.C. 147 (1964); *In re* Pacifica Found., Inc. (WBAI-FM), 56 F.C.C.2d 94 (1975); *In re* Pacifica Found., Inc. (WPFW), 95 F.C.C.2d 750 (1983); *In re* Pacifica Found., Inc. (KPFK), 2 F.C.C.R. 2698 (1987). See FORNATALE & MILLS, *supra* note 4, at 171-73 for a history of the Pacifica-owned radio stations.

176. 36 F.C.C. 147 (1964).

“short-term,” one-year renewal to Pacifica’s West Coast stations one year later.¹⁷⁷ Similarly, in 1970, the Commission granted a short-term renewal to an alternative, listener-supported station that had broadcast three unspecified four-letter words several times during a lengthy reading of a novel.¹⁷⁸ Although the Commission obviously focused on “indecent” language, this second stage of indecency regulation can be characterized as the era of alternative regulatory rationales. The Commission did not impose its sanctions under the umbrella of its early sweeping statements about indecency and public morals, but rather rested its decisions on more traditionally administrative rationales under its public interest mandate. It cast the indecent broadcasts not as problematic per se, but as symptomatic of inadequate supervision and lack of candor with the Commission.¹⁷⁹

The third era of the FCC’s approach to indecency began with the explicit adoption of a broad definition of indecency in 1970. The Commission fined Philadelphia’s non-commercial, progressive radio station WUHY for broadcasting an interview with the Grateful Dead’s Jerry Garcia.¹⁸⁰ The agency suggested that the Garcia broadcast, in which expletives were used for rhythm and emphasis rather than for their sexual meanings,¹⁸¹ ran afoul of section 1464 because its language was “patently offensive by contemporary community standards and wholly without redeeming social value.”¹⁸² This test paral-

177. Pacifica Foundation, 2 F.C.C.2d 1066 (1965); see also JOHN DOWNING, *RADICAL MEDIA: THE POLITICAL EXPERIENCE OF ALTERNATIVE COMMUNICATION* 35-54, 74-95 (1984) (discussing the FCC and the right’s attempts to suppress radical media and stations like KPFA); *Morality and the Broadcast Media*, *supra* note 174, at 668.

178. KRAB, a non-commercial Seattle station, aired portions of a taped autobiographical novel by Reverend Paul Sawyer of the Lake Forest Park Unitarian church. Jack Straw Memorial Found., 21 F.C.C.2d 833 (1970) and 24 F.C.C.2d 266 (1970). See FORNATALE & MILLS, *supra* note 4, at 173-74 (providing a description of KRAB, on air in 1962, as one of the new movement of “alternative radio” or “community radio” stations operated by Lorenzo Milam.).

179. The cease and desist order issued in the KIMN case rested on the Commission’s finding that the broadcasts were outside the public interest, convenience, or necessity and revealed laxness in supervision. *In re Revocation of License of Mile High Stations, Inc. for KIMN*, 28 F.C.C. 795, 797 (1960). In *WDKD*, the Commission justified its refusal to renew on the grounds that the station owner had abdicated control of programming and lied in his testimony before the Commission. *Palmetto Broadcasting Co.*, 33 F.C.C. 250, 252-55 (1962), *aff’d*, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843 (1964).

Consistent with this approach, the Commission assertedly based its regulatory crackdown on the Pacifica stations on the fact that their broadcasts had violated Pacifica’s own programming standards, although they had done so only in isolated instances. See *POWE*, *supra* note 3, at 171. Because the Commission ostensibly rested its decision on the ground of inadequate supervision in the KRAB case, it did not specify which substantive language would trigger a censorial response from the Commission. Accordingly, broadcasters simply knew that some — although not which — four-letter words would be considered unacceptable by the Commission. *Jack Straw*, 21 F.C.C.2d at 834 (Cox, dissenting).

180. *In re WUHY-FM*, 24 F.C.C.2d 408, 416 (1970); see also *POWE*, *supra* note 3, at 174-75.

181. The FCC’s notice of liability for forfeiture focused, *inter alia*, on the following statements: “Shit, man;” “I must answer the phone 900 fuckin’ times a day, man;” and “[p]olitical change is so fucking slow.” *WUHY-FM*, 24 F.C.C.2d at 410; see also *supra* note 46.

182. *Id.* at 412.

leled the then-current definition of obscenity announced by the Supreme Court in *Roth v. United States*¹⁸³ and refined in *Memoirs v. Massachusetts*.¹⁸⁴ Moreover, for the first time, the Commission made a distinction between form and content by suggesting that since the expletives were unnecessary and "gratuitous," they did not advance the public interest.¹⁸⁵ As then-Commissioner Nicholas Johnson strongly put it in dissent:

What this Commission condemns today are not words, but a culture — a lifestyle it fears because it does not understand. . . . What the Commission decides, after all, is that the swear words of the lily white middle class may be broadcast, but those of the young, the poor, or the blacks may not.¹⁸⁶

At first, the Commission used this new indecency definition to target relatively powerless non-commercial stations and alternative, counter-cultural programming. It subsequently moved to eliminate the highly popular commercial format of "topless radio."¹⁸⁷

The most publicized indecency crackdown of the 1970s was the FCC's ban on the daytime broadcast of George Carlin's *Filthy Words* monologue in which the comedian took a highly satirical look at the conventional taboos on the seven "words you couldn't say on the public . . . airwaves."¹⁸⁸ The FCC found the broadcast indecent in violation of section 1464, reformulating its definition of indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast me-

183. 354 U.S. 476 (1957).

184. 383 U.S. 413 (1966); see Winer, *supra* note 170, at 469, 473-74. The parallel between the Commission's indecency standard and the Court's test for obscenity was pointed out in the *Pacifica* case discussed *infra* at note 189 and text accompanying note 190. Citizen's Complaint Against Pacifica Foundation Station WBAI(FM), 56 F.C.C.2d 94 (1975), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

185. 24 F.C.C.2d at 415 ("[R]obust, wide-open debate . . . does not require that persons being interviewed or station employees on talk programs have the right to begin their speech with, "s—t, man . . .," or use "f—g," or "mother f—g" as gratuitous adjectives throughout their speech. This fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people.").

186. *Id.* at 422-23 (1970) (Johnson, dissenting).

187. See discussion *supra* at notes 5, 87-90; FORNATALE & MILLS, *supra* note 4, at 75-76; see also *In re Sonderling Broadcasting Corp.*, 41 F.C.C.2d 777 (1973), *aff'd sub nom.* Illinois Citizens Committee for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975) (imposing sanctions on WGLD-FM for references to oral sex during "Femme Forum" programs). Although no specific "dirty words" were used in this case, the Commission found the broadcast obscene as well as indecent. Accordingly, the agency did not use the occasion to articulate further its definition of indecency or to explain precisely the manner in which the programs were indecent. The show at issue in *Sonderling* was the top-rated radio program for its time slot in the Chicago market. Lucas Powe, *Consistency Over Time: The FCC's Indecency Rerun*, 10 HASTINGS COMM. & ENT. L.J. 571, 577 (1988).

188. *In re Pacifica Found.*, 56 F.C.C.2d 94, 96 (1975) (quoting *Pacifica's* comments on complaint). The seven "words you couldn't say on the public, ah, airwaves" were "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and . . . maybe, even bring us, God help us, peace without honor. . . ." *Id.* at 100.

dium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."¹⁸⁹

Having noted that there had been no definitive interpretation of the meaning of indecency in section 1464 and that in light of changes in the Supreme Court's definition of obscenity itself, the Commission's obscenity-driven definition in *WUHY* was suspect, the FCC decided *Pacifica* as a test case.¹⁹⁰ The D.C. Circuit reversed the Commission's decision, with each judge in the three-person panel writing separately.¹⁹¹ In the famous *Pacifica* case in 1978, a divided Supreme Court affirmed the FCC's authority to channel the Carlin broadcast to late-night hours.¹⁹²

Although the Supreme Court's *Pacifica* decision at first caused much anxiety and uncertainty in the broadcaster ranks, what in fact emerged from the case was a bright-line test that simply prohibited repeated use of Carlin's im-

189. 56 F.C.C.2d at 98. It may well have been because the Supreme Court had changed its *Roth*- and *Memoirs*-based definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973) that the Commission felt the need to develop the revised definition of indecency it suggested in *Pacifica*. See 56 F.C.C.2d at 94. The majority distinguished this reformulated indecency standard from the obscenity standard by suggesting that language may be indecent even if it lacks obscenity's appeal to the prurient interest, and that it is unredeemed by claims of merit when broadcast at times in which children might be in the audience. *Id.* at 98.

190. The Commission was quite split in its reasoning in *Pacifica*, even though all Commissioners concurred in the result. Two members would have opted for a 24-hour ban on indecency; two others concurred with reluctance, emphasizing their agreement with the narrowness of the intervention suggested by the decision. The Chairman concurred in the result but did not issue an opinion himself. The Commission did not impose any direct sanctions on the licensee for having broadcast the program. Instead, it simply "associated" its order with the station's license file and took the case as an opportunity to issue a declaratory ruling to clarify its own indecency standards and to allow aggrieved parties to seek reconsideration and judicial review. *Id.* at 99.

While the original *Pacifica* opinion cryptically suggested that a different, more lenient standard might be used when the number of children in the audience was at a minimum, it did not define children or provide broadcasters with a clearly circumscribed safe harbor. *Id.* at 99-100. Pursuant to a petition for further clarification of its order, the Commission stated that indecent material could be broadcast in a newscast, a public affairs program, or live coverage of public events. Such material also might be broadcast in other programming if the number of children were at a minimum at broadcast time, if unconsenting adults were warned of the nature of the material, and if the language in context had serious literary, artistic, political, or scientific value. *In re Pacifica Found.*, 59 F.C.C.2d 892, 893 (1976).

191. *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977). Judge Tamm held that the Commission's definition of indecency constituted prohibited censorship under § 326 of the Communications Act and, in any event, was overbroad and vague. *Id.* at 18. Relying on evidence that numerous children can be found in the late-night broadcast audience in many markets, Judge Tamm challenged the FCC's attempt to characterize its effective prohibition as mere channeling of indecent material to hours with a minimal number of children in the audience. While Chief Judge Bazelon was of the opinion that § 326 was bounded by § 1464, he concluded that the First Amendment required a narrow reading of § 1464 to cover only language deemed obscene or otherwise unprotected by the Constitution. Judge Leventhal dissented, stating that the only issue at hand was whether the language was indecent "as broadcast," and that the Commission had properly found the material indecent in light of the interest in preventing children's exposure not only to the subject matter itself, but also to the suggestion that such language has official approval. *Id.* at 31, 37 n.18 (Leventhal, J., dissenting).

192. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); see also discussion *infra* at text accompanying notes 418-23.

mortalized seven dirty words before 10:00 p.m.¹⁹³ The fourth stage — that of regulatory retreat — thus consisted of a new decade of agency non-enforcement of the broad indecency standard developed in the Commission's original decision in *Pacifica*. Because broadcasters largely avoided the seven "dirty" words and the Commission held to its narrow interpretation of the indecency standard, the prohibition on indecency nearly fell into desuetude during this period. Ironically, the result of the Commission's attempt to crack the whip was a broadcast landscape with significant room for station experimentation with sex-related expression, so long as broadcasters did not venture into the narrow and clearly-defined area of the impermissible.

2. *The Post-1987 Standard*

In 1987, the FCC unexpectedly reversed course. It did so using three warnings issued to specific broadcasters as the occasion to announce "new standards to clarify its enforcement authority over [indecent] broadcasts in the future."¹⁹⁴ It simultaneously released a Public Notice in order to describe those actions for broadcasters generally and to "clarify" when it would exercise its enforcement authority.¹⁹⁵ Explicitly retreating from its narrow enforcement approach of the previous near-decade, the Commission warned that it would thenceforth enforce the "generic definition of indecency"¹⁹⁶ initially adopted in the Commission's *Pacifica* case and later abandoned. The generic approach defined indecency as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."¹⁹⁷ Concluding that the post-*Pacifica* limitation of enforcement to the seven dirty words arbitrarily excluded whole categories of offensive speech, the Commis-

193. *In re* Application of WGBH Educational Found., 69 F.C.C.2d 1250, 1254-55 (1978). The Commission subsequently used the WGBH case to deny a number of complaints of indecency, even when they involved the occasional use of one of Carlin's forbidden words. *In re* Rahall Broadcasting of Indiana, Inc., 94 F.C.C.2d 1162 (1983); *In re* Application of Pacifica Found., 95 F.C.C.2d 750 (1983); *In re* Service Broadcasting Corp., 46 R.R.2d 413 (1979).

194. FCC Press Release 2823, Apr. 16, 1987; see also *In re* Pacifica Found., Inc. (KPFK-FM), 2 F.C.C.R. 2698 (1987); *In re* Infinity Broadcasting Corp. (WYSP-FM), 2 F.C.C.R. 2705 (1987); *In re* The Regents of the University of California (KCSB-FM), 2 F.C.C.R. 2703 (1987), *reconsideration denied*, 3 F.C.C.R. 930 (1987) [hereinafter *Reconsideration Order*]. The new standards were adopted in connection with three broadcast cases and one amateur radio decision but were announced as indications of a general change in the Commission's regulatory philosophy about indecency. The particular adjudications ended in warnings rather than fines because of the lack of prior notice that the Commission was about to institute a drastic change in its enforcement philosophy. Public Notice, *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 F.C.C.R. 2726 (1987) [hereinafter *Public Notice*].

195. *Id.*

196. See Public Notice, *supra* note 194, at 2726.

197. The distinctions between this definition of indecency and the Supreme Court's current definition of obscenity are, *inter alia*, that (1) speech can be regulated as indecent even if it does not appeal to the prurient interest, and (2) a work's serious literary, artistic, political, or scientific value is not a threshold criterion that would preclude a finding of indecency. See *Miller v. California*, 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

sion opted for a contextual, encompassing approach in its intended future enforcement.¹⁹⁸

The second prong of the Commission's 1987 actions about indecency related to time "channeling." Harking to the language of its position in *Pacifica*, the Commission ruled that material covered by the definition of indecency would be "actionable if broadcast or retransmitted at a time of day when there is a 'reasonable risk that children may be in the audience.'"¹⁹⁹ Although the time period after 10:00 p.m. previously had been considered a "safe harbor" for potential indecency, the agency opined for the first time that "this benchmark is not susceptible to a uniform standard."²⁰⁰ Having looked at the evidence of children's viewing patterns in the specific markets at issue in the cases before it, the Commission concluded that "there were in fact children in the broadcast audience at later hours" than 10:00 p.m.²⁰¹ Thus, the Commission grounded its regulatory policy on its desire to protect children, rather than relying on the traditional argument for regulation based on notions of spectrum scarcity.²⁰² It characterized time channeling as the only "practicable" way to separate children and adults in the broadcast audience in a manner analogous to the child-protective spatial separations permitted in other expres-

198. *In re* The Regents of the University of California (KCSB-FM), 2 F.C.C.R. 2703 (1987).

199. Public Notice, *supra* note 194, at 2726.

200. *Id.*

201. *Id.* As will be discussed below, however, the assumptions of a childless late-night audience were always known to be false. In the *Pacifica* case itself, an *amicus* brief demonstrated that there were children in the broadcast audience even at 1:30 a.m. Brief of Amicus Curiae Committee for Open Media at 17, *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). While this was not thought relevant to the Supreme Court's approval of the channeling notion in *Pacifica*, the FCC in 1987 proceeded as if the Court's approval of channeling in that case were premised on the complete absence of children from the late-night viewing and listening audience. Despite its desire to eschew bright line rules in this area, the Commission did subsequently suggest, in a footnote in its reconsideration of the original 1987 order, that broadcasters should think of midnight as the starting point of the indecency safe harbor. Reconsideration Order, 3 F.C.C.R. 930, 937 n.46 (1987).

202. *See, e.g.*, MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 9-18 (1986). Although the Supreme Court relied solely on the pervasiveness and invasiveness of the broadcast medium to justify upholding time channeling of indecency in *Pacifica*, broadcast content regulations have traditionally been justified on the ground that the scarcity of the broadcast spectrum justifies regulatory interventions that would be constitutionally precluded for the print medium. *See, e.g.*, *Red Lion v. FCC*, 395 U.S. 367 (1969). Critics have attacked the scarcity rationale for regulation, contending, *inter alia*, that the broadcast spectrum is no more scarce than any other commodity. Thus, these critics argue, the scarcity rationale does not properly serve either to distinguish broadcasting or to justify governmental incursions into broadcast speech. *See, e.g.*, SPITZER, *supra* this note; R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Mark Fowler & Daniel Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982); Matthew Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989). The challenge to scarcity was successful in the late 1980s in persuading the Commission to eliminate the fairness doctrine in *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). *See also* *Arkansas AFL-CIO v. FCC*, 980 F.2d 1190 (8th Cir. 1992) (affirming FCC's discretion to abolish fairness doctrine).

sive contexts such as film theaters and bookstores.²⁰³

On appeal of the Commission's ruling, in *Action for Children's Television v. FCC (ACT I)*, the D.C. Circuit Court of Appeals rejected conventional constitutional challenges based on overbreadth and vagueness, suggesting that vagueness was inherent in any attempt to define indecency and asserting, in any event, that the generic indecency standard had implicitly run the gauntlet of Supreme Court constitutional review in *FCC v. Pacifica*.²⁰⁴ Yet, calling the Commission's temporal findings for time channeling "more ritual than real," the court remanded the matter to the Commission with instructions to develop a better record justifying the decision to change the hours of the day in which indecent material could properly be channeled.²⁰⁵

Congressional attention to the matter pre-empted that inquiry, however. At the urging of Senator Jesse Helms, Congress passed and President Bush signed into law an appropriations bill requiring the Commission to adopt regulations enforcing the provisions of section 1464 "on a 24 hour per day basis."²⁰⁶ Denying any administrative discretion, the FCC adopted such a total ban of indecent material.²⁰⁷ It could have interpreted the statutory mandate narrowly, simply returning to a brighter-line definition if it felt constrained by the Congressional action. Nevertheless, the agency applied the total ban to all material subsumed under its new, generic definition of indecency — even though it had earlier opined that a total ban would probably be unconstitutional.²⁰⁸

203. Reconsideration Order, 3 F.C.C.R. at 930, 937 n.47.

204. As the court put it,

In our view the Supreme Court's disposition of *Pacifica* stops "what the constitution calls an 'inferior court' " from addressing this question on the merits . . . [I]f acceptance of the FCC's generic definition of "indecent" as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction.

Action for Children's Television v. FCC, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (*ACT I*) (As is further detailed in text, *ACT I* was followed by the FCC's adoption of a total ban on indecency, a subsequent stay and remand by the D.C. Circuit (*ACT II*), another pass at a total ban by the agency, yet another reversal and remand by the D.C. Circuit (*ACT III*), the adoption by the FCC of a new, narrow safe harbor for indecency, and a stay of the new rules by the D.C. Circuit (*ACT IV*) in the context of a pending substantive appeal.)

205. *Id.* at 1340-44.

206. *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (*ACT III*), cert. denied, 112 S. Ct. 1281 (1992) (quoting Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988)).

207. *In re Enforcement of Prohibitions Against Broadcast Obscenity and Indecency* 18 U.S.C. § 1464, 4 F.C.C.R. 457 (1988) (Order) (codified at 47 C.F.R. § 73.3999 (1990)).

208. *Id.* at 458; *ACT I*, 852 F.2d at 1343 n.18. In the first Public Notice announcing the new indecency standards, and thereafter in the Reconsideration Order, the Commission made amply clear its view that a total ban on indecent material would be constitutionally suspect. While Commissioner Dennis expressed her "serious doubts" about whether a total ban would be upheld on judicial review, the Commission adopted such a rule in response to the Congressional mandate. *Enforcement of Prohibitions*, 4 F.C.C.R. at 457-58 (Order). For a critique of this decision, see Guy A. Reiss, *New F.C.C. Standards on Indecency on the Air and the First Amendment: Offensive Obscenity or Profound Profanity?*, 13 COLUM.-VLA J.L. & ARTS 221-22, 238, 248-51 (1989).

In *Action for Children's Television v. FCC (ACT II)*,²⁰⁹ the D.C. Circuit stayed the 24-hour ban, suggesting that the statute and its attendant regulation were in conflict with the channeling rationale espoused in *ACT I*. It did not rule on the constitutionality of the total ban, however, because the Commission asked the court to remand the case once again,²¹⁰ in light of the Supreme Court's just-issued decision in *Sable Communications, Inc. v. FCC*, which struck down a total ban on indecent dial-a-porn telephone services.²¹¹

Having read *Sable* to suggest that total bans on indecent material could be affirmed if no alternative means of protecting minors were in fact available, the Commission issued a Notice of Inquiry in order to create a factual record in support of a total ban.²¹² On the basis of the record compiled in response to its Notice, the Commission issued a *Report and Order* justifying adoption of a 24-hour-a-day ban on indecent broadcasts as the only adequate response to the problem of broadcast indecency.²¹³ Again, the *Order* characterized the Commission's approach as designed primarily for the protection of children.²¹⁴ Having designated the category of "children" to include youths seventeen years old and under,²¹⁵ the Commission relied on data that indicated the presence of children so defined in the late night broadcast audience.²¹⁶ The Commission also mounted a "reality-based" argument, suggesting that a 24-hour ban was the most narrowly tailored means of addressing the compelling governmental interests both in parental supervision and in "protecting the well-being of youth"²¹⁷ in an era when many parents cannot adequately control the

209. *Action for Children's Television v. FCC*, No. 88-1916 (*ACT II*) (D.C. Cir. Jan. 23, 1989) (Stay Order).

210. *Act II*, No. 88-1916 (D.C. Cir. Sept. 13, 1989) (Remand Order).

211. 492 U.S. 115 (1989).

212. Enforcement of Prohibitions, 4 F.C.C.R. 8358 (1989) (Notice of Inquiry); see also *ACT III*, 932 F.2d 1504, 1507 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992).

213. Enforcement of Prohibitions, 5 F.C.C.R. 5297 (1990) (Total Ban Report).

214. *Id.* at 5297, 5301.

215. *Id.*

216. *Id.* at 5302-06.

217. *Id.* at 5297, 5299-5300.

In *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989), the Court articulated the following standard of review: "The government may . . . 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." In its Total Ban Report, the FCC suggested that it had applied the stringent First Amendment standard of review entailed by *Sable*. It also relied on the concurring opinion of Justice Scalia in *Sable*, in which he suggested a broader regulatory scope for indecency to accompany the apparent constriction of the current definition of obscenity. *Id.* at 132 (Scalia, J., concurring) ("The more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the more reasonable it becomes to insist upon greater assurance of insulation from minors."). The Commission specifically noted that the "broad range" of sexually-oriented material that would not fit into the stringent definition of obscenity while still potentially being indecent "heighten[ed] our concern of preventing harm to children." Enforcement of Prohibitions, 5 F.C.C.R. at 5300 (Total Ban Report).

In addition to the child-protective rationale, the Commission noted that there is also a governmental interest in protecting "the public's right to be free from indecent material in the privacy of their own homes." *Id.* This argument, which had been a linchpin of the Supreme

viewing and listening habits of their children.²¹⁸

Predictably, the D.C. Circuit struck down the 24-hour ban as unconstitutional in *Action for Children's Television v. FCC (ACT III)*.²¹⁹ Relying on its earlier decision in *ACT I*, the court again off-handedly rejected vagueness and overbreadth challenges to the generic indecency standard.²²⁰ But it held that such material must be channeled rather than subjected to a 24-hour-a-day ban. Even in the broadcast context, the court held, a total ban on indecency would not satisfy the strict level of constitutional scrutiny required both by *Sable* and *ACT I*. While accepting as "compelling" the asserted governmental interest in "safeguarding the physical and psychological well-being of a minor," the court found that the 24-hour-per-day ban was not sufficiently carefully and narrowly tailored to protect that interest constitutionally. Without reiterating any substantive arguments in support of this proposition, the court simply found that *ACT I*'s requirement that the FCC identify a safe harbor "necessarily means that the Commission may not ban such broadcasts entirely."²²¹ That the Commission had acted pursuant to a Congressional directive did not ensure the constitutionality of the total ban. Thus, the court remanded the matter to the Commission once again to "redetermine" the appropriate safe harbor for indecent material "after a full and fair hearing."²²² The Supreme Court denied the government's petition for certiorari seeking to overturn *ACT III* and reinstate a 24-hour ban on indecency.²²³ Pending action on the remand, the FCC continued to enforce its indecency policy only between 6:00 a.m. and 8:00 p.m., on the assumption that the presence of large numbers of children in the broadcast audience during that time frame was incontestable.²²⁴

Despite judicial setbacks, the issue of broadcast indecency continued to be at the legislative forefront. Last fall, President Bush signed the Public Telecommunications Act of 1992, reauthorizing the Corporation for Public Broadcasting and prohibiting the broadcast of indecent material on both public and

Court's decision in *Pacifica*, took a secondary seat in the Commission's reasoning on indecency. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748, *reh'g denied*, 439 U.S. 883 (1978). The Commission also did not rely on the traditional argument that adults who flip channels might unknowingly come upon offensive material and feel assaulted by it.

218. Enforcement of Prohibitions, 5 F.C.C.R. at 5300 (Total Ban Report).

219. *ACT III*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

220. *Id.* at 1508. ("We have already considered and rejected a vagueness challenge to the Commission's definition of indecency. . . . In our view, the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the definition.")

221. *Id.* at 1509.

222. *Id.* at 1509-10. On remand, the court suggested — without explanation — that the Commission investigate three matters in connection with its "redetermination": the definitions of "children" and "reasonable risk;" "the paucity of station or program-specific audience data expressed as a percentage of the relevant age group population;" and "the scope of the government's interest in regulating indecent broadcasts." *Id.* at 1510.

223. *FCC v. Action for Children's Television*, 112 S. Ct. 1281 (1992).

224. See *In re Zapis Communications Corp. (WZAK)*, 7 F.C.C.R. 3888 n.2 (1992) (noting limitation of FCC's enforcement authority from 6:00 a.m. to 8:00 p.m.); *In re Goodrich Broadcasting, Inc. (WVIC-FM)*, 6 F.C.C.R. 7484 (1991) (rejecting claim that FCC had no daytime jurisdiction after its total ban was struck down as unconstitutional).

private television and radio stations before midnight.²²⁵ Apparently joining his Republican colleague Jesse Helms's crusade against indecency and immorality, Democratic Senator Robert Byrd had authored the indecency limitation in an amendment to the Senate's reauthorization bill.²²⁶ Senator Byrd, in a floor statement, deplored the "smutty language" and "lack of morality" in television programs, characterized much television programming as "nothing more than packaged corruption for the soul" and "mental junk food," and called for Congress to step in "before the salacious, prurient imaginings of irresponsible scriptwriters of today become the norms of conversation and behavior a decade or two from now."²²⁷

In light of the *ACT III* remand and the Congressional enactment of the Public Telecommunications Act of 1992, the Commission commenced a Notice of Proposed Rulemaking on October 5, 1992, to establish a record for a new, midnight-to-6:00 a.m. safe harbor²²⁸ and adopted such a safe-harbor rule to be effective on February 24, 1993.²²⁹ The Court of Appeals for the D.C. Circuit stayed effectiveness of the new safe harbor, at least until oral argument is scheduled in the fall on the merits of a multi-party appeal from the Commission's regulatory decision.²³⁰ The FCC accordingly has returned to enforcing its policy of banning indecent broadcasts from 6:00 a.m. to 8:00 p.m.²³¹

In the meantime, the pending *ACT* appeal is not the only judicial challenge to the FCC's rules. Although most broadcasters swept into the FCC's indecency net paid their fines and adjusted their programming, one licensee

225. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 1992 U.S.C.A.N. (106 Stat. 954) (to be codified at 47 U.S.C. § 303); *Bush Signs Public TV Bill*, N.Y. TIMES, Aug. 29, 1992, at 44.

226. See S. 1054, 101st Cong., 2d Sess. (1992); *Senate Votes to Extend 'Indecent' Programming Ban*, 20 Media L. Rep. (BNA) at 4 (June 16, 1992).

227. 138 CONG. REC. S7308-09 (daily ed. June 2, 1992) (statement of Sen. Byrd).

As part of its cable reform legislation of last fall, Congress also authorized the FCC to enact indecency regulations for cable. The agency is currently in the midst of a Notice of Proposed Rulemaking on the subject. *In re* Implementation of § 10 of the Cable Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materialism on Cable Access Channels, 1992 FCC LEXIS 6343 (Nov. 5, 1992).

228. *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 7 F.C.C.R. 6464 (1992).

229. *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 71 Rad. Reg.2d 1116 (1993).

230. John Carmody, *The TV Column*, WASH. POST, Feb. 25, 1993, at D6. A coalition of twenty-one media and public interest groups, again under the umbrella of Action for Children's Television, recently challenged the FCC's indecency policy. *ABC, CBS and NBC Aren't Parties: Coalition of 21 Groups Asks Court to Enjoin FCC on Indecency*, COMM. DAILY, Feb. 25, 1993, at 3; *FCC's Indecency Rules Taken to Court*, BROADCASTING, Feb. 1, 1993, at 64. The court's original stay of the FCC's planned midnight-to-6:00 a.m. safe harbor for indecency was granted on February 23, 1993. On March 8th, the court issued a Stay Order clarifying its earlier ruling and indicating that the FCC was enjoined only from enforcing its new safe harbor time frame rather than any other aspects of its indecency policy. *Action for Children's Television v. FCC*, No. 93-1092 (*ACT IV*); COMM. DAILY, Mar. 11, 1993, at 7.

231. Carmody, *supra* note 230.

has refused to pay its forfeiture in order to trigger a court challenge²³² to the definition of indecency on the grounds that it is "unconstitutionally vague and unworkable."²³³ Infinity, the licensee whose broadcasts of Howard Stern material have left it facing the largest forfeiture ever imposed for a violation of indecency rules, has also expressed its intention to fight the fine.²³⁴ The issue is again ripe for review.

3. *The Influence of Interest Groups*

The Commission's newly-strengthened commitment to a broad definition of indecency cannot fully be appreciated in the abstract, divorced from the political background against which it has occurred and the peculiar characteristics of FCC procedure. Paralleling the changes in popular culture and the increasingly risqué content of broadcast programming in the 1980s, a vocal and organized movement of socially conservative, predominantly religious,²³⁵ groups dedicated to pressuring government, broadcasters, and advertisers into removing "filth" and anti-Christian matter from the airwaves²³⁶ have begun to

232. A trial de novo is available if the subject of an FCC forfeiture refuses to pay the fine and is brought to court by the government in an action to collect. See 47 U.S.C. § 504 (1992).

233. Evergreen Media, the licensee of a station that was the subject of a forfeiture order for the broadcast of indecency, refused to pay the Commission's order, seeking court review of the finding of indecency. Joe Flint, *Evergreen to Fight Indecency Charge*, BROADCASTING, Jan. 13, 1992, at 91; see also *Just Say No Thank You*, BROADCASTING, Jan. 13, 1992, at 130 (agreeing with Evergreen's position that the FCC's vague policies have a chilling effect on innovative and sometimes controversial public interest programming). The Commission sent the matter to the Department of Justice, which recently commenced a civil action for collection of the forfeiture. See General Action; Commission Asks Justice Department to Initiate Civil Enforcement Proceedings Against WLUP(AM) Chicago, IL, Report No. GH-90, 1992 FCC LEXIS 693 (Feb. 5, 1992); Joe Flint, *WLUP (AM) Goes to Court*, BROADCASTING, Aug. 24, 1992, at 10; Harry A. Jessell, *FCC Picks Up Pace on Indecency Enforcement*, BROADCASTING, Aug. 31, 1992, at 25. Evergreen recently has been fined another \$33,750 for two additional broadcasts found indecent by the FCC. *WLUP(AM) Chicago*, 1993 FCC LEXIS 832 (Feb. 19, 1993).

234. Joe Flint, *FCC Fines Stern \$600K; OK's Deal*, BROADCASTING, Dec. 21, 1992, at 5; see also Joe Flint, *Hounding Howard: FCC's \$100K Fine*, BROADCASTING, Oct. 26, 1992, at 8 (describing similar decision by licensee of KLSX(FM)); *supra* text accompanying note 21.

235. The most prominent of the current groups are CLEAR TV, the Reverend Donald Wildmon's National Federation for Decency, and Wildmon and Rev. Jerry Falwell's Coalition for Better Television. TODD GITLIN, *INSIDE PRIME TIME 250-52* (1983); Bruce Selcraig, *Reverend Wildmon's War on the Arts*, N.Y. TIMES, Sept. 2, 1990, § 6 (Magazine), at 22; Steve Weinstein, *Back Into the Closet*, L.A. TIMES, Apr. 7, 1991, at 5; see also POWE, *supra* note 3, at 572-73 (discussing the efforts of the National Decency Forum). In addition, Terry Rakolta's Americans for Responsible TV, Morality in Media, Concerned Women of America, and the American Family Association have become active on the indecency enforcement issue. See Remarks of Commissioner James H. Quello Before the Arizona Broadcasters Association's 40th Annual Convention, 1992 FCC LEXIS 6242 (Nov. 6, 1992).

There is a history of anti-vice crusades in America during the nineteenth and early twentieth centuries. See generally JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 202-21* (1988); ROBERT W. HANEY, *COMSTOCKERY IN AMERICA 84-96, 109-31* (1974); DAVID J. PIVAR, *PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900* (1973). Such crusades of moral order have often been associated with religious groups. GITLIN, *supra* this note, at 250.

