

# The FCC's Regulation of Indecency

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The FCC's Regulation of Indecency is one in an ongoing series of First Reports, published by the First Amendment Center, on major First Amendment issues of our time.



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# The FCC's Regulation of Indecency

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## *Introduction*

The goal of this First Report is to describe the history of the Federal Communications Commission's regulation of broadcast indecency and the agency's decision in recent years to take a much more active stance toward such regulation. This development arguably has spawned two reactions that pull in strikingly different directions. On the one hand, it has given renewed salience to arguments that indecency regulation of broadcast channels should be deemed unconstitutional. At the same time, the FCC's willingness to take a more activist regulatory position in this area may have also encouraged some to press for expansion of the commission's indecency regime to include cable and satellite as well as broadcasting, and to serve as a model for the regulation of televised violence as well. Thus, the commission's renewed emphasis on indecency after a period of relative quiescence may have the effect of triggering a debate on more sweeping and fundamental questions than merely whether a woman's bare back can be shown on television during times when children may be in the audience.

## *Executive summary*

The Federal Communications Commission has the statutory authority under 18 U.S.C. § 1464 to regulate the broadcast of obscene, indecent or profane material. Pursuant to that authority, it has defined broadcast indecency (in what it calls its "generic" definition) as "material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium."<sup>1</sup> Unlike obscene material, which can be banned completely from the airwaves, expression fitting the commission's definition of indecency must be "channeled" to late-night hours (currently 10 p.m. to 6 a.m.).

The Supreme Court narrowly upheld the agency's right to channel indecency against First Amendment challenge in *FCC v. Pacifica*<sup>2</sup> in 1978. Thereafter, for 10 years, the commission chose to use its regulatory power simply to focus on broadcast uses of the "seven dirty words" identified in *Pacifica*. When it decided to expand its regulatory

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- 1912**      **Congress approves** “An Act to regulate radio communication,” also known as the Radio Act of 1912. Although it was mainly concerned with seafaring vessels, this act did require all amateur radio operators to obtain a license from the secretary of commerce and labor and prevented them from transmitting over certain wavelengths.
- 1927**      **The Radio Act of 1927 is signed** into law. This act established the Federal Radio Commission, whose responsibility was to regulate radio communications inside the United States “as public convenience, interest, or necessity requires.” The act gave the FRC the “authority to make special regulations applicable to radio stations engaged in chain broadcasting.” The act also stated that the FRC had no power to censor radio communications or interfere with free speech but did stipulate that “No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications.”
- 1928**      **Charles Jenkins Laboratories obtains** the first television license from the Federal Radio Commission.
- 1931**      **The 9th U.S. Circuit Court of Appeals affirms** the judgment of a federal district court in Oregon convicting Robert Gordon Duncan of “knowingly, unlawfully, willingly, and feloniously uttering obscene, indecent, and profane language by means of radio communication” in violation of the Radio Act of 1927. Duncan, by referring to an individual as “damned” and using the expression “By God” irreverently, became the first person convicted of broadcast indecency.
- 1934**      **The Communications Act of 1934 is enacted** by Congress. This act is essentially the same as the 1927 act, the major change being the replacement of the FRC with the Federal Communications Commission.

footprint beyond those words in the late 1980s, the agency indicated that it would nevertheless wield its regulatory power with restraint. The commission’s “send a message” cases of that period put broadcasters on notice that crass shock-jocks, boundary-crossing college radio stations, and programs targeting particular groups (such as gay men) could all be found to have aired actionable indecency even if they did not use any of the forbidden words. Yet the judicial approval, in the *ACT v. FCC*<sup>3</sup> cases, of the FCC’s revised approach to indecency in the 1980s seemed to hinge on the agency’s continuing regulatory restraint.

Thus, the commission’s cases made it a point to reassure broadcasters that fleeting sexual references or depictions would not likely be problematic, that at least some innuendo and double entendre could pass muster, that merit was an important aspect of indecency analysis, and that complainants would have to provide evidentiary support to trigger serious commission review of indecency claims. Although several radio station programs were swept into the net of indecency regulation under those rules in the following decade, television programming escaped regulation. And despite more stringent FCC language about indecency, programming with sexual themes and references continued to flourish both in shock radio and increasingly on mainstream television.

The commission’s approach to indecency changed radically in 2003. The agency’s recent decisions — in cases such as Janet Jackson’s breast-revealing “wardrobe malfunction” during CBS’s Super Bowl XXXVIII half-time show, Bono’s expletive-accompanied “thank you” for his Golden Globe award, salacious scenes of simulated sex in *Married by America* and *Without*

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*A Trace*, and vulgar banter in several shock radio/morning “zoo” radio programs — reflect a significant shift in the commission’s indecency regime today.

The most obvious change is the FCC’s imposition of large fines (called “forfeitures”) for indecency broadcast outside the nighttime safe harbor. Even before Congress’ recent approval of extensively increased forfeiture authority by statute, the agency had begun imposing high fines under its old rules by assessing them on a “per utterance” basis and charging network affiliates as well as the networks themselves for indecency in network programming. The increases in fines were designed to address the apparently unanimous commission view that broadcasters, instead of being deterred from airing indecency, had absorbed their prior indecency forfeitures merely as minor costs of doing business.

Increased forfeitures were accompanied by additional significant changes both in procedure and substance. Procedural changes included revisions to the complaint process that greatly ease the complainants’ burdens. Substantive changes included the development (despite the commission’s talk of context) of what appeared to be categories of “per se indecency” — including even fleeting references to expletives such as what the commission euphemistically calls “the F-Word” and the “S-Word.” It did not weigh in the broadcasters’ favor that the challenged programming was presented live and the indecency was unscripted, unexpected or accidental. The recent cases also cast doubt on the decisive significance of merit. Moreover, the commission began explicitly to consider the risqué character of the overall program in determining whether the challenged material

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- 1937** **The “Mae West Affair.”** A mildly risqué radio skit known as the “Adam and Eve” sketch, featuring Mae West as Eve, causes a public uproar and earns NBC a written reprimand from the FCC.
- 1940** **In the Mayflower Broadcasting decision,** the FCC rules that stations could never editorialize. This ban becomes known as the Mayflower Doctrine and is considered the precursor of the Fairness Doctrine.
- 1941** **The beginning of modern commercial television.** The FCC grants WNBT-TV New York the first commercial TV license, making it the first commercial television station in the United States.
- 1943** **National Broadcasting Co. v. United States.** The U.S. Supreme Court constructs the “scarcity” theory. The Court rules that the radio spectrum is a limited, or scarce, commodity that requires government regulation, in the form of licenses. “The facilities of radio are limited and therefore precious: they cannot be left to wasteful use without detriment to the public interest,” the Court writes. “The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the ‘public interest, convenience, or necessity.’ Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.” This theory becomes the main rationale used to justify regulation of speech on the radio as opposed to print media.
- 1944** **First instance of television censorship.** NBC turns off the sound on a performance of “We’re Having a Baby” by Eddie Cantor because, according to NBC representatives, the song contains “objectionable” lyrics.

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**1948** **The prohibition that “No person** within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications” is removed from the Communications Act of 1934 when Congress creates the U.S. Criminal Code. 18 USCA §1464 provides for a \$10,000 fine and/or a two-year prison sentence for whoever violates the law. However, the FCC does retain the right, under a different section of the Communications Act, to enforce an indecency prohibition and assess fines.

**1949** **FCC issues a policy statement,** “Report on Editorializing by Broadcast Licensees.” It marks the formal announcement of the Fairness Doctrine. It discards the Mayflower doctrine and recognizes that it is the duty of broadcasters to cover controversial issues as well as to provide contrasting views.

**1957** **Singer Elvis Presley appears** on “The Ed Sullivan Show.” Cameramen are ordered to shoot only from the waist up, as Elvis’s pelvic gyrations were considered too suggestive for television.

**1967** **The Rolling Stones appear on** the Sullivan show. Sullivan finds the chorus of the song “Let’s Spend the Night Together” “objectionable” so the Rolling Stones agree to change the lyrics to “Let’s spend some time together.”

**1969** **Red Lion Broadcasting v. FCC.** The U.S. Supreme Court revisits and upholds the scarcity theory, saying that “because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed.” The Court also upholds the Fairness Doctrine, asserting that broadcasters must give adequate coverage to public issues and that coverage must be fair, accurately reflecting opposing views. In addition, the Court holds that broadcasters must provide an opportunity for any individuals involved in a public issue to respond to any personal attacks

was patently offensive, turning its analysis of the expressive context of indecency into a sword rather than an exculpatory shield. In addition, after 40 years, the commission found broadcasters liable for airing not only indecent, but also profane programming, with the term “profane” defined to include far more than blasphemous expression.

Overall, these refinements in the FCC’s indecency policy appear to have had a chilling effect on programming. News accounts provide evidence of increased timorousness and self-censorship on the part of broadcasters. The FCC’s actions have also shifted the locus of power between networks and affiliates, reduced the pressure on the industry to perfect blocking mechanisms, and perhaps created incentives for possible format changes.

This report does not to purport to explain the reason for the commission’s shift in indecency policy. However, a significant development is the ability of anti-indecency interest groups, such as the Parents Television Council, to use the Internet to generate mass complaints to the FCC from their members and visitors to their Web sites. When joined with congressional pressure to clean up the airwaves, massive numbers of public complaints about indecent programming can become a powerful regulatory justification. This report also observes that indecency has become a powerful rhetorical tool for those who argue for reduced media consolidation. Asserting that consolidated media lead to increased indecency, opponents of media concentration highlight broadcast indecency as a strategic element of their broader de-concentration agenda. Finally, the report notes that the FCC’s actions in stepping up indecency enforcement enhance its own power in an

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atmosphere that has been otherwise largely deregulatory since the Reagan era.

Because of the apparently strong consensus at the commission on eliminating daytime indecency, and Congress' inability to vote "for smut and against America's children," as popular opinion might phrase it, the broadcast networks apparently concluded that judicial challenges are their only option. Accordingly, Fox, CBS and their affiliates challenged some of the commission's indecency decisions on constitutional and administrative-law grounds in the 2nd and 3rd U.S. Circuit Courts of Appeal respectively. We await the decision of the 3rd Circuit, but the 2nd Circuit recently found the FCC's new policy sanctioning fleeting expletives to be arbitrary and capricious in violation of the Administrative Procedure Act, vacated the FCC's order, and remanded the matter to the commission.<sup>4</sup> In the course of doing so, the court suggested — in dicta — that the policy would likely be unconstitutional as well. The commission has apparently decided not to appeal the decision to the full court of appeals, but still has the opportunity to seek Supreme Court review.\* A legislative response to the decision is also in process.

While final analysis will have to await all relevant court rulings, the First Amendment issues are well worth addressing here. On the one hand, the Supreme Court in *Federal*

\* Editor's note: On Nov. 1, 2007, the FCC filed a petition for writ of certiorari, asking the U.S. Supreme Court to review the 2<sup>nd</sup> Circuit's decision. The Supreme Court granted review in *FCC v. Fox Television Stations* (07-582) on March 17, 2008. See p. 96 in the Appendix for the article "Justices to examine 'fleeting' expletives" by veteran Supreme Court reporter Tony Mauro.

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made against them. "We think that the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority," the justices write.

**1970** **The FCC issues its first fine** for broadcast indecency to Philadelphia radio station WUHY for airing a taped interview with Grateful Dead band member Jerry Garcia in which he used numerous expletives.

**1973** ***Miller v. California***. This case provides the legal "definition" of obscenity and basic guidelines to determine what is obscene. (Obscene material has no First Amendment protection.) The guidelines are (a.) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b.) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c.) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

**1975** **The National Association of Broadcasters** and the three major networks, ABC, CBS, and NBC, adopt the "family viewing" hour in an attempt to reduce the amount of violent and sexually oriented material on TV. (In 1976 a federal court in California declares the family viewing hour unconstitutional owing to FCC pressure on the networks to adopt the policy. The 9th U.S. Circuit Court of Appeals vacated the ruling in 1979 on jurisdictional issues, but the family viewing hour was never reinstated.)



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1978

**FCC v. *Pacifica***, the “Seven Dirty Words Case.” The U.S. Supreme Court holds that an afternoon broadcast of comedian George Carlin’s “Seven Dirty Words” monologue was indecent and that the FCC was within its constitutional rights to impose sanctions on the radio station and regulate further indecent broadcasts. The Court says the FCC may regulate obscene, indecent or profane material and that although the monologue was not obscene, it was indecent. Prurient appeal, the Court notes, is not an essential component of indecent language as it is with obscene language. This finding basically puts indecent speech in another category. The Court observes that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.” It gives two reasons. First, in what some call the “pervasiveness theory,” the Court says that “the broadcast media had established a uniquely pervasive presence in the lives of Americans.” Thus, one can be subjected to offensive material at any time while tuning from one station to another. Second, that “broadcasting is uniquely accessible to children, even those too young to read” justifies special treatment of broadcast material.

1987

**The FCC, in response to increasing** complaints about content on the airwaves, decides the indecency standard used from 1975 to 1987 was “unduly narrow” and gives public notice that it will apply a more appropriate “generic definition of broadcast indecency.” The new definition involves “material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.” The FCC also puts broadcasters on notice that the accepted standard of airing indecent broadcasts after 10 p.m. was no longer a given and that broadcasts may still be in violation of the law if “there is a reasonable risk that children may be in the audience.” In addition, the FCC discards the “scarcity theory” as a basis for regulation of broadcast media.

*Communications Commission v. Pacifica* did permit FCC channeling of broadcast indecency, and subsequent cases limiting indecency regulation in other contexts have distinguished (and not purported to overrule) *Pacifica*. The D.C. Circuit as well has specifically rejected vagueness challenges to the indecency standard. If the agency can channel all indecent material to late-night hours on a nuisance rationale under *Pacifica*, it can reasonably decide that limiting its focus to the “seven dirty words” is tantamount to an arbitrary distinction. So long as it does not regulate in a manner designed to promote any particular viewpoint, courts may well find the ambiguity associated with a standard like the generic indecency definition to be an unavoidable aspect of language. Moreover, a presumption that particular types of expletives will be deemed patently offensive is not so vague and unpredictable that it should lead to a significant chilling effect. And even if there is a chilling effect, it arguably amounts to no more than delaying indecent programming to 10 p.m. — one might say not an overly onerous requirement. As for indecency-enforcement procedures, there is arguably nothing in the First Amendment that places unrealistic evidentiary burdens on complainants, so long as the agency requires enough to be able to make some kind of reasonable contextual determination.

On the other hand, while the commission has consistently uttered the mantra that its definition of indecency has withstood constitutional review already, neither the Supreme Court in *Pacifica* nor the D.C. Circuit in the *ACT v. FCC* cases has opined on the constitutionality of the indecency regime as currently applied. Cautions in those cases for

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regulatory restraint cast doubt on the commission's assertions of constitutionality. Broadcaster supporters will point out that Supreme Court First Amendment precedent in areas *other* than broadcasting has struck down attempts to regulate indecency: on the telephone (*Sable v. FCC*<sup>5</sup>), on cable (*United States v. Playboy Entertainment Group, Inc.*<sup>6</sup>), and on the Internet (*Reno v. American Civil Liberties Union*<sup>7</sup>). Certainly, constitutional questions surround the commission's revival of profanity as a separate ground for liability under Section 1464. The FCC's invigorated indecency regime further exacerbates the expressive intrusion of this type of regulation: In assessing patent offensiveness, for example, the commission inevitably uses its own substantive judgment to decide whether the material in question was "necessary" or "gratuitous," thereby making itself the final aesthetic arbiter of programming. In attempting to apply the standpoint of the average broadcast viewer or listener without reference to program-popularity data, the commission also risks engaging in regulation that privileges certain kinds of mainstream cultural norms without even considering the existence of alternative expressive communities. And while *some* degree of uncertainty is admittedly inherent in attempts to apply a standard as broad as the "generic" indecency definition, the cursory character of the commission's explanations and the apparent inconsistencies in at least some of its indecency precedent are likely to lead to excessive self-censorship on the part of broadcasters.

Ultimately, the FCC's indecency regime must pass strict scrutiny under the First Amendment because it is fundamentally content-based regulation. The stringency of the review,

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- 1988** **The District of Columbia** Circuit Court of Appeals upholds the generic definition the FCC has decided to apply to indecency complaints but rules that "in view of the constitutionally protected expression interests at stake," the FCC must give broadcasters clear notice of times at which indecent material may be aired.
- The FCC bars all indecent** broadcasting. This 24-hour-a-day ban was a directive from Congress issued Oct. 1, 1988, as part of an appropriations bill.
- 1991** **The D.C. Circuit rules that** the complete ban on indecent broadcasts is unconstitutional.
- 1993** **The FCC, as directed by Congress** in passing the Public Telecommunications Act of 1992, bars indecent programming from 6 a.m. to midnight.
- The D.C. Circuit**, relying on its two previous rulings, holds that the new time restriction on indecent broadcasts is unconstitutional.
- 1995** **The FCC, in compliance** with previous decisions of the D.C. Circuit, limits its ban on the broadcast of indecent material to the hours of 6 a.m. to 10 p.m.
- Infinity Broadcasting reaches** a settlement with the FCC to pay \$1.7 million in fines for various violations by shock jock Howard Stern. This was, at the time, the largest cumulative fine for indecency ever paid.
- 1996** **The Telecommunications Act of 1996** is signed into law. The law mandates that the broadcasting industry develop a rating system to identify sexual, violent or other indecent programming. It also required TV manufacturers to install the V-chip in all newly manufactured sets by Jan. 1, 2000.

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**1997**      **The TV Parental Guidelines ratings system** is first put into use.

**2000**      ***United States v. Playboy Entertainment Group.***  
 This case challenges a section of the Telecommunications Act of 1996. The section in question required cable-television operators who provided primarily sexually oriented programming either to fully scramble or fully block those channels or limit their programming to between 10 p.m. and 6 a.m. Playboy alleges that the statute is an unnecessarily restrictive, content-based restriction that violates the First Amendment. The Supreme Court agrees and declares the statute unconstitutional.

An important issue brought out in this case is the difference between cable television, which is not subject to FCC regulation, and regular broadcast media, which is regulated by the FCC. The key difference, as the Court pointed out, is that cable systems have the ability to block unwanted channels on a household-by-household basis. So if a household finds the content on a certain channel offensive, that household can contact the cable provider and have that channel blocked, thus avoiding the need for government supervision.

**2001**      **The FCC issues its first fine** against a TV station when it fines Telemundo of Puerto Rico station WKAQ-TV for broadcasting “indecent material in apparent willful and repeated violation of” federal law. The broadcast in question, which appeared on the variety show “No te Duermas,” featured a scene showing a man and a woman in a bubble-filled bathtub. In the scene, the woman licks the man’s chest, winks and says she needs to look for her contact lens, then disappears underwater as the man smiles. The station argues that the scene merely contained sexual innuendo, but the FCC says the “sexual meaning was unmistakable.”

however, depends on two factors. The first goes to the specifics of strict-scrutiny analysis. How the issue is resolved depends on how courts define the compelling interest and what the government must show to discount technological alternatives to regulation. Even if the protection of children from fleeting expletives is a compelling government interest, cases like *Playboy* can be read to suggest that indecency regulation will not pass constitutional muster if there is a non-content-based alternative to regulation — even if the alternative is not perfect. The availability of the V-chip and the fact that so many Americans receive their broadcast channels via cable (with its own blocking mechanisms) suggest that such (admittedly imperfect) consumer-empowerment devices could well undermine the FCC’s regulatory regime.

The second underlying constitutional consideration is the fact that since the inception of radio, broadcasting has been consistently treated by the Supreme Court as a medium *sui generis* — unique — under the First Amendment. Far more regulation than would have been deemed constitutionally acceptable in the context of print has been permitted for radio and television because broadcasting has been treated as different from other forms of media. This “broadcast exceptionalism” has been justified by reference to the scarcity of broadcast frequencies, the pervasiveness of the medium and its unique accessibility to children. Technological change, the convergence of electronic media, the transformation of the information marketplace, and powerful critiques of the underlying assumptions of the distinctive character of broadcasting now put in question the continued vitality of broadcast exceptionalism and the

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lesser First Amendment protection for broadcast expression associated with it. The commission's recent decision to enhance its broadcast-indecency prohibitions provides an opportunity to address directly the claim that no relevant distinctions remain to justify distinct content regulation for broadcast media.

Ultimately, even though the FCC's decisions in the area of broadcast indecency are important on their own terms and the pending cases will have important consequences for the jurisprudence of broadcast regulation, two recent developments additionally demonstrate the fundamental importance of this inquiry. First, supporters of the FCC's indecency regime claim that the agency should expand its regulation to include indecency on cable and satellite media as well and congressional action to that effect is in the offing. Second, interest groups and members of Congress are currently discussing expanding FCC authority to channel violent programming to late night-hours in a fashion parallel to its regulation of indecency. A report on television violence recently released by the FCC argues for the constitutional viability of well-tailored interventions to curb television violence.

Both the extension of indecency regulation to cable and satellite and the channeling of violent programming face significant constitutional hurdles, particularly with respect to cable. The fact that both cable and satellite are subscription services would weigh against the constitutionality of command-and-control regulation parallel to broadcast-indecency enforcement. Moreover, constitutionally suspect vagueness is even more clearly likely to accompany attempts to regulate television violence. However, both "voluntary" compliance and sophisticated drafting of legislation and

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2003

**Accepting a Golden Globe award**, Bono, lead singer of the rock group U2, utters the phrase "this is really, really f\*\*\*ing brilliant." The FCC receives 234 complaints but decides that "the utterance did not violate federal restriction . . . because the language in question did not describe or depict sexual or excretory activities or organs." Later, at the urging of FCC Chairman Michael Powell, the FCC reverses its decision but levies no fine.

2004

**The FCC levies the largest single fine** for indecency in history to Clear Channel Communication. The radio chain is fined \$755,000 for sexually explicit content that aired between 6:30 a.m. and 9 a.m. on the "Bubba the Love Sponge Show."

**The "wardrobe malfunction"** during the Super Bowl halftime show. This incident leads to a \$550,000 fine issued to Viacom, the owner of CBS, and a crackdown on indecency by the FCC. A record \$7.9 million in fines are issued in 2004. CBS is challenging the fine.

**Thirty-nine members of the House of Representatives** send a letter to FCC Chairman Michael Powell asking the agency to initiate a "Notice of Inquiry" on the issue of television violence and its impact on children.

**The FCC reverses its decision** regarding Bono's use of the F-word during the Golden Globe awards, and says any use of that word, regardless of context or the number of times it is used, will be considered indecent and be subject to FCC fines.

**Clear Channel Communications reaches a settlement** with the FCC and agrees to pay a record \$1.75 million in fines for a series of indecency complaints dating to 1995. The settlement does not include the \$755,000 fine from January 2004.

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**2004** **The FCC proposes the largest cumulative fine** to date, against Fox Television Network. The FCC fines 169 Fox stations \$7,000 each for a total of \$1.18 million for an episode of “Married by America” which featured “strippers and various sexual situations.” FOX is challenging the fine.

**Citing fear of FCC fines**, 66 ABC affiliates decide not to show the movie “Saving Private Ryan” as part of their Veterans Day commemoration.

**2005** **Michigan GOP Rep. Fred Upton** introduces H.R. 310, the Broadcast Decency Enforcement Act: “To increase the penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent, and profane material, and for other purposes.” The next day Sen. Sam Brownback, R-Kan., introduces a similar bill, S.193, in the Senate.

**The House votes 389-38 to pass** the Broadcast Decency Enforcement Act.

**Democratic Sen. Jay Rockefeller** of West Virginia introduces S. 616, the “Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005.” This bill would allow the FCC to regulate, for the first time, cable and satellite programming and violence on regular broadcast television. The measure was referred to the Committee on Commerce, Science and Transportation where it died.

**The chairman of the Senate Committee** on Commerce, Science, and Transportation, Sen. Ted Stevens, R-Alaska, holds an official Open Forum on Decency. He hopes to stimulate voluntary anti-indecency action by broadcasters.

commission rules can avoid constitutional barriers to some extent. Thus, even if the future regulatory initiatives — to extend indecency regulation to cable and satellite subscription programming, and to channel violence to a late-night safe harbor akin to the indecency safe harbor — fail doctrinally, the fact that they have garnered public support and achieved some legislative traction suggests that these initiatives are likely to have a significant degree of indirect impact on media behavior.

*I. The history of broadcast-indecency regulation*

The FCC’s authority to regulate broadcast indecency — in place since 1927 — currently comes from 18 U.S.C. § 1464, which provides that:

Whoever utters any obscene, indecent, or profane language by means of radio communications shall be fined under this title or imprisoned not more than two years, or both.<sup>8</sup>

The statute does not define the terms “obscene, indecent, or profane” and their elaboration has been left to the commission. The commission may revoke a station license, impose a monetary forfeiture or issue a warning for the broadcast of indecent material.<sup>9</sup>

The FCC has attempted to regulate on-air indecency since the 1920s. The history of the FCC’s indecency enforcement reflects four different eras. At first, until the 1960s, the commission issued some letters containing

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sweeping rhetoric, but engaged in few formal indecency-enforcement processes.<sup>10</sup> Whether the reason for this relative reticence was the cultural conformity of the 1950s,<sup>11</sup> the private codes of conduct adopted by the National Association of Broadcasters,<sup>12</sup> the FCC's ability to address the issue of indecency indirectly, under other regulatory rationales,<sup>13</sup> or some combination of factors, the FCC did not develop a significant jurisprudence of Section 1464 until 1970, when it explicitly adopted a broad definition of indecency.<sup>14</sup>

It was not until a Pacifica Foundation radio station aired a monologue by comedian George Carlin in 1973 and a single member of Morality in Media complained that his 15-year-old "young son" had heard the program at 2 p.m. in the car that the commission began to focus seriously on prohibiting indecency.<sup>15</sup> In *FCC v. Pacifica*,<sup>16</sup> the Supreme Court upheld the FCC's authority to impose sanctions for the broadcast of "Filthy Words," Carlin's satirical monologue about the seven "words you couldn't say on the public ... airwaves."<sup>17</sup>

Despite the fact that *Pacifica* approved the FCC's indecency action, the decade immediately following *Pacifica* was characterized by extreme restraint on the part of the commission in enforcing its newly approved power over indecency: One could call it an era of regulatory retreat. The commission effectively limited its indecency enforcement to instances in which broadcasters used the "seven dirty words" before 10 p.m.<sup>18</sup>

The commission reversed this restrained approach in 1987. Prodded by conservative activist groups and White House interest, the

## TIMELINE: Broadcast Decency

2006

**Sen. Stevens sponsors several more hearings** on broadcast decency and other broadcasting issues. The panel includes executives from CBS, Motion Picture Association of America, Comcast Corp. and the National Association of Broadcasters. Broadcasters say the rating system and V-chip are adequate, and that parents need to learn how to use these tools.

**The FCC proposes a new record fine** against CBS for an episode of "Without a Trace" that "graphically depict[ed] teenage boys and girls participating in a sexual orgy." The FCC fines 111 CBS affiliate stations \$32,000 each, a total of \$3.55 million. CBS is challenging the fine. The FCC also reviews a number of other shows about which it received complaints of so-called "fleeting obscenities" — obscenities uttered spontaneously during live broadcasts or in an isolated or fleeting manner within a broadcast — and decides not to issue any fines. "But for the fact that existing precedent would have permitted [these broadcasts], it would be appropriate to initiate a [fine] against [broadcasters] that broadcast the program prior to 10 p.m.," the FCC says. The agency also puts broadcasters on notice that any usage of the F-word, S-word or any derivatives would be considered indecent.

**The four major TV networks** file a lawsuit against the FCC challenging its March indecency rulings. The networks are challenging the constitutionality of the rulings, saying the FCC standards for indecent language restrict free speech and are arbitrary, vague and have resulted in significant self-censorship. The case is *Fox Television v. FCC*.

**The Senate passes** the Broadcast Decency Enforcement Act by unanimous consent.

**President Bush signs** the Broadcast Decency Enforcement Act of 2005 into law. The law ups the maximum fine the FCC can impose per indecency violation tenfold, from \$32,500 to \$325,000.

TIMELINE: Broadcast Decency

2006

**The 2nd U.S. Circuit Court of Appeals**

temporarily blocks parts of the FCC enforcement guidelines issued in 2004 and grants a request by the FCC to allow the agency to reconsider its findings.

**The FCC reverses two indecency rulings** from its contentious March 2004 ruling.

2007

**The FCC releases the report** "In the Matter of Violent Television and Its Impact on Children." This is the report requested in 2004. Among the report's conclusions is that exposure to violence in the media can increase aggressive behavior in children; while there are constitutional barriers to regulating violent programming, the courts have provided a framework for regulating violent content; and the current "fixes," i.e., the V-chip and the rating system, are not effective in protecting children from violent programming. The report sums up by saying that Congress could limit the hours when violent programming can be broadcast "and/or mandate some other form of consumer choice in obtaining video programming."

