

Indecency, Content Regulation and Cultural Policy:
Defining – Not Defending – Indecency

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This is Draft Version 1.0. Before the TPRC Conference, I will add and conform citations and hyperlinks and expand several of the sections.

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I. Premise

Unlike other countries with government organs explicitly in charge of establishing and administering cultural policy,¹ the United States has no such entity, and has no comprehensive domestic statement of cultural policy.² This is not to say that the U.S. lacks a cultural policy. Rather, the United States’ cultural policy is fragmented and ad hoc both in substance and administration.³ Nevertheless, in the enforcement of mass media policies such as indecency there are important clues as to what constitutes the United States’ cultural policy. This paper relies upon an empirical exploration of indecency enforcement by the Federal Communication Commission (“FCC”) to suggest insights on U.S. cultural policy and how a cultural policy shaped by indecency enforcement may come into conflict with other important values such as localism and diversity.

¹ For example, France has a Ministry of Culture and Communication and Colombia has a Ministry of Culture.

² The United States is an adherent to treaties recognizing cultural rights, for example, the International Covenant on Economic, Social and Cultural Rights (text available at http://www.unhcr.ch/html/menu3/b/a_ceschr.htm), but this outward looking type of statement of principle is different from having a coherently stated and administered official domestic policy on culture, cultural rights or cultural policy.

³ Bradford, G., M. Gary, et al. (2000). The politics of culture : policy perspectives for individuals, institutions, and communities. New York, New Press : Distributed by W.W. Norton.

II. Conceptual Framework

Cultural policy traditionally refers to organized institutional efforts to preserve cultural artifacts and evidence of cultural traditions, as in government supported museums, or through funding efforts, as through the National Endowment for the Arts (“NEA”).⁴ This paper postulates that equally important indicia of cultural policy, yet far more troublesome, are efforts to define cultural policy by means of law enforcement actions against mass media outlets with first amendment rights. This paper postulates that looking at trends over even a period as short as ten years can be revealing of the content of U.S. cultural policy.⁵

Another problem that emerges from administering cultural policy via law enforcement actions is the possibility of conflicts with other elements of cultural policy stated elsewhere in law or policy. These conflicting policy values include, for example, localism, diversity (in content, format and ownership, for example) and competition in newsgathering.⁶

It is possible that perceived trends in indecency enforcement will exert a chilling effect on first amendment expression, a problem by itself, but even worse because it may occur at the expense of other policy goals. For example, live local news broadcasts might well advance the policy goal of localism, but broadcasters might be reluctant to invest in such broadcasts if they thereby risk exposure to fines if the broadcast inadvertently includes objectionable material.

III. Research Question

What does an analysis of FCC indecency complaints, both those dismissed and those acted upon, reveal about the evolving cultural policy of the United States? Based upon the answer to this question, the paper will explore whether the trends are consistent with other prevailing or authoritative statements of cultural policy as may be found in statutes, administrative law or treaties.

⁴ Bradford, 2000

⁵United States. Congress. House. Committee on Energy and Commerce. Subcommittee on Telecommunications and the Internet. (2004). "Can you say that on TV?" : an examination of the FCC's enforcement with respect to broadcast indecency : hearing before the Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce, House of Representatives, One Hundred Eighth Congress, second session, January 28, 2004. Washington, U.S. G.P.O. : For sale by the Supt. of Docs. U.S. G.P.O.; Lipschultz, J. H. (1997). Broadcast indecency : F.C.C. regulation and the First Amendment. Boston, Focal Press.

⁶ Einstein, M. (2004). Media diversity : economics, ownership, and the FCC. Mahwah, N.J., L. Erlbaum Associates.

IV. Methodology

The methodology employed is to analyze indecency decisions of the FCC since the establishment of the Enforcement Bureau in 1999 to discern relevant trends and to seek insights about the consistency of the trends with other cultural policies that the FCC has articulated with respect to broadcast media. The convenience of this data set is that it is available on line from a free website. The limitation of this data set is that it looks back over a small number of years. Yet, these most recent precedents and trends are probably the most relevant for broadcasters seeking to conform their behavior to current norms and expectations of the FCC.

