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THE SEVEN DIRTY WORDS YOU *SHOULD* BE ALLOWED TO SAY ON TELEVISION

I. INTRODUCTION

Shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.¹

For any American who has turned on his or her television since 1978 and tuned into one of the traditional broadcast networks—ABC, NBC, CBS, or Fox—these seven words have been conspicuously absent from broadcasting. Confusingly, with a flip of the remote over to a premium cable television station, these seven words may all occur in quick succession on one television show.² When one of them does happen to make it to air on a broadcast network, it often becomes the source of an astronomical fine from the Federal Communications Commission (“FCC”) and years of litigation between the network and the federal government.³

A recent case resulted in a huge victory for broadcasters. In the 2012 holding of *FCC v. Fox Television Stations, Inc.*, the Supreme Court required the FCC to eliminate its existing policy on how it regulated indecent content on the broadcast networks.⁴ The Court found the policy unconstitutionally vague because it did not put broadcasters on notice about what types of content were prohibited on television.⁵ This holding left the FCC with a gaping hole, but also an enormous opportunity. For a body that often struggles to keep up with the ever-changing entertainment industry,⁶ the FCC now has the chance to rewrite its indecency policy and bring the law into the twenty-first century. Since the 2012 ruling, the FCC has sought guidance from lawmakers, content creators, private interest

1. GEORGE CARLIN, *Filthy Words, on OCCUPATION: FOOLE* (Little David Records & Atlantic Records 1973), *quoted in* *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978).

2. There is a memorable scene from *The Wire* in which Detectives Bunk and McNulty use only the word “fuck” and its derivations in their efforts to map out a crime scene. *The Wire: Old Cases* (HBO television broadcast Jun. 22, 2002). Noted television critic Alan Sepinwall refers to the scene as a “symphony of cussing” and argues that it serves as a harbinger for whether viewers will love or loathe *The Wire*. ALAN SEPINWALL, *THE REVOLUTION WAS TELEVISED: THE COPS, CROOKS, SLINGERS, AND SLAYERS WHO CHANGED TV DRAMA FOREVER* 84–85 (2013).

3. *See, e.g.*, *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502 (2009); *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307 (2012).

4. *Fox II*, 132 S. Ct. at 2320.

5. *Id.* at 2317–18.

6. Historically speaking, when faced with a change in the television business, the FCC has reacted in a predictable fashion. First the agency ignores the change; then, it tries to protect the status quo; and finally, with a certain degree of public and congressional prodding, it incorporates the changes into a new status quo. HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION* 31 (3d ed. 2006).

groups, and average citizens on what this new policy should be. They have yet to issue a new regulation.⁷

An important reason the FCC has yet to act may be that the existing regulatory framework for indecent content on television has grown obsolete.⁸ The federal government's ability to regulate the broadcast airwaves is based on the idea that the airwaves are a scarce resource—an idea that led to the creation of something known as the scarcity doctrine.⁹ However, after the advent of cable and the digital transition, many see opportunities to access the airwaves as plentiful, not scarce.¹⁰ Part of the Court's holding in *Fox II* was that the government does still have the power to regulate the broadcast networks.¹¹ However, it would be wise for the FCC to think about television in a more modern context when making its new regulations.¹²

The American government need only look across the pond for guidance on how to structure a modern regulatory scheme for indecent content on television.¹³ In the 2003 Communications Act, the United Kingdom empowered its Office of Communications, the U.K. equivalent of the FCC, to create a strong and coherent Broadcasting Code to take U.K. television regulation into the modern era.¹⁴ The code it promulgated is a happy medium that can satisfy all interested parties, which would be an excellent model to emulate in the United States.¹⁵ The U.K. Broadcasting Code appeals to parents because it sets limits about content during the hours when children are most likely to be watching.¹⁶ Yet, its flexible regulations on content also appeal to broadcasters who want to push the envelope.¹⁷ And, it regulates all networks equally, which appeals to all parties because there is only one set of rules to follow.¹⁸ Creating a

7. See discussion *infra* Part II.D.

8. See discussion *infra* Part III.

9. See discussion *infra* Part II.B.2.

10. See discussion *infra* Part II.B.5.

11. See discussion *infra* Part III.

12. See discussion *infra* Part V.

13. See discussion *infra* Part IV. It should not look too far over the pond though, or at least not as far as Russia. In 2014, the Kremlin banned swearing in the arts; violators can be fined up to the equivalent of \$1400 for using “the words khuy (cock), pizda (cunt), yebat (to fuck) and blyad (whore).” Maryam Omid, *WTF? Russia Bans Swearing in the Arts*, *GUARDIAN* (Jul. 14, 2014, 4:42 A.M.), http://www.theguardian.com/world/2014/jul/01/russia-bans-swearing-arts?CMP=tw_t_gu.

14. See discussion *infra* Part IV.

15. See discussion *infra* Part V.

16. See discussion *infra* Part IV.

17. Kanye West may have said it best on *Late Night*: “If you go to Europe, there’s nudity on TV.” *Late Night with Seth Meyers: February 25, 2013* (NBC television broadcast Feb. 25, 2013).

18. See discussion *infra* Part IV.

regulatory model like this for the United States would be a vast improvement over its current model with its different rules for different types of broadcasting.¹⁹ A new U.S. model that mimics the U.K. Broadcasting Code would be much clearer than the old FCC policy and would much more likely survive a potential vagueness analysis by the Court in the future.²⁰

Part II of this Note examines the development of the American television industry and the indecency laws that govern it. Part III discusses why this model of indecency regulation has grown obsolete as television technology advances. Part IV takes an in-depth look at the U.K. model and the indecency laws that arose out of the 2003 Communications Act. Finally, Part V offers some suggestions on how the United States could implement some of the successful strategies being used by the United Kingdom to regulate indecent television content. The suggestions outlined in this Note advocate a cohesive scheme that will end the bifurcated regulatory system that has persisted despite a changing industry and culture.

II. THE AMERICAN MODEL

A. *Development of the American Television Industry and Regulatory Model*

The relationship between the public's First Amendment rights and the government's ability to regulate content put out over the airwaves has always been strained.²¹ The American television industry grew out of radio, both in content and in the way the government treated the industry's use of the airwaves.²² Though the government wanted to foster competition in the television industry through the privatized affiliate system,²³ it still wanted to have some oversight over the content that

19. See discussion *infra* Part V.

20. See discussion *infra* Part V.

21. See HERNAN GALPERIN, *NEW TELEVISION, OLD POLITICS: THE TRANSITION TO DIGITAL TV IN THE UNITED STATES AND BRITAIN* 58 (2004).

22. For a discussion on the early history of radio and the technological development of television in the United States, see David Hendy, *Television's Prehistory: Radio*, in *THE TELEVISION HISTORY BOOK*, 4, 4–6 (Michele Hilmes & Jason Jacobs eds., 2003); Brian Winston, *The Development of Television*, in *THE TELEVISION HISTORY BOOK*, *supra*, at 9, 9–12.

23. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 9. The privatized affiliate system refers to the ownership structure of individual television stations and how they are linked together through their network affiliations. Local television stations are either independently owned or owned by a station group, which then signs an affiliate agreement with a major broadcast network. It is very much a quid

television broadcasters were putting on air.²⁴ The government controlled the broadcasting spectrum,²⁵ and discovered that it could regulate the television networks through their access to the spectrum.²⁶ The earliest form of regulation of television content in the U.S. was the Television Code, which resulted from a 1952 FCC opinion.²⁷ The FCC action froze the number of licenses that would be granted to television networks that wanted to broadcast in the VHF spectrum, creating practical monopolies for CBS, NBC, and ABC, which were the only three networks broadcasting in VHF at the time.²⁸ In exchange for this license freeze, the networks allowed the FCC to have oversight over the content that was being put to air.²⁹ This was the first instance in which the FCC's regulation of television content was tied to the physical broadcasting spectrum,³⁰ and this regulatory model, sometimes referred to as the public trustee model, has persisted into the present day.³¹ The introduction of cable channels³²

pro quo arrangement: the network gains access to the local station's viewers and the local station gains access to the network's programming at no cost. *Id.* at 2–10.

24. GALPERIN, *supra* note 21, at 57–60.

25. The broadcasting spectrum refers to the type of radio waves that can be used to send programming out through television and radio. *Id.* at 47. The analog spectrum had two types of waves—Very High Frequency (“VHF”) and Ultra High Frequency (“UHF”). *Id.* Traditionally, the broadcast networks used VHF waves for broadcast and the cable networks used UHF waves. *Id.* at 62–63. For a more in-depth technical explanation of the broadcasting spectrum, see *id.* at 43–52.

26. The federal government, through the FCC, controls the licenses granted to television networks to utilize certain frequencies within the spectrum so the spectrum does not get crowded. *Id.*

27. Matthew Murray, *Establishment of the US Television Networks*, in THE TELEVISION HISTORY BOOK, *supra* note 22, at 35, 36–37.

28. *Id.*

29. *Id.*

30. This connection between broadcaster spectrum access and government regulation of television content represents a very important compromise between the television networks' First Amendment rights and their carrier obligations to the United States government and its citizens. GALPERIN, *supra* note 21, at 58.

31. *Id.* at 57 (referring to this model of regulation as the public trustee model). Though broadcasters are private companies, their obligations to the federal government make them a public trustee. *Id.* Under this model, if the broadcasters refuse to act in the public's best interest, perhaps by putting content on television that the federal government does not approve of, the government has the power to suspend or revoke their access to the broadcasting spectrum. *Id.*

32. Cable television has been an important part of the American television industry for the past forty years. See BLUMENTHAL & GOODENOUGH, *supra* note 6, at 12. Nearly seventy percent of Americans with a television now have a cable package and watch the cable channels along with the traditional broadcast networks. *Id.*

Technically, cable television channels broadcast in the UHF spectrum, and the government controls cable networks' access to the UHF spectrum the same way it regulates the broadcast networks' access to the VHF spectrum. GALPERIN, *supra* note 21, at 63. There was some early discussion of the broadcast networks switching to the UHF frequency, but the process of converting from VHF to UHF would have been too cumbersome. *Id.* Older television sets could only pick up channels on the VHF frequency, but once cable channels were popularized, sets were made to pick up both types of waves. *Id.*

and the creation of the digital broadcasting spectrum³³ have added new dimensions and challenges to the public trustee model and its applicability in the modern day.³⁴ The tension between the ever-expanding broadcasting spectrum and the federal government's continued desire to regulate indecent content on television is the core issue this Note seeks to address.

B. Case Law Involving Regulation of Content on Television

Much of the guidance on how the government can regulate television content comes from case law. There are five landmark Supreme Court cases in this area of the law that have shaped how the courts and the government have been able to control indecent content on television. Although some of the facts of these cases involve content broadcast over radio, their holdings hold true for television as well, as the FCC's power to regulate the broadcast spectrum includes the airwaves for both radio and broadcast television.³⁵

1. Red Lion Broadcasting Co. v. FCC

In the first major case that dealt with regulating broadcast media content, *Red Lion Broadcasting Co. v. FCC*, the content being regulated was political, not indecent.³⁶ At the time, an FCC regulation said that radio and television stations were required to give equal time to opposing sides on issues of public importance.³⁷ When a radio station owned by the Red

33. After the spread of the Internet, the television networks began to use digital waves to broadcast their programming. *Id.* at 3–13. Digital television opens up the spectrum capacity for far more channels and types of programming. *Id.* at 10. The transition from analog broadcasting to digital broadcasting represents a huge opportunity for deregulation and change in the television industry. *Id.* at 276. The digital transition and what it means for government regulation of indecent content on television will be discussed in depth later in this Note. See discussion *infra* Part III.