**The 2nd U.S. Circuit Court of Appeals** reaches a decision in the *Fox Television v. FCC* case. In a 2-1 decision, the court ruled that the FCC policy, articulated in the March 2004 "Golden Globe" decision, regarding "fleeting expletives" "is arbitrary and capricious." The court agreed with the networks that "there is no question that the FCC has changed its policy." The majority did point out, however, that "agencies are ... free to revise their rules and policies" but these changes must be accompanied with "a reasoned analysis for departing from prior precedent." The court ruled that the FCC did not do this, thus its new policy was invalid.

commission issued three decisions<sup>19</sup> unveiling a new indecency approach under which the agency would begin enforcing a "generic" definition of indecency — one articulated in the FCC's *Pacifica* case — against "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."<sup>20</sup> The agency explained that it would abandon its post-*Pacifica* focus on the "seven dirty words," and in response to a Petition for Clarification filed by broadcasters, the commission established midnight as the beginning of the safe harbor, and articulated factors it would consider in finding indecency (such as the vulgar or shocking nature of the words or images, the manner of presentation, whether the material was isolated or fleeting, and the material's artistic or literary merit).<sup>21</sup>

In *Action for Children's Television v. FCC (ACT I)*, this order was challenged as overly broad and unconstitutionally vague. In rejecting the constitutional claims, the D.C. Circuit concluded that the commission's indecency definition had already passed constitutional muster in the Supreme Court's *Pacifica* decision, and that vagueness was inherent in any attempt to define indecency.<sup>22</sup> Nevertheless, the court relied upon the commission's continued commitment to a "restrained enforcement policy"<sup>23</sup> and remanded the case so that the commission could further support the particular time frame it had chosen for the indecency "safe harbor."<sup>24</sup> This decision apparently prodded Congress to adopt a requirement that the commission enforce its indecency rules 24 hours per day. In turn, the regulations adopted by the

## THE FCC'S REGULATION OF INDECENCY

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FCC in response to the 24-hour ban of broadcast indecency succumbed to constitutional challenge in *Action for Children's Television v. FCC (ACT II)*.<sup>25</sup> Congress responded by adopting the Public Telecommunications Act of 1992, pursuant to which the FCC was required to establish a safe harbor from midnight to 6 a.m. for indecency (except for public broadcasters, whose safe harbor would begin at 10 p.m.). The D.C. Circuit held in *Action for Children's Television v. FCC (ACT III)* that even though the midnight-to-6 a.m. safe harbor could pass the First Amendment narrow-tailoring requirement standing alone, it would have to be struck down because of the public-broadcaster exception.<sup>26</sup>

Thereafter, the commission engaged in some indecency enforcement, but to a more limited extent than its 1987 decisions might have suggested. Between 1987 and 2001, the commission reportedly issued 52 fines for indecency.<sup>27</sup> Shock-jock Howard Stern became a common target of indecency enforcement, leading to his on-air challenge to the FCC: "Hey, FCC, penis!"<sup>28</sup> Ultimately, Stern broadcaster Infinity entered into a settlement agreement with the commission whereby it would volunteer \$1.7 million to the U.S. Treasury in return for the dismissal of the then-pending actions against Stern's radio programming.<sup>29</sup> Other than this Infinity settlement, the total amount of fines for indecency ranged from \$25,500 to \$49,000 during the second Clinton administration.<sup>30</sup> Moreover, even though the commission became more active with respect to indecency on radio, television programs remained virtually exempt from indecency findings during this period.<sup>31</sup> Thus, some FCC-watchers characterize the agency's pre-2003 indecency efforts as quite restrained.<sup>32</sup>

This state of affairs changed dramatically during the tenure of then-Chairman Michael Powell, who oversaw the imposition of indecency fines totaling \$7,928,080 in 2004.<sup>33</sup> Although Chairman Powell began his term with statements indicating distaste for content regulation,<sup>34</sup> he ultimately oversaw the beginning of the most aggressive indecency enforcement effort in FCC history.<sup>35</sup> The succeeding FCC Chairman, Kevin Martin, has made clear that the elimination of indecency during daytime hours is a key component of his FCC policy.<sup>36</sup> The current commission appears united in its desire to enforce its indecency rules with gusto.<sup>37</sup>

In the meantime, while the commission was finding ways of increasing indecency fines even under its limited forfeiture authority until 2006, Congress considered bills to increase the FCC's power to increase indecency fines significantly. Ultimately, President George W. Bush signed the Broadcast Decency Enforcement Act, which amends the Federal Communications Act by greatly multiplying the potential penalties for airing indecency.<sup>38</sup> By contrast to the maximum forfeiture authority of \$32,500 per incident



under the old law, the commission can now impose a fine up to \$325,000 for each violation or each day of a continuing violation, so long as the fine for any continuing violation does not exceed \$3 million for any single act or failure to act.<sup>39</sup>

## *II. The current regime*

Indecency enforcement became extremely active beginning in 2003. A clear inkling of the seismic shift in FCC indecency policy came when the FCC, faced with congressional pressure, reversed its own Enforcement Bureau's decision and found indecent U2 singer Bono's excited utterance, in accepting a Golden Globe award, that "this is really, really fucking brilliant."<sup>40</sup> Similarly, Janet Jackson's millisecond breast-baring "wardrobe malfunction" during her performance with Justin Timberlake in the halftime show of CBS' broadcast of the 2004 Super Bowl garnered tremendous media attention and provided a highly publicized occasion to demonstrate the agency's stepped-up indecency-enforcement regime.<sup>41</sup> Beyond targeting fleeting expletives or momentary "costume reveals," however, the current era of indecency enforcement reflects important broader changes both in procedure and substance. It also reflects responsive self-regulatory developments by broadcasters and other media.

### ***A. The FCC's description of its indecency standard***

The FCC has stated that it reviews indecency complaints pursuant to a two-pronged review process. It first reviews the challenged material to determine whether it fits into the "subject matter scope" of the indecency definition: the requirement that there be a depiction or description of a sexual or excretory organ or activity.<sup>42</sup> Once it determines that the material does in fact constitute such a depiction or description, the agency then assesses whether the reference is "patently offensive as measured by contemporary community standards for the broadcast medium."<sup>43</sup>

Unlike the obscenity standard, the commission's indecency standard is not local: "[T]he standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."<sup>44</sup> The commissioners determine the views of the average broadcast viewer or listener by relying not on social-science data or program popularity as reflected in ratings, but on "our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."<sup>45</sup>

In determining whether the material is patently offensive, the commission has

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repeatedly stated that “the full context in which the material appeared is critically important.”<sup>46</sup> The agency has explained that:

“It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used. Explicit language in the context of a bona fide newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be. Moreover, contextual determinations are necessarily highly facts-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.”<sup>47</sup>

In engaging in its contextual analysis, the FCC looks at: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.<sup>48</sup> The commission “takes into account the manner and purpose of broadcast material. For example, material that panders to, titillates, or shocks the audience is treated quite differently than material that is primarily used to educate or inform the audience.”<sup>49</sup> In examining these three factors, the commission “weigh[s] and balance[s] them on a case-by-case basis” because “[e]ach indecency case presents its own particular mix of these, and possibly, other factors.”<sup>50</sup> In addition to opening the door to as-yet-unarticulated factors, the commission has recently explained that “in particular cases, one or two factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent or, alternatively, removing the broadcast from the realm of indecency.”<sup>51</sup> Nevertheless, the commission has reiterated its view that “subject matter alone does not render material indecent.”<sup>52</sup>

### ***B. A recent sampling of enforcement actions***

Although the FCC's reactions to the Janet Jackson Super Bowl episode and Bono's Golden Globes “thank you”<sup>53</sup> were probably the most publicized recent enforcement actions, other examples of live programming featuring expletives and/or nudity, however fleeting, attracted the commission's attention. The commission, writing in its *Omnibus Order* in 2006, found actionable indecency in Cher's statement, when accepting her 2002 Billboard Music Award, that “people have been telling me I'm on the way out every year, right? So fuck 'em.”<sup>54</sup> Nicole Richie's ad-libbed quip as a presenter at the 2003 Billboard Music Awards show — “Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple” — was similarly deemed indecent.<sup>55</sup>

Shock radio, morning zoo programs and other such popular fare continued to feel the brunt of the FCC's attention after 2003. Clear Channel Radio was fined for airing Howard Stern segments referencing anal sex and the fictitious personal-hygiene product "Sphincterine."<sup>56</sup> A week before the 2004 Super Bowl broadcast, the commission proposed a fine of \$755,000 against Clear Channel Communications for widespread indecency — including discussions of penis size — in its popular "Bubba the Love Sponge" shock-radio programming.<sup>57</sup> The agency also fined Infinity Broadcasting Corp. \$357,000 for a show in which radio talents Opie & Anthony conducted a contest in which couples were encouraged to have sex in public places and described some contestants apparently having sex in St. Patrick's Cathedral.<sup>58</sup>

Nor was mainstream television spared the commission's wrath. The agency imposed a fine on CBS for an episode of its hit series "Without a Trace" that involved a depiction of a teenage orgy.<sup>59</sup> Similarly, the Fox network was subjected to a fine of \$1,183,000 for an episode of its reality program "Married by America," during which bachelor and bachelorette parties for the potential spouses featured strippers and sexual situations.<sup>60</sup> Broadcaster attempts to obscure nudity in some "reality" programming were unavailing, as the agency found indecent an episode of the WB reality show "The Surreal Life 2" despite the fact that many of the images were blurred by digital pixilation.<sup>61</sup> In a parallel trend, Spanish-language programming was also swept into the net of indecency enforcement, despite the FCC's need for translation.<sup>62</sup>

Merit did not guarantee immunity either. The commission issued a notice of apparent liability against PBS stations for daytime airing of "The Blues: Godfathers and Sons?," a highly acclaimed documentary about the blues by Martin Scorsese, because of its interviewees' casual and extensive use of expletives.<sup>63</sup> (By contrast, the agency concluded that the use of expletives in the movie "Saving Private Ryan" were necessitated by the subject and therefore not indecent.)<sup>64</sup>

Even cartoons did not receive automatic indecency exemptions. While an episode of the cartoon program "The Simpsons" featuring scantily clad cartoon girls pole-dancing was deemed not indecent, the commission did not dismiss the possibility of an indecency finding for cartoons and other animated programming.<sup>65</sup>

Finally, attempts to advise viewers by providing parental ratings and advisories were not sufficient to avoid maximum indecency fines in some programs — such as an NBC Telemundo broadcast of "Con el Corazon en la Mano," a Spanish-language program depicting a rape scene.<sup>66</sup>

Indecency cases after 2003 did not always lead to forfeitures for licensees, however.<sup>67</sup> Some of the confusion asserted by broadcasters was grounded on instances in which

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programming was deemed not patently offensive despite what the licensees claimed were merely marginal differences from instances in which maximum forfeitures were imposed. For example, despite the outcome in “Con el Corazon en la Mano,” parental warnings and advisories seemed to play an important role in the commission’s conclusion that other programs (such as “Saving Private Ryan”) should not be considered indecent.<sup>68</sup> Although “fuck” and “shit” had triggered indecency findings, as noted above, the commission in 2005 found the particular references to the words “dick,” “power dick,” “ass,” “pissed,” “bastard,” “penis,” “son of a bitch,” “testicle” and “vaginal” in programs targeted by the Parents Television Council not to be “sufficiently explicit or graphic and/or sustained to be patently offensive.”<sup>69</sup> “Hell,” “damn,” “orgasm,” “penis,” “testicles,” “breast,” “nipples,” “can,” “crap” and “bitch” also escaped a finding of patent offensiveness as used.<sup>70</sup> The commission absolved sexually suggestive scenes or language from popular television programs such as “Alias,”<sup>71</sup> “Buffy the Vampire Slayer,”<sup>72</sup> “Will and Grace”<sup>73</sup> and “Friends.”<sup>74</sup> Some absurd innuendo also received liberal treatment from the commission. Examples include the commission’s denial of an indecency complaint about an episode of the Fox television program “Keen Eddie,” which involved hiring a prostitute to “extract” semen from a thoroughbred horse<sup>75</sup> and a tongue-in-cheek introductory segment to a 2004 Monday Night Football broadcast in which a towel-clad actress from another television sit-com purported to entice one of that night’s football players away from the game by dropping her towel (thereby revealing her naked back above the waist to viewers).<sup>76</sup> Television programming with an educative purpose was also spared indecency liability when the commission rejected complaints about a discussion of teenage sexual practices — including descriptions of current slang for various sexual activities — in a 2004 “Oprah Winfrey Show” segment titled “The Secret Language of Teens” on the grounds that the program was designed to educate parents and was not presented in a vulgar manner.<sup>77</sup>

### ***C. How has the FCC’s indecency-enforcement process changed?***

The account in Section II (B) above of some recent FCC indecency actions, as well as other commission statements, reflect what this report suggests are significant shifts in the FCC’s attitude, its procedures, and its substantive rule applications in the indecency context. It also provides concrete examples to illustrate what some have claimed to be the inconsistent application of the current indecency regime by the FCC.<sup>78</sup> This section, II (C), attempts to provide a systematic categorization of the commission’s changes in this area.

**1. FCC ‘PROCEDURAL’ DEVELOPMENTS**

On what one might call the “procedural” front, the FCC’s recent actions demonstrate changes both in the complaint process and in the imposition of liability. With respect to the complaint process, the commission appears to have relaxed its evidentiary requirements for reviewing indecency complaints. Its attempts to solve the endemic delays in the indecency process have generated mass complaint resolutions covering programming aired over many years. For the first time, the commission has emphasized the non-binding character of FCC staff-level decisions in the indecency area. With respect to the imposition of liability, the commission has very significantly increased the forfeitures imposed for violations of the indecency rules; has shifted its position on the imposition of forfeitures against licensees that have not themselves received viewer or listener complaints; has pointedly reminded broadcasters that it could well deny license renewal to recidivist violators of its indecency rules; and has entered into consent decrees that remove pre-decree indecency from consideration at license renewal while imposing stringent compliance requirements on broadcasters.

*a. Regarding complaint processes*

The FCC has never functioned as a roving commission seeking out indecent broadcast programming aired outside the safe-harbor hours; instead, indecency enforcement has always been a complaint-driven process.<sup>79</sup> Since the early days of the indecency rules, the FCC has required complainants to provide it with full or partial tapes of the offending program, the date and time of the broadcast, and the call sign of the station involved.<sup>80</sup> Recently, however, the agency has proceeded on a number of indecency complaints despite the complainants’ inability to provide such tapes or transcripts.<sup>81</sup> The FCC has taken the position that its traditional reliance on complainants’ tapes or transcripts is better characterized as a “practice” rather than a mandatory requirement, and that the practice can be waived in appropriate circumstances by the commission.<sup>82</sup> The evidentiary burden at the outset thus appears to have now shifted from the complainants to the licensees, effectively creating a presumption that an indecency complaint will be considered valid unless rebutted by the licensee.<sup>83</sup> This development is potentially significant, especially in light of the fact that most broadcasters — having been relieved of many record-keeping requirements by the FCC in the deregulatory 1980s — no longer keep either tapes or transcripts of the programming they air.<sup>84</sup> Thus, the ability of stations to confirm or deny complainants’ assertions depends on the fortuitous existence of documentation and the recollections of station personnel. That in turn is further complicated by the delays in FCC processing of indecency complaints;<sup>85</sup> recollections naturally fade and documents are routinely purged over time.<sup>86</sup> Moreover, as broadcasters have responded to the enhanced stringency in FCC

indecent enforcement, they have often fired the very personnel whose recollections would become relevant in delayed FCC indecent proceedings. Thus, the combination of changes in complaint processes, FCC delay, and spotty licensee record-keeping have effectively shifted the burden of proof from complainants to licensees in indecent enforcement and have made it difficult for licensees to avoid liability.

FCC delays in resolving indecent complaints have given broadcasters an arrow in their constitutional quiver: allowing them to argue that the delays and disorganization of the FCC process provide insufficient and untimely guidance in their attempts to follow the commission's shifting rules. Although the flurry of indecent decisions released until 2006 indicate that the commission has sought to resolve its indecent backlog, the extent of the delays and the number of complaints have meant that mass decisions covering many years have been issued. The danger of such mass decisions, as articulated by Commissioner Michael J. Copps, is that they are "cursory."<sup>87</sup> The delays have also meant that indecent enforcement decisions have been released confusingly out of order. Moreover, the commission appears to be waiting for judicial resolution of the networks' constitutional challenges before it resolves its pending indecent complaints.<sup>88</sup>

Finally, in response to broadcaster claims that the indecent process has led to inconsistent decisions, the FCC has apparently tightened the reins on the delegated authority under which commission staff had previously been permitted to operate regarding indecent. In the past, both commission and staff decisions had been used interchangeably as precedent in attempting to provide guidance on the agency's application of indecent standards.<sup>89</sup> Recently, however, the commission has rejected claims by broadcasters that it is enforcing its indecent standards inconsistently either by disavowing previous staff-level decisions, or refusing to rely on findings in Notices of Apparent Liability (NALs) because they are not formally final decisions, or rejecting the precedential value of unpublished decisions.<sup>90</sup> However, the commission does not explicitly say that it will reverse all those previous decisions. Thus, in attempting to distance itself from its staff precedent, the commission is effectively creating an orphan staff jurisprudence.<sup>91</sup>

***b. Regarding liability***

With regard to the imposition of liability for indecent, the commission has increased forfeiture amounts, changed the way in which it assesses forfeitures, reminded broadcasters of the agency's license-revocation authority even when only imposing fines, and entered into micromanaging settlement agreements with many of the largest broadcasters.

The first item of note with respect to forfeitures is that the commission has significantly increased the amounts of forfeitures it imposes in response to findings of indecency-rule violations. Since former Chairman Michael Powell decried the commission’s traditionally low indecency fines as simply “costs of doing business” absorbed by large, profitable media conglomerates,<sup>92</sup> there has been bipartisan concern on the part of the commission that the indecency-enforcement process does not have an appropriate deterrent effect. This has led the commission, for the first time, to an explicit consideration of the offender’s economic resources as part of the process of imposing forfeitures.<sup>93</sup>

The desire to enhance the effectiveness of the agency’s forfeiture process also led the commission to proceed on two fronts. First, at the congressional level, the commission and its allies called for legislative increases in its forfeiture authority.<sup>94</sup> Second, while waiting for congressional enhancement of its forfeiture authority, the commission also began to increase the totality of fines imposed by reinterpreting its application of its existing forfeiture authority.<sup>95</sup> It did so in two ways: by proposing (and sometimes imposing) forfeitures on a “per utterance” basis,<sup>96</sup> and by imposing forfeitures on network affiliates for having aired network programming thereafter found to be actionably indecent.<sup>97</sup> Although the commission did not in fact impose forfeitures in these ways in every instance, the fact that it did so in some instances very likely had a deterrent effect overall particularly in light of liability “per utterance.” At a minimum, the “double whammy” of per-utterance liability for affiliates — and even small-market affiliates — likely shifted the power relationship between affiliates and networks and increased affiliate leverage over network programming that might be deemed unacceptable in conservative parts of the country.<sup>98</sup>

Further uncertainty has been engendered by the commission’s apparent recent shift in its forfeiture approach. Arguing that the restraint appropriate in light of First Amendment values should limit the imposition of forfeitures “only against licensees and stations whose broadcasts ... were the subject of a viewer complaint filed with the Commission[,]”<sup>99</sup> the commission in its *Omnibus Order* appeared to retreat from its prior practice of imposing indecency liability regardless of whether a particular station’s viewers complained about a program, so long as the program was deemed indecent in response to complaints by some station’s viewers.

Worth noting also is the fact that the commission has used even its forfeiture decisions as platforms to remind broadcasters in dicta that the agency is empowered to revoke licenses for failure to comply with its rules.<sup>100</sup> Indeed, Commissioner Copps has on several occasions criticized the commission for having failed to commence license-revocation procedures against recidivist stations.<sup>101</sup> It is notable that such license-

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revocation threats have been made by the commission with respect to major networks, even in circumstances of merely vicarious liability.

Finally, the commission has relatively recently entered into settlements with some of the largest radio group owners who have been repeat offenders of its indecency rules. For example, the agency settled with Viacom for a “voluntary contribution” of \$3.5 million to the United States Treasury,<sup>102</sup> with Clear Channel for \$1.75 million,<sup>103</sup> and with Emmis for \$300,000.<sup>104</sup> While the settlement of old, outstanding indecency claims is not a particularly new development, it is notable both that the commission has agreed in these settlements that the settled indecency charges would not be considered at renewal time or in the context of license transfers,<sup>105</sup> and that some of the settlements require very specific employment-related decisions by the broadcasters.<sup>106</sup> The renewal immunity for settled indecency claims has raised the ire of certain groups and has induced Commissioner Copps to complain that recidivist broadcasters should be challenged at license renewal.<sup>107</sup> Objections have been made to the broadcasters’ settlement commitments: Their agreements mean not only that an FCC decision will trigger suspending or terminating broadcast personnel upon receipt of an NAL “or other proposed action” — quite an unusual type of internal control — but also that broadcasters will likely censor themselves more than the government might be able to.<sup>108</sup> Another significance of the settlement process is that it avoids judicial assessment of the commission’s indecency approach.<sup>109</sup>

### FEDERAL COMMUNICATIONS COMMISSION V. PACIFICA FOUNDATION, 438 U.S. 726 (1978)

Nearly 30 years ago, the U.S. Supreme Court ruled in *FCC v. Pacifica Foundation* that the government could fine a radio station for an “indecent” broadcast delivered during daytime hours. The oft-criticized decision reaffirmed the idea that the government has a freer hand to regulate the broadcast medium to a greater degree than other forms of media.

“I certainly think *Pacifica* demonstrates how we have medium-specific jurisprudence in the First Amendment arena,” says free-speech expert Robert Richards, the founding co-director of the Pennsylvania Center for the First Amendment. “The Supreme Court cases from that era show that the Court was very willing to treat broadcasting differently from print media.”

On Oct. 30, 1973, John R. Douglas, a member of the group Morality in Media, heard a radio broadcast of comedian George Carlin’s “Filthy Words” monologue while driving with his minor, teenage-son in New York. At 2 p.m. that day, a local station played the monologue, which repeatedly featured Carlin’s “seven dirty words you can never say on television” — “shit, piss, fuck, cunt, cocksucker, motherfucker and tits.”

Douglas filed a complaint with the Federal Communications Commission, contending that minors should not be exposed to such profane and indecent comments. The FCC agreed and issued an order in February 1975, reasoning that *Pacifica Foundation*, which owned the New York radio station that broadcast Carlin’s monologue, “could have been the subject of administrative sanctions.” The FCC did not impose formal sanctions but placed a letter in the station’s file that could be used to increase future punishments. The FCC determined that “the language as broadcast was indecent and could



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FOUNDATION, 438 U.S. 726 (1978)

be prohibited by federal law 18 U.S.C. § 1464," which forbids the radio broadcast of "obscene, indecent or profane" speech.

Pacifica appealed successfully to the U.S. Court of Appeals for the District of Columbia, which ruled 2-1 that the FCC had exceeded its statutory authority and violated the First Amendment. The FCC then appealed to the U.S. Supreme Court.

In his plurality opinion, Justice John Paul Stevens examined statutory issues and then tackled the broader free-expression question — "whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances."

Stevens noted that the speech took place in the broadcast medium, which "has received the most limited First Amendment protection." He emphasized "two distinctions" between the broadcast medium and other forms of communication that justified this lower level of protection: (1) broadcast's "uniquely pervasive presence" and (2) its accessibility to children. "The ease with which children may obtain access to broadcast material ... amply justifi[es] special treatment of indecent broadcasting," he wrote.

Justice William Brennan, joined by Justice Thurgood Marshall, dissented vehemently, accusing the majority of "misapplication of fundamental First Amendment principles." Brennan contended that if the First Amendment protected Robert Paul Cohen from punishment for wearing a jacket with the words "Fuck the Draft" into a California courthouse in *Cohen v. California* (1971), then it should also protect the radio station for playing Carlin's social commentary.

**c. Commission consensus**

Finally, it is important that the decision to focus on broadcast indecency appears to have garnered unanimous support from the Commissioners. This is not a partisan issue for the agency. Even though Commissioner Copps argues for greater stringency in enforcement<sup>110</sup> and Commissioner Jonathan Adelstein expresses concern that the agency may have taken its enforcement too far in certain cases,<sup>111</sup> all the commissioners appear to support increased indecency enforcement generally. At a minimum, the commission consensus regarding the need to regulate indecency is likely to have a very strong deterrent effect on the media industry.

**2. FCC 'SUBSTANTIVE' CHANGES**

Although the commission claims to be continuing to apply its traditional and heavily contextual indecency analysis, a review of the commission's recent indecency decisions discloses some major substantive changes. The most potentially expansive new development is the FCC's decision to enforce the statutory prohibition against broadcasting "profane" as well as "indecent" material. Additional substantive changes include the apparent development of some categories of virtually per se indecency, the diminution in significance of the commission's former "fleeting use" exception, increased skepticism toward claims of a "news reporting" exception or reliance on innuendo, refusal to excuse live programming and lack of broadcaster control for accidental indecency, use of full context as a sword rather than a mitigating factor, and reliance on broadcasters' failure to make full use of

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technology to block indecency as evidence of willful violation. As will be discussed below,<sup>112</sup> the recent 2nd Circuit decision striking down the commission's new "fleeting expletives" policy puts into question the continued viability of the agency's presumption that use of the expletives "fuck" and "shit" would be indecent and profane.

### *a. Revival of profanity*

Perhaps the most obvious of the substantive changes in the commission's approach to sexual expression on the air after 2003 was that the agency, for the first time since the 1930s, revived the prohibition against profanity and indicated its intention to force broadcasters to confine "profane" as well as "indecent" material to the late-night safe harbor. In finding the "F-Word" and the "S-Word" to be presumptively profane, the commission interpreted the profane as extending far beyond the blasphemous.<sup>113</sup> The "F-Word" was profane because, in context, it constituted vulgar and coarse language "so grossly offensive to members of the public who actually hear it as to amount to a nuisance."<sup>114</sup> Even beyond the expletives, the commission defined objectionably "profane" material very broadly, to include expression that would not necessarily rise to the level of indecency.<sup>115</sup> The commission articulated some limits to the presumptively profane: "We reserve that distinction for the most offensive words in the English language, the broadcast of which are likely to shock the viewer and disturb the peace and quiet of the home."<sup>116</sup> Although the agency stated in its *Omnibus Remand Order* that "[i]n certain cases, language that is presumptively

FEDERAL COMMUNICATIONS  
COMMISSION V. PACIFICA  
FOUNDATION, 438 U.S. 726 (1978)

He criticized the plurality for allowing the suppression of non-obscene speech that adults and older minors should be able to listen to if they wish. He wrote: "It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable." He further accused the justices in the majority of "acute ethnocentric myopia." Two other justices dissented — Potter Stewart and Byron White — although they dissented on statutory, rather than constitutional, grounds. Stewart reasoned that 18 U.S.C. § 1464's prohibition of "obscene, indecent or profane language" should be limited to reach just obscene expression.

"*Pacifica* withstood the test of time for so many years because it provides for a safe harbor period during which broadcasters could be more adventuresome in language and subject matter," said Richards, author of *Freedom's Voice: The Perilous Present and Uncertain Future of the First Amendment*.

Whether *Pacifica* will continue to withstand the test of time remains an open question, particularly in light of the 2nd Circuit's decision in *Fox Television Stations v. FCC* and the 3rd Circuit's pending decision in *CBS Corp. v. FCC*.

profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance,”<sup>117</sup> the commission’s interpretation of “essential” appears to be quite narrow.<sup>118</sup> The status of the Commission’s revival of “profanity” as a regulatory category has been put into question by the 2nd Circuit’s recent decision in *Fox v. FCC*, at least with regard to the fleeting broadcast of expletives.<sup>119</sup>

***b. Presumptive indecency***

Recent decisions have made clear that the commission has also been developing certain per se triggers for indecency, parallel to its categories of presumptive profanity. An overview of the commission’s recent indecency decisions suggests that the following factors have developed presumptive weight: certain expletives, nudity, sex involving children/teenagers, whether the program in question is marketed for viewing by families with children and is the kind of show in which indecency would be unexpected, and whether the program uses sexual expression as a way to solicit audience participation.

Specifically, the commission found the individual expletives, the “F-Word” or the “S-Word,” as the commission described them, presumptively indecent (as well as presumptively profane).<sup>120</sup> As in the profanity context, the commission explained that although Section 1464 did not entirely prohibit these expletives, it would find their use acceptable “only in unusual circumstances.”<sup>121</sup> The presumption against fleeting uses of these expletives has been struck down by the 2nd Circuit in *Fox v. FCC*, which remanded the policy to the agency.

Like the targeted expletives, televised nudity as well seems to have developed a presumption of regulability. Video exposure of a breast, characterized by the commission as a sexual organ,<sup>122</sup> is now considered “graphic and explicit,” sometimes even if the image is obscured by digital pixilation.<sup>123</sup> Even when the commission denies an indecency complaint grounded on nudity, it justifies its position by saying that the programming did not involve frontal nudity.<sup>124</sup> Thus, while a sex-related program can be found indecent if it has no nudity, it will virtually never escape liability if it does contain nudity.

Another area in which the commission appears to be developing a presumption of indecency is references to sex with children.<sup>125</sup> In several cases, the commission has almost reflexively found that purported humor (usually in morning-zoo or shock-jock programs on radio) about incest or other sex between children and adults is indecent.<sup>126</sup> In a related vein, the agency also appears to begin from a presumption of indecency if sexualized depictions or descriptions involve teenagers, even if the depictions are not graphic or explicit, no nudity is involved, or the program airs on radio.<sup>127</sup>

Yet another context in which the commission may be developing something like a bright-line indecency assumption is broadcast formats that involve audience interactions. The clearest examples are radio shows that promote either audience participation in contests or audience call-in shows.<sup>128</sup> The identity of the participants on-air also appears to trigger presumptions as to indecency.<sup>129</sup> For example, the commission has easily found indecent programs involving interviews with porn stars,<sup>130</sup> and actors known to have previously uttered uncouth language on air.<sup>131</sup>

Finally, the commission appears to place great emphasis on whether the programming at issue was directed to a national audience and/or was likely to attract a large family or child audience. In the *Super Bowl* decision, for example, the commission emphasized the fact that the Super Bowl was one of the most popular sports programs traditionally watched by families together.<sup>132</sup> Whether the broadcaster has provided adequate notice of potentially offensive material also appears significant in the commission's analysis — going to the question of whether viewers were unsuspecting captive audiences or on notice of possibly controversial material.<sup>133</sup>

**c. Cabining the 'fleeting use' exception**

In its *Golden Globes* decision, the commission held that prior agency decisions “that isolated or fleeting broadcasts of the ‘F-word’ ... are not indecent or would not be acted upon” are “no longer good law.”<sup>134</sup> In rejecting prior staff-level precedent, the commission explained that “granting an automatic exemption ... unfairly forces viewers (including children) to take ‘the first blow.’”<sup>135</sup> As noted previously, the 2nd Circuit recently found that the commission's change to its previous policy of permitting fleeting expletives was insufficiently justified and has remanded the policy to the agency.<sup>136</sup>

**d. Questions about the news and merit exceptions in practice**

The law “on the books” since the commission's 2001 *Policy Statement* has been that characterization of a program as a news show or a program with substantive merit will not deflect the possibility of an indecency finding.<sup>137</sup> However, there had been a common understanding among broadcasters that, in practice, news programming would not be found to violate the indecency rules. After all, the commission had previously rejected a claim that airing an NPR news story featuring an expletive-peppered surveillance tape of mobster John Gotti violated the agency's indecency rules.<sup>138</sup> The commission's recent cases, however, while not repudiating the Gotti precedent, explicitly reiterate that news status does not absolve indecent programming: “[T]here is no outright news exemption from our indecency rules.”<sup>139</sup> More significantly, the Commission has, for the first time, actually found content on a news program to be indecent.<sup>140</sup> Admittedly, the commission in its recent *Omnibus Remand Order* reiterated

its commitment to proceed “cautiously” and with the “utmost restraint” when dealing with complaints involving news programming, and expressed its willingness to rely on broadcasters’ bona fide characterizations of programs as news programming.<sup>141</sup> However, in other cases, the commission has seemed far more comfortable with making assessments of the newsworthiness of any news story with a sexual (or even perhaps otherwise offensive) component.<sup>142</sup> Thus, even if the news claim is still likely to carry weight with respect to traditional or mainstream news-type programming, it is not likely to be effective for non-mainstream discussions of news or dispositive even for mainstream news programming. Thus, broadcasters cannot be sanguine about the immunity of news programming.