V. Defining Indecency and Explaining the Link to Cultural Policy

A. Legal Authority to Police Indecency

The government's underlying statutory authority to police and punish indecency comes from 18 U.S.C. §1464 of the Communications Act of 1934, as amended, (the "Act") which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication." Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the FCC is authorized to take administrative action against licensees that broadcast such language or material. Section 503(b)(1)(D) provides

Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have violated any provision of section 1304, 1343, or 1464 of title 18, United States Code; shall be liable to the United States for a forfeiture penalty.

The Commission, in its administrative decisions, has "defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."⁷ Yet the first amendment prohibits a total ban on indecent language or material; the government may only impose time, place and manner restrictions that are narrowly tailored to an acceptably defined governmental interest. The FCC has offered the objective of protecting minors from exposure to indecent language or material as such a governmental interest. The courts have recognized this objective as a compelling governmental interest, and have upheld the FCC's rulemaking efforts to ban the broadcast of indecent material at those times of day when there is a reasonable risk that children may be in the audience.⁸ Thus, the courts have upheld a regulatory scheme that creates a safe harbor permitting the broadcast of indecent material between 10:00 p.m.

⁷ See *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)(citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁸ See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

and 6:00 a.m., deeming such an approach as sufficiently narrowly tailored to serve the government's compelling interest in protecting children from exposure to such material.⁹

B. Implementation of Authority to Regulate Indecency

The FCC's administrative decisions regarding indecency, read together, reveal general rules concerning where the FCC regards licensees as having crossed the line and broken the law. Many of these guidelines are summarized in the FCC's 2001 Policy Statement in Indecency,¹⁰ though the FCC has been careful to emphasize that determining whether a particular broadcast is actionably indecent is highly fact specific.

At the most obvious level, explicit use of language that refers to sexual or excretory organs or functions is often deemed indecent. Yet, because the FCC's analytical process requires evaluation of the context of the material, even such explicit language may not be deemed indecent where, for example, it is uttered in the context of sex education or a bona fide discussion of improving intimate (often referred to in the jurisprudence as "marital") relations. The FCC has been quick to disregard sophomoric attempts to claim that discussions of sex acts that do not have a bona fide educational context are not indecent simply because they may be framed by a surface discussion of what might improve a marriage.

In addition, explicit utterances of expletives relating to sexual or excretory organs or functions do not automatically lead to a finding of indecency. The FCC has so found when the utterance was used fleetingly and, perhaps accidentally, for example, in reaction to on air mishaps. Nevertheless, the use of such language, even if fleeting, may be actionable if, in context, it is patently offensive.

Inversely, actionable indecency need not include explicit references to sexual or excretory organs or functions. Innuendoes and double entendres that are clearly understandable as references to sexual or excretory organs or functions are often found indecent. This class of utterances crowds the field among recent FCC administrative cases, as might be expected.

Yet these guidelines concerning what has been deemed indecent belie the necessity that someone, or some group of people, at the FCC have to decide whether material complained of is actionable because it is patently offensive under prevailing community standards. This introduces multiple elements of subjectivity.

⁹ See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 701 (1996).

¹⁰ Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd 7999, 8015 (2001)(¶ 24)("Indecency Policy Statement").`

First, what is the community's standard? The FCC has hewn to the line that it should apply a national standard when evaluating broadcast complaints, even though most complaints are generated by local, non-syndicated broadcasts. Boilerplate language in the FCC's Notices of Apparent Liability ("NALs") recites that this approach is permissible because the Supreme Court has endorsed the use of community standards that conform to no particular geographic boundary.

Second, who speaks for the community? At the outset of any enforcement proceeding in the area of indecency, only a single complainant need speak up. But the FCC recites in its Indecency Policy Statement that it applies the community standard in a way that somehow averages the viewpoints of citizens and looks at the material from such a viewpoint, rather than the perspective of an exceptionally sensitive listener or viewer.

The FCC offers no empirical basis for explaining how it comes to understand this average viewpoint, neither in the Policy Statement nor in its individual determinations in specific cases. It does not offer, for example, polling or survey data, nor even information collected as part of an administrative record, to demonstrate how it came to this understanding. It appears, by contrast, that what the FCC actually does is compare incoming complaints to its existing precedent, and then attempts to handle the complaint in a way that is explicably consistent with prior precedent. In any event, disclaiming an intent to apply a "sensitive listener" or "sensitive viewer" test is counterintuitive in the context of the stated goal of protecting children – presumably the group most sensitive and vulnerable to exposure to indecent language and material, which is why they purportedly require protection.