236. See GITLIN, *supra* note 235, at 247-63; KATHRYN C. MONTGOMERY, *TARGET:*

use the Commission's processes in an effort to reform broadcast content. They have pledged to monitor broadcast content for indecency²³⁷ and have sought to drum up grass-roots support by using inflammatory newsletters to inform concerned parents and other like-minded people about how to contact Congressmen, the FCC, and broadcasters themselves in order to complain about material they find inappropriate.²³⁸

The FCC's ordinary processes reflect one clear effect of this interest group activity. The FCC's indecency enforcement routine is driven by complaints registered by private citizens. If a complaint about a station's broadcast is specific and substantiated with a transcript or tape of the allegedly offending material, and if the Commission's enforcement staff believes that the broadcast might trigger the Commission's indecency policy, the staff will send a letter of inquiry to the broadcaster. If the Commission personnel are satisfied with the licensee's explanation, they typically will write a letter to the complainant denying the complaint and explaining their rationale for doing so. If, on the other hand, the staff finds merit in the complaint and there is no justifying explanation from the broadcaster, the Commission will issue a Notice of Apparent Liability imposing a forfeiture on the broadcaster.²³⁹ The broadcaster then has the opportunity to respond by demonstrating the inappropriateness or excessiveness of the forfeiture.²⁴⁰ Thereupon, an order reduc-

PRIME TIME: ADVOCACY GROUPS AND THE STRUGGLE OVER ENTERTAINMENT TELEVISION (1989); Weinstein, *supra* note 66, at 5.

237. See, e.g., GITLIN, *supra* note 235, at 251 (discussing Falwell and Wildmon's announcement of a campaign to scrutinize the network prime time schedule for "skin scenes," "sexual innuendo," "implied sexual intercourse," "profanity," and "violence"); Weinstein, *supra* note 66, at 5.

238. In addition, one of their most common public tactics has been to threaten, organize, and stage public boycotts of the products of advertisers associated with programming they find offensive. GITLIN, *supra* note 235, at 250-52; C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2158-59 (1992) and sources cited therein. Recently Mennen, Clorox, and Burger King have been targets of such boycotts. Weinstein, *supra* note 66, at 5. The precise effects of such boycotts are difficult to measure, in large part because neither the advertisers nor the broadcasters wish to admit that they have been pressured by the boycott to change the content of programming. However, there is at least some evidence that these conservative groups' complaints are being taken seriously by the media and its advertisers. See, e.g., Mike Freeman, *Ad Pullouts Making Agencies More Gun Shy*, BROADCASTING, Sept. 2, 1991, at 32; Ronald Paul Hill & Andrea L. Beaver, *Advocacy Groups and Television Advertisers*, J. OF ADVERTISING (1981); Kate Oberlander, *Network Group Hits Boycotts*, ELECTRONIC MEDIA, Aug. 5, 1991, at 4; Weinstein, *supra* note 66, at 5. But see Bill Carter, *Advertisers Less Skittish About Explicit Programs*, N.Y. TIMES, Dec. 7, 1992, at D1.

239. Under the Commission's rules, the Mass Media Bureau (MMB) has the authority to investigate complaints and administer the Commission's established policies, 47 C.F.R. § 0.61(g) (1991), and, when delegated, the authority to order the imposition of sanctions, 47 U.S.C. § 155(c)(1) (1988). Such sanctions include the imposition of a monetary forfeiture, 47 C.F.R. § 1.80 (a)(4) (1991). The first step in the imposition of such a sanction is the issuance of a Notice of Apparent Liability (NAL), 47 C.F.R. § 1.80(d), (f) (1991). For a popular description of the process, see *How Indecency Process Works at FCC*, BROADCASTING, Aug. 31, 1992, at 24 (suggesting that the Commissioners themselves make the ultimate decisions in this area).

240. Upon receipt of such a NAL, the broadcaster must be given a reasonable time in which to explain why the forfeiture is inappropriate or excessive, 47 C.F.R. § 1.80(d), (f)(3) (1991).

ing or reaffirming the penalty and requiring payment may be issued pursuant to Commission rules.²⁴¹

Because the administrative process is triggered by complaints from outside the Commission and the agency's own discretion is exercised only with respect to its decision whether or not to investigate such complaints, those who initiate grievances about broadcasters can reform broadcast content and, if sufficiently organized and powerful, can use the Commission's own processes to affect the shape and direction of the FCC's enforcement program.²⁴² Opportunities abound for influence on the administrative process by politically motivated, well-orchestrated groups or individuals who seek to reshape what is broadcast over the airwaves according to their particular moral visions.²⁴³

In addition to filing complaints through these official, public channels,²⁴⁴ decency groups have also sought to exert pressure on the FCC by picketing, sending letters of protest,²⁴⁵ and engaging Congressional interest.²⁴⁶ While a

241. 47 C.F.R. § 1.80(f)(4) (1991). In the meantime, any party aggrieved by the imposition of sanctions can apply to the Commission for review. The order does not become final until the Commission affirms it. 47 U.S.C. § 155(c)(4) (1988). At that point, the broadcaster faces several choices. One option is simply to pay the fine. Another possibility is to refuse to pay the fine and force the government to commence a collection action in court, subjecting the whole matter to a trial de novo. See discussion *supra* note 232.

242. While evidence suggests that conservative decency groups have helped the FCC steer the anti-indecency bandwagon, competition may have spurred some broadcasters themselves to join the decency campaign. Prior FCC indecency cases suggest that complaints about indecent programming have sometimes been initiated not by citizen or morality groups, but by competitive stations. After all, getting a licensee in trouble with the FCC can result in the imposition of an onerous fine on the station, cutting into its economic prospects; can get the station to temper its programming, thereby causing it to lose the audience it attracted; and can even cause the station to lose its license in favor of a "purer" candidate. In line with these scenarios, the owner of one of the most recent subjects of the FCC's indecency investigations has suggested that a rival station orchestrated the FCC complaint and a letter to the station's advertisers. Harry A. Jessell, *FCC Puts Broadcasters On Notice for Indecency*, BROADCASTING, Mar. 2, 1992, at 29.

243. The programmatic character of such reform efforts has been evident since *Pacifica* itself. After all, *Pacifica* was prompted by a single complaint, made by a planning board member of Morality in Media, a conservative media watchdog group. POWE, *supra* note 3, at 186 (suggesting that the complainant, as a resident of Florida, may not have heard the program). The complaint arguably was part of an orchestrated attempt by the conservative group to silence *Pacifica* for political reasons, rather than simply the personal "gut" reaction of an offended parent.

244. See discussion *infra* at text accompanying notes 263-65.

245. For example, the Southern Baptist Convention this summer condemned "the moral breakdown in our society," targeted the networks for promoting premarital sex, adultery, homosexuality, rape, and violence, and "encourage[d] all Christians to register their outrage and opposition to this misuse of the public airways and cable access." *Baptists See Moral Decay in TV*, N.Y. TIMES, June 12, 1992, at A13.

246. Congressional pressure on the FCC has been spearheaded by the ultra-conservative Jesse Helms. Even before Congress passed any legislation requiring the Commission to adopt a total ban on indecency, Helms quizzed then-Chairman Dennis Patrick in 1987 on his intentions in the fight against indecency. Crigler & Brynes, *supra* note 36, at 353. Upon receiving Patrick's response that a finding of indecency would be unlikely for indecent programming broadcast after midnight, Helms orchestrated the adoption in 1988 of a total indecency ban rider to an appropriations bill. *Id.*; see also 134 CONG. REC. S9911-12 (daily ed. July 26, 1988) (remarks

precise causal link between their activities and the FCC's adoption and enforcement of its indecency standards cannot simply be assumed, it is likely that these groups have come to wield widespread influence,²⁴⁷ at least to the extent of enhancing the Commission's sensitivity to socially conservative views.

The Commission's renewed interest in indecency commenced in June 1986, when various conservative decency groups picketed the FCC's offices and urged letter-writing campaigns in order to protest then-Chairman Mark Fowler's renomination.²⁴⁸ Subsequently, concerned about Alfred Sikes' commitment to aggressive enforcement of the indecency policy, conservative decency groups engaged in demonstrations against his nomination for Chairmanship of the agency.²⁴⁹ Chairman Sikes thereafter emerged as an aggressive regulator in the area of indecency.²⁵⁰ Commissioner Ervin Duggan, who currently serves on the Commission and has made clear his intransigent

of Sen. Helms, quoting letter from then-Chairman Patrick). Characterizing indecent material as "trash" and "garbage," Helms cited the VCR as proof of the availability of indecent material to children at any time of the day or night. *Id.* Most recently, Helms joined the American Family Association in writing to the FCC to request that it deny Infinity Corporation's proposed purchase of three additional radio stations in major markets on the ground that Infinity might cause its Howard Stern programming to be aired on the stations. Joe Flint, *Hounding Howard: FCC's \$100K Fine*, BROADCASTING, Oct. 26, 1992, at 8 [hereinafter Flint, *Hounding Howard*]. Although the Commission ultimately decided to approve the purchase, it did so against vociferous dissent by then-Chairman Sikes. Joe Flint, *FCC Fines Stern \$600K; OK's Deal*, BROADCASTING, Dec. 21, 1992, at 5 [hereinafter Flint, *FCC Fines Stern \$600K*].

247. On the increasing influence of the religious right generally, see, e.g., DIAMOND, *supra* note 69; RODNEY A. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* 124-32 (1988). Indeed, the Republican party's adoption of its extraordinarily conservative platform on abortion during last summer's convention is evidence of the seriousness with which religious social conservatives have come to be considered by the rest of Washington.

248. Crigler & Byrnes, *supra* note 36, at 344-45; *Fowler Target of Group*, COMM. DAILY, June 6, 1986, at 9. Far from ignoring the complaints, the otherwise deregulatory and market-oriented Chairman Fowler and the Commission's General Counsel met on several occasions in the summer of 1986 with representatives of the National Decency Forum and Morality in Media. The National Decency Forum agreed to discontinue its planned picketing if the Commission would "cooperate" on indecency investigations and actions. Crigler & Byrnes, *supra* note 36, at 345 (quoting letter from Brad Curl of the National Decency Forum). Morality in Media even provided a memorandum outlining the legal arguments in support of a 24-hour ban on indecency over the air. *Id.* at 345. The Commission's General Counsel then told Morality in Media to pass on to its supporters the suggestion that they tape or provide transcripts of broadcast material they found offensive. *Id.* The FCC General Counsel also wrote to the Reverend Wildmon in late 1986, discouraging him from filing a complaint with regard to a particular televised movie, on the ground that he did not think the complaint "present[ed] the kind of airtight case that you want to push at this time." *Id.* at 346 (quoting Sept. 19, 1986 letter from FCC General Counsel John B. Smith to Donald E. Wildmon, Executive Director, National Federation for Decency).

249. See, e.g., *Religious Right Up in Arms Over FCC Nominees*, BROADCASTING, July 31, 1989, at 48 (describing fundamentalists' objections, directed at White House, over FCC nominations); *Anti-Indecency Groups Set to Protest Sikes Nomination Monday*, COMM. DAILY, July 28, 1989, at 1. Alfred Sikes was appointed Chairman of the Commission after the tenure of Dennis Patrick, who had followed Mark Fowler as chair. Chairman Sikes resigned this year, to be replaced by Commissioner Quello as interim Chairman.

250. See *Sikes the Enforcer*, BROADCASTING, Feb. 12, 1990, at 24.

opposition to indecency on the air, was supported in his nomination by vocal groups of religious conservatives.²⁵¹ Even acting Chairman Quello, often perceived as a friend of broadcasters in the context of deregulation, also has staked out a rather strong anti-indecency position in public statements.²⁵²

4. *Application of the New Standard*

In light of Congressional pressure, decency group intervention, and the Commissioners' own expressed disapproval of indecency, the agency's increasingly aggressive enforcement regime after 1987 is unsurprising.²⁵³ At the start, the agency focused on explicit sex talk in connection with non-mainstream radio broadcasting and hostile shock radio. The Commission selected "send a message" cases that would be used to break the news on the change in indecency standards.²⁵⁴ Two of the three initial broadcast cases involved programming on non-profit, alternative stations: KCSB-FM, a college station, had aired a punk rock song called *Makin' Bacon*, by the now-defunct Pork Dukes,²⁵⁵ and KPFK, a non-profit station owned by the progressive Pacifica

251. *Duggan Sails through Senate*, BROADCASTING, Feb. 12, 1990 at 20; see also Flint, *Hounding Howard*, *supra* note 246, at 8.

252. See Flint, *Hounding Howard*, *supra* note 246, at 8 (quoting high-level FCC staffer's view that Quello and Duggan are "hardliners" on indecency); Harry A. Jessell, *Quello Lauds 'Marketplace' Curbs on Indecency*, BROADCASTING, Jan. 27, 1992, at 39.

253. Although this Article will not describe in detail all of the FCC's enforcement actions since 1987, it will directly and extensively quote the challenged material of some typical cases. The purpose of such quotations is not to achieve a prurient effect; rather, I hope to provide a detailed and concrete sense of what is at stake in the Commission's indecency enforcement actions. I seek to do so not only to demonstrate the broad range of the FCC's enforcement, but also to give pause to those who would, in the abstract, stake out an absolutist position on the issue. I, like Judge Leventhal in his dissent from the circuit court decision in *Pacifica*, "think it important, especially because so many may be disposed to consider the matter in absolutist terms, to know what material it is that the Commission has held was improperly broadcast." *Pacifica Foundation v. FCC*, 556 F.2d 9, 31 (D.C. Cir. 1977) (Leventhal, J., dissenting), *rev'd*, 438 U.S. 726 (1978).

254. Crigler & Byrnes, *supra* note 36, at 345 (quoting FCC General Counsel Jack Smith).

255. The song, *Makin' Bacon*, involved explicit sexual references:

Makin' bacon, makin' bacon, makin' bacon, makin' bacon

[Inaudible]

A ten-inch cropper with a varicose vein

Makin' bacon is on my mind

Come here baby, make it quick,

Kneel down there and suck on my dick

Makin' bacon is on my mind

...

Get down baby on your hands and knees

Take my danish and give it a squeeze

Makin' bacon is on my mind

Makin' bacon is on my mind

Turn around baby, let me take you from behind. . . .

In re Regents of the University of California (KCSB-FM), 2 F.C.C.R. 2703, 2703 (1987). The song was part of a small, equally explicit musical output by a little-known British punk band recording in 1977 and 1978. INTERNATIONAL NEW WAVE DISCOGRAPHY 318 (B. George & Martha Defoe eds., 1982).

Foundation, had broadcast a reading from a critically acclaimed play called *Jerker*, about post-AIDS gay phone sex.²⁵⁶ The third enforcement action in 1987 was taken against commercial radio station WYSP(FM) for its broadcast of segments of the controversial Howard Stern shock radio program.²⁵⁷ In repartee that can most kindly be described as abusive, misogynistic, and homophobic, Stern had discussed matters ranging from testicles to bestiality.²⁵⁸

Both KCSB and KPFK were known in their markets for playing non-commercial material. The excerpts from *Jerker* were read during an explicitly gay program catering to a gay audience on an educational station.²⁵⁹ Similarly, college radio stations are often experimental, cater to progressive listeners, and number very few children in their audiences.²⁶⁰ In both cases, the material was aired after 10:00 p.m.²⁶¹ Also in both cases, the sexual references and descriptions were graphic and explicit. WYSP-FM's broadcast of the Howard Stern programs, in contrast to the alternative programming in the other two cases, took place in the morning and involved widely popular mainstream programming. The Stern material was not as explicit in its sexual descriptions but was intended to be controversial and even offensive.²⁶²

Three particulars stand out with regard to these enforcement actions.

256. The broadcast of *Jerker* included, *inter alia*, the following language in the first vignette: "Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking." *In re Pacifica Found., Inc. (KPFK)*, 2 F.C.C.R. 2698, 2700 (1987). This was followed by a descriptive exchange of what the Commission noted as "an anonymous sexual encounter:"

He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain. . . . Well, he must have gone at it for twenty minutes at the very least, just slidin' his cock back and forth inside of my ass. And then he whispered to me, "You're gonna feel me come inside of you." And I did. Man, I could feel the cum pulse up his shaft inside of my ass. I could count the pulses and it felt warm and good.

Id. In the third excerpt found objectionable by the Commission, the characters changed attitude: "None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?" "Hot throbbing cocks, hard pounding muscles." *Id.*

257. *In re Infinity Broadcasting Corp. (WYSP(FM))*, 2 F.C.C.R. 2705 (1987).

258. For example, as part of a "discussion of lesbians," Stern said: "I mean[,] to go around porking other girls with vibrating rubber products and they want the whole world to come to a standstill." *Id.* at 2706. On bestiality, he said: "Well, don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds?" In the process of insulting one of his female callers, he said: "Let me tell you something, honey. These homos you are with are all limp. . . . You've probably never been with a man with a full erection." *Id.*

259. *Pacifica Foundation*, 2 F.C.C.R. at 2698.

260. On the limited audience for alternative college radio (even within the college context itself), see Jonathan Gaw, *Campus Radio Station is on an 'Alternative' Wavelength*, L.A. TIMES, Jan. 17, 1990, at Part E, 5B; Linda Moss, *Offbeat Slices of Life Float Over the Airwaves*, CRAIN'S N.Y. BUS., Aug. 21, 1989, at 3; Kevin Zimmerman, *Schizoid College Rock: Hip Radio, Safe Acts*, VARIETY, Aug. 16-22, 1989, at 67.

261. *In re Pacifica Found., Inc. (KPFK-FM)*, 2 F.C.C.R. 2698 (1987); *In re Infinity Broadcasting Corp. (WYSP-FM)*, 2 F.C.C.R. 2705 (1987); *In re The Regents of the University of California (KCSB-FM)* 2 F.C.C.R. 2703, 2704 (1987).

262. See, e.g., Goldstein, *supra* note 12, at 3.

First, they reflect the extent to which sexually explicit talk had come to pervade both mainstream and minority cultures. Second, they suggest the Commission's belief that focusing on such explicit discussions of sexuality in controversial programming would render its decision to crack down on indecency non-controversial. Finally, they cement the connection between the FCC's 1987 change of course and the influence of the social right wing. Specifically, all three actions were brought to the FCC's attention by members of decency groups or their sympathizers: WYSP-FM's broadcast of the Howard Stern show was brought to the Commission's attention by Mary Keeley, a supporter of *Morality in Media*.²⁶³ Patrick Buchanan, then-White House Communications Director, directed the complaint about KCSB's broadcast of *Makin' Bacon* to the Commission after the individual complainant had sent his charge to the Parents Music Resource Center, which forwarded it to the White House.²⁶⁴ The complaint against the broadcast of *Jerker* on Pacifica's KPFK was made by Larry Poland, an "evangelistic minister and Christian entrepreneur."²⁶⁵

The enforcement guidelines immediately led to an atmosphere of constraint on the broadcast of controversial and sexual expression, especially on alternative and public stations.²⁶⁶ The new indecency approach thus has fostered an atmosphere in which some popular material is simply excluded by stations themselves. This has meant that most radio stations have steered clear of playing the unedited versions of numerous popular raps, ranging from N.W.A.'s political anthem *Fuck the Police*²⁶⁷ to 2 Live Crew's *As Nasty As They Wanna Be*, with its comment that "[b]itches think a pussy can do it all/ So we try real hard just to bust the wall."²⁶⁸

A constrained attitude on the part of broadcasters cannot but be influenced by yet another factor: the recent change in the Commission's schedule

263. Crigler & Byrnes, *supra* note 36, at 345.

264. *Id.* at 345-46.

265. Dennis McDougal, *How 'Jerker' Helped Ignite Obscenity Debate*, L.A. TIMES, Aug. 18, 1987, Part 6, at 1. Similarly, the sanction subsequently imposed by the Commission on the Miami stations airing Neil Rogers' shock radio show was sparked by an ultra-conservative Coral Gables attorney. See Christina Cheakalos, *News: Feds to the Rescue! Foul Mouthed Radio Doomed*, NEW TIMES, Nov. 8-14, 1989, at 4; discussion *infra* note 293 and accompanying text.

The effect of the right did not stop there; for example, the fine imposed by the Commission on WNDE and WFBQ for the broadcast of innuendo-laden parodies on the *Bob and Tom Show* in Great American Television and Radio Co. (WFBQ(FM) and WNDE(AM)), 6 F.C.C.R. 3692 (1990), see *infra* note 296, resulted from a complaint filed by John Price, a founder of Decency in Broadcasting. DAILY DIG., July 25, 1990.

266. See Robert Corn-Revere, *Regulation By Raised Eyebrow*, STUDENT LAW., Feb. 1988, at 26, 29; David Crook, *KPFK Watching Its Language Now*, L.A. TIMES, Apr. 30, 1987, Part 6, at 1; Dennis McDougal, *Radio Daze: FCC Moves Indecency Issue to Front Burner*, L.A. TIMES, Aug. 17, 1987, Part 6, at 1; Chuck Philips, "Decency Day" to Air a Free Speech Marathon, L.A. TIMES, Mar. 2, 1991, at F8; *Radio Station Censors Itself After F.C.C. Action*, N.Y. TIMES, Apr. 25, 1987, § 1, at 54; see also Crigler & Byrnes, *supra* note 36, at 359, 361-63.

267. NELSON & GONZALES, *supra* note 138, at 108.

268. Crenshaw, *Beyond Racism*, *supra* note 157, at 6, 30.

of fines, from a base of \$2,000 per violation to a base of \$12,500 (up to \$25,000) per violation.²⁶⁹ In light of the FCC's narrow interpretation of "violation," its increasing tendency to impose large sums in fines, and its potential imposition of multiple fines for networked or syndicated programming, the cost of playing with fire in the indecency area likely will be heavy indeed.

Despite the immediately constraining effect of the Commission's new indecency approach on some stations, certain of the mainstream commercial station personnel continued their attempts to resist the FCC's crackdown on sex talk after 1987, either by simply playing sexually referential music without sexualized banter or by using humorous innuendo to "get around" the newly announced standards.

Having announced its new approach in connection with rather explicit sexual references, the Commission then expanded its enforcement actions against increasingly indirect and coded references to sexuality. A number of stations were fined by the Commission for the content of their mainstream shock, Morning Zoo,²⁷⁰ rock, and talk radio programs.²⁷¹ The programs that raised the Commission's hackles after the three 1987 enforcement actions have varied as to the explicitness, character, tone, and quantity of their sexual references. Recent reports of Commission action — consisting, for example, of a fine for the single utterance of the word "shit" on a morning radio program — suggest an increasing scope and stringency in the agency's interpretation of its

269. See Standards for Assessing Forfeitures, 6 F.C.C.R. 4695 (1991).

270. "Morning Zoo" programs, while generally classifiable as part of shock radio because of their outrageousness, see *supra* note 61, were designed to be less confrontational and shocking than the prototypical shock radio interview program. The typical morning zoo format consists of zany, spontaneous, and humorous banter among a number of announcers and audience callers. See Daley, *supra* note 12, at 1 (describing the wide spectrum of shock radio, ranging from "bathroom humor" to material that "carries a much harder edge"); Goldstein, *supra* note 12, at 3, 4 (describing the programming approaches of various "shock jocks").

271. While the Commission did receive complaints and undertake investigations in connection with television programming, virtually all of the agency's enforcement activity focused on radio stations (as might be expected from the greater format diversity of the medium.). This is true despite the fact that visually explicit material commonly has an immediate and strong visceral impact on the viewer. The Commission has not found television to be *de facto* exempt from indecency inquiries, however. In 1988, the Commission sought to impose a \$2,000 forfeiture on Kansas City's KZKC(TV) for airing a nude side shot of the female protagonist in the movie "Private Lessons." (The forfeiture ultimately was vacated because of questions about the FCC's authority to enforce its ban.) Doug Halonen, *FCC Fines K.C. Station \$2,000 for Broadcasting Indecent Film*, ELECTRONIC MEDIA, June 27, 1988, at 3; *In re Kansas City Television, Ltd.*, 4 F.C.C.R. 6706 (1989) (Order Vacating Proceeding). The film, which aired at 8:00 p.m., appears to have been a coming-of-age story concerning the seduction of a young man by his governess; see also Crigler & Byrnes, *supra* note 36, at 349 (describing the film and the Commission's failure to act on an earlier complaint about the same film on a different station).

The Commission is also reportedly inquiring into complaints about indecency in 2 Live Crew, Enigma, and Michael Jackson music videos. *Closed Circuit*, BROADCASTING, Mar. 2, 1992, at 17. The BROADCASTING article suggests that the FCC has received indecency complaints about Spokane and San Jose stations' broadcast of 2 Live Crew's *Me So Horny* and Pop That Coochie music videos, about the Spokane station's broadcast of Enigma's *Principles of Lust* music video, and about the Fox network's broadcast of Michael Jackson's *Black and White* video. *Id.*

anti-indecency mandate.²⁷²

Post-1987 indecency enforcement by the FCC has swept into its net, for example, broadcasts of Uncle Bonsai's feminist satire *Penis Envy*, protests by women about the fact that "the men never have to sleep in the wet spot," and song parodies whose references to "the cop who carries a big night stick/it's just an extension of his wick" have a political edge.²⁷³ It also has punished shock radio programming, whose content consists largely of homophobic "humor" ranging from pedophilia in song parodies like *Kiddie Porn* to jokes like "the doctors gave Liberace six more weeks to live . . . [b]ecause a gerbil came out of his butt and saw his shadow."²⁷⁴

Even within the shock radio genre, the Commission has enforced its rule against both tame and more risk-taking sorts of programming.²⁷⁵ For example, after the 1987 warning, Howard Stern became the subject of a second enforcement action by the FCC in connection with an abusive and homophobic skit about a Christmas party in which someone allegedly played the piano with his penis.²⁷⁶ Stern's "dwelling on sexual matters" with "lewd and vulgar" references to sexual activities and organs "made in a pandering

272. See Jessell, *supra* note 252, at 39 and *infra* text accompanying notes 300-01. Admittedly, although the Commission has imposed a comparatively large number of monetary forfeitures for violations of § 1464, it has not thus far denied a license renewal on indecency grounds. See *In re* Jacor Broadcasting of Tampa Bay, Inc., 7 F.C.C.R. 1826 (1992) (denying informal objection by competitor to license renewal of station which aired the words "suck" and "useless piece of crap" in connection with complainant).

273. The Commission imposed sanctions on broadcasters who aired the satirical alternative hit *Penis Envy* by the popular Seattle feminist group, Uncle Bonsai. *In re* WIOD, 6 F.C.C.R. 3704 (1989); Guy Gannett Publishing (WZTA-FM), 5 F.C.C.R. 7688 (1990); see also *infra* notes 395-96.

274. KCNA(FM), 6 F.C.C.R. 2174, 2175 (1991).

275. The post-1987 enforcement actions focused, by and large, on disc jockey-driven radio programming rather than music per se. Despite a dispute as to whether Prince's *Erotic City* used the word "fuck" or "funk," the Commission took administrative notice of the use of the offending word and issued a forfeiture order against Las Vegas, Nevada's KLUC-FM for airing the song at 7:53 a.m. Nationwide Communications (KLUC-FM), 6 F.C.C.R. 3695 (1990). In fact, it appears that the only non-parodistic songs which have subjected broadcasters to FCC fines are those which use expletives or consist of non-mainstream references to sexuality. For example, the Commission found indecent a Miami shock radio program's broadcast of the song *Jet Girl, Jet Boy*, which refers to oral sex between men and laments the unfaithfulness of the singer's male lover. *In re* WIOD, 6 F.C.C.R. 3704 (1989). Both *Penis Envy* and *Jet Boy, Jet Girl* used commonly known terminology to refer to sexual organs and oral sex.

To confuse matters, the Commission dismissed a complaint about the broadcast, by KSHE-FM, Crestwood, Missouri, of a Lou Reed song from his NEW YORK album. The song contained lines such as "Give me your tired, your poor/I'll piss on them" and "the TV whores are calling the cops out for a suck." *Passing Grades: Surveying the FCC's Sense of Decency*, BROADCASTING, Nov. 6, 1989, at 36 [hereinafter *Passing Grades*]. However, the ground for dismissal is unclear and might well have been jurisdictional.

276. We're back at the Christmas Party . . . and I gotta tell you it's wild in here.
Robin . . . the guy who plays the piano with his wiener is here now.

(Gay choir)

We got two gay guys and a heavy-set woman lesbian (Negro). Remember you're on the radio, will you honey? I get called a fag hag. Have you ever had a man? Have you been with a man? Disappointment, hell. Oh, you like it? Well, it's not just a

and titillating fashion” led to a 1990 forfeiture against WXRK(FM), WYSP(FM), and WJFK(FM) for a program aired in 1988.²⁷⁷ The most recent Howard Stern programming targeted on KLSX(FM)²⁷⁸ and Infinity stations WYSP(FM), WXRK(FM), and WJFK(FM),²⁷⁹ covering twelve broadcasts, was deemed by the Commission to contain “egregious” material,²⁸⁰ ranging from statements like “I’ve done stuff to myself and thought about you” (said to a guest) to a promise that with Michelle Pfeiffer, Stern “would not even need a vibrator. . . . Boy, her rump would be more black and blue than a Harlem cub scout.”²⁸¹ The Commission also issued a Notice of Apparent Liability to KFI-AM for various call-in statements during the *Tom Leykis Show*,²⁸² ranging from relatively explicit references to sex acts (such as one caller’s description of an occasion during which she “gave head” to her lover and another caller’s confession that she masturbated her dog) to slightly more coded discussions of celebrity penis size and oral sex.²⁸³

By contrast, WWWE(AM) was fined \$8,000 in 1990 for five excerpts of

preference. It just doesn’t turn me on as much . . . you gotta be glad about the 5-minute AIDS test. Now you guys can test each other and then hop into the sack.

What is it that men don’t find me attractive? . . . men who find other men attractive . . . my uh? . . . your small penis probably . . .

How about this? ‘A Tuckis So Bright’? (Gay choir) - ‘I’m dreaming of some light torture, some bruises just to make me moan . . . Masturbate. Humiliate. Gay sex is fun in the city. Howard Stern is going to learn how great a tuckis can be. . . .’

(To Robin, about to be hypnotized by Dr. Marshall King) Just think about this. Every time I rub my ear, you’ll be orgasming. . . .

‘Bo, you look great. Yes . . . Bo . . . getting very aggressive. Bo just rubbed herself in my face. Juliet (one of the naked girls) getting wild. Oh, my God. Diane (another naked girl) is whipping Bo. Good, girls, excellent. The big black lesbian is out of her mind with lust. Look at her. You can’t say it on the air? Were you getting excited? Fabulous. All right. That was really good. Best part of the whole Christmas Party.’

Sagittarius Broadcasting, 5 F.C.C.R. 7291, 7293-94 (1990).

277. *Id.* at 7291.

278. Greater Los Angeles Radio, Inc. (KLSX(FM)), 1992 FCC LEXIS 6082 (Oct. 27, 1992) (Letter Opinion).

279. See Joe Flint, *FCC Fines Stern \$600K*, *supra* note 246, at 5. This fine on the Infinity stations is for the same programming as led to the forfeiture against KLSX(FM).

280. KLSX(FM), 1992 FCC LEXIS at 6084.

281. *Id.*; see also Joe Flint, *Where the FCC Draws the Line*, BROADCASTING, Nov. 2, 1992, at 56 (excerpting some of the numerous pages of the KLSX(FM) transcript). In various references to Pee-Wee Herman, for example, Stern expressed dismay at the fantasy of “go[ing] to the movie theater and . . . sitting in Pee-Wee’s mess;” suggested that the comedian be given the sentence of “scrub[bing] the theatre seats where guys drop their load;” and noted that, although “I . . . am the head of the masturbation club . . . and am totally devoted to masturbation[,] . . . to [masturbate] twice in ten minutes is unbelievable.” *Id.* Stern also lashed out at his competition, the *Mark and Brian Show*, during the targeted KLSX programming. Having characterized the announcers on the show as “two little pussies with dildos,” Stern said: “I want to just strip and rape Mark and Brian. I want my two bitches laying there in the cold, naked. . . . I want them bleeding from the buttocks.” *Id.*

282. KFI, Inc., 6 F.C.C.R. 3699 (1989).

283. In the first broadcast, the discussion of masturbation consisted of the female caller’s confession and the disc jockey’s subsequent attempts to press her for more details, including whether the caller’s dog “made any noise” when she masturbated him, whether she enjoyed

the *Gary Dee Show*, a call-in personality program much tamer than the Howard Stern program or the Tom Leykis show. Although they did not have the sexual detail of some of the shock radio discussions of sex, and although the announcer made clear that there were limits to acceptable discourse when he excoriated one caller for a sexual proposition directed at another announcer,²⁸⁴ the offending segments of the Dee show referred to masturbation, fellatio, and attemptedly humorous but absurd discussions of the results of moving sexual organs to other places on the body.²⁸⁵

Similarly, in 1991, WVIC-FM of East Lansing, Michigan, was fined for broadcasting segments of the *Michaels in the Morning Show*, in which the announcer asked listeners to come up with a headline for a tabloid news story about a man whose testicle was pulled down a hot tub drain on his honeymoon.²⁸⁶ The Mass Media Bureau found the show indecent, citing the "explicit vulgar language" used on the show,²⁸⁷ the "pandering and titillating" presentation and the fact that on-air talent "repeatedly solicited audience con-

doing so, and whether the dog "ever reciprocate[d]" the masturbatory activities. *Id.* at 3699-3700.

The later broadcasts involved briefer interactions. In response to the question "what is the grossest thing you have ever put in your mouth?" one female caller referred to "anteater smegma," having distinguished men on the basis of whether they were "anteaters" or "firemen's hats." In a less coded vein, the announcer interviewed the founder of the "Hung Jury," who explained that "when a limp penis is short . . . it can sometimes go twice [its flaccid] length." He opined that women thought "size did make a difference to their vaginal opening, to their clitoral stimulation," and then informed the audience as to the prodigious penis sizes of Warren Beatty, Milton Berle, and Lyndon Johnson. *Id.* at 3699-701.

284. The exchange was reported as follows:

Caller: "Gary, I have a comment to make and then I want to tell you what my dream and my goal was for me in life."

Gary D: "Excellent."

Caller: "My comment is Lou told me that Chris James gives fellatio okay. Now my dream . . . is to get in Chris James' pants."

Gary D: "Well, why don't you be a man and go down there and say that to her face. You know, you are just like a little kid masturbating in public. You've got no class, you've got no taste."

Independent Group Limited Partnership (WWWE-AM), 6 F.C.C.R. 3711, 3712 (1990).