Similarly, the commission’s decision that a critically acclaimed Martin Scorsese documentary on blues musicians violated indecency rules indicates the reduced weight of merit in the commission’s overall indecency analysis.<sup>143</sup> The fact that the commission rejected an indecency claim regarding the expletives in the critically acclaimed film “Saving Private Ryan” is not to the contrary.<sup>144</sup> For the commission, what distinguished the two cases was that the expletives in the bluesmen’s speech was unnecessary to their expression whereas expletives during a wartime battle are to be expected by the nature of the material.<sup>145</sup> This is not a distinction based on merit as such, but rather on the agency’s third prong in its indecency inquiry — whether the material was pandering. It thus puts into question the independent significance of merit in future indecency determinations.<sup>146</sup>

*e. Use of ‘context’ as sword*

Some of the agency’s recent decisions demonstrate a new approach to the interpretation of context in the commission’s patent-offensiveness analysis. In a number of radio programs found indecent, the commission emphasized the nature of the format as the basis for its finding that the material was presented in a pandering or titillating or shocking fashion.<sup>147</sup> In the television context, the agency focused on the risqué character of the choreography of the entire Super Bowl halftime show and stated that:

“In cases involving televised nudity, the contextual analysis necessarily involves an assessment of the entire segment or program, and not just the particular scene in which the nudity occurs. Accordingly, in this case, our contextual analysis considers the entire halftime show, not just the final segment during which Jackson’s breast is uncovered.”<sup>148</sup>

Thus, the fact that the surrounding material was sexual — even if not indecent — was interpreted as counting toward the indecency of the specific material at issue. On this reading, context is used as a sword — to show how even otherwise innocuous or

fleeting references to sex can be transformed into indecency simply by being part of a generally risqué program.<sup>149</sup> Thus, while the commission's references to context in earlier years appeared designed to reassure broadcasters that sexual expression would not be actionable if the context rendered it socially valuable, context today is more likely to be used for inculcation than exculpation.<sup>150</sup>

Analogously, the commission expands the notion of context beyond the content of the program itself to include audience expectations. In the Super Bowl forfeiture order, for example, the agency rested its finding that the Jackson halftime show was patently offensive by focusing on audience expectations about the type of programming at issue: "Clearly, the nudity in this context was pandering, titillating and shocking to the viewing audience, particularly during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity."<sup>151</sup>

*f. No excuses for live programming, lack of control or accidental indecency*

The commission has also made it clear that broadcasters could not excuse indecency on the ground that their programming was aired live.<sup>152</sup> It denied that its rulings in cases like *Golden Globes* and *Super Bowl* would spell the end of live programming — particularly of popular formats such as sports programming and live awards shows — because broadcasters could eliminate indecency even in live programming with the use of time-delay systems and by taking appropriate steps to prevent foreseeable live activity or utterances that could be considered indecent.<sup>153</sup> This position indicates that the commission will expect technological measures to be used regardless of the news judgments of the broadcasters regarding the benefits of live, unmediated programming.<sup>154</sup> Indeed, a broadcaster's failure to implement technological blocking mechanisms is likely to count as evidence of its willfulness in airing actionable indecency.<sup>155</sup> This may suggest an implicit adoption by the FCC of liability based on "negligent indecency."<sup>156</sup>

Moreover, the commission has imposed liability on both networks and affiliates on a *respondeat superior* or classic agency theory, despite their lack of direct fault.<sup>157</sup> This appears to be a shift from FCC precedent under which licensees were allowed to avoid indecency liability by pointing out that the offending employee of the station had been disciplined.<sup>158</sup> It is also different from the precedent under which the commission found that licensees had failed to exercise sufficient supervision over their stations.<sup>159</sup> By reading willfulness as established by the networks' failure to guard fully against unanticipated indecency, the FCC has placed the burden to guard against indecency squarely on the broadcasters. The commission takes the position that any other rule would invite gross manipulation.<sup>160</sup>

### *III. Untangling the background*

One of the significant background questions regarding the commission's new initiative is "Why is the FCC going after indecency now?" Without selecting among them, this First Report describes three possible explanations.

One explanation describes the commission as simply responding to broadcaster behavior and public outrage. FCC commissioners have repeatedly pointed to the increase in indecency complaints in the past decade.<sup>161</sup> According to "decency groups," the increase in complaints has been prompted by an across-the-board increase in casual indecency both on television and on radio, even in the precincts of what has historically been thought of as family entertainment.<sup>162</sup> Critics of broadcasters and the FCC claim that indecency grew at least in part because of the insufficiency of commission enforcement. With FCC enforcement delays and easily absorbable small fines, broadcasters could comfortably steer very close to — and often over — the danger zone so long as their programming continued to be profitable.

Arguments focusing on the asserted increase in broadcast indecency also predict its likely increase as a result of the current media climate. Thus, proponents argue, daytime broadcasting will be further overrun with indecency if the FCC does not step in aggressively. Why should we anticipate increased broadcast indecency? Some claim that increases in niche programming and competition with cable and satellite will push broadcasters to emulate more risqué programming featured on cable and DBS.<sup>163</sup> Earthier programming may also be generated by changes in program formats — such as reality programs or procedural crime dramas that often focus on sexualized crime. Moreover, many decry what they see as the coarsening morality of America which invites increasingly shocking and transgressive programming. Finally, both media watchers and some FCC commissioners have adverted to an argument that indecency may be associated with — and perhaps even promoted by — media consolidation.<sup>164</sup>

A complementary explanation for the commission's activity focuses on the increasing pressure brought to bear on the commission both by Congress<sup>165</sup> and by certain private interest groups such as the Parents Television Council.<sup>166</sup> The effect of such activist interest groups, especially when accompanying congressional interest, is evident throughout the history of FCC regulation of indecency.<sup>167</sup> The commission has been less than clear about the role and significance of complaints by the PTC and others on its recent shift in indecency regimes, however. The commission has taken the position that an increasingly stringent enforcement of its indecency rules is necessitated by the fact that broadcasters are airing more indecency outside the safe harbor than ever previously<sup>168</sup> and that the public is increasingly upset about the coarsening of the

airwaves.<sup>169</sup> The agency's evidence for that conclusion is the increasing number of complaints it receives from the public about indecent programming. Thus, although the commission does not purport to rely on audience reaction in gauging individual programming for indecency, it does attribute its enhanced enforcement to public outrage. Although the number of complaints has not previously figured centrally in the commission's indecency analyses, the agency today interprets the existence of multiple complaints as the public's invitation to the FCC to regulate.

The FCC's reliance on the increasing number of public complaints about indecency is notable because its interpretation of the meaning of such complaints is a more complex and contestable issue than is admitted by the commission. For example, claims have been made that the commission has changed its method for counting complaints, thereby inflating their significance and permitting double counting.<sup>170</sup> Some of the complaints have demonstrably been by people who did not see or hear the programming in question.<sup>171</sup> In addition, while some programs have generated very significant numbers of public complaints, others have not.<sup>172</sup> This casts some doubt on the Commission's assertion that the increasing number of indecency complaints reflects both increasing broadcast indecency and the public's desire for regulation. Of course, one might argue that just because complaints are form letters generated via the PTC does not mean that large numbers of people are not, in fact, offended by indecency on television and radio. They may have simply been finally given the tools with which to express their beliefs to the government with a minimum of transaction costs. But the ways in which challenged programming is described on anti-indecency Web sites may unduly inflame visitors to the sites, even if they might not have been offended had they seen the programming in context. Moreover, the reason for which FCC reliance on PTC-generated complaints is problematic is not that the complainants do not mean what they say. Rather, the problem is that the FCC is initiating its public-regarding regulations at the behest of a particular interest group — with perhaps particular views — thereby creating a potential regulatory skew.<sup>173</sup>

Finally, there is also an alternative explanation grounded not on broadcaster, watchdog group or legislative behavior, but, rather, on notions of regulatory power and politics. There is today very little left with which the FCC can control broadcasters' programming decisions. In a world in which license terms are lengthy, licenses are presumptively renewable, and assignments are made by auction, few regulatory hooks that remain available to the Commission. Thus, whether one characterizes such a regulatory hook as the attempt to promote good broadcast programming, or generally to protect children from bad programming, or even as a strategic way in which government can seek to control broadcasters' political coverage,<sup>174</sup> one could characterize it as a strategic move to maintain control by the FCC.<sup>175</sup>



## F I R S T R E P O R T S

Q & A WITH PROFESSOR ADAM CANDEUB — ACTING DIRECTOR  
OF THE INTELLECTUAL PROPERTY & COMMUNICATIONS LAW PROGRAM,  
MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

Q: What was your past role with the FCC?

A: I served as an attorney adviser in the Common Carrier Bureau and the Media Bureau.

Q: What do you see as the most significant changes in the FCC's policy with respect to indecency?

A: The FCC's policy has changed dramatically over the last few decades. In the wake of the *Pacifica* ruling, the FCC for most of the 1980s concentrated on prohibiting the broadcast of certain words, such as George Carlin's famous "seven dirty words." This changed toward the end of the (Ronald) Reagan FCC under Chairman (Dennis) Patrick as social conservatives pushed for a more expansive definition. Their efforts resulted in the progenitor of the current definition — indecency defined (roughly) as material that describes or depicts sexual or excretory organs or activities and that is patently offensive as measured by contemporary community standards for the broadcast medium. It took nearly a decade to get the FCC's more expansive definition through the courts in the interminable Action for Children's Television litigation. In the mid-1990s, the (Bill) Clinton FCC under Chairman (Reed) Hundt used it to rack up huge fines primarily against shock jocks like Howard Stern. The George Bush FCC, under Chairmen Michael Powell and Kevin Martin, expanded this policy in numerous ways. First, the FCC instituted online complaint forms, which made it easy for pressure groups to submit thousands of complaints. Second, the FCC used more draconian interpretations of what constitutes a single violation of the regs, thereby increasing the dollar amount of the forfeitures. Third, the FCC appeared to have instituted more enforcements (though there are questions on the exact numbers). Fourth, Chairman Martin, through what constitutes in my eyes unlawful statutory interpretation, began to use the FCC's authority to prohibit "profane" broadcasts to punish broadcasters who use "profanity." (In virtually every other legal context and in all previous FCC precedent, "profane" had referred to the blasphemous.)

Q: What effect has increased enforcement had?

A: It is hard to say. The broadcasters, of course, claim that their speech is being chilled. Given the limited contribution of broadcast to the media environment, however, this effect, to the degree it exists, may not be noticeable. To my cynical eyes, the entire indecency debate is a signaling game, whereby socially conservative activist groups can demonstrate their political muscle and elected officials, or their appointees, can demonstrate — in a relatively costless way to them — their responsiveness. What is upsetting about this whole Kabuki drama is that it uses the First Amendment as a prop. Rather than recognize the need to promulgate clear guidelines so as to respect the spirit of the First Amendment (or not to promulgate any at all), the FCC uses its plastic definition of indecency to fit its political needs of the moment.

Q: What will the commission's approach be to enforcement now that it has such high forfeiture authority?

A: Possibly, the high forfeiture authority could have had a positive result — perhaps it was a factor behind the

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Q & A WITH PROFESSOR ADAM CANDEUB — ACTING DIRECTOR  
OF THE INTELLECTUAL PROPERTY & COMMUNICATIONS LAW PROGRAM,  
MICHIGAN STATE UNIVERSITY COLLEGE OF LAW (CONT.)

broadcaster's decisions to challenge the Janet Jackson forfeiture in court (although that occurred before the increase). In any case, it is often claimed — as for instance Howard Stern's famous call-in radio show experience with Michael Powell — that the FCC uses its authority over broadcasters' licenses as a silent threat to ensure that the indecency rulings are not challenged in court. If the forfeitures get high enough, perhaps the broadcasters will be willing to take the risk (or hit) of challenging the regulations in court. From the perspective of legality and the First Amendment, such challenges would be a good thing.

Q: What do you think of the extension of this regime beyond broadcasting to other media? Could this be done constitutionally?

A: Under current judicial precedent, expansion seems unlikely. In *Reno v. ACLU* (1997) and *Ashcroft v. ACLU* (2004), the Supreme Court placed the bar pretty high for constitutionally acceptable indecency regulation online. The Supreme Court in *United States v. Playboy Entertainment Group* (2000) and the lower courts have placed the bar pretty high for cable indecency regulation. Unless there is a change of heart with the Supremes, extending the regulation seems unlikely.

Q: Could the FCC begin regulating excessively violent program as it does indecency? This hasn't fared well in the courts with respect to violent video games — could it be done constitutionally in this context?

A: Again, it's unlikely the courts would step in under the current legal environment. Further, the FCC lacks statutory authority to go after violent programming, unless it wants to change its definition of "indecency."

Q: Do you think the current indecency regulation is fine or does it need to be amended to be made clearer or less subjective?

A: It must be made more objective to avoid the politicization of the First Amendment.

Q: Do you think *Pacifica* was correctly decided?

A: That's an interesting question. Certainly, *Pacifica's* reliance on technology distinctions — allowing restrictions only on broadcast — is doomed. It makes no sense in a wireless/Internet age. As to *Pacifica's* deeper question — can government regulate any pervasive media to protect children — I'm not sure. As a recent dad, I'm deeply ambivalent.

#### *IV. What is the effect of the changes in the FCC's regulatory regime for indecency?*

It is difficult to reach any final conclusions at this point about the fundamental effects of the FCC's moves in the indecency area. At a minimum, this is because we have two recent challenges in the federal courts to the commission's new indecency regime (as discussed below). Decisions in those cases will surely affect what we can anticipate in the future. However, some tentative observations of the effects so far are warranted.

##### ***A. Self-regulatory responses and the chilling effect***

Much has been written about the phenomenon of “regulation by raised eyebrow” and regulated entities' incentives to agree “voluntarily” to behavior that might be constitutionally suspect if regulatorily mandated. Invitations to self-regulate have pervaded the indecency debate.<sup>176</sup> Although the National Association of Broadcasters has not revived its code of conduct, many broadcasters appear to have accepted the self-regulatory invitations.<sup>177</sup>

For example, broadcast licensees and networks have routinely fired on-air talent and producers of programs found to be indecent.<sup>178</sup> Clear Channel — owner of the largest number of radio licenses and a consistent subject of indecency complaints — touted its adoption of a “zero tolerance” policy toward indecency in 2004.<sup>179</sup> Howard Stern attributed his move to satellite radio at least in part to programming liberty.<sup>180</sup> Many television stations have developed video time delays and radio stations routinely now use audio time delays.<sup>181</sup>

News accounts as well reflect some examples of the new enforcement regime's apparent chilling effect on broadcast speech.<sup>182</sup> As for television dramas, for example, CBS affiliates serving approximately 10% of U.S. households decided in 2006 either not to broadcast or to delay till the safe-harbor period the fifth-anniversary airing of “9/11,” the network's award-winning documentary about the Sept. 11 terror attacks.<sup>183</sup> Previously, numerous ABC affiliates had decided not to air the film “Saving Private Ryan” to commemorate Veterans Day in 2004 because of concerns that the commission might find it indecent in response to complaints about the use of expletives in the movie.<sup>184</sup> NBC deleted an 80-year-old woman's exposed breast in one scene of the popular medical drama *ER* in the week following the 2004 Super Bowl.<sup>185</sup> Daytime soap operas cooled off their content as soon as Commissioner Copps suggested that the commission might target them.<sup>186</sup> Edgy television series — such as WB's “The Bedford Diaries” — were required to cut potentially indecent scenes, despite objections by series creators.<sup>187</sup> Television producers complained about network intimidation.<sup>188</sup>

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## THE FCC'S REGULATION OF INDECENCY

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Public stations joined commercial broadcasters in self-censorship. With fewer resources, the nonprofit, public-broadcasting sector may be particularly sensitive to the possibility of massive indecency fines. The producers of “Masterpiece Theatre” chose not to make available an unexpurgated version of the British television series “Prime Suspect” to PBS member stations because of concern about broadcast indecency.<sup>189</sup> A manager of a PBS station asked in an internal PBS communication whether the public television station in Boston should edit an episode of “Antiques Roadshow” because it depicted a nude photograph of Marilyn Monroe.<sup>190</sup> After the commission’s decision regarding “The Blues,” PBS apparently asked program producers not only to bleep out profanities, but also to blur the speaker’s lips if he/she were facing the camera.<sup>191</sup> Public television stations considered whether to edit “Frontline” documentaries on al-Qaida and a child-killer as well as an episode of “NOVA” on the Iraq war because they contained expletives.<sup>192</sup>

Radio stations as well have taken FCC indecency enforcement seriously. Some have publicly fired raunchy on-air talent, instituted compliance programs throughout their organizations, and touted “zero tolerance” policies on indecency. Some of these efforts have included pruning playlists: Even radio rock standards like The Who’s “Who are You?” and Pink Floyd’s “Money” have been edited for radio on some stations or dropped from playlists altogether.<sup>193</sup> An Indianapolis radio station eliminated words like “urinate,” “damn” and “orgy” from a 2004 broadcast of the Rush Limbaugh talk show.<sup>194</sup>

Both news programming and other live programming have been affected, as well. For example, broadcast licensees limited coverage of the eulogies delivered at a memorial service for a former professional football player.<sup>195</sup> KTLA-TV used digital technology to blur the expletives spray-painted on a vandalized car shown in a news story.<sup>196</sup> In 2006, a Vermont public-radio station barred one senatorial candidate from participating in a candidate debate because the candidate had used the expletive “shits” in reference to two students in a prior student forum and use of similar language during the debates could expose the station to a high fine.<sup>197</sup> ABC adopted a five-second delay on its live coverage of the Academy Awards (not to mention NBC’s time delay for the NASCAR races).<sup>198</sup> On a more frivolous front, CBS canceled the annual Victoria’s Secret fashion show.<sup>199</sup>

The chilling effect extends far beyond the elimination of programming or the firing of on-air talent for fear of indecency liability, however. The more subtle effect occurs not when programs are canceled, but when they are subjected to the censorious use by low-level station technicians of the “dump” button, in which words or images are pre-empted on tape delay before being heard by the audience.<sup>200</sup> Time-delay mechanisms are not virtually automatic technological solutions to the problem of indecency; rather,

they require split-second deployment decisions by station personnel. When those decisions are made by technicians following broadly phrased directions from management and aware that high-level talent has been fired for indecency, logic compels the conclusion that they will err on the side of caution.<sup>201</sup> A similar argument can be made regarding the incentives for network standards and practices departments to seek greater control of creative processes.<sup>202</sup>

The chilling effect may also extend far beyond sexual expression. Former FCC Chairman Reed Hundt has argued that the FCC's new indecency regime can be a powerful tool to intimidate broadcasters from taking positions critical of government: The power to regulate indecency “acts, many believe, as an implicit threat designed to discourage the news side of the electronic media to broadcast anything, even if true, that would undercut the administration’s efforts to obtain public opinion in favor of their political purposes.”<sup>203</sup> Broadcasters concerned that the commission could abuse its power by enforcing its indecency rules to deter news departments from fulfilling their roles as government watchdogs would likely censor themselves on both fronts.

Moreover, self-regulation vis-à-vis indecency is not limited to broadcasters. The cable, movie and DBS companies have recently advised Congress that they are engaging in an unprecedented joint effort to educate the public and to create family-friendly tiers of programming to advance consumer choice.<sup>204</sup> This is likely an attempt to deflect “a la carte” proposals for cable and other subscription services now sold on a tiered basis.<sup>205</sup> Whatever its trigger, however, it indicates that cable and satellite as well as broadcasting are responding to the content initiatives of the current FCC and its private allies. Given that the FCC has consistently taken the position that it is not authorized to regulate indecency on cable,<sup>206</sup> and that the agency’s prior attempt to jawbone “voluntary” family-hour programming was judicially struck down even in the broadcast context,<sup>207</sup> the cable companies’ decision voluntarily to adopt family-viewing tiers when they might not be compelled to do so is significant.<sup>208</sup>

***B. Format changes***

The emphasis on decreasing daytime indecency may also lead to changes in entertainment formats. For example, sex-related banter has been part of the shock-radio format since the 1980s. With the departure of Howard Stern to satellite radio and radio stations’ termination of other “shock jocks” for indecency violations, that type of programming may evolve in a different direction.<sup>209</sup> At a minimum, with the increasing use of time-delay mechanisms, the character — or at least the public image — of “live” programming will also change. Similarly, the possibility that reduced indecency on

daytime broadcasting might be replaced by greater television violence is likely to spur the already-percolating attempts to authorize FCC channeling of violent programming to late-night hours.<sup>210</sup>

**C. Network/affiliate relations**

It is also likely that the shift in indecency regulation has affected a shift in power between networks and affiliates. This is because the commission's decision to contemplate imposing forfeitures on network affiliates for airing network programming will either push networks to absorb those costs, and/or will increase the local affiliate's leverage with regard to network content and the practical ability of affiliates to review such content in a timely fashion, and to reject it because of asserted fears of FCC fines.<sup>211</sup> The relationship between networks and affiliates historically has been complex and characterized by both mutual service and power imbalance. With the possibility of looming indecency fines, affiliates can now easily reject network programming they feel is inappropriate for their local communities. While this can give affiliates more local autonomy, it may also potentially have collateral effects on the nature of future network programming. Given that network advertising profits are grounded on the ability to deliver maximal audiences to national advertisers, the possibility of significant numbers of affiliate opt-outs from controversial and edgy programming might well have an impact on future project development by the networks.

**D. The possibility of skew**

Justice William Brennan, dissenting in *Pacifica*, saw the need "to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court" and accused the Court of "acute ethnocentric myopia" in approving the FCC's decision.<sup>212</sup> The history of indecency regulation (as well as other content regulation by the FCC) demonstrates at least a few troubling cases of politically motivated enforcement initiatives.<sup>213</sup> Even those less concerned about specifically political uses of regulatory authority could worry about government imposition of cultural policy limiting both non-mainstream and increasingly mainstream speech. Some, for example, might worry that the agency's indecency regime is subtly skewed against non-mainstream and politically unpopular speech, as evidenced by its fines for two feminist satirical and political songs and one gay-themed play reading. (These critics might claim that since broadcasters have self-censored such speech in response to the commission's signals, the fact that there are few actual FCC decisions of this type is insignificant. On this view, their symbolic value outweighs their number.) Others might see the FCC's rejection of expletives uttered during a live hip-hop concert, blues

documentary or reality show as an unrealistic attempt to reinforce word taboos despite their general acceptance, particularly by youth.<sup>214</sup> A concern about socially or even politically conservative indecency enforcement is reinforced by the fact that the FCC's indecency process has permitted particular interest groups — such as the Parents Television Council and the American Family Association — to dominate indecency enforcement.<sup>215</sup> To the extent that they determine the contours of indecency enforcement overall, this may create a regulatory skew toward the views of a minority of the public. In sum, the extensive discretion entailed by the substantive rule changes opens the door to politicization of the FCC's process.

### ***E. Decreased pressure on industry to improve technology***

A final predictable result of the commission's new indecency regime is that there will likely be decreased pressure to improve technological blocking mechanisms and program ratings, including the adoption of alternative ratings systems. If the commission were to bow out of regulating indecency — or at least to continue its pre-2003 approach — parents and decency groups would feel the pressure to regulate their children's viewing with the help of increasingly sophisticated and effective technological measures. Shifting back to a regulatory model from a technological self-help model is likely to decrease the incentive to innovate on the technological front.

## ***V. Challenges to the new indecency regime***

Broadcast indecency has not been subject to judicial review since the *ACT* cases in the late 1980s. Indeed, some critics suggest that an important part of the FCC's indecency strategy since that time has been to deflect, or at least defer, judicial review of its decisions. With the commission's stepped-up enforcement and the increasingly large fines at stake, however, broadcasters finally challenged the commission's indecency actions in court.

### ***A. Fox Television Stations Inc. et al. v. FCC and CBS Corporation et al. v. FCC***

Following release of the FCC's *Omnibus Order*, which concerned Fox's 2002 and 2003 Billboard Music Awards shows, an episode of CBS's "The Early Show," and episodes of ABC's "NYPD Blue,"<sup>216</sup> Fox Television Stations and CBS filed a joint petition for review in the 2nd Circuit, challenging the commission's new indecency approach on constitutional and statutory grounds.<sup>217</sup> In a separate proceeding, the CBS network and its affiliates appealed the commission's *Super Bowl XXXVIII* decision to the 3rd Circuit.<sup>218</sup>

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Although *CBS v. FCC* is still pending in the 3rd Circuit, a divided 2nd Circuit panel recently vacated the commission's *Omnibus Order* in *Fox v. FCC* and remanded the fleeting-expletives policy to the commission.<sup>219</sup> The majority found that the agency's new policy regarding the broadcast of fleeting expletives was "a significant departure from positions previously taken by the agency and relied on by the broadcast industry" and was arbitrary and capricious under the Administrative Procedure Act because the commission had failed to articulate a reasoned basis for its change in policy.<sup>220</sup> While the majority opinion purported not to reach the other challenges to the commission's indecency regime, it nevertheless discussed — in a portion of the opinion it explicitly said was outside the court's holding — the constitutionality of the new policy.