This would suggest a reassuring constancy in the administration of indecency policy, which the vast run of cases suggest is actually present. Coarse discussions of sexual adventure and jokes relying on the perception of humor in child abuse and incest are consistently ruled out of bounds. But cases involving an element of political speech, however crudely articulated, and those involving ethnic, cultural and regional differences, are where consistency matters most in protecting first amendment rights, and where it is most at risk of compromise when subjectivity plays a significant role in deciding what is indecent.

The reason that the stakes are particularly high with respect to these areas – ethnic, cultural and regional differences – is that the FCC's rules and policies with respect to broadcast ownership state as one goal the objective of maintaining diversity. Scholars have identified several different types of diversity that may be worth promoting, and content diversity is one of them. Einstein argues that the rules of media ownership and their limitations on concentration are mostly elaborate proxies for nurturing what the government cannot directly mandate – diversity in content. Since the government cannot require broadcasters to offer a specific format or content, she argues, it instead has limited the extent to which media outlets can be concentrated in the hands of common owners. Diversity of ownership, it is hoped, leads to a diversity of voices, which in turn leads, it is hoped, to diversity in content.

But, Einstein argues and convincingly demonstrates, this strategy has not worked, and it explains why many radio stations in the same market observe the same format and why certain genres of programming, like reality television, dominate prime time. It has not worked because broadcasting is advertiser supported, and broadcasters are naturally attracted to formats that attract advertising. Broadcasters naturally gravitate toward formats and programming genres that are appealing to advertisers. Advertisers, for their part, are naturally attracted to programming that affords them the most efficient, effective exposure to audiences whose prevailing demographic characteristics make them the most likely customers or patrons of the advertisers' products and services. Thus, as long as this link between advertising and broadcasting exists, she argues, content diversity is unattainable.

Nevertheless, the FCC soldiers on through countless renditions of rules limiting and redefining the limits of media ownership, volleyed back and forth from the agency to the courts. The courts have questioned the reasoned basis on which the FCC has set its proposed limits, despite the FCC's efforts to introduce empirical evidence into the process by means of the Diversity Index. At this writing, the FCC is reconsidering the media ownership limits in light of the most recent remand from the United States Court of Appeals for the District of Columbia Circuit. The Diversity Index was a creation of the prior leadership of the FCC, under Chairman Powell, and it is not yet clear whether the current leadership, under Chairman Martin, will continue to employ this methodology. Nevertheless, it is reasonably predictable that the current Commission will state some limits on media concentration, with some rationale based on the public policy goal of diversity.

Promoting diversity of ownership as a proxy for diversity of content does not require a defense of the broadcast of indecent language or material, or a liberalization of enforcement policy with respect to, indecency enforcement. The argument of this paper is simply that patterns of enforcement in indecency may create a cultural policy that is less hospitable to other values that have been identified as important to cultural policy.

C. The Enforcement Process

The FCC's enforcement procedure with respect to indecency entails several steps. Since the FCC does not monitor broadcasts, a listener or viewer must initiate a complaint. Generally, the FCC's process requires three components:

1. a full or partial transcript or recording of the broadcast, including pertinent excerpts
2. the date and time of the broadcast
3. the call sign of the radio or television station involved

In practice, even a fragmentary reconstructed transcript appears sufficient to satisfy the FCC's requirements for making out an actionable complaint, a reasonable

accommodation to the practical circumstances in which many listeners and viewers find themselves when they are exposed to the material they find offensive. The FCC's website points out to visitors that while specificity is required in allegations of indecency, there are numerous examples of cases in which the FCC has fined broadcasters even though there was no transcript of the broadcast attached to the complaint. The website even helpfully cites and links to those examples. In a way, this leniency in pleading makes sense. Drive time radio, a major generator of indecency complaints, does not lend itself to listeners recording or writing down what they hear. But, as described below, the broadcaster has an opportunity to affirm or rebut the accuracy of the complainant's allegations as to the content of the broadcast.