34. See discussion *infra* Part III.

35. Radio was the first form of media to be broadcast over the public airwaves, so it was also the first form of media to be regulated by the FCC. Once television was invented, the government brought the new medium under the same regulatory scheme. See GALPERIN, *supra* note 21, at 57–65.

36. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75 (1969).

37. This FCC policy is commonly known as the fairness doctrine. *Id.* at 373. The regulation in question read:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

Id. at 373–74 (quoting 47 CFR §§ 73.123 (1969)) (internal quotation marks omitted).

Lion Broadcasting Company did a story on a book about Barry Goldwater written by Fred Cook, Cook requested reply time to clarify his position.³⁸ When the station refused, Cook sued.³⁹ The station argued it was unconstitutional under the First Amendment for the FCC to regulate the type of content it put out and the time it had to devote to opposing political views.⁴⁰

The Court upheld the FCC's regulation and ruled against the radio station.⁴¹ The Court accepted that the broadcast media fell within the purview of the First Amendment, but acknowledged that the novel characteristics of broadcast media allowed for greater regulation than print media.⁴² Because of the broadcasting spectrum's unique position as a scarce resource, the Court said that the government had the ability to enact laws and regulations to insure that all Americans have the right to access it.⁴³ This contention became known as the scarcity doctrine.⁴⁴ Along with the government's ability to grant licenses to radio and television stations, it was allowed to place certain restrictions on how those stations may deliver their product to the American people.⁴⁵ One of those restrictions was the type of content that can be broadcast over the public airwaves,⁴⁶ which has had enormous implications for all future cases.⁴⁷ According to the Court, the right of the public to hear more than one position from their radio station outweighed the station's freedom to broadcast the content it wanted.⁴⁸ The Court placed the First Amendment rights of listeners and the public ahead of those of broadcasters, establishing an important power relationship that has been preserved in cases since *Red Lion*.

38. *Id.* at 371–72.

39. *Id.* at 372.

40.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

Id. at 386.

41. *Id.* at 400–01.

42. *Id.*

43. *Id.* at 387–89.

44. *Id.*

45. *Id.* at 389.

46. *Id.*

47. See discussion *infra* Parts II.B.2–5.

48. *Red Lion*, 395 U.S. at 389–90.

2. FCC v. Pacifica Foundation

FCC v. Pacifica Foundation was the first case that specifically targeted the FCC's ability to sanction radio and television stations for broadcasting indecent content.⁴⁹ In 1973, a father and his young son were in the car during the afternoon and flipped to a radio station owned by the Pacifica Foundation that was broadcasting George Carlin's "Filthy Words" routine. The father was appalled by the language⁵⁰ used in the broadcast and complained to the FCC.⁵¹ The FCC took his complaint very seriously and used it as the catalyst for a new policy, which allowed it to sanction broadcasters for airing indecent material.⁵² Although it did not sanction the Pacifica Foundation outright, it issued a declaratory order in which it found that the language used was indecent⁵³ and warned that if there were further complaints about the "Filthy Words" broadcast, Pacifica could be

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

50. See CARLIN, *supra* note 1 and accompanying text.

51. *Pacifica*, 438 U.S. at 730.

52. The Court extensively discussed how the FCC arrived at its decision to prohibit the airing of indecent content. Justice Stevens wrote:

In its memorandum opinion the Commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C. § 303(g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."

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

....

... The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it."

Pacifica, 438 U.S. at 731–33 (emphasis added) (citations omitted).

53.

[T]he Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464."

Id. at 732 (citations omitted) (second alteration in original).

fined in the future.⁵⁴ *Pacifica* fought the declaratory order⁵⁵ and argued that the FCC's new policy was tantamount to censorship and was forbidden under the First Amendment.⁵⁶

The case made it to the Supreme Court, and the Court upheld the FCC's ability to limit indecent content on broadcast media like radio and television.⁵⁷ It summarily dismissed *Pacifica*'s claim that the FCC restrictions were improper censorship and held that the FCC's power to prohibit indecent content was within the purview of the First Amendment, following the holding in *Red Lion*.⁵⁸ *Pacifica*'s most enduring legacy is its last section, in which Justice Stevens discussed the reasons why the broadcast media are afforded less First Amendment protection than traditional print media.⁵⁹ The first is the pervasiveness of television and radio;⁶⁰ because television and radio have the opportunity to invade the home, a person's right to be left alone in his own home should be emphasized over a broadcaster's right to air content.⁶¹ The second is the accessibility of broadcast media by children;⁶² when young children who do not yet know how to read see a profane word in print media, it has no meaning to them—but hearing a swear word over the radio is much different because children learn through listening.⁶³ Because the government's interest to protect children outweighed a broadcaster's right to air indecent content, the FCC's ability to regulate content was upheld.⁶⁴ These reasons echoed the key power relationship first established in *Red Lion*: the rights of the public come before the rights of the broadcasters.⁶⁵

Justice Stevens closed the opinion by emphasizing the narrowness of the holding and reminding the FCC and broadcasters to consider the context of the content above all else.⁶⁶ Despite this affirmation, the Court's

54. *Id.* at 730.

55. *See id.* at 733.

56. *Id.* at 742.

57. *Id.* at 747–48.

58. *Id.* at 742–50.

59. *Id.* at 748–51.

60. *Id.* at 748–49.

61. *Id.*

62. *Id.* at 749–50.

63. *Id.*

64. *Id.*

65. *Id.*

66.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which

ruling in *Pacifica* created an entirely new class of content to be regulated by the government.⁶⁷ In reality, indecent content is nearly impossible to define; it seems to exist in the gray area between the black of obscenity and the white of what is appropriate for air. The Court's best attempt to define indecent content was: "patently offensive references to excretory and sexual organs and activities."⁶⁸ But that definition did not give any guidance as to what these references are.⁶⁹ Not only that, but the Court was cavalier about the potentially chilling effects of prohibiting this type of content on air.⁷⁰ The Court's attitude of "we're not quite sure what it is but the FCC can regulate it anyways" opened the door for the sanctioning of indecent content on broadcast television in the nearly thirty-five years that followed.⁷¹

3. United States v. Playboy Entertainment Group, Inc.

The distinction between cable and broadcast networks was made explicitly clear in *United States v. Playboy Entertainment Group, Inc.*⁷² Playboy Entertainment Group challenged a federal statute⁷³ that required

context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Id. at 750.

67. See, e.g., Barry Chase, *The FCC's Indecency Jurisdiction: A Stale Blemish on the First Amendment*, 39 OHIO N.U. L. REV. 697, 704–07 (2013); Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 574–89.

68. *Pacifica*, 438 U.S. at 743.

69. See *id.*; see also Chase, *supra* note 67, at 704–07; Fairman, *supra* note 67, at 574–82.

70.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

Pacifica, 438 U.S. at 743 (emphasis added) (citations omitted).

71. Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631, 637–46 (2013).

72. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000).

73. 47 U.S.C. § 561, *invalidated by Playboy*, 529 U.S. 803.

all television channels to scramble sexually explicit programming when children could potentially be watching.⁷⁴ Playboy requested an injunction against the enforcement of the statute, and the case made it to the Supreme Court after the statute was struck down below.⁷⁵ The Court found the federal statute to be a content-based restriction on speech for cable television companies, which was an untenable type of restriction.⁷⁶ The Court reasoned that the government may have an imperative to protect children from exposure to indecency on television, but any laws or regulations it enacts to enforce that imperative must respect cable broadcasters' First Amendment rights.⁷⁷ Though *Pacifica* and *Playboy* essentially brought the same question before the Court,⁷⁸ only the cable broadcasters emerged victorious.⁷⁹ The Court's differentiation of speech rights for broadcast networks versus cable networks was so strong that later cases have interpreted the *Playboy* decision as holding that cable networks are not subject to the same regulations of indecent content as broadcast networks.⁸⁰ While broadcast networks must not put indecent or obscene content on air, a cable network can air whatever content it chooses without being subject to government regulation, so long as the programming is not obscene.⁸¹

74. *Playboy*, 529 U.S. at 806.

75. *Id.* at 807.

76. *Id.* at 827. In support of striking down the statute, the Court argued:

Basic speech principles are at stake in this case. When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression. We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause. If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles. Here the Government has not met the burden the First Amendment imposes.

The Government has failed to show that § 505 is the least restrictive means for addressing a real problem; and the District Court did not err in holding the statute violative of the First Amendment.

Id. at 826–27.

77. *Id.*

78. *FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978); *Playboy*, 529 U.S. at 811–12.

79. *Playboy*, 529 U.S. at 826–27.

80. *See infra* note 137 and accompanying text.

81. *See id.*

4. Fox I

The first iteration of the *Fox* case came before the Supreme Court in 2009 and directly addressed the issue of fleeting expletives on broadcast television networks.⁸² Broadcast networks had generally not been sanctioned or fined in the past for airing fleeting instances of indecent language or nudity on their stations.⁸³ When the broadcast networks were fined, it was generally for repetitive use of expletives or using expletives in their literal capacity to describe sexual or excretory functions.⁸⁴ After several highly publicized instances of fleeting expletives,⁸⁵ the FCC revised its policy and said that broadcast networks could be fined for fleeting, nonliteral expletives as well.⁸⁶ The *Fox* case was a conglomeration of several broadcast networks appealing their fines for fleeting expletives, arguing that the FCC's enforcement of this new regulation was arbitrary and capricious.⁸⁷ The Court agreed and remanded to the lower court to determine whether the regulation itself was constitutional.⁸⁸

5. Fox II

When the *Fox* case returned to the Supreme Court in 2012, tensions were high.⁸⁹ The FCC fought hard for its policy, which it argued was necessary to protect children from indecent content on broadcast media.⁹⁰ Unfortunately for the FCC, its policy was ripped to shreds by the broadcast networks.⁹¹ The policy said that certain words were off limit, but certain networks were fined for these words and others were not.⁹² Fleeting instances of nudity were acceptable in some contexts but not others.⁹³ Though the regulation required the FCC to consider each instance of fleeting expletives in context, it never clearly defined what context

82. FCC v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502 (2009).

83. See discussion *infra* Part II.D for a more in-depth explanation of FCC complaint and fining procedures.

84. See *infra* Part II.D.

85. *Fox I*, 556 U.S. at 510.

86. *Id.* at 510–13.

87. *Id.* at 521–22.

88. *Id.* at 530.

89. FCC v. Fox Television Stations, Inc. (*Fox II*), 132 S. Ct. 2307 (2012).

90. *Id.* at 2318–19.

91. See *infra* note 105.

92. *Id.* at 2319–20.