On the administrative-law front, agency decisions will be set aside on judicial review if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>221</sup> Courts will find agency actions arbitrary and capricious or an abuse of discretion if the agencies do not provide a "reasoned analysis" for departing from their former rules.<sup>222</sup> The majority in *Fox v. FCC* was unpersuaded by the reasons advanced by the commission for its change in policy.<sup>223</sup> It rejected the government's principal argument that its new fleeting-expletives policy advanced the "first blow" theory under *Pacifica* — that any other rule would unfairly force viewers, including children, to absorb the "first blow" of unexpected expletives. Claiming that the commission had no reasonable explanation for its change of mind after 30 years and that it had shown no evidence of harm from fleeting broadcast expletives, that the commission's otherwise contextual approach under which fleeting expletives might be permissible when not patently offensive necessarily undermined its "first blow" justification because the justification was disconnected from the policy implemented by the commission,<sup>224</sup> that the commission's view that it is often difficult to distinguish whether an expletive is being used in a non-literal way "defies any common-sense understanding of these words,"<sup>225</sup> that the agency's fear that a per se exemption for fleeting expletives would lead to a barrage of expletives on television is "divorced from reality,"<sup>226</sup> and that the FCC's argument that requiring repetition before finding expletives indecent would be inconsistent with its contextual indecency approach is itself inconsistent with the presumptive indecency of certain expletives under the agency's own new rules,<sup>227</sup> the majority concluded that the agency's fleeting-expletives rule was insufficiently explained. Referring to President Bush's use of the word "shit" in a conversation with Prime Minister Tony Blair and Vice President Dick Cheney's utterance of "fuck yourself" on the Senate floor as evidence of non-sexual uses of the terms, the *Fox v. FCC* majority found incomprehensible the commission's conclusion that the expletives are always grounded in sex or excrement.<sup>228</sup> As for the commission's new approach to profanity, the majority found it to be "supported by even less analysis, reasoned or



not.”<sup>229</sup> To the extent that the profanity definition was justified by the arguments underlying the change in the indecency regime, the court found them equally unpersuasive for profanity. Moreover, the majority found that the commission, which had previously taken the position that a separate ban on profane speech was unconstitutional, had not shown the necessity for profanity regulation — particularly because the scope of the definition of profane “appears to be largely (if not completely) redundant with its indecency prohibition.”<sup>230</sup> Because of the substantial overlap between the commission’s definitions of “indecent” and “profane,” the court concluded that the FCC had not provided “a reasonable construction of the term ‘profane.’”<sup>231</sup>

In addition to arguments grounded on the Administrative Procedure Act, the networks and *amici curiae* had challenged the *Omnibus Remand Order* in *Fox v. FCC* on the grounds that the FCC’s “community standards” analysis was arbitrary and meaningless; that the indecency findings were invalid because the commission did not make findings of scienter; that the definition of “profane” was unconstitutional; that the indecency regime as a whole was unconstitutionally vague; that the indecency test permitted the commission to make unconstitutional determinations about the quality of speech; and that the FCC’s indecency regime was an impermissible content-based regulation of speech in contravention of the First Amendment.<sup>232</sup>

Although the majority refrained from deciding the constitutional challenges as such, the *Fox v. FCC* opinion contained significant commentary on the First Amendment issues.<sup>233</sup> “[W]e are skeptical,” concluded the majority opinion, “that the Commission can provide a reasoned explanation for its ‘fleeting expletive’ regime that would pass constitutional muster.”<sup>234</sup> In broad language (arguably not limited to the “fleeting expletives” context), the majority said that it was “sympathetic” to the contention that “the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”<sup>235</sup> It agreed with the plaintiffs’ contentions that the “indecency test” coupled with its “artistic necessity” exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to “steer far wider of the unlawful zone[.]”<sup>236</sup>

With regard to the constitutional issues, Judge Pierre Leval, in dissent, expressed “neither agreement nor disagreement” with the majority’s constitutional discussion.<sup>237</sup> As for the challenges under the Administrative Procedure Act, the dissent disagreed with the majority’s conclusion that the commission had not provided a reasoned explanation for its change of policy. Judge Leval rejected the majority’s conclusion that the commission’s explanation was irrational, arbitrary or capricious, contending that even if one could reasonably disagree with the commission’s new position, it was adequately supported.<sup>238</sup> The dissent rejected the majority’s reliance on inconsistency,

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arguing that such an argument “must be directed against the entire censorship structure” and “does not demonstrate that the Commission’s change of standard for the fleeting expletive was irrational[,]”<sup>239</sup> that allowing the broadcast of the same material in some circumstances and not others — far from irrational — is an attempt “to reconcile conflicting values.”<sup>240</sup> The dissent also argued for deference to the commission’s judgment as to its prediction that expletives would be more common in broadcast programming if unsanctioned,<sup>241</sup> and found rational the commission’s conclusion that although “fuck” is often used “without a necessary intention on the part of the speaker to refer to sex[,]”<sup>242</sup> it was “not irrational for the Commission to conclude that, according to the understanding of a substantial segment of the community, the F-word is never completely free of an offensive, sexual connotation.”<sup>243</sup> In the dissent’s view, “What we have is at most a difference of opinion between a court and an agency.”<sup>244</sup>

The precise scope and meaning of the 2nd Circuit’s 2-1 decision in *Fox v. FCC* are not clear. On the one hand, the majority specifically rejects the FCC’s attempt to limit its scope of review to whether the two Fox broadcasts of the Billboard Music Awards were indecent and/or profane.<sup>245</sup> Yet it does not purport to rule on the FCC’s enforcement regime as a whole. Rather, the court describes its review as focused on the validity of the “new ‘fleeting expletives’ policy announced in *Golden Globes* and applied in the *Remand Order*.”<sup>246</sup> Thus, the various other aspects of the FCC’s current indecency enforcement regime discussed in this First Report are not explicitly addressed by the court’s *Fox v. FCC* decision. The court’s holding is simply that the commission has not adequately explained its shift in enforcement to include fleeting expletives. Nevertheless, the court makes clear that it doubts the FCC’s ability to craft a viable explanation for its fleeting-expletives presumption: “[W]e are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks.”<sup>247</sup> In addition, language in the majority opinion, particularly in the constitutional discussion, appears to extend further than the fleeting-expletives aspect of the indecency regime. The majority opinion “question[s] whether the FCC’s indecency test can survive First Amendment scrutiny[,]” suggesting that the generic definition of indecency “fails to provide the clarity required by the Constitution,” and notes that the Supreme Court in *Reno v. ACLU* struck down as unconstitutionally vague an indecency regulation for the Internet worded virtually identically to the FCC’s definition.<sup>248</sup> While the *Fox* majority perceives itself as limited by Supreme Court precedent with respect to the appropriate level of First Amendment scrutiny for broadcasting,<sup>249</sup> it nevertheless expresses its view that current media reality vitiates the uniqueness attributed to the broadcast medium in prior Supreme Court cases. In the

*Fox* majority’s view, strict scrutiny of a traditional sort may “at some point in the future” apply to regulation of broadcast television.<sup>250</sup>

What does this mean? First, despite its use of very expansive language in parts of the opinion, the holding of the *Fox* case is limited. Second, a panel of the 2nd Circuit has rejected the FCC’s articulated reasons for adopting its new fleeting-expletives policy, thereby requiring the commission either to justify its policy differently or to stop imposing sanctions for indecency merely on the basis of fleeting expletives. Third, it suggests that the panel is uncertain whether the FCC’s entire regime for the regulation of indecency would be unconstitutional under current Supreme Court precedent.

One possible — albeit unlikely — FCC response to the *Fox v. FCC* decision is the elimination of the fleeting-expletives policy. Another is a commission effort to craft new justifications in response to the panel’s ruling. FCC Chairman Martin responded to the 2nd Circuit decision by “completely disagree[ing]” with the ruling, asserting that “[i]f ever there was an appropriate time for Commission action, this was it.”<sup>251</sup> In a pointed statement invoking expletives and referring to the 2nd Circuit as “the New York court,” Chairman Martin sought to demonstrate that the court was “divorced from reality in concluding that the word ‘fuck’ does not invoke a sexual connotation.” The chairman asserted that “it is hard to believe that the New York court would tell American families that ‘shit’ and ‘fuck’ are fine to say on broadcast television during the hours when children are most likely to be in the audience.”<sup>252</sup> In like vein, Commissioner Capps warned in a statement that “any broadcaster who sees this decision as a green light to send more gratuitous sex and violence into our homes would be making a huge mistake. ... Enforcing the laws against indecency, profanity and obscenity must remain a Commission priority.”<sup>253</sup> The U.S. Supreme Court may ultimately decide the issue, as the FCC appealed the 2nd Circuit decision to the Court of Last Review in November 2007. As of February 2008, the Supreme Court has not decided whether to review the decision.<sup>254</sup> \* While the case proceeds in the judicial arena, further congressional action is likely. Although a Senate bill to grant the commission explicit enforcement authority to regulate fleeting expletives failed to receive a floor vote before Congress’ August recess last year, Chairman Martin’s remarks to Congress that legislative “efforts are even more important in the wake of the Second Circuit’s recent decision” will likely bear additional fruit as Congress reconvenes.<sup>255</sup>

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\* See editor’s note on p.5.

***B. The First Amendment landscape***

Even though final judicial resolution of these challenges is still pending, the First Amendment issues are well worth addressing. How they will be resolved depends in large degree on: the stringency of the review the First Amendment will be deemed to require for broadcasting today, the characterization of the compelling interest at issue, and the degree of effectiveness required of technological alternatives.

The underlying issue in all considerations of the First Amendment status of broadcast television and radio is whether broadcasting is exceptional and distinguishable from print media, thereby justifying more governmental regulation than would traditionally be permitted by the First Amendment in the print context. A complementary question is whether other, non-broadcast media should be treated like broadcasters or like print in constitutional analysis. Most media scholars agree that the Supreme Court has applied a less stringent version of the First Amendment to review broadcast regulation, thereby establishing a distinct (and less protective) First Amendment broadcast paradigm.<sup>256</sup> Traditionally, the principal rationale for the distinguishable constitutional treatment of broadcasting has been the scarcity of broadcast frequencies. In the indecency context, however, the principal arguments have rested on the pervasiveness of broadcasting, its unique accessibility to children, and the insufficiency of warnings to prevent exposure to indecent material. Yet all these rationales for differential treatment of broadcasting have been subject to sustained critique. In the indecency context, for example, the current questions are whether broadcasting is still sufficiently distinguishable from cable and other media conduits in terms of its pervasiveness and accessibility to justify greater regulation, or whether the broadcast paradigm has been rendered archaic by technological change. If new technologies are indistinguishable on these bases from radio and over-the-air television, then different constitutional treatment appears arbitrary.<sup>257</sup>

The FCC's recent opinions claim that they are fundamentally sensitive to First Amendment issues.<sup>258</sup> They are careful to reiterate that the commission engages in a weighing and balancing process in assessing indecency and patent offensiveness. They also explain that because their analysis is contextual, the particular weight and balance of any of the factors they consider cannot be established *in vacuo*, in advance. The FCC relies on *FCC v. Pacifica* as the judicial foundation for its indecency enforcement, characterizing the *Pacifica* Court as having "quoted the commission's definition of indecency with apparent approval."<sup>259</sup> The definition has also been upheld against constitutional challenges in the ACT cases in the D.C. Circuit.<sup>260</sup> According to the commission, even when the Supreme Court has rejected indecency regulations in non-broadcast contexts, it has nevertheless reaffirmed its acceptance of FCC intervention

with regard to broadcast indecency.<sup>261</sup> Thus, the commission argues that the constitutional status of broadcasting is still distinguishable from that of other media, and, indeed, that something less than First Amendment strict scrutiny should apply to the review of the agency's indecency regulations.<sup>262</sup> The commission takes the position that broadcasting is still especially pervasive and accessible to children.

In support of the commission's indecency approach, one might argue that broadcasters' broad void-for-vagueness and overbreadth arguments under the First Amendment are overstated. Since the Supreme Court in *Pacifica* permitted the commission to channel indecent material to late night hours, and since the commission reasonably decided that limiting such channeling to the seven dirty words "made no legal or policy sense,"<sup>263</sup> then the agency will be faced by definition with having to make discretionary, contextual judgments. So long as it does not regulate in a manner designed to promote any particular viewpoint, courts may well find the ambiguity associated with a standard like the generic indecency definition to be an unavoidable aspect of language.<sup>264</sup> The reality is that any contextual analysis can be criticized as potentially vague and overbroad. If that degree of vagueness and breadth were to be constitutionally fatal, then rational indecency enforcement would not be viable. In any event, commission-supporters would argue, a presumption that particular types of expletives will be deemed patently offensive is not so vague and unpredictable on its own that it should lead to a significant chilling effect. Even if there is a chilling effect, it arguably amounts to no more than channeling the programming to 10 p.m. — arguably not an overly onerous requirement. The Supreme Court has recognized that total bans are more constitutionally problematic than mere zoning regulations of speech.<sup>265</sup> The FCC could argue that because technological alternatives are not likely to be effective, the most reasonable way to balance the interests of children and adults is to rely on government regulation and simply move the undesirable material to a safe harbor.<sup>266</sup> As for indecency enforcement procedures, there is arguably nothing in the First Amendment that places unrealistic evidentiary burdens on complainants, so long as the agency requires enough evidence to be able to make some kind of reasonable contextual determination. Similarly, the Supreme Court has on many occasions recognized the compelling character of the government interest in the protection of children.<sup>267</sup> As for the proposition that children are likely to hear the commission's prohibited expletives elsewhere, thereby making the agency's enforcement quixotic, "it makes a difference whether they hear [the words] in certain places, such as the locker room or gutter, or at certain times, that do not identify general acceptability."<sup>268</sup> On this view, the government has an interest in making certain that it does not implicitly suggest, by its regulatory reticence, that indecency on the air is socially acceptable.

On the other hand, although the commission has consistently uttered the mantra that its definition of indecency has withstood constitutional review already, neither the Supreme Court in *Pacifica* nor the D.C. Circuit in the *ACT v. FCC* cases has in fact opined on the constitutionality of the indecency regime *as currently applied*.<sup>269</sup> The definition of indecency was not challenged by any of the parties in the *Pacifica* case<sup>270</sup> and the *Pacifica* Court declined to consider a vagueness challenge to the indecency definition.<sup>271</sup> Moreover, the case made clear that the Court's holding was an "emphatically narrow"<sup>272</sup> ruling issued in response to an as-applied challenge to a "verbal shock treatment."<sup>273</sup> Thus, there has been no final finding by the Supreme Court with regard to the constitutional status of the commission's indecency definition. Moreover, both *Pacifica* and the *ACT* trilogy contain cautions in favor of regulatory restraint.<sup>274</sup> A failure to abide by those cautions may well cast doubt on the commission's assertions of constitutionality. Finally, the 2nd Circuit's recent decision in *Fox v. FCC* "question[s] whether the FCC's indecency test can survive First Amendment scrutiny."<sup>275</sup>

The newly revived and potentially expansive category of the "profane" under Section 1464 also raises constitutional issues. Whatever the validity of the argument that *Pacifica* can serve as the springboard for expansive indecency regulation, it is certainly true that neither *Pacifica* nor any subsequent Supreme Court case opined on the constitutional permissibility of the commission's definition of "profane" under Section 1464.<sup>276</sup> That definition — including "personally reviling epithets," "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance," and "vulgar, irreverent, or coarse language"<sup>277</sup> — is even more open-ended than the agency's definitions of actionable indecency. The new definition of the "profane" is either co-extensive with indecency and therefore unnecessary,<sup>278</sup> or so ambiguously more expansive as to pose even greater vagueness and overbreadth problems than the definition of indecency.

In addition, an argument grounded on the history of the indecency rules' application might have constitutional traction. Arguably, the commission's contextual factors for indecency assessments insufficiently cabin regulatory discretion and provide inadequate guidance to broadcasters because, by definition, the relationship of the factors to one another is unpredictable in any given case.<sup>279</sup> The contextual factors are manipulable. Simply complying with emerging per se indecency or profanity rules is an insufficient option — not only because the commission has not in fact limited its regulatory scope, but also because even those per se rules are subject to override.<sup>280</sup> The inconsistencies in some commission resolutions of apparently similar or comparable cases supports the argument that broadcasters are left with insufficient guidance and are therefore more

likely to self-censor.<sup>281</sup> While case-by-case determinations will inevitably lead to variations supposedly based on contextual differences, the reasonably risk-averse broadcaster must operate as if the contextual standard is really a bright-line rule established by the most limiting decision. The interpretive openness of a contextual standard is operationally irrelevant when license revocation is potentially a live possibility. On this view, a constitutional problem with the indecency rules is that despite the agency's claims that the contextual character of its indecency regime is what makes it avoid arbitrariness, its inevitable effect is to lead broadcasters to gear their behavior to the most restrictive possible interpretation of the rules.<sup>282</sup> As the majority put it in dictum in *Fox v. FCC*, "[W]e are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of broadcast indecency."<sup>283</sup> Similarly, because the FCC currently sees merit as far from dispositive in indecency cases, a broad range of even socially valuable material is likely to be shunned. The procedural developments described in Section II (C) above are also troubling in this connection. The fact that the commission does not hold a formal hearing for the imposition even of extraordinarily high fines, the expense and length of even informal indecency processes, and the effective pressure on broadcasters to settle multiple complaints by consent decree, can certainly enhance the chilling effect of the indecency rules.<sup>284</sup>

The FCC's invigorated indecency regime also engages the commission in substantive appraisals of expression: In assessing patent offensiveness, for example, the commission inevitably uses its own editorial, substantive judgment to decide whether the material in question was gratuitous or necessary to the point being made.<sup>285</sup> This, as Judge Patricia Wald put it in her dissent in *ACT III*, necessarily leads to unduly subjective judgments about the closeness of the connection between the challenged material and the point of the program.<sup>286</sup> More troublingly, however, the FCC's insertion of itself into the editorial process — in second-guessing decisions made by the producers of the programming — is a usurpation of a different sort of role. The First Amendment would not permit, one would think, that kind of interference in fundamental editorial judgments, if the judgment were not about content that might be considered indecent.<sup>287</sup> In the FCC context, the commission has consistently advanced the proposition that the agency should not be second-guessing substantive programming decisions made by broadcasters.<sup>288</sup> The definitional determination made by the FCC in assessing the indecency of sexual or excretory materials necessarily involves substantive second-guessing inconsistent with the agency's stated goal of deference to programming decisions of broadcasters.<sup>289</sup> This approach gives far too much discretion to government officials to judge the merit of speech.<sup>290</sup>

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Similarly, the commission's refusal to consider program popularity<sup>291</sup> or some sort of objective measure of community acceptance places a great deal of weight on the commission's ability to rely on its collective experience to predict the reactions of the average viewer or listener. The purported benefit of a community-based standard is that it will avoid assessing speech either by reference to each fact-finder's personal opinion or its "effect on a particularly sensitive or insensitive person or group."<sup>292</sup> But to the extent that the commission has been relying on the increasing number of indecency complaints in triggering its new indecency-enforcement process, it is in danger of having its patent-offensiveness judgments influenced by the least-tolerant complainants. Especially in light of the fact that most of the indecency complaints received by the commission since 2003 have been orchestrated by particular interest groups such as the PTC or the American Family Association, there is the danger that speech will be "judged by the standards of the community most likely to be offended by the message."<sup>293</sup>

Finally, broadcasters have argued that the commission's imposition of liability on broadcast networks for airing indecent material under Section 1464, even though they had no prior knowledge, is tantamount to liability without fault ("strict liability") for speech and therefore unconstitutional under the First Amendment.<sup>294</sup>

Those who argue that the broadcast paradigm is archaic will point out that Supreme Court First Amendment precedent in areas other than broadcasting has struck down attempts to ban indecency: on the telephone (*Sable*)<sup>295</sup>, on cable (*Playboy*)<sup>296</sup>, and on the Internet (*Reno*).<sup>297</sup> In *Reno*, the Court expressed particular concern with the vagueness associated with the indecency definition in the Communications Decency Act — a definition using language identical to the FCC's indecency definition.<sup>298</sup> Were the Court to face the facts of *Pacifica* today, on this view, it would be hard-pressed to distinguish broadcasting from cable and the Internet sufficiently to justify more invasive regulation.<sup>299</sup> The Court has stated that cable is as accessible as broadcasting.<sup>300</sup> If most Americans now receive their network channels via cable, the argument distinguishing the two technologies seems flimsy. Critics of the FCC and *Pacifica* would then claim that the diluted First Amendment scrutiny given broadcasting in *Pacifica*, if ever appropriate, is now unjustifiable.<sup>301</sup> On this view, indecency regulation in general — and particularly the new version currently employed by the commission — must be subjected to the strictest of constitutional scrutiny.<sup>302</sup>

In traditional strict-scrutiny analysis, regulations controlling speech must be shown to respond to a compelling government interest in the most narrowly tailored fashion.<sup>303</sup> Indecency regulation is often defended because of the commission's compelling interest in protecting the psychological well-being of children. On the one hand, a number of



Supreme Court cases have characterized such an interest as compelling without much discussion.<sup>304</sup> On the other hand, some members of the Court have recently emphasized the government interest as the interest in helping parents control their children (rather than an independent government interest in the welfare of children).<sup>305</sup> The two interests are not always coextensive. In addition, it is unclear whether courts will require the government to make more of a showing of harm from indecency to children in order to justify indecency channeling. Neither the Supreme Court in *Pacifica* nor the D.C. Circuit in the *ACT* cases required proof of harm; instead, they deferred to administrative and congressional findings. In his dissent in *ACT I*, Judge Harry Edwards of the D.C. Circuit argued that the government had not proved that indecency would harm children, and that regulations constraining speech should require such showings.<sup>306</sup> In the cable context, Justice Anthony Kennedy appeared disposed to requiring more empirical evidence of indecent signal bleed.<sup>307</sup> If the Court were to conclude that the harm of indecency has not been established with particularity (especially with respect to the upper end of the age range included in the commission's definition of children) — then the viability of broadcast indecency regulation would be in doubt.

The second prong of the strict-scrutiny analysis focuses on the fit between the regulation and its goal: whether the regulation is sufficiently narrowly tailored. It is unclear whether the actual FCC indecency enforcement process is well-suited to achieve the goal.<sup>308</sup> If the purpose of the indecency regulations in the first place is to protect children, then it seems that assessing patent offensiveness from the point of view of the average adult viewer does not necessarily serve the central purported purpose of the regulations.<sup>309</sup> A related rationale has to do with privacy. The commission contends that its regulatory purpose is to protect the viewer and listener from being accosted in the privacy of his or her home with unexpected and patently offensive material. Even if it is deemed compelling, there is a question as to the regulation's efficacy in promoting such an interest because such material can be aired during the indecency safe harbor or during some kinds of meritorious programming, and adults can be accosted with the very same patently offensive material in their homes either during a program deemed not patently offensive, or in programming aired after 10 p.m.

Moreover, the operative question regarding the tailoring prong of strict-scrutiny analysis will be whether the courts will accept the availability of less-intrusive technological measures as solutions to broadcast indecency, or whether they will focus on the fact that such technological blocking measures depend on the ability and willingness of parents to use them and, in any event, that they cannot adequately address accidental exposure to unexpected, surprising indecency.

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The precedent is equivocal with regard to this question. On the one hand, the Supreme Court in cases like *Pacifica* justified time-channeling on the ground that viewers or listeners could be surprised by indecency in their homes. On the other hand, more recent cases can be read to suggest that indecency regulation will not pass constitutional strict scrutiny if there is a non-content-based alternative — even if that alternative is not perfect.<sup>310</sup> The availability of the V-chip and the fact that so many Americans now receive their broadcast channels via cable (with its own blocking mechanisms) suggest that such (admittedly imperfect) consumer-empowerment devices could undermine the FCC's regulatory regime as a whole.<sup>311</sup>

To some extent, the resolution of the tailoring question will depend on the extent of the government's burden. Whether technological blocking mechanisms would completely undermine the commission's indecency regime would depend on the degree of effectiveness required of blocking mechanisms like the V-chip and/or blocking programs offered to consumers by various cable companies.<sup>312</sup> The targeted blocking available on non-broadcast technologies has figured in the Court's regulatory analysis in non-broadcast contexts. Recent cases (albeit outside the broadcast context) suggest that the Court might place a heavier burden on the government to show that filters and blocks do not work effectively.<sup>313</sup> Since the vast majority of Americans receive their broadcast programming via cable or satellite, the television V-chip is not the only filtering technology available. Targeted blocking offered by cable is a viable alternative for most of the country. The effectiveness of blocking technology will also doubtless increase when the digital transition is completed. Such technological solutions were not available at the time of *Pacifica*, and given that the *Pacifica* Court's reasoning for distinguishing broadcast from other media is under technological pressure today, it would be reasonable to expect that the Court would look closely at the possible role of blocking technology in addressing broadcast indecency.

At the same time, the Court has noted that the First Amendment will not prohibit speech regulation so long as the government can demonstrate that the alternatives to regulation are not as effective as regulation.<sup>314</sup> Thus, the viability of the broadcasters' argument will depend on the kind of showing made by the commission regarding the failings of current blocking technology for broadcast. While the Supreme Court's non-broadcast cases suggest that a mere demonstration that parents are not using the available V-chip technology is not in itself sufficient to show that the non-regulatory alternative is insufficiently effective,<sup>315</sup> the facts that not all television sets contain V-chip technology, that the current content rating system to which the V-chip technology is keyed is subject to criticism,<sup>316</sup> and that the V-chip cannot prevent viewers from being exposed to unexpectedly indecent material in otherwise child-friendly

programming may persuade courts that technological solutions are not in fact less-restrictive alternatives than the FCC regulatory option.

In sum, the Supreme Court has struck down legislative attempts to impose indecency regulations on non-broadcast media such as telephone, cable, and the Internet. Thus, courts addressing the constitutionality of the FCC's indecency-broadcast regime will first have to decide whether broadcasting can still be treated distinctly from other media, or whether changed circumstances justify limiting *Pacifica*. (Even if a special constitutional analysis were still applicable to broadcasting, courts would nevertheless have to assess the constitutionality of the generic definition of broadcast indecency and the actionably profane as applied under the new indecency approach.) The issues that will likely influence the First Amendment analysis of the FCC's indecency regime will include whether the right focus is on empowering parents or protecting children, whether the government has to make up for the failings of inattentive parents, whether courts should defer to congressional or administrative findings of harm to justify regulation or require government to demonstrate specific evidence of harm from exposure to indecency, and whether the existence and likely future improvements in blocking technology undermine the need for regulatory intervention.<sup>317</sup> Although the majority of one 2nd Circuit panel has concluded that the commission's current indecency regime violates the Administrative Procedure Act and would likely fail constitutional review as well, the chairman of the FCC has strongly criticized the decision and reminded us that it is not the last word. We await the government's decisions regarding appeal of *Fox v. FCC*, the 3rd Circuit's decision in the pending CBS case, the FCC's response to the 2nd Circuit's remand, and the commission's legislative initiatives, if any, on the subject of indecency and profanity.

## VI. *Extension of the indecency approach — beyond broadcasting and into violence*

Ultimately, even though the FCC's decisions in the area of broadcast indecency are important on their own terms and the pending cases will have important consequences for the jurisprudence of broadcast regulation, two additional developments demonstrate the fundamental importance of this inquiry. First, supporters of the FCC's indecency regime claim that the agency should expand its regulation to include indecency on cable and satellite as well. Second, certain interest groups and members of Congress are currently discussing expanding FCC authority to channel violent programming to late-night hours in a fashion parallel to its regulation of indecency.<sup>318</sup>

**A. Extension of indecency regulation to cable and other subscription services**

The FCC's current chairman, Kevin Martin, has argued before Congress and elsewhere that there should be a uniform approach to indecency in all electronic media (and that such an approach not be deregulatory).<sup>319</sup> Indeed, Chairman Martin has explicitly called for content-neutral legislative solutions in the wake of the 2nd Circuit's decision striking down the commission's new fleeting-expetives policy in the broadcast context.<sup>320</sup> There has been a grass-roots movement — supported by legislators as well — to push cable to an “a la carte” subscription system for those people who do not want access to indecency on cable.<sup>321</sup> A new bill has been introduced in Congress recently in order to permit cable and satellite subscribers to opt out of programming.<sup>322</sup>

Extension of the FCC's current regime of indecency regulation to cable and satellite faces significant constitutional hurdles, particularly with respect to cable.<sup>323</sup> As noted above, attempts to regulate indecency on cable have been rebuffed recently by the Supreme Court.<sup>324</sup> The significant blocking and filtering capabilities of non-broadcast media are likely to weigh heavily in the constitutional calculus.<sup>325</sup> Thus, analysts have concluded that in the current Supreme Court climate, it would be unlikely that the Court would apply *Pacifica* to non-broadcast media such as cable.<sup>326</sup> It may be that, doctrinally, acceptable government regulation of indecency on cable is probably limited to public information about the use of filters and blocking mechanisms. As for satellite radio and television, even though the First Amendment cases regarding broadcasting (such as *Pacifica*) should apply directly because satellite provision of programming uses the broadcast spectrum, the fact that these media are “subscription only,” not very pervasive at this point, and capable of targeted blocking might well influence courts to treat these new media as more analogous to cable than to traditional broadcast.<sup>327</sup>

However, mandated a-la-carte systems are not as susceptible to constitutional challenge. Chairman Martin has advised cable operators of his view that government a-la-carte mandates would easily survive First Amendment scrutiny:<sup>328</sup>

“In the first place, it is far from clear that any level of First Amendment scrutiny would be applied to a requirement to unbundle, for payment purposes, disparate video signals that comprise a programming package. While the Constitution protects the right to speak, it certainly doesn't protect a right to get paid for that speech. Even if, however, the First Amendment were thought to apply to an a la carte regime, such a regime does not on its face favor or disfavor particular types of speech or impose a burden on speech based on a program's ideas or views. All of the versions

of a la carte would keep government out of regulating content directly while enabling consumers, including parents, to receive the programming they want and believe to be appropriate for their families.”<sup>329</sup>

Others, of course, argue forcefully to the contrary, suggesting that a-la-carte proposals are subject to strict (or, at a minimum, intermediate) First Amendment scrutiny and cannot properly be masked as mere rate regulation.<sup>330</sup> Whether Martin’s constitutional predictions would be proven correct on judicial review is in practical effect almost less important than the fact that he made such an argument to the national association of cable operators. The rational cable operator might well respond to such a message by self-regulating. In addition, recent First Amendment jurisprudence suggests that incentive-based regulation — rules which provide incentives for voluntary agreement to regulation — is substantially more likely to pass constitutional muster than traditional command-and-control regulatory requirements.<sup>331</sup> Therefore, even if the government were not to mandate any indecency-reducing rules for non-broadcast multichannel video providers, it might consider developing incentives for cable and satellite companies to reduce or zone their indecent programming.<sup>332</sup>

***B. The possibility of regulating television violence***

Like indecency, violent television programming “has been a matter of private and governmental concern and discussion almost from the beginning of television broadcasting.”<sup>333</sup> Recently, arguments have been made that the FCC should regulate televised violence as well as indecency.<sup>334</sup> The new president of the Parents Television Council has publicly proclaimed that television violence is his “primary concern.”<sup>335</sup> Bills to authorize the commission to regulate television violence have been introduced.<sup>336</sup> In 2004, 39 members of Congress asked the FCC to undertake an inquiry into television violence and determine the negative effects of televised violence on children and government’s ability to regulate excessively violent programming in keeping with the constitution.<sup>337</sup> The FCC recently released a report in response to this congressional request.<sup>338</sup>

Like the commission’s prior report on television violence, released in 1975, the 2007 *Violence Report* finds that “there is deep concern among many American parents and health professionals regarding harm from viewing violence in media.”<sup>339</sup> Yet, by contrast to its non-intervention recommendations in the 1975 report,<sup>340</sup> the 2007 *Violence Report* recommends that “action should be taken to address violent programming”<sup>341</sup> because research indicates that televised violence can increase aggressive behavior in children, at least in the short term,<sup>342</sup> and because “although the V-chip and TV ratings system appear useful in the abstract, they are not effective at protecting children from

violent content.”<sup>343</sup> The report opines that constitutionally acceptable legislation could be drafted, but does not purport to recommend particular statutory language.<sup>344</sup>

Specifically, the report concludes that Congress could constitutionally implement a time-channeling solution or mandate some other form of consumer choice in obtaining video programming.<sup>345</sup> (It endorses, for example, an a-la-carte regime for the purchase of multichannel video programming.<sup>346</sup>) While it recognizes that “further action to enable viewer-initiated blocking”<sup>347</sup> would be desirable, the report asserts that such actions would not be sufficient without an adequate mandatory ratings system.<sup>348</sup> This is not to say that self-regulation is discouraged: “[I]ndustry could on its own initiative commit itself to reducing the amount of excessively violent programming viewed by children (e.g., broadcasters could adopt a family hour at the beginning of prime time, during which they decline to air violent content).”<sup>349</sup> Finally, the *2007 Violence Report* specifically addresses the question of defining violent programming, stating that a definition must be “sufficiently clear to provide fair notice” and concluding that: “While developing a definition would be challenging, we believe that Congress could do so.”<sup>350</sup>

Although the FCC’s *2007 Violence Report* suggests that the First Amendment would not totally block congressional attempts to channel violent programming,<sup>351</sup> the constitutional viability of anti-violence provisions would depend with great particularity on how they were structured and drafted.<sup>352</sup> It should be noted, however, that the *2007 Violence Report* explicitly rejects strict scrutiny as the applicable standard for broadcast content regulation.<sup>353</sup> That conclusion is questionable, particularly as regards classic content regulation.<sup>354</sup>

Given that a court would likely subject a television violence statute to strict scrutiny, the first question is whether the government has shown that regulating television violence would serve a compelling governmental interest. Though the protection of children from harm has been deemed such an interest, the precise connection between television violence and harm to children has not been clearly established. The *2007 Violence Report* recognizes that research has shown only a correlation between increased aggressiveness and television violence and has not proved causation (particularly of violent behavior).<sup>355</sup> Thus, the *2007 Violence Report* does not make a very strong empirical argument.<sup>356</sup> If a reviewing court were to require empirical evidence of harm from television violence as part of its inquiry into the compelling governmental interest justifying regulation, the report’s empirical discussions would not be deemed powerfully conclusive.<sup>357</sup>

Another critical difficulty is the need to define violence. In the commission’s view,

“Congress could develop an appropriate definition of excessively violent programming” if “such language [were] narrowly tailored and in conformance with judicial precedent.”<sup>358</sup> Yet it is difficult to conceive of such a definition that would not trigger viable overbreadth and vagueness challenges.<sup>359</sup> There is a lack of consensus on how to define violence (and, especially, “excessive” violence). Violence is inevitable in journalism (especially in wartime), but a news exemption would both create perverse incentives to denominate violent “infotainment” as “news” and arguably arbitrarily protect material harmful to children. Some social scientists distinguish between the effects of exposure to “good” and “bad” violence, generally suggesting that violence is bad when it is unrealistic and its consequences are not shown.<sup>360</sup> However, others claim that these distinctions are not empirically established.<sup>361</sup> Ironically, the commission’s attempts in the *2007 Violence Report* to suggest definitional refinements — such as defining violence differently for different purposes<sup>362</sup> — exacerbate the difficulties. The commission’s suggestion of possibly basing the definition of violence “on the scientific literature ... which recognizes the factors most important to determining the likely impact of violence on the child audience”<sup>363</sup> is obviously problematic because of the lack of agreement in the social-science literature. The explanatory example provided by the commission itself casts doubt on the commission’s expressed definitional optimism: “[S]uch a definition might cover depictions of physical force against an animate being that, in context, are patently offensive.”<sup>364</sup> In marrying its violence definition to the patent offensiveness of its indecency definition, the commission merely imports the vagueness and subjectivity of that part of the indecency standard to violence.<sup>365</sup>

Finally, one could question whether the commission’s skepticism about the effectiveness of viewer-initiated blocking mechanisms, particularly in light of impending technological changes, should be found to constitute a sufficient showing by the government that the regulation of television violence would be the least-restrictive alternative.<sup>366</sup>

Nevertheless, as with indecency, indirect regulations of violent content — in the form of incentives not to air excessively violent programming during the day or, more likely, a-la-carte purchases of channels — are more likely to pass constitutional muster. Moreover, parsing of First Amendment precedent should not obscure the reality that industry self-regulation is likely to result, to some degree, from the combined pressures of the FCC’s *2007 Violence Report*, Chairman Martin’s public statements directed to regulated entities, the increasing emphasis on television violence by significant interest groups such as the Parents Television Council, and the likelihood of congressional consideration of anti-violence legislation.<sup>367</sup> The history of broadcast regulation is full of examples of regulation by lifted eyebrow. Media companies with multiple interests

and continuing relationships with the FCC have consistently engaged in some degree of self-regulation. Even without congressional mandates, cable and satellite companies have already “voluntarily” begun to offer a-la-carte options, or family tiers, or opt-out options for customers in response to the push to regulate indecency beyond broadcasting. Moreover, consolidation in the media marketplace has led to a high degree of vertical integration and horizontal cross-ownership of media subject to different legal regimes. The realities of program production for integrated entities that consist of multiple different media interests may indirectly achieve the desired results, to some degree, because the broadcast rules will become the programming guideposts.