If the complaint fails to furnish the basic elements of an actionable complaint, or if the offending material was broadcast during the safe harbor hours of 10 p.m. to 6 a.m., the FCC typically dismisses the complaint by letter to the complainant. If the complaint does meet the bar of providing evidence of a broadcast during non-safe harbor hours and contains potentially indecent language or material, the staff reviews the evidence to determine whether it is "patently offensive". If so, the staff decides whether further enforcement action is appropriate. Possible actions or dispositions include:

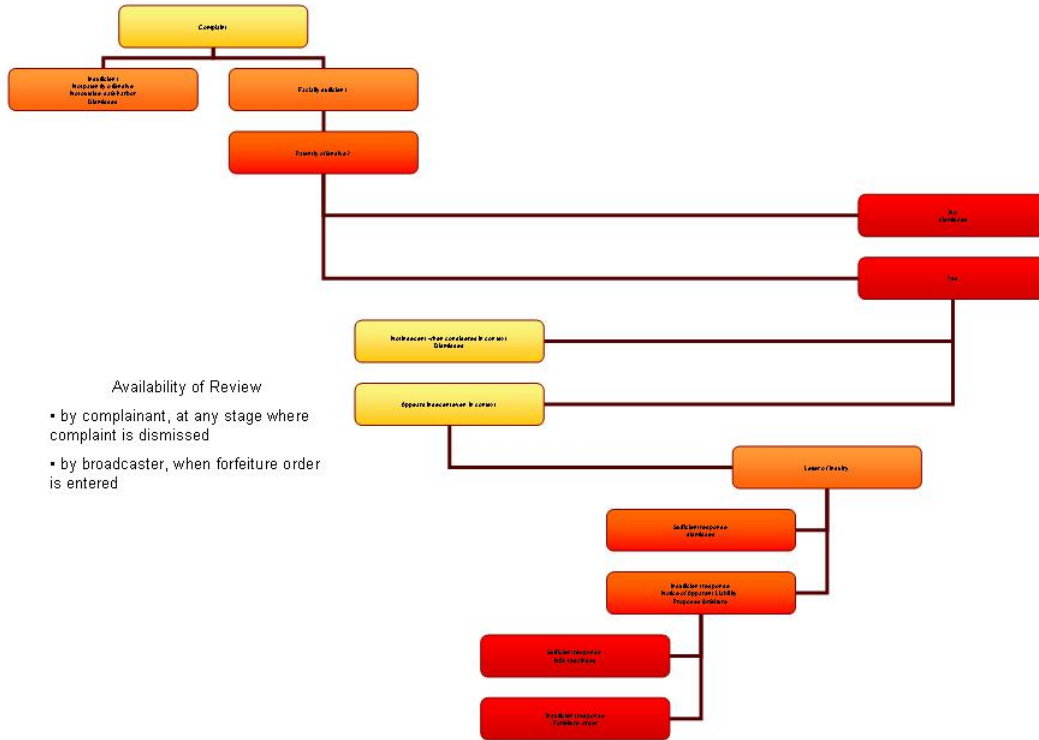
- (1) denial of the complaint by staff letter based upon a finding that the material, in context, is not patently offensive and therefore not indecent;
- (2) issuance of a Letter of Inquiry (LOI) to the licensee seeking further information concerning or an explanation of the circumstances surrounding the broadcast;
- (3) issuance of a Notice of Apparent Liability (NAL) for monetary forfeiture; and
- (4) formal referral of the case to the full Commission for its consideration and action¹¹

In the event of the issuance of an LOI, the FCC contacts the broadcaster to ask it to verify the content of the material that the complainant alleges was broadcast, and to confirm that the broadcast occurred during non-safe harbor hours. The broadcaster is afforded an opportunity to provide an alternative certified transcript of the broadcast, which the broadcaster often waives, thereby acknowledging that the information provided by the listener or viewer is materially correct.

If the FCC issues an NAL, the broadcaster may attempt to rebut the Commission's stated reasoning for its determination of apparent liability. If the broadcaster is successful, the NAL is dismissed. If not, the Commission enters a forfeiture order requiring the broadcaster to pay the specified amount.

¹¹ FCC Indecency Policy

Administrative review is available in the form of an Application for Review for decisions entered by the staff upon delegated authority from the Commission, and in the form of a Petition for Reconsideration for decisions entered by the Commission. The following chart summarizes the flow paths of the enforcement process.