93. *Id.*

meant.⁹⁴ Because the policy was unclear and its enforcement arbitrary and capricious, the Court said, there was no way for the networks to know what content would be considered indecent and for what they could be fined.⁹⁵ As such, the Court decided this regulation was unconstitutionally vague and did not provide broadcasters with sufficient notice.⁹⁶ The Court upheld *Red Lion* and *Pacifica* and noted that the government imperative to protect children from indecency on the pervasive broadcast medium of network television is still important law.⁹⁷ However, it found that the unconstitutional ills of this particular policy outweighed the benefits of that imperative.⁹⁸ The Court reversed the networks' fines and struck down the FCC's indecency policy.⁹⁹ The government still had the responsibility and the power to regulate indecent content on broadcast television, but it could not violate the Constitution in doing so.¹⁰⁰

C. *Indecency and the First Amendment*

As the above cases have illustrated, indecency on broadcast television occupies a murky gray area of the First Amendment, somewhere between protected speech and obscenity. What is clear is that obscenity is not protected speech (both on and off television),¹⁰¹ that indecent content is not the same as obscenity but can be restricted nonetheless,¹⁰² and that indecent content that would be impermissible on broadcast channels is permissible on cable television.¹⁰³ Because the Supreme Court struck down the FCC's indecency policy on unconstitutional vagueness grounds in *Fox II*, it did not rule on the meritorious speech issue.¹⁰⁴ However, the parties to the case addressed speech in their briefs, which provided valuable insights on this subject.¹⁰⁵ Unsurprisingly, the FCC argued that indecent content on broadcast television was not protected under the First Amendment and that the precedent set by *Red Lion* and *Pacifica* allowed

94. *Id.*

95. *Id.*

96. *Id.* at 2320.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Miller v. California*, 413 U.S. 15, 36 (1973).

102. *See FCC v. Pacifica Found.*, 438 U.S. 726, 738 (1978).

103. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000).

104. *See Fox II*, 132 S. Ct. at 2320.

105. *See infra* note 107.

for continued regulation of this type of speech.¹⁰⁶ The broadcast networks submitted several briefs, and all argued for some variation of the constitutional protection of indecent content on television.¹⁰⁷ One of the better arguments made by the networks was that the FCC did not adequately explain that the indecent content at issue actually harmed children in any way.¹⁰⁸ As such, it could not show a clear governmental purpose to satisfy the intermediate scrutiny test.¹⁰⁹ Additionally, the inherent broadness of the policy destroyed the FCC's ability to successfully argue that it was sufficiently narrowly tailored.¹¹⁰ With no clear governmental purpose and no narrow tailoring, the networks said, the FCC could not continue to restrict this kind of speech.¹¹¹ Since a discussion of speech was not a part of the final *Fox II* opinion,¹¹² it is hard to know what the Justices thought of the parties' views on indecency and freedom of speech.

It is unclear how the Supreme Court would rule if this issue reached it again sometime in the near future. While it declined to strike down *Red Lion* and *Pacifica* when given the chance during *Fox II*,¹¹³ the Roberts

106. Brief for the Petitioners at 36–53, *Fox II*, 132 S. Ct. 2307 (No. 10-1293), available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-1293_petitioner_unitedstates.authcheckdam.pdf.

107. Brief for Respondents ABC, Inc.; KTRK Television, Inc.; & WLS Television, Inc. at 37–57, *Fox II*, 132 S. Ct. 2307 (No. 10-1293), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1293_respondentamcuabc-krk-andwls.authcheckdam.pdf; Brief of Respondents ABC Television Affiliates Ass'n et al. at 17–26, *Fox II*, 132 S. Ct. 2307 (No. 10-1293), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1293_respondentabc.authcheckdam.pdf; Brief for Respondents CBS Television Network Affiliates Ass'n & NBC Television Affiliates at 28–39, *Fox II*, 132 S. Ct. 2307 (No. 10-1293), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1293_respondentcbs-nbc.authcheckdam.pdf; Brief of Respondents Center for Creative Voices in Media & the Future of Music Coalition at 10–14, *Fox II*, 132 S. Ct. 2307 (No. 10-1293), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1293_respondentamcuccvandfmc.authcheckdam.pdf; Brief of Respondents Fox Television Stations, Inc.; NBCUniversal Media, LLC; CBS Broadcasting Inc.; & FBC Television Affiliates Ass'n at 15–39, *Fox II*, 132 S. Ct. 2307 (No. 10-1293), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1293_respondentamcufox-nbc-cbs-andfbc.authcheckdam.pdf.

108. Brief for Respondents ABC, Inc.; KTRK Television, Inc.; & WLS Television, Inc., *supra* note 107, at 38–41.

109. Brief for Respondents CBS Television Network Affiliates Ass'n & NBC Television Affiliates, *supra* note 107, at 32–39.

110. *Id.*

111. *Id.*; Brief for Respondents ABC, Inc.; KTRK Television, Inc.; & WLS Television, Inc., *supra* note 107, at 38–41.

112. *See Fox II*, 132 S. Ct. at 2320.

113. *See* discussion *supra* Part II.B.5.

Court has taken strong positions on speech issues.¹¹⁴ Recently, it upheld violent video games¹¹⁵ and animal crush videos¹¹⁶ as protected speech,¹¹⁷ both of which seem more extreme than the kind of speech at issue in *Pacifica* or the *Fox* cases.¹¹⁸ The Court has devoted valuable space on its docket to indecency twice in the past six years,¹¹⁹ so that may be an issue it would hear again should a ripe case present itself. Two justices even seem interested in the prospect of re-evaluating *Pacifica* sometime in the near future.¹²⁰ Until then, indecency will remain a gigantic legal question mark for the FCC, broadcasters, and the television-watching American public.

D. The FCC's Past Regulatory Schemes

The FCC has been in the process of revising its policies on indecency since the *Fox II* decision came down in 2012. In early 2013, the FCC opened up the process to the public and invited it to submit ideas¹²¹ on what the new indecency policies should be.¹²² To date, it has received over

114. See Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 423–24 (2013).

115. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

116. *United States v. Stevens*, 559 U.S. 460 (2010).

117. See Collins, *supra* note 114, at 424–28, 433–34.

118. See *id.*

119. The Court heard *Fox I* in 2009 and *Fox II* in 2012.

120. See *infra* notes 246–48 and accompanying text.

121. As a general matter:

[T]he FCC generally cannot adopt or change rules without first describing or publishing the proposed rules and seeking comment on them from the public. We release a document called a Notice of Proposed Rule Making, in which we explain the new rules or rule changes that we are proposing and establish a filing deadline for public comment on them. . . . After we have had a chance to hear from the public and have considered all comments received, we generally have several options. We can: (1) adopt some or all of the proposed rules, (2) adopt a modified version of some or all of the proposed rules, (3) ask for public comment on additional issues relating to the proposals, or (4) end the rulemaking proceeding without adopting any rules at all.

FED. COMM'NS COMM'N, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 7 (rev. 2008), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-940A2.pdf.

122.

We now seek comment on whether the full Commission should make changes to its current broadcast indecency policies or maintain them as they are. For example, should the Commission treat isolated expletives in a manner consistent with our decision in *Pacifica Foundation, Inc.* . . . ? Should the Commission instead maintain the approach to isolated expletives set forth in its decision in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program* . . . ? As another example, should the Commission treat isolated (non-sexual) nudity the same as or differently than

one hundred thousand suggestions and is still open to receive more,¹²³ so it seems fairly clear the FCC is currently in the weeds on this issue. It has asked for suggestions on whether the policies of the past should remain intact or whether new, forward-looking policies should replace them.¹²⁴ Before a discussion of potential future indecency policy can be had, it is useful to examine the past policies that the FCC has submitted to the public for feedback.

The mechanism of the FCC's indecency policy has always been basically the same, but the framework in which the FCC evaluated indecency has evolved over time.¹²⁵ After viewing something on television they thought to be indecent, concerned citizens could file a complaint with the FCC.¹²⁶ The FCC would then examine the claim and, if it found the content was indecent, could sanction the network that broadcast it.¹²⁷ Only broadcast networks could be sanctioned for broadcasting indecent content.¹²⁸ Even after *Pacifica*, the FCC was initially wary of its enforcement power and only went after broadcasters that used one of the "seven dirty words"¹²⁹ before 10 P.M.¹³⁰ Gradually it expanded its

isolated expletives? Commenters are invited to address these issues as well as any other aspect of the Commission's substantive indecency policies.

Press Release, FCC, FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy 1–2 (Apr. 1, 2013), available at <http://apps.fcc.gov/ecfs/comment/view?id=6017170272>.

123. *Proceeding 13-86 Details*, FCC, <http://apps.fcc.gov/ecfs/proceeding/view?name=13-86> (last visited Apr. 10, 2015).

124. See FCC, *supra* note 122.

125. See *supra* note 71.

126. See Appendix I *infra* for a helpful figure on how the citizen complaint process works.

127.

Any person or entity that the FCC determines has willfully or repeatedly violated the indecency, obscenity and/or profanity prohibitions is potentially liable for a forfeiture penalty, which is a monetary sanction paid to the United States Treasury. To impose such a penalty, the FCC must first issue a Notice of Apparent Liability for Forfeiture containing the FCC's preliminary findings and the amount of the proposed forfeiture. That decision contains the Commission's findings that, based on a preponderance of the evidence, the person or entity at issue has apparently violated the indecency, obscenity, and/or profanity prohibitions. The person or entity against which the penalty is proposed then may respond, in writing, and explain why no such forfeiture penalty should be imposed. The Commission will then issue a forfeiture order formally imposing the monetary sanction if it finds, by a preponderance of the evidence, that the person or entity has violated the indecency, obscenity or profanity prohibitions.

Guide: Obscenity, Indecency, and Profanity—FAQ, FCC, <http://www.fcc.gov/guides/obscenity-indecency-profanity-faq> (last visited Apr. 10, 2015).

128. *Id.*

129. See CARLIN, *supra* note 1 and accompanying text.

130. Lili Levi, "Smut and Nothing but": *The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 509, 522–23 (2013)

enforcement to repetitive and literal uses of expletives and pushed the “safe harbor” hours back to 12 A.M.¹³¹ It generally did not fine networks for fleeting or nonliteral uses of expletives during safe harbor hours, but after the many instances of fleeting expletives on television in 2003, public pressure required it to change its policy.¹³² It was then that the FCC began to sanction networks for individual and nonliteral uses of expletives during safe harbor hours.¹³³ The networks opposed this change in policy, so many of the sanctions and fines were contested.¹³⁴ After the Supreme Court struck this policy down in *Fox II*, no sanctions or fines could be levied against the networks without notice;¹³⁵ if the broadcast networks had no constitutional notice under the old policy, they certainly could not be put on notice with no policy in place. Citizens can still complain about indecent content on the broadcast networks, but the broadcast networks have enjoyed relative freedom over indecent content for almost two years.¹³⁶

III. WHY THESE LAWS NO LONGER WORK

As a result of the case law and regulations detailed in the previous Part, the legal distinctions between regulation of indecent content on broadcast and cable television are confusing to the networks, content creators, and

131. *Id.* at 523–24.

132.