### *Conclusion*

This is an important moment in the history of FCC regulation of television and radio content. We await final judicial pronouncements on the viability of the commission’s invigorated indecency-enforcement regime and legislative initiatives regarding televised violence. Whatever the results of the judicial process, however, the agency’s post-2003 stance on indecency — not to mention lobbying and congressional pressure — already has had significant effects on the electronic media generally. The effects of self-regulation can be seen both in broadcasting and non-broadcast subscription services. This is not to say that “Desperate Housewives” and the “CSI” or “Law & Order” franchises will be taken off the air, however. It is likely that the indirect success of the initiatives seeking to expand the FCC’s regulation of content will last only so long as the need to fend off further regulation is perceived as real by the media industries. Ultimately, as in the prior history of FCC content regulation, it will be a complex interaction of legal rules, marketplace developments, technology, consumer pressure, and politics that will influence the extent of indecency and violence available on mass media.



## Resources

### Endnotes

- ♦ Professor of law, University of Miami School of Law. Many thanks are due to Robin Schard and the reference staff of the University of Miami Law Library and to Mark Zurada for research assistance.
- <sup>1</sup> In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, 8000 ¶ 4 (2001) [hereinafter *2001 Policy Statement*].
- <sup>2</sup> FCC v. Pacifica Found., 438 U.S. 726 (1978) [hereinafter *FCC v. Pacifica*].
- <sup>3</sup> In Action for Children's Television v. FCC (ACT I), 852 F.2d 1332, 1338-39 (D.C. Cir. 1988), the court "rejected the argument that the Commission's definition of indecency was unconstitutionally vague and overbroad." *Id.* at 1338-40. Shortly thereafter, pursuant to a congressional directive to enforce § 1464 on a 24-hour per day basis, the Commission banned all broadcasts of indecent material. This ban was overturned in Action for Children's Television v. FCC (ACT II), 932 F.2d 1504 (D.C. Cir.1991), *cert. denied*, 503 U.S. 913 (1992). Thereafter, Congress passed Public Telecommunications Act of 1992, pursuant to which the FCC adopted regulations prohibiting the broadcast of indecent material between 6 a.m. and midnight for commercial broadcasters and 6 a.m. and 10 p.m. for public broadcasters. In Action for Children's Television v. FCC (ACT III), 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996), the Court of Appeals for the D.C. Circuit concluded that the disparate safe harbors for commercial and non-commercial stations had not been justified and remanded the case to the FCC "with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m." *Id.* at 669-70. Again, the ACT III court "dismiss[ed] petitioners' vagueness challenge as meritless." *Id.* at 659.
- <sup>4</sup> Fox Television Stations v. Federal Communications Commission, \_\_\_ F.3d \_\_\_, 2007 U.S. App. LEXIS 12868 (2d Cir. June 4, 2006) [hereinafter *Fox v. FCC*].
- <sup>5</sup> Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 130-131 (1989) [hereinafter *Sable v. FCC*].
- <sup>6</sup> United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) [hereinafter *U.S. v. Playboy*].
- <sup>7</sup> Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) [hereinafter *Reno v. ACLU*].
- <sup>8</sup> 18 U.S.C. § 1464 (2000). This prohibition originated in the Radio Act of 1927, 44 Stat. 1172-73 (1927). Section 29 of the 1927 Act empowered the Federal Radio Commission to punish "whoever utters any obscene, indecent, or profane language by means of radio communication." Pub. L. No. 69-632, Sec. 29, 44 Stat. 1162 (1927). (The same provision included a prohibition on censorship by the FCC.) The provision migrated to § 326 of the Communications Act of 1934, 47 U.S.C. § 326 (1934), and to the criminal code in 1948. The commission has adopted Rule 73.3999, which states that "no licensee of a radio or television broadcast station shall broadcast ... any material which is indecent." 47 C.F.R. 73.3999 (2006).
- <sup>9</sup> While § 1464 is a criminal statute, the commission has authority to impose civil penalties for the broadcast of indecency without regard to the criminal nature of the statute. *2001 Policy Statement*, 16 F.C.C.R. at 7999, n.2. The Department of Justice is responsible for prosecution of criminal violations of the statute. *Id.* Under § 503(b)(1) of the Communications Act, any person who is determined by the Commission to have "willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated § 1464 of title 18, United States Code, shall be liable to the United States for a forfeiture penalty." 47 U.S.C. §§ 503(b)(1)(B) & (D) (2006). See also 47 C.F.R. 1.80(a)(1) (2006). Section 312(f)(1) of the Communications Act defines

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- “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1) (2004). The term “repeated” means that the action was committed or omitted more than once, or lasts more than one day. In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664. (2006) [hereinafter *Omnibus Order*], *vacated in part*, In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006) [hereinafter *Omnibus Remand Order*], *vacated and remanded*, *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 (2d Cir. June 4, 2007). License revocation for violations of § 1464 is permitted under 47 U.S.C. § 312(a)(6).
- <sup>10</sup> Chastising letters issued without formal action seemed to achieve their purpose at the time: Mae West was banned from NBC Radio for her overly suggestive reading of a skit featuring Adam and Eve on the popular Edgar Bergen show. See generally Steve Craig, *Out of Eden: The Legion of Decency, the FCC, and Mae West's 1937 Appearance on the Chase & Sanborn Hour*, 13 J. OF RADIO STUD. 232 (2006). See also MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 91 (2001). For descriptions of the history of indecency regulation, see, e.g., HEINS, *supra*, at 89-108; THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 103-141 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 162-190 (1987); WILLIAM RAY, THE UPS AND DOWNS OF RADIO-TV REGULATION (1990); Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 86-97 (1992-93).
- <sup>11</sup> Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463, 1482 (2005).
- <sup>12</sup> The NAB Code prohibited broadcast of “offensive language, vulgarity, illicit sexual relations, sex crimes, and abnormalities during any time period when children comprised a substantial segment of the viewing audience.” HEINS, *supra* note 10, at 92; Brown & Candeub, *supra* note 11, at 1483 (citing BRUCE A. LINTON, SELF-REGULATION IN BROADCASTING 11-15 (1967)). This definition would certainly encompass more than would be actionable indecency under the FCC’s rules.
- <sup>13</sup> See Levi, *supra* note 10, at 88.
- <sup>14</sup> It did so in the context of a small, nonprofit radio station’s airing of an interview with Jerry Garcia, lead singer of the Grateful Dead, during which he peppered his answers to questions about nonsexual subjects such as the environment and government with expletives as intensifiers. In Re WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408 (1970). Although the commission had originally thought that this would be a good test case for judicial review of its new standard, the station simply paid the minimal fine and chose not to pursue the issue in the courts. See Levi, *supra* note 10, at 88.
- <sup>15</sup> The complainant in the *Pacifica* case was apparently a member of the national planning board of Morality in Media, a conservative political group. Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 3 MICH. ST. L. REV. 911, 921 (2005). For suggestion that the complaint was part of a political strategy by Morality in Media and that the complainant may not in fact even have heard the broadcast, see LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 162 - 210 (1987).
- <sup>16</sup> *FCC v. Pacifica*, 438 U.S. 726 (1978).
- <sup>17</sup> *Id.* at 729-730. The Court made clear that it was not ruling on the commission’s general authority to regulate indecency. Rather, it was affirming the agency’s regulation against a particular program as broadcast. *Id.* at 750-751. *Pacifica* had not contested that the Carlin monologue could be characterized as patently offensive. Rather, it had gambled (and lost) that the Court would limit the definition of indecency to material encompassed by obscenity.
- <sup>18</sup> Levi, *supra* note 10, at 90-91. The FCC rejected a 1978 petition by Morality in Media to deny a license renewal for educational station WGBH on the ground that it has consistently broadcast offensive, vulgar

and otherwise harmful material to children, announcing that it intended “strictly to observe the narrowness of the *Pacifica* holding.” *In re WGBH Educational Foundation*, 69 FCC 2d 1250, 1254 (1978).

The FCC in fact had announced its policy of restraint in *Pacifica* below. Petition for Reconsideration of a Citizen’s Complaint Against *Pacifica* Foundation Station WBAI (FM), New York, New York, 59 F.C.C. 2d 892, 893 n. 1 (1976) (stating that the agency was concerned only with “clear-cut, flagrant cases” and explaining that it would be inequitable to apply its rule when “public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.”)

- <sup>19</sup> *Pacifica Found. Inc.*, 2 F.C.C.R. 2698 (1987), *recon. granted*, *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *aff’d in part, vacated in part*, *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter *Pacifica Found. Inc.*]; *Regents of Univ. of California*, 2 F.C.C.R. 2703 (1987), *aff’d in part, vacated in part*, *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705 (1987), *aff’d in part, vacated in part*, *Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). *See also* *Brown & Candeub*, *supra* note 11, at 1488-90. Because the Commission was announcing new standards to clarify when it would exercise its enforcement authority, the particular adjudications ended in warnings rather than fines. Public Notice, *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 F.C.C.R. 2726 (1987).
- <sup>20</sup> *Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987), *recon. granted*, *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *aff’d in part, vacated in part*, *Action for Children’s Television v. FCC (ACT I)*, 852 F.2d 1332 (D.C. Cir. 1988). *See also* *FCC v. Pacifica*, 438 U.S. 726, 732 (1978) (citing *In re Pacifica Found.*, 56 F.C.C.2d 94, 98 (1975)).
- <sup>21</sup> *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987), *aff’d in part, vacated in part sub nom* *Action for Children’s Television v. FCC (ACT I)*, 852 F.2d 1332 (D.C. Cir. 1988).
- <sup>22</sup> *Action for Children’s Television v. FCC (ACT I)*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988).
- <sup>23</sup> *Id.* at 1340 at n. 14.
- <sup>24</sup> *Id.* at 1341, 1344.
- <sup>25</sup> *Action for Children’s Television v. FCC (ACT II)*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992).
- <sup>26</sup> *Action for Children’s Television v. FCC (ACT III)*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).
- <sup>27</sup> *Brown & Candeub*, *supra* note 11, at 1492-93 & n. 180 and sources cited therein.
- <sup>28</sup> Jon Pareles, *Shock Jocks Shake Up Uncle Sam*, N.Y. TIMES, NOV. 15, 1992, § 2, at 32, col. 4, cited in *Levi*, *supra* note 10 at n. 45. *See also* Seth T. Goldsamt, *Crucified by the FCC? Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 206 (1995) (describing self-styled “King of All Media” as having compiled an album of show excerpts entitled “Crucified by the FCC”).
- <sup>29</sup> Until he left terrestrial radio for satellite radio, Stern used his program to attack the FCC and contend that he had been punished by indecency fines for having taken political views unpopular with the government. *See, e.g.*, Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look to Crack Down on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167, 188-89 & n. 107 (2006); Anne Marie Squeo, *FCC to Penalize Clear Channel for Stern Show*, WALL ST. J., April 8, 2004, at B1; Staff, Editorial, *The Silent Media*, BROADCASTING & CABLE ONLINE, April 12, 2004, available at <http://www.broadcastingcable.com/article/CA409709.html> (describing Stern claim that the FCC focused on him because of his opposition to President Bush). *See also* Sarah McBride & Joe Flint, *Radio’s Stern Leaps to Satellite in \$500 Million Deal*, WALL ST. J., Oct. 7, 2004, at A1.
- <sup>30</sup> *Brown & Candeub*, *supra* note 11, at 1493. *See also* John Dunbar, *Indecency on the Air: Shock-Radio Jock*

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- Howard Stern Remains 'King of All Fines'*, Center for Pub. Integrity, Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200>.
- <sup>31</sup> Brown & Candeub, *supra* note 11, at 1493.
- <sup>32</sup> See, e.g., Brief of Former FCC Officials at 5-9, *CBS Corporation v. FCC*, No. 06-3575 (3d Cir. Nov. 29, 2006). These analysts contend that while the agency did enforce its indecency rules after 1987, the Commission's actions were directed to the most provocative kind of programming by "rogue" broadcasters at the time. *Id.* at 8.
- <sup>33</sup> John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains 'King of All Fines'*, Center for Pub. Integrity, Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239&sid=200>. See also Christopher M. Fairman, *FUCK*, 28 *Cardozo L. Rev.* 1711, 1739-40 (2007).
- <sup>34</sup> In a speech to the Media Institute on April 22, 1998, when he was still a commissioner, Chairman Powell argued for a "single standard of First Amendment analysis that recognizes the reality of the media marketplace and respects the intelligence of American consumers." See Reed Hundt, *Regulating Indecency: The Federal Communications Commission's Threat to the First Amendment*, 2005 *DUKE L. & TECH. REV.* 13, n.3 (2005) (quoting remarks by Comm'r Michael K. Powell before the Media Institute).
- <sup>35</sup> Candeub, *supra* note 15, at 922-23 and sources cited therein. See also *In re Clear Channel Broadcasting Licenses Inc.*, Licensee of Stations WPLA(FM), 19 F.C.C.R. 1768, 1815 (2004) (separate statement of Chairman Michael K. Powell) [hereinafter *Clear Channel WPLA*].
- <sup>36</sup> Bill McConnell, *Kevin Martin's Challenge, New FCC Chairman Could Pose Problems for Big Media*, *BROADCASTING & CABLE ONLINE*, March 21, 2005, available at <http://www.broadcastingcable.com/article/CA511792.html>. See also Kevin J. Martin, *Family-Friendly Programming: Providing More Tools for Parents*, 55 *FED. COMM. L.J.* 553, 557 n.18 (2003).
- <sup>37</sup> Only Commissioner Adelstein has expressed reservations about the expansion of the scope of enforcement to isolated words. *Omnibus Order*, 21 F.C.C.R. at 2726 (separate statement of Comm'r Jonathan Adelstein). At the same time, he reiterated his support for an enhanced enforcement policy generally. *Id.* at 2784. See also Hearings on HR 3717, 108th Congress 83, 106 (statements of Commrs Martin, Adelstein and Copps). Commissioner Taylor-Tate argued in print in support of significant indecency fines and broadcaster responsibility to air family-friendly programming. John Eggerton, *Tate Promotes Positive Programs*, *BROADCASTING & CABLE ONLINE*, June 12, 2006, available at <http://www.broadcastingcable.com/article/CA6342898.html>.
- <sup>38</sup> Broadcast Decency Enforcement Act, Pub. L. 109-235, Sec. 2, 120 Stat. 491 (amending § 503(b) of the Communications Act to authorize significantly increased forfeiture penalties and indicating congressional concern about indecent broadcast programming).
- <sup>39</sup> 47 U.S.C. § 503 (2006).
- <sup>40</sup> *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the Golden Globe Awards Program*, 19 F.C.C.R. 4975, 4980 and n. 32 (2004) [hereinafter *Golden Globes*]. See also *Omnibus Order* 21 F.C.C.R. at 2664, 2683-2700 ¶¶ 72-145. In *Golden Globes*, the FCC forthrightly admitted that its decision constituted a shift in FCC indecency policy. *Golden Globes*, 19 F.C.C.R. 4975 at ¶ 12. Thereafter, the commission claimed that its rules in the indecency context had not in fact changed much and that the same result would have been reached in the Bono case even under previous precedent. See *Omnibus Remand Order*, 21 F.C.C.R. 13306-07 at ¶¶ 20-21 (suggesting that previous policy toward fleeting expletives was limited to "staff letters and dicta"). While it thus appeared to "backpedal[]" somewhat on this clear recognition that the Commission was departing from prior precedent," the FCC "concede[d] [before the Second Circuit in *Fox v. FCC*] that *Golden Globes* changed the landscape with regard to the treatment of fleeting expletives." *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*34-5.

- <sup>41</sup> A LexisNexis search in major newspapers (File Name: MAJPAP) for “Janet Jackson wardrobe malfunction” on May 23, 2007, resulted in 664 citations. [Janet Jackson & wardrobe malfunction=2484 citation.] See also Press Release, FCC Chairman Powell Calls Super Bowl Halftime Show a “Classless, Crass, Deplorable Stunt” (Feb. 2, 2004), 2004 WL 187406; Press Release, FCC Commissioner Martin Supports the Opening of Investigation into Broadcast of Super Bowl Halftime Show, 2004 WL 193087 (Feb. 2, 2004).
- <sup>42</sup> 2001 Policy Statement, 16 F.C.C.R. at 8002 ¶ 7. See also Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 F.C.C.R. 6653, 21 F.C.C.R. at 6654, 6656 ¶¶ 5, 9 (2006) [hereinafter *Super Bowl XXXVIII Half Time Show on Reconsideration*].
- <sup>43</sup> 2001 Policy Statement, 16 F.C.C.R. at 8002 ¶ 8. See also *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6654 ¶ 5.
- <sup>44</sup> *Id.* See also 2001 Policy Statement, 16 F.C.C.R. at 8002 ¶ 8 and n. 15.
- <sup>45</sup> In re Infinity Radio License, Inc., 19 F.C.C.R. 5022, 5026 ¶ 12 (2004). The commission has explicitly rejected reliance on polls: “In determining whether material is patently offensive, we do not rely on polls, but instead apply the three-pronged contextual analysis described in the text.” *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. 2760, 2762 ¶ 5, n. 17. See also *Super Bowl XXXVIII Half Time Show on Reconsideration* 21 F.C.C.R. 6658 at ¶ 14.
- <sup>46</sup> See, e.g., *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6654 ¶ 5; 2001 Policy Statement, 16 F.C.C.R. at 8002 ¶ 9.
- <sup>47</sup> *Id.*
- <sup>48</sup> *Id.* See also *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6654 ¶ 5.
- <sup>49</sup> In re Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program “Without a Trace,” 21 F.C.C.R. 2732, 2734 ¶ 7 (2006) [hereinafter *Without a Trace*].
- <sup>50</sup> *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2734 ¶ 5. See also *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6654 ¶ 5.
- <sup>51</sup> *Without a Trace*, 21 F.C.C.R. at 2734 ¶ 7. The commission stated in its 2001 Policy Statement that the overall context of the broadcast in which the disputed material appeared is critical. Each indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding.” *Id.* at 8003 ¶ 10. The commission explained that “the more explicit or graphic the description or depiction, the greater the likelihood that the material will be considered patently offensive.” *Id.* at 8003 ¶ 12. Less explicit material and material relying principally on innuendo to convey a sexual or excretory meaning “have also been cited by the commission is actionably indecent where the sexual or excretory meaning was unmistakable.” *Id.* at 8005 ¶ 14.
- <sup>52</sup> *Omnibus Order*, 21 F.C.C.R. at 2708 ¶ 187 (2006). See also 2001 Policy Statement, 16 F.C.C.R. at 8011 ¶ 21.
- <sup>53</sup> *Golden Globes*, 19 F.C.C.R. 4974 (2004).
- <sup>54</sup> *Omnibus Remand Order*, 21 F.C.C.R. at 13300 ¶ 3.
- <sup>55</sup> *Id.* at 13300 and ¶¶ 3, 13 et seq. This is the Order recently vacated by the 2nd U.S. Circuit Court of Appeals in *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 (2d Cir. June 4, 2006).
- <sup>56</sup> In re Clear Channel Broadcasting Licenses, Inc., 19 F.C.C.R. 6773 (2004).
- <sup>57</sup> *Clear Channel WPLA*, 19 F.C.C.R. 1768 (2004) (involving seven indecency findings, including purported cartoon characters discussing sex and drugs, with “bleeps,” callers explicitly describing their penises, being “loud masturbators,” details of their sexual exploits, their preferences for oral sex as part of a contest to win breast-implant surgery, and the abnormally large size of a participant’s “balls”).
- <sup>58</sup> In re Infinity Broadcasting Operations, Inc., 18 F.C.C.R. 19954 (2003) [hereinafter *Infinity Broadcasting Operations*].

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- <sup>59</sup> *Without a Trace*, 21 F.C.C.R. 2732 (2006).
- <sup>60</sup> In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married by America” on April 7, 2003, 19 F.C.C.R. 20191 (2004) (including scenes of “party-goers lick[ing] whipped cream from strippers’ bodies in a sexually suggestive manner,” “a man on all fours in his underwear as two female strippers playfully spank him,” and the strippers “attempt[ing] to lure party-goers into sexually compromising situations”) [hereinafter *Married by America*].
- <sup>61</sup> *Omnibus Order*, 21 F.C.C.R. at 2671 ¶ 23. During the ten-minute sequence depicting a pool party, the episode displays approximately 20 pixilated views of various female guests’ nude breasts and, in one case, a female guest’s entire nude body. In addition, there are numerous other examples of sexual images and innuendo, including two brief, pixilated scenes in which Ron Jeremy, an actor in pornographic movies, touches or kisses a female guest’s bare breast.
- <sup>62</sup> *Omnibus Order*, 21 F.C.C.R. at 2678 ¶52 (2006) (regarding Video Musicales program). Broadcaster claims about the greater cultural tolerance of the Spanish-speaking audience for sexually oriented programming were unavailing. See, e.g., *Telemundo of Puerto Rico License Corp.*, 16 F.C.C.R. 7157 (2001).
- <sup>63</sup> *Omnibus Order*, 21 F.C.C.R. at 2683 ¶ 72.
- <sup>64</sup> In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Television Network’s Presentation of the Film “Saving Private Ryan,” 20 F.C.C.R. 4507 (2005) [hereinafter *Saving Private Ryan*].
- <sup>65</sup> *Omnibus Order*, 21 F.C.C.R. at 2717-2718, at ¶ 219-223. Indeed, Commissioner Barbara Taylor-Tate opined in her separate statement in the *Omnibus Order* that indecency in cartoons might be particularly problematic because of cartoons’ appeal to children. *Omnibus Order*, 21 F.C.C.R. at 2730.
- <sup>66</sup> *Omnibus Order*, 21 F.C.C.R. at 2675 ¶ 38.
- <sup>67</sup> In a number of instances, the commission did not impose forfeitures for its finding of indecency — basing its reticence on procedural grounds. With regard to the 2002 and 2003 Billboard Music Awards programs, for example, the commission found that no forfeiture should be imposed for the expletives used by Cher and Nicole Richie because the decisions preceded the commission’s clear articulation in the Golden Globes Awards case that a single use of an expletive could trigger indecency liability. *Omnibus Remand Order*, at 21 F.C.C.R. at 13301 ¶ 7. Similarly, complaints about the use of expletives in “NYPD Blue” were dismissed for procedural reasons. *Id.* at 13299, 13328-29 ¶¶ 74-77.
- <sup>68</sup> *Saving Private Ryan*, 20 F.C.C.R. at 4507 ¶ 15.
- <sup>69</sup> In re Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, 20 F.C.C.R. 1920, 1922-1925, 1926-1927 ¶¶ 6, 8 (2005) [hereinafter *PTC Complaints*]. The commission did say that “use of such words may, depending on the nature of the broadcast at issue, contribute to a finding of indecency ...” *Id.* at 1926 ¶ 8. See also In re Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material, 20 F.C.C.R. 1931, 1933, 1938 ¶ 8 [hereinafter *PTC Complaints II*].
- <sup>70</sup> *PTC Complaints II*, 20 F.C.C.R. at 1938 ¶ 8. The commission’s *Omnibus Order* similarly permitted the particular uses of “hell,” “damn,” “bitch,” “pissed off,” “up yours,” “ass,” “for Christ’s sake,” “kiss my ass,” “fire his ass,” “ass is huge,” and “wiping his ass.” *Omnibus Order*, 21 F.C.C.R. at 2710, 2712 ¶ 193, 197 (“although the complained-of word[s] ... are coarse expressions, in the context presented, they are not sufficiently vulgar, graphic, or explicit to support a finding of patent offensiveness. ... [A]ss’ [ ] is used in a nonsexual sense to denigrate or insult the speaker or another character. The word ‘piss’ is used as part of a slang expression that means ‘angry.’ The word ‘ass’ and the phrase ‘pissed off’ do not invariably invoke coarse sexual or excretory images, and in the context presented they do not rise to the level of offensiveness of the ‘F-Word’ or ‘S-Word.’ ... The manner in which these terms are used in the complained-of broadcasts resembles that presented in our previous decisions.”)