285. *Id.* At one point, the disc jockey commented: "But you know, when God in his infinite wisdom, you know, but to me the missionary position is sort of funny. It's sort of weird. And it would be a lot easier if we did have our organs, our sexual organs, on our elbow and you could, you know. . . ." The caller replied, "it would make normal things a lot more fun, like driving and . . . shopping." *Id.*

286. *In re Goodrich Broadcasting, Inc.* (WVIC-FM), 6 F.C.C.R. 7484 (1991). The licensee mounted a two-pronged attack on the FCC's finding of indecency. First, it claimed that since no new safe harbor had been set up pursuant to the latest court mandate in *ACT III* (referred to in *Goodrich* as *ACT II*), the Commission had no jurisdiction to impose a forfeiture. Second, the station challenged whether the program was indecent, claiming that it was not patently offensive, pandering, or titillating in that the reference to the sexual organ had taken place in the context of a news story (thereby suggesting that it should not be deemed indecent). *Id.*; see also *In re Goodrich Broadcasting, Inc.* (WVIC-FM), 6 F.C.C.R. 2178 (1991) (Notice of Apparent Liability).

287. *Id.* The language included the words "ball," "nuts," "jewel," and "suck." Most were attempts to make bad puns, like "gonad done gone" and "honeymoon couple has a ball in a hot tub." The Notice of Apparent Liability focused on the following headlines: "man ties knot,

tributions in the same vein.”²⁸⁸ Also less explicit, intense, and sex-packed than the Howard Stern programming targeted by the FCC was a KCNA-FM broadcast of two jokes found indecent by the Commission in 1990.²⁸⁹ Most recently, the Commission imposed sanctions on WLUP(AM) for the broadcast of a discussion with a caller about penis size on the *Steve and Garry Show* and the broadcast of a *Kevin Matthews Show* in which the announcer sang a parody of Frankie Avalon’s *Venus* by substituting the word “penis.”²⁹⁰

As is evident in these descriptions, the Commission has increasingly attacked language that can be characterized as innuendo or *double entendre*, rather than focusing its regulatory attention only on clear and graphic descriptions of sexual or excretory organs or activities. Although *double entendre* led the FCC to investigate indecency in the early days of broadcasting,²⁹¹ such humor was not at significant risk of FCC sanction after the mid-1950s. In 1976, for example, the Commission staff received an indecency complaint about the broadcast of a song called *Butter Boy* and the use of the name “Pussy Galore” for a character in the James Bond film *Goldfinger* and concluded that “[t]he words used, at the worst, are double entendres or innuendos. It is, therefore, the staff’s view that the language used is not “patently offensive,” as that phrase is employed by the Commission. . . .”²⁹²

The Commission’s approach to *double entendre* now focuses on whether the reference’s sexual aspect is understandable. In other words, if a word has two meanings, the Commission asks whether the sexual meaning is clearly understandable and predominant. Since 1987, many of the FCC’s indecency

loses nut,” “drain sucks off man,” “honeymoon drains testicle,” “man falls victim to ball sucker,” and “man gets ball sucked on honeymoon.” *Id.*

288. The Mass Media Bureau’s Notice of Apparent Liability stated that the broadcast was pandering and suggestive in tone, but that it would be indecent even if it were not. *Id.* On review, the opinion did not address this point. *In re Goodrich Broadcasting, Inc. (WVIC-FM)*, 6 F.C.C.R. at 7484.

289. A forfeiture was imposed on KCNA-FM in 1990 for two 1989 broadcasts of the *Guy Kemp Show*, another personality program in which the announcer had an abusive on-air style. Sound Broadcasting Corp. (KCNA-FM), 6 F.C.C.R. 2174 (1991). The station aired a tape of a telephone conversation by Guy Kemp containing expletives and explicit “dirty words,” used to express anger and not to refer to matters sexual. In addition, the station aired epithet-laden insults by a caller on three occasions. In a sexual reference more typical to these sorts of shows, the KCNA announcer made thinly disguised homosexual jokes about Liberace and allowed a caller to tell a tasteless joke about female urination. 6 F.C.C.R. at 2175-77. With regard to the vulgar programming, the Mass Media Bureau focused on the following joke: “How come a woman farts after she pisses? She can’t shake it off.” *Id.* at 2175.

290. *WLUP(AM) Hit With Second Indecency Fine*, BROADCASTING, Feb. 22, 1993, at 6.

291. The most famous of such early FCC investigations concerned the redoubtable Mae West. In 1937, West caused an outcry by reading an apparently innocent script about Adam and Eve on the Edgar Bergen show with her usual plummy tones and suggestive innuendo. *See, e.g.,* MACDONALD, *supra* note 170, at 106-07; Stephen E. Louis, *Broadcasting Offensive Programming Under a New Communications Act*, 15 COLUM. J.L. & SOC. PROBS. 427, 442-43 (1980). Similarly, the Commission investigated CBS and the Blue network for their broadcast of “suggestive” Spanish songs in the mid-1930s. H. P. WARNER, RADIO AND TELEVISION LAW § 34a, at 337 (1948).

292. Letter to Norman Markovitz, 74 F.C.C.2d 613, 614 (June 3, 1976).

findings have involved precisely this sort of humorous innuendo. For example, shock jock Neil Rogers' *The Candy [W]rapper* and the *Butch Beer* commercial parody were constructed entirely of puns and lightly coded *double entendres*. The song used the names of common candies to make sexual allusions, and the ad parody consisted of plays on words based on slang references to lesbian sex.²⁹³ The Commission opined that the references to sexual activities were clear, despite their implicit character,²⁹⁴ and stated that humor is not a defense to a claim of indecency.²⁹⁵ Thereafter, the agency consistently imposed forfeitures for broadcasts of *double entendres* whose sexual meanings were "clearly understandable" and "inescapable" even though the language consisted only of indirect sexual references, metaphors, and slang.²⁹⁶ The *double entendres* at issue in the cases have varied, some being more elaborate and offensive than others.²⁹⁷

293. The Rogers program had featured *Jet Boy*, *Jet Girl*, *Penis Envy*, the *Candy Wrapper Song*, and *Walk with an Erection* on various days in 1988. Cox Enterprises, Inc. (*In re* WIOD), 6 F.C.C.R. 3704 (1991). Both *Penis Envy* and *Jet Boy*, *Jet Girl* used commonly known terminology to refer to sexual organs and oral sex. The other songs were more circumspect.

The *Candy Wrapper Song* was a morality tale of sorts:

It was another Payday. I was tired of being a Mr. Goodbar. So when I saw Miss Hershey standing behind the Powerhouse on the corner of Clark and Fifth Avenue, I whipped out my Whopper and whispered, "Hey Sweet Tart. How'd you like to Crunch on my Big Hunk for a Million Dollar Bar?"

She immediately went down on my Tootsie Roll and, you know, it was like pure Almond Joy. . . .

I was giving it to her Good 'N' Plenty, when all of a sudden, my Star Burst. Yeah, as luck would have it, she started to grow a bit Chunky and complained of her Wrigley in her stomach. Sure enough, nine months later, out popped a Baby Ruth.

Id. at 3706.

The *Butch Beer* Commercial was a homophobic ad parody of Busch beer:

Introducing Butch beer! The first beer brewed for women by women. When you grab a Butch beer, you're taking hold of the Billie Jean King of beers With Butch beer, you've got a beer that goes down easy. Taste it and you'll know why it's our personal best. . . . Go grab a Butch beer, it goes down quicker. . . . The taste you'll savor. Go grab a Butch Beer — it's tuna flavor. . . . Brewed by Ann Howser Bush, French Lick, Indiana, a Division of Tie One On Industries, Beaver Falls, Pennsylvania.

Id. at 3706-07.

294. *Id.* at 3706 ("[N]otwithstanding the use of candy bar names to symbolize sexual activities, the titillating and pandering nature of the song makes any thought of candy bars peripheral at best. Thus . . . the song's description of sexual activities is the primary focus."); see also *In re* Guy Gannett Publishing Co., WZTA(FM), 5 F.C.C.R. 7688, 7689 (1990).

295. *In re* WIOD, 6 F.C.C.R. 3704, 3704 (1991) (holding that the humorous nature of broadcast material does not lessen its patent offensiveness and citing the Supreme Court's decision in *Pacifica*).

296. For example, a total forfeiture of \$10,000 was imposed on the licensee of WFBQ(FM) and WNDE(AM) for broadcasts on the *Bob and Tom Show* in 1987 and 1989. The 1987 broadcast, like the Neil Rogers show on WIOD in Miami, involved the airing of the *Butch Beer* product parody and *The Candy [W]rapper Song*. The later broadcasts included two other parody songs called *Dick & Jane* and *Stroke Your Dingy*. Great American Television and Radio Co. (WFBQ(FM) and WNDE(AM)), 6 F.C.C.R. 3692 (1990).

297. For example, the Commission recently has focused an investigation on WWZZ(FM) of Karns, Tennessee, in connection with the broadcast of a punning promotional announcement. *FCC Puts Broadcasters on Notice for Indecency*, BROADCASTING, Mar. 2, 1992, at 29-30.

Finally, the Commission's recent actions suggest an increasing initiation

The station's promo ridiculed a rival radio station by discussing its shrinking "testicles" and told listeners that "[i]t takes balls to rock hard; Z-93 — we keep it harder, longer." *Id.* at 29.

In 1990, the Commission sent a Notice of Apparent Liability for forfeiture to San Jose's KSJO-FM for nine separate 1988 broadcasts of the Perry Stone Show, a shock radio program. Narragansett Broadcasting Co. of California, 5 F.C.C.R. 3821 (1990). They consisted, *inter alia*, of two puns recounted by callers, one abusive excretory exchange, and several parodies ranging in subject from horror movies to classical music compilation ads. The ad parodies were a trailer for a "horror" movie ("Coming soon, S & M pictures presents, Pecker This Pecker is long and hard and waiting to pounce from the bush"); and an ad for a compilation of classical music "performed in true Dolby stereo with complete fellatio Order today and get a free Beethoven bib"; and an ad for the "Rodgo foreskin garage opener." *Id.* at 3822. The excretory exchange involved the disc jockey telling a caller that he'd "like to have a smorgasbord in [her] butt" *Id.* The so-called puns consisted of a song called *Sore Pussy*; a joke defining "relative humidity" as "the sweat running down your sister's back when you're doing her doggie style;" and the following riddle: "If I had a rooster and you had a donkey and your donkey ate the feet off my rooster, what would you have? Two feet of my cock in your ass." Finally, the show featured an apparently political parody sung to the tune of the *Beverly Hillbilies* theme: "Come listen to a story about a man named Boas, a poor politician that barely kept his winky fed, then one day he's poking a chick and up from his pants came a bubbling crude. . . . Jail bait is the place where I really want to be"

A Notice of Apparent Liability for \$6,000 was also issued to KLOL(FM) for three occasions in 1990 on which the Commission deemed its mornings *Stevens and Pruett Show* to have been indecent. Rusk Corp. (KLOL(FM)), 5 F.C.C.R. 6332 (1990). The segments ranged from a product parody called Aunt Vagina pancakes to an extended session with a caller that included obvious *double entendres* about sex. During the show, the disc jockeys prompted callers to become ever more detailed about their sexual allusions but to maintain a lightly veiled or coded manner. *Id.* In one of the programs at issue, the disc jockeys asked callers what made their "hiney parts tingle." *Id.* at 6332-33; *see also supra* text accompanying note 10. Another program addressed the question "What are your joys of sex?" The following constituted the exchange on that question:

FC: I love having a threesome and getting it in my mou (interrupted by horn) and in my meow at the same time.

MV: Gee, that's got to be a long one.

FC: No, make it long.

MV: What a spoon?

FC: Pardon me.

MV: A spoon, a fork, what are you talking about?

MV2: I don't know, you say you're dining out and bringing your cat to a, I just don't know what you're talking about.

FC: Oh, come on.

MV: That's it, we just don't understand this.

FC: Oh, come on.

MV: 'Cause if we did there'd be a helluva meeting.

MV2: That's right, so thank you very much.

MV: Yeah, thanks for calling.

FV: Have a good day.

MV: A girl who likes to dine in and

MV2: And loves animals.

FC: In and out it's both good.

MV: Yeah, lets the cat in, lets the cat out.

Id. at 6334.

In 1991, the Commission denied reconsideration of its sanction against Chicago's WLUP(AM). Evergreen Media Corp. (WLUP(AM)), 6 F.C.C.R. 5950 (1991). The station was fined for two broadcasts of the *Steve and Garry Show*, one in 1989, commenting on then-Miss America Vanessa Williams' nude photos in *PENTHOUSE*, *see infra* discussion at text accompa-

rate and a broader scope for the regulatory mantle. The Commission became more active during the chairmanship of Al Sikes, with fines already imposed on fourteen stations and actions pending against another nineteen.²⁹⁸ There is no indication that the Commission's approach to indecency enforcement will change under the acting chairmanship of Commissioner Quello.²⁹⁹ With respect to stringency, the Commission imposed a fine of \$3,750 on WYBB-FM, Folly Beach, South Carolina for the single utterance of the word "shit" on one morning program.³⁰⁰ While such a sanction for a fleeting reference seemed entirely contrary to the Commission's prior, *Pacifica*-influenced approach to "dirty words," the Commission justified it by suggesting that the disc jockey's repeated references to "crap" as a synonym for "shit" were designed to enhance the impact of the word when finally uttered.³⁰¹ The Commission's increasing stringency is also demonstrated by the larger scale of the fines it imposes on broadcasters and by its threats of even more severe sanctions. In-

nying note 343, and one in 1987, in which one caller sang a song parody called *Kiddie Porn* and another told a homophobic joke about the best pick-up line at a gay bar. See Evergreen Media Corp. (WLUP(AM)), 6 F.C.C.R. 3708 (1991) (Notice of Apparent Liability). The segment on Vanessa Williams included lines such as: SD [Steve Dahl]: Went down on that other woman and oh God, you had your tongue in her vagina. It was fabulous. A lot of your Miss Americas can. . . . [Bob Costas, who had interviewed Ms. Williams] had to put his leg up on the ottoman because he had a stiff-oh. . . ." *Id.* at 3709. The homophobic joke — "May I push your stool in for you?" — was recounted by a caller to whom the disc jockey said: "Don't you think those guys have enough to deal with? We got AIDS and all that and then we're all naming gerbil jokes and stuff. I don't know." *Id.* at 3710.

The Commission recently has commenced an investigation of Muscatine, Iowa's KFMH(FM), which mistakenly broadcast two jokes told by callers in a best-joke contest. Both jokes relied on undermining the listeners' settled expectations. *FCC Puts Broadcasters on Notice for Indecency*, BROADCASTING, Mar. 2, 1992, at 29. In one joke, a man goes into a bar and orders 12 martinis in celebration of his first "blow job." In declining the offer of a 13th drink, he says: "No, thanks, if twelve won't take the taste out of my mouth, then nothing will." *Id.* at 29. The other joke is as follows: "What do you do after you eat a bald pussy? Refasten the diaper." *Id.* As the contest was live, with no delay mechanism, the jokes were broadcast because the callers circumvented the station's screening procedures by changing their jokes once they got on the air.

298. Harry Jessell, *FCC Puts Broadcasters on Notice for Indecency*, BROADCASTING, Mar. 2, 1992, at 29. Recently, the Commission imposed a \$23,750 fine on WSUC-FM, Cortland, New York, for a broadcast describing sexual activities in "patently offensive terms," COMM. DAILY, Jan. 8, 1993, at 4, and upheld a \$25,000 fine on KMEL(FM), San Francisco, for the "deliberate dwelling on sexual matters" of the *Rick Chase Show*, COMM. DAILY, Jan. 8, 1993, at 4.

299. Nat Hentoff, *Censors of the Airwaves*, WASH. POST, Mar. 6, 1993, at A21; Bloomberg Business News, *The Media Business: Interim FCC Head*, N.Y. TIMES, Feb. 8, 1993, at D8, col. 2.

300. L. M. Communications of South Carolina, Inc. (WYBB(FM)), 7 F.C.C.R. 1595 (1992); Jessell, *supra* note 298.

301. *L.M. Communications*, 7 F.C.C.R. at 1595.

[T]he scatological material as broadcast involved a deliberate and repetitive use of the word "crap" to heighten the audience's awareness of and attention to the subsequent use of the term "shit" by the announcer. Such willfully focused use is patently offensive and inconsistent with any contention that the passage at issue represented an incidental remark. Moreover, the material fits within the definition of indecency, since it contained patently offensive language concerning excretory activities

deed, no more than a reference to the unprecedented \$600,000 fine imposed on Infinity in connection with the simulcast of certain Howard Stern programming should be needed to underscore the seriousness of the FCC's crackdown.³⁰² The agency also has made clear that unsatisfactory "past compliance history" with regard to indecency will justify the imposition of large fines for new violations of the indecency policy.³⁰³ Most tellingly, the Commission has made no secret of its willingness to revoke Infinity's broadcast licenses if Stern continues his brand of sex talk.³⁰⁴

B. *Questioning the FCC's Indecency Standard*

Despite its aggressive enforcement policy, the FCC has never defined its "patent offensiveness standard," rejecting an invitation to provide "a comprehensive index or thesaurus of indecent words or pictorial depictions that will be considered patently offensive," and averring that the phrase "must, of necessity be construed with reference to specific facts."³⁰⁵ According to the Commission, any attempt to adopt a "definitive list" could not be "comprehensive."³⁰⁶ Thus, under the new policy, the "context in which the allegedly indecent language is broadcast [would] serve as an important factor" in determining whether language "going beyond" the use of expletives is nevertheless indecent.³⁰⁷

Despite its asserted reliance on context, however, the Commission's rationales in the indecency area swing strategically between two extremes. On the one hand, the agency relies on the "inherent vagueness" of the definition of indecency in order to argue against constitutional challenges. On the other hand, it relies on the "patent" obviousness of the indecency in the cases in which it imposes sanctions for violations of its standard. In going from one justificatory extreme to the other — from inherent vagueness to inherent clarity — the Commission avoids the hard work of really contextualizing and justifying its indecency applications.

The Commission's attempt to give methodological meaning to patent offensiveness by referring to a number of factors it describes as part of its contextual inquiry is of little help. The agency's assertedly contextual approach consists of conclusory and even contradictory applications of a number of ele-

302. See discussion *supra* at text accompanying notes 21-22, 234.

303. Citing such "past compliance history," the Commission imposed a new fine of \$33,750 on Evergreen's WLUP(AM) in connection with indecent comments on the *Steve and Gary Show* of January 13, 1991, and the *Kevin Matthews Show* of March 4, 1991. *WLUP(AM), Chicago, Notified of Apparent Liability for \$33,750 Forfeiture for Indecent Broadcasts*, 1993 FCC LEXIS 832 (Feb. 19, 1993); see also *supra* note 233.

304. Paul Farhi, *FCC's Stern Rebuke*, WASH. POST, Dec. 19, 1992, at D1.

305. Infinity Broadcasting Corp. of Pennsylvania (WYSP(FM)), 3 F.C.C.R. 930, 931-32 (1988) (Reconsideration Order).

306. *Id.*

307. New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726, 2726 (1987) (Public Notice) [hereinafter *New Indecency Standards*]; see also *Infinity Broadcasting Corp.*, 3 F.C.C.R. at 932.

ments whose interrelationships are never explored and whose potential structural tilt is never acknowledged or justified.

1. *The Commission's "Definition" of Context*

Although none of the Commission's statements on indecency since 1987 has provided any systematic guidance on the meaning of "context" as an interpretive tool in applying the new indecency definition, the agency has cited a number of variables to be considered in its case-by-case review of indecency. In sum, they relate to the composition of the audience, the merit of the work, and the manner of presentation of the sexual material. There is, however, no assurance that these factors in fact exhaust the Commission's category of relevant contextual inquiries.

The time of the challenged broadcast and "a determination of the presence of children in the audience"³⁰⁸ are often referred to by the Commission in its descriptions of conceptual assessments of indecency. With respect to the nature of the challenged material, the Commission has rejected the notion that "if a work has merit, it is per se not indecent" and asserted that the merit of a work would only be considered as "one of the many variables that make up a work's 'context.'"³⁰⁹ In addition, the agency has made a distinction between the substance and manner of presentation of sexual discourse, focusing on whether it has been presented in a "pandering and titillating" manner; whether it is "vulgar," "shocking," or "lewd;" and whether it is "isolated or fleeting."³¹⁰

The Commission has explained that, under its new approach, even sexual innuendo and *double entendre* would not be exempt from a finding of indecency, because "in certain circumstances, [they] . . . may be rendered explicit or capable of only one meaning when intermingled with explicit references that make the meaning of the entire discussion clear. . . ."³¹¹ The agency stresses that the "interplay" of the various contextual variables will "vary depending on the facts presented."³¹²

As previously noted, the Commission also has clarified that its definition of contemporary community standards was intended to be measured from the perspective of "an average broadcast viewer," without reference to any specific geographic communities.³¹³ Thus, the determination of indecency is to be based on "a broader standard for broadcasting generally," derived from the Commissioners' "knowledge of the views of the average viewer or listener, as

308. *Id.* at 930, 932, 937 n.31.

309. *Id.*

310. *See, e.g., id.* at 932; *In re Evergreen Media Corp. (WLUP(AM))*, 6 F.C.C.R. 502, 504 (1991), *reconsideration denied*, 6 F.C.C.R. 5950 (1991); *In re Peter Branton*, 6 F.C.C.R. 610 (1991).

311. *New Indecency Standards to be Applied to All Broadcast and Amateur Radio Licenses*, 2 F.C.C.R. 2726, 2727 (1987) (Public Notice).

312. *Infinity Broadcasting Corp.*, 3 F.C.C.R. at 933 (1987).

313. *Id.*

well as their general expertise in broadcast matters.”³¹⁴

The Commission’s decisions discuss context as if a case-by-case analysis will somehow ineluctably lead to one proper answer in each situation, an answer which the agency need simply discover but cannot predict. In keeping with this approach, many of the recent indecency enforcement actions rest on the simple and unelaborated assertion that the challenged material is “patently offensive.” The decisions reiterate a formulaic statement of the indecency standard and conclude either that the Commission “believe[s]” the material to be indecent³¹⁵ or that the language “fits squarely” into the category of indecency.³¹⁶ Instead of a reasoned analysis of challenged programming in which the Commission actually balances certain articulated and justified contextual factors, the agency’s post-1987 cases suggest that it is simply recognizing indecency “when it sees it.”³¹⁷

The absence of an articulated normative hierarchy is particularly troubling in light of the foreseeable conflict among the factors addressed by the Commission. For example, the Commission does not explain how to deal with meritorious material that may, in fact, be obviously offensive to some viewers. Or suppose that the material at issue uses sexual discourse as part of an important and powerful political statement, but does so in a manner that is potentially subject to being interpreted as “pandering.”³¹⁸ Although it assures broadcasters that it will take merit into consideration as part of its contextual inquiry, the Commission nowhere provides guidelines for exactly how it will do so if merit in any given case in fact conflicts directly with other contextual factors.

Contrary to the implicit suggestion in the Commission’s cases, contextual interpretation inevitably takes place neither by itself nor “in the air,” but with reference to a set of normative criteria by which circumstances are organized and characterized. It is those criteria that dictate the selection of particular contextual factors and that allow for their balancing and harmonization in situations in which they conflict.³¹⁹ Other than a conclusory reference to the

314. *Id.*

315. *See, e.g.*, Rusk Corporation (KLOL(FM)), 5 F.C.C.R. 6332 (1990); KFI, Inc. (KFI-AM), 6 F.C.C.R. 3699 (1989) (*Tom Leykis Show*); Legacy Broadcasting of Detroit (WLLZ(FM)), 6 F.C.C.R. 3698 (1989) (broadcast of *Walk with an Erection*).

316. *See, e.g.*, KGB Inc. (KGB-FM), 7 F.C.C.R. 3207 (1992) (holding that broadcast of *Sit On My Face* “fit squarely” into indecency definition); Sound Broadcasting Corp. (KCNA-FM), 6 F.C.C.R. 2174 (1991) (*Guy Kemp Show*); Narrangansett Broadcasting Co. of California, 5 F.C.C.R. 3821 (1990) (finding that *Perry Stone Show* excerpts “all fit squarely” into indecency definition); WWWE(AM), 6 F.C.C.R. 3711 (1990) (holding that five excerpts of the *Gary Dee Show* “all fit squarely” into the definition of indecency).

317. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (coining “I know it when I see it,” the now-famous dictum about the difficulty of defining obscenity).

318. *Cf.* Jack Anderson, *Portraits of Gay Men, With No Apologies*, N.Y. TIMES, Jan. 10, 1993, § 2, at 6.

319. The Commission’s selection of contextual factors appears to be based solely on the Supreme Court’s decision in *Pacific*; however, that decision focused on particular contextual analyses precisely because they were the factors that the Commission had pointed out to the

state's interest in children's "well being," the FCC provides no guidelines pursuant to which the "interplay" of variables can be resolved in any given case.

The Commission's refusal to articulate any organizing approach for its contextual analysis suggests a strategic attempt to provide itself the utmost in interpretive flexibility in indecency enforcement. Such regulatory flexibility is troubling:³²⁰ it allows the Commission to increase the stringency and breadth of its enforcement without discussion and to interpret contexts in haphazard, unpredictable, and even contradictory ways. It even allows the claim of contextuality to be transformed into a mere smokescreen for a child-centered and otherwise acontextual regulatory policy pursuant to which the timing of the broadcast and the possible presence of children in the audience would be the only relevant criteria. To the extent that the Commission's actions are unpredictable and its regulatory extensions unexplained, its decisions are difficult to understand and rationalize. This, in turn, is contrary to the Commission's own assumptions. To the extent that the Commission's approach is nothing more than child-centered acontextuality, it is surely a far cry from the individualized, case-by-case, multi-factorial context analysis suggested in the Commission's rhetoric.

The FCC's application of its indecency policy since 1987 appears to reflect these troublesome tendencies.³²¹ As described above,³²² the Commission's enforcement policy appears to have become increasingly stringent over the years since 1987. The history of enforcement also demonstrates a broad scope of coverage, although shock radio has been the most insistent target of the Commission's ire. The Commission has not required "descriptions" of sexual activity or organs in any literal sense; mere references to such matters frequently have been sufficient.³²³ In response to broadcaster complaints of

Court. The Court's references were entirely descriptive, with no claim to prescription. *FCC v. Pacifica Found.*, 438 U.S. 726, 750, *reh'g denied*, 439 U.S. 883 (1978).

320. This is so even if the particulars of the FCC's actions would not be troublesome enough to constitute violations of constitutional or administrative law *per se*, as will be discussed *infra* Part III.

321. The extensive administrative discretion afforded by the FCC's contextual standard leads to accountability problems as well. Most systems of governmental discretion are said to be legitimated by openness to oversight. While diplomatic operations and prosecutorial discretion, for example, demonstrate that openness and public monitoring are not the norm for all governmental activity, both the Federal Freedom of Information Act, 5 U.S.C.A. § 552 (1974), and parallel state open-government laws suggest that openness is at least an aspirational ideal for most administrative and legislative functions. Since the Commission's indecency complaints are considered matters of public record, the FCC's indecency enforcement process could be said to be open to oversight. However, the difficulties of contending with the Commission's bureaucratic systems and the government's filing system (which appears to be organized by station rather than topic) make it hard for the public to develop a sophisticated sense of the agency's indecency enforcement patterns overall. Because it is difficult to compare the indecency complaints on which the FCC has acted with those that it has denied or ignored, the public cannot easily assume the role of watchdog.

322. See discussion at text accompanying notes 253-304.

323. See *Sagittarius Broadcasting Corp. (WXRK(FM), WYSP(FM))*, 7 F.C.C.R. 6873 (1992) (holding that the minimal level of description be gauged by whether it is "readily under-

arbitrary and inconsistent treatment of similar cases, the Commission has simply asserted that “[m]aterial which is indecent is not the less so, nor is it rendered immune to our enforcement authority, simply because it is less graphic or egregious than material we have heretofore found actionable.³²⁴

The inconsistency between the Commission’s rhetoric and its actions in applying its assertedly contextual approach underscores the lack of predictability in the indecency area. Three related examples should serve to make the point.

First, one of the contextual factors emphasized by the Commission is an apparent distinction between the subject of sex and the manner of its presentation.³²⁵ The Commission has said that “subject matter alone does not render material indecent. Only when that matter is presented in a manner that is patently offensive will it be considered indecent.”³²⁶ Thus, the agency consistently disclaims any desire to punish sexual subject matter per se. Yet, the Commission also has responded to broadcaster claims that their sexual material was not presented in an offensive manner by saying that an acceptable manner of presentation would not necessarily preclude the imposition of sanction for a broadcast of sexually-referential material.³²⁷ On its face, this seems either self-contradictory or bluntly outcome-oriented. It is reminiscent of the “heads I win, tails you lose” gambit in children’s games.

Second, as noted above, one of the specific contextual factors mentioned by the Commission is whether the potentially indecent material is repetitive or “isolated or fleeting.”³²⁸ Yet, by punishing broadcasts that would previously have passed the fleeting references test, the Commission’s recent cases suggest

standable” by children and rejecting claim that by not asking for “detailed” descriptions, FCC effectively eliminated “description” requirement from indecency definition).

324. Goodrich Broadcasting, Inc. (WVIC-FM), 6 F.C.C.R. 2178 (1991); *see also* Sagittarius Broadcasting Corp. (WXRK(FM), WYSP(FM) & WJFK(FM)), 5 F.C.C.R. 7291, 7291-92 (1990), *aff’d*, 7 F.C.C.R. 6873 (1992); Great American Television & Radio Co., Inc. (WFBQ(FM) & WNDE(AM)), 6 F.C.C.R. 3692, 3694 n.3 (1990); Cox Enterprises, Inc. (WIOD), 6 F.C.C.R. 3704, 3705 (1989) (“[W]e do not accept constraints on our discretion to pursue violations less egregious than others may have been.”).

325. The coherence of this distinction is discussed *infra* at text accompanying notes 373-86.

326. Infinity Broadcasting Corp., WYSP(FM), 3 F.C.C.R. 930, 932 (1987); *see also* Sagittarius Broadcasting, 5 F.C.C.R. 7291, 7292 (1990); King Broadcasting Co. (KING-TV), 5 F.C.C.R. 2971 (1990).

327. *See, e.g., In re* Evergreen Media Corp. (WLUP-FM), 6 F.C.C.R. 502, 504, *reconsideration denied*, 6 F.C.C.R. 5950 (1991). In its letter to WVIC-FM concerning the *Michaels in the Morning Show*, the Commission opined that “it is not necessary to find that material is pandering or titillating in order to find that its references to sexual activities or organs are patently offensive.” Goodrich Broadcasting, Inc. (WVIC-FM), 6 F.C.C.R. 2178 (1991). In *In re* Guy Gannett Publishing Co. (WZTA-FM), 5 F.C.C.R. 7688, 7689 (1990), the Commission stated that even if the material at issue were not pandering or titillating in nature, “case law has not held these characteristics to be essential to a finding of indecency under 18 U.S.C. § 1464”; *see also In re* Cox Enterprises Inc. (WIOD), 6 F.C.C.R. 3704 (1991) (“[I]t is not necessary to find that the material is pandering or titillating in order to find that its references to sexual activities and organs are patently offensive”).

328. *Infinity Broadcasting Corp.*, 3 F.C.C.R. at 932; *Evergreen*, 6 F.C.C.R. at 504.

a trend away from an approach that would exculpate isolated and fleeting indecency.³²⁹ As noted earlier, for example, the Commission recently imposed a fine on a radio station for the single utterance of the word "shit" on one morning program.³³⁰ This action seems inconsistent with the several possible rationales that could have motivated the Commission to exempt fleeting sexual references from sanction in the first place.³³¹ Moreover, even if the Commission were to retain its "isolated and fleeting" test, its application — by requiring a comparative assessment of the whole work — could well be inconsistent with the Commission's effective refusal to consider the whole work in other respects.

Third, the Commission's approach to merit in news and entertainment programming seems inconsistent.³³² Although the Commission explicitly refused to adopt a news exemption to the indecency rules in its Reconsideration Order,³³³ a recent FCC decision indicates that even expletives, when used as part of a "bona fide" news program, will be tolerated over the air.³³⁴ Thus, narrow categories of otherwise indecent material might be acceptable if they air on serious, legitimate news reports. Former FCC Chairman Alfred Sikes has been quoted as opining that a newscast showing the sexually explicit photographs of Robert Mapplethorpe on WGBH-TV would not have been considered indecent even if it had been aired before 8:00 p.m.³³⁵ Similarly, the

329. *L. M. Communications of South Carolina, Inc. (WYBB(FM))*, 17 F.C.C.R. 1595 (1992). In fact, *WYBB* may actually signal the abandonment of the "isolated or fleeting" character of a reference as a contextual factor to be considered in an indecency determination. The Commission went to great lengths to assert that the repeated use of "crap" heightened awareness to the single use of the term "shit" and then matter-of-factly stated, "[m]oreover, the material fits within the definition of indecency, since it contained patently offensive language concerning excretory activities." *Id.* (emphasis added). This suggests that the broadcast was indecent without regard to the isolated or fleeting character of the reference.

330. See *L. M. Communications*, 7 F.C.C.R. 1595; *In Brief*, BROADCASTING, Feb. 24, 1992, at 57; see *supra* text accompanying note 272.

331. Although the Commission's decision did not specify why the isolated and fleeting character of sexual references should exempt broadcasts from findings of indecency, several possibilities come to mind. First, the Commission might have thought that, from the audience's point of view, repetition can tend to increase the force and impact of offensive material. Second, repetitive sexual references also might function as attractive nuisances to children, who might be less likely to look for "the good parts" if such parts were fleeting and uncertain to arise. Third, one could argue that listeners are more likely to learn repeated offensive references than those made in passing.

332. A substantive critique of the merit factor is addressed *infra* at text accompanying notes 387-403. The focus here is on the Commission's uncertainty, inconsistency, and ambivalence in its applications of the merit factor.

333. 3 F.C.C.R. at 937 n.31.

334. *In re Peter Branton*, 6 F.C.C.R. 610 (1991) (allowing wiretap of expletive-laden telephone conversation with John Gotti to be broadcast by National Public Radio program in connection with Gotti trial). The Commission also dismissed a complaint against High Point, North Carolina's WGHP-TV in connection with a series on topless bars (and promotional spots for the series) which showed a scantily clad woman in a bump-and-grind pose. *Passing Grades*, *supra* note 275, at 36. It is unclear whether this was one of the agency's substantive dismissals.