By contrast, 2003 became a watershed year in indecency regulation—beginning the most aggressive indecency enforcement effort in the FCC’s history. During the 2002 Billboard Music Awards program, Cher had responded to receiving an award by saying: “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck ‘em.” In the 2003 version of the show, award presenter Nicole Richie, star of the then-airing television series *The Simple Life*, quipped: “Have you ever tried to get cow [shit] out of a Prada purse? It’s not so [fucking] simple.” These incidents, as well as Janet Jackson’s infamous millisecond “wardrobe reveal” during the 2004 Super Bowl telecast, led to waves of indecency complaints filed by members of the Parents Television Council (PTC) advocacy group. Although the FCC staff had previously indicated that fleeting or isolated expletives would not be deemed to violate the agency’s indecency policy, the Commission reversed course in 2004 and found actionably indecent U2 frontman Bono’s comment during the Golden Globes Awards program that receiving his prize was “really, really fucking brilliant.”

Id. at 525–26 (footnotes omitted).

133. *Id.* at 529.

134. See discussion *supra* Part II.B.4.

135. See discussion *supra* Part II.B.5.

136. The broadcast networks seem to be relishing their newfound ability to play with the limits of airing indecent content. One such example was in the first episode of *Brooklyn Nine-Nine*, a show that airs on Fox, in which a character mentioned his old nickname was “Terry Titties.” *Brooklyn Nine-Nine: Pilot* (Fox television broadcast Sept. 17, 2013). “Titties,” of course, is a derivation of one of the seven words referenced in the Carlin monologue that should never be said on television. See CARLIN, *supra* note 1 and accompanying text; see also *infra* note 271.

consumers. Most people in the entertainment industry follow a general rule of thumb: obscenity and indecency are prohibited on broadcast networks, while only obscenity is prohibited on cable networks.¹³⁷ The decision in *Fox II* striking down the FCC's regulations on indecency offers a unique opportunity in American lawmaking: a chance to examine whether these laws actually work. It is the opinion of many, including at least one voice within the FCC itself,¹³⁸ that the scarcity rationale is deeply outdated.¹³⁹ The Supreme Court has struck down other regulations predicated on the scarcity doctrine,¹⁴⁰ so striking down indecency would not be unprecedented. Though *Pacifica*,¹⁴¹ which attached indecency policy to the scarcity doctrine,¹⁴² remains good law after *Fox II*,¹⁴³ there has been speculation that this could be the next indecency law to go.¹⁴⁴ Perhaps it is time to remove indecency policy from this antiquated framework and create laws and regulations that actually work for a twenty-first century television industry and society.

A. *The Scarcity Doctrine Is All but Obsolete*

The scarcity doctrine has always been a legal fiction. At its inception, it was created as a way to bring the content of television and radio programming under governmental control.¹⁴⁵ It represented, at best, a compromise between broadcasters and the First Amendment.¹⁴⁶ After the prominence of the *Red Lion* and *Pacifica* opinions, scarcity became an inevitability of American media law.¹⁴⁷ But in the years since those landmark decisions, many legal scholars have taken the position that the scarcity rationale should have never existed in the first place.¹⁴⁸ The

137. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 290–91.

138. See John W. Berresford, Fed. Comm'n's Comm'n, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper No. 2005-2, 2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf. Though Berresford's paper is a working paper available for access on the FCC's website, he makes it very clear that it is his opinion alone and may not necessarily reflect the FCC's feelings towards scarcity. *Id.* at ii.

139. See Chase, *supra* note 67; Fairman, *supra* note 67; Richards & Weinert, *supra* note 71, Levi, *supra* note 130; Bloom, *infra* note 163; see also *infra* note 241.

140. See BERRESFORD, *supra* note 138, at 18–28.

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

142. See *supra* notes 57–58 and accompanying text.

143. FCC v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012).

144. Richards & Weinert, *supra* note 71, at 651–62.

145. See *supra* notes 28–31 and accompanying text.

146. GALPERIN, *supra* note 21, at 58.

147. See *supra* notes 42–48 and 58–65.

148. See *infra* notes 149–51 and accompanying text.

broadcasting spectrum, even in its analog function, was never a scarce resource that needed to be protected by the government for the benefit of the public¹⁴⁹ or the market.¹⁵⁰ Not only was it a mistake in law, it was a mistake in physics.¹⁵¹ The scarcity rationale was used to bar access to traditional broadcasting throughout much of the twentieth century,¹⁵² but the proliferation of cable channels and the Internet—both of which utilize spectrum capacity—have shown that the spectrum has a much higher capacity than Congress and the FCC originally thought.¹⁵³

If the validity of the scarcity doctrine was questionable prior to the digital transition, that transition has downright destroyed it. In the United

149.

The Court misunderstood spectrum. Rights to use frequencies can be subdivided just as other rights and are no more “physically scarce” than paper, water, or diamonds. There is literally no limit to the number of “broadcast frequencies” given time sharing or frequency-splitting possibilities, e.g., or the creation of joint ownership interests in a license. Rights to use frequencies, which the Court thought could be assigned only by “public interest” judgments, are now routinely assigned via competitive bidding. That the market distributes wireless rights makes the economic organization look like other markets, including the newspaper business. And while the Court held that licensing a medium of expression could lead to an unconstitutional “chilling effect” on speech, a footnote indicated that it had found no evidence that broadcast licensing was having any such impact. In stunning revelations a few years later, however, the very matter decided in *Red Lion* was shown to have originated as a strategic campaign to file FCC Fairness Doctrine challenges so as to “harass and intimidate” speakers of a particular viewpoint. *Red Lion* unknowingly facilitated that strategic effort to quash free expression.

Thomas W. Hazlett et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 54–55 (2010) (footnotes omitted).

150.

That ‘scarcity’ is largely the result of decisions by government, not an unavoidable fact of nature. The government’s decisions about spectrum allocation (especially for traditional broadcasting), channel bandwidth, interference protection, local coverage and other technical matters make licenses fewer than they otherwise would be. A second and perhaps even more fundamental decision by which government makes traditional broadcast licenses scarce is to give them—very valuable things in many cases—away for free. If a valuable thing is given away for free, it should not be surprising that the demand exceeds the supply.

BERRSFORD, *supra* note 138, at 11–12 (footnotes omitted).

151.

The Scarcity Rationale appears to assume that there is a physical thing, like land and water, of which there is a scarce amount. What is commonly called “the radio frequency spectrum,” however, has no discrete physical existence. When traditional broadcasting occurs, what happens is a new movement of electrons. The electrons already exist, move, and make up the world around us. . . . Traditional broadcasting can be compared aptly to the creation of a wave in water, which is an activity, a perturbation on the surface of the water, but is not the water itself. . . . Thus, to the extent that *The Scarcity Rationale* assumes that there is a tangible thing, radio spectrum, of which there is a scarce amount, the Rationale is simply incorrect as a matter of scientific fact.

Id. at 8–9 (emphasis added) (footnotes omitted).

152. *Id.* at 3–6.

153. *Id.* at 12–18.

States, television networks are now required to broadcast their signals in a digital format, rather than in analog.¹⁵⁴ The transition started in 1996 and was fully completed by 2009.¹⁵⁵ The digital spectrum, in addition to providing a better television viewing experience, greatly widens television spectrum capacity and allows for far more channels than analog.¹⁵⁶ The move to digital television opened enough of the analog spectrum back up¹⁵⁷ that parts of it were auctioned off to private telecommunications and wireless companies or reserved for public safety communications.¹⁵⁸ If the analog spectrum is so available that the government can sell parts of it off, it is fairly obvious that it is no longer a scarce resource that must be protected.

In addition to changing the supposed scarcity of the broadcasting spectrum, the transition to digital television has huge implications for media law. Any legal differences between broadcast and cable originate with the distinction drawn in *Playboy* that these two different types of channels were broadcast on two different types of radio frequencies.¹⁵⁹ UHF cable frequencies were not scarce, so they escaped much of the regulations that were put on VHF broadcast frequencies.¹⁶⁰ After the digital transition, all of these waves are digital—there is no longer a physical difference between the ways cable and broadcast networks send out their programming to American homes.¹⁶¹ If the distinction between these two types of waves no longer exists, it makes no rational sense to continue to uphold a legal doctrine that preserves it.

154. *Digital Television*, FCC, <http://www.fcc.gov/digital-television> (last visited Apr. 10, 2015).

155. *Id.*

156. GALPERIN, *supra* note 21, at 10.

157. Josephine Soriano, Note, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion's Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341, 344 (2006).

158. *Digital Television*, *supra* note 154.

159. See discussion *supra* Part II.B.3.

160. See *supra* note 31 and accompanying text; discussion *supra* Part II.B.3. Cable channels may have escaped the types of content regulations that plagued broadcast channels, but it also means that they lost out on the benefits that the scarcity trade-off afforded broadcast networks. See *supra* notes 27–28 and accompanying text. Cable channels do not automatically come into the home of every American with a television; they have to rely on subscribers' fees to support their businesses. For a full discussion of the various business models of television networks, see *infra* notes 265–69 and accompanying text.

161. See BERRESFORD, *supra* note 138, at 18.

B. Because the Regulatory Scheme for Indecent Content Is Predicated on the Scarcity Doctrine, It Is Also Obsolete

Early on in the digital transition it looked as though scarcity may survive to shape media law in the twenty-first century.¹⁶² But in the years that have followed, it has become increasingly clear that the scarcity doctrine will soon be as extinct as television sets with actual antennae.¹⁶³ Removing the scarcity doctrine from media law has enormous implications for American indecency policy and whether indecency can still be regulated without it.¹⁶⁴ The main reason for tying indecency to scarcity in *Pacifica* was because of broadcast television and radio's position as both a scarce resource and a uniquely pervasive medium.¹⁶⁵ Scarcity had allowed only a select few networks access to the broadcast spectrum in the first place, and because those few networks were ubiquitous, the FCC had a responsibility to make sure their content was palatable for the American public.¹⁶⁶

Today, broadcast television's position as a uniquely pervasive and scarce resource is simply no longer tenable.¹⁶⁷ Just under seventy percent of American homes with a television have a cable package of some kind.¹⁶⁸ Cable television has become just as pervasive and accessible as broadcast for a vast majority of Americans, which is a stark change from the era in which *Pacifica* was decided.¹⁶⁹ Most Americans are now making

162. See Soriano, *supra* note 157, at 343.

163. Matthew Bloom, Note, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 YALE J.L. & TECH. 109, 110–11 (2007).

164. BERRESFORD, *supra* note 138, at 28–29.

165. See discussion *supra* Part II.B.2.

166. See discussion *supra* Part II.B.2.

167. See generally Bloom, *supra* note 163; BERRESFORD, *supra* note 138; Hazlett et al., *supra* note 149.

168. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 12.

169.

The increasing availability of cable (and the potential pervasiveness of satellite and internet radio) leads to another reason why the “public broadcasts/private subscriptions” distinction based on consumer choice is becoming less relevant. In terms of cable, many people would argue that it is more difficult to receive only the main broadcast networks than it is to subscribe to basic cable. Few stores still sell television antennas. Setting up and maintaining an antenna is more difficult than having the local cable service handle all maintenance and repairs. Also, in today's America, cable television is so important to modern culture that money seldom stands in the way of even the poorest Americans making cable a priority. One need only walk by an unemployment or welfare line and ask how many people have cable TV to understand its importance. A recent report found that 62% of households below the poverty line have cable or satellite TV. Choice is quickly being eliminated from the debate; cable television is becoming a socio-cultural necessity for American households.