One of the ironies of the enforcement process is that if the material is judged indecent, the FCC generally appends an unexpurgated transcript of the offending broadcast. The order is then published to the FCC’s website at www.fcc.gov. As a government website, this would generally be available outside the confines of blocking software, and thus available to readers of all ages, including the youthful population that the FCC’s indecency policy seeks to protect from exposure to such material. Thus, a teenager who missed a local broadcast of Eminem’s The Real Slim Shady can easily review the lyrics reprinted at [website]

D. Indecency Enforcement as Cultural Policy

Cultural policy is an aspect of cultural studies, which Barker defines as “[a]n interdisciplinary or post-disciplinary field of inquiry that explores the production and inculcation of maps of meaning. A discursive formation, or regulated way of speaking,

concerned with issues of power in the signifying practices of human formation.”¹² Barker explains that in “cultural studies, knowledge is never a neutral or objective phenomenon, but a matter of positionality.” Thus, when cultural studies look at indecency and indecency policy, it cannot conclude that particular words or expressions are objectively wrong or indecent. Rather, cultural studies regard indecency policy as a way, among others, to react to certain types of language in certain contexts. Language and use of language are squarely within the “zone of contestation over meaning”, in the lexicon of cultural studies. How the contest is waged and how the contestants fare within that zone is inextricably wrapped up in who has the power to enforce his, her or their view.

Gramsci suggests that incumbency is the key to power. Power largely resides, he writes with an historic bloc of power factions. But the powerful factions generally do not enforce their views by coercion and repression, but rather by establishing hegemony by gaining the consensus of the constituents whose behavior they seek to control. This consensus conveys four types of power that Barker, citing Jordan and Weedon, categorizes as follows:

- the power to name;
- the power to represent common sense;
- the power to create ‘official versions’;
- the power to represent the legitimate social world.

This is a powerful suite of capabilities to define norms. Barker writes,

In the Gramscian view, the common sense and popular culture through which people organize their lives and experience becomes the crucial site of ideological contestation. This is the place where hegemony, understood as a fluid and *temporary* series of alliances, needs to be constantly rewon and renegotiated. The creation and dissolution of cultural hegemony is an ongoing process and culture a terrain of continuous struggle over meanings.

Barker defines cultural policy as “[p]rocedures, strategies and tactics that seek to regulate and administer the production and distribution of cultural products and practices.”¹³ Touching as it does upon speech, music, drama, conversation, and performances of various types, indecency policy, when enforced, does “regulate ... the production and distribution of cultural products and practices.” It is then, itself, a form of cultural policy.

Likewise, strategies and rules that support diversity and localism are artifacts of cultural policy. Diversity and localism as policy principles seek to promote programming that reflects these principles, without directly regulating the content of the programming. Avoiding regulation of content is dictated by the law interpreting the first amendment,

¹² Barker at 437

¹³ Barker, *Cultural Studies Theory and Practice* (2d ed.)(2001) at 437.

but is also itself an aspect of cultural policy – a norm that tells the government that it may not regulate the production and distribution of cultural products in a way that specifically dictates or limits its content. No less than indecency policy, which seeks to limit the language and material that can be broadcast, diversity and localism policies, which seek to influence broadcasting to embrace and reflect diversity and localism “regulate and administer the production and distribution of cultural products and practices.”

VI. No Defense of Indecency

This paper anticipates the objection that cultural policy values such as localism and diversity in content are achievable without liberalizing broadcast indecency standards or relaxing their enforcement. These are reasonable objections, and it is conceded that it is possible to cultivate localism and advance diversity goals without defending the largely empty entertainment furnished by the language and material that is at issue in many of the cases at issue here. No defense of such material is offered here.

Rather, this paper suggests that the FCC’s indecency enforcement policy establishes a set of financial and behavioral incentives for broadcasters. These incentives guide broadcasters that wish to avoid the financial burden associated with indecency enforcement and to avoid the opprobrium that comes with indecency enforcement.¹⁴ Since the standards are administered with a high degree of subjectivity, broadcasters have an incentive to constrain their behavior even more tightly than would be necessary under a clearly stated suite of rules about what will earn a forfeiture – which rules do not exist.

Still, it might be objected that, even in the absence of clear, declarative rules, broadcasters ought to know that using particular words are likely to trigger a complaint, which could lead to a forfeiture. By steering clear of such words, it might be argued, they can be sure to avoid trouble. But there are two problems with this objection.

First, the FCC’s own jurisprudence make it clear that it is permissible to utter even the most taboo words if the context saves the material from being indecent. Conversely, the FCC’s jurisprudence makes it clear that a broadcaster can earn a forfeiture even without using the most controversial words if the sexual or excretory nature of the discussion is clear even in the absence of such words.