335. Patrick Sheridan, *Indecency Exemption for News in All but Name*, BROADCASTING, Feb. 18, 1991, at 34.

Commission has dismissed indecency complaints about sexual material presented in a clinical, educational, and informational fashion. For example, a complaint against KING-TV, in connection with a 1988 broadcast of a sex education program entitled *Teen Sex: What About the Kids?*, was dismissed despite the fact that explicit models of sex organs were used to demonstrate information.³³⁶ Indeed, despite complaints, sensationalistic and homophobic discussions of sex have passed FCC indecency review, so long as they are presented in a format that is formally characterizable as "informational" or "instructional." Thus, for example, the Commission did not impose sanctions for the following on-air statement during a talk show on Tampa's WFLA-AM: "Two vaginas don't go together, no, but if you rub the two of them together there is a great sensation and it feels good. Nevertheless, it's still perversion."³³⁷

This prompts the question of why there is an effective exemption for news programming, while an unsystematic, case-by-case approach to the mitigating character of merit governs in other, non-news contexts. The Commission's failure to define merit or to justify the distinction between different sorts of news-related broadcasts has led to a lack of predictability in connection with news-related programming as well. For example, while the Commission has permitted sexually explicit speech in the bona fide news context,³³⁸ and in a typically sensationalistic Geraldo talk show about sex information entitled *Unlocking the Great Mysteries of Sex*,³³⁹ it rejects claims of news-relatedness (and merit) in other broadcasts if they are not nominally news or informational programs. Once past the "reputable" news organizations, how does the Commission distinguish on merit?

The Commission's imposition of a forfeiture on KSD-FM in St. Louis in connection with a 1987 reading from a Playboy magazine interview with Jessica Hahn about her claim of rape against the now-infamous evangelist, Reverend Jim Bakker, puts this question in bold relief.³⁴⁰ Rejecting the station's claim that this was an "issue-related program" and that newsworthiness should be dispositive, the Commission staff said that the explicit description of the rape was indecent, "contained lurid language" about sex and sexual or-

336. King Broadcasting Co. (KING-TV), 5 F.C.C.R. 2971 (1990).

337. *Id.* The Commission also dismissed complaints about a morning discussion, aired on Wilmington, North Carolina's WAAV-AM, in which a sex therapist discussed the particulars of painful sex when the partners' sexual organs differ in size and about a segment of *Geraldo*, shown on St. Louis, Missouri's KTVI-TV, which featured a sex therapist who assured the audience that penis size was irrelevant to sexual pleasure. *Id.*; see also note 339. The complaints presumably were dismissed because the broadcasts were aired as news-related or informational programs. Perhaps under an analogous sports programming exception, the FCC also dismissed complaints against KZKC-TV of Kansas City for presenting *GLOW* (Gorgeous Ladies of Wrestling) at 9:00 a.m. *Id.*

338. *In re Peter Branton*, 6 F.C.C.R. 610 (1991).

339. See *Sagittarius Broadcasting Corp.*, 5 F.C.C.R. 7291, 7294 n.3 (1990) (citing Letter to Gerald P. McAtee, KTVI, St. Louis, Mo., dated Oct. 26, 1989, dismissing complaint).

340. KSD-FM, 6 F.C.C.R. 3689 (1990).

gans, and was presented in a pandering manner.³⁴¹ This was despite the fact that the hosts of the show veered between referring to the excerpt as “the good parts” and commenting unfavorably on the forcible nature of the sex and its perpetrator.³⁴² Similarly, although Penthouse magazine’s publication of nude photographs of the first Black Miss America, Vanessa Williams, was considered newsworthy by mainstream news organizations at the time, a discussion of the Williams photos on a morning radio program on WLUP was considered unacceptable by the Commission. Despite the stations’ claims that it constituted political and social commentary with news value, the FCC found the discussion indecent because it contained “vulgar” material presented in a “pandering and titillating” manner. The expletive-laden wiretap of mob boss John Gotti in the *Branton* case, however, was not subject to such criticism.³⁴³ In sum, the FCC’s new definition of indecency does not function as much of a definition at all.

2. *The Implicit Tilt in the FCC’s Contextual Factors*

If anything, the interpretive flexibility of the FCC’s contextual approach to indecency has allowed the agency to apply its multi-factorial analysis with conservative, anti-majoritarian rationales and results. Although the Commission’s description of its contextual approach implicitly suggests that its considerations will be fair, unbiased, and simply dictated by the facts of the given case, its factors are easily subject to regulatory tilt. This is not to make the crude point that the FCC uses its promise of contextualism as a self-conscious smokescreen to shield the acontextual imposition of the right-wing social

341. *Id.* at 3689. This finding is particularly striking in view of the fact that, after reading the excerpt from *Playboy* and joking in parts of the reading, the announcer finally said “this is rape” and articulated his disapproval of Bakker’s alleged behavior. *Id.* at 3690.

342. The FCC’s transcript contains the following commentary:

JC: I was reading this last night and I was getting sick.

JOE: Yea, I know.

JC: This was rape.

JOE: Yea, really.

JC: This was not, this was not some guy who just had like a little bit of a twist in a hotel room with a church secretary. This was rape!

JOE: Yea.

JC: Well, pretty incredible you know, because we’ve been making jokes about all this.

JOE: Yea, don’t you ever come around here Jim Bakker or we’re going to cut that thing off.

. . . . See this [the magazine] is not out yet. I went to all the book stores yesterday trying to see if this thing is out. . . .

DJ: It kind of makes you wonder who people are following really.

JC: Well, I think there is a natural curiosity about all of this too, though.

DJ: Yea.

Id.

343. See *In re Evergreen Media Corp. (WLUP(AM))*, 6 F.C.C.R. 5950, 5951 (1991) (distinguishing the WLUP case from *Branton*). The description occurred in a discussion about pornography which led to a spoof of Ms. Williams’ appearance on NBC’s *Bob Costas Show*. *In re Evergreen Media Corp. (WLUP-FM)*, 6 F.C.C.R. 502, 503, *reconsideration denied*, 6 F.C.C.R. 5950 (1991).

agendas of its fundamentalist masters.³⁴⁴ The regulatory ambivalence sketched out above provides ample evidence that the FCC does not seek to preclude *all* sexual allusions on the broadcast airwaves. The agency does not find indecent every broadcast brought to its attention by a socially conservative individual or pressure group. But the factors chosen by the FCC in its definition of context — the average broadcast audience member as the analytic vantage point, the narrow scope of agency review, the manner/subject distinction, and the equivocal role of merit — are all amenable to a conventional and socially conservative tilt.³⁴⁵ At the very least, they are interventionist and regulatory. When the stage for enforcement of such norms is set by well-organized decency groups, the FCC's decisions are constrained within a framework that provides only more or less conservative options.³⁴⁶ As pointed out above, the particular institutional context of indecency enforcement has a marked effect on the meaning of the Commission's claims to contextual, yet neutral and non-partisan, decision making in the area of indecency regulation.

Admittedly, the Commission's apparent responsiveness to the socially conservative New Right is hardly its first reaction to political pressure. With regard to its historical patterns of enforcement in the area of indecency, the Commission has moved back and forth between regulatory and deregulatory approaches, presumably in response to some combination of political pressures, the status of the broadcast industry's self-censorship efforts, and the agency's legal interpretations of section 1464.³⁴⁷ It is useless to engage in an unequivocal polemic against the influence of political factors in the Commission's policy-making and adjudicative forays. The elimination of factors we might call "political" is impossible.

Nevertheless, there are some differences between the history of political pressure on the Commission and the current political context. One major difference relates to the content of the messages addressed. Professor Powe has demonstrated that the FCC's enforcement of its rules against indecency historically operated to promote middle-class values and, in most instances — particularly in the 1960s — to chill non-mainstream, dissenting speech.³⁴⁸

344. As noted above, other observers have criticized the Commission for effectively becoming the pawn of the religious right. See generally Crigler & Byrnes, *supra* note 36.

345. The Commission's approach is subject to critique for its amenability both to conventionalism and to social conservatism. Conventionalism refers to the tendency to support existing views at the expense of experimental, cutting-edge, and *avant garde* programming. Conservatism refers to the substantive political stance shared by religious social conservatives seeking to encourage sweeping enforcement of the Commission's indecency policy.

346. A left-wing agency committed to diversity presumably would look at different kinds of factors to assess indecency; it might also apply categories neutral in name but designed to have diversifying effects in application. Such a Commission might look at the amount of diversity actually available on the airwaves in a particular market, the different culturally defined groups comprising the area broadcasters' demographic base, the extent to which the challenged material represented otherwise unrepresented points of view, and whether the material insulted any identifiable cultural or political groups.

347. For a more detailed account, see Levi, *supra* note 36.

348. POWE, *supra* note 3, at 165-72.

Similarly, the FCC's adoption of a narrow vision of acceptable sex talk exerts a clear constraining influence on broadcast speech, particularly on the speech of small, non-profit organizations.³⁴⁹ It doubtless has a particularly silencing effect on certain groups targeted by the far right. For instance, the fundamentalist right has made its moral opposition to homosexuality abundantly clear and has sought to pressure the Commission to enforce its new indecency norms against depictions of homosexual life.³⁵⁰ This has hardly exhausted the conservative social agenda, however. Much of the material against which the Commission has been enforcing its rules since 1987 is largely mainstream and popular, often politically conservative, programming. Thus, probably in response to pressures by Congress and the social conservatives of the religious right, the agency recently has been spotlighting majoritarian preferences and values in addition to non-mainstream speech.

Despite the change to the Clinton administration and the resignation of the FCC's Chairman Sikes, there is little reason to believe that the regulatory bent fostered by the FCC's current contextual indecency factors will be subject to radical change, at least in the near term. Neither Commissioner Duggan nor Commissioner Quello has made a secret of his strong antipathy to broadcast indecency.³⁵¹ The religious conservatives continue to be a social force to be reckoned with, particularly because it is difficult for legislators to resist right-wing pressure on issues such as this one. Doing so subjects them to the charge that they vote to protect "smut" rather than America's children. In any event, since the concern with the broadcast of sexual messages is shared by progressives as well as social conservatives, as discussed above, many in the Clinton administration will presumably be sympathetic to the regulation of at least some types of broadcast indecency.³⁵²

349. See *supra* text accompanying notes 266-68.

350. In 1991, for example, the FCC received many indecency complaints in connection with public television stations' airing of *Tongues Untied*, a sexually explicit documentary about homosexual lifestyles. See *supra* note 266 and sources cited therein.

351. Commissioner Ervin Duggan's dissent from the Commission's refusal to impose a fine for a radio station's broadcast of expletives during a bona fide news program suggests that he favors a sanitized discourse over the airwaves. *In re* Peter Branton, 6 F.C.C.R. 610, 611-12 (1991) (Duggan, dissenting); see also *supra* text accompanying notes 250-51 for references to the two Commissioners' conservatism on this issue.

352. See Farhi, *supra* note 304. It should not be forgotten that Vice President Al Gore's wife, Tipper, was a founder of Parents Music Resource Council, a group that called for the inclusion of warning labels on records containing explicit or violent lyrics. RUSSELL SANJEK & DAVID SANJEK, *AMERICAN POPULAR MUSIC BUSINESS IN THE 20TH CENTURY* 264 (1991). Moreover, former Chairman Sikes recently recalled that then-Senator Al Gore had voted against his nomination as chairman, but "only because he didn't think FCC had gone far enough in opposing indecency." *Sikes Finds Agreement With Gore on Key Issues*, COMM. DAILY, Jan. 8, 1993, at 2.

In addition, particularly in light of the possibility that a future Republican administration might resuscitate the indecency standard even if it were relaxed during the Clinton administration, a look at the structural tilt of the current standard is indispensable.

a. *The Acontextuality of the Analytic Vantage Point*

Tensions and unarticulated assumptions plague the Commission's concept of the "average broadcast viewer or listener" from whose vantage point the contextual inquiry into indecency is supposed to take place.³⁵³ Presumably, the agency's focus on the average audience member is intended to provide a fair and neutral perspective for a determination of patent offensiveness by privileging neither extremely permissive nor extremely squeamish viewpoints. Yet because the Commission's offensiveness inquiry does not have an empirical basis, the standard is applied acontextually and conservatively, reflecting the views of an imaginary "average" listener rather than the real listeners in the relevant market.

The reference to an "average broadcast viewer or listener" could indicate a market-directed inquiry into the views of the audience in a given station's market.³⁵⁴ In keeping with this, many broadcasters have attempted to respond to Notices of Apparent Liability for indecent broadcasts by introducing market-based evidence of the popularity and community acceptance of their programs.³⁵⁵ As noted above, for example, broadcasters of shock radio programs truthfully can claim that such shows are highly popular. In addition to the ratings information provided in target broadcasters' responses to Commission Notices of Apparent Liability, a survey of 1,000 adults in medium- and large-sized cities regarding their tolerance for shock radio programming suggested that "substantial majorities" of survey respondents were not offended by the broadcast material.³⁵⁶ The Commission did not base its assessment on this data. The Commission's approach to market data demonstrates that the average broadcast viewer or listener is really a hypothetical and formal con-

353. See, e.g., Rocio de Lourdes Cordoba, *To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting*, 42 HASTINGS L.J. 635, 662, 669-70 (1991); Linda Meisler, *A New Approach to the Regulation of Broadcast Programming: The Public Nuisance Doctrine*, 28 AM. U. L. REV. 239, 257-62 (1979).

354. This assumes the problematic proposition that a market inquiry can lead to the discovery of an "average" viewer or listener. Nevertheless, such an approach at least would be consistent with an attempt to gauge the reality of audience reactions to broadcast material.

355. See *In re Evergreen Media Corp.*, Licensee of Radio Station WLUP (AM), 6 F.C.C.R. 502, 503 (1991); *In re Guy Gannett Publishing Co.*, Licensee of Radio Station WZTA-FM, 5 F.C.C.R. 7688 (1990); *Sagittarius Broadcasting Corp.*, 5 F.C.C.R. 7291, 7292 (1990); *Great American Television & Radio Co., Inc. (WFBQ(FM))*, 6 F.C.C.R. 3692, 3692-93 (1990); *In re Infinity Broadcasting Corp. (WYSP(FM))*, 2 F.C.C.R. 2705 (1987). This was also the case in the original topless radio context in the early 1970s. HIMMELSTEIN, *supra* note 90, at 294-97 (discussing the popularity of topless radio programs).

356. *Dirty Words Don't Offend: Majority of Public Doesn't Want Govt. Censoring Shock Radio*, COMM. DAILY, May 12, 1987, at 4.

All this suggests that, at the very least, the Commission should seriously address the issue of why it would ignore such data. For a discussion of the relationship between popularity and indecency, see Richard G. Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited — What Does the Future Hold for the Seven "Dirty" Words?*, 65 TUL. L. REV. 131, 164-65 (1990); Helen T. Schrier, *A Solution to Indecency on the Airwaves*, 41 FED. COMM. L.J. 69, 96-97 (1988).

struct of the Commission's imagination.³⁵⁷ The reality is that the Commission, while attributing its decisions to the views of the "average" broadcast viewer, is not attempting to gauge majoritarian tastes. If it were, it might well be persuaded by the level of market acceptance demonstrated by ratings.

While espousing a contextual approach to the issue, the Commission has neglected even to explain why it systematically ignores data of actual listenership that reflects popularity and market acceptance. At most, the agency has stated that "the popularity of allegedly indecent broadcasts in any given community cannot vitiate an apparent violation of federal law."³⁵⁸ It might be said, by those who hew to classic arguments about the distinctions between conduct and standards, that popularity data reflect only mere practices, and not necessarily the population's standards and aspirational norms. Even so, it is unlikely that an outraged audience would in fact watch or listen to such programming.

Perhaps the underlying problem is that there is a taste for what the Commission might call indecency. This, in turn, suggests that the Commission holds a particular, substantive view of offensiveness in sexually referential speech and that its indecency enforcement test is nothing more than an unarticulable, intuitive assessment of whether that standard has been exceeded. The Commission cannot pass off reliance on such a substantive vision as the reflection of the average listener's views, discovered in the agency's exercise of its expertise; rather, it must be specifically admitted and justified, especially because First Amendment values are at stake. While it is certainly possible to articulate rationales for refusing to base social values and regulatory policies on the existing preferences of majorities, the Commission has neither developed nor articulated such justifications for its indecency policy.³⁵⁹

357. The Commission's refusal to consider market data of popularity on the patent offensiveness issue is in ironic contrast to its reliance on market-wide data of the presence of children in order to justify a narrow time frame into which broadcast indecency should be channeled. See, e.g., *In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 1993 FCC LEXIS 314, at *38 (Jan. 19, 1993) (rejecting broadcasters' invitation to substitute station-specific, program-specific, or format-specific audience measurements for market-wide data on the presence of children in the audience.) Even though the two sets of data are not in themselves comparable, they do suggest that the kind of market and audience evidence that the Commission finds relevant is a function of the substantive result it seeks to reach.

358. *Evergreen Media Corp.*, 6 F.C.C.R. at 503; *Cox Enterprises, Inc. (In re WIOD)*, 6 F.C.C.R. 3704, 3705 (1991).

359. The leading treatise on American constitutional law bases a critique of *Pacifica* on the ground that "[s]peech . . . cannot properly be valued according to the preferences of the majority." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 942 (2d ed. 1988). The citation to Justice Brennan's dissenting opinion in *Pacifica* suggests that the basis of this assertion is the countermajoritarian character of First Amendment protections: that speech should be protected even if a majority of people find it offensive, as long as there is a minority of listeners unoffended by the communication. *Id.* at n.95. The converse is not necessarily true, however. The FCC's *sub rosa* substantive approach reads the First Amendment as allowing the government to ban majority speech simply because a minority does not approve of it. At best, the Commission's subtext adoption of a substantive and largely constraining vision of appropriate speech unjustifiably ignores the mainstream acceptance of such material without explaining why it should be discounted.

Moreover, even if the "average broadcast viewer or listener" standard did not call for a hypothetical construct, it would still assume the appropriateness of the average as the right measuring stick for an offensiveness finding. This uncritically ignores the multiplicity of broadcast viewers and listeners and the cultural meanings of sex talk. Particularly in light of the fact that self-censorship by broadcasters already precludes the airing of much popular material considered too risky for radio and television, the FCC's focus on what the average audience member would find patently offensive further circumscribes the community out of which the average viewer or listener is to be identified.

The Federal Communications Commission has always interpreted its mandate to regulate in the public interest as requiring the promotion of broadcast diversity.³⁶⁰ The Commission has consistently assumed that the public interest would properly be served by a "marketplace of ideas" in which diverse points of view are represented. In order to avoid excessive and direct intrusion into the editorial judgments of broadcasters, however, the FCC has sought to insure viewpoint diversity indirectly by implementing structural regulations designed to promote diversity of ownership.³⁶¹ In addition, the FCC's historical commitment to programming guidelines, based in large part on licensee ascertainment of community needs, also attests to the agency's belief in the value of community-responsiveness and diversity.³⁶²

Ironically, despite this commitment to structural diversity, the Commission's approach to indecency fails to address the questions of diversity raised by the issue. Specifically, the Commission's decision to judge patent offensiveness from the vantage point of a hypothetical "average" broadcast viewer or listener assumes a homogeneous national broadcast community in which the

360. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3010 (1990) ("[S]afeguarding the public's right to receive a diversity of views and information over the airwaves is . . . an integral component of the FCC's mission.").

361. See, e.g., *Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984) (discussing goals of ownership diversity); MARC A. FRANKLIN & DAVID A. ANDERSON, *CASES AND MATERIALS ON MASS MEDIA LAW* 762-63 (1990). The Commission has adopted minority ownership and preference policies in an effort to foster broadcast diversity. See, e.g., *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978). The Supreme Court upheld the Commission's diversity-based minority enhancement policy and its distress sale policy in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); see also Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 293-302 (1991).

362. See, e.g., *The Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971). Admittedly, the FCC's formal ascertainment requirements were eliminated in the radio and television deregulation decisions of the 1980s. *Deregulation of Radio*, 84 F.C.C.2d 968 (1981), *aff'd sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Deregulation of Commercial Television*, 98 F.C.C.2d 1076 (1984), *modified on reconsideration*, 104 F.C.C.2d 358 (1986), *aff'd in part sub nom., Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987). Nevertheless, elimination of the formal requirements does not mean that ascertainment is no longer necessary and appropriate. Stations must still program in the public interest and in a manner responsive to their communities even if the Commission does not prescribe the particular procedures to be used in ascertaining community needs. See, e.g., *Deregulation of Radio*, 104 F.C.C.R. 505 (1986).

American population is conceptualized as an undifferentiated group with uniform cultural and linguistic norms. The reality is that we are not a homogeneous society; we consist of "innumerable subcultures,"³⁶³ of groups and subgroups. Gender, race, religion, class, sexual orientation, age, nationality, geographic location, and political affiliation — to mention a few characteristics — all imply differences. Although the relevance, importance, and interrelation of these factors are complex and variable,³⁶⁴ each can affect what a particular group of people will either understand or find offensive in a communicative act.

Broadcast practices increasingly respond to and reflect audience diversity. Market factors, such as the increase in types of available media, have led to audience fragmentation and a concomitant attempt by broadcasters to "narrowcast" programming for subgroups rather than targeting the traditional lowest common denominator of a mass audience.³⁶⁵ Although this phenomenon is most obvious in radio, television has also joined the narrowcasting bandwagon as a result of the networks' audience erosion.³⁶⁶ The FCC's approach refuses to recognize the varied character of broadcasting and the market niches into which broadcast audiences now self-select. Thus, it completely

363. *FCC v. Pacifica Found.*, 438 U.S. 726, 777 (Brennan, J., dissenting).

364. See FISKE, *supra* note 78, at 17.

365. See, e.g., *CHR-Top 40: Programming a Moving Target*, BROADCASTING, June 11, 1990, at 48, 49; *Radio Formats*, BROADCASTING, Apr. 15, 1991, at 75; *The Ups and Downs of Radio Formats*, BROADCASTING, Mar. 26, 1990, at 92.

366. While there is still some incentive to program for the same mass audience, audience erosion and fragmentation have increasingly plagued the three traditional television networks since the mid-1980s. See, e.g., Bill Carter, *The Media Business: Cable Networks See Dimmer Future*, N.Y. TIMES, July 22, 1991, at D1; Bill Carter, *The Media Business: Television*, N.Y. TIMES, Nov. 5, 1990, at D1; Joe Flint, *No More Bull Market*, BROADCASTING, Dec. 17, 1990, at 63; Tom Shales, *The Endangered NBC Peacock*, WASH. POST, Mar. 28, 1991, at B2; *TV Should Consider Radio Ways*, BROADCASTING, Jan. 21, 1991, at 36. Indeed, niche marketing is expanding in the cable industry as well. See, e.g., *Cable Ponders Filling Channels Created by Compression*, BROADCASTING, Oct. 7, 1991, at 52 (describing, *inter alia*, MTV's plans to offer three channels with diverse musical genres).

The spread of new technologies, such as cable, and the emergence of Fox as a competing broadcast source have seriously affected the conventional networks' market shares and profitability. See, e.g., Tom Shales, *CBS Network Eliminates 400 Jobs*, WASH. POST, Apr. 6, 1991, at D1. Consequently, the networks have begun to differentiate audiences to a much greater extent in the past few years. It has become evident, for example, that CBS has been programming primarily for a relatively older, more conservative, and more "heartland" audience. By contrast, ABC and Fox have taken many more programming chances in order to attract a younger, "yuppie" audience. See, e.g., Stuart Elliott, *NBC Likes Young Viewers, Judging From its Fall Plans*, N.Y. TIMES, May 13, 1992, at D18, col. 3; *Who Holds High Cards in Network Programming?*, BROADCASTING, June 11, 1990, at 39, 42.

The need for intra-format diversity, as well as incentives to program for more narrowly defined audiences, is likely to increase, even on television. This in turn might create economic incentives for broadcasters to air less sexually timid shows. In addition to the common assumption that "sex sells," and that there may be a connection between economic downturns and the rise in sexually explicit programming, see, e.g., PAUL OLIVER, *SCREENING THE BLUES*, *supra* note 118, at 181, the existence of sexually explicit programming on cable pay channels suggests that there are at least some demographic niches whose viewing tastes would be satisfied by such fare.

rejects the idea of testing broadcasts by reference to narrow communities in order to promote diversity.

b. The FCC's Narrow Lens

The implicit regulatory tilt of the FCC's indecency standard is also reflected in the narrow scope of the Commission's review of material challenged for indecency. Consideration of a whole work, and not only its "dirty" parts, can save challenged material from a finding of obscenity.³⁶⁷ Conversely, the Commission's narrow compass for the assessment of offensiveness has the predictable effect of making it reasonably easy to find material indecent. Under its approach to indecency regulation, the Commission does not use a broadcast day schedule, or even the entire text of a program, in order to determine whether or not the station has broadcast indecent material.³⁶⁸ Songs alone are the discrete units assessed in some indecency findings, with the live and free-wheeling character of the program as a whole considered irrelevant.³⁶⁹ Moreover, even to the extent that the Commission looks at whether the material was isolated or fleeting, the real question is "fleeting compared to what?" Challenged speech may well fail the "fleeting or isolated" test if assessed with a narrow compass.³⁷⁰ The Commission's approach consists simply of pluck-

367. See *Miller v. California*, 413 U.S. 15, 24 (1973) (proposing that the sexual material must be assessed in the context of the whole work rather than in isolation); see also TRIBE, *supra* note 359, at 909. This element of the *Miller* test and its immediate predecessors constitutes a reversal of the early standard for obscenity established in *Regina v. Hicklin*, 3 L.R.-Q.B. 360, 371 (1868), under which the permissibility of a work was to be judged by the "tendency" even of its isolated sexual passages to "deprave and corrupt those minds that are open to such influences." See also Meisler, *supra* note 353, at 272-74; *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 627-30 (1975) [hereinafter *Filthy Words*].

368. In the *WYSP* case featuring the early Howard Stern material, the Commission stated that "the tape recordings were considered in their entirety." *In re Infinity Broadcasting Corp. (WYSP(FM))*, 2 F.C.C.R. 2705, 2706 (1987). However, claims that it considered the whole program have not surfaced in the Commission's subsequent decisions. Further, it is not entirely clear what the Commission's consideration entailed in the *WYSP* case. There is no indication of how many broadcasts the "tape recordings" contained or what length of time they encompassed. Moreover, the Commission's citation to the problematic material in isolation precludes any independent assessment of the Commission's conclusory characterization of its "contextual" review.

369. See, e.g., *In re Evergreen Media Corp., Licensee of Radio Station (WLUP(AM))*, 6 F.C.C.R. 502, 503 (1991) (imposing forfeiture order despite station's claim that the context of the program was an "extemporaneous, frank, live and spontaneous, open forum, often humorous but never pandering or titillating, often discussing important public issues and incorporating listener comments in over half of its dialogue (subject to WLUP's reasonable seven-second screenings)"); *Independent Group Limited Partnership (WWWE(AM))*, 6 F.C.C.R. 3711 (1990); *Cox Enterprises, Inc. (In re WIOD)*, 6 F.C.C.R. 3704 (1989) ("Whether or not the context of the entire Neil Rogers Show dwelt on sexual themes, the songs themselves provide sufficient context to determine their patent offensiveness and can be considered discrete units. . . .").

370. The station argued in *Sagittarius* that the written excerpts of the Howard Stern show at issue there "exaggerate and concentrate the fleeting nature of the references which were extended throughout an entire program." *Sagittarius Broadcasting Corp.*, 5 F.C.C.R. 7291, 7292 (1990).

ing out of a program its most striking and egregious sexual references. This does not allow the sexual material to be "diluted" by a more broad-ranging consideration of the particular program or the entire programming schedule. It also sometimes precludes a clear understanding of either the meanings of the sexual language used in context or their derivation.³⁷¹ Indeed, the full program is considered by the Commission only as an aggravating, rather than mitigating, factor in the offensiveness inquiry.³⁷² It follows that the FCC is apt to consider a number of unadulterated sexual references to be offensive, appraised in the abstract, even though they might be unlikely to be perceived as assaultive by the audience if widely dispersed and explained.

In light of the narrow scope of its review, it is not surprising that the Commission also ignores the character of the broadcast market in which the challenged material appears. Except for a reference to the presence of children, the FCC does not attempt to determine the composition of the station's audience or the larger social context in which the sexually explicit material is heard. In making its determinations of indecency, the agency neglects to look at what other material is available in the culture. Despite the potential tilt of using such a narrow scope in considering the context of challenged material, the Commission neither addresses nor justifies the highly contingent nature of its inquiry.

c. The Elusive Manner/Subject Distinction

The Commission's asserted distinction between the subject of sexuality and the manner of its presentation is both manipulable and potentially incoherent. The most dangerous aspect of the distinction is that it can disguise attempts by the architects of the controversy over indecency to suppress selected substantive speech about sexuality. Specifically, it can cause favorable depictions of disfavored practices such as homosexuality to be suppressed while preserving deniability against charges of discrimination.³⁷³

Because the manner and style of expression sometimes may be as substantive an element of the message as the subject matter itself,³⁷⁴ it is disingenuous for the Commission to suggest that its manner/subject distinction is simply a means of stripping away extraneous and gratuitously offensive speech.³⁷⁵ The

371. In recent enforcement actions, the best example of this is the Howard Stern Christmas party skit, which is very difficult to decipher in the snippet form provided in the Commission's case appendix. See *Sagittarius Broadcasting Corp.*, 5 F.C.C.R. at 7293-94.

372. *KGB, Inc. (KGB-FM)*, 7 F.C.C.R. 3207 (1992).

373. For example, Senator Helms stated that *Jerker* "is a sick, sick discussion between two homosexuals on how they perform their perversion[.]" making it clear that he objected as much to the substance of what was portrayed in the broadcast as to the manner in which it was portrayed. 134 CONG. REC. S9885, S9912 (1988); see also *Cordoba*, *supra* note 353, at 637-43.

374. See, e.g., Post, *The Constitutional Concept*, *supra* note 41, at 663 n.314 ("[T]he distinction between style and substance is tenuous and unconvincing: often *how* something is said determines *what* is said."); see *Cohen v. California*, 403 U.S. 15 (1971); see also *supra* Part I, text accompanying notes 47-50 (discussing the emotive character of sex-referential speech).

375. See, e.g., *In re Peter Branton*, 6 F.C.C.R. 610 (1991) (finding that words were not

very determination of extraneousness is a substantive assessment based on cultural understandings.³⁷⁶

Moreover, the Commission's characterizations of what constitutes an unacceptable manner of presentation beg the very questions they presume to answer and effectively conflate the distinction between manner and subject. For example, characterizing the offensiveness of certain sexual material as inhering in its "vulgar" or "shocking" character is simply an unsupported and circular conclusion. It is useless to look to the concept of "vulgarity" in order to make clear and predictable the concept of "patent offensiveness." Nor do the Commission's conclusory assertions as to the vulgarity of material take into account the class-based social aspects of such characterizations.³⁷⁷ The Commission has articulated its distinction between the subject of sex and the manner of its presentation by asking whether programs deal with sex in a "pandering and titillating manner." In light of the imprecision of the notion of "pandering," the FCC fails in this attempt to define what might be offensive about the manner in which sexually explicit speech is presented.³⁷⁸ The imprecision of the "pandering" concept is aggravated by the Commission's failure to articulate any particular rationale for its view that pandering and titillating presentations of sexual matter are patently offensive. The Commis-

used gratuitously in legitimate news report). The Commission first explicitly articulated the distinction between form and content in *In re WUHY-FM*, 24 F.C.C.2d 408, 415 (1970) (finding that the expletives used in the broadcast of an interview with Jerry Garcia of the Grateful Dead were unnecessary, "gratuitous," and served no social purpose).

376. *WUHY-FM*, 24 F.C.C.2d at 422-23 (Johnson, dissenting) (discussing the extent to which the manner/substance distinction discriminates by culture and is used particularly to combat counter-cultural speech).

377. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2566 (1971) (tracing the term "vulgar" to the Latin "vulgaris," or "of the mob, of the common people").

378. For a critique of the concept of "pandering" as an aggravating factor in the determination of obscenity in cases such as *Ginzburg v. United States*, 383 U.S. 463 (1966), see TRIBE, *supra* note 359, at 911; see also Andrea L. Bonnicksen, *Obscenity Reconsidered: Bringing Broadcasting into the Mainstream Commentary*, 14 VAL. U. L. REV. 261, 273 (1980); Gey, *supra* note 43, at 1574. Pandering is problematically vague in the obscenity context; it is all the more so in the broader and more amorphous indecency arena.

In many of its indecency enforcement actions, the Commission's focus on "pandering and titillating" presentations appears to raise a passion/reason dichotomy, as does the Supreme Court's current obscenity standard. The focus on the leering manner of presentation reflects, at some level, the notion that obscenity is excluded from the realm of First Amendment protection because it appeals not to reason and probity, but to assertedly unmediated passion. See *supra* note 197 and text accompanying notes 62-63; *infra* notes 448-55. In *Ginzburg v. United States*, 383 U.S. 463, 470 (1966), for example, the Court found sexually-oriented materials constitutionally unpalatable because they stimulated the reader to "look[] for titillation, not for saving intellectual content." Similarly, the purported distinction between reason and passion has been used to justify a First Amendment approach that excludes obscene speech from constitutional protection. See, e.g., John Finnis, "Reason and Passion": *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967). It is beyond the scope of this Article to elaborate a critique of obscenity law or of the role in obscenity doctrine of a distinction between reason and passion or, indeed, to stake out a position on the continuing controversy over pornography.

sion's failure to provide such a grounding leaves the concept entirely without form.