Bloom, *supra* note 163, at 119 (footnotes omitted).

an active choice to pay for and invite cable into their homes, thus opening themselves up to channels that are known to have content that is more risqué than the broadcast networks. In addition, the Internet has changed many things in today's society, including disrupting television's role in the home.¹⁷⁰ Last year marked the first time in history that more cable company customers purchased Internet services than television services, so it is fair to say that the Internet is surpassing television in pervasiveness.¹⁷¹ This gap will only continue to widen as over-the-top (OTT) services¹⁷² grow more popular and more customers become cord-cutters.¹⁷³ The American media landscape has outgrown the limited

170. *Id.* at 121–25; BERRESFORD, *supra* note 138, at 28–29.

171. Salvador Rodriguez, *In a First, Cable Companies' Broadband Subscriptions Surpass TV Subscriptions*, L.A. TIMES (Aug. 15, 2014), <http://www.latimes.com/business/technology/la-fi-tt-cable-broadband-surpass-tv-20140815-story.html>.

172. OTT services refer to a customer's ability to purchase individual channels to watch over the Internet. The growth of OTT addresses the long-standing complaint of many cable customers: to get the one or two channels they actually want to watch, they have to pay for a whole package of channels they will never watch. Kenneth Ziffren, *Power Lawyer Ken Ziffren on Who Wins the Race to Go over-the-Top* (Guest Column), HOLLYWOOD REP. (Mar. 12, 2015, 10:00 AM), <http://www.hollywoodreporter.com/news/power-lawyer-ken-ziffren-who-780897>. Perhaps after looking at the success of Internet-only OTT services like Netflix and Amazon Prime, OTT is also becoming increasingly attractive to television networks. In the past year, CBS, HBO, and Starz have all made high-profile announcements of their decisions to offer OTT services. Cecilia Kang, *CBS Launches a Stand-Alone Streaming Service*, WASH. POST (Oct. 16, 2014), <http://www.washingtonpost.com/news/business/wp/2014/10/16/cbs-launches-a-stand-alone-streaming-service/>; Leo Barraclough, *Starz to Launch Streaming Service in International Markets: Report*, VARIETY (Oct. 13, 2014, 12:50 AM), <http://variety.com/2014/tv/news/starz-to-launch-streaming-service-in-international-markets-report-1201328356/>; Marc Graser & Todd Spangler, *HBO Now to Launch on Apple TV*, VARIETY (Mar. 9, 2015, 10:11 AM), <http://variety.com/2015/digital/news/hbo-now-to-launch-on-apple-tv-1201448842/>.

Despite the recent growth of OTT, some Internet-only media companies are still seeking the validation of traditional television. In 2014, the FCC announced proposed rules to allow online-only OTTs to have equal access to broadcast and cable television stations. To maintain the underlying philosophy of OTT—that customers can choose the television stations for which they wish to pay—these channels can be purchased individually and are categorized as multichannel video programming distributors (MVPDs). Edward Wyatt, *F.C.C. Proposal Would Allow À La Carte Internet Video Services*, N.Y. TIMES BITS BLOG (Oct. 29, 2014, 12:06 AM), <http://bits.blogs.nytimes.com/2014/10/29/f-c-c-proposal-would-allow-a-la-carte-internet-video-services/>. With the ability for television channels to become OTTs online and online-only OTTs to become MVPDs on television, it is even more crucial for the FCC to develop indecency regulations that take a more wholistic look at the television landscape and that do not single out broadcast television networks. Drawing distinctions between broadcast and cable television will grow even more complicated as this kind of cross-platform programming becomes the norm.

173. Vikas Bajaj, *Ready to Cut the Cord?*, N.Y. TIMES (Apr. 6, 2013), <http://www.nytimes.com/2013/04/07/opinion/sunday/ready-to-cut-the-cord.html>; Emily Steel, *Suddenly, Plenty of Options for Cord Cutters*, N.Y. TIMES (Mar. 18, 2015), <http://www.nytimes.com/interactive/2015/business/media/streaming-tv-cord-cutting-guide.html>; Paul Bond, *Cord-Cutting Has "Markedly Increased" in Past Year, Analyst Says*, HOLLYWOOD REP. (Feb. 25, 2015, 9:56 AM), <http://www.hollywoodreporter.com/news/cord-cutting-has-markedly-increased-777681>.

regulatory framework that has been built for it; it has become larger and more varied than the *Pacifica* Court could have ever imagined.

At the moment, the Supreme Court says that *Pacifica* is still good law.¹⁷⁴ Broadcast television is still regulated for indecent content¹⁷⁵ while its equally pervasive counterparts on cable and on the Internet go unregulated.¹⁷⁶ However, this may not always be the case. If and when scarcity is removed from American media law, the government will have to look for another rationale upon which it can base its indecency regulations. The U.K. government's regulation of indecent content on television has never been associated with spectrum scarcity,¹⁷⁷ so it provides an interesting model for the United States for a post-scarcity regulatory scheme.

IV. THE U.K. MODEL

A. *Development of the U.K. Television Industry and Regulatory Model*

When the United Kingdom set up its television industry, it did so with different philosophies and intentions than its American counterpart. The core difference between the two systems was that the U.K. government had no reason to tie regulation to the broadcasting spectrum because all early U.K. television channels were publicly owned.¹⁷⁸ The U.K. government was distrustful of private operation of the media,¹⁷⁹ so it set up the television arm of the British Broadcasting Corporation ("BBC") as a public entity.¹⁸⁰ The BBC was and still is a public corporation; its license fee is collected from the public coffers.¹⁸¹ As such, the symbiosis of the television and the advertising industry was never a part of the early British television industry. The public trustee model arose in the United States as a left-handed way to bring private companies under the regulatory eye of the federal government,¹⁸² but in the U.K., the publicly owned television channels were already under the control of the government. As such, the government could place any rules or regulations about content on the BBC and other publicly owned television channels as it saw fit.

174. See *supra* note 143 and accompanying text.

175. See *supra* note 97 and accompanying text.

176. See *supra* note 170.

177. See *infra* note 178 and accompanying text.

178. GALPERIN, *supra* note 21, at 147.

179. *Id.* at 149.

180. *Id.* at 150.

181. *Id.* at 147.

182. See *supra* note 31 and accompanying text.

Cable television eventually came to the United Kingdom after Prime Minister Margaret Thatcher deregulated the media industry and opened up the possibility of privately owned media companies for the first time.¹⁸³ However, unlike the bifurcated regulatory scheme that grew out of the broadcast-cable divide in the United States, the United Kingdom kept its television industry highly centralized.¹⁸⁴ Even after deregulation, there were far fewer moving parts than in the United States,¹⁸⁵ and the U.K. government could still place regulations on privately owned cable channels.¹⁸⁶ Content regulations in the United Kingdom have never been tied to access to the broadcasting system, so content rules on U.K. television are platform neutral¹⁸⁷ and apply to all channels, regardless of public or private ownership.¹⁸⁸ The highly centralized nature of its television industry and its government in general has allowed the United Kingdom to create a flexible and modern scheme to regulate the use of indecent content on television.

B. The 2003 Communications Act

The U.K.'s 2003 Communications Act ("the Act") is an expansive law that governs the entire U.K. media.¹⁸⁹ When Parliament was drafting the Act, it intended to create a forward-thinking piece of legislation that could bring U.K. media into the twenty-first century.¹⁹⁰ It included sections on

183. GALPERIN, *supra* note 21, at 153.

184. *Id.* at 154.

185. The U.K. government, even after Thatcher, had little interest in promoting television competition at the local level, so the affiliate system never existed in that country the way it did in the United States. *Id.* at 151.

186. The U.K. government was far more explicit about the public duties of privately owned television networks than the United States ever was. *Id.* There was no need to create the intermediate legal device of the public trustee model that connected private companies to their public obligations. *Id.* Because the U.K., as a society, is far more accepting of governmental regulations, the privately owned media companies have never really protested the government's ability to regulate the type of content they put on television. *Id.* Of course, it also helps that the British government is far less puritanical about what types of indecent content it allows on television than the American government. *See infra* note 270.

187. GALPERIN, *supra* note 21, at 235.

188. Cable channels in the United Kingdom are only allowed to be privately owned, but because content regulations have never been tied to spectrum access, can still be regulated by the government. *Id.* at 153.

189. Communications Act, 2003, 51 Eliz. 2, c. 21, available at <http://www.legislation.gov.uk/ukpga/2003/21/contents>.

190.

The draft Bill aimed to provide a modern framework for the regulation, content as well as economic, of the broadcasting and telecommunications sectors. From the outset, the draft

media ownership, the future of the BBC and other public broadcasting channels, independent radio and television stations, and the maintenance of the broadcasting spectrum.¹⁹¹ The new Office of Communications (“Ofcom”), which was also created in the Act, was tasked with enforcing this new law. Ofcom is the result of a consolidation of five governmental agencies that previously oversaw various facets of the media.¹⁹² The consolidation of these offices into Ofcom created a powerful watchdog that has been given expansive power over the media by Parliament. The drafters of the Act hoped that by creating a more cohesive and centralized regulation scheme for broadcast media, broadcasters would be allowed to self-regulate as much as possible.¹⁹³

In the sections of the Act that deal with the regulation of indecent content on radio and television,¹⁹⁴ Parliament tasked Ofcom with the responsibility of maintaining a code of minimum content standards that all broadcasters must follow.¹⁹⁵ Parliament offered some guidelines for these content standards in section 319 of the Act,¹⁹⁶ but for the most part,

Bill’s policy narrative sought to elucidate government thinking—including those provisions, such as media ownership, which had not at the time made the face of the Bill.

Grahame Danby, House of Commons Library, *Broadcasting and the Communications Bill (Bill 6 2002-03) 14* (2002).

191. Communications Act, c. 21.

192. The five organizations that combined to create Ofcom are the Office of Telecommunications, the Radiocommunications Agency, the Independent Television Commission, the Radio Authority, and the Broadcasting Standards Commission. DANBY, *supra* note 190, at 17.

193. *Id.* at 14.

194. These provisions are housed under the title “Programme and Fairness Standards.” Communications Act, §§ 319–28.

195. It is important to note just how revolutionary this provision of the 2003 Act is. This was the first time in British history that public channels like the BBC would be regulated in the same manner as private channels. The BBC was quite unhappy to learn that Ofcom would be able to levy fines against it under the 2003 Act. Tim Yeo spoke eloquently of Parliament’s motivation to bring the BBC under Ofcom regulation when the initial bill was introduced:

That this House believes that the Office of Communications should be responsible for regulating the whole of the media and communications industries; that there is no special case to be made for the BBC to be wholly or partly excluded from Ofcom; and that the Government should end this anomaly and establish a level playing field by bringing the BBC fully within Ofcom’s remit, so as to leave the BBC governors with an important role, similar to the non-executive directors of other broadcasting organisations with public service obligations.

DANBY, *supra* note 190, at 15–16.

196. Some of these relevant guidelines for the content code include:

2) The standards objectives are—

(a) that persons under the age of eighteen are protected;

(b) that material likely to encourage or to incite the commission of crime or to lead to disorder is not included in television and radio services;

....