- <sup>71</sup> *Omnibus Order*, 21 F.C.C.R. at 2701 ¶ 151 (“While the episode shows the male and female characters kissing, caressing, and rubbing in bed, the overall context, including the camera angle, the background music, and the immediately preceding scene, is not shocking in contrast to clear and graphic depictions of sexual intercourse.”)
- <sup>72</sup> In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the UPN Network Program “Buffy the Vampire Slayer” on Nov. 20, 2001, 19 F.C.C.R. 15995 (2004) (in which the main character “kiss[ed] and straddl[ed]” another character shortly after fighting with him.) [hereinafter *Buffy the Vampire Slayer*].
- <sup>73</sup> The commission has rejected complaints against several different episodes of “Will and Grace.” See, e.g., *Omnibus Order*, 21 F.C.C.R. at 2701-2702 ¶¶153-159 (denying complaint about episode in which characters adjust Grace’s breasts in her clothes prior to a post-divorce first date); NBC Telemundo Licensing Co., 20 F.C.C.R. 4813 (2005) (episode dealing with visit to doctor’s office); *PTC Complaints*, 20 F.C.C.R. at 1926 (episode involving blood pressure double entendre and references to “all the bones in the human penis”); KSAZ License Inc., 19 F.C.C.R. 15999 (2004) (episode including a scene in which a woman kisses and “dry humps” a character).
- <sup>74</sup> *PTC Complaints II*, 20 F.C.C.R. at 1934-1936 (rejecting indecency in three “Friends” episodes: one dealing with an inadvertent mix-up in which a bakery inadvertently substitutes a cake shaped like a penis for a child’s birthday cake (although the cake is never shown), another including references to a man “with his hand up his kilt” and one with “a pretty serious latex fetish,” and a third in which characters use the words “hell,” “crap,” “pissed,” “bastard,” “son of a bitch,” “the F-word” and “porn”).
- <sup>75</sup> In re Complaints Against Fox Television Stations, Inc. Regarding Its Broadcast of the “Keen Eddie” Program on June 10, 2003, 19 F.C.C.R. 23063, 23066 (2004).
- <sup>76</sup> In re Complaints Against Various Television Station Licensees Regarding the ABC Television Network’s November 15, 2004 Broadcast of “Monday Night Football,” 20 F.C.C.R. 5481 ¶ 2 (2005) [hereinafter *Monday Night Football*].
- <sup>77</sup> *Omnibus Order*, 21 F.C.C.R. at 2705-2707 ¶¶ 173-79, 178 (focusing on “serious discussions” on the show about teenage sex, characterizing discussions as “educational,” and noting that “[t]he material is not presented in a vulgar manner and is not used to pander to or titillate the audience. Rather, it is designed to inform viewers about an important topic. . . . It would have been difficult to educate parents regarding teenagers’ sexual activities without at least briefly describing those activities and alerting parents to the little-known terms (i.e., ‘salad tossing,’ ‘rainbow party’) that many teenagers use to refer to them.”).
- <sup>78</sup> See, e.g., Fairman, *supra* note 33, at 1737-52. For a general critique of the commission’s new indecency regime, see generally Clay Calvert, *Bono, The Culture Wars, and a Profane Decision: The FCC’s Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61 (2004).
- <sup>79</sup> *2001 Policy Statement*, 16 F.C.C.R. at 8015.
- <sup>80</sup> *2001 Policy Statement*, 16 F.C.C.R. at 8015 and ¶ 24. The policy of requiring such evidence was explained by the commission as follows: “[g]iven the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming.” *Id.* Although a formal shift has not been articulated by the commission, its actions suggest a reduced burden for complainants. This is an ironic development, given that most of the complainants today are members of the Parents Television Council, an organization that has the resources to monitor, tape and transcribe the programming it deems indecent.
- <sup>81</sup> See, e.g., In re Entercom Portland License, LLC, 18 F.C.C.R. 25484, 25487 n. 21 (2003).
- <sup>82</sup> In re Infinity Broadcasting Corporation of Los Angeles (KROQ-FM), 16 F.C.C.R. 6867, 6870 (2001). For a very thoughtful account of the procedural, evidentiary and defense issues in FCC indecency

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- enforcement, see Michael Botein & Dariusz Adamski, *The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale*, 15-FALL MEDIA L. & POL'Y 7, 24-30 (2005).
- <sup>83</sup> In re Retention by Broadcasters of Program Recordings, 19 F.C.C.R. 12626, 12628 n. 9 (2004) (citation omitted). See also Bill McConnell, *New Rules for Risque Business*, BROADCASTING & CABLE, March 4, 2002 at 5.
- <sup>84</sup> See, e.g., In re Deregulation of Radio, 104 F.C.C.2d 505 (1986); In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 104 F.C.C. 2d 357 (1986).
- <sup>85</sup> One of the consistent problems plaguing FCC indecency enforcement since the late 1980s is delay. *Action for Children's Television v. F.C.C. (ACT IV)*, 59 F.3d 1249, 1254-56 (D.C. Cir. 1995), cert. denied, 516 U.S. 1072 (1996). Indeed, commissioners themselves have pointed to the agency's delays and called for expeditious resolution of indecency complaints. See, e.g., In re Infinity Radio License, Inc., Licensee of Station WLLD(FM), 19 F.C.C.R. 5022, 5030 (2004) (dissenting statement of Comm'r Michael J. Copps) (describing 4 ½-year delay in resolving indecency claims about live hip/hop music event *The Last Damn Show*); Broadcasting of San Francisco, Inc., Licensee, KRON-TV, San Francisco, 19 F.C.C.R. 1751, 1765 (2004) (separate statement of Michael J. Copps) (delays in resolving indecency claims about news report on Puppetry of the Penis) [hereinafter *Young Broadcasting*]. In one striking example, the commission was advised that the statute of limitations had run after it had finally voted to impose a forfeiture for airing indecency. AMFM Radio Licenses, L.L.C., Licensee of Station WITH(FM), Order, 19 F.C.C.R. 10751 (2004)(NAL reversed because of statute of limitations in case involving discussions, *inter alia*, of penile enlargement devices). See also Edmund Dinis, 19 F.C.C.R. 1907 (2004). The appeals process is also lengthy. See John Eggerton, *Facing Indecency Fines? Give Crigler A Call*, BROADCASTING & CABLE, Feb. 16, 2004, at 13 (noting that rescission of fine for indecency against KBOO(FM) Portland, Ore., for airing Sarah Jones rap song *Your Revolution* took two years).
- <sup>86</sup> See *supra* note 84.
- <sup>87</sup> *PTC Complaints*, 20 F.C.C.R. at 1941 (Comm'r Copps dissenting). Commissioner Copps characterized the two orders issued in 2005 in response to a slew of PTC complaints about television programs as follows: "In these two Orders, the Commission combines 36 unrelated complaints with no apparent rhyme or reason other than that they concern television broadcasts. The Commission then denies these complaints with hardly any analysis of each individual broadcast, relying instead on generalized pronouncements that none of these broadcasts violates the statutory prohibition against indecency on the airwaves. I believe that some of these broadcasts present a much closer call. ... Although it may never be possible to provide 100 percent certainty because we must always take into account the specific context, developing guidance and establishing precedents are critically important Commission responsibilities. We serve neither concerned consumers nor the broadcast industry with the approach adopted in today's item." *Id.*
- <sup>88</sup> See John Eggerton, *FCC's Profanity Ruling Against Fox Thrown Out*, BROADCASTING & CABLE ONLINE, June 4, 2007, available at <http://www.broadcastingcable.com/article/CA6448861.html>.
- <sup>89</sup> See generally *2001 Policy Statement*, 16 F.C.C.R.7999 (2001).
- <sup>90</sup> See, e.g., *Omnibus Remand Order*, 21 F.C.C.R. at 13307 ¶ 21 ("[s]ubsequent to this 1987 guidance, there were several Bureau-level decisions finding the isolated use of an expletive not to be actionably indecent. In no case, however, did the Commission itself, when evaluating an actual program, find that the isolated use of an expletive, such as the 'F-Word,' as broadcast was not indecent or could not be indecent."). See also *id.* at 13308 ¶ 23. See Brief of Federal Communications Commission at 39-40, *Fox Television Stations Inc. v. FCC*, 06-1760-ag 39-40 (2d Cir. Dec 6, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268846A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268846A1.pdf) (refusing to discuss the apparent



- inconsistency between the decisions in “Saving Private Ryan” and “The Blues” by noting that “The Blues” NAL represented the commission’s “tentative conclusions” and that the agency would have the opportunity to analyze the consistency of its precedents in the course of issuing its final decision in “The Blues.”) *See also* Staff, Editorial, *Good Directions*, BROADCASTING & CABLE ONLINE, Oct. 10, 2005, available at <http://www.broadcastingcable.com/article/CA6266853.html>.
- <sup>91</sup> *See* Brief of Federal Communications Commission at 27, *Fox Television Stations Inc. v. FCC*, 06-1760-ag (2d Cir. Dec 6, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268846A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268846A1.pdf) (characterizing the networks as requesting reversal of the *Omnibus Remand Order* “on the basis of other issues — presented in other cases — that the Commission has not fully resolved”).
- <sup>92</sup> *See, e.g.*, *Clear Channel WPLA*, 19 F.C.C.R. at 1815 (separate statement of Chairman Michael Powell) (“these increased enforcement actions will allow the Commission to turn what is now a “cost of doing business” into a significant “cost for doing indecent business.”); *id.* at 1816 (dissenting statement of Comm’r. Michael J. Copps); *Infinity Broadcasting Operations*, 18 F.C.C.R. at 19972 (dissenting statement of Comm’r. Michael J. Copps).
- <sup>93</sup> *Omnibus Order*, 21 F.C.C.R. at 2775 ¶ 28 (“[f]inally, regarding the element of ability to pay and financial disincentives to violate the Act and rules, we find that CBS’s size and resources, without question, support an upward adjustment to the maximum statutory forfeiture of \$550,000 because a lesser amount would not serve as a significant penalty or deterrent to a company of its size and resources.”). *See also* *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6665-66 ¶ 32; *Omnibus Order*, 21 F.C.C.R. at 2686-2687 ¶ 85 (reducing forfeiture because licensee “runs a small, community station that airs college level educational courses for most of the day” and “may have been under the good faith belief” that its airing of expletives in a documentary “served a legitimate informational purpose”).
- <sup>94</sup> *See, e.g.*, John Eggerton, *D.C.’s Indecency Frenzy; Hearings Abound, FCC Sharpens Enforcement Blade*, BROADCASTING & CABLE, Feb. 16, 2004 at 8 (describing House and Senate bills to increase FCC forfeiture authority).
- <sup>95</sup> The commission’s *Forfeiture Policy Statement* established a base forfeiture amount of \$7,000 for the transmission of indecent or obscene materials. Report and Order, *In re Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 F.C.C.R. 17087, 17113 (1997), *recon. denied*, 15 F.C.C.R. 303 (1999) [hereinafter *Forfeiture Policy Statement*]. *See also* 47 C.F.R. § 1.80(b). The *Forfeiture Policy Statement* also specified that the Commission could adjust a forfeiture based upon consideration of the factors enumerated in § 503(b)(2)(D), such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” *Omnibus Order*, 21 F.C.C.R. at 2669 ¶ 20.
- <sup>96</sup> Commissioners have called for “per utterance” application of forfeitures — finding violations not on a per program basis, but for each utterance of the forbidden language or image in the relevant program. *See* *Infinity Broadcasting Operations Inc.*, 18 F.C.C.R. 6915, 6918 (2003) (announcing new “per utterance” policy); *Clear Channel WPLA*, 19 F.C.C.R. at 1818 (2004) (separate statement of Comm’r Kevin J. Martin) (calling for higher fines); *Clear Channel Broadcast Licensees Inc.*, 19 F.C.C.R. 6773, 6779 (2004) (applying “per utterance” policy). *See also* *In re Entercom Sacramento License, LLC.*, 19 F.C.C.R. 20129, 20154-55 (2004) (separate statements of Comm’rs Michael J. Copps and Kevin J. Martin) [hereinafter *Entercom Sacramento*]. The fact that the commission has not inevitably assessed forfeitures on a per utterance basis is not critical, given that it has announced its authority to do so and indeed exercised it in some circumstances.
- <sup>97</sup> For example, the commission imposed forfeitures of \$7,000 per station on every Fox affiliate that aired the episode of the Fox network program “Married by America” that the commission found to be

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actionably indecent. See *Married by America*, 19 F.C.C.R. at 20,196 ¶ 16 (proposing forfeitures against all Fox Television Network affiliate stations that broadcast apparently indecent material because they had the opportunity to review and reject the taped program). But see *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6665 (fining only CBS owned stations and not all CBS affiliates for nudity on live show); *Clear Channel Broadcasting Licenses, Inc. et al.*, 19 F.C.C.R. 6773, 6779 ¶ 16 (2004) (proposing forfeiture against all commonly owned and operated stations that broadcast the programming at issue), *vacated per consent decree*, 19 FCC Rcd 10880 (2004).

In its *Omnibus Order*, however, the commission imposed forfeiture penalties only on stations against whom a complaint had been made. *Omnibus Order*, 21 F.C.C.R. at 2673 ¶ 32 (“We recognize that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming.”). Thus affiliates against whom no complaints were made could avoid liability under today’s rules.

<sup>98</sup> See Section II.

<sup>99</sup> *Omnibus Order*, 21 F.C.C.R. at 2673, 2676, 2687 ¶¶ 32, 42, 86; *Omnibus Remand Order*, 21 F.C.C.R. at 13299 ¶ 76. This position has led to critique from Commissioner Adelstein, who has argued that it leads to a patchwork of indecency findings and inconsistent levels of protection for children, effectively replaces a national standard with a local one, and “lack[s] ... logic.” *Omnibus Remand Order*, 21 F.C.C.R. at 13330 (statement of Commissioner Jonathan S. Adelstein, concurring in part, dissenting in part.) It is unclear whether it will in reality lead to much inconsistency, however, as media watchdog groups such as the Parents Television Council will doubtless see the shift as an invitation to blanket the FCC with complaints against all stations airing targeted programming.

<sup>100</sup> Thus, commissioners have reminded broadcasters that the commission will, in the appropriate situation, consider license revocations for repeated violations of the indecency rules. See, e.g., *Infinity Broadcasting Operations*, 18 F.C.C.R. at 19965 (“[w]e reiterate our recent statement that ‘additional serious violations by Infinity may well lead to a license revocation proceeding.’”), *order rescinded on other grounds sub nom* In re Viacom et al, 19 F.C.C.R. 23100 (2004). See also *Clear Channel WPLA*, 19 F.C.C.R. at 1816 (separate statement of Comm’r Michael J. Copps, dissenting) (“[t]o fulfill our duty under the law, I believe the Commission should have designated these cases for a hearing on the revocation of these stations’ licenses ...”). While the commission has not commenced license revocation hearings in the indecency context the fact that the possibility of revocation is even mentioned is likely to be noticed by broadcasters. Doug Halonen, *Feds Change the Rules: FCC Expands the Scope of Indecency Enforcement to Include Any Profanity*, 23 TELEVISION WEEK, March 22, 2004, at 1; Todd Shields, *Common Decency: As Powell’s FCC Tries to Find the Middle Ground Between Censorship and First Amendment Rights, the Media Continue to Push the Envelope*, 14 MEDIA WEEK, Feb. 6, 2004, at 18.

<sup>101</sup> Halonen, *supra* note 100. See also Bill McConnell, *Next Time Your License: FCC Levies \$375K Fine on Infinity Broadcasting Over St. Pat’s Sex Stunt*, 133 BROADCASTING & CABLE, Oct. 6, 2003, at 1; Todd Shields, *Indecency Fines on Coarse*, 14 MEDIA WEEK, Feb. 2, 2004, at 6.

<sup>102</sup> In re Viacom, Inc., et al., 19 F.C.C.R. 23100 (2004) [hereinafter *Viacom Order*] (attaching and incorporating Consent Decree) *aff’d*. In re Viacom, Inc., Order on Reconsideration, 21 F.C.C.R. 12223 (2006) [hereinafter *Viacom Order on Reconsideration*].

<sup>103</sup> *Clear Channel Communications Inc. Order*, 19 F.C.C.R. 10,880 (2004) (attaching Consent Decree) [hereinafter *Clear Channel Order*].

<sup>104</sup> In re Emmis Communications Corp., Order, 19 F.C.C.R. 16003 (2004), Consent Decree, 19 F.C.C.R. at 16007, 16008 ¶¶ 11, 13 (2004) [hereinafter *Emmis Order*], *aff’d*, 21 F.C.C.R. 12219 (2004) (rejecting challenges to Emmis consent decree) [hereinafter *Emmis Order on Reconsideration*].

<sup>105</sup> The *Emmis Order on Reconsideration*, for example, explained that “[t]he Commission also agreed not to

use the facts of the Consent Decree, the forfeiture orders, the pending inquiries or complaints, “or any similar complaints” regarding programming aired before the Consent Decree’s effective date for any purpose relating to Emmis or its stations, and to treat all such matters as null and void.” *Emmis Order on Reconsideration*, 21 F.C.C.R. at 12220 ¶ 3.

<sup>106</sup>In the Clear Channel consent decree, for example, the company agreed to implement a company-wide indecency compliance plan including automatic suspension, remedial training, and significant time delays for programs upon the employees’ return. See *Clear Channel Order*, 19 F.C.C.R. at 10886. See also *Emmis Order*, 19 F.C.C.R. at 16007. (Some commissioners complained that the consent decree with Viacom did not include sufficiently specific compliance plans. See *Viacom Order*, 19 F.C.C.R. at 23110 (concurring statement of Comm’r Kevin J. Martin). However, it is assumed that all three consent decrees will be enforced in the same fashion. See John Eggerton, *FCC Upholds Viacom Indecency Settlement*, BROADCASTING & CABLE ONLINE, Oct. 17, 2006, available at <http://www.broadcastingcable.com/article/CA6382130.html> (noting Viacom’s agreement to same conditions).)

<sup>107</sup>See, e.g., *Emmis Order*, 19 F.C.C.R. at 16011 (concurring statement of Comm’r Michael J. Copps).

<sup>108</sup>See, e.g., Staff, Editorial, *Pay for Play*, BROADCASTING & CABLE ONLINE, Nov. 29, 2004, available at <http://www.broadcastingcable.com/article/CA483385.html>; Staff, Editorial, *The Silent Media, Committed to the First Amendment*, BROADCASTING & CABLE ONLINE, Apr. 12, 2004, available at <http://www.broadcastingcable.com/article/CA409709.html>. See also Botein & Adamski, *supra* note 82, at 24-30; Fairman, *supra* note 33, at 1739, 1747.

<sup>109</sup>Some have claimed that the FCC pressures licensees to forbear from seeking judicial review of indecency actions. Brown & Candeub, *supra* note 11, 1463-64 & n. 5 (2005). Appeals to the courts have also been forestalled by delays in the resolution of reconsideration orders. *Id.* at n. 5.

<sup>110</sup>See, e.g., *Infinity Broadcasting Operations*, 18 F.C.C.R. at 19971 (2003) (separate statement of Comm’r Michael J. Copps, dissenting).

<sup>111</sup>*Omnibus Order*, 21 F.C.C.R. at 2726 (Comm’r Jonathan S. Adelstein, concurring in part, dissenting in part); *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2784.

<sup>112</sup>Section V.A.

<sup>113</sup>Historically, the agency had apparently limited its understanding of the term “profane” to blasphemous material. Candeub, *supra* note 15, at 924.

<sup>114</sup>*Golden Globe Awards*, 19 F.C.C.R. at 4981 (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)). The agency thereafter explained that because “it is not clear whether the ‘fighting words’ portion of [the Tallman] definition applies ... [and] [g]iven the nature of television and radio, it appears unlikely that broadcast material would provoke immediate violence between those uttering such words and the audience. Therefore, ... we will analyze potentially profane language with respect to whether it is ‘so grossly offensive as to constitute a nuisance.’” *Omnibus Order*, 21 F.C.C.R. at 2669 ¶ 17. See also *Omnibus Order*, 21 F.C.C.R. at 2686 ¶ 81 (“Like the ‘F-Word,’ [the ‘S-Word’] is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.”); *id.* at 2669 ¶ 17 (“[a]s a general matter, we will analyze potentially profane language with respect to whether it is ‘so grossly offensive as to constitute a nuisance.’”).

<sup>115</sup>One possible explanation for the revival of the “profane” as a separate category of liability under § 1464 is that the commission was concerned that the use of the term “fucking” might not be found to be a depiction or description of a sexual organ or activity as used in the *Golden Globes* case on judicial review. (It should be recalled that the FCC’s Enforcement Bureau had excused the statement in the original decision in the *Golden Globes* case. For an argument that the Enforcement Bureau’s analysis was correct, see, for example, Fairman, *supra* note 33, at 1741-45) Thus, to reinforce its finding, the commission also

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adopted a definition of the statutory term “profane” that would cover “profanity,” of which the expletive “fucking” is an example.

In itself, however, liability for profanity under this definition could be far more extensive. It could permit the FCC to regulate non-sexual or non-excretory expression that the commission believes is offensive to the average broadcast viewer. However, the commission has “establish[ed] a presumption that our regulation of profane language will be limited to the universe of words that are sexual or excretory in nature or are derived from such terms. . . .” *Omnibus Order*, 21 F.C.C.R. at 2669 ¶ 18. Of course, this expression of restraint is only a presumption and does not entirely tie the commission’s hands.

<sup>116</sup>*Id.* at 2669 ¶ 19.

<sup>117</sup>*Omnibus Remand Order*, 21 F.C.C.R. at 13314 ¶ 40 and sources cited therein.

<sup>118</sup>This conclusion is implicitly supported by the Commission’s finding in its *Omnibus Order* that the airing during CBS’s “The Amazing Race 6” of a camera shot of graffiti stating “Fuck Cops!” was neither indecent nor profane: “This . . . is one of the *rare instances* in which this presumption [that the F-word is profane] is effectively rebutted. . . . [T]he written version of the word during this broadcast . . . would not have been noticed by the average viewer. As such, we find it impossible to conclude that its broadcast was ‘likely to shock the viewer and disturb the peace and quiet of the home’ and thus amount to a nuisance.”) *Omnibus Order*, 21 F.C.C.R. at 2709 ¶ 192 (emphasis added).

<sup>119</sup>The *Fox v. FCC* court found that “[t]he Commission’s new approach to profanity is supported by even less analysis, reasoned or not.” *Fox Television Stations v. Federal Communications Commission*, 2007 U.S. App. LEXIS 12868 at \*51.

<sup>120</sup>*Golden Globe Awards*, 19 F.C.C.R. at 4978; *Omnibus Order*, 21 F.C.C.R. at 2684 ¶ 74, 75 (“the “F-Word” is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image.” Similarly, we find the “S-Word” to be one of the most vulgar, graphic and explicit words relating to excretory activity in the English language. Use of the “S-Word” invariably invokes a coarse excretory image.”); *Omnibus Remand Order*, 21 F.C.C.R. at 13304-05 ¶ 16 (“Given the core meaning of the “F-Word,” any use of that word has a sexual connotation even if the word is not used literally. Indeed, the first dictionary definition of the “F-Word” is sexual in nature. Moreover . . . the word’s power to “intensify” and offend derives from its implicit sexual meaning. . . . [I]ts use inherently has a sexual connotation and thus falls within the scope of our indecency definition.”).

<sup>121</sup>*Omnibus Order*, 21 F.C.C.R. at 2686 ¶ 82.

<sup>122</sup>See, e.g., *Omnibus Order*, 21 F.C.C.R. at 2676 at ¶ 44-46 (regarding Fernando Hidalgo Show, Spanish-language talk show, that featured female guest in an open-front dress).

<sup>123</sup>See, e.g., *Omnibus Order*, 21 F.C.C.R. at 2672 ¶ 25 (“the mere pixilation of sexual organs is not necessarily determinative under our analysis because the material must be assessed in its full context.”); *Married by America*, 19 F.C.C.R. at 20194 ¶ 10 (pixilated nudity on program featuring bachelor and bachelorette parties met first prong of indecency standard). In *Married by America*, the commission found that “scenes in which nudity is electronically obscured may be considered graphic and explicit if the sexual nature of the scene is unmistakable.” *Omnibus Order*, 21 F.C.C.R. at 2674 ¶ 36 (citing *Married by America*, 19 F.C.C.R. at 20194 ¶ 10). See also *Back Bay Broadcasting*, 14 F.C.C.R. 3997, 3998 (Mass Media Bur. 1999) (forfeiture paid) (finding broadcast indecent despite attempt to obscure objectionable language because words remained clearly “recognizable, notwithstanding the editing”).

Attempts to obscure nudity are not always discounted, however. In denying some indecency complaints by the Parents Television Council against a number of television programs, the Commission justified its decision with regard to some images because they were obscured by pixilation. *PTC Complaints*, 20 F.C.C.R. at 1927 ¶ 9. The commission does not explain the distinctions in context that would lead to such disparate results on pixilation, but the facts of the cases suggest that if the sexual character of the

images is not effectively obscured, pixilation will not help. With respect to the pixilated nudity on the “Surreal Life 2” episodes found indecent, for example, the commission’s explanation is instructive: “Here, despite the obscured nature of the nudity, it is unmistakable that partygoers are exposing and discussing sexual organs as well as participating in sexual activities. ... Indeed, a child watching this program could easily discern that nude or partially nude adults are attending a party and participating in, or soliciting participation in, sexual activities.” *Omnibus Order*, 21 F.C.C.R. at 2672 ¶ 25. The Commission has analogously found “scripted bleeps” that make the language indecipherable by viewers to serve in avoiding an indecency finding. In re Fox Television Stations Inc., 20 F.C.C.R. 4800, 4803 ¶ 8 (2005) (regarding an episode of “Arrested Development”).

<sup>124</sup>See, e.g., *Monday Night Football*, 20 F.C.C.R. at 5483. The significance of nudity is reinforced by the fact that some of the commission’s denials of indecency complaints explicitly refer to the fact that no nudity was aired. See, e.g., In re KSAZ(TV) License Inc., 19 F.C.C.R. 15999, 16001 (2004) (finding “Will and Grace” episode featuring a kiss between two women and a “dry hump” not to be indecent, the commission specifically noted that “[b]oth characters are fully clothed ...”); *PTC Complaints*, 20 F.C.C.R. at 1927 ¶ 9 (“[m]any of these complaints involved characters whose sexual and/or excretory organs were covered by bedclothes, household objects, or pixilation ...”).

<sup>125</sup>See, e.g., *Entercom Sacramento*, 19 F.C.C.R. at 20133; In re Citicasters Co., 15, F.C.C.R. 19091 (2000); In re GA-MEX Broadcasting Co., 17 F.C.C.R. 8143 (2002); *Tempe Radio, Inc. (KUPD-FM)*, 12 F.C.C.R. 21828 (1997)[hereinafter *Tempe Radio*]; *EZ New Orleans, Inc. (WEZB(FM))*, 12 F.C.C.R. 4147 (1997).

<sup>126</sup>See *WQAM License Limited Partnership*, 19 F.C.C.R. 22997 ¶ 10, n. 31 (2004) and sources cited therein; *Rubber City Radio Group*, 17 F.C.C.R. 14745 (2002); *GA-MEX Broadcasting Co.*, 17 F.C.C.R. 8143 (2002); *Tempe Radio*, 12 F.C.C.R. 21,828 (1997).

<sup>127</sup>The commission’s decision in *Without A Trace* made many mentions of the fact that the participants in the relevant scene were teenagers. *Without a Trace*, 21 F.C.C.R. at 2735 ¶¶ 11, 13. See also *Omnibus Order*, 21 F.C.C.R. at 2680 ¶ 61 (regarding child masturbation in music videos aired on *Video Musicales* program); *AMFM Radio Licenses LLC*, 18 F.C.C.R. 19917, 19922 at ¶ 13 (2003) (interview with high school girls regarding sex found indecent). The fact that the description is on radio rather than television does not seem to matter. For example, the agency found indecent a shock radio program in which a teenage girl talked about her sexual exploits and purportedly rubbed the phone on her private parts. *Infinity Broadcasting Operations, Inc.*, 17 F.C.C.R. at 10666. But see *Buffy the Vampire Slayer*, 19 F.C.C.R. at 15998 (although the central character in the show is supposed to be a teenager, the commission concludes that the scene was not “sufficiently graphic or explicit to be deemed indecent.”). In sexual expression involving teenagers, the commission places greater weight on whether the depictions dwelled on the sexual and were clearly understandable as such than on whether the depictions were necessary to the story. Because “a child watching the program could easily discern that the teenagers shown in the scene were engaging in sexual activities, including apparent intercourse” and because the “broadcast dwells on and repeatedly depicts the sexual material,” *Without a Trace*, 21 F.C.C.R. at 2735-2736 ¶ 13, 14, the commission made clear that the result would have been the same even if the material had been necessary to the story: “even if the depictions had been more essential to the program, the other two factors weigh heavily in favor of a finding of patent offensiveness as measured by contemporary community standards for the broadcast medium, so we would not alter our ultimate conclusion in this case.” *Id.* at n. 23.

<sup>128</sup>See, e.g., *Entercom Kansas City License LLC*, 19 F.C.C.R. 25011 (2004) (finding indecent radio station’s *Naked Twister* contest); *Capstar TX Limited Partnership, Licensee of Station WAVW(FM)*, 19 F.C.C.R. 4960 (2004) (hosts “goading” couple into discussing sexual matters).

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<sup>129</sup>See, e.g., *id.* (interviews with porn stars).

<sup>130</sup>See, e.g., *Omnibus Order*, 21 F.C.C.R. at 2671 ¶ 23 (focusing on the fact that a reality show participant was a porn star).

<sup>131</sup>For example, the commission made much of the fact that the actress Nicole Richie was known to have uttered expletives on camera in previous appearances when it fined Fox for airing Richie's comments in the 2003 Billboard Music Awards Show. *Omnibus Remand Order*, 21 F.C.C.R. at 13312 ¶ 33.

<sup>132</sup>See also *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. 6662 ¶ 22. Similarly, the Commission characterized the Golden Globe awards as programming during which children would be expected to be in the audience. *Golden Globe Awards Order*, 19 F.C.C.R. at 4979 ¶¶ 9, 10; *Saving Private Ryan*, 20 F.C.C.R. at 4514 ¶ 18. See also *Omnibus Remand Order*, at 13305-06 ¶ 18 (stating that the 2003 Billboard Awards show "was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars[;]. . . . [i]n this case a significant portion of the viewing audience for this program was under 18."); FCC Press Release, *FCC Chairman Powell Calls Superbowl Halftime Show a "Classless, Crass, Deplorable Stunt," Opens Investigation*, 2004 WL 193086 (Feb. 2, 2004). See also *Omnibus Order*, 21 F.C.C.R. at 2688, 2690 ¶ 93, 99 (finding that the airing of the word "shit" in various forms in the film "The Pursuit of D.B. Cooper" would needlessly offend unsuspecting viewers in their homes on a weekend afternoon, at a time when children are likely to be in the audience, and that this heightened the gravity of the violation).

<sup>133</sup>In its decision denying complaints about ABC's airing of "Saving Private Ryan," the commission emphasized the extent of viewer advisories aired about the movie. *Saving Private Ryan*, 20 F.C.C.R. at 4508 ¶¶ 3, 15.