Although one can speculate as to potential rationales, each variation raises problems for the Commission's manner/subject distinction. One possible rationale rests on the observation that when something is presented in a pandering and titillating manner, it is made attractive and desirable.³⁷⁹ The manner of presentation thus may be part of the substantive view of sexuality that the speaker espoused. If that is the case, it may well be that the FCC does not want to be in the position of condoning certain sorts of public sexual activities or depictions. This might be because the agency panders to the moralistic homophobia of the religious right. Alternatively, the agency might disapprove of pandering descriptions of sexuality because they objectify or commodify sexuality. As noted above, social theorists on both the right and the left have criticized the objectification and depersonalization of sexuality.³⁸⁰ Some of the language in the Supreme Court's opinion in *Pacifica* suggests a parallel approach.³⁸¹ At least one problem exists with this argument as a ground for the FCC's indecency policy: sexuality, gender, and the consumption of products have become so linked in our culture that it would be difficult to mark the outer boundaries of the Commission's regulatory intervention.³⁸²

Another option is to suggest, on the basis of now-conventional, middle-class morality, that indecent expression simply mixes up the categories of public and private. On this view, a certain level of reticence about private matters is necessary for a civilized society.³⁸³ In a similar vein, it might be argued that

379. This may be the meaning of Commissioner Duggan's unexplained reference to pandering as "catering to low tastes" in his *Branton* dissent. *In re Peter Branton*, 6 F.C.C.R. 610, 611 (1991). There appear to be two ways in which material may be sexually pandering or titillating. First, the material can be a serious depiction of sexuality and have the effect of arousing the audience. This is akin to the prurient appeal of sexually explicit material that might be considered obscene under the prevailing *Miller* standard. Alternatively, material may titillate not through direct prurient appeal, but by turning people's attention to matters of sex through humor.

380. See, e.g., Cass Sunstein, *Neutrality*, *supra* note 42, at 181-89; discussion *supra* at notes 72-78.

381. The plurality opinion in *Pacifica* expressed concern that sexually explicit language might be "debas[ing]" and "brutaliz[ing]" to human beings "by reducing them to their mere bodily functions." 438 U.S. 726, 746 n.23 (1978) (quoting the Commission's ruling below in 56 F.C.C.2d at 98). Thus, what appear to be concerns about the objectification of people are consistent with, if not identical to, concerns about commodified sexuality. See also Sunstein, *Neutrality*, *supra* note 42, at 18 (suggesting that people who believe that sexuality is private and sacred often favor the regulation of pornography to protect sexuality from the "exploitative and degrading depictions of the marketplace," just as feminists argue for regulation on the ground that pornography debases and objectifies women).

382. See EWEN, *supra* note 75, at 47-50 (analyzing the connection between product advertising and eroticism/desire); HAUG, *supra* note 77, at 55 (describing the sexualization of objects); see also *supra* text accompanying notes 72-78 (discussing the image of sexuality in consumer culture as a counterpoint to the view of sex as necessarily empowering).

383. See NORBERT ELIAS, *THE CIVILIZING PROCESS: THE HISTORY OF MANNERS* 169-91 (1978) (describing the history of "the civilizing process" as involving an increasing reluctance, after the Middle Ages, to talk openly and publicly about matters of sexuality, and a connection increasingly felt between sexuality and shame or embarrassment); KAREN HALTTUNEN, *CON-*

when material is sensationalistic in style, it necessarily is presented in a pandering fashion. Nevertheless, the private/public distinction does not answer the question of what should be kept limited to the private realm and which public references to sexuality, whether in substance or style, should be characterized as offensive. Moreover, in addition to potential conflicts with questions of merit, critiques based on sensationalism historically share a class-based, rationalistic bias.³⁸⁴ Most importantly, all of these rationales are subject to the argument that any attempt by the FCC to address or influence the substantive content of sexual speech would conflate the distinction that the agency originally drew between manner and substance and thus would conflict with the Commission's asserted desire to punish not the choice of subject matter, but only the manner of presentation.

Further complicating the analysis is that the FCC's imprecise focus on the pandering manner of presentation effectively puts at risk whole forms of bawdy humor and song. An overview of recent material that the Commission found indecent demonstrates an increasing focus on more or less coded humorous plays on words³⁸⁵ on the ground of their pandering and titillating overtones. The Commission's approach to the *double entendre* both dessicates the form and serves as a good example of a context in which the Commission's manner/subject distinction becomes unworkable. The whole point of *double entendre* is that it be understood; it is pointless otherwise. *Double entendre* simultaneously leads to snickering over the shared joke and convinces the hearer of the speaker's verbal cleverness. This dual aspect is the source of the amusing character of the reference. The manner of its presentation — the signal that the dual meaning of the reference is being mined — is, in a fundamental way, the substance of the form. In addition to undermining the manner/subject distinction, the Commission's approach to the *double entendre*

FIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA 1830-1870 104 (1982) (describing rituals of etiquette and privacy developed by the antebellum middle class and the reflection of those rituals in the geography of the home). Retice and privacy have been said to reflect a mode of social life in which individuals perceive their status as dependent on inner virtue and believe that outward conduct reflects inner virtue, thus requiring at least the appearance of complete bodily self-restraint. See also Robert P. George, *Moralistic Liberalism and Legal Moralism*, 88 MICH. L. REV. 1415, 1422 (1990) (discussing the immorality of immodesty, according to moral conservatives).

384. Charges of sensationalism — exaggerated appeals to emotion — historically have a class-based aspect. In the press context, criticism based on sensationalism had its roots in the "moral war" waged by respectable newspapers of the educated middle and upper classes in the 1880s and 1890s against the "yellow sheets," which carried sensationalistic human interest stories and were geared to appeal to immigrants and the uneducated middle and working classes. MICHAEL SCHUDSON, *DISCOVERING THE NEWS* 99, 101, 112-14 (1978).

385. In recent years, the Commission has found several types of *double entendre* to be indecent. Some of the challenged material consisted of classic plays on words; such *double entendres* have been the traditional stuff of wit, both puerile and sophisticated. Other challenged programming contained sexual references that were not terribly clear or explicit and that lacked the character of wit and cleverness associated with the classic *double entendre*. For a discussion of *double entendre* and indecency, see Schrier, *supra* note 356, at 90; see also *supra* text accompanying notes 44-46, 52-56, 104-06, 270-72, 291-97 and *infra* text accompanying notes 392-94.

leads to the ironic conclusion that its regulatory net might snare more coded material than overt discussions of sexuality. Indeed, a serious enforcement policy could lead to the all-but-elimination of a whole genre of popular American humor. In light of the prevalence of the *double entendre* in modern humor and its characteristic appearance in African-American musical forms such as the blues, for example,³⁸⁶ the application of the manner/subject distinction to broadcast sex talk can have unexpectedly skewing cultural effects.

d. The Uncertain Place of Merit

The Commission's treatment of merit, as yet one more factor to address in its contextual assessment of potentially indecent material, is also problematic in ways that belie the Commission's assumption of "patently" obvious answers on indecency questions addressed in context.

First, even if the Commission were committed to some "appropriate" consideration of merit as a mitigating factor in indecency, many today would argue that the merit inquiry is incoherent on its face. On this view, the traditional distinction between works of artistic merit and other expressive works is an illusory difference inappropriate in a postmodern landscape.³⁸⁷ Holders of this opinion would suggest that, among works containing sexually explicit material, there is no neutral definitional principle by which one could distinguish works with merit from those without. Thus, they would consider the Commission incapable of developing rationalizable content for its merit-based contextual inquiry.

Second, even if the merit inquiry were substantively justifiable and a consensus could be reached at least on the existence of degrees of merit, the concept is nevertheless highly manipulable and far from value-neutral. It requires the decision maker to take substantive positions on the value and purpose of material asserted to be art. The dangers of allowing governmental agents to determine the merit of expressive works are quite obvious.³⁸⁸ At best, we could argue that the discretionary character of the inquiry makes it difficult to predict how the Commission would take the merit factor into account. At worst, it suggests that the Commission can use the cloak of "merit language" to make substantive decisions on other grounds without considering merit at all. Most likely, the presence of discretion suggests that the standard is often used conventionally and conservatively. Both critiques can come into play

386. See *supra* text accompanying notes 121-25.

387. See generally Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990). At least since Marcel Duchamp and the Dada movement conflated the distinction between art and mass production by recognizing collections of produced objects as art, there has been a move in the art world to undermine the distinction between the highbrow world of "fine" art and the lowbrow universe of everything else. This tendency to subvert old categories is even more pronounced now as part of a postmodern, iconoclastic aesthetic. In a world of deconstructionists, surely anything can be characterized as art. *But see* Robert Hughes, *Art, Morals, and Politics*, N.Y. REV. OF BOOKS, Apr. 23, 1992, at 21-27.

388. See *supra* text accompanying notes 338-43, for a discussion of the Commission's treatment of merit in the news context.

when the Commission decides to evaluate merit as a factor in its indecency decisions. As Justice Holmes recognized, albeit in a different context, governmental decisions on the merit of art tend to promote conventionalism.³⁸⁹ The attempt to regulate away shock radio programs like those of Howard Stern is a current context in which to address issues of conventionalism. Surely, Mr. Stern's programming is self-consciously designed to be unconventional and challenging to authority.³⁹⁰ Moreover, a review of the FCC's decisions in the indecency area suggests that they are animated by a socially conservative vision.

The history of the Commission's approach to sexually explicit speech for which claims of merit could be made is instructive in this connection. Political aspects of indecent material, both implicitly and explicitly critical of conventional and conservative viewpoints, have been insufficient to deter the FCC's imposition of sanctions. Merit-based and political arguments can be made about *Pacifica* itself, to which the current Commission refers as if it were the uncontroversial starting point of inquiry in the indecency area. George Carlin, who has been a social satirist for the past several decades and tends to ridicule government and conventional society, specializes in iconoclastic routines of a liberal or progressive political bent.³⁹¹ In the monologue at issue in *Pacifica*, Carlin attempted to focus attention on the hypocrisy of *double entendres* and the fact that government purported to protect us from "dirty" words in broadcasting while leading us into the Vietnam war.³⁹² The self-conscious use of these words was designed to make a point, yet the Commission did not look at the meaning and intent of the words in the context of the monologue. It focused instead on the broadcast of the words themselves and disapproved their use in any context so long as children might be present in the broadcast audience.

The same approach prevails with the current Commission. In 1989, WLLZ(FM) was fined for its 1988 broadcast of *Walk With an Erection*, a

389. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903) (adopting what has come to be known as the anti-discrimination principle in copyright).

390. This is not the point at which to address the issue of whether Stern-type shock programming is in fact as unconventional as its propagandists suggest it is intended to be. Suffice it to say that the extraordinary commercial acceptance of the form suggests otherwise, as does the rather typical set of stereotypes on which Stern relies in order to construct his assertedly taboo-smashing diatribes.

391. See, e.g., Lawrence Christon, *Facing Ourselves With Two Veteran Social Observers*, L.A. TIMES, Jan. 14, 1991, at F6; William Grimes, *George Carlin: Small but Amusing*, N.Y. TIMES, Jan. 21, 1992, at C13; Patricia Smith, *To Carlin, 'Lifestyle' is a Dirty Word*, BOSTON GLOBE, Apr. 20, 1991, at 9.

392. See *supra* note 188.

parody of the Bangles' popular song *Walk Like An Egyptian*.³⁹³ *Walk With an Erection* used sexually descriptive slang (such as "hard on" and "pink dolphin"), contained rather clear descriptions of masturbation, and used a sexual metaphor to make a political attack on the police.³⁹⁴

At the same time, two Miami radio stations were fined in connection with the broadcast, *inter alia*, of the feminist, satirical song *Penis Envy*³⁹⁵ on a

393. Legacy Broadcasting of Detroit (WLLZ(FM)), 6 F.C.C.R. 3698 (1991).

394. He puts the Penthouse in his desk
 He's got big muscles in his wrist
 He holds his organ in his fist
 He gives his pink dolphin (?) a mighty twist
 All the boys from Maine to Mexico
 Are all obsessed with sex and blow
 Like the cop who carries a big night stick
 It's just an extension of his wick
 He busts those hookers on the block
 Unless they give service 'round the clock
 Goes home to wife and kids so nice
 Although he gets off on working vice
 All the girls from B.U. they say, "Hard-on,
 hard-on, beg my pardon"
 Walk with an erection
 Walk with an erection.

Id.

395. The lyrics of to the song are as follows:
 If I had a penis, I'd wear it outside
 In cafes and car lots, with pomp and with pride
 If I had a penis, I'd pamper it proper
 I'd stay in the tub and use me as the stopper
 If I had a penis, I'd take it to parties
 I'd stretch it and stroke it and shove it at smarties
 I'd take it to pet shows and teach it to stay
 I'd stuff it in turkeys on Thanksgiving Day
 I'd rival my buddies in sports cars with stick shifts (?)
 I'd shower my spire with girlies and gifts
 I'd peek around corners, I'd aim at my toilet
 I'd poke it at foreigners, and soap it and oil it
 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
 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
 I'd sit like a guy, I'd straddle the chair
 I'd play with my fly, I'd beat it with care
 I'd dip it in chocolate, I'd stick it in sockets
 I'd stroll to the movies with hands deep in pockets
 I'd stick it in vacuums on vacant verandas
 Gas-guzzling Volvos and poodles and pandas
 And puddles and drainpipes and doggies and ditches
 And potholes and bottles and bitches
 Zucchini and zebras, tomatoes, tomah-toes
 And pineapples, pumpkins, and gulches and grottos

morning shock radio show in 1987.³⁹⁶ The Commission also rejected station WFBQ's claim of news value in connection with its broadcast of material that had been targeted by the FCC and alluded to in the reports of local newspapers.³⁹⁷

Similarly, the critical acclaim received by Robert Chesley's *Jerker* did not dissuade the Commission from finding it indecent (and even potentially obscene), although it was broadcast with content warnings to a self-selected nighttime audience.³⁹⁸ The explicit homoerotic character of much of the material challenged both convention and conservative social viewpoints.

As discussed above, the influence of religious social conservatives is even more dramatically evident in the Commission's failure to recognize the "merit" or "news" quality of a radio program in which an announcer read portions of the *Playboy* article recounting Jessica Hahn's claim that Reverend Jim Bakker raped her.³⁹⁹

In a less pedestrian vein, the Commission also refused to give Pacifica a declaratory ruling of acceptability on one of its stations' planned readings from James Joyce's *Ulysses*, traditionally scheduled to take place on Bloom-sday.⁴⁰⁰ Having once survived an obscenity prosecution,⁴⁰¹ Joyce's work was again subjected to the mercy of government censors. The station's failure to

And melons and marshmallows, gloves and gorillas
 Slurpees and slippers, Chinooks and chinchillas
 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 climb every mountain
 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.

In re Guy Gannett Publishing Co., WZTA(FM), 5 F.C.C.R. 7688, 7689-90 (1990).

Interestingly, the station owner did not try to make a political argument about this song but simply claimed that it was innuendo-laden, "silly and puerile," and not pandering or titillating. The response to the FCC's Notice of Apparent Liability also argued that since the station forbade this song and any sexual references by Neil Rogers in the future, it should not be exposed to a forfeiture. *Id.* at 7688.

396. *News: Feds to the Rescue! Foul-Mouthed Radio Doomed*, NEW TIMES, Nov. 8-14, 1989, at 4; Cox Enterprises (*In re* WIOD), 6 F.C.C.R. 3704 (1991); *In re* Guy Gannett Publishing Co. (WZTA-FM), 6 F.C.C.R. 3702 (1991), on reconsideration, 5 F.C.C.R. 7688 (1990); see also *FCC Turns up the Heat on Indecency*, BROADCASTING, Aug. 28, 1989, at 27 (containing transcripts of other programs censored by the FCC in 1989).

397. Great American Television & Radio Co., Inc. (WFBQ(FM) & WNDE(AM)), 6 F.C.C.R. 3692, 3694 n.1 (1990).

398. See *supra* text accompanying note 259.

399. Pacific & Southern Co. (KSD-FM), 6 F.C.C.R. 3689 (1991); see *supra* discussion at notes 340-42 and accompanying text.

400. *In re* Pacifica Found., Inc. (WBAI(FM)), 2 F.C.C.R. 3957 (1987); see also Crigler & Byrnes, *supra* note 36, at 347. Nevertheless, the program was broadcast without FCC sanctions.

401. For a readable description of the obscenity prosecution, see EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 7-39 (1992).

identify its planned program as consisting of Joyce excerpts — and the Commission's initial failure to recognize the work and exempt it from challenge — highlighted the Commission's difficulties with the merit factor.⁴⁰²

Finally, in a further twist on the merit question, one could characterize even such shock radio programs as Howard Stern's as containing political content.⁴⁰³ Many of the scatological and sexual comments made by Stern, however insulting and demeaning, are made in response to matters of the day on which Stern sees fit to comment. The Commission's failure even to advert to the politically-grounded character of at least some of the shock programming that includes sex talk suggests the agency's inability to take account of claims of merit in controversial circumstances.

e. The "Chilling Effect" and the Irrelevance of Repentance

Even the FCC's enforcement strategy contains something of an implicit conservative bias because of its predictably chilling effect on broadcast speech. After the FCC's adoption of its 1987 indecency guidelines, alternative and public stations carefully considered whether their planned programming would pass muster under the new rules, and some cancelled previously scheduled shows.⁴⁰⁴ Even the stations that did not do so sought declaratory advice from the Commission with regard to their programming plans.⁴⁰⁵ Self-censorship at the public station level was also promoted by the general atmosphere of controversy created during the past several years by conservative attacks on public funding of art with sexual content. For example, seventeen public television stations in the top fifty markets refused to air a documentary on Black gay life entitled *Tongues Untied* because of its depictions of nudity and sexuality.⁴⁰⁶ New developments enhance the likelihood of censorship and self-constraint. Jesse Helms, joining Pat Buchanan's presidential campaign ads in focusing on *Tongues Untied*, criticized the program for being about "homosexual men dancing around naked." The continued existence of some programming that refers to sexuality in more or less explicit ways does not undermine the self-censorship concern. Discourse does not have to be frozen in order to exhibit significant signs of chill. The concern about chill is particularly weighty in light of the Commission's striking new tendency to impose very

402. Before the Commission denied a declaratory judgment, Commissioner James Quello stated publicly that he thought the highlighted *Ulysses* material was "probably indecent." Crigler & Byrnes, *supra* note 36, at 347 (quoting the Commissioner as saying that, although he had never read the Joyce book, its swear words "are stuff you deck someone over," and as expressing his surprise that the book had become a "classic").

403. See also *infra* text accompanying note 549.

404. Corn-Revere, *supra* note 266, at 29; Crook, *supra* note 266.

405. Corn-Revere, *supra* note 266, at 28-29; see also *In re* Pacifica Found., Inc. (WBAI(FM)), 2 F.C.C.R. 3957 (1987) (petitioning FCC for a declaratory ruling on a proposed broadcast of an excerpt from James Joyce's *Ulysses*); Crigler & Byrnes, *supra* note 36, at 338-41.

406. See, e.g., Kit Boss, *Public TV Too Liberal, Say Conservatives*, SEATTLE TIMES, Apr. 5, 1992, at L8; Rich Brown, *P.O.V. Gets More Money, More Flak*, BROADCASTING, Nov. 18, 1991; John Leonard, *Culture Shock*, NEWSDAY (Nassau and Suffolk ed.), Mar. 5, 1992, at 64.

stiff fines for indecency. The stiffer the potential fine, the less likely are minimally-funded alternative stations to take the financial risk of airing controversial sex talk. Although broadcaster testimonials of a chilling effect may be thought suspect because of their inherently self-serving character,⁴⁰⁷ there is sufficient evidence of broadcaster concern and action to substantiate claims of a newly constrained approach to programming. Even commercial stations are not immune: many licensees have publicly apologized for their programming and reprimanded, fired, or suspended offending disc jockeys upon mere inquiry by the Commission.⁴⁰⁸

The FCC's reassurances that it applies its indecency regulations only as the context warrants are put into question by the agency's effective refusal to consider as mitigating factors either (1) explanations for error and claims of good-faith attempts to comply with the rules, or (2) apologies, self-regulation, and self-policing by the broadcast entities targeted.⁴⁰⁹

In the contexts of many of its other regulations, the agency has been careful to give a significant amount of leeway for broadcaster discretion and good-faith broadcaster judgments.⁴¹⁰ That has clearly been the case, for example, in other content-related areas in which the Commission has decided that deference to good-faith broadcaster discretion would maximally promote First Amendment interests in editorial freedom. In the context of indecency regulation historically, abject apologies and self-imposed punitive measures by broadcasters sometimes have served to stave off Commission sanctions.⁴¹¹ Since 1987, by stark contrast, the FCC has not allowed broadcasters to clean up their own houses in connection with indecency, despite the agency's assurance that it "generally considers prompt and effective remedial action by a licensee in determining the appropriate sanction level. . . ."⁴¹² A number of broadcasters have explicitly apologized for the remarks of their on-air personalities, have suspended or fired responsible personnel for having violated agency policy, and — despite clear evidence of self-censorship — have nevertheless had to bear the imposition of sanctions.⁴¹³

407. Even this concern may be more illusory than real. The Commission itself pointed out, in another context, that reputational concerns, among other factors, provide disincentives for broadcasters to admit to such chilling effects. *Fairness Report*, 102 F.C.C.2d 143, 180-82 (1985); see also *Syracuse Peace Council v. FCC*, 867 F.2d 654, 662-64 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Thus, while there is a self-serving character to the protestations of institutions arguing for the elimination of the assertedly chilling rules, the reputational concerns of such institutions may temper the incentives to exaggerate such claims.

408. See *infra* text accompanying notes 413-15.

409. Admittedly, the FCC rhetoric only relies on context with respect to the determination of the decency of the material, rather than its actionability once indecency is found.

410. Cf. *In re Peter Branton*, 6 F.C.C.R. 610 (1991) (noting that the FCC "traditionally [has] been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present public affairs programming to their listeners").

411. See, e.g., *Mile High Stations, Inc.*, 28 F.C.C. 795 (1960), discussed *supra* note 179.

412. *Narragansett Broadcasting Co. (KSJO(FM))*, 5 F.C.C.R. 3821 (1990).

413. See, e.g., *KGB Inc. (KGB-FM)*, 7 F.C.C.R. 3207 (1992) (issuing Notice of Apparent Liability for \$25,000 forfeiture due to broadcast of *Candy Wrapper* and *Sit on My Face*, despite the station's assurances that the disc jockey was admonished, the broadcasts were contrary to

Once having decided to impose sanctions, the Commission has refused to back down simply because broadcasters argue that their broadcasts of indecency were inadvertent or, at worst, unavoidably small side-effects of human error occasioned by the live format of controversial, socially-useful programming.⁴¹⁴

Finally, the Commission has considered broadcaster's failure to self-censor in response to previous FCC rulings to be an effectively aggravating circumstance deserving of punitive sanctions. This is so despite the fact that the agency claims to apply a contextual determination of indecency, whereby the same material could be considered either actionably indecent or perfectly acceptable, depending on the case and context. In one case, a station claimed to have mistakenly broadcast a song that the FCC had found indecent when played by another station. Nevertheless, the FCC imposed an extra \$12,500 fine for the broadcast precisely because the agency had found the material indecent previously.⁴¹⁵

What can be made of the agency's decision to ignore error-based explana-

station policy, and the records had been destroyed); *WYBB(FM)*, COMM. DAILY, Feb. 25, 1992 (imposing sanction despite the station's claim that the broadcast was in violation of its policy and that the disc jockeys involved were "severely admonished," suspended without pay, and subsequently placed on probation for some time); Narragansett Broadcasting Co. (*KSJ0(FM)*), 5 F.C.C.R. 3821 (1990) (holding that a licensee's action in suspending an offending disc jockey was not adequate to stave off a \$20,000 fine because it was not triggered by the indecency policy); *In re* Guy Gannett Publishing Co. (*WZTA-FM*), 5 F.C.C.R. 7688, 7689 (1990) (imposing forfeiture despite the licensee's installation of a stringent station policy, forbidding disc jockey Neil Rogers from mentioning anything sexual and withholding money from his paycheck for violation of company policy, because nearly two months had elapsed between the subject broadcast and the remedial actions); Pacific & Southern Co. (*KSD-FM*), 6 F.C.C.R. 3689 (1990) (imposing forfeiture for the Jessica Hahn broadcast despite the fact that station management admonished employees who aired the material). The Commission is also investigating *WWZZ(FM)*, as noted above, for an innuendo-laden promotional announcement. This apparently stringent indecency inquiry is particularly surprising in light of the fact that the station had not used the promo for some time and had changed formats from album-oriented rock to country. Harry A. Jessell, *FCC Puts Broadcasters on Notice For Indecency*, BROADCASTING, Mar. 2, 1992, at 29-30. Recent newspaper reports reveal that one station previously fined for airing Howard Stern material is now editing *The Stern Show* prior to broadcast. Claudia Puig, *Stern Editing Elicits a New Kind of Shock*, L.A. TIMES, Mar. 17, 1993, at F1; Claudia Puig, *Editing of Stern Show Admitted*, L.A. TIMES, Mar. 12, 1993, at F1.

414. In one case, a station mistakenly broadcast two jokes as part of a call-in best-joke contest. Focusing on the fact that the contest was live and not subject to any delay mechanism, the FCC held it to be irrelevant that the jokes were broadcast only because the callers changed their jokes once they were on the air, thus circumventing the station's screening procedures. Jessell, *FCC Puts Broadcasters on Notice*, *supra* note 405, at 29-30. The investigation was undertaken by the Commission despite the station's contemporaneous apologies to its audience and its disqualification of the joke-tellers from the contest. *Id.*; see also Sound Broadcasting Corp. (*KCNA-FM*), 6 F.C.C.R. 2174 (1991) (terminating a call after a joke is "belated action" that "cannot excuse" the violation, given that the material would not have aired at all if the station had employed adequate screening techniques).

415. KGB Inc. (*KGB-FM*), 7 F.C.C.R. 3207 (1992) (imposing a \$25,000 fine on a station that broadcast *Candy Wrapper*, in light of the station's knowledge that the FCC previously had found the song indecent when broadcast by Neil Rogers (in Miami)). *Cf. In re* Evergreen (*WLUP(AM)* Chicago), 1993 FCC LEXIS 832 (Feb. 19, 1993) and *supra* notes 233, 303.

tions and abject apologies? In the few cases in which the Commission actually addressed the question, it effectively characterized the apologies and self-censorship measures as "too little, too late." One could argue, then, that the agency was engaged in the minutiae of context analysis, assessing on a case-by-case basis the *bona fides* of claims of repentance. This argument has particular force in light of the FCC's apparently underlying suspicion, in the context of shock radio programs, that the measures of repentance undertaken by the target broadcasters were really small sacrifices made to evade sanctions, that some of the station-imposed punishments for on-air indecency were minimal and quickly reversed, and that the broadcast stations actually had policies pressing their on-air personalities to engage in sex talk as close to the line as possible, while still disclaiming corporate responsibility when particular announcers "got caught."

The message to be gleaned from the Commission's published approach to error, apology, and self-censorship is unmistakable. Whatever the reason, I am aware of no instances in which a broadcast station has received the benefit of the Commission's mercy after the agency had deemed its broadcasts otherwise indecent. This stance has surely had the effect, intended or not, of sending a "strict liability" message to all broadcasters, not only the shock radio jocks trying to test regulatory limits. Strict liability is likely to reinforce conservatism, particularly on stations that otherwise might have broadcast more politically progressive fare.

III

THE LIMITS OF THE EXISTING DOCTRINAL VOCABULARY

The existing legal vocabulary that has been called upon to address the problem of indecency, as defined by the FCC, is largely that of constitutional and administrative law. Challengers of the Commission's broadcast indecency enforcement have relied on free speech precedent, have deployed notions of unconstitutional vagueness and overbreadth, and have mounted claims of failure in the administrative process. This Part argues that although both constitutional law doctrine and principles of administrative law supply persuasive arguments for a traditional critique of the generic definition of indecency and the FCC's censorial role, those arguments are subject to challenge. Constitutional and administrative law can be mined to equal profit for arguments in support of the FCC's intervention. Most fundamentally, neither use of the doctrines in the field of litigation thus far has focused on the complex reality that is at stake in the FCC policy of suppressing broadcast indecency.

A. The Indefiniteness of Current Constitutional Argument in Resolving the Dispute

The constitutional status of the FCC's generic definition of indecency is an open question. The Commission's sanguine assurance that its definition has already implicitly passed constitutional muster in the Supreme Court's

decisions is highly overstated. Indeed, powerful claims of unconstitutional vagueness and overbreadth can be made by challengers to the FCC's indecency actions. On the other hand, although it may be instrumentally necessary and appropriate for challengers to make such arguments, it is far from certain that those claims in their traditional guises would find a receptive ear in the current Supreme Court. The relevant free speech precedent is subject to multiple interpretations, and vagueness and overbreadth arguments are subject to the criticism that they do not in themselves answer the underlying normative dilemma posed by the amorphous notion of indecency.

1. *Pacifica and Sable*

To be sure, the D. C. Circuit stated in *ACT I* that the Supreme Court had implicitly found the Commission's generic indecency standard acceptable in *Pacifica*.⁴¹⁶ However, the court seriously overreads the *Pacifica* decision in concluding that it represents tacit approval of the generic indecency standard articulated and applied by the Commission since 1987.⁴¹⁷

While the Supreme Court's *Pacifica* decision can be read both broadly and narrowly, it is clear that the Court sought to limit its review to the FCC's determination that the Carlin monologue was indecent as broadcast.⁴¹⁸ In other words, the Court did not address the Commission's definition of indecency as a general policy but, rather, focused on the decisional rule of a particular adjudication. Justice Stevens noted that in the FCC's opinion, "questions concerning possible action in other contexts were expressly reserved for the future."⁴¹⁹ *Pacifica* was a narrowly drawn, highly divided decision in which no opinion was signed by a majority of the Justices. The only point on which they all clearly agreed was that they were deciding a single, particular application of the FCC's power.⁴²⁰ That application involved "dirty words," and the Court's entire analysis was specifically predicated on the assaultive effects on the audience of the repeated broadcast of such language.⁴²¹ Emphasizing "the

416. *ACT I*, 852 F.2d 1332, 1340 (D.C. Cir. 1988); see also *TRIBE*, *supra* note 359, at 942 (suggesting that by "accepting the FCC's broader interpretation of indecency (as extending beyond obscenity), the *Pacifica* Court implicitly embraced a general or national standard of offensiveness").

417. See Schrier, *supra* note 356, at 69, 84 (criticizing the *ACT* court's reliance on *Pacifica* to establish the constitutionality of the current indecency standard).

418. *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978). The plurality agreed that § 326 (the anti-censorship provision of the Communications Act) did not "limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting." *Id.* at 738.

419. *Id.* at 734.

420. *Id.* at 734-35, 742 (plurality opinion); *id.* at 757 (Powell, J., concurring). On the narrowness of *Pacifica*, see, e.g., Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 *FORDHAM L. REV.* 606, 627-30 (1983).

421. *Id.* at 739 (plurality opinion); *id.* at 757 (Powell, J., concurring). The reference to "verbal shock treatment[s]," now associated with *Pacifica*, is found in Justice Powell's concurring opinion; the plurality opinion also focused on the repetitive and assaultive character of the language when intruding into the home.

narrowness of [its] holding,” the plurality expressly stated that it had not decided that “an occasional expletive” in a two-way radio conversation by a cabdriver or the broadcast of an Elizabethan play “would justify any sanction.”⁴²² In addition, the “patent offensiveness” of the language at issue was not challenged in *Pacifica*.⁴²³ Thus, while the *Pacifica* Court did not take pains to disapprove the Commission’s generic definition of indecency, neither can it fairly be said to have approved the definition.

Nor was the definitional matter resolved in *Sable Communications, Inc. v. FCC*,⁴²⁴ in which the Supreme Court struck down a total prohibition on the transmission of indecent “dial-a-porn” messages by telephone lines.⁴²⁵ There, the issue before the Court was whether a total prohibition could apply to indecent as well as obscene material, given that indecent material enjoys First Amendment protection. *Sable* assumed a constitutionally cognizable distinction between indecent and obscene speech and nowhere purported to define the precise contours of indecent material.⁴²⁶ In short, the Supreme Court’s FCC-related precedent does not resolve the constitutional propriety of the Commission’s latest indecency definition.

422. *Id.* at 750.

423. *Id.* at 739. In *ACT I*, the court argued that the *Pacifica* Court’s reference to a dictionary definition of indecency suggested that the Supreme Court found the generic definition of indecency acceptable. 852 F.2d 1332, 1339 (D.C. Cir. 1988). In *Pacifica*, the Court cited Webster’s Dictionary for the proposition that the “normal definition” of indecent “refers to nonconformance with accepted standards of morality.” *Pacifica*, 438 U.S. at 740. The Court adverted to the dictionary definition in support of the argument that indecency was intended to mean something other than obscenity as used in 47 U.S.C. § 1464. *Id.* at 739-40 & nn.14 & 15. The Court was trying to justify its conclusion that prurient appeal, a necessary element of obscenity, was not ordinarily seen as a component of indecency. *Id.* This was certainly not a ruling on the substantive content of indecency or the constitutional propriety of a “patent offensiveness” standard.

Professor Post suggests that *Pacifica* demonstrates the Court’s sensitivity to the conflict between democratic claims for public discourse and countervailing community-based pressures on the public sphere, and that it constitutes an ideologically determined boundary to the domain of public discourse. Post, *The Constitutional Concept*, *supra* note 42, at 629-33. Just as Professor Post’s argument does not explain why offensiveness is considered constitutionally less tolerable in *Pacifica* than in *Hustler Magazine v. Falwell*, his perceptive description of the Court’s First Amendment jurisprudence does not suggest a definitive constitutional outcome in the broadcast indecency context. This is because, as Professor Post readily concedes, the periphery of public discourse “will remain both ideological and vague, subject to an endless negotiation between democracy and community life.” *Id.* at 684.

424. 492 U.S. 115 (1989).

425. In *Sable*, the Court addressed the constitutionality of § 223(b) of the Communications Act of 1934, which regulates sexually-oriented, pre-recorded telephone messages (popularly known as dial-a-porn). *Id.* at 117-18. *Sable* held that while the statute and the FCC could completely preclude obscene messages from being transmitted over the telephone, a total ban on indecent programming violated the First Amendment. The Court made certain, however, to distinguish carefully the context of the telephone from that of broadcasting, apparently in order to maintain the vitality of *Pacifica*. *Id.* at 128 (“[U]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”).

426. *Id.* at 124, 126-31 (“The cases before us today do not require us to decide what is obscene or what is indecent.”).