Parliament has left Ofcom free to come up with its own code. The Act also sets up the bare bones of Ofcom's enforcement powers for violations of the content code. Broadcasters are bound to Ofcom's content code under section 325, which makes following the content code a condition of Ofcom granting the broadcaster its license.¹⁹⁷ In addition, section 328 binds broadcasters to Ofcom's administrative remedies.¹⁹⁸ Though the Act does not elaborate much on these administrative remedies, it does mention Ofcom's duty to hear complaints from public citizens about programs they feel are harmful or offensive.¹⁹⁹ If Ofcom finds a violation, broadcasters are required by law to comply with any fines levied against them.²⁰⁰ If they do not follow Ofcom's direction, they risk losing their broadcasting licenses.²⁰¹ By providing only a skeletal structure for Ofcom's duties to regulate content, this portion of the Act provides Ofcom with substantial freedom to create its own content code for television and radio.

C. *The Broadcasting Code*

The most recent iteration of Ofcom's Broadcasting Code ("the Code") was published in March 2013 and covers a broad range of content on television and radio.²⁰² The two sections most relevant to the discussion of indecent content are those on "Protecting the Under-Eighteens" ("Section

(e) that the proper degree of responsibility is exercised with respect to the content of programmes which are religious programmes;

(f) that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material

Communications Act, § 319(2).

197. *Id.* § 325(4).

198. *Id.* § 328.

199. This framework of complaints directly to the government entity charged with regulating broadcasting is a carry-over from the regulation scheme that was in place prior to the Act. At the time the Act was passed, Parliament was considering changing this procedure. One proposal was to have citizens complain directly to the broadcaster first and then, once they had exhausted their efforts, they could start the complaint process with Ofcom. However, Parliament decided to keep the direct complaint system in place because "it is important that people should also feel able to complain to the regulator, especially about breaches of standards which appear serious and which might be detrimental to the public at large. It is equally important that the regulator is able to deal with the complaint promptly." DANBY, *supra* note 190, at 24–25.

200. *See* Communications Act, § 319(2).

201. *Id.*

202. Ofcom Broadcasting Code, 2013, available at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.

1”)²⁰³ and “Harm and Offence” (“Section 2”).²⁰⁴ Ofcom also publishes and regularly updates “Guidance” on each section of the Code, which provides broadcasters and the public with insights into Ofcom’s intent in writing the Code.²⁰⁵

Because Ofcom is charged by law to protect children under eighteen from indecent programming on television,²⁰⁶ it is not surprising that Ofcom reiterates this imperative in the very first section of the Code.²⁰⁷ The main regulatory scheme it put in place is called the “watershed”—an important line of demarcation in the British television schedule.²⁰⁸ The watershed is no longer a new concept, and most parents see it as an important way to protect their children from harmful or offensive programming.²⁰⁹

The watershed is the period between 5:30 A.M. and 9 P.M., during which broadcasters are required to take extra care because there is a higher likelihood that children could be watching or listening.²¹⁰ After 9 P.M., the rules about content are progressively eased²¹¹ as it gets later in/throughout the evening.²¹² Section 1 also lays out the types of harmful and offensive

203. Ofcom Broadcasting Code, 2013, § 1, available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section1.pdf>.

204. Ofcom Broadcasting Code, 2013, § 2, available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section2.pdf>.

205. See OFCOM, OFCOM BROADCASTING CODE GUIDANCE, OFCOM.ORG.UK, <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/bguidance/> (last visited Apr. 10, 2015).

206. See Communications Act, c. 21.

207. Ofcom Broadcasting Code §§ 1.1–1.3.

208. “Television broadcasters must observe the watershed. . . . The watershed only applies to television. The watershed is at [9:00 P.M.]. Material unsuitable for children should not, in general, be shown before [9:00 P.M.] or after [5:30 A.M.].” *Id.* §§ 1.4–1.5.

Premium film subscription services or pay per view services are the only television broadcasters that are exempt from the watershed, provided they implement other measures to protect children from their programming. *Id.* §§ 1.24–1.25. This usually includes adding in a “mandatory restricted access” feature, which is “a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.” *Id.* § 1.18.

209. OFCOM, OFCOM GUIDANCE NOTES—SECTION ONE: PROTECTING THE UNDER 18S, at 2 (2015), available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section1.pdf>.

210. See discussion *supra* note 208.

211. “The transition to more adult material must not be unduly abrupt at the watershed (in the case of television) For television, the strongest material should appear later in the schedule.” Ofcom Broadcasting Code § 1.6.

212. The Code provides that while indecent content can occur after the watershed, “adult sex material” can only be broadcast between 10 P.M. and 5:30 A.M., as an additional protection measure. *Id.* § 1.18. The Code defines adult sex material as “material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation.” *Id.* Adult sex material can be broadcast on premium subscription services and pay per view provided that there is mandatory restricted access and “measures must be in place to ensure that the subscriber is an adult.” *Id.*

content from which those under eighteen must be protected during the watershed hours.²¹³ Unsurprisingly, the section contains provisions on drugs, smoking, solvents, and alcohol;²¹⁴ violent and dangerous behavior;²¹⁵ offensive language;²¹⁶ sexual material;²¹⁷ and nudity.²¹⁸ This

213. Ofcom Broadcasting Code § 1.

214.

The use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol: must not be featured in programmes made primarily for children unless there is strong editorial justification; must generally be avoided and in any case must not be condoned, encouraged or glamorised in other programmes broadcast before the watershed (in the case of television), or when children are particularly likely to be listening (in the case of radio), unless there is editorial justification; must not be condoned, encouraged or glamorised in other programmes likely to be widely seen or heard by under-eighteens unless there is editorial justification.

Id. § 1.10.

215. The Code dictates that:

[v]iolence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed” and that both violence and dangerous behavior “that is easily imitable by children in a manner that is harmful or dangerous: must not be featured in programmes made primarily for children unless there is strong editorial justification; [and] must not be broadcast before the watershed . . . unless there is editorial justification.

Id. §§ 1.11–1.13.

216.

The most offensive language must not be broadcast before the watershed Offensive language must not be used in programmes made for younger children except in the most exceptional circumstances. . . . Offensive language must not be broadcast before the watershed . . . unless it is justified by the context. In any event, frequent use of such language must be avoided before the watershed.

Id. §§ 1.14–1.16.

The Code Guidance on these offensive language provisions points broadcasters to a 1998 study done by the Broadcasting Standards Commission—Ofcom’s predecessor, which oversaw these types of content issues on television—to shed some light on what “the most offensive” language is considered to be. PROTECTING THE UNDER 18S, *supra* note 209, at 5. The study contains a ranking of some colorful words from most to least offensive. The top three were unsurprising—a vast majority of people found cunt (81%), motherfucker (82%) and fuck (75%) to be “very severe.” However, after that there was a large drop-off in percentages of the population who found other words to be “very severe.” Wanker (41%) was the next highest, and others included twat (34%), arsehole (26%), shit (18%), and tits (11%). ANDREA MILLWOOD HARGRAVE, BROAD. STANDARDS COMM’N, BAD LANGUAGE—WHAT ARE THE LIMITS 44–45 (1998), available at http://www.ofcom.org.uk/static/archive/bsc/pdfs/research/Bad_lang.pdf.

217. “Material equivalent to the British Board of Film Classification (“BBFC”) R18-rating must not be broadcast at any time.” Ofcom Broadcasting Code § 1.17. “Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not ‘adult sex material’ as defined in Rule 1.18 above, is justified by the context.”

Id. § 1.19.

Representations of sexual intercourse must not occur before the watershed (in the case of television) or when children are particularly likely to be listening (in the case of radio), unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited.

Id. § 1.20.

section of the Code serves to put broadcasters on notice about the types of content that they may and may not include in their programming.

Section 2 sets out the context in which broadcasters and the general public should think about television content. The Code mandates that content must be within “generally accepted standards,” which “must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.”²¹⁹

The context of the indecent content must be considered in connection with these generally accepted standards.²²⁰ If the indecent content is justified by the context of the program in which it was included, it is not considered a violation of the Code.²²¹ The expansive definition of context in the Code gives Ofcom a broad picture in which to consider potentially indecent content. As such, it gives broadcasters extensive creative freedom when they are producing and creating content, in addition to a substantial defense to cover them if their content comes under question.²²² This

218. “Nudity before the watershed must be justified by the context.” *Id.* § 1.21.

219. *Id.* § 2.1.

220.

In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context . . . Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.

Id. § 2.3.

221. According to the Code,

[c]ontext includes (but is not limited to): the editorial content of the programme, programmes or series; the service on which the material is broadcast; the time of broadcast; what other programmes are scheduled before and after the programme or programmes concerned; the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description; the likely size and composition of the potential audience and likely expectation of the audience; the extent to which the nature of the content can be brought to the attention of the potential audience for example by giving information; and the effect of the material on viewers or listeners who may come across it unawares.

Id.

222. However, Ofcom puts a lot of the onus on broadcasters to be aware of their programming and audience, and the fact that none of it takes place in a vacuum. In the Code Guidance for Section 2, Ofcom notes,

Broadcasters should know their audiences. The use of language (including offensive language) is constantly developing. Whether language is offensive depends on a number of factors. Language is more likely to be offensive, if it is contrary to audience expectations. Sensitivities can vary according to generation and communities/cultures. Offensive material (including offensive language) must be justified by the context (as outlined under Rule 2.3 in

definition of context also provides meaning to many of the provisions in Section 1. While Section 1 can sometimes seem restrictive because of the regulations it places on certain types of content, once the context of those types of content is considered per Section 2, a lot of possibilities open up for broadcasters.

D. The Complaint Process

The complaint process for British citizens to call Ofcom to investigate potentially indecent content on television²²³ is very streamlined. Up to twenty days after viewing questionable content on television,²²⁴ citizens can write a report²²⁵ and submit it to the Ofcom website or at the Ofcom office. This is where the citizen's inquiry ends—a U.K. citizen's only responsibility in the complaint process is to raise the issue in a timely manner, and Ofcom takes care of the rest.²²⁶ Ofcom will then examine the complaints to see if the content in question raises an issue under the Broadcasting Code.²²⁷ If there is no substantive issue raised under the Code, the inquiry ends.²²⁸ But if there is something that requires further examination, Ofcom will request a copy of the program from the network that aired it.²²⁹ Ofcom will then investigate whether the content in the program is indecent as defined by the guidelines in the Code.²³⁰ If Ofcom finds that the content was indecent, the broadcaster that aired the programming can be fined or sanctioned.²³¹ If the broadcaster does not

the Broadcasting Code). Broadcasters should be aware that there are areas of offensive language and material which are particularly sensitive.

OFCOM, OFCOM GUIDANCE NOTES—SECTION TWO: HARM AND OFFENCE 2 (2012), *available at* <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section2.pdf>.

223. *See* OFCOM, PROCEDURES FOR INVESTIGATING BREACHES OF CONTENT STANDARDS FOR TELEVISION AND RADIO (2011), *available at* <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>.

224. *Id.* at 5.

225. The report must contain certain types of information for claims to be processed correctly by Ofcom. Among them, the complaining citizen must list:

the name/title of the programme complained about; the date and time of the programme; the channel on which it was broadcast; the nature of the complaint and (where possible) the particular parts of the programme complained about; the complainant's full contact details (including e-mail address where appropriate); and whether (and, if so, when) the complainant has submitted a complaint to the relevant broadcaster.

Id. at 4.