¹⁴ It may be objected in this context that the FCC’s fines are comparatively trivial for some broadcasters and not significant enough to change behavior. This may be true, but the FCC has pursued strategies lately to maximize the impact of its statutory power to impose fines by aggregating its treatment of offenses. Under consideration is a proposal to allow individual utterances or portions of a broadcast to count as multiple infractions. Moreover, the FCC’s recounting of the response of some broadcasters to the FCC’s Letter of Inquiry indicates that the accusation of indecency does carry community opprobrium to which the broadcaster often reacts with contrition. An interesting area for further research would be to explore whether broadcasters found to have broadcast indecent language or material suffer any recession of advertising revenues in the wake of such a finding.

Second, the network effect of the Internet has magnified the power of individuals who find broadcast material objectionable to lodge complaints individually, or as part of an organized campaign. The intensified and broadened agency that the Internet gives individuals and groups to complain turns brief moments such as Janet Jackson's costume reveal at the Superbowl, or Bono's excited utterance at an award presentation into *causes celebres* that take on a life of their own and drive policy debates at the FCC and in Congress.

Thus, the lines between trouble and calm for broadcasters are not at all clear, are administered with subjectivity in a politically charged environment, and can change as a result of extraneous influences applied by activist minorities empowered by the Internet or by political figures. While indecency is not worth defending, it is worth defining with crisp clarity.

At stake are not only the first amendment rights of broadcasters, but the derivative rights of speakers who convey their thoughts via the broadcasters' platforms. While speakers are not subject to fines by the FCC, the FCC's power to impose forfeitures upon the broadcasters whose platforms they rely upon to convey their messages may constrain the speakers' access to broadcast platforms.

Also at stake are other cultural policy values that the FCC expresses elsewhere in its rules, orders and jurisprudence, such as localism and diversity. The FCC's indecency jurisprudence reveals a tension between indecency and these other cultural policy values. This is a problem within the broadcast sphere, but it also foreshadows a larger debate. While many worry about concentration in the broadcast industry, there is an explosion of alternative outlets among private networks owned by the cable and satellite industries, among Internet sites, which may be accessed through a variety of means, satellite radio, and fiber video networks owned by the local telephone industry.

The FCC's indecency policy is at a crossroads. There are many alternative outlets to which objectionable content can migrate. Howard Stern, the radio personality who has been so famously flogged by the FCC for indecency in his broadcasts, announced that he will leave broadcast radio and take his work to satellite radio, a private network not subject to the FCC's indecency jurisdiction – so far. What will happen when objectionable content turns up in these unregulated venues even as their popularity and adoption increase? Will the empowered minorities be content with the artificial distinction that broadcast channels are fair game and adjacent cable channels delivered over the same cable box are off limits to their complaints? If these pressures result in formal or informal norms that restrict content on so far unregulated venues, the stakes for a clear definition of indecency become more important, not less, even as broadcast faces increasing competition.

VII. The Data

The FCC publishes on its website materials memorializing its decisions on indecency complaints. It appears to have consistently published such materials since November 1999 when the Enforcement Bureau came into existence, and the website indicates that it has been updated most recently in March 2005. The available decisional materials fall into the following categories.

	Notices of Apparent Liability	Forfeitures	Consent Orders
Number Published	36	13	3

Some letters and other materials relating to complaints that the FCC dismissed are also available, but this material does not reach back to 1999. It appears that regular publication of such materials began only recently.

The FCC website also makes available a group of 32 “Other Orders”, including Commission orders that grant or deny petitions for reconsideration of Commission decisions relating to indecency or applications for review of Enforcement Bureau decisions. A subsequent version of this paper will offer expanded observations based on these decisional materials; the current version is based upon review of the NALs, forfeiture orders and consent orders enumerated above.

Below, for reference purposes, is reproduced a chart from the FCC’s website summarizing data on enforcement activity.