2. *Vagueness and Overbreadth*

The centerpieces of virtually all of the doctrinal arguments regarding the scope of the FCC's new approach to indecency, whether by broadcasters in the *ACT* cases or commentators on the Commission's actions, are the assertedly unconstitutional vagueness and overbreadth of the definition of indecency.⁴²⁷ The notion of a case-by-case assessment of whether depictions or descriptions of sexuality or excretion will be considered patently offensive to the average broadcast viewer or listener is claimed to be obviously vague. In addition, it is argued that the Commission's failure to create a categorical exclusion from indecency for works of serious merit renders the regulation unconstitutionally overbroad.⁴²⁸

The judicial and regulatory attention paid to the constitutional propriety of time channeling has delayed a thorough analytical assessment of the constitutional objections to the definition of indecency. Indeed, in both the FCC cases and the judicial precedent there is an underlying implication that by a legal legerdemain, limitations on the time frame of regulation — akin to time, place, and manner rules — can take the constitutional sting out of governmental control of constitutionally protected speech. Consequently, and despite the FCC's assurance in its Reconsideration Order that the issues of indecency and actionability are separate inquiries,⁴²⁹ the two-pronged character of the new

427. See, e.g., *ACT I*, 852 F.2d 1334, 1339-40 (D.C. Cir. 1988). In the academic literature, see, e.g., Julie Ann Alagna, *1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left with an "Indecent" Compromise*, 48 WASH. & LEE L. REV. 1545, 1574-76 (1991); Cordoba, *supra* note 353, at 635, 656, 662, 669-70; Crigler & Byrnes, *supra* note 36, at 337-44; Jay A. Gayoso, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach for Removing Immorality from the Airwaves*, 43 U. MIAMI L. REV. 871, 912-14 (1989); Reiss, *supra* note 208, at 238, 240-41; Schrier, *supra* note 356, at 84, 88-96, 94-98; cf. TRIBE, *supra* note 359, at 942 (criticizing 18 U.S.C. § 1464, the statute at issue in *Pacifica*, as failing on its face to define the conduct prohibited); *Filthy Words*, *supra* note 367, at 593 (mounting an analogous vagueness and overbreadth attack on *Pacifica*).

428. The argument that the indecency standard potentially encompasses works of serious literary, scientific, and artistic value and thus applies to both protected and unprotected expression is the most common overbreadth argument in the briefs and literature. See, e.g., *Act III*, 932 F.2d 1504, 1508 (D.C. Cir. 1991); Cordoba, *supra* note 353, at 670.

429. *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930, 936 n.6 (1987) (Reconsideration Order). Although no substantive message can properly be deduced from the Supreme Court's denial of *certiorari* in *ACT III*, only the 24-hour facet of the ban was presented for review in the government's petition for *certiorari*. *FCC v. Action for Children's Television*, 112 S. Ct. 1282 (1992). Thus, the D. C. Circuit's finding of unconstitutionality currently stands as to that issue.

While the Supreme Court precedent is inconclusive on the constitutionality of a total temporal ban, there are persuasive arguments that the total ban on indecency should be deemed unconstitutional, particularly when the definition of indecency is as encompassing as in the current generic standard. Admittedly, although the Supreme Court struck down the total ban on indecency in telephone communications in *Sable Communications Inc. v. FCC*, 492 U.S. 115 (1989), it carefully distinguished broadcasting, leaving itself conceptual maneuvering room to permit more extensive regulation. Cf. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (upholding, on easily distinguishable grounds, a state's public indecency law banning totally nude dancing). Nevertheless, for example, the FCC has not demonstrated that a total, 24-hour ban is the least restrictive option. Even if indecent material is available in non-broadcast contexts (a questionable assumption as to live radio broadcasts) there is a troubling "let them eat

enforcement regime has enabled the agency to avoid a stringent analysis of the substantive content of the patent offensiveness test. The following analysis will specifically address constitutional claims regarding the indecency definition itself.

The void-for-vagueness doctrine, based on due process notions, requires that statutes and regulations be struck down as unconstitutionally vague if persons of "common intelligence must necessarily guess as to [their] meaning and differ as to [their] application."⁴³⁰ Vague laws and regulations are said to violate constitutional norms by failing to provide fair warning, by allowing arbitrary and discriminatory enforcement and, when expression is at issue, by leading to a chilling effect on protected speech. Thus, in addition to promoting an interest in fair notice, the void-for-vagueness doctrine is designed to serve the value of government accountability by regularizing and constraining the discretion of administrative officials. Simply put, government "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his action."⁴³¹ Although the vagueness doctrine originates in the Due Process Clause, it has been applied with particular care and attention in the First Amendment context in order to eliminate the possibility of discriminatory enforcement and because of the perception that the chilling effect of vagueness on expression is especially pernicious.⁴³²

cake" quality to the FCC advising the poor that they can go to clubs or subscribe to cable or buy books and tapes in order to hear the material that the Commission would ban from the airwaves. Moreover, least restrictive alternative analysis does not require the FCC to reject anything less than a 24-hour ban simply because some very small percentage of teenagers may be awake and listening in a given market. The notion necessarily involves a certain level of compromise with respect to the State's substantive interest. A normative judgment must be made about the number of teenagers whose potential presence in the overnight audience is insufficient to justify a restriction on speech. For critiques of the total ban, see, e.g., Cordoba, *supra* note 353, at 668-69; Passler, *supra* note 356, at 155-60 (1990).

430. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-10 (1972); *TRIBE, supra* note 359, at 1033. Professor Tribe explains that "[s]uch vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork." *Id.* The vagueness doctrine was originally deployed to invalidate penal statutes that did not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The notion was subsequently exported to the non-criminal, First Amendment setting.

431. *Kunz v. New York*, 340 U.S. 290, 295 (1951).

432. *See, e.g., Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732 (1991); *id.* at 2749 (O'Connor, J., concurring); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988); *City of Houston v. Hill*, 482 U.S. 451, 465-67 & n.15 (1987); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 572-73, 575 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972); *see also TRIBE, supra* note 359, at 1034-35 (contending that because of a fear of the chilling effect of vague legislation, "the Supreme Court requires more specificity of a statute potentially applicable to expression sheltered by the First Amendment than in other contexts, although no doctrinal formulation of the required increment in specificity has seemed possible"); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 904 (1991) (suggesting that although the minimal requirement of fair notice imposed by the due process-based vagueness doctrine, in its most familiar form, is applicable in

The overbreadth doctrine, which often overlaps with the vagueness principle, allows persons whose own expression may properly be prohibited by a statute or regulation to challenge the rule and evade sanction on the ground that the rule would unconstitutionally include protected speech within its sweep as well.⁴³³ The doctrine, commonly viewed as an exception to ordinary standing requirements, is permitted in the First Amendment context by virtue of the Court's desire to preclude an undue chilling effect on protected speech.⁴³⁴ Since overbreadth is perceived by the Court as "strong medicine," it is used sparingly.⁴³⁵ The scope of a statute does not make it unconstitutional unless the overbreadth is "substantial . . . judged in relation to the statute's plainly legitimate sweep."⁴³⁶

In common parlance, the FCC's current, generic definition of indecency is indefinite on its face. No more is needed to support this point than a reference to the language of the regulation itself, with its unexplained mention of "patent offensiveness." In addition, as has been detailed above, the FCC's attempts to define indecency are imprecise, manipulable, and largely responsive in practice to pressures from socially conservative special interest groups.⁴³⁷ Raising the spectre of discriminatory intent, they implicate precisely the concerns that are said to justify the vagueness doctrine.

However, imprecision, unpredictability, and administrative discretion do not automatically mean that a regulation will be considered so vague as to offend the Constitution. Similarly, that the FCC might ban, from normal daytime hours, some meritorious material with no appeal to the prurient interest does not mean that the agency's definition of indecency is necessarily to be considered substantially and fatally overbroad.

One could argue that invalidation for vagueness is particularly inappropriate for notions like indecency, which are inherently amorphous and vague because we cannot predict in advance every form of expression that might be patently offensive. In just such an argument, the D. C. Circuit agreed with the Commission that bright-line rules are arbitrary in the context of indecency regulation.⁴³⁸ The Commission could not provide a rational justification for

the First Amendment context, "[t]here is . . . a separate, additional vagueness doctrine that applies in First Amendment cases").

433. See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 112 n.8 (1990). While vagueness and overbreadth are related doctrines that are often both implicated in the constitutional review of legislation, they are not necessarily coextensive. For example, it is possible to have perfectly clear and precise laws that unconstitutionally trammel protected expression.

434. *Osborne*, 495 U.S. at 112 n.8; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). For conflicting views on the extent to which the doctrine serves prophylactic functions, see Fallon, *supra* note 432, and sources cited therein.

435. *Broadrick*, 413 U.S. at 613.

436. *Id.* at 615; see also *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982); *Houston v. Hill*, 482 U.S. 451, 458 (1987).

437. See discussion *supra* Part II.A.3 & II.B.1.

438. The court relied not only on what it perceived to be the Supreme Court's implicit approval of the generic indecency definition, but also on Judge Leventhal's dissenting opinion in

enforcing indecency regulations only against a few offensive words when there is far more sexualized expression that could plausibly be considered indecent by a segment of the population.⁴³⁹ Having thus expanded the universe of regulable material by discounting the rationality and justifiability of bright-line rules, both the FCC and the court concluded that vagueness is inherent in a generic description of indecency adequate to account for all sexual expression that would be found socially offensive. According to this argument, since vagueness and breadth are inescapable in any responsible and logical definition of indecency, the one chosen by the Commission should not be considered unconstitutionally vague *per se*.

This is essentially an argument that the type of inherent vagueness diagnosed by the court in the indecency area should not completely preclude regulation, precisely because the difficulty of drawing exact lines cannot in itself justify the refusal to draw them at all.⁴⁴⁰ After all, we could resolutely decide to ignore the lack of broad consensus on what is indecent, at least at the margin, and simply admonish regulatory agencies and legislatures to be as specific as possible in drafting regulations despite inherent vagueness. The process of regulation could then unfold by the accretion of specifics.

Yet, the court's justification of regulation by reference to inherent indecency of the sort it diagnoses involves a non sequitur. The observation that the definition of indecency must be inherently vague and amorphous because any attempt to cabin it would be arbitrary still does not answer the question of whether we should accordingly regulate or decline to do so. There is something troubling about the position that a statute or regulation that is admittedly vague on its face can be saved from constitutional infirmity simply by the expedient of saying that the kind of broad coverage it envisages cannot be accomplished by a less vague rule. While the Supreme Court's vagueness jurisprudence does allow for the adoption of saving constructions, the Court also has struck down statutes that purport to regulate behavior the description of which is necessarily vague.⁴⁴¹ We might say, then, that the D.C. Circuit's finding of "inherent" vagueness should counsel regulatory timidity.

Pacifica, in which he referred to the vagueness "inherent" in the subject matter of indecency. *ACT I*, 852 F.2d 1332, 1338 (D.C. Cir. 1988). As the majority stated, "the difficulty . . . is not the absence of 'reasoned analysis' on the Commission's part, but the '[v]agueness . . . inherent in the subject matter.'" *Id.* (citation omitted).

439. *Id.*

440. *Cf.* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 294-95 (1981) (making this argument, but also counseling against the opposite error and suggesting that categories like "offensiveness" might raise a serious risk of misapplication because they are "so inherently and extremely indeterminate and so linguistically ill-defined").

441. For example, the Court has struck down statutes or ordinances prohibiting "annoying" conduct akin to vagrancy or loitering. *See, e.g.,* *Coates v. Cincinnati*, 402 U.S. 611 (1971) (finding an ordinance vague where it made it illegal for a number of persons to assemble on a sidewalk and "there conduct themselves in a manner annoying to persons passing by"); *cf.* *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding a particular vagrancy ordinance to be unconstitutionally vague without explicitly stating that vagrancy statutes' necessar-

Simply put, although a vagueness argument seems well-suited and persuasive in the indecency context, there are countervailing claims that make a vagueness finding uncertain. First, although the vagueness doctrine is of potentially expansive application, it has received limiting constructions.⁴⁴² The degree of tolerable vagueness explicitly depends on the type of enactment at issue, with greater tolerance for imprecision in the civil rather than the criminal context.⁴⁴³ It is now a truism that unconstitutional vagueness cannot be based on "potential uncertainty at the margins."⁴⁴⁴ In addition, examples of a history of implementation may be used to avoid a vagueness finding. The existence of "common understandings" can cure what appears to be facially vague language.⁴⁴⁵ Finally, the Court has stated that absolute perfection and precision are not preconditions to regulation in the event that specificity is impossible.⁴⁴⁶ Even the most stringent vagueness test does not "expect mathematical certainty from our language."⁴⁴⁷

Therefore, supporters of the FCC standard could argue that the notions of indecency and patent offensiveness, due to their use in different contexts over a reasonably long period of time, have developed a core of common understandings or meaning. For example, since *Miller v. California*⁴⁴⁸ established the modern approach to obscenity, the concept of offensiveness has found a home in the Supreme Court's obscenity jurisprudence, despite the

ily vague attempts to describe the range of prohibited conduct would render all such ordinances per se vague).

In an analogous context, the Court held that "[a]lthough due process does not require "impossible standards" of clarity," a state statute requiring loiterers to account for their presence by producing "credible and reliable" identification upon request by the police did not constitute "a case where further precision in the statutory language is either impossible or impractical." *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). This indicates that the Court's interpretation of the "impossible clarity" standard is in fact rather stringent. It might well be argued that the Commission's definition of indecency would also fail for lack of adequate precision.

442. The sweep of the overbreadth doctrine is limited by the requirement that objectionable breadth be substantial. Narrowing constructions are allowed to save otherwise facially overbroad rules, just as such clarifications routinely save regulations subject to vagueness claims. Because the arguments are parallel for vagueness and overbreadth, the discussion in text will deal only with vagueness.

443. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982).

444. *See, e.g., United States v. National Dairy Corp.*, 372 U.S. 29, 32 (1963).

445. *See, e.g., Parker v. Levy*, 417 U.S. 733 (1974). Although the Court more recently distinguished *Parker* on the ground that the military context involved in that case had required a less stringent vagueness analysis, *see Kolender v. Lawson*, 461 U.S. 352, n.8 (1982), the Court apparently used *Parker* to affirm the more general notion that narrowing constructions of vague language, either by reviewing courts or "less formalized custom and usage," could save the provisions. *Parker*, 417 U.S. at 754.

446. *See, e.g., Kolender*, 461 U.S. at 361; *United States v. Petrillo*, 332 U.S. 1, 7-8 (1946) (reversing the dismissal of a criminal information on the ground that § 506(a)(1) of the Communications Act, designed to discourage featherbedding, was unconstitutionally vague: "The constitution does not require impossible standards. Common understanding and practices make the language convey sufficiently definite warning").

447. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

448. 413 U.S. 15 (1973); *see TRIBE, supra* note 359, at 904-19; *Gey, supra* note 43, at 1567-81 (describing the development of obscenity doctrine).

trenchant critique to which the doctrine has been subject.⁴⁴⁹ It may be argued that if the offensiveness standard is considered sufficiently determinate in the obscenity context by the Court, then it should be, *a fortiori*, constitutionally permissible in the definition of indecency.⁴⁵⁰

However, nothing impels us to accept such transplantation. The notion of common understanding, like the concept of common sense, is a subtly loaded idea pursuant to which social consensus on fundamental issues of value is simply taken for granted.⁴⁵¹ One could argue that accretions of meaning to the notion of indecency in other contexts are and should be irrelevant when the FCC context is at stake. Indeed, the FCC's own changes in definition and enforcement policy in the indecency context over the years could be said to have obscured the meaning of the concept and made it vague.⁴⁵²

In any event, although the *Miller* Court referred to offensiveness as determined by contemporary community standards in a fashion superficially similar to the Commission's definition of indecency, the *Miller* test requires that the states specify concretely the sexual descriptions and depictions considered obscene.⁴⁵³ Such specificity is nowhere required under the FCC's indecency scheme. The *Miller* test also demands the application of the standards of a particular community rather than the reactions of a constructed "average broadcast viewer or listener."⁴⁵⁴ Therefore, both the legislative precondition and the applicable community standard in the obscenity context are arguably more concrete than the FCC's definition of indecency. Moreover, it must be noted that material subject to the *Miller* test traditionally has been perceived as excluded from the protection of the First Amendment.⁴⁵⁵ Surely, the

449. In *Miller*, the Court adopted a three-pronged definition of obscenity, focusing on whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct as defined by the State; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24; *see also supra* note 197.

450. In an analogous overbreadth challenge to a statute prohibiting the possession and viewing of nude photographs of minors, the majority of the Court in *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) was unswayed by the dissent's argument that the state court's narrowing construction, requiring a showing that the targeted nudity constituted "a lewd exhibition or involve[d] a graphic focus on the genitals," led to an unconstitutional level of vagueness. *Id.* at 133-40.

451. *See generally* RICHARD CAMPBELL, 60 MINUTES AND THE NEWS: A MYTHOLOGY FOR MIDDLE AMERICA (1991) for a discussion of the role of common sense in deflecting value inquiries in the media context.

452. *See Levi, supra* note 36. The history of the FCC's indecency enforcement efforts is subject to numerous interpretations. For a view contrary to that in text, *see infra* text accompanying notes 516-17 (arguing that the Commission's approach to indecency has been relatively stable rather than haphazard).

453. 413 U.S. 15, 24 (1973).

454. *Id.* at 30-33. For discussions of the relationship between *Miller* and indecency, *see Cordoba, supra* note 353, at 662; Schrier, *supra* note 356, at 97-98; Robert Wolff, *Pacific's Seven Dirty Words: A Sliding Scale of the First Amendment*, 1979 LAW F. 969, 1004 (1979).

455. *But see* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (opinion of Scalia, J.) (challenging the categorical method of addressing obscenity and the First Amendment).

FCC's challengers could argue that even if somewhat vague standards are constitutionally acceptable in connection with expression outside the protection of the First Amendment, the same cannot be said about speech within its ambit.

Despite the argument distinguishing *Miller* as providing a limiting construction for indecency, there are conflicts in the lower courts over the constitutional propriety of the notion of indecency. For example, one court recently held that a regulatory reference to "decency" as a criterion for the grant of public art funding was unconstitutionally vague because there was "no question" that persons of common intelligence would have to guess at the meaning of the reference to decency.⁴⁵⁶ Other courts have reached contrary conclusions. Recently, for example, the Second Circuit and the Ninth Circuit Courts of Appeal upheld the FCC's definition of indecency in the dial-a-porn context, using a standard virtually identical to that adopted by the agency in the broadcast arena.⁴⁵⁷ In distinguishing FCC usage from references to "offensiveness" in public health grant guidelines, yet another court concluded that indecency

456. In *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457 (C.D. Cal. 1992), the court held void for vagueness the "decency clause" of the National Endowment for the Arts' (NEA's) governing statute, pursuant to which "general standards of decency and respect for the diverse beliefs and values of the American public" must be taken into consideration in the grant of NEA funds. 20 U.S.C. § 954(d). In support of its conclusion, the court pointed out that the undefined reference to decency "clearly gives rise to each of the three evils identified in *Grayned*." *Finley*, 795 F. Supp. at 1472. As the court specified:

(1) it creates a trap for the unwary applicant who may engage in expression she or he believes to comport with the standard, only to learn upon receiving notice that her or his grant has been withdrawn or a new application denied because she or he has offended someone's subjective understanding of the standard; (2) panelists, the Council, and the Chairperson are given no guidance in administering the standard; each apparently is supposed to draw on her or his own personal views of decency or some ephemeral "general American standard of decency;" and (3) it necessarily causes the imposition of self-censorship wider than the line drawn by the statute because the line is, in effect, imperceptible.

Id. at 1472 (citation omitted).

457. In *Dial Info. Services of N.Y. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied sub nom.*, *Dial Info. Services Corp. v. Barr*, 112 S. Ct. 966 (1992), the court rejected a vagueness challenge to an FCC regulation defining procedures for preventing access by minors to indecent dial-a-porn services on the ground that the rule tracks the definition of indecency "that [the FCC] developed in the radio broadcast context and that passed muster in the Supreme Court." *Id.* at 1540. *Dial* challenged the 1989 Helms Amendment to the Communications Act of 1934, which shielded dial-a-porn providers from prosecution for the provision of indecent material to minors if they complied with certain telephone company presubscription procedures or engaged in independent billing and collection.

Similarly, the Ninth Circuit upheld FCC dial-a-porn rules incorporating the indecency definition in *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991). The court accepted the Commission's argument that, as defined, the term indecency was no more vague than the definition of obscenity applied in Supreme Court cases and that the term had a definition that had already received the imprimatur of the Court in the broadcast context. The court inferred support for its position in the Supreme Court's failure to address the vagueness argument in *Sable*: "By saying that it was not necessary 'to decide what is obscene and what is indecent . . .,' the necessary implication of the Court's action is that the term 'indecent' as interpreted by the Commission is not per se void for vagueness." *Id.* at 874 (citations omitted).

was "a clearly defined term" in the context of FCC interpretations.⁴⁵⁸ And for courts that find no undue vagueness in regulations hinging on the notion of "nuisance," the reference to patent offensiveness may be equally untroubling.⁴⁵⁹

The conflicts among the lower courts reflect a parallel, and equally non-dispositive, conflict in the Supreme Court's First Amendment jurisprudence beyond the direct precedent on broadcast indecency. Other than discussing the matter in *Pacifica*, the Supreme court has never defined indecency for purposes of the relevant statute.⁴⁶⁰ The instances in which the Court previously has struck down statutes regulating indecent speech in other contexts are not particularly useful for the current analysis.⁴⁶¹ In addition, the Court's public order and public morality cases demonstrate the conflicting character of the precedent.⁴⁶² In addition, despite the Commission's cavalier assumptions, in

458. In holding unconstitutional grant guidelines of the Centers for Disease Control which precluded "offensiveness" in educational materials related to AIDS, the court in *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278 (S.D.N.Y. 1992) distinguished the broadcast and dial-a-porn contexts. The court opined that under FCC usage, indecency was "a clearly defined term . . . specifically set forth in a[n] FCC Report and Order and drawn from decades of that agency's interpretation of 'indecent' communications" and was narrowed by being limited to explicit "depictions of bodily functions or organs." *Id.* at 300.

459. *See, e.g., Kreimer v. Bureau of Police*, 958 F.2d 1242, 1264 (3d Cir. 1992) (upholding, against vagueness challenge by a homeless person, public library regulations allowing the eviction of "patrons whose bodily hygiene is so offensive as to constitute a nuisance to other persons").

460. *See FCC v. Pacifica Found.*, 438 U.S. 726, 740-41 (1978).

461. The Supreme Court, in *Pacifica*, stated that the definition of indecency under 18 U.S.C. § 1464 need not be limited to obscenity, even though it had previously construed the term "indecent" to be the same as "obscene" in other statutory contexts. The Court indicated that the reasons supporting the equation of indecency and obscenity in prior cases addressing the constitutionality of statutes regulating non-broadcast communications did not apply to § 1464. 438 U.S. at 741.

462. A plurality of the Court recently agreed in *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), that a state's interest in "societal order and morality" could justify the incidental burden on marginally expressive conduct of banning totally nude dancing. *Id.* at 2461. Similarly, a number of the Court's cases in the area of "erogenous zoning" also suggest that, despite speech-related implications, the Court recognizes countervailing governmental interests in safety, public order, and even public morality or decency. *See TRIBE, supra* note 359, at 934 (coining the term "erogenous zoning"). In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld a zoning ordinance that prohibited adult movie theatres within 1,000 feet of residential, school, church, or park zones on the ground that the legislature simply had sought control of the theatres' "secondary effects" on the surrounding community. *Id.* at 47-48; *see also Young v. American Mini Theatres*, 427 U.S. 50, 71-72 (1976) (upholding zoning ordinances that limited the location of "adult" movie theatres on the ground of "the city's interest in preserving the character of its neighborhoods").

The Court generally has treated these cases as raising First Amendment concerns about expression only incidentally, thereby justifying less searching constitutional scrutiny of the challenged legislation. *See Barnes*, 111 S. Ct. at 2461. By contrast, the FCC's indecency actions are directly related to the suppression of particular speech in the service of public morality goals. Moreover, concerns for public order and individual sensibilities were insufficient to trump constitutional values in *Cohen v. California*, 403 U.S. 15 (1971). *See also* discussion *supra* notes 49-50. In *Cohen*, Justice Harlan relied on the notion that offensive utterances are by-products of free expression and must simply be tolerated, at least in venues without a substantial expecta-

none of the central cases in which the Court sought to protect children from exposure to sexually explicit material can we find a clear answer as to the doctrinal status of the FCC's current indecency policy.⁴⁶³

The seemingly inconsistent results in vagueness cases suggest that the vagueness doctrine is often used by courts as a doctrinal proxy for substantive considerations that require a complex balancing of the costs and benefits of regulation. Vagueness, as a ground for facial invalidation, is neither content-neutral nor self-defining. It is not a mechanical doctrine with results predictable in the abstract. Because words are used in varying contexts and necessarily require interpretation, language is, in some sense, inherently vague and

tion of privacy, in order to reject the proposition that the states "acting as guardians of public morality, may properly remove [an] offensive word from the public vocabulary." *Id.* at 22-23.

In *Ernoznick v. City of Jacksonville*, 422 U.S. 205 (1975), the Court struck down a regulation prohibiting a drive-in theatre from showing scenes of nudity because they could be seen by passers-by. Although a narrowly drawn traffic regulation requiring the screening of drive-in theatres from public view might well pass constitutional muster, the Court found the existing legislation unconstitutional because it discriminated between movies on the basis of content and would deter the showing of non-obscene and constitutionally protected films. *Id.* at 215 n.13. Despite this precedent, however, one could argue that the Court has been moving in the direction of a tiered approach to the value of speech, with sexually expressive/offensive speech at the outer periphery of First Amendment protection, as suggested in Justice Stevens' opinion in *Pacifica*. See *TRIBE*, *supra* note 359, at 934-40. If so, it may be deemed to deserve less searching constitutional scrutiny than more fully protected speech (such as political expression), making indecency a less likely candidate for a vagueness finding.

463. The Court has suggested in other contexts that the State has a particular interest in protecting children from sexually explicit, albeit not obscene, material. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (establishing "variable obscenity" standard, pursuant to which the sale of material not obscene as to adults would nevertheless be prohibited to children as obscene because of the state's interest in minors' welfare). In a similar vein, the Court noted in *Sable* that it had "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors," and that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." 492 U.S. at 126 (citing *Ginsberg*, 390 U.S. at 639-40); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding the imposition of a short disciplinary sanction on a student for having addressed a school assembly with a sexually explicit, though not obscene, metaphor). In *Bethel*, the Court reasoned that society has an interest "in protecting minors from exposure to vulgar and offensive spoken language," *id.* at 684, and "in teaching students the boundaries of socially appropriate behavior." *Id.* at 681.

Yet the Court has not abdicated the field entirely to state regulation based on child-protective rationales. It held in *Butler v. Michigan*, 352 U.S. 380 (1957), for example, that the First Amendment did not tolerate regulations that reduced the whole adult population to seeing and hearing only what is fit for children. In *Butler*, the Court struck down a Michigan statute that purported to criminalize the general dissemination of material deemed harmful to minors even though the material was not obscene as to adults. *Id.*; see also *TRIBE*, *supra* note 359, at 910, 912.

Moreover, the Court did not intend to eliminate the distinction between indecency and obscenity in *Ginsberg*. See Danile R. White, *Pacifica Foundation v. FCC: "Dirty Words," the First Amendment and the Broadcast Media*, 78 COLUM. L. REV. 164, 179 (1978) (distinguishing *Ginsberg* from the FCC's definition of indecency in *Pacifica* on the ground that "that case dealt with obscenity, not indecency, and the variable obscenity upheld there was a significantly closer approximation of the then prevailing and current definitions of obscenity than is the Commission's definition of indecency").

unclear.⁴⁶⁴ The question whether a rule is so unclear that persons of common understanding must necessarily guess at its meaning is always "a matter of degree" and "practical judgment."⁴⁶⁵ Thus, normative decisions about what speech should be protected must be made in the process of deciding whether a statute or regulation is too vague. As Professor Anthony Amsterdam argued in his still-seminal student note on the vagueness doctrine, the traditional rationale of providing fair warning does not adequately explain the development or application of the doctrine.⁴⁶⁶ Rather, the vagueness doctrine is used as a doctrinal "makeweight" in order to preserve a certain level of breathing space for selected provisions of the Bill of Rights; in short, it is a surrogate for merits considerations.⁴⁶⁷ A parallel argument can be made about the doctrine of unconstitutional overbreadth.⁴⁶⁸ Thus, the simple characterization of some statutory or regulatory language as vague does not in itself answer the question of the proper constitutional outcome.⁴⁶⁹ Such a substantive inquiry in the case of broadcast indecency leads to the kind of contradictory picture drawn in Part I above. In sum, although an argument can be made that the indecency stan-

464. See J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 425-27 & n.109 (1990).

465. *Id.* at 426-27 n.109.

466. Anthony Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 72 (1960).

467. Professor Amsterdam argued that the courts' ultimate response on vagueness issues depended on the nature of the menaced freedom, the probability of violation, the deterrent effect of enforcement, and an assessment of the danger of the regulated activity. *Id.* at 72.

468. Scholars exploring the complex area of overbreadth have argued that the doctrine, much like the related void-for-vagueness rule, is applied to achieve particular substantive ends. Fallon, *supra* note 432, at 904. The overbreadth claim of overinclusiveness both begs the question and requires value choices in application. The necessity of determining whether a particular statute or rule's overbreadth is sufficiently substantial to be unconstitutional gives courts "considerable leeway" to take value and context into account. Balkin, *supra* note 464, at 426; cf. Martin Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983) (suggesting the necessity of sensitivity to context in overbreadth analysis). Moreover, the claim that the agency's definition sweeps protected as well as unprotected expression into the net because it does not exclude works of merit from its ambit is a substantive argument that the First Amendment precludes the regulation of expression that is both patently offensive and of serious merit. It is an argument about the legitimacy of the category of "indecency" and begs the question whether we can channel serious and meritorious sexual expression simply because it is patently offensive. If we accept that there can be some category of indecent speech that can be channeled in order to protect child viewers or listeners, then there is no reason to suggest that even some work of serious literary and artistic merit should not be channeled, since it is not being entirely repressed. In addition, much of the sting of the overbreadth argument may be said to be removed by the FCC's decision to consider the merit of a work and to exclude classic news treatments from the sweep of its coverage. In any event, it seems clear that these substantive arguments about protecting the expression we choose to protect under the First Amendment cannot simply be avoided by references to overbreadth: the overbreadth claim assumes that some resolution has been reached about the content of protected expression.

469. See Amsterdam, *supra* note 466; cf. Post, *The Constitutional Concept*, *supra* note 41, at 625-26, 632-33 (noting that the problematic aspect of the distinction between outrageous and non-outrageous speech is not that it is subjective or arbitrary, but rather that it is "constitutionally inappropriate" as the standard to regulate public discourse).

dard should be considered unconstitutionally vague or overbroad, that claim must be made in effect on substantive grounds.

3. *The Hate Speech Analogy*

The current debate on the propriety of regulating hate speech, while illuminating, is ultimately limited in its analogic usefulness in the broadcast indecency context. Although the Court's recent decision in *R.A.V. v. City of St. Paul*,⁴⁷⁰ striking down a "hate speech" ordinance, bears importantly on the issue of indecent speech, it does not settle the matter.⁴⁷¹

Although all members of the Court concurred in the result in *R.A.V.*, they differed fundamentally in their rationales.⁴⁷² The interpretation of *R.A.V.* and its impact on future First Amendment law are uncertain and will evolve over time.⁴⁷³ The case can be read both narrowly and broadly, but, in either case, its ramifications for indecency are unclear. Although Justice Scalia's opinion in *R.A.V.* speaks in sweeping generalities about the unconstitutionality of content-based regulation of expression even in constitutionally proscribable categories of speech,⁴⁷⁴ the opinion in fact reaffirms the traditional content-based regulation inherent in the fighting words and obscenity doctrines.⁴⁷⁵ It also allows for content-based distinctions within those categories of speech so long as the basis for those distinctions "consists entirely of the very reason the entire class of speech at issue is proscribable;" is grounded on the association of a subclass of expression with particular secondary effects; or entails "no realistic possibility that official suppression of ideas is afoot."⁴⁷⁶

Accordingly, rather than the first step in the Court's jettisoning of the categorical approach to the First Amendment, *R.A.V.* might most fruitfully be read narrowly, as a case allowing content-based discrimination against speech so long as disfavored topics or viewpoints are not selectively singled out. In other words, *R.A.V.* might be little more than a strong affirmation of the principle of state neutrality as to ideas. On this reading, the ordinance at issue in

470. 112 S. Ct. 2538 (1992).

471. The St. Paul Bias-Motivated Crime Ordinance at issue in the case provided that [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 2541.

472. For a typically insightful treatment of the *R.A.V.* decision and the jurisprudential differences it reflects, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 40-45, 103-07 (1992).

473. It is not only the doctrinal contours of the case that are subject to multiple interpretations. Indeed, as Justice Blackmun contended, "[t]he majority opinion signals one of two possibilities: it will serve as precedent for future case, or it will not. Either result is disheartening." *Id.* at 2560 (Blackmun, J., concurring). The fractured character of the Court's approach to the issue undermines simplistic predictions.

474. *R.A.V.*, 112 S. Ct. at 2543 (1992).

475. I am particularly grateful to Professor Laurence Tribe for his thoughts on *R.A.V.*

476. 112 S. Ct. at 2545-47.

R.A.V. would have passed constitutional muster if it had been an inclusive offensiveness statute that covered all fighting words and did not specifically target bigoted speech of a particular sort. The real linchpin of such an “underbreadth” approach is likely a concern that hate speech ordinances like the one at issue in *R.A.V.* constitute viewpoint-based, rather than merely content-based, discrimination. Thus, on this view, *R.A.V.* does not eliminate governmental power to proscribe hate speech in all circumstances.