226. *See id.*

227. *Id.* at 5–6.

228. *Id.* at 6.

229. *Id.*

230. *Id.*

231. *Id.* at 9.

comply with Ofcom's direction, it can have additional fines or sanctions levied against it, including losing its broadcasting license.²³²

V. WILL THE U.K.'S LAWS WORK HERE?

In comparison to the United States' bifurcated system of regulation, the scheme set up by the U.K.'s Communications Act and Broadcasting Code to regulate indecent content on television is cohesive, coherent, and consistent. After examining the U.K.'s system, it becomes clear that the United States model needs a complete overhaul to take it into the new millennium. The *Fox II* opinion put the FCC in a unique position to reevaluate the way it regulates indecent content on television.²³³ Though the FCC tends to operate through "institutionalized inertia,"²³⁴ meaning that it only makes policy changes when absolutely necessary, it is clear that the current situation is reaching its critical mass. The television industry has changed drastically over the past fifteen years, yet the laws have not. The vast majority of American homes have a cable subscription.²³⁵ Cable providers can even block their subscribers' access to one of the traditional broadcast networks during a negotiation dispute between the cable provider and the network- no longer is access to broadcast networks guaranteed by simply plugging a television set into the wall.²³⁶ More and more of the most prestigious programming is moving to cable, and the broadcast networks are trying desperately to compete.²³⁷ And for the first time, consumers can turn to online sources like Netflix and Amazon Prime for quality television programming that is not even on television to begin with.²³⁸ The FCC is now in the unique position to get out in front of these changes and create new content regulations to bring the legal side of television in line with the innovative changes that are happening on the creative side.

Though over two years have passed since the *Fox II* decision was handed down,²³⁹ the FCC has not yet chosen a plan of action. One source

232. *Id.*; see also discussion *supra* notes 197-98 and accompanying text.

233. See discussion *supra* Part II.B.5.

234. GALPERIN, *supra* note 21, at 238.

235. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 12.

236. Bill Carter, *Time Warner Temporarily Removes CBS in Major Cities*, N.Y. TIMES (July 30, 2013), http://www.nytimes.com/2013/07/31/business/media/time-warner-cbs.html?_r=0.

237. See generally SEPINWALL, *supra* note 2.

238. David Carr, *TV Foresees Its Future. Netflix Is There.*, N.Y. TIMES (July 21, 2013), <http://www.nytimes.com/2013/07/22/business/media/tv-foresees-its-future-netflix-is-there.html?page-wanted=all>.

239. FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012).

of influence it should look to is the United Kingdom. Despite legal, governmental, and cultural differences between the two countries, there is a lot the United States could learn from the United Kingdom in setting up laws that would carry its regulation of the television industry into the twenty-first century.²⁴⁰ The FCC should abandon the obsolete scarcity doctrine and strive to create a legal system that regulates all television channels equally.²⁴¹ In addition, it should create broader content laws that focus on context rather than fixating on specific words or images regardless of how they are used. Both types of changes would create a more focused legal scheme and would hopefully avoid the vagueness that got the FCC's policies stricken down in the first place.

A. *Say Goodbye to Scarcity*

Ideally the FCC would seek to regulate indecent content on both broadcast and cable networks the exact same way, something unlikely to happen without eliminating the scarcity doctrine. As of *Fox II*, the scarcity rationale is still good law in the United States.²⁴² The Court declined to reexamine the precedent set by *Pacifica*, which explicitly tied content laws to the scarcity doctrine,²⁴³ in favor of overruling the FCC's indecency rules for vagueness.²⁴⁴ However, if the issue comes before the Court again, there are at least two Justices who would be in favor of reexamining whether the scarcity doctrine should continue to control television content laws.²⁴⁵

240. Though "some aspects of media law are specifically local and tied deeply to their context," Monroe Price notes that comparing different media law systems from different countries can be a very valuable endeavor. Monroe E. Price, *The Market for Loyalties and the Uses of Comparative Media Law*, 5 CARDOZO J. INT'L & COMP. L. 445, 462 (1997). "Foreign models can, of course, provide standards which are, though non-binding, influential assessments of what responsible officials elsewhere, presented with similar problems, have done." *Id.* at 461.

241. As the FCC has left a gaping hole in its regulatory policy, several other authors have written recently with their ideas on how to solve this problem; none look to the United Kingdom for guidance or inspiration. See Chase, *supra* note 67; Fairman, *supra* note 67; Levi, *supra* note 130; Jon Mills, Case Note, *Constitutional Law—Due Process Clause—The Due Process Clause of the Fifth Amendment Requires Fair Notice of What Violates Federal Agency's Indecency Standards*, Fed. Comm'n's Comm'n v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012), 43 CUMB. L. REV. 573 (2013); Alison Nemeth, *The FCC's Broadcast Indecency Policy on "Fleeting Expletives" After the Supreme Court's Latest Decision in F.C.C. v. Fox Television Stations: Sustainable or Also "Fleeting?"*, 21 COMMLAW CONSPECTUS 394 (2013); Richards & Weinert, *supra* note 71.

242. See *supra* note 143 and accompanying text.

243. See discussion *supra* Part II.B.2.

244. See discussion *supra* Part II.B.5.

245. See *infra* notes 246–48 and accompanying text.

As of *Fox II*, a majority of the Court still believed that the government should have some hand in regulating television content, but it is unsure of what that role should be. Justice Ginsburg concurred with the majority in *Fox II*, but wrote separately to voice her concerns that the *Pacifica* precedent was ripe for a second look because of changes in the legal and television landscapes.²⁴⁶ Though brief, her concurrence expressed a possibility for governmental regulation of television content that is divorced from the *Pacifica* model.²⁴⁷ Should another case on this issue come before the Court in a future Term, Justice Ginsburg and Justice Thomas—who expressed concerns about the continued feasibility of *Pacifica* in his concurrence in *Fox I*²⁴⁸—could be important voices for overruling these precedents. If the Supreme Court decided to overrule *Red Lion* and *Pacifica* and vanquish the scarcity doctrine once and for all,²⁴⁹ it would be an enormous opportunity for Congress and the FCC to create a new scheme for regulating indecent content on television.

Despite the Court's adherence to the scarcity doctrine, *Fox II*'s contention that television content still should be subject to some sort of regulation is a good one. The United States and United Kingdom have both premised their systems of regulation on the idea that children must be protected from the indecent content that can come into a home via the television.²⁵⁰ As television content continues to push the envelope, this goal remains vital. A modernized scheme of regulating indecent content on American television should look like the one that the United Kingdom

246. "Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring).

247. *Id.*

248. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 530–35 (2009) (Thomas, J., concurring).

249. Of course, Congress also has the power to repeal the underlying statutes that create the differences in regulation for broadcast and cable networks. If Congress repealed both 18 U.S.C. § 1464, which governs content on the broadcast networks, and 18 U.S.C. § 1468, which governs cable, and created a new law that regulated both types of networks the same, it would have the same net effect as the Supreme Court overruling the precedents of *Red Lion* and *Pacifica*. Congress has been historically unproductive in 2013 and 2014, and it seems likely this trend will continue. Jonathan Weisman, *Underachieving Congress Appears in No Hurry to Change Things Now*, N.Y. TIMES (Dec. 2, 2013), <http://www.nytimes.com/2013/12/03/us/politics/least-productive-congress-on-record-appears-in-no-hurry-to-produce.html>; Drew Desilver, *Congress Still on Track To Be Among Least Productive in History*, PEW RESEARCH CENTER (Sept. 23, 2014), <http://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history/>; Cristina Marcos & Ramsey Cox, *Historically Unproductive Congress Ends*, THE HILL (Dec. 16, 2014, 11:25 PM), <http://thehill.com/blogs/floor-action/senate/227365-historically-unproductive-congress-ends>. As the Court has taken both iterations of the *Fox* case in the past six years, the Court will likely take up this issue again in the future if there is a ripe case.

250. See discussion *supra* Part II.B.2; discussion *supra* note 152 and accompanying text.

has in place, which regulates all television networks equally.²⁵¹ Practically, it would mean that all complaints about indecent content on television would be evaluated using the same framework, and broadcast and cable networks would no longer be treated differently because of the type of frequency they once used.²⁵² The United Kingdom uses a multi-factor analysis to determine whether content is indeed indecent and deserving of a penalty.²⁵³ This model would also be viable model in the United States because it is very flexible and, as a result, allows context to come into the decision-making process in a way it never has before. Part of the Supreme Court's problem with the FCC's previous policy in the *Fox* cases is that it said that context should be considered in determining whether something was indecent, but never actively defined what context was.²⁵⁴ The United Kingdom definition of context puts broadcasters, regulators, and consumers on notice about the type of content they should be expecting.²⁵⁵ Creating a broader framework in which potentially indecent content is considered and adding a well-defined context analysis would erase some of the vagueness or capriciousness of the FCC's policy that the Court so sharply opposed in the *Fox* cases.

Structurally, the complaint process is similar in both countries and should stay the same in the United States under a new system. Citizens should report questionable television content through a formal process. Then, the FCC should be responsible for investigating whether the content was truly indecent and sanctionable under the law. Just like the U.K. model, the FCC's examination of whether the content is indecent should take many factors into consideration.²⁵⁶ The overarching theme should be the context in which the content was used,²⁵⁷ which is something that is entirely absent from the FCC policy that was struck down in the *Fox* cases. In addition, time of day,²⁵⁸ intended audience,²⁵⁹ and actual

251. See discussion *supra* notes 187–88, 208 and accompanying text.

252. To clarify, only basic cable networks will be brought underneath the umbrella of FCC regulation in this proposed scheme. Premium pay cable services like HBO, Starz, Cinemax, and Showtime should be exempt from these regulations, just like they are in the U.K., provided there is an option for parents to block their children's access to the channel. This is the standard used in the U.K., and it is yet another piece of their model that would make sense in the United States. See discussion *supra* note 137 and accompanying text.

253. See discussion *supra* Part IV.C.

254. See discussion *supra* Part II.B.5.

255. See discussion *supra* note 219 and accompanying text.

256. See discussion *supra* Part IV.B–D.

257. See *supra* notes 219–22 and accompanying text.

258. Like in the U.K. laws, programs that are broadcast during the day when children are more likely to be watching should be fined if they contain indecent content. In the U.K., the watershed ends at 9 P.M., but in the United States, the safe harbor hours end at 11 P.M. See discussion *supra* notes

audience²⁶⁰ should be taken into consideration. There should also be rules written on subject areas like language, sex, violence, and drug use, which all tend to be magnets for indecent material.²⁶¹ After weighing all of these factors, if the FCC believed that the programming and content were still too indecent for television, it could then issue fines.²⁶² One piece of the old American regulatory scheme that should be kept is that the recipient of a fine would be allowed to appeal the administrative decision of the FCC in federal court.²⁶³ Using this general framework, the FCC should have a much broader scope in which to consider indecent content on television and would, hopefully, survive judicial scrutiny in a future iteration of *Fox* or a related case.

Undoubtedly, the cable networks will have strong objections to this plan, seeing as they are not currently subject to any sort of regulations for indecent content.²⁶⁴ The way to address this problem is to add a factor in the FCC's analysis that considers the type of network that featured the content. Along with other factors like time of day and context in which the

208–12, 50–70 and accompanying text. While 11 P.M. may seem overly cautious, pushing the safe harbor hours to end at 9 P.M. may seem too early to many Americans. Ending the safe harbor hours at 10 P.M. seems more reasonable for American audiences.