INDECENCY COMPLAINTS and NALs: 1993 – 2004

Calendar Year	# of Complaints Received	# of Programs By Service	# of NALs ¹	# of NALs By Service	\$ Amount of NALs ²	Status
2004	1,405,419 (314 programs)	Radio: 145 TV: 140 Cable: 29	12	Radio: 9 TV: 3	\$7,928,080 ³	4 paid, 1 agreed to be paid, 6 pending, 1 cancelled
2003	202,032 (375 programs)	Radio: 122 TV: 217 Cable: 36	3	Radio: 3	\$440,000	1 paid, 2 agreed to be paid
2002	13,922 (389 programs)	Radio: 185 TV: 166 Cable: 38	7	Radio: 7	\$99,400	2 paid, 3 agreed to be paid, 1 pending, 1 cancelled
2001	346 (152 programs)	Radio: 113 TV: 33 Cable: 6	7	Radio: 6 TV: 1	\$91,000	5 paid, 2 cancelled
2000	111 (111 programs)	Radio: 85 TV: 25 Cable: 1	7	Radio: 7	\$48,000	5 paid, 2 agreed to be paid
1999	N/A	N/A	3	Radio: 3	\$49,000	3 paid
1998	N/A	N/A	6	Radio: 6	\$40,000	5 paid, 1 not prosecuted by DOJ
1997	N/A	N/A	7	Radio: 6 TV: 1	\$35,500	5 paid, 2 cancelled
1996	N/A	N/A	3	Radio: 3	\$25,500	1 paid, 2 cancelled
1995	N/A	N/A	1	Radio: 1	\$4,000	1 paid
1994	N/A	N/A	7	Radio: 7	\$674,500	4 paid, 3 cancelled
1993	N/A	N/A	5	Radio: 5	\$665,000	4 paid, 1 cancelled

Source: Federal Communications Commission

VIII. Policy Tensions in FCC Decisions

The FCC’s jurisprudence reveals several types of tensions between indecency as a cultural policy, on the one hand, and localism and diversity as coordinate cultural policy objectives, on the other hand.

First, in several cases, the FCC has spurned broadcasters’ arguments that complained of material is not indecent, in context, under prevailing community standards. For example, in [FCC-04-231A1.html], the FCC rejected the broadcaster’s argument that three segments of a drive time radio show called Dare and Murphy that included a vividly narrated game of Naked Twister and an interview with an adult movie star who claimed to be able to perform oral sex upon himself were not indecent because the show enjoyed high ratings in Kansas City, thus demonstrating that the community did not find the material indecent. There and elsewhere, the FCC emphasized that it evaluates the indecency *vel non* of complained-of material against a nationwide standard that is calibrated to match the sensibilities of the average listener or viewer. The FCC states that it is empowered to do so under its interpretation of *Miller v. California*¹⁵, which it reads as requiring that the community standards applied need not be those of a specific geographic area.

But that is not exactly what *Miller* says. *Miller* holds that it was not constitutional error for the judge to instruct the jury in that case that it should evaluate the allegedly obscene material at issue in that case according to statewide standards as opposed to nationwide standards. The FCC’s dogged adherence to nationwide standards turns *Miller* on its head since *Miller* upholds the use of a more granular community standard than nationwide.

It might be objected that even if the FCC has employed a sleight of hand in the name of consistency and efficiency, broadcasters are in no way impeded in fostering localism by a plethora of means that need not include indecent material. This is conceded to be true with respect to material that the broadcaster’s on-air employees contribute. But it is not true with respect to interviewees and audience callers.

In another group of cases, the FCC has examined what happens when there is an utterance or an airing of material that the broadcasters’ employees did not contribute. The most famous examples are Janet Jackson’s exposure of her nipple during the Superbowl half-time show and Bono’s joyous but colorful exclamation, employing the word “fucking” in his on-air acceptance of an award. In those cases, the FCC ultimately dealt forfeiture orders to the broadcasters on the reasoning that they should have prevented these unsolicited contributions from airing. In the latter case, the Enforcement Bureau initially ruled that the material was not indecent because, when “fucking” is used as an adverb, it does not refer to sexual activity. This distinction may appear counterintuitive and almost comical since it turns on the part of speech to which the root “to fuck” is adapted, but it was fully consistent with the then-existing body of precedent.

¹⁵ 413 U.S. 15 (1973); [Miller v. California \(link to FindLaw\)](#)

The Bureau’s decision led to an uproar among conservative and family values constituencies, and in Congress, which led the FCC to reverse the Bureau.

Where indecency collides with localism, and specifically the desirable activity of newsgathering is in a case this paper refers to as “Nightmare at the Porn Shop”. In [da002041.html], the radio licensees sent a crew to cover a celebrity appearance at a local business. The celebrity was an adult movie star and the business was an adult video store. The event was covered by remote live broadcast. The interviewer warned the interviewee in advance that the broadcast would be live and counseled her as to what types of language and expression would be unacceptable. Shortly after the interview began, however, the interviewee seized control of the cell phone over which the broadcast was conducted and improvised a monologue touting her talents and preferences in sexual performance. The celebrity’s promoter physically prevented the interviewer from regaining control of the cell phone. After approximately thirty seconds, the interviewer was able to terminate the broadcast of the celebrity’s monologue. Two on-air apologies by the broadcasters’ employees followed.