If this is the proper reading of the case, then the FCC could argue that its indecency definition and enforcement policy do not discriminate among viewpoints or context, except to the extent that they channel the most patently offensive depictions and descriptions of sexuality and excretion. Justice Scalia contemplates that a state might prohibit “only that obscenity which is the most patently offensive in its prurience. . . .”⁴⁷⁷ If such content-based discrimination is acceptable in the obscenity context under Justice Scalia’s first exception to the presumption of neutrality, a similar argument might be made by analogy in the indecency context. Channeling the most patently offensive sexual and excretory material to broadcast times at which it will not be available to children arguably regulates the material for its proscribable elements and thus would be consistent with *R.A.V.*’s exception to the content-neutrality rule. In addition, the FCC could argue that, because its enforcement policy claims to regulate not the subject matter of sex but, rather, only the manner of its presentation, the kind of subject matter and viewpoint distinctions that Scalia characterized in *R.A.V.* would not be implicated in the broadcast indecency context.⁴⁷⁸

On the other hand, this argument assumes that indecent broadcast speech is “proscribable,” in the terminology of Justice Scalia’s opinion, despite the fact that indecency encompasses a broader scope of expression than obscenity. “Proscribable speech” was never defined in the Scalia opinion; the analysis simply noted that certain classes of speech were traditionally considered outside First Amendment protections due to the social decision that those sorts of expression did not contain sufficient social value to justify constitutional protection. Although the explicit allegiance of three concurring Justices to the principle of a hierarchy of speech protections, with non-obscene sexual speech considered as a “second class” type of expression,⁴⁷⁹ might support an extension of the proscribability argument to indecent speech, this is hardly the traditional reading.

477. *Id.* at 2546.

478. This is not to say that the Commission in fact applies its indecency standard in the fashion described above. David Cole has suggested recently that the notion of content neutrality in Justice Scalia’s opinion referred to whether the regulations at issue “maintain a formal neutrality among the citizenry” (as the category of obscenity is supposed to do through its reference to “general community standards”) or whether they seek to single out and protect particular groups “by excising certain disapproved messages or forms of expression from the social vocabulary.” David Cole, *The U.S. Supreme Court Year in Review 1991-1992: ‘Hate Speech’ is Protected*, N.J. LAW J., Aug. 24, 1992, Supp. at 14.

479. 112 S. Ct. at 2564.

Even if content-based discrimination were acceptable in order to prohibit such indecency as is the most patently offensive "*in its prurience*," as Scalia suggests, the notion of prurience is understood as entailing "that which involves the most lascivious displays of sexual activity."⁴⁸⁰ Though this language is not a model of clarity, it could well be said to provide a more determinate basis for distinction than that provided by the Commission's generic definition of indecency in broadcasting.

Finally, it could be argued that the FCC's application of its indecency regulations, to the extent that it contains identifiable cultural biases and skewing effects, should be interpreted as implicating the kind of viewpoint discrimination explicitly made impermissible by *R.A.V.*. Even if the FCC could permissibly prohibit *all* indecent speech, its current application of its indecency rules may *in effect* be too class- and race-dependent to avoid the kind of viewpoint discrimination that even a narrow reading of *R.A.V.* would suggest is impermissible.

Challengers to the regime of FCC indecency enforcement would find even more solace in a broad and sweeping reading of the case, seeing the decision as the foundation for the establishment of blanket constitutional security against most content-based regulation and the first step in the dismantling of a categorical approach to the First Amendment. It is unlikely, however, that *R.A.V.* would be interpreted so broadly. At the very least, the anti-absolutist stance of four Justices suggests that they would strongly resist such radical changes to modern First Amendment doctrine.

A broad reading even in the specific context of regulating sex talk is equally unlikely. *R.A.V.* focused on fighting words⁴⁸¹ and did not address directly the issues posed by regulation of indecent speech. Nevertheless, if the case provides security for language long thought to be outside the purview of the Constitution, it stands to reason that at least the same (if not more) protection would follow in connection with content-based discriminations in the context of speech that traditionally has been protected.⁴⁸² One could argue that the FCC's regulation of indecency is a classic example of content-based discrimination applied to speech protected by the First Amendment and not subject to the exceptions Justice Scalia admitted in the context of proscribable

480. *Id.* at 2546.

481. The Minnesota Supreme Court had sought to avoid overbreadth claims by construing the ordinance to cover fighting words, a category of speech whose regulation was permitted in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *R.A.V.*, 112 S. Ct. at 2540.

482. By suggesting this, I am not addressing Justice Blackmun's reference to the realpolitik of First Amendment jurisprudence, pursuant to which he predicts that the demise of the categorical approach will in fact lead to a relaxation of the level of scrutiny applied to all content-based laws. *R.A.V.*, 112 S. Ct. at 2560. My sole point is that a reading which extends Justice Scalia's reasoning to areas of fully protected speech would cast doubt on other content-based selective speech regulations as well. The concurrences' suggestion that the perverse result of Scalia's approach is to protect fighting words more stringently than commercial speech and even political speech seems mostly rhetorical, since the majority opinion could be read to adopt implicitly the extreme position of extending the content-neutrality principle beyond its current status in the protected speech area in order to assure symmetry.

speech. With regard to broadcasting, a reading of *R.A.V.* that would undermine the FCC's decision to regulate indecency in the first place would require that Justice Scalia's opinion be read to cast serious doubt on the continuing vitality of *Sable* and *Pacifica* itself. However, in light of Scalia's approving citation of *Sable* in *R.A.V.* (as permitting content-based discrimination "only in certain media and markets,")⁴⁸³ and his own argument, in *Sable* itself, which noted that the increasing regulation of indecency hinged on the contraction of the obscenity principle,⁴⁸⁴ one could question whether the hate speech precedent would be read indirectly to eliminate the FCC's jurisdiction to regulate broadcast indecency.⁴⁸⁵

The decision in *R.A.V.* aside, the disparate First Amendment traditions of the broadcast and print media also rob the hate speech analogy of some of its parallelism. Although increasingly under attack,⁴⁸⁶ the traditional justification for extensive governmental regulation in the broadcast area has been the assertedly unique scarcity of the electromagnetic spectrum and the governmental role in its allocation. First articulated in *National Broadcasting Co. v. United States*⁴⁸⁷ in Justice Frankfurter's notion that the "unique" distinguishing characteristic of radio is that it "inherently is not available to all," the focus on broadcast scarcity reached its apogee in *Red Lion Broadcasting Co. v. FCC*,⁴⁸⁸ in which the Court used the notion to reject a constitutional challenge to applications of the fairness doctrine. *Red Lion*, then, made possible the perception of a fundamental distinction between the government's power to regulate speech in the newspaper or from the soapbox and its power to do so over the airwaves. Whatever we ultimately think about the persuasiveness of technological scarcity as the justification for the disparate constitutional treatment afforded to the broadcast medium, the reality is that a competing First Amendment model of broadcast regulation has been "enthusiastically embraced"⁴⁸⁹ by the Supreme Court since the inception of broadcasting.

The traditional amenability of the broadcast medium to governmental regulation does not mean, however, that the powerful new scholarship⁴⁹⁰ con-

483. *R.A.V.*, 112 S. Ct. at 2543.

484. *Sable*, 492 U.S. at 132 (Scalia, J., concurring).

485. Justice Scalia's opinion sought to downplay *Pacifica* by characterizing it as a mere plurality opinion. *R.A.V.*, 112 S. Ct. at 2547 n.6 ("Justice Stevens cites a string of opinions as supporting his assertion that 'selective regulation of speech based on content' is not presumptively invalid. . . . Analysis reveals, however, that they do not support it. To begin with, three of them [including *Pacifica*] did not command a majority of the Court. . . ."). This footnote dictum should not be given too much interpretive weight, especially since the Court's failure to reach a majority in *Pacifica* did not relate to the broad question of whether selective regulation of speech in terms of content is invalid. As noted above, *Pacifica* addressed the FCC's jurisdiction to regulate under a federal statute a particular instance of indecent, but not obscene, speech.

486. See *supra* note 202.

487. 319 U.S. 190 (1943) (upholding the FCC's authority to adopt the Chain Broadcasting rules).

488. 395 U.S. 367 (1969).

489. LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 72 (1991).

490. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Hate*

structuring arguments in support of the regulation of racist hate speech should simply be transposed to the indecency context. The FCC's definition of indecency presents a different, and arguably more complicated, problem for the justification of governmental regulation than racist hate speech.⁴⁹¹

First, the contexts in which hate speech regulations have been addressed are distinguishable in important respects from those involved in the broadcast indecency ban. Regulations of hate speech have been implemented in two contexts: campus hate speech codes and criminal municipal ordinances. Freedom of speech in the school context has been interpreted differently than in the other ordinary settings of expressive life.⁴⁹² Similarly, although criminal penalties are stiffer than sanctions imposed by the FCC, criminal statutes and regulations have to be especially narrowly drafted in order to pass constitutional muster. Further, the processes of the criminal justice system allow for a spectrum of due process and fair trial guarantees, not the least of which is a jury trial. The FCC's regulation of indecency on the airwaves is not subject either to the narrowed scope of a campus ordinance or to the extreme procedural care ideally required in the criminal context.

Second, many of the hate speech regulations at issue in the scholarly liter-

Speech on Campus, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 267 n.5 (1991) [hereinafter Post, *Racist Speech*] (collecting representative citations). Even public choice theorists have argued for some regulation of hate speech. See, e.g., Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 572 (1991).

491. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 386 (1991) (suggesting that racial insults are different from other offensive speech acts). The text might suggest that I find the regulation of hate speech "easy," but I am not ignoring the arguments that have been made by civil libertarians or civic republican fellow travelers in response to the proposals for the regulation of hate speech. See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. For an individualist critique of arguments in support of the regulation of hate speech, see, e.g., Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103 (1992). Although the issue is a difficult one for civil libertarians, like myself, who habitually argue for the First Amendment as a bulwark against governmental attempts to subdue dissent and establish a single orthodoxy, I believe that there is much to be said in support of the constitutionality and wisdom of regulations that purge at least narrowly-defined racist and anti-Semitic hate speech from public discourse. As the discussion in the text illustrates, however, I do not adopt the strong version of the current scholarly critique of free speech libertarianism, based on a fundamental challenge to the public/private distinction in the speech context. See Sullivan, *supra* note 472, at 104-06.

492. Public high schools have been given more than ordinary leeway in the regulation of student speech. See, e.g., *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), discussed *supra* note 463; see Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1272-73 (1991) (discussing cases and arguing for broader protection than currently available for student speech). While the Court also has refused to characterize the First Amendment as a bar to all regulations of speech in the public university context, see Post, *Racist Speech*, *supra* note 490, and cases cited therein, some recent dicta suggest a particularly generous interpretation of the First Amendment in the university context. See *R.A.V.*, 112 S. Ct. at 2568 (Stevens, J., concurring in the judgment) (citing *Widmar v. Vincent*, 454 U.S. 263, 277-80 (1981)); *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991).

ature and extant campus codes and ordinances concern speech acts that appear to be far more clearly identified and delineated than those that might be swept into the net of indecency by the FCC. While the label of impermissible indecency could be applied to virtually any reference to or depiction of sexual conduct (and not simply a list of offensive words), much of obvious hate speech consists of specific, identifiable words which demean and subordinate others on the basis of group identity. Admittedly, there may be instances at the periphery in which we could not easily distinguish between sex talk and hate speech, yet even when hate speech consists of more than such easily identifiable and generally recognized offensive words, it can still arguably be defined in narrower and more predictable ways than can the definition of indecency adopted by the Commission.

Third, and most importantly, many proponents of regulation of hate speech rest their arguments on the fact that hate speech is a particularly powerful weapon with which to exclude target group members from public discourse, particularly in light of the history of racism, sexism, and anti-Semitism in our culture. And, civil libertarians who object to the regulation of hate speech do not do so on the basis of truth claims or arguments about the affirmative value of such speech to social discourse. Rather, they do so for indirect reasons, believing that learning to withstand the worst offenses will build up the desirable civic virtue of tolerance,⁴⁹³ or that relaxing the protections of the First Amendment with respect to this most offensive type of speech will call into question the Constitution's guarantee of freedom with respect to all sorts of other, socially valuable speech and thus threaten the expression of dissenters and racial minorities.⁴⁹⁴ Although I am not arguing that these justifications for tolerating hate speech are less strongly held because they are indirect, it is important to note that, overall, sexually-oriented expression that might be swept into the FCC's indecency net has the Janus-faced character of being both affirmatively liberating and disempowering. Thus, even if we could mount by-now-standard arguments questioning the ultimate persuasiveness of slippery slope claims like the ones used to justify non-intervention in hate speech,⁴⁹⁵ the harm posed by broad indecency regulations might be said to be far more certainly direct, attacking affirmatively liberating expression. Admittedly, it might be argued that not all instances of sex talk present this paradoxical, ambiguous character, and that the claim of contradiction applies to sex talk only as a whole. Indeed, particular instances of sex talk could be characterizable on close examination as either disempowering

493. See, e.g., BOLLINGER, *supra* note 148; Strossen, *supra* note 491, at 560 (discussing the positive effect of racist hate speech in raising public consciousness about the underlying social problem of racism).

494. See, e.g., Post, *Racist Speech*, *supra* note 490, at 290-300 (testing arguments for the regulation of racist speech against the principle of democratic self-governance); Strossen, *supra* note 491, at 536-41, 555-59.

495. For an analytic dissection of slippery slope arguments, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 83-85 (1982).

and silencing, like hate speech, or as affirmatively liberating, with few exhibiting both characteristics as to either speaker or audience. For example, just as those subjected to ethnic name-calling are silenced by such hate speech, it might be that both feminists and social conservatives would find themselves silenced by explicit sex talk demeaning to women. While this view suggests that at least some part of the universe of sex talk raises the same issues as hate speech and should be dealt with in the same way, it does not necessarily address the different meanings of sex talk in different cultures. Moreover, it entirely dispenses with any claim to governmental viewpoint neutrality in a way more troubling to civil libertarians like myself than the narrower sweep of hate speech cases.

B. *The Uncertainties of Administrative Law*

In addition to the constitutional arguments at center stage of the debate on the FCC's indecency policy, two objections have been culled from administrative law by indecency litigants and scholarly commentators. Principally, broadcasters and other FCC challengers have argued that the Commission's 1987 approach to indecency violates the Administrative Procedure Act (APA) by constituting a change in long-standing policy without any adequate explanation for the shift.⁴⁹⁶ Another claim based on administrative law doctrine is the argument that the process used by the FCC to adopt its indecency enforcement policy ran afoul of rulemaking requirements under the APA.⁴⁹⁷ Such arguments based on current administrative law doctrine are unlikely *per se* to provide an adequate response to the problem of broadcast indecency.

1. *The Asserted Lack of Reasoned Analysis*

The classic statement of administrative law doctrine on the point of agency inconsistency is that although administrative agencies are not precluded from changing their policies, they must "articulate a reasoned explanation for [their] departure from prior norms."⁴⁹⁸ Such a "reasoned analysis"

496. See, e.g., Brief of Petitioners on Petition for Review of an Order of the Federal Communications Commission, *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332 (D.C. Cir. Mar. 25, 1988) (No. 88-1064).

497. See, e.g., Reiss, *supra* note 208, at 248-51.

498. *Telecommunications Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986); see also *Action for Children's Television v. FCC*, 821 F.2d 741, 745-47 (D.C. Cir. 1987); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44, 50-51, 58 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Because current FCC indecency regulation involves affirmative enforcement of policies rather than discretionary decisions not to enforce, the close-to-plenary level of judicial deference established by *Heckler v. Chaney*, 470 U.S. 821 (1985), on the basis of a prosecutorial discretion analogy is inapplicable. In any event, even under *Heckler*, inconsistency with a long practice of enforcement patterns is one of the possible exceptions to the extreme deference listed by Justice Rehnquist. See Cass Sunstein, *Review of Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653 (1985) (arguing that *Heckler* should not be read as a general rejection of judicial review of agency inaction); Ronald M. Levin, *Understanding Unreviewability in Administrative*

must indicate that prior policies and standards have been “deliberately changed, not casually ignored”⁴⁹⁹ The requirement that the agencies take a “hard look at the salient problems”⁵⁰⁰ enables reviewing courts to understand the agencies’ actions and judge their consistency with legislative mandates,⁵⁰¹ as well as assuring that the general standards will be “applied without unreasonable discrimination.”⁵⁰²

As with all matters doctrinal in this area, the application of this classic doctrine to the broadcast indecency context is complex and indeterminate. First, the extent to which the generic definition of indecency would trigger hard look review is unclear. Second, the initial determination of whether there has been an agency policy change triggering hard look review is itself contingent and dependent on the selection and characterization of the historical time frame in which agency action is to be addressed. Third, even when courts engage in hard look review, there is a built-in range of meaning in such an inquiry. Both proponents and opponents of the FCC can mount respectable arguments as to whether the rationales expressed by the Commission were or

Law, 74 MINN. L. REV. 689, 762-69 (1990) (discussing, *inter alia*, application of *Heckler* to refusals to initiate rulemaking proceedings).

499. *Greater Boston*, 444 F.2d at 852 (footnote omitted); see also *American Hosp. Ass’n v. NLRB*, 111 S. Ct. 1539, 1546 (1991) (“Given the extensive notice and comment rulemaking conducted by the Board, its careful analysis of the comments that it received, and its well-reasoned justification for the new rule, we would not be troubled even if there were inconsistencies between the current rule and prior NLRB pronouncements.”).

500. *Greater Boston*, 444 F.2d at 851; see also Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 410-25; Marianne Koral Smythe, *Judicial Review of Rule Rescissions*, 84 COLUM. L. REV. 1928 (1984); Cass Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUP. CT. REV. 177 [hereinafter Sunstein, *Hard Look Doctrine*]. The hard look required of agencies in circumstances of inconsistency is a particular example of what has come to be known as the hard look doctrine of judicial review, pursuant to which a court will review administrative policymaking with more than the traditional level of extreme deference.

There is a certain lack of clarity, however, as to whether the essence of the hard look required under the doctrine is a searching inquiry into the process used by the agency and its fidelity to statutory commands or a true review of the merits of the agency’s decisions, or both. See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 238-39 (1984) (characterizing hard look review as properly consisting of an assessment of the record’s support for agency policy rather than a review of the distributional fairness of regulation); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 526-49 (1985) (same); Shapiro & Levy, *supra* this note, at 419-22; Smythe, *supra* this note, at 1963-67 (arguing that in most circumstances, hard look review should not require agencies to discredit the factual premises of the administrative position they have rescinded); Sunstein, *Hard Look Doctrine*, *supra* this note, at 181-84 (describing both procedural and substantive aspects of hard look review). Some cases suggest that the requisite judicial review is satisfied by a judicial discernment of the footprints of the agency’s actions, see, e.g., *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2779 (1992) (Stevens, J., concurring), while other cases, such as *State Farm*, 463 U.S. 29, show the Court reviewing the merits of the agency’s action. In light of the discussion of administrative process below, this Part will focus on the merit-based interpretation of the hard look doctrine.

501. *Telecommunications Research*, 800 F.2d at 1184 (quoting *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)).

502. *Greater Boston*, 444 F.2d at 851.

were not "reasoned" according to conventional administrative benchmarks. Most problematically, because both the FCC and the Court of Appeals ignored the political context of the Commission's change of mind, the actual interpretation of the requirement of reasoned explanation had the effect of driving underground a truly complex question implicated by the shift in the Commission's regulatory approach. Even if the courts had sought to be more sensitive to the political framework of the issue by analogy to the traditional administrative law concern about agency capture, however, the attempt would likely yield no more satisfactory an analysis.

In addition to the hard look doctrine of independent judicial review of agency policymaking, administrative law currently contains the *Chevron* doctrine of substantial deference to agency interpretations of statutory terms.⁵⁰³ Pursuant to the *Chevron* doctrine, judicial review of agency interpretations of statutory terms in legislation administered by the agency in question consists of a two-step process. First, the court must determine whether Congress has spoken precisely to the issue and, if so, must simply effect the legislation's plain meaning. If Congress has not spoken so clearly, the second step requires the court to extend full deference to any agency reading of the statute that is a rational interpretation of what Congress meant to regulate. If there are several possible rational interpretations of a term, the court is to give deference to the meaning selected by the agency, even if it is not the best interpretation in the court's own view.⁵⁰⁴

503. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

The relationship between the two doctrines is complex and has been subjected to searching inquiry and critique. See, e.g., Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117-18, 1129-30 (1987) and sources cited therein. Some have argued that there are ways to make the doctrines consistent, see, e.g., Garland, *supra* note 500, at 549-53; Strauss, *supra* this note; while others can be read to claim that the apparent distinctions are unrealistic and artificial, see, e.g., Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 N.W. U. L. REV. 646, 678-80 (1988) (challenging the rationality of grounding the distinction on the difference between statutory interpretation and agency policy making).

Whatever the conceptual tensions, it seems clear that *Chevron* has not displaced hard look review. Recent scholarship questions the Supreme Court's actual commitment to the level of deference on statutory analysis theoretically entailed in the *Chevron* approach itself. See generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); see also Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 20-23 (1990) (suggesting that the applicability and extent of *Chevron* when pure questions of statutory interpretation are at issue depend on how broadly we read *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (noting the Supreme Court debate on the applicability of *Chevron* to "pure question[s] of statutory construction").

Although a fuller discussion of the issue and the large literature on the proper extent of judicial deference to statutory interpretations by administrative agencies is beyond the scope of this Article, it is clear that both the *Chevron* and *State Farm* doctrines continue to coexist, at least in those cases where the Supreme Court finds them useful. Thus, the FCC's policy with regard to indecency should be subjected to both sorts of review.

504. Recently, in *Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992), the Court held,

Applying these often-intersecting doctrines requires an examination both of the FCC's indecency policy and of its enforcement actions. As to the former, because the FCC's indecency policy could be said primarily to consist of an interpretation of the statutory terms of section 1464, it could well be argued that the matter is governed by the principles of *Chevron* only. To the extent that the *Chevron* analysis applies, the result is debatable. With regard to the first prong of the *Chevron* doctrine, one could argue that in section 1464, Congress had spoken precisely to the issue of the definition of indecency by suggesting that it could not have crafted a less vague definition. Alternatively, one could argue that Congress had not so spoken since no definition of the term had been provided or discussed in the legislative history.⁵⁰⁵ Thus, the suggestion that the statute is a precise Congressional statement replicates the same substantive issue discussed above in connection with claims of constitutional vagueness.

Under the second prong of the *Chevron* doctrine, the question of judicial deference depends on whether the FCC's definition of indecency could be considered a rational interpretation of what Congress could have meant to regulate in passing section 1464. Although the second prong of *Chevron* is a relatively easy standard to meet, this inquiry is also subject to conflicting arguments. In addition, some might argue that the interpretive format of the indecency approach, itself an issue subject to differential characterization, would influence the extent of judicial deference under *Chevron*.⁵⁰⁶

Even under the hard look doctrine, the malleability of the reasoned analysis inquiry is placed in bold relief in light of the contingent character of the circumstances triggering rationality review of agency rule changes. Whether the FCC is said to have acted consistently or inconsistently with its past policies depends, in large part, on the time frame in which the issue is addressed and the manner in which it is characterized. Thus, the period between 1978 and 1987 is not the only time frame in which to assess whether the FCC has provided adequate and rational explanations for its change in policy. If we were to look at the entirety of FCC indecency enforcement stances since 1934, for example, the agency could argue that its decision to adopt only a narrow, bright-line enforcement standard after *Pacifica* was a radical and insufficiently justified shift away from a history of interactive FCC enforcement and indus-

under the first prong of the *Chevron* analysis, that Congressional language in § 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA) was unambiguous in providing that injured workers who do not obtain employer approval of settlements with third parties forfeit all future benefits, including medical payments, from their employers. The statement proffered in the text might be considered an expansive interpretation of *Chevron* by some. See, e.g., Cass Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 523 n.4.

505. See Scalia, *supra* note 503, at 520-21 (discussing the malleability of the first prong of the *Chevron* doctrine and the question it raises as to "how clear is clear?").

506. See, e.g., Anthony, *supra* note 503 (positing that *Chevron* does not require courts to accept agency interpretations when they are expressed in informal formats).

try self-censorship.⁵⁰⁷ Surely, the agency could claim that returning to a historically consistent regulatory regime after what it considered to be a failed deregulatory experiment is not the kind of abrupt shift in policy for which the reasoned explanation requirement was intended.⁵⁰⁸ Indeed, some might argue that such an account would constitute a "reasoned explanation" given the traditional thinness of judicial review of agency action, even in the hard look context.

The doctrine of review for reasoned analysis of change is also subject to a critique of its application. The FCC's change of position on indecency in 1987 assertedly was based on the virtues of consistency and completeness, in light of the agency's obligation to enforce § 1464 "responsibly."⁵⁰⁹ In its Reconsideration Order, the Commission explained that it was broadening its enforcement strategy beyond the Carlin dirty words because narrowing the test to that litany of expletives might lead to "anomalous results that could not be justified."⁵¹⁰ Under that standard,

material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue — and, consequently, of concern with respect to its exposure to children — would have been permissible to broadcast simply because it avoided certain words. That approach, in essence, ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency. This made neither legal nor policy sense.⁵¹¹

Broadcasters argued that the Commission's pre-1987 standard was adopted in order to provide licensees with both certainty and adequate "breathing space" for programming and that the agency had not explained "why it is now necessary to regulate under an inherently vague one."⁵¹² They complained that the Commission had not identified the "anomalous results" that had occurred, had not precisely described what category of speech had

507. See *POWE*, *supra* note 3, at 162-90; *Levi*, *supra* note 36.

508. The Supreme Court's analysis in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), provides an apt analogy. There, the Court was rather deferential to the agency's decision to stop enforcing the "format doctrine," under which it had reviewed proposed changes in broadcaster entertainment formats to ensure format diversity as directed by the D.C. Circuit's decisions. Although the Court stated that its ultimate conclusion rested on the FCC's "reasonable explanation for this preference," the Court did "attach some weight" to the Commission's past preferences for market solutions to the format question. 450 U.S. at 603. The agency's shifts in policy were discounted as having flowed from responsiveness to a judicial mandate: "[A]lthough the Commission was obliged to modify its policies to conform to the Court of Appeals' format doctrine, the Policy Statement reasserted the Commission's traditional preference for achieving diversity in entertainment programming through market forces." 450 U.S. at 599.

509. 64 R.R.2d at 214; see *ACT I*, 852 F.2d 1332, 1338 (D.C. Cir. 1988).

510. 3 F.C.C.R. at 930; see also discussion *supra* text accompanying notes 438-39.

511. *In re Infinity Broadcasting Corp.*, 3 F.C.C.R. 930 (1987), *aff'd in part and remanded in part sub nom.* *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

512. Brief for Petitioners at 39, *Act I*, 852 F.2d 1332 (D.C. Cir. 1988) (No. 88-1064).

been ignored, and had not stated what considerations outweighed the ease of applying the formal, bright-line, seven-dirty-words rule.⁵¹³ Specifically, the petitioning broadcasters chided the Commission for the inadequacy of its rationale on the ground that

the Commission did not purport to find that the amount of objectionable broadcast programming had increased in the decade since the original *Pacifica* case, or that large amounts of such programming were in fact being broadcast under the post-*Pacifica* standard, much less provide convincing statistics as evidence of a problem.⁵¹⁴

Although not explicitly set out, the subtext of this argument is an assumption of an irrational and ideologically motivated change in policy on the part of the Commission. The history of the FCC's approach to indecency thus could be characterized as a "lurching" model, in which the Commission assertedly has changed policy willy-nilly, responding at least in part to varying political pressures. According to this view, the Commission's decision to return to its generic indecency standard after a decade of non-enforcement constitutes nothing more than another instance of the agency's habitual, arbitrary, and unreasoned submission to political will in derogation of its mandate to act independently and in the public interest.⁵¹⁵

Both positions can be supported, depending on the starting point of the inquiry. On the one hand, one could emphasize that consistency for its own sake is not necessarily an absolute value. That governmental actors have the power to regulate more than a core set of things does not mean that the power should be exercised if other values would be implicated and undermined thereby. The arbitrariness of government selections in the realm of sex talk could be seen as the counterweight to the value of consistency and completeness.

In contrast, one could underscore the fact that the FCC's position rested on the arbitrariness of picking only a certain subset of sex talk to regulate when so much other definitionally indistinguishable material could flourish. The FCC could claim that if the purpose of regulation is to make certain that offensive material is not broadcast to children, it is irrational to suggest that channeling the seven dirty words alone is sufficient to address the goal. Assertedly having received many viewer and listener complaints in the last decade about the indecent sexual content of broadcasting, the FCC could take official notice of the obvious increase in sexually explicit programming and argue that its reasoned analysis relied on such complaints without having to provide statistics, as suggested by the broadcasters.⁵¹⁶

513. *Id.*

514. *Id.*

515. The question of the appropriateness of political considerations in agency decision-making is addressed *infra* text accompanying note 532.

516. There is a question whether the agency could do this under the circumstances. The APA, 5 U.S.C. § 556(e)(1988), provides for a right to rest agency decisions on official notice in

The Commission could rely also on another of the multiplicity of readings available for the history of the agency's dealings with indecency. An alternative view of the history is that the agency, in its various approaches to the regulation of indecency, was simply and conscientiously interpreting its statutory mandate under section 1464, primarily in response to interpretations of Supreme Court precedent, changes in the level of sexual discourse allowed to air as a result of competitive pressures on broadcaster self-censorship, and an increasingly risk-taking attitude toward judicial reversal on the part of changed FCC membership. Far from responding irrationally to political pressures over an uneven history of enforcement, historical evidence could be read to support the claim that the agency's regulatory moves were properly synchronized with changes in social mores and the agency's legal interpretations. Indeed, the history could be read as relatively consistent, except for an unusual period of non-enforcement dictated by the agency's interpretation of constitutional limitations on its authority.

The 1987 change in indecency enforcement policy was reviewed by the D.C. Circuit pursuant to "reasoned analysis" review. The court found that the Commission "adequately" had explained why it had decided to change its enforcement standard.⁵¹⁷

Short of the thesis that only the seven dirty words are properly designated indecent — an argument petitioners disavow — some more expansive definition must be attempted. The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results. No reasonable formulation tighter than the one the Commission has announced has been suggested in this review proceeding. The difficulty, or "abiding discomfort," we conclude, is not the absence of "reasoned analysis" on the Commission's part, but the "[v]agueness . . . inherent in the subject matter."⁵¹⁸

This conclusion is an example of the malleable character of judicial review of inconsistent agency action. The court just as easily could have asked whether the FCC's enforcement decision was rational in light of the option of reading indecency in a manner coextensive with the Supreme Court's current definition of obscenity, for example.

A hard look at the application of the hard look doctrine to the FCC in matters involving changes in policy suggests that it has been wielded with varying levels of analytical rigor across the contexts in which the Commission has changed regulatory course.⁵¹⁹ It is beyond the scope of this Article to

formal rule-making and adjudication if the parties have the opportunity to show the contrary of the propositions to be officially noticed. There is a question whether this statutory requirement should apply in informal contexts to which the statute does not specifically speak. Nevertheless, official notice in the administrative context is given far greater latitude than judicial notice. *See, e.g.,* *Banks v. Schweiker*, 654 F.2d 637, 640 (9th Cir. 1981).

517. *ACT I*, 852 F.2d 1332, 1335 (D.C. Cir. 1988).

518. *Id.* at 1338 (citation omitted).

519. Indeed, the thinness of the review that occasionally has passed for hard-look scrutiny

tabulate and analyze all the instances in which changes in FCC rules have been judicially reviewed. Nevertheless, a few recent cases suggest that courts have employed rather deferential standards of review in upholding the rationality of some deregulatory moves,⁵²⁰ while engaging in more scrupulous and skeptical review in other such circumstances.⁵²¹ Indeed, the Supreme Court itself appears to waver in its doctrinal antipathy to agency changes in policy. Recently, in *Cowart v. Nicklos Drilling Co.*,⁵²² the Court relied on the "plain meaning" of the statutory language and refused to defer to an agency interpretation of a statute (on which a private litigant sought to rely) because the director of the agency changed his views on the issue after the Court had granted *certiorari*. Pointing both to prior administrative inconsistency in interpretation and to the change of official interpretation, the Court stated that "it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself,"⁵²³ particularly because the agency's failure to "speak with one voice" on the issue "further diminishe[d] the persuasive power of the Director's earlier decision to endorse the . . . questionable interpretation, a decision he has since reconsidered."⁵²⁴

Malleability in application and unpredictability are not the only problems with the reasoned analysis requirement, however. After all, this sort of objection might be made with respect to the application of many legal standards, not the least of which is the reasonableness standard common from torts to commercial law. An additional problem with the requirement is that it does

has been made evident recently in Justice Stevens' concurrence in *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). There, contending that the basis of administrative changes in policy need not be more than "reasonably discernible," Justice Stevens suggested that, under *State Farm*, the decision of the Commerce Department to include overseas residents in the census for purposes of apportioning Congressional seats among the states would be permissible despite a history of administrative flip-flops on the issue and little evidence to support the current position. *Id.* at 2787.

520. *See, e.g.*, *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (upholding the FCC's decision to decline review of changes in licensees' entertainment programming formats, leaving diversity to be promoted by market forces); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (upholding the FCC's decision that the public interest would no longer be served by enforcement of the fairness doctrine, despite claims that the agency's articulated reasons for dropping the long-standing doctrine were inadequate); *NAACP v. FCC*, 682 F.2d 993, 999, 1001 (D.C. Cir. 1982) (upholding repeal of the Commission's anti-concentration "top 50 policy" because "Congress did not compel it to adopt" the policy and because "greater discretion [should be] given administrative bodies when their decisions are based upon judgmental or predictive conclusions").

521. *See, e.g.*, *Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) (holding inadequate the Commission's market-oriented explanation for its decision to eliminate its traditional children's commercialization policy, but accepting the adequacy of the agency's shift from a comprehensive television program log requirement to that of a quarterly list of significant issue-oriented programming); *cf.* *National Ass'n for Better Broadcasting v. FCC*, 830 F.2d 270, 275-77 (D.C. Cir. 1987) (holding that the FCC's interpretation of the Communications Act's sponsorship identification requirement in connection with children's programming plainly conflicts with Congress' unambiguously expressed intent).

522. 112 S. Ct. 2589, 2597 (1992).

523. *Id.* at 2597.