<sup>134</sup>*Golden Globe Awards*, 19 F.C.C.R. at 4980 and n. 32. Reversing its own Enforcement Bureau, which had denied the Golden Globes complaint in part because the utterance was fleeting and isolated (Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 18 F.C.C.R. 19859 (2004)), the commission found irrelevant that both Bono's thanks and the image of Janet Jackson's breast were extremely fleeting. *Id.* See also *Omnibus Remand Order*, 21 F.C.C.R. at 13308 ¶ 23 ("While, as explained above, Commission dicta and Bureau-level decisions issued before Golden Globe had suggested that expletives had to be repeated to be indecent . . . we believe that this guidance was seriously flawed. We thus reaffirm that it was appropriate to disavow it."). The fleeting-expletive policy had been articulated in cases such as *Pacifica Clarification Order*, 59 F.C.C.2d 892 (1978); *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250 ¶ 10(1978); *Application of Pacifica Found.*, 95 F.C.C.2d 750 ¶¶ 16, 18 (1983); *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 ¶ 3 (1987).

For criticisms of the current FCC approach to indecency (and the *Golden Globes Awards* decision), see, e.g., Clay Calvert, *Bono, The Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, (2004) ; Fairman, *supra* note 33, at 1740-50. For a catalogue of difficulties posed by the commission's new approach, see generally Botein & Adamski, *supra* note 82.

<sup>135</sup>The FCC characterized its previous precedent as illogically distinguishing between "expletives" and "descriptions or depictions of sexual or excretory functions" as to whether repetition would be required for an indecency finding. *Omnibus Remand Order*, at 13309 ¶ 25. Viewers "of free television broadcasts utilizing the public airwaves should [not] feel . . . that they cannot safely allow their families to watch prime-time broadcasts." *Id.*

<sup>136</sup>*Fox v. FCC*, 2007 U.S. App. LEXIS 12868 (2d Cir. June 4, 2007).

<sup>137</sup>2001 *Policy Statement*, 16 F.C.C.R. at 8002-03; *Omnibus Remand Order*, 21 F.C.C.R. at 13327 ¶ 71 ("to be sure, there is no outright news exemption from our indecency rules").

- <sup>138</sup>Letter to Mr. Peter Branton, 6 F.C.C.R. 610 (1991). See also *In re Infinity Broadcasting Corp. of Pennsylvania*, 3 F.C.C.R. 930, 937 n. 31 (1987), *aff'd in part and vacated on other grounds sub nom. ACT I*, 852 F.2d 1332 (D.C.Cir. 1988) (noting that “context will always be critical to an indecency determination and ... the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern.”); *2001 Policy Statement*, 16 F.C.C.R. at 8002-03 (stating that “[e]xplicit language in the context of a bona fide newscast might not be patently offensive”).
- <sup>139</sup>*Omnibus Remand Order*, 21 F.C.C.R. at 13327-28 ¶ 71-72 (denying indecency complaint regarding news interview in CBS’s “Early Show”).
- <sup>140</sup>The momentary glimpse of the penis of one of the performers in the strage production “Puppetry of the Penis” during a news-interview segment in a station’s morning news program led to the FCC’s finding of indecency. *Young Broadcasting*, 19 F.C.C.R. at 1752.
- <sup>141</sup>*Omnibus Remand Order*, 21 F.C.C.R. at 13327-13328 ¶ 71. This case involved a complaint that an interviewee in a CBS “Early Show” segment discussing the previous night’s entertainment program “Survivor” had referred to another of the contestants as a “bullshitter.” Similarly, the agency denied an indecency complaint about the momentary exposure of a flood victim’s penis during a “Today” show excerpt, noting that the segment “contained contemporaneous coverage of an important news event. Therefore, we must exercise particular caution here as the complaint involves programming that implicates core First Amendment concerns.” *Omnibus Order*, 21 F.C.C.R. at 2716 ¶ 214.
- <sup>142</sup>*In re Entercom (KNDD) Kansas City License, LLC*, 19 F.C.C.R. 25011 (2004), the Enforcement Bureau found indecent a discussion of whether a penis could be used to pull objects. Although the defendant made the claim that the discussion was news-related, and although the commission admitted that the discussion concerned a news item, it nevertheless stated its view that the discussion was not a bona fide newscast. In distinguishing the “Today” show rescue footage from the *Puppetry of the Penis* morning news segment, the FCC did not flinch from delving into comparative detail: “... the display was not incidental to the coverage of a news event; rather, it occurred during an interview of performers who appear nude to manipulate their genitalia, and as the performer stood up to give an off-camera demonstration to the show’s hosts. Here, in contrast, the program’s focus is a rescue effort, and the complained-of material is incidental and easily could evade the notice of a viewer focused on this effort.”) *Omnibus Order*, 21 F.C.C.R. at 2717 ¶ 218. Finally, although the commission denied the indecency claim regarding the use of the word “bullshitter” in an “Early Show” segment, it “defer[red] to CBS’s plausible characterization of its own programming.” *Omnibus Remand Order* at 13328 ¶ 72 (emphasis added). The Commission thereby accepts the task of distinguishing between plausible and implausible broadcaster claims regarding their news programming. Moreover, Commissioner Adelstein objected to the *Omnibus Remand Order*’s treatment of the Early Show “Survivor” interview as news, taking issue with such an “infotainment’ exception — in a segment essentially promoting an entertainment show on CBS ...” John Eggerton, *Split Decision on FCC Profanity Review*, BROADCASTING & CABLE ONLINE, Nov. 6, 2006, available at <http://www.broadcastingcable.com/article/CA6388805.html>. If Commissioner Adelstein’s view gains traction at the Commission, less deference to broadcaster characterizations of their programming as news is likely.
- <sup>143</sup>*Omnibus Order*, 21 F.C.C.R. at 2683-88 ¶¶ 72-86. The commission did not discuss the merit of the programming. In response to the licensee’s argument that “the expletives in question were not removed from the program so that the viewpoints of those being interviewed would be accurately reflected,” the Commission dismissed this claim of necessity and “disagree[d] that the use of such language was necessary to express any particular viewpoint in this case.” *Id.* at 2685 ¶ 77. The commission also “note[d]that many of the expletives in the broadcast are not used by blues performers[, but by record

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industry parties]” thereby suggesting that they were not necessary to the expression of the bluesmen subjects of the documentary.

<sup>144</sup>*Saving Private Ryan*, 20 F.C.C.R. at 4507 ¶ 11 (noting that “[i]n connection with the third factor, we consider whether the material has any social, scientific, or artistic value, as finding that material has such value may militate against finding that it was intended to pander, titillate or shock. Of course ... merit ... does not render such material per se not indecent.”)

<sup>145</sup>In finding that although the expletives in “Saving Private Ryan” met the first and second components of its indecency analysis but not the third, the commission emphasized that the movie “realistically depicts the fierce combat,” that such realism is “essential to the ability of the filmmaker to convey ... the extraordinary conditions,” that the expletives “realistically reflect the soldiers’ strong human reactions” and that the dialogue “is integral to the film’s objective of conveying the horrors of war.” *Saving Private Ryan*, 20 F.C.C.R. at 4512-13 ¶ 14. The commission found that “[d]eleting all of such language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers. In short, the vulgar language here was not gratuitous ...” *Id.*

<sup>146</sup>The commission in 2004 also rejected merit claims with respect to the use of the expletive “fuck” and the phrase “eating pussy” by artists in a hip-hop concert called “The Last Damn Show.” In re Infinity Radio License, Inc., Licensee of Station WLLD(FM), 19 F.C.C.R. 5022 (2004). Infinity argued that the concert was “a major artistic and cultural event in Tampa” and that the commission could not constitutionally draw a distinction between the concert and other cultural events it might find of greater cultural or serious merit. *Id.* at 5025 ¶ 10. Infinity claimed that the language “sought to convey the street legitimacy of the various artists.” *Id.* at 5024 ¶ 7. After distinguishing broadcasters from other First Amendment speakers, *id.* at 5025 ¶ 10, the commission concluded that even if the work had artistic or social merit, it would still be considered patently offensive because it was explicit, graphic and repeated. *Id.* at 5026 ¶ 11.

Analogously, the current status of sexual innuendo in the commission’s indecency analysis is not entirely clear. The commission has made clear since 2001 that the use of innuendo cannot save material from a finding of indecency so long as the innuendo is not ambiguous and the sexual meaning is unmistakable. See 2001 Policy Statement, 16 F.C.C.R. at 8002-04 ¶¶ 9-12. Nevertheless, numerous indecency complaints about innuendo or double entendre have been denied in practice if unaccompanied by more explicit sexual material. While one would suspect that the commission’s tightening of the rest of its indecency regime would also entail greater skepticism toward innuendo, conclusions are in fact hard to draw because few cases of simple innuendo have been brought. In rejecting several complaints by Parents Television Council about television programming involving innuendo, the commission summarily stated that the “vague references or innuendo to sexual organs or activities ... [i]n context, ... were not sufficiently graphic or explicit and were not repeated or dwelled upon.” *PTC Complaints II*, 20 F.C.C.R. at 1938 ¶ 11. See also *Fox Television Stations*, 20 F.C.C.R. 4800 (2005) (denying complaint about “Arrested Development” episode featuring references to “corn-holing” because of the ambiguity of the innuendo). These cases suggest that the commission is continuing to use its traditional innuendo analysis.

However, some recent FCC language may suggest a subtle change in the agency’s approach to sexual innuendo or double entendre. With regard to complaints about episodes of the NBC program “Coupling,” which contained dialogue including “sustained and repeated use of sexual innuendo and double entendre, with sex the constant theme of the program episodes[,]” while the commission denied the complaints, it said that “[t]he material presents a close case.” *NBC Telemundo License Co., Licensee of Station WRC-TV*, 19 F.C.C.R. 23025, 23027 (2004). The agency focused not on whether the



innuendo itself was easy to decipher — the previous standard for innuendo analysis — but on the fact that “the cumulative effect of such repeated references appear to render the material shocking, titillating, or pandering to the viewing audience.” *Id.* It is at least possible that this language uses the sexual context in the program as a factor in assessing whether the sexual meaning of the innuendo is ambiguous or evident. A focus on the rest of the program is more likely to lead to findings that the double entendre is actually decipherably about sex.

- <sup>147</sup>The commission was explicitly influenced in its indecency findings, for example, that the Opie & Anthony program often ran sexual contests for listeners. *Infinity Broadcasting Operations, Inc.*, 18 F.C.C.R. at 19962 ¶ 14. See also Bill McConnell, *Next Time, Your License*, BROADCASTING & CABLE ONLINE, Oct. 6, 2003, available at <http://www.broadcastingcable.com/article/CA327538.html>.
- <sup>148</sup>*Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2765 ¶ 10. The commission saw Janet Jackson’s “costume reveal” as simply the patently offensive culmination of a highly sexualized performance of “Rock Your Body.” Even though the choreography contained no nudity, the commission suggested that its generally risqué character presaged it. *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6658\_¶ 13.
- <sup>149</sup>As the commission explained: “The offensive segment in question did not merely show a fleeting glimpse of a woman’s breast, as CBS presents it. Rather, it showed a man tearing off a portion of a woman’s clothing to reveal her naked breast during a highly sexualized performance and while he sang ‘gonna have you naked by the end of this song.’ From the viewer’s standpoint, this nudity hardly seems ‘accidental,’ nor was it. This broadcast thus presents a much different case than would, for example, a broadcast in which a woman’s dress strap breaks, accidentally revealing her breast for a fraction of a second.” *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2767 ¶ 13.
- <sup>150</sup>The Supreme Court has pointed out that the “artistic merit of a work does not depend on the presence of a single explicit scene.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002). In the context of obscenity, the *Miller* test requires that “redeeming value be judged by considering the work as a whole” (*id.*) (citation omitted), suggesting that even if an isolated scene in a work is offensive, the whole will not necessarily be deemed obscene. *Miller v. California*, 413 U.S. 15 (1973).
- <sup>151</sup>See also *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. 2767 at ¶ 13.
- <sup>152</sup>*Golden Globes Awards*, 19 F.C.C.R. 4975, 4980 ¶ 11; *Omnibus Remand Order*, 21 F.C.C.R. at 13311-14 ¶ 31-38.
- <sup>153</sup>Thus, for example, the commission stated that the networks could have foreseen indecent activity on air in the Nicole Richie case, *Omnibus Remand Order*, 21 F.C.C.R. at 13312, and the *Super Bowl* case. *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6660-6661.
- <sup>154</sup>The commission argues, in its *Omnibus Remand Order*, that awards shows are not in fact typically aired live for parts of the country in different time zones, and that therefore the requirement of a time-delay would not in fact “place live broadcasts at risk or impose undue burdens on broadcasters.” *Omnibus Remand Order* at 13313 ¶ 36.
- For other examples of live programming that might have invited FCC indecency enforcement, see CBS Broadcasting Inc., Opposition to Notice of Apparent Liability for Forfeiture, 49-50, Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl, XXXVIII Halftime Show, File No. EB-04-IH-0011 (3d Cir. filed Nov. 5, 2004) (discussing 2004 Democratic National Convention, California gubernatorial politics, and presidential scandals).
- <sup>155</sup>In the *Super Bowl* case, for example, the agency concluded that CBS’s failure to include a delay mechanism in light of the possibility that indecency might result during the suggestive choreography of the half-time show could be weighed in a liability finding. *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2769-2770 ¶¶ 19-20 (2006) (“In sum, there was a significant and foreseeable risk in a

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halftime show seeking to push the envelope and replete with sexual content that performers might depart from script and staging, and this is particularly true of Jackson and Timberlake given the sexually-provocative nature of their performance, the fact that it was promoted as “shocking,” and the fact that it culminated with the scripted line “gonna have you naked by the end of this song.” ... [W]e conclude that CBS recognized the high risk that this broadcast raised of airing indecent material.”). And in the final 2003 Billboard Awards Order, the commission chastised Fox for using the same time-delay system that had proven inadequate to edit out Cher’s expletive in the previous year’s award ceremony. *Omnibus Remand Order*, 21 F.C.C.R. at 13312-13 ¶ 34-35.

<sup>156</sup>Botein & Adamski, *supra* note 82, at 18 (coining the phrase).

<sup>157</sup>See *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6659 ¶ 15 (“CBS acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast. CBS also is vicariously liable for the willful actions of the performers under the doctrine of respondeat superior.”); *id.* at 6663 ¶ 23 (respondeat superior theory).

<sup>158</sup>For example, in *Mile High Stations*, 28 F.C.C. 795 (1960), the commission accepted the licensee’s argument that the indecent material was broadcast by accident and the announcer responsible for the mistake had been fired and therefore declined to impose sanctions on the licensee. See also HEINS, *supra* note 10, at 92.

<sup>159</sup>By contrast, adequate supervision would not have changed the outcome in the *Super Bowl* case. CBS provided evidence that it had apprised the half-time show performers about its policies, including policies regarding indecency. On the commission’s analysis, the only viable option available to CBS was installing time-delay mechanisms.

<sup>160</sup>*Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2771 ¶ 22 (“A contrary result would permit a broadcast licensee to stage a show that ‘pushes the envelope,’ send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility — leaving no one legally responsible for the result.”). See also *Omnibus Remand Order*, 21 F.C.C.R. at 13309 ¶ 25 (“We believe that granting an automatic exemption for ‘isolated or fleeting’ expletives ... would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time.”).

<sup>161</sup>See, e.g., *Omnibus Order*, 21 F.C.C.R. at 2723 (statement of Chairman Kevin J. Martin). However, there is a question whether the appearance of an extremely enhanced number of complaints is due to two factors that might skew our assessment: 1. that the FCC has changed its way of accounting for complaints; and 2. that most of the complaints are actually generated by groups such as the Parents Television Council.

<sup>162</sup>See, e.g., Brief for Amicus Curiae Parents Television Council at 10, *Fox Television Stations Inc. v. FCC*, No. 06-1706 (2d Cir. Dec. 12, 2006) available at <http://www.parentstv.org/PTC/fcc/images/PA-38-2ndCirAmicus.Brief.pdf>. See also Alessandra Stanley, *The TV Watch: It’s a Fact of Life: Prime-Time Shows Are Getting Sexier*, N.Y. TIMES, Feb. 5, 2003, at E1 (describing increasing explicitness of television programming and study supporting that conclusion).

<sup>163</sup>Michael Powell, for example, blamed “competitive pressures for more programming that tests the limits of indecency and violence.” Michael Powell, Chairman, Federal Communications Commission, Remarks at National Association of Broadcasters Summit on Responsible Programming (March 31, 2004), available at <http://www.fcc.gov/commissioners/previous/powell/speeches.html>. See also Brian Steinberg, *Broadcasters Devise Plans to Placate FCC*, WALL ST. J., Feb. 23, 2004, at B1.

<sup>164</sup>See, e.g., *Omnibus Order*, 21 F.C.C.R. at 2724 (statement of Comm’r Michael J. Copps).

- <sup>165</sup>See, e.g., S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004). These resolutions called for stricter enforcement of indecency rules. See also Broadcast Decency Enforcement Act, Pub. L. 109-235, Sec. 2, 120 Stat. 491 (amending § 503(b) of the Communications Act to authorize significantly increased forfeiture penalties and indicating congressional concern about indecent broadcast programming).
- <sup>166</sup>As noted above, virtually all the complaints received by the commission in 2003 were generated by the Parents Television Council. Brown & Candeb, *supra* note 11, at 1464-65 & n. 8 (citing to an FCC estimate obtained by *Mediaweek* attributing 99.9 percent of indecency complaints in 2003 to the PTC). See also Calvert, *supra* note 78, at 70-88; Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effects of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 129-34 (2005).
- <sup>167</sup>See, e.g., Brown & Candeb, *supra* note 11, at 1488 (describing the FCC's flurry of indecency enforcement actions in the late 1980s as precipitated by pressure from Morality in Media and the National Federation of Decency).
- <sup>168</sup>See Alessandra Stanley, *The TV Watch: It's a Fact of Life: Prime-Time Shows Are Getting Sexier*, N.Y. TIMES, Feb. 5, 2003, at E1 (describing increasing explicitness of television programming and study supporting that conclusion).
- <sup>169</sup>See, e.g., *Golden Globes*, 19 F.C.C.R. at 4975 ¶ 3; *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2781 (statement of Chairman Kevin J. Martin).
- <sup>170</sup>See, e.g., Botein & Adamski, *supra* note 82, at 17-18; John Eggerton, *ACLU Rep Calls Smut Actions "Ridiculous,"* BROADCASTING & CABLE ONLINE, March 30, 2006, available at <http://www.broadcastingcable.com/article/CA6320491.html>; Frank Rich, *The Great Indecency Hoax*, N.Y. TIMES, Nov. 28, 2004, at 1; Staff, *PTC Drives Spike in Smut Gripes*, BROADCASTING & CABLE, Nov. 14, 2005, at 12. See also ADAM THIERER, THE PROGRESS AND FREEDOM FOUNDATION EXAMINING THE FCC'S COMPLAINT-DRIVEN BROADCAST INDECENCY ENFORCEMENT PROCESS 5-9 (November 2005) available at <http://www.pff.org>. Reply Brief of Petitioners CBS Corporation, et al. at 15 & n.6, *CBS Corporation v. FCC*, No. 06-3575 (3d Cir. Jan. 8, 2007); Brief of Amicus Curiae Center for Democracy & Technology and Adam Thierer, Senior Fellow with the Progress & Freedom Foundation ("PFF") and the Director of PFF's Center for Digital Media Freedom at 3-8, *CBS Corporation v. FCC*, No. 06-3575 (3d Cir. Jan. 8, 2007). There have also been charges that the agency has double-counted some complaints. *Id.*
- <sup>171</sup>See, e.g., Fox Broadcasting Company et al., *Opposition to Notice of Apparent Liability for Forfeiture, In re Complaints Against Various Licensees Regarding their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, File No. EB-03-IH-0162 (Dec. 3, 2004), available at <http://www.fcc.gov/eb/broadcast/Plead.html>. See also Comments of the Center for Creative Voices in Media at 33, *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005* (FCC Sept. 21, 2006), available at <http://www.fcc.gov/DA06-1739/ccvm.pdf>. Cf. *Omnibus Remand Order*, 21 F.C.C.R. at 13328-29 ¶ 75 (dismissing indecency finding against NYPD Blue because complaints not made by viewers residing in markets in which complained-of programs aired outside of safe harbor).
- <sup>172</sup>For example, Fox's "Married by America" generated fewer than 160 complaints. *Married by America*, 19 F.C.C.R. at 20191 ¶ 2.
- <sup>173</sup>For articles making similar arguments, see, e.g., note 166, *supra*.
- <sup>174</sup>This is the claim in a law review article by Reed Hundt, former Chairman of the FCC during the Clinton Administration. Reed Hundt, *Regulating Indecency: The Federal Communications Commission's Threat to the First Amendment*, 2005 DUKE L. AND TECH. REV. 13 (2005).
- <sup>175</sup>Cf. Brown & Candeb, *supra* note 11, at 1465 (noting that FCC indecency enforcement "leads to public

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choice speculation that indecency enforcement is simply a vehicle to allow politicians to further their own agendas[]”).

<sup>176</sup>Commissioner Copps, for example, has suggested that broadcasters adopt a “voluntary code of broadcaster conduct” in order to reduce what they see as ambiguities in the Commission’s indecency rules. See, e.g., John Eggerton, *Copps: FCC’s Power Broker*, BROADCASTING & CABLE ONLINE, April 16, 2007, available at <http://www.broadcastingcable.com/article/CA6433742.html>; Jacques Steinberg, *Eye on the F.C.C., TV and Radio Watch Words*, N.Y. TIMES, May 10, 2004, at A1. See also Remarks of FCC Comm’r Michael J. Copps, NAB Indecency Summit, Washington D.C., March 31, 2004, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-245610A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245610A1.pdf). In addition, the commission has focused on whether challenged programming was consistent with broadcasters’ own policies. See e.g., *Omnibus Remand Order*, 21 F.C.C.R. at 13310-11 ¶ 29, 30 (“In this case, moreover, our assessment of contemporary community standards for the broadcast medium is strongly bolstered by broadcasters’ own practices. . . . Taken as a whole, broadcasters’ practices with respect to programming aired during the safe harbor reflect their recognition that airing the ‘F-Word’ and the ‘S-Word’ on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium.”).

<sup>177</sup>A similar effect is what in other contexts (such as the Internet) has come to be called “proxy regulation” — the regulation of speech by private intermediaries. For a discussion of proxy regulation — private regulation by intermediaries — in the context of the Internet, see, for example, Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006). Private intermediaries have incentives to over-regulate, suggesting that in an environment with vague regulatory statements and high fines for violations, they are likely to avoid attempting to make the fine distinctions between patently offensive or socially valuable sexual expression. Of course, this argument is more powerful with entities, such as cable operators, that operate more classically as intermediaries than do broadcasters. Nevertheless, especially in light of the attempts, discussed below, to extend indecency regulation to cable, the structural skews are worth noting.

<sup>178</sup>See, e.g., Brian J. Rooder, *Note: Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”:* *Has the FCC Grown Too Big for Its Britches?*, 74 FORDHAM L. REV. 871, 889 (2005) (noting that Clear Channel Communications, the largest radio chain, fired Florida “shock jock” Bubba the Love Sponge and dropped the Howard Stern program from all six of its stations that carried it in 2004). If the performers are not rehired once the tumult dies down, the firings can have significant format effects. It could be the end of shock radio on the analog context, parallel to the end of topless radio in the 1970s, when the FCC decided to move against those programs for indecency. See *Sonderling*, 27 R.R. 2d 288, *aff’d sub nom*, *Illinois Citizens Comm*, 515 F.2d 397 (D.C. Cir. 1974). See also HEINS, *supra* note 10, at 89-91.

<sup>179</sup>John Eggerton, *Clear Channel Vows to Wash Out Dirty Jocks*, BROADCASTING & CABLE ONLINE, Feb. 24, 2004, available at <http://www.broadcastingcable.com/article/CA386172.html>; John Eggerton, *Clear Channel Sues Stern*, BROADCASTING & CABLE ONLINE, July 21, 2004, available at <http://www.broadcastingcable.com/article/CA386172.html>; Clear Channel Press Release, Feb. 25, 2004, available at <http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=418> (announcing termination of Howard Stern Show on Clear Channel stations). See also AMFM Radio Licensees LLC, *Licensee of Station WWDC(FM) et al.*, 19 F.C.C.R. 5005 (2004), (concurring statement of Comm’r Kevin Martin) (Clear Channel “has already taken steps to implement its ‘zero-tolerance’ policy.”).

<sup>180</sup>Eric A. Taub, *As His Sirius Show Begins, Radio Ponders the Stern Effect*, N.Y. TIMES, Jan. 9, 2006, at C3.

<sup>181</sup>See, e.g., Steve McClellan, *Bleepinator Anyone?*, BROADCASTING & CABLE ONLINE, April 26, 2004, available at <http://www.broadcastingcable.com/article/CA412624.html>; Allison Romano, *Broadcast-Decency Bill: Pro or Con?*, BROADCASTING & CABLE ONLINE, June 19, 2006, available at

- <http://www.broadcastingcable.com/article/CA6344827.html> (LIN TV equipped all stations with capacity to block out live programming).
- <sup>182</sup>There are also general statements by industry participants that reflect excessive caution regarding indecency. See, e.g., Steinberg, *supra* note 176 (quoting Chairman of Emmis Communications); Deborah Potter, *Indecent Oversight*, AM. JOURN. REV., Aug.-Sept. 2004, at 80 (quoting KTLA News Director).
- <sup>183</sup>Brief of Petitioner CBS Broadcasting Inc. at 49-50, *Fox Television Stations, Inc. v. FCC*, 06-1760-ag (2d Cir. Nov. 22, 2006).
- <sup>184</sup>See, e.g., Brian J. Rooder, Note, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown Too Big for Its Britches*, 74 *FORDHAM L. REV.* 871, 890-91 (2005). Ironically, ABC had previously aired unedited versions of the World War II movie in 2001 and 2002 without incident.
- <sup>185</sup>*Id.* at 888-89.
- <sup>186</sup>Paige Albiniak, *Soaps on the Rope, Daytime Feels FCC Hear and Cools Down Its Act*, BROADCASTING & CABLE ONLINE, April 12, 2004, available at <http://www.broadcastingcable.com/article/CA409679.html>.
- <sup>187</sup>Joel Topcik, *Flash! Victory for Decency Crusaders? Not so Fast*, BROADCASTING & CABLE ONLINE, April 3, 2006, available at <http://www.broadcastingcable.com/article/CA6321274.html>?. See also John Eggerton, *FCC's Full Frontal Assault on TV*, BROADCASTING & CABLE ONLINE, March 20, 2006, available at <http://www.broadcastingcable.com/article/CA6317038.html> ("writers and show creators say the document [FCC decision] has already begun to chill their appetite for edgier fare. ... Reality producer Mark Burnett ... has decided not to try to push the envelope. ... 'This all began with Janet Jackson ... and I've been cutting with that in mind.'").
- <sup>188</sup>Jim Benson, *Bochco Blasts Indecency Rulings*, BROADCASTING & CABLE ONLINE, March 20, 2006, available at <http://www.broadcastingcable.com/article/CA6317022.html> (quoting Steven Bochco, producer of programs such as "NYPD Blue," "L.A. Law" and "Hill St. Blues").
- <sup>189</sup>See, e.g., Steinberg, *supra* note 176. PBS station WGBH edited cleavage out of its documentary on Emma Goldman. Lisa de Moraes, *Even Buttoned-Down PBS Gets Caught in the Wringer*, WASH. POST, March 11, 2004 at C7. Expletives were edited out of a documentary on the work of the poet Piri Thomas even though they appeared in the poetry. See Petition for Reconsideration on behalf of ACLU et al. at 20, In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, File No. EB-03-1H-0110 (filed April 19, 2004), available at <http://www.aclu.org/FilesPDFs/reconsideration.pdf>.
- <sup>190</sup>Steinberg, *supra* note 176.
- <sup>191</sup>John Eggerton, *Regulatory Rush Hour*, BROADCASTING & CABLE ONLINE, June 19, 2006, available at <http://www.broadcastingcable.com/article/CA6344828.html>.
- <sup>192</sup>Comments of Public Broadcasters on Petitions for Reconsideration, 4-5, In re Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globes Awards" Program, File No. ED-03-1H-0110 (May 4, 2004). Each public television station was given the option of airing an edited or unedited version of A Company of Soldiers, a Frontline film on soldiers serving in Iraq. Louis Wiley, *Why 'Frontline' Used Bad Language*, BROADCASTING & CABLE ONLINE, Feb. 28, 2005, available at <http://www.broadcastingcable.com/article/CA506958.html>.
- <sup>193</sup>Petition for Reconsideration on behalf of ACLU et al. at 19, In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, File No. EB-03-1H-0110 (filed April 19, 2004), available at <http://www.aclu.org/FilesPDFs/reconsideration.pdf>. See also Mark Brown, *No Evil: Broadcast Words, Actions Stir Efforts to Clean Up 'Dirty' Airwaves*, ROCKY MOUNTAIN NEWS, March 27, 2004, at 1D; Jacques Steinberg, *supra* note 176 (describing the elimination from radio station playlists of classic rock songs such as Elton John's "The Bitch is Back" and "Bitch" by the Rolling Stones).

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<sup>194</sup>Steinberg, *supra* note 176.

<sup>195</sup>Fox Entertainment Group, NBC Universal Inc., Viacom Inc., Joint Petition for a Stay at 14, In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program, File No. EB-03-IH-0110 (June 18, 2004) [hereinafter *Joint Petition*] See also Allison Romano, *Reporting Live. Very Carefully.*, BROADCASTING & CABLE ONLINE, July 4, 2005, available at <http://www.broadcastingcable.com/article/CA623019.html> (describing, *inter alia*, effect of indecency rulings on live local news coverage).

<sup>196</sup>Deborah Potter, *Indecent Oversight*, AM. JOURN. REV., Aug.-Sept. 2004, at 80.

<sup>197</sup>Brief of Former FCC Officials as Amici Curiae in Support of Petitioners and In Support of a Declaration that Indecency Enforcement Violates the First Amendment at 16, Fox Television Stations Inc. v. FCC, No. 06-1760-ag (2d Cir. Nov. 29, 2006).