259. Intended audience would look at the network's intended target demographic for the program. Obviously the intended audiences for programs on Nickelodeon versus programs on Comedy Central or FX would be important to consider when determining whether the content is indecent.

260. Ratings data from the Nielsen Company are often very detailed about the demographics of television viewers. See *Television Measurement*, NIELSEN, <http://www.nielsen.com/us/en/nielsen-solutions/nielsen-measurement/nielsen-tv-measurement.html> (last visited Apr. 10, 2015). If the FCC looks at the ratings and realizes an indecent program has been shown to an audience that is mostly children, it would be a factor that weighs heavily in favor of sanctioning the network. In contrast, if the FCC looks at the ratings and finds that the program has been shown only to adults over the age of eighteen, that is a factor that would weigh heavily against sanctioning the network.

261. On the whole, cultural standards on these controversial subject areas between the United States and the United Kingdom can be very different. The FCC should conduct surveys of American attitudes on these topics and consult with various media organizations in order to write effective rules that govern these types of content. An entirely separate paper with an administrative law focus could be written on how the FCC should write these rules. This Note's key suggestion to the FCC during the rulemaking process would be to look to the U.K. rules for a model of a well-written, reasoned, and measured consideration of how a governmental body should evaluate these types of indecent content. See discussion *supra* notes 214–19 and accompanying text.

262. The U.K. scheme for fines is far less punitive than the scheme the United States currently has in place. Right now, the FCC will fine a network for every local affiliate that aired the offending programming, which means that a hypothetical \$250,000 fine can become astronomical when multiplied by the hundreds of local network affiliates. See *supra* note 23 for a discussion of the local affiliate system. These enormous fines are likely what makes the networks so litigious. If the United States adopted a flat fine model—fining a network once, not once for each affiliate—it could potentially reduce the time that the networks and the FCC spend in court fighting about these issues.

263. There is no appeals process for fines in the U.K., but doing away with that process in the United States would sharply contravene the entire American administrative law system.

264. See discussion *supra* Part II.B.3.

content was shown, the type of network would be considered by the FCC in determining whether content is indecent. Though an argument can be made that making type of network a factor in the analysis would preserve the very bifurcated system of analysis a new regulatory scheme would seek to eliminate, adding this factor would only seek to take the current television landscape, and what the American people think about it, into consideration.

At this point in time, the American people have grown to expect two different types of programming on broadcast and cable. If a complaint is filed against a program on a cable network, the FCC should be able to consider that network's status as a cable network in deciding whether to fine it. Over time, as the American people begin to think about broadcast and cable as two sides of the same coin rather than two entirely different coins, the need to take the network's status as broadcast or cable into consideration will diminish. Type of network should not be the determinative factor in the FCC's analysis, but the factor should carry enough weight in order to satisfy the cable networks and not disturb the status quo of the industry too much. The important characteristic of this new model would be that all networks would be evaluated under the same general framework, rather than two entirely different frameworks for two different types of frequencies. Even if different factors were weighed for broadcast versus cable programming, the mere fact that all complaints about indecent content would be evaluated within the same framework would be a huge step in the right direction for the FCC and the American government.

B. The More Things Change, the More They Stay the Same

Even under this new system of regulation that eliminates the distinction between broadcast and cable networks and allows for more flexibility in deciding which content is indecent, it is unlikely that the television landscape will devolve into pornography in primetime. The main external control on the type of content television networks will put on the air is, as always, the market. In addition to having different frequencies, the different types of television channels have different ways of making their money. Broadcast networks rely entirely on advertising revenues, premium cable channels rely almost entirely on subscriber fees, and basic cable channels rely on a mix of both.²⁶⁵ As a result, the degree to which a

265. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 73–77.

network relies on advertising revenues generally correlates with the degree to which it will put indecent content on the air.²⁶⁶ Television networks, especially broadcast and basic cable, have a long history of self-regulation and compliance departments, often called standards and practices, that often enforce stricter standards than what is legally required.²⁶⁷ This is done mostly to appease advertisers; the relationship between television networks and their advertisers is entirely symbiotic and always has been.²⁶⁸ A television network will not put a program on the air if it believes the content will upset its advertisers or lose them money.²⁶⁹ As such, even if the regulations on indecent content were broadened, it is unlikely that CBS would start airing *Game of Thrones*-esque programming at 8 P.M., or that Malcolm Tucker's foul mouth²⁷⁰ would find its way onto NBC.²⁷¹ Changing the content regulations simply means that networks will

266. *Id.*

267. *Id.* at 295–96.

268. Jason Mittell, *The 'Classic Network System' in the US*, in THE TELEVISION HISTORY BOOK, *supra* note 22, at 44, 44–46.

269. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 295–96. A working paper published by the FCC notes that “advertisers prefer programming content that best ‘frames’ their advertising. Such content tends to be light and ‘unchallenging.’” Keith S. Brown & Roberto J. Cavazos, Fed. Comm’n Comm’n, *Empirical Aspects of Advertiser Preferences and Program Content of Network Television* 18 (Media Bureau Staff Research Paper No. 2003-1, 2003), available at <http://www.fcc.gov/working-papers/empirical-aspects-advertiser-preferences-and-program-content-network-television>. Advertisers on broadcast networks tend to steer clear of edgy content; if they want to cater their product to an audience that prefers racier content, they tend to look to premium channels like HBO. *See id.*

270. Malcolm Tucker, as immortalized by Peter Capaldi, is a character on the long-running BBC series *The Thick of It*. *The Thick of It: Malcolm Tucker*, BBC TWO, <http://www.bbc.co.uk/programmes/b006qgrd/profiles/malcolmtucker> (last visited Apr. 10, 2015). He is known for his creative swearing, which often contains many of the “Seven Dirty Words” in the same breath. *Id.* Armando Iannucci, who created *The Thick of It*, is also the mastermind behind *Veep* for American audiences. Ian Parker, *Expletives Not Deleted: The Profane Satire of Armando Iannucci’s ‘Veep’*, THE NEW YORKER (March 26, 2012), http://www.newyorker.com/reporting/2012/03/26/120326fa_fact_parker. While *The Thick of It* airs on a television channel that is paid for by the British government, Tucker’s equally filthy American counterparts on *Veep* have been relegated to HBO. *Id.*

271. This is not to say, of course, that many of the broadcast networks do not already air content in primetime that many people consider indecent:

I don’t mean to complain about censorship at all though, because as you probably have seen by now, you can basically say whatever you want on television. It’s ridiculous. You can say anything you want. And if you don’t believe me, you should watch a little program called *Law & Order: Special Victims Unit*. Yeah—a show that I love. Because on that show, you can say the grossest things you’ve ever heard in your life. No, you can’t say, like, the f-word. You can’t say that on *Special Victims Unit*. But people walk around on *SVU* going like: “Looks like the victim had anal contusions.” “Yo, looks like we found semen and fecal matter in the victim’s ear canal.” Those are two real things that I heard on *Law & Order: SVU* at 3 in the afternoon, both spoken by Ice-T.

JOHN MULANEY: NEW IN TOWN (Comedy Central Records 2012). *Law & Order: Special Victims Unit* airs at 9 P.M. on NBC, which is during the safe harbor hours. *Law & Order SVU*, NBC.COM, <http://www.nbc.com/law-order-special-victims-unit> (last visited Apr. 10, 2015).

be evaluated on the same playing field when they use the same indecent words and images, rather than two separate fields.

Children will also be a large reason why the current television landscape is unlikely to change. Children's television has become big business in the years since *Pacifica* was handed down; the growth of the cable industry allowed for the possibility of channels that were devoted entirely to content for children.²⁷² The Nickelodeons and Disney Channels of the industry give children a safe space on television and give parents peace of mind that their children will only be exposed to content that is age-appropriate.²⁷³ Despite the ever-expanding number of options of children's programming on television,²⁷⁴ children do still watch broadcast and basic cable channels with content that may be too indecent for them to view. Public pressure in the late 1990s and early 2000s gave way to the rating system and the creation of the V-Chip.²⁷⁵ The V-Chip comes standard in all television models and allows parents to block out certain programs whose ratings are greater than what they want their children to be exposed to.²⁷⁶ The same public pressure that gave rise to these innovations for controlling children's access to television content would likely continue to keep indecent content off channels that many children are watching. If parents feel they are unable to continue watching certain networks with their children, both during and after official safe harbor hours, the network's ratings will drop as a result—something to which the network will respond quickly. The opinions of the American people about the content of television programming, and the access that children have to it, will not fall on deaf ears. As a result, the networks will likely keep the content of their programming similar to what is currently on television, even under a different regulatory regime.

NBC is not the only broadcast network that pushes the boundaries of appropriate content in primetime, safe-harbor-hours television. Fox recently made headlines for risqué storylines on its shows *New Girl* and *The Mindy Project*. Lesley Goldberg, *Fisting, Anal Sex, Penis Pictures: Broadcast TV's Ratings Grab Gets Raunchy*, HOLLYWOOD REP. (Nov. 5, 2014, 5:00 AM), <http://www.hollywoodreporter.com/news/fisting-anal-sex-penis-pictures-746403>; Andy Greenwald, *Backdoor Cover: The Last-Minute Resurrection of 'New Girl' and 'The Mindy Project'*, GRANTLAND (Nov. 19, 2014), <http://grantland.com/hollywood-prospectus/new-girl-mindy-project-mindy-kaling-fox/>.

272. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 250–57.

273. *Id.*

274. See *id.* at 104–07 for an expansive list of the options for children's programming on television. In addition, the availability of options for children on Netflix is an important piece of that platform's popularity. Georg Szalai, *Analyst: Netflix's Popularity Driven by Kids TV Content*, HOLLYWOOD REP. (July 2, 2012, 7:41 AM), <http://www.hollywoodreporter.com/news/analyst-netflixs-popularity-driven-by-344127>.

275. BLUMENTHAL & GOODENOUGH, *supra* note 6, at 296–97.

276. *Id.*

VI. CONCLUSION

The way in which the United States government regulates indecent content on television has reached a critical mass. The 2012 *Fox II* decision has given the FCC the opportunity to completely overhaul the way in which the government regulates content on television, but so far no new regulatory scheme has been issued. Perhaps it is because the FCC is trying a “wait-and-see” approach and allowing the dust to settle in a rapidly changing television industry, or perhaps it is because the agency is entirely overwhelmed with the endless possibilities for a new regulatory scheme. One guiding light for FCC policy makers should be the U.K. model, which allows for context, flexibility, and a broader consideration of indecent content. All of the television networks in this country could be evaluated under the same regulatory framework, rather than the outdated and broken bifurcated model that is still the norm. With the changes suggested in this Note, the FCC could create a modern and adaptive model of regulation that could guide the American television industry—and the legal arm that oversees it—into the twenty-first century and beyond.

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APPENDIX I—THE FCC COMPLAINT PROCESS

How the FCC Resolves Obscenity/Indecency/Profanity Complaints, FCC.GOV, <http://transition.fcc.gov/eb/oip/flow.pdf> (last visited Apr. 10, 2015).