524. *Id.*

not deal with the political character of the FCC's history of broadcast regulation.⁵²⁵ Thus, the starting point of the argument might be that the current hard look doctrine has not taken into account the apparent responsiveness of the indecency enforcement process to socially conservative religious groups acting in concert with the current Commission.

However, even if courts sought to address the political context of agency rule changes in their application of reasoned analysis review, such an extension of the current doctrine would not lead predictably to more determinate results than current hard look doctrine. It would also raise more questions than it would answer. What should be the role of the political context in the judicial assessment of reasoned analysis by agencies? How should the political context be interpreted? Should the interpretation of the meanings of political pressure on agencies differ depending on whether they are legislative, executive, or private?

Much scholarship in administrative law addresses the problem of administrative discretion and seeks to cabin it by calling for different regimes of accountability, ranging from stringent judicial review to executive oversight.⁵²⁶ In turn, much of the concern about administrative discretion has focused on the problem of agency "capture" by regulated interests.⁵²⁷ This concern at first might be thought to provide a useful administrative law tool to deal with the political background of the FCC's indecency rules.⁵²⁸

525. See Crigler & Byrnes, *supra* note 36 (criticizing the reasoned analysis requirement, although not in the context of a specific administrative law critique).

526. For a collection of references, see, e.g., Hirshman, *supra* note 503, at 646-75 and sources cited therein; see also CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RE-THINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990) (advocating judicial review pursuant to sound governance norms); Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 582-93 (1985) (favoring statutory interpretation by agencies over courts in situations where agencies are endowed with significant policymaking responsibilities); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991) (questioning assumptions underlying arguments that strong interest groups justify enhanced judicial review of administrative action); Sunstein, *supra* note 504 (suggesting that although the question is difficult, aggressive judicial review has increased legality, rationality, and administrative justice in many circumstances).

527. On the problem of capture by regulated interests, see, e.g., MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955) (describing agencies as having life cycles during which they are at points susceptible to capture); PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981) (discussing incentives to adopt pro-industry policies); Hirshman, *supra* note 503, at 656. For challenges to some traditional assumptions about agency capture, see JAMES L. BAUGHMAN, *TELEVISION'S GUARDIANS: THE FCC AND THE POLITICS OF PROGRAMMING 1958-1967* (1985); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 81-88 (1989); Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 291 (1986).

528. I focus on scholarly discussions of "capture" as a central problem in the administrative state because I know of no judicially articulated administrative law doctrine which explicitly considers issues of agency capture. Although a recognition of the captured character of the administrative agency may well have influenced the level of judicial scrutiny in some cases, that influence is basically left unarticulated in the decisions. See, e.g., *Board of Governors, Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361 (1986), where a unanimous Court over-

An explicit substantive review for evidence of capture raises serious workability problems. How is a court to know whether there has been an impermissible level of agency capture? Should the court be in the position of assessing the different levels of capture of different agencies before it? Should it undertake a capture analysis for each suit involving an agency, or should an agency be deemed captured after once being so found? The former could involve extraordinary complexity. The latter might be hard to square with judicial practice, either as *res judicata* or estoppel. Moreover, focusing solely on the extent to which agency action satisfies interest-group demands is not determinative of the capture question because agencies can claim to have arrived at conclusions favoring one set of interests over another as a result of their own deliberations about the public interest rather than by mere acquiescence. The procedural approach to capture is equally unavailing. Focusing on the question of viewpoint representation in the administrative process as a proxy for substantive capture determinations is problematic, if only for the reasons described below in relation to the inadequacy of rule-making proceedings to address fully the issue of indecency.

In addition, the traditional capture argument is not particularly apt in the broadcasting context. The classic version of that argument rests on the concern that, as a result of institutional incentives such as the revolving door of employment between regulators and the regulated, administrative agencies will become the handmaidens of the industries they regulate.⁵²⁹ The case of broadcast indecency presents a different problem. Here, the argument rests on

turned the Federal Reserve Board's attempts to regulate "non-bank banks" under its authority to regulate banks. The Court did not discuss, but might have had in mind as one relevant factor, the reputation of the Federal Reserve Board as very sympathetic to money center banks and hostile to upstart financial institutions. Of course, this is not to say that courts do not refer to industry influence, *see, e.g.,* *Sierra Club v. Morton*, 405 U.S. 727 (1972) (Douglas, J., dissenting) ("[F]ederal agencies . . . are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated."). Naturally, a demonstration that a regulation constituted nothing more than "an interest-group deal serving no public purpose" would likely be considered "arbitrary and capricious" under § 706(2)(4) of the APA. Sunstein, *Neutrality*, *supra* note 42, at 277. This is a very difficult standard to meet, however. Surely the FCC can make a straight-faced argument about the public interest in indecency regulation, even if initiated at the behest of the social conservatives.

529. *See, e.g.,* BERNSTEIN, *supra* note 527, at 82; EDWARD S. GREENBERG, *SERVING THE FEW: CORPORATE CAPITALISM AND THE BIAS OF GOVERNMENT POLICY* 75-76 (1974). With regard to this argument in the FCC context, much of the administrative law commentary about the Commission has focused on stories of apparently striking coziness between the FCC and broadcast interests. *See, e.g.,* ROBERT BRITT HORWITZ, *THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF TELECOMMUNICATIONS* 34-38 (1989); ERWIN G. KRANSNOW, LAWRENCE D. LONGLEY & HERBERT A. TERRY, *THE POLITICS OF BROADCAST REGULATION* 48-52 (1982); Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 *BUFF. L. REV.* 615 (1991). For example, many have claimed that the delay in the development of cable as a clear competitor to broadcasting was due, in part, to protectionist policies adopted by an agency too concerned with limiting competition for the over-the-air broadcasters it was supposed to regulate. *See, e.g.,* KRANSNOW, *supra* this note, at 51; Weinberg, *supra* this note, at 700-01.

the FCC's adoption of policies contrary to the interests of large portions of the regulated industry, assertedly at the behest of well-organized and reformist conservative decency leagues. The particular concerns explicitly fueling the objection to agency capture by regulated groups are not implicated when the capturing agents are single-issue public interest groups.

For a time, interest-group pluralism held great scholarly allure as the model for the direction of legislative and administrative organization.⁵³⁰ Some still believe in the affirmative and explicit recognition of politics in administrative law.⁵³¹ Yet many scholars have expressed doubts recently about the assumptions of parity in interest group pluralist accounts and have articulated serious reservations about a republic governed on the basis of interest-group pluralism.⁵³² An interest-group pluralist model might be even less palatable, for those scholars, in the indecency context than in the ordinary industry capture scenario because it may be hard for countervailing forces to be organized and brought to bear.⁵³³ Whatever the benefits and flaws of an interest group model in general, it seems clear that a judicial review standard grounded on notions of capture is far less administrable when applied to all interest groups

530. See, e.g., EDLEY, *supra* note 526, at 147-48; Bruff, *supra* note 500, at 210; Elhauge, *supra* note 526, at 36; Garland, *supra* note 500, at 510-11; Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

531. For example, using an approach that approves of administrative responsiveness to political agendas of the executive branch, Justice Rehnquist opined in *State Farm* that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations" and that "[a]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1982) (Rehnquist, J., concurring in part and dissenting in part), see also EDLEY, *supra* note 526, at 9, 184-99 (describing strong and weak versions of this view). According to the Rehnquist view, agency responsiveness to administration ideology is democratic because it responds to the majoritarian political mandate. This recalls arguments based on democratic theory for a default rule of deference to agency interpretations of statutes rather than independent judicial interpretations. See, e.g., Merrill, *supra* note 503, at 978-80 (discussing the basis in democratic theory of the Court's move to executive deference in *Chevron*); see also Scalia, *supra* note 503, at 512 (describing permissible policy shifts in response to changing political pressures allowed under *Chevron* if Congress has given the agency interpretive discretion).

532. See, e.g., Bruff, *supra* note 500, at 211; Elhauge, *supra* note 526, at 37; William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as Postmodern Cultural Form*, 89 MICH. L. REV. 707, 738-40 (1991) and sources cited therein; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Jerry Mashaw, *Pro-delegation: Why Administrators Should Make Political Decision*, 1 J. L. ECON. & ORG. 81, 91-99 (1985); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124-26 (1990) (collecting cites to Arrow-influenced social choice theorists who turn to administrative solutions in light of their concerns about the fairness and rationality of collective democratic decision-making processes) Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

533. On the relative advantages of small interest groups in organizing constituencies, see Bruff, *supra* note 500, at 216, 244 (citing M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 22-36 (1965)).

than when applied to regulated interests only. Application of the pejorative label of "capture" in these circumstances cannot silence the agency's argument that it arrived at the right public policy conclusion, regardless of whether it was procedurally aided in doing so by well-organized public interest groups. In turn, this leads back to the kind of substantive analysis called for by the hard look doctrine and to the problems, detailed above, of that approach. Particularly in light of the controversy, even within administrative law scholarship, on the issue of how to deal with interest-group impact on policy, no "answer" to our problem can be found in administrative law.

2. *Procedural Defects*

A different type of attack on the Commission's new approach to indecency enforcement focuses on 'procedural' grounds, primarily arguing that the agency's procedure in connection with indecency violated the Administrative Procedure Act (APA) in various particulars.⁵³⁴ The core of the procedural argument is that the Commission violated the APA by failing to undertake a legislative rule-making process replete with notice, public debate, and comment.⁵³⁵ This is questionable, from the point of view both of current administrative law doctrine and of administrative law policy.

This Article will not engage the particulars of administrative procedure or parse the text of the APA to address whether the FCC's Notice of Inquiry procedure for the adoption of its indecency enforcement standards satisfied procedural APA standards. Suffice it to say that there is a serious question as to the persuasiveness of formal and hyper-technical arguments that it did not. Supreme Court precedent suggests that, in the absence of a Congressional command, it is usually up to the agency to decide the manner in which it seeks to proceed in any given regulatory circumstance. In particular, an agency does not have to proceed by rule making if it chooses to adjudicate instead.⁵³⁶ Moreover, agencies are granted almost complete discretion in their choice of procedures for informal adjudications.⁵³⁷ In addition, the Supreme Court has warned courts not to impose extra procedural hurdles on agencies that choose to operate by informal rule making.⁵³⁸

In warning three broadcasters and simultaneously issuing a Public Notice of its new indecency policy in 1987, the FCC characterized its actions simply as the issuance of declaratory rulings designed to reduce uncertainty in the

534. Reiss, *supra* note 208, at 248-51.

535. *Id.*

536. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

537. See 5 U.S.C. § 553(b)(A) (1988); see also Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1561 (1992); Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

538. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). *Vermont Yankee* led to a profusion of scholarly literature, including Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1979).

area.⁵³⁹ (The agency had used the declaratory ruling method in *Pacifica* previously.⁵⁴⁰) On review, the D.C. Circuit Court of Appeals concluded that the FCC had “employed the informal adjudication format to promulgate a rule of general applicability.”⁵⁴¹ The court found no procedural impediment to the agency’s actions.⁵⁴²

Formal adjudicatory-type hearings in connection with rule-making proceedings, with their attendant testimony and cross-examination, are now far from the norm.⁵⁴³ With regard to the procedural requirements for informal rule-making proceedings, notably notice and comment periods, the actualities of the FCC’s proceedings on the issue of indecency since 1987 would seem to satisfy the purposes of those incidents. As the D.C. Circuit pointed out, the agency’s Reconsideration Order, issued in response to multiple petitions for clarification and reconsideration,⁵⁴⁴ read like the result of a notice and comment rule making rather than an adjudication.⁵⁴⁵ The agency considered many sets of comments in connection with its Reconsideration Order and,

539. New Indecency Enforcement Standards to be Employed to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726, 2727 (1987).

[A]lthough [the Commission] was addressing the particular facts [in each of the cases before it], the decisions will have a precedential effect on all broadcast and amateur licensees. The Commission also noted that there have been questions as to the Commission’s enforcement policy in this complicated area of the law and, through its authority to issue declaratory rulings in order to remove uncertainty, see 5 USC Section 554(e), it has sought to resolve those questions in these proceedings.

Id.

Courts often will consider the agency’s own characterization of a particular action in determining whether notice and comment procedures apply to the action. Telecommunications Research & Action Ctr. v. FCC, 800 F.2d 1181, 1186 (D.C. Cir. 1986) (discussing the FCC’s policy statement repealing certain “underbrush” regulations as general statements of policy, not subject to notice and comment). However, the agency’s decision is not controlling. A legislative rule must conform to the APA’s requirements in § 553, even if the agency had characterized it quite differently. See, e.g., Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987) (holding that the FDA’s “action levels” for contaminants in food were really legislative rules requiring APA notice and comment).

540. FCC v. *Pacifica Found.*, 438 U.S. 726 (1978); see also *ACT I*, 852 F.2d 1332, 1334 (D.C. Cir. 1988).

541. *ACT I*, 852 F.2d at 1337.

542. The court could have arrived at the same result by characterizing the agency’s action either as a general statement of policy or an interpretive rule, both of which are explicitly exempted from the notice and comment requirements under § 553(b)(A) of the APA.

543. See, e.g., GLENN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 131 (1991). The Supreme Court effectively held in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) and in *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973) that formal hearings would not be required in rule making unless they are required by the terms of the agency’s governing statute. See Carl A. Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 Nw. U. L. REV. 15, 59 (1977); Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 725-26 (1975).

544. *ACT I*, 852 F.2d at 1336.

545. *Id.* at 1337. It was by virtue of that finding that the court was able to reach various constitutional and administrative law arguments about the generic indecency standard on the merits and as a whole, rather than as applied in the individual case. *Id.*

subsequently, in connection with its Notices of Inquiry about the adoption of a total ban on indecency.⁵⁴⁶ Thus, as the agency's overall procedures appear to have been consistent with the deliberative goals of the APA, the determination of the procedural acceptability of the agency's actions should not be based on technical readings of the statute, even if such arguments could be made under the operative legislation.

Of course, this is not to say that the agency's public comment procedure constituted the kind of open-minded and free-ranging inquiry we might prefer in administrative agency review. Indeed, the various FCC documents describing the agency's approach to time-channeling might be read to suggest that the Commission effectively had made up its mind with regard to the issue and was simply seeking some additional public support for its position.⁵⁴⁷ Barring an explicit, applicable requirement of such open-minded public discussion in the current law, however, it is questionable whether faulting the FCC on a purely technical, doctrinal basis is likely either to be successful or to promote "real" deliberation.

C. *Toward a Regrounding for Constitutional and Administrative Approaches*

Having suggested that there is potential uncertainty and manipulability in the application of existing rubrics of constitutional and administrative law to the question of broadcast indecency does not end the inquiry or suggest that such doctrines are in fact useless in deciding cases.⁵⁴⁸ Legal doctrine does not fail simply because it does not satisfy some aspirational ideal of certitude and ineluctability in application. To the contrary, as a practical matter, doctrines like vagueness, hard look, and administrative due process often serve as effective and substantial constraints on administrative action, both on remand in particular cases and prospectively, by setting standards for future cases. Moreover — and most importantly — the permeability and uncertainty of such doctrines allow for new interpretations. The point, then, is not that constitutional and administrative law doctrines should be dispensed with in the area of indecency. It is, rather, that further doctrinal argument about broadcast indecency is likely to prove fruitless if it fails to take into account the ambiguous and multivalent meanings of sex talk in our cultures.

546. The latest Total Ban Report, 5 F.C.C.R. 5297 (1990), indicates that the agency considered numerous comments regarding the definition of indecency. In an earlier Notice of Inquiry issued to compile a record for a total ban, the agency stated that the definition was not in issue, yet asked challengers of its definition to articulate their own proposals and explain why they should be adopted in lieu of the agency's approach. 4 F.C.C.R. 8358 (1989).

547. See, e.g., Passler, *supra* note 356, at 150-52.

548. For critiques of critical analyses relying on the indeterminacy of doctrine, see, e.g., Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); John Stick, *Can Nihilism be Pragmatic?*, 100 HARV. L. REV. 332 (1986). Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); cf. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

A full engagement with the underlying dilemma described in Part I of this Article would make possible a new and much richer form of vagueness argument; a brief sketch of its outlines would be in order. Having recognized that there is a spectrum of vagueness in language and that a contrast between vagueness and clarity per se is not a particularly useful basis on which to apply legal doctrine, we might nevertheless recharacterize the important questions as why we think that something is more or less vague and whether we think that the vagueness is inevitable.

The D.C. Circuit's way of positing the substantive choice in the application of vagueness doctrine does not adequately address the nature of what is inherently vague in the FCC's standard for broadcast indecency. At some level, indecency is amorphous because, in our heterogeneous culture, it is currently unrealistic to seek an overall consensus as to what is indecent. Moreover, meaning, as noted above, is rooted in cultural practices and understandings. In our culture, sex talk implicates countervailing practices. It thus has different and often inconsistent social meanings. Because sexual statements will likely have multiple meanings, their fundamental ambiguity in today's social conditions suggests that any attempt to regulate will necessarily lack clarity and fairness. We might conclude, then, that the FCC's definition of indecency is subject to attack for vagueness in a far deeper sense than the glib argument that, after all, everything is vague. The FCC's approach to indecency is problematically vague precisely because it attempts to regulate a social form that is itself deeply equivocal and ambiguous in today's social conditions. Once we see the underlying dilemma, a truly "hard look" is likely to produce even more ambiguity, rather than some reasoned basis for the meaningful control of administrative actions.

The issue of Howard Stern is a case in point. Stern's programming is puerile in its anatomical and scatological references. Yet it is also virtually always political and tied to some commentary on current events.⁵⁴⁹ I have heard respectable and progressive academics say that the program's political commentary often rivals and sometimes even exceeds in acuity and sophistication the coverage of National Public Radio. This is not to deny that the programming is also often sexist, racist, and homophobic. Although Stern seems to pride himself on being an "equal-opportunity insulter," some groups do seem to have more such opportunities than others.⁵⁵⁰ Nevertheless, in more serious moments, Stern can publicly say about Colorado's anti-gay referendum, for example, that he finds the voters' refusal to accept homosexuals as people to be "frightening."⁵⁵¹ Stern sends a multiplicity of messages.

To some extent, in expressing cynicism, mocking authority, and displaying what is taken for independence of mind, Stern may express many people's sense of disengagement from, and even opposition to, governmental, social,

549. See discussion *supra* text accompanying note 403.

550. Pareles, *supra* note 45.

551. *Id.*

and political forces to which they feel subject. As one journalist puts it, Stern is “our collective high-frequency id.”⁵⁵² In the abstract, this embodiment of resistance may seem empowering. Yet Stern’s program is likely to be understood differently by different audiences. For example, he ties his manifestos of cynicism and aggression to comments that are threatening for some (such as women, gays and lesbians, and Blacks) and comforting for others who rely on them to confirm their prejudices. *Lesbian Dial-a-Date* and *Guess Who’s the Jew* are subject to different interpretations and effects, depending on the audience culture. And while one newspaper editorial can salute Stern for airing an interview with a Marge Schott impersonator who salted her comments with “vile racial epithets and insults” precisely because the mock interview “made a point about racism in a way no nice respectable news story could,”⁵⁵³ another can question the extent to which we can expect true reevaluation from people living in a culture still rife with prejudices, subtext or otherwise.

Admittedly, contradiction and complexity plague all sorts of social issues subject to regulatory oversight. It would be a strong stance indeed — and one that I am not prepared to take — to suggest that there should therefore never by any regulation in areas involving polyvalence and contradiction. If that is the case, why should broadcast indecency be exempt from regulation because it too is ambiguous? One possibility is that our culture treats sex and gender as implicating such fundamental and constitutive matters that the multiplicity of meanings constructed in talk about them is more intense and contradictory than in many other areas of social life. Yet another (not mutually exclusive) possibility rests on the presumption of press- and speech-protectiveness that is already deeply a part of our First Amendment tradition. A simple reliance on a First Amendment tradition should not lead us to embrace deregulation by reflex, however. The whole point of revealing the ambiguity of the social role of sex talk is to demonstrate the necessarily imperfect character of *any* regulatory solution in current times.

Professor Post has suggested that, through negotiation in the sphere of public discourse, a heterogeneous society dedicated to democratic structures can arrive at the proper boundary between robust and challenging public discourse and the ground norms of civility that will permit such discourse to flourish.⁵⁵⁴ The question, then, is whether the ground norms of administrative law can be mined and reinterpreted to provide a forum for such structured public discourse with respect to sex talk.

We could attempt a reclamation of administrative law by arguing that the

552. Andrea Sachs, *In Defense of Bad Taste: It’s a Relief in Grim Times*, L.A. TIMES, Nov. 27, 1992, at B5.

553. *Howard Stern and the FCC*, WASH. POST, Dec. 19, 1992, at A18 (editorial).

554. Post, *The Constitutional Concept*, *supra* note 41. While I do not take Professor Post to be suggesting a single, unchanging boundary, he does seem to believe that some accommodation is possible if we clearly articulate what is at stake in public discourse. *Id.* at 683; *see also* Post, *Racist Speech*, *supra* note 490, at 288 (“[T]he boundary is inherently uncertain and subject to perennial reevaluation.”).

FCC should have conducted full-fledged hearings on the subject of indecency before deciding to adopt a stringent enforcement mode, not because of the need to comply technically with the APA but, rather, in order to understand the full scope of what is at stake in the indecency issue and to allow for debate reflecting all points of view. This kind of an argument for rulemakings effectively rests on a two-pronged goal: to promote both the ventilation of a wide spectrum of viewpoints and the achievement of better, more informed and expert truth-finding.

While there is much to recommend public debate on issues of social importance, the argument for debate in the current administrative agency context is problematic. Others have already described the deep flaws in the operation of notice and comment rule-making processes for the development of civic discourse.⁵⁵⁵ The actual processes of informal rule making, depending as they frequently do on "insider" input, can crystallize agency positions before the process is even opened up for public comment.⁵⁵⁶ Indeed, perhaps the fact that rule-making proceedings are necessarily "adversarial" in nature, with pro forma written comments commonly ignored by the agencies, in fact promotes absolutist ground-claiming rather than open-minded debate or a will to reach consensus.⁵⁵⁷ History provides numerous examples of situations in which administrative agencies, after soliciting public input, fail to consider the resulting comments.⁵⁵⁸

In addition, most people do not get involved in the debate at the Commission level. In light of the fact that administrative hearings often are not televised, it is equally unlikely that large segments of the population would become engaged in the debate indirectly, through television viewing.⁵⁵⁹ These social realities should make us wonder about the extent to which proposals of in-depth administrative inquiry into indecency would really result in widespread debate in any socially consensus-building sense.

Even if such debate were possible as a practical matter, how would we

555. See, e.g., Seidenfeld, *supra* note 537, at 1560-61.

556. *Id.* at 1560.

557. See *id.* at 1560-61 ("[I]nformal rulemaking often does not generate true discourse but rather encourages participants to pursue their private interests single-mindedly."); Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (criticizing rule making as a political and overly adversarial enterprise).

558. Mary C. Dollarhyde, *Surrogate Rulemaking: Problems and Possibilities Under the Administrative Procedure Act*, 61 S. CAL. L. REV. 1017, 1019 & n.17 (1988) (describing both the general issue and a specific instance in which the FCC called for two days of hearings in 1972 with regard to the adoption of cable rules, ultimately only to rubberstamp an industry compromise); cf. Garland, *supra* note 500, at 583 (describing efficiency problems of agency proceduralism).

559. Network news programs are notoriously skimpy in their coverage of events at the administrative agency level. Cable sources, such as C-SPAN, have many other Congressional matters to cover and, in any event, only reach areas where cable is available and subscribers pay the cost of the service. Cf. STEPHEN HESS, *THE GOVERNMENT/PRESS CONNECTION: PRESS OFFICERS AND THEIR OFFICES* 106 (1984) (discussing administrative agencies and departments with little press contact).

decide which issues merited a thorough public debate before new rules could be adopted? Clearly not all rules would. Some rules implicate fundamental civil and political rights. Others can have profound effects on the health and safety of the public. Yet others may have multi-billion-dollar impacts. Still others, while important, do not merit national soul-searching. Who should make that decision? By what standards? At the very least, a substantial revision of the APA would be needed before such a doctrine could be applied, even if we think the idea has merit.

Most importantly, it is likely that "real" debate about indecency would not have led to a resolution grounded on expertise-based directives. Rather, such open discussion probably would have exposed starkly the ambiguities and social contradictions posed by the problem of broadcast sex talk. Indeed, FCC regulation of broadcast indecency may well be a striking counter-example to the recent scholarly suggestion of the administrative agency as the possible locus for a civic republican revival, with an invigorated public debate achieved through the reclaimed bureaucratic state.⁵⁶⁰

It is sometimes true that talking about problems aggrandizes and ossifies them and increases the difficulty of negotiating around them. Compromise is only possible when the parties to the negotiation believe that they hold certain values and norms in common and assume that they can arrive at a consensus in which each side will leave the table with something. It may well be that sometimes, and on some subjects, public debate is counter-productive, or, at least wholly non-productive.⁵⁶¹ Is indecency one of those subjects? At the very least, we are sure to remain unsatisfied if we relegate the decision to a flawed administrative process. After all, the institutional context of the FCC's indecency policy after 1987 appears to suggest a set of decisions about the extent of tolerance for uncivil speech derived by an administrative agency in cooperation with a community for whom civility norms trump virtually all democratic arguments for critical interaction.

CONCLUSION

After nearly a decade of regulatory quiescence undergirded by a narrow proscription on the broadcast of seven specified dirty words, the FCC of the

560. See generally Seidenfeld, *supra* note 537; see also Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 834-47 (1993) (articulating a general critique of civic republicanism theory, including skepticism about its call for dialogue and consensus); Pildes & Anderson, *supra* note 532, at 2163 (describing political incommensurability and noting that "[s]ocially shared norms of rational argument might exist, but they do not suffice to narrow the disagreements among the public or to indict one of the contending viewpoints with irrationality").

561. A strategist might argue that because of the difficulties involved in calling for such open public debate on the issue, a requirement to proceed by formal rule making would prompt the agency to forgo such action in favor of regulation by the market. This would promote a great deal of speech-protectiveness by default. However, this level of unevaluated indecency-protectiveness might actually be worrisome. At the very least, it would seem to be too indirect a way of arriving at the decision not to regulate.

past five years quietly has been applying a sweeping definition of indecency in order to "clean up" the broadcast airwaves. Citing the "inherent vagueness" of any responsible generic definition of indecency, the Commission has attempted to forestall any constitutional critique of its generic standard by relying on a tailored, case-by-case, assertedly contextual method of analysis and neutral decision making.

The reality, however, is that the Commission applies its policy conclusorily, acontextually, and even inconsistently, in an ambivalent practice suggesting that it simply knows indecency "when it sees it." When the agency's decisional factors are examined at face value, they reveal themselves to have characteristics easily amenable to conservative tilt.

Of even greater importance is the fact that a purely doctrinal assessment of the Commission's claim to contextual "common-law" decisionmaking is incomplete in ignoring the far more complex problems raised by indecency enforcement. The question of broadcast indecency is part of a larger social debate between pluralists and social conservatives over conflicting conceptions of the social and individual good, particularly as they relate to sexuality, privacy, and social diversity. To call certain speech indecent, then, is to engage fundamental questions as to the liberating character of talk about sex and the connection between sexual expression and diversity, pluralism, and the inclusion of minority voices.

A richly contextualist consideration of the social settings of broadcast sex talk makes evident the contradictory, ambiguous, changeable, and complex role of sex talk in social life — a complexity that the extreme pluralist and social conservative arguments fail to capture. To further complicate matters, a searching contextualist approach reveals the extent to which the FCC's own processes lend themselves to use by organized and intolerant groups anxious to foreclose debate on sexual self-expression.

An attempt fully to describe the contexts of broadcast indecency would undermine the effectiveness of the FCC's claims to contextuality. By stubbornly refusing to look beyond platitudes about the fear of indecency's harmful effects on children, the Commission fails to recognize the difficult issues about individual empowerment, cultural meaning, and social heterogeneity that are often raised by its amorphous rules on sexual expression. It also fails to acknowledge the dangers of the particular political and institutional contexts of its increasingly stringent enforcement of indecency rules. Available doctrine, whether in constitutional or administrative law, provides neither a satisfactory description of the problem of indecency nor a clear direction to the FCC on how to solve it.

Where does that leave us? To start, we must recognize that indecency is a particularly hard social question. This Article has sought to show that sex talk can have a multiplicity of social meanings and both liberating and oppressive characteristics, often simultaneously. Sexual statements accrue meaning from cultural practices and will therefore have multiple (and sometimes incon-

sistent) meanings to the extent that they reflect different cultural customs and norms. So, by definition, any single socio-legal response will be only half-satisfactory; no legal regime is indisputably "right" in its approach to this kind of problem. In a world in which many of us no longer believe in the availability of true moral consensus on contested issues relating to matters like sex, we must be satisfied with troubled, partial, and ultimately contestable answers.

This does not close the inquiry, however. We are still left with the question of what, if anything, should be done about indecency on the air. Because sex talk is not an unambiguous phenomenon and there cannot be a "right" approach to it, both regulation and governmental non-intervention can be rationalized in the indecency area. Thus, the real-life effect of this can be an uncomfortable toleration of the status quo, whether it be regulatory or deregulatory in character. While the pro-speech presumption of our First Amendment tradition would suggest leaning toward non-intervention in the rough and tumble of broadcast speech, there are good reasons to be troubled by that response. Or, put more optimistically, the recognition of complexity and contingency can allow the troubled but resolute activity of governmental experimentation, fully cognizant of the uncertainty of things. In either case, however, both regulating or refusing to regulate amount to the regime of the third-best, always unsatisfactory but hopefully open to reexamination and change as circumstances warrant.

Yet we could say that the contradiction pointed out in this Article is in fact more localized and less intractable than at first appears. It is not in every instance that broadcast sex talk will have both empowering and subordinating characteristics, after all. It may be the case in some rap, for example, but is not necessarily so in other contexts. Moreover, that a song like *Penis Envy* can receive airplay on a shock radio program does not mean that it will be understood by the largely male listening audience as the feminist challenge I hear.

Perhaps, then, the answer is to require the FCC to enter into a far more seriously contextual analysis of the problem and really do the kind of case-by-case assessment that might reveal where the contradictions and intractabilities really lie. The FCC could then regulate in situations in which meaning is not so contested, on the basis of some open articulation of what practices and meanings it is seeking to regulate. Even if such a role for the Commission were not rendered hopeless by the culturally contingent meanings of sex talk, and even if it did not undermine many of our most deeply held modern beliefs about the state's role in the regulation of speech under the First Amendment, it would nevertheless present insuperable problems of application in the current FCC context. After all, the likely pattern of this FCC's enforcement can be seen in the extensive description above, both of the Commission's cases and of the institutional context in which the issue of indecency enforcement arises in the first place. Thus, I propose a troubled deregulation in this area, not because that is the ideal solution, but because it arises in the context of a non-ideal administrative world.

My rationale for that position is neither the common, market-oriented justification for deregulation — the notion that people should be given their preferences in broadcasting, whatever they may be — nor the other arguments explored above about the potentially political character of talk about sex, the culturally skewing effects of the current regulatory regime, or the overall benefits of social diversity. Rather, the change in the institutional context of indecency regulation — the growing influence of socially conservative pressure groups — enhances my concern about the influence on administrative agencies of a single interest group's viewpoint on a matter of such social controversy and importance. Any hope that the administrative agency context could serve as the groundwork for a self-conscious, rational, and deliberative process of discussion and consensus-building on important issues is cast into question when the administrative review process becomes deeply infused with a particular viewpoint and agenda. This is all the more worrisome when that viewpoint is intolerant of the self-expressive potential that broadcast "indecency" might afford for some. Yet, because of the potentially harmful characteristics of much broadcast sex talk, my proposed deregulatory approach should constantly be open to debate and revision, depending on what happens to sex talk and the FCC.

It is possible that, in the absence of governmental steering, the content of some of the currently indecency-laden aesthetic forms will change over time. Thus, the misogyny of rap may well recede into the background as the form evolves and more rappers focus self-reflexively on some of the music's early sexism. As the talk show potentially becomes a new vehicle for more direct democracy, real public discourse, and an empowered electorate,⁵⁶² we might hope to see a change — a less conservative political development — in the shock radio format. Or perhaps a technological solution, like those available for cable, could take the sting out of broadcast indecency by limiting its availability to children without imposing too high a general cost.

However, these beneficial results are far from predictions; we cannot foretell the effects either of FCC deregulation of indecency, or of its regulation. Nor is history per se a satisfactory guide. One reading of the history of indecency regulation is that indecency of an increasingly problematic sort flourishes when the FCC has specifically committed itself to a narrow and effectively *laissez-faire* regulatory regime. If history is any guide, then, this reading would suggest that a deregulatory experiment might lead to an in-

562. For discussions of such changes in the use of media formats in the most recent presidential campaign, see, e.g., Tom Fiedler, *Nomination by Talk Show Startles Pundits*, MIAMI HERALD, June 7, 1992, at C5; Carl M. Gannon & Mark Gunther, *Hopfuls Turn Up on TV Talk Shows*, MIAMI HERALD, June 10, 1992, at A1; Elizabeth Kolbert, *Political Candidates and Call-In Shows: When the People Want to be Heard*, N.Y. TIMES, June 10, 1992, at A20; Elizabeth Kolbert, *Technology Brought in To Personal Touch*, N.Y. TIMES, June 9, 1992, at A25; Elizabeth Kolbert, *Whistle-Stops a la 1992: Arsenio, Larry and Phil*, N.Y. TIMES, June 5, 1992, at A18; For a less optimistic view of the phenomenon, see, e.g., Lili Levi, *Book Review: Challenging the Autonomous Press*, 78 CORNELL L. REV. 501, 538-41 (1993).

crease in the amount and explicitness of indecency. Yet, alternative causal readings of the history are available. The bottom line is that developments in broadcasting, popular taste, and mass culture are part of complex interactions with legal rules and administrative enforcement policies. No one element holds constant while the others change.

This should not leave us unduly dissatisfied, however. The search for fully comfortable and unambiguous prescriptions is fruitless in hard cases. At the very least, a stance conscious of the deeply problematic character of broadcast indecency and self-conscious about its own adequacy is greatly preferable to the kind of question-begging, child-protective arguments reflexively marshalled by the Commission in support of its approach to indecency on the air.