<sup>198</sup>Shelly Branch and Joe Flint, *Limited Brands Decides to Cancel Lingerie TV Show*, WALL. ST. J., April 12, 2004, at B2. This was apparently unprecedented for the Oscars show. Katherine A. Fallow, *The Big Chill! Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW. 1 (2004). See also Steve McClellan, *Bleepinator Anyone?*, BROADCASTING & CABLE ONLINE, April 26, 2004, available at <http://www.broadcastingcable.com/article/CA412624.html>; Allison Romano, *Broadcast-Decency Bill: Pro or Con?*, BROADCASTING & CABLE ONLINE, June 19, 2006, available at <http://www.broadcastingcable.com/article/CA6344827.html> (LIN TV equipped all stations with capacity to block out live programming.).

<sup>199</sup>Branch & Flint, *supra* note 198; Staff, Editorial, *Pay for Play*, BROADCASTING & CABLE ONLINE, Nov. 29, 2004, available at <http://www.broadcastingcable.com/article/CA483385.html>.

<sup>200</sup>See Steinberg, *supra* note 176 (describing the “dump” button and a program director’s instructions to technicians not to resist the urge to use it: “You will never be criticized for dumping something that may not have needed to be dumped. But God forbid we miss one and let it slip up.”)

The commission recognizes but rejects this argument. In its *Omnibus Remand Order*, for example, the agency argues that some degree of self-censorship is “inevitable and not necessarily undesirable, so long as proper standards are available.” *Omnibus Remand Order* at 13314 ¶ 38 (citations omitted). It concludes that “[t]he possibility that an over-zealous broadcast standards employee may “dump” material that is not actionably indecent during the live presentation of an awards show does not outweigh the compelling interest in preventing patently offensive broadcasts ...” *Id.*

<sup>201</sup>It should also be noted that signal delay devices are expensive (see Potter, *supra* note 182) and can require additional monitoring personnel. This can constitute a significant expenditure, particularly for smaller broadcasters (especially radio stations). These expenses can be avoided if the station simply steers very clear of the forbidden zone — avoiding live programming and less-conservative fare.

<sup>202</sup>There are news reports of program producers complaining of pressure from standards and practices departments. See, e.g., Benson, *supra* note 188; John Eggerton, *FCC Mulls Next Move on Indecency*, June 11, 2007, BROADCASTING & CABLE ONLINE, available at <http://www.broadcastingcable.com/article/CA6450561.html>. In addition, the recent indecency settlements with major broadcasters require compliance training. See John Eggerton, *FCC to CBS: Why Doesn't Trace Airing Violate Consent Decree?*, BROADCASTING & CABLE ONLINE, June 27, 2007, available at <http://www.broadcastingcable.com/article/CA6456057.html>. See generally Jonathan Rintels, *Big Chill: How the FCC's Indecency Decisions Stifle Free Expression, Threaten Quality Television and Harm America's Children*, Appendix to Brief for Intervenor Center for Creative Voices in Media at A-345, Fox Television Stations, Inc. v. FCC, No. 06-1760AG (2d Cir. Nov. 22, 2006) (describing chilling effect experienced by specific members of the organization).

<sup>203</sup>Reed Hundt, *Regulating Indecency: The Federal Communications Commission's Threat to the First*

- Amendment*, 2005 DUKE L. AND TECH. REV. 13 (2005) (“[t]he federal government has, wittingly or not, obtained and exercised sanctions that can be used to encourage cooperation between private means of publishing information and the political purposes of government.”).
- <sup>204</sup>Decency in Broadcasting, Cable, and Other Media: Hearing Before the Comm. on Commerce, Science and Transportation, 109th Cong. 531 (2006). See also John M. Higgins, *The Economics of Indecency*, BROADCASTING & CABLE ONLINE, Dec. 12, 2005, available at <http://www.broadcastingcable.com/article/CA6290435.html>; Amy Schatz & Joe Flint, *Under Pressure, Cable Offers Family Packages*, WALL ST. J., Dec. 13, 2005, at B1.
- <sup>205</sup>In addition to anti-indecency groups, FCC Chairman Kevin Martin has argued that consumers should not have to purchase their cable programming in a bundled fashion, and should be able to choose — “a la carte” — the channels to which they wish to subscribe. See, e.g., Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV, May 7, 2007 (as prepared for delivery), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-272897A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf). In his testimony before Congress in 2005, Commissioner Martin stated that he believed that a-la-carte pricing was economically feasible for cable companies, and that an FCC Report arguing otherwise that had been produced under the Powell administration was flawed in its conclusions. John M. Higgins & P.J. Bednarski, *Congress and the FCC Turn Up the Heat*, BROADCASTING & CABLE ONLINE, Dec. 5, 2005, available at <http://www.broadcastingcable.com/article/CA6288804.html>. The FCC issued a 2006 report supporting the viability of a-la-carte pricing and detailing the flaws in the previous report. Further Report on the Packaging and Sale of Video Programming Servs. to the Public, No. 04-207, 2006 WL 305873 (Feb. 9, 2006) [hereinafter 2006 FCC A-la-carte Report]
- <sup>206</sup>See, e.g., Various Complaints Regarding CNN’s Airing of the 2004 Democratic National Convention, 20 F.C.C.R. 6070 (2005) (“the Commission has indicated that it does not regulate indecency and profanity on cable and satellite subscription services”); Various Complaints Against the Cable/Satellite Television Program “Nip/Tuck,” 20 F.C.C.R. 4255, 4255 (2005) (“the Commission has indicated that it does not regulate cable indecency or indecency on satellite subscription services ...”); Violent Television Programming and Its Impact on Children, Notice of Inquiry, 19 F.C.C.R. 14394, 14403 ¶ 21 (2004); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, 17 F.C.C.R. 23246, 23328, (2002) (subsequent history omitted).
- <sup>207</sup>*Writers Guild of America, West Inc. v. Amer. Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979).
- <sup>208</sup>Naturally, we cannot predict precisely how this will cut. Will the non-family-viewing tiers be freed to provide even more racy programming because the existence of the safe zone will defang critics? Will that put even more pressure on the rationale for regulating broadcast indecency? Or will the private parties effect the Commission’s underlying policy on their own by creating a programming red light district?
- <sup>209</sup>See, e.g., Jeff Leeds, *Scrambling to Fill A Vacancy After Stern*, N.Y. TIMES, Oct. 6, 2005, at E6.
- <sup>210</sup>See § VL.B. *infra*.
- <sup>211</sup>See Stuart Minor Benjamin, *Evaluating the Federal Communications Commission’s National Television Ownership Cap: What’s Bad for Broadcasting is Good for the Country*, 46 WM. & MARY L. REV. 439 (2004).
- <sup>212</sup>*FCC v. Pacifica*, 438 U.S. at 775 (Brennan, J. dissenting).
- <sup>213</sup>In the 1960s, for example, Pacifica Foundation stations were targeted by some FCC commissioners because of their liberal views. See, e.g., *Pacifica Found.*, 36 F.C.C. 147 (1964) (granting renewal after inquiring into possible Communist affiliations). Outside the specific indecency context, the Nixon Administration’s attempt to use its broadcast licenses against *The Washington Post* has been well documented. See, e.g., FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING* (1976); POWE, *supra* note 10, at 121-141.

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- <sup>214</sup>Cf. Fairman, *supra* note 33, at 1744 (“[w]ord taboo drives the FCC’s final conclusion that Bono’s single use of the phrase “really fucking brilliant” is indecent.”)
- <sup>215</sup>Brown & Candeub, *supra* note 11, at 1464. See also Candeub, *supra* note 15, at 921 (2005).
- <sup>216</sup>*Omnibus Order*, 21 F.C.C.R. 2664 (2006).
- <sup>217</sup>*Fox Television Stations, Inc. et al. v. FCC*, No. 06-1760-AG (2d Cir. filed April 13, 2006), *remanded and partially stayed*, Sept. 7, 2006. Similarly, ABC Television Network and Hearst-Argyle Television, Inc. filed a petition for review with the United States Court of Appeals for the D.C. Circuit, and that petition was subsequently transferred to the Second Circuit and consolidated with the Fox and CBS petition. The ABC Television Affiliates Association was permitted to intervene in the case as well. See *Omnibus Remand Order*, 21 F.C.C.R. at 13301 ¶ 8. In addition, NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates Association, and the Center for Creative Community, Inc. were also permitted to intervene in the case by the Second Circuit. *Id.* at 13301 note 19.
- On July 5, 2006, the FCC asked the Second Circuit to remand the case for 60 days in order to allow for further briefing to and consideration by the Commission of part of the *Omnibus Order*. The Second Circuit granted the Commission’s motion and stayed the case on September 7, 2006 “for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances.” See *Omnibus Remand Order*, at 13301-02 ¶¶ 9-10 and n. 22. On November 6, 2006, the Commission released the *Omnibus Remand Order*, in which it replaced III.B of the *Omnibus Order* in its entirety. *Omnibus Remand Order*, 21 F.C.C.R. at 13300. However, although the Commission vacated Section III.B of the *Omnibus Order* and reversed its findings of indecency regarding *The Early Show* and *NYPD Blue*, it did not modify its new indecency regime, *inter alia*, with respect to the fleeting expletives found indecent in the *Golden Globes* decision.
- <sup>218</sup>*CBS Corporation et al. v. FCC*, No. 06-3575 (3d Cir. filed Dec. 22, 2006). A recent news report suggests that a decision in the Super Bowl case should not be expected before the end of 2007, at the earliest. John Eggerton, *Janet Jackson Decision Won’t Come Before Late 2007*, BROADCASTING & CABLE ONLINE, May 21, 2007, available at <http://www.broadcastingcable.com/article/CA6445148.html>. Oral argument was heard in the Fox challenge in December 2006, but the 2d Circuit’s decision is still pending. *Id.*
- <sup>219</sup>*Fox v. FCC*, 2007 U.S.App. LEXIS 12868 (2d Cir.) (June 4, 2007)
- <sup>220</sup>*Id.*
- <sup>221</sup>5 U.S.C. § 706(2)(A).
- <sup>222</sup>*Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*36 (2d Cir. June 4, 2006). 2d Circuit precedent established that “the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive” and why “the new rule effectuates the statute as well as or better than the old rule.” *Id.* at \*36-37 (citation omitted).
- <sup>223</sup>Rejecting the proposition that it could only address the narrow question on appeal of whether the Fox broadcasts of the Billboard Music Awards shows were indecent and/or profane, the court first expressed its intention to analyze the change in the fleeting-expletives policy as a whole because adjudication could not properly be used to insulate a generic standard from judicial review. *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*29-30.
- <sup>224</sup>“Thus, the record simply does not support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to this language on the airwaves. The ‘first blow’ theory, therefore, fails to provide the reasoned explanation necessary to justify the FCC’s departure from established precedent.” *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*43 (footnote omitted).
- <sup>225</sup>*Id.* at \*45.
- <sup>226</sup>*Id.* at \*47.



<sup>227</sup>*Id.* at \*47-8.

<sup>228</sup>*Id.* at \*46.

<sup>229</sup>*Id.* at \*51.

<sup>230</sup>*Id.* at \*52.

<sup>231</sup>*Id.* at \*69.

<sup>232</sup>*Id.* at \*28-9.

<sup>233</sup>It issued the dicta because dicta “can help clarify a complicated subject ... assist future courts to reach sensible, well-reasoned results ... help lawyers and society to predict the future course of the court’s rulings.” *Id.* at \*53 n. 12, quoting Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1253 (2006). This citation is particularly ironic, as Judge Leval, the author of the quoted article, was the dissenting judge in the *Fox v. FCC* case itself.

<sup>234</sup>*Id.* at \*54.

<sup>235</sup>*Id.* at \*55.

<sup>236</sup>*Id.* at \*57 (citation omitted).

<sup>237</sup>*Id.* at \*90 n. 19 (Leval, J. dissenting).

<sup>238</sup>*Id.* at \*79-80 (Leval, J. dissenting).

<sup>239</sup>*Id.* at \*82-83.

<sup>240</sup>*Id.* at \*83.

<sup>241</sup>*Id.* at \*84-85.

<sup>242</sup>*Id.* at \*87.

<sup>243</sup>*Id.* at \*89.

<sup>244</sup>*Id.* The dissent explicitly refused to consider the standard under which use of the word “shit” would be an indecency violation, opining, however, that the justification for such a finding must be based not on harm to children, but on “concern for good manners.” *Id.* at \*89 n. 18. “When the censorship is exercised only to protect polite manners and not by reason of risk of harm, I question whether it can survive scrutiny.” *Id.* at \*89.

<sup>245</sup>*Id.* at \*29.

<sup>246</sup>*Id.* at \*30.

<sup>247</sup>*Id.* at \*69-70.

<sup>248</sup>*Id.* at \*55, \*57.

<sup>249</sup>*Id.* at \*62.

<sup>250</sup>*Id.*

<sup>251</sup>FCC News Release, *Statement of FCC Chairman Kevin Martin on 2nd Circuit Court of Appeals Indecency Decision*, June 4, 2007, pg. 1, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-273602A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf).

<sup>252</sup>*Id.*

<sup>253</sup>FCC News Release, *Commissioner Copps Disappointed in Court Decision on Indecency Complaints*, June 4, 2007, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-273599A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273599A1.pdf).

<sup>254</sup>See *FCC v Fox Television Stations (07-582)* at <http://www.supremecourtus.gov/docket/07-582.htm>.

<sup>255</sup>See Remarks by FCC Chairman Kevin J. Martin, *Providing More Tools for Parents*, U.S. Capitol, June 14, 2007, pg. 1, available at [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2007/db0614/DOC-274169A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2007/db0614/DOC-274169A1.pdf). See also *Protecting Children From Indecent Programming Act*, S. 1780, 110th Cong. (2007), available at <http://www.thomas.gov/cgi-bin/bdquery/D?d110:27:./temp/~bdIPiS:@@L&summ2=m&l/bss/d110query.html>; John Eggerton, *Violence Bill Still on Drawing Board*, BROADCASTING & CABLE ONLINE, Aug. 3, 2007, available at <http://www.broadcastingcable.com/article/CA6465483.html>; FCC News Release, *Press Statement by FCC*

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- Chairman Kevin J. Martin on Passage of 'Protecting Children from Indecent Programming Act' in Senate Committee, July 19, 2007, available at <http://www.fcc.gov/commissioners/martin/statements2007.html>.
- <sup>256</sup>Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1003 (1993). See also *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (noting that some of the Court's cases have "recognized special justifications for regulation of broadcast media that are not applicable to other speakers"). Some First Amendment theorists, however, have questioned whether even the print paradigm is as hostile to speech-expansive governmental regulation as was previously thought. See, e.g., C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733 (2005); C. Edwin Baker, *Media Concentration: Giving Up On Democracy?*, 54 FLA. L. REV. 839 (2002).
- <sup>257</sup>See, e.g., Christopher Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).
- <sup>258</sup>See, e.g., *Without a Trace*, 21 F.C.C.R. at 2733 ¶ 3 ("Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission's overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights. As such, in making indecency determinations, the Commission proceeds cautiously and with appropriate restraint.").
- <sup>259</sup>2001 Policy Statement, 16 F.C.C.R. at 8000 ¶ 4 (citing to 438 U.S. at 732). See also Brief of Federal Communications Commission, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-ag (2d Cir. Dec. 6, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268846A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268846A1.pdf).
- <sup>260</sup>*Action for Children's Television v. FCC (ACT I)*, 852 F.2d at 1338-39; *Action for Children's Television v. FCC (ACT II)*, 932 F.2d at 1508; *Action for Children's Television v. FCC (ACT III)*, 58 F.3d at 659.. See also *Super Bowl XXXVIII Half Time Show*, 21 F.C.C.R. at 2776 ¶ 31; *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6666 ¶ 34 (citing to ACT cases). As will be discussed below, however, this was grounded at least in part on the D.C. Circuit's view that the issue had been decided by the Supreme Court in *Pacifica*.
- <sup>261</sup>For example, the commission relies on the fact that although the Supreme Court struck down an indecency standard for the Internet in *Reno v. ACLU*, 521 U.S. 844 (1997), it nevertheless "did not question the constitutionality of our broadcast indecency standard." 2001 Policy Statement, 16 F.C.C.R. at 8000 ¶ 4. See also *Super Bowl XXXVIII Half Time Show on Reconsideration*, 21 F.C.C.R. at 6666 ¶ 33.
- <sup>262</sup>Brief of Federal Communications Commission at 58-61, *Fox Television Stations Inc. v. FCC* 06-1760-ag (2d Cir. Dec. 6, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268846A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268846A1.pdf).
- <sup>263</sup>ACT I, 852 F. 2d at 1338 ("[s]hort of the thesis that only the seven dirty words are properly designated indecent ... some more expansive definition must be attempted. The FCC rationally determined that its former policy could yield anomalous, even arbitrary, results. ... The difficulty, or 'abiding discomfort,' we conclude, is not the absence of 'reasoned analysis' on the Commission's part, but the '[v]agueness ... inherent in the subject matter.'" (citation omitted).
- <sup>264</sup>That is at least implicit in the majority's positions in the ACT cases. The 2nd Circuit's dictum in *Fox v. FCC*, however, takes the contrary view. *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*57-8.
- <sup>265</sup>See, e.g., *Sable. v. FCC*, 492 U.S. at 130-131.
- <sup>266</sup>The Court in *Reno* distinguished the regulation of the Internet at issue there from *Pacifica*, which involved an agency that had long regulated radio stations. *Reno v. ACLU*, 521 U.S. at 866-877. In *Denver Area* as well, Justice Breyer focused on the fact that broadcasting had been subjected to a lengthy regime of regulation historically. *Denver Area Educational Telecommunications Consortium v. FCC*, 518

- U.S. 727 (1996) [hereinafter *Denver Area v. FCC*].
- <sup>267</sup>See, e.g., *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 675 (2002) and cases cited therein [hereinafter *Ashcroft v. ACLU*].
- <sup>268</sup>*Pacifica Found. v. FCC*, 556 F.2d 9, 34 (D.C. Cir. 1977) (Leventhal, J. dissenting), *rev'd*, 438 U.S. 726 (1978).
- <sup>269</sup>In fact, the D.C. Circuit stated its view that it was not free to opine on the definition of indecency, because the Supreme Court had previously accepted that definition in the *Pacifica* case. *Action for Children's Television v. FCC (ACT I)*, 852 F.2d at 1339.
- <sup>270</sup>The Court in *Reno*, for example, found distinguishing the fact that the *Pacifica* order targeted a specific broadcast and involved an agency that had long regulated radio stations. *Reno v. ACLU*, 521 U.S. at 867.
- <sup>271</sup>*FCC v. Pacifica*, 438 U.S. at 742-43.
- <sup>272</sup>*Sable v. FCC*, 492 U.S. at 127 (characterizing *Pacifica* holding); *FCC v. Pacifica*, 438 U.S. at 750 (“It is appropriate ... to emphasize the narrowness of our holding.”).
- <sup>273</sup>*FCC v. Pacifica*, 438 U.S. at 756 (Powell, J. concurring).
- <sup>274</sup> “[T]he Commission may be expected to proceed cautiously, as it has in the past.” *Id.* at 761 n.4 (Powell, J. concurring). See also *ACT I*, 852 F.2d 1332, at 1340 n. 14.
- <sup>275</sup>*Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*55.
- <sup>276</sup>In 1976, the FCC itself recommended to Congress that it eliminate the term “profane” from § 1464. 122 Cong. Rec. 33359, 33364-65.
- <sup>277</sup>*Golden Globe Awards*, 19 F.C.C.R. at 4981. See also *Omnibus Remand Order*, 21 F.C.C.R. at 13314-15, 13325-26 ¶ 40, 65.
- <sup>278</sup>The majority makes this point in *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*69.
- <sup>279</sup>Vague restrictions on expression are constitutionally suspect because they do not give adequate guidance to those who are subject to restriction and can therefore lead to an impermissibly chilling effect on speech because uncertain speakers will “steer far wider of the unlawful zone” (*Speiser v. Randall*, 357 U.S. 513, 526 (1958)) and restrict their expression to the “unquestionably safe.” (*Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)). In addition, vague standards give too much discretion to government officials to censor speech they find uncongenial. Similarly, the First Amendment overbreadth doctrine will apply to prohibit regulations that capture more than regulable expression in their net. The government cannot ban even unprotected speech if a substantial amount of protected speech will be “prohibited or chilled in the process.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).
- <sup>280</sup>As the majority pointed out in dictum in *Fox v. FCC*, “the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.” *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*55. In support of this view, the majority relied on the fact that despite its declaration “that all variants of ‘fuck’ and ‘shit’ are presumptively indecent and profane, repeated use of those words in ‘Saving Private Ryan,’ for example, was neither indecent nor profane. And while multiple occurrences of expletives in ‘Saving Private Ryan’ was [sic] not gratuitous, ... a single occurrence of ‘fucking’ in the Golden Globe Awards was ‘shocking and gratuitous’ ...” *Id.* at 32.
- <sup>281</sup>See, e.g., Fairman, *supra* note 33. In addition to the apparent inconsistency of making exceptions to the uses of terms such as “fuck” and “shit” in meritorious programming such as “Saving Private Ryan,” the majority in *Fox v. FCC* pointed to other examples of apparent FCC inconsistency in application of its indecency rules:  
 “Although the Commission has declared Parental ratings and advisories were important in finding ‘Saving Private Ryan’ not patently offensive under contemporary community standards, ... but irrelevant in evaluating a rape scene in another fictional movie, ... The use of numerous expletives as “integral”

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to a fictional movie about war, ... but occasional expletives spoken by real musicians were indecent and profane because the educational purpose of the documentary “could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives. ... The ‘S-word’ on The Early Show was not indecent because it was in the context of a ‘bona fide news interview,’ but ‘there is no outright news exemption from our indecency rules ...’.”

*Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*55-56 (citations omitted). The *Fox* majority made these observations in support of its dictum that the FCC’s indecency test is inconsistent and unconstitutionally vague. *Id.* at \*55.

<sup>282</sup>Justice Brennan’s dissent in *Pacifica* was grounded on the concern that in attempting to apply the standpoint of the average broadcast viewer or listener, the commission would be engaging in regulation that privileges certain kinds of mainstream cultural norms without even considering the existence of alternative expressive communities. *FCC v. Pacifica*, 438 U.S. at 766-767. While the commission’s recent decisions, overall, do not appear to target non-mainstream speech, they can be characterized as turning regulatory efforts toward halting the mainstreaming of expression previously unacceptable in mainstream public discourse.

<sup>283</sup>*Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*58.

<sup>284</sup>See Botein & Adamski, *supra* note 82, at 24-30.

<sup>285</sup>For example, in finding indecency in a CBS “Without a Trace” episode depicting a teenage orgy, the commission explained its reasoning as follows: “As for the third factor, we find that the complained-of material is pandering, titillating, and shocking to the audience. The explicit and lengthy nature of the depictions of sexual activity, including apparent intercourse, goes well beyond what the story line could reasonably be said to require. *Without a Trace*, 21 F.C.C.R. at 2737 ¶ 15.

<sup>286</sup>*Action for Children’s Television v. FCC (ACT III)*, 58 F.3d at 685-686 (1995) (Wald, J. dissenting).

<sup>287</sup>In the copyright context, it was made clear and in opinion by Oliver Wendell Holmes in the late 19th century that the government should not be placed in the position of distinguishing between different types of speech as to the level of their artistic character. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). This has come to be known as the fundamental nondiscrimination principle in the assessment of copyright originality.

<sup>288</sup>See, e.g., *Omnibus Remand Order* 21 F.C.C.R. 13329 ¶ 76 (characterizing its approach as “demonstrating appropriate restraint in light of First Amendment values”) Arguably, the fact that the FCC ultimately decides whether broadcasters have provided federal political candidates “reasonable access” under §312(a)(7) suggests some limits to broadcasters’ programming freedom, at least in connection with political advertising. 47 U.S.C. § 312(a)(7). See also *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 396 (1981)(upholding reasonable access requirement of § 312(a)(7)) [hereinafter *CBS v. FCC*]. See also 47 U.S.C. § 315 (describing categories of programming exempt from “equal opportunities obligations regarding political advertising and thereby indirectly influencing broadcaster political programming). Nevertheless, neither of the statutory provisions affecting political advertising requires FCC review of the necessity of a particular expression or image to the story of a particular program.

<sup>289</sup>See John Eggerton, *FCC ‘Whitewashing’ Blues, Says Scorsese*, BROADCASTING & CABLE ONLINE, May 8, 2006, available at <http://www.broadcastingcable.com/article/CA6332444.html> (reporting director Martin Scorsese’s explanation of why expletives in blues documentary were not gratuitous). According to a study by TV Watch, a network-funded group, two thirds of respondents said that the commission “should not decide what kind of language is necessary in an artistic or educational work.” John Eggerton, *Survey Says: Don’t Crack Down on Content*, BROADCASTING & CABLE ONLINE, March 31, 2006, available at <http://www.broadcastingcable.com/article/CA6320995.html>.

<sup>290</sup>The majority in *Fox v. FCC* also observed that “the FCC’s indecency test raises the separate

constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech. It appears that under the FCC's current indecency regime, any and all uses of an expletive is [sic] presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were 'integral' to the work. In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials." *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*59 (citations omitted).

- <sup>291</sup>See, e.g., *Entercom Sacramento*, 19 F.C.C.R. at 20135 (community standards not to be measured by ratings). For a criticism of the FCC's refusal to rely on studies suggesting that most are not offended by expletives, see Fairman, *supra* note 33.
- <sup>292</sup>*Hamling v. U.S.*, 418 U.S. 87, 107 (1974).
- <sup>293</sup>*Reno v. ACLU*, 521 U.S. at 877-78. See also *Ashcroft v. ACLU*, 535 U.S. at 590 (Breyer, J. concurring in part and concurring in the judgment) (on providing "the most puritan of communities with a heckler's ... veto affecting the rest of the Nation").
- <sup>294</sup>See, e.g., Brief of Petitioners CBS Corp. et al. at 28-30, *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Nov. 20, 2006). Because "the First Amendment requires that statutory provisions imposing penalties on speech must include a scienter requirement[,]” and because the scienter requirement should not be read as applicable only to criminal statutes, broadcasters argue that the commission's theories for indecency liability based on agency principles contravene the First Amendment. *Id.* at 29. The networks are joined in this argument by former FCC officials Henry Geller (former FCC general counsel) and Glen Robinson (former commissioner), writing as amici in the pending cases. See, e.g., Brief of Former FCC Officials as Amici Curiae in Support of Petitioners and In Support of a Declaration that Indecency Enforcement Violates the First Amendment at 12, *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Nov. 29, 2006). Geller and Robinson argue that the imposition of liability on CBS for the Super Bowl episode, for example, is an instance of vicarious liability without fault, contrary to the First Amendment requirements established under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). For the commission's argument in response, see *Super Bowl XXXVIII Half Time Show on Reconsideration* at 6662 ¶ 23 et seq.
- <sup>295</sup>*Sable v. FCC*, 492 U.S. 115 (1989). See also *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*57-66 (suggesting that strict scrutiny and non-broadcast case law might apply given the decreasing uniqueness of broadcasting).
- <sup>296</sup>*U.S. v. Playboy*, 529 U.S. 803 (2000). For a discussion of *Denver Area v. FCC*, 518 U.S. 727 (1996), the one pre-*Playboy* case that could be read to support application of *Pacifica* to cable, see *infra* note 324.
- <sup>297</sup>*Reno v. ACLU*, 521 U.S. 884 (1997).
- <sup>298</sup>*Reno v. ACLU*, 521 U.S. at 870-71 (“[r]egardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. ... Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.”). Admittedly, the *Reno* case concerned an attempt to regulate indecency on the Internet. Nevertheless, the indecency definition in the CDA was extremely similar to that originally provided in *Pacifica*. The majority in *Fox v. FCC* opined in dictum that because *Reno* found the CDA definition of indecency to be unconstitutionally vague, “we are skeptical that the FCC's identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny.” *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*58.

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<sup>299</sup>See, e.g., Yoo, *supra* note 257, at 298. See also *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*62 (noting that while arguments against broadcast uniqueness “cannot sway us in light of Supreme Court precedent[,] . . . we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”).

One of the arguments that could be made against the regulation of indecency on broadcast stations is that such regulation is nothing more than a finger in the dike: If cable and satellite provide all the indecency children wish to find, and if most people now get their broadcast television channels through cable, then attempting to regulate broadcasters is destined to be costly and ineffective. As HBO has demonstrated, cable can provide an end-run around the various content limitations of advertiser-supported broadcast television. This argument, however, rests on the assumption that the FCC could not properly regulate indecency in the non-broadcast contexts. Good arguments can be made that regulating indecency on cable would be constitutionally problematic. However, there have been a number of legislative discussions about empowering the commission to do exactly that. See discussion at Section VI.A. *infra*. Given that indirect regulation — regulation of structure or incentive-based regulation — pass First Amendment muster more easily under current Supreme Court precedent, the viability of cable indecency regulation will likely depend on the particular nature of the legislation. Ellen Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2004).

<sup>300</sup>*Denver Area v. FCC*, 518 U.S. at 744.

<sup>301</sup>See, e.g., Yoo, *supra* note 257. The rhetoric of the *Reno* Court also minimized the significance of *Pacifica*, referring to it merely as a plurality opinion. Interestingly, Justice Stevens was the author of both the *Pacifica* plurality opinion and the majority opinion in *Reno*. The fact that Justice Stevens in *Reno* criticized the indecency legislation at issue there because it “omits any requirement that the ‘patently offensive’ material covered by § 223(d) lack serious literary, artistic, political, or scientific value” when the same could be said of the FCC’s indecency definition at issue in *Pacifica* suggests either that Justice Stevens has moved away from his *Pacifica* reasoning, or that we might read the *Pacifica* case as resting importantly on the plurality’s faith in the restrained application of the Commission’s indecency definition.

<sup>302</sup>For an argument against the application of mechanical scrutiny analysis in the broadcast regulation context, and particularly in connection with structural regulation, See C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 148-160 (2007) (claiming that mechanical application of such strict scrutiny will often lead to striking down otherwise beneficial structural rules affecting broadcast speech).

<sup>303</sup>See, e.g., *Sable