The station’s general manager then adopted as a prophylactic measure against future similar problems “a policy that, except for station personnel, emergency workers, and government officials, all conversations must be pre-recorded”.

The station’s contrition and swift institution of remedial measures did not dissuade the FCC for imposing a forfeiture upon the station. But the self-imposed ban on live conversations, with limited exceptions, is significant. It may be a meaningful constraint on coverage of local sports events, for example, which are a quintessential feature of localism.

Here, then is a real collision between indecency and localism, not directly caused by the FCC’s enforcement policies, but engendered because a broadcaster affected by the enforcement mechanism constrained its behavior to try to avoid a repeat experience.

Another group of cases portends a collision between diversity and indecency. In [name] and [name], the FCC fielded complaints about indecency based on sexual innuendo in Spanish language dramas. Sexual innuendo can be a basis for a finding of indecency if the sexual meaning is unmistakable. In these cases, the FCC rejected arguments that the language and material, when evaluated in context according to the standards of the Spanish speaking community, was not indecent. The FCC relied upon translated transcripts of the complained-of material in making its decision.

But Spanish language broadcasting formats are an aspect of diversity, and may be one niche where diversity in ownership as a proxy for diversity of content actually works. If diversity is a valued aspect of cultural policy, it would seem important to take seriously the possibility that different cultural communities might have different norms and that language nuances, in a language not native to most of the regulators, might be crucially important in judging whether the sexual meaning of an innuendo is unmistakable.

It might be objected that this suggests a willingness to believe that non-Caucasian cultures have lower standards than Caucasians. That is not the argument of this paper. The case is offered as an illustration of a point where there is a clear tension between encouraging diversity, but enforcing indecency policy in a way that insists that diversity is not relevant.

In another group of cases, the FCC considered whether rap lyrics that contained objectionable imagery and language were indecent. Several cases considered whether the lyrics to Eminem's *The Real Slim Shady* are indecent. The lyrics, which are reprinted in several places on the FCC's website, are available for review at [insert hyperlink]. Ironically, the lyrics are themselves a critique of the fractured and sometimes hypocritical way in which Americans regard crude language. A similar case involving a public broadcaster in Oregon involved rap lyrics declaring that "Your revolution will not occur between my thighs", as part of a commentary on the role of women in violence and conflict. The lyrics are available on the FCC's website at [insert hyperlink].

Rap as a performance medium is often characterized by rough language, and it is not much of a stretch to suggest that the rough words are part of the anti-hegemony commentary of rap. As such, it may be an indicia of successful propagation of diversity. Nevertheless, the FCC has been direct in its labeling of such lyrics as indecent. It appears that for the immediate future, there is no room for this mode of expression, at least not on broadcast.

IX. Implications and Areas for Further Study

The area of indecency evokes strong reactions under debate and discussion. Some view it as the swampland of the first amendment, and wish indecency could be policed more effectively. Some have called, for example, for a more proactive government approach to watching for and identifying indecent broadcasts, rather than waiting for complaints to arrive. Others regard the survival of indecency in broadcast, even if curtailed by regulation, as proof of the robustness of the first amendment to tolerate some offensive speech as a way of giving a wide berth of protection to speech generally. Still others take a libertarian view, inviting listeners and viewers to protect themselves and children from exposure to indecency by turning off the receiver or changing the frequency, without the benefit of governmental regulation.

This paper posits that there is another way of looking at indecency to evaluate whether emphasis on indecency enforcement creates tensions and imbalances within the suite of cultural policy objectives that the FCC has established in the broadcast area. These internal inconsistencies, within the suite of cultural policies that the FCC has set up as goals in broadcast policy, provide a heuristic for evaluating whether there are hidden costs to robust indecency enforcement.

Additional research could focus on a larger body of FCC enforcement jurisprudence to test this heuristic against a larger data set. It could also usefully study the impact of extraneous influences such as active minorities that organize to instantiate complaints, and elected officials, upon trends and discontinuities in FCC indecency jurisprudence.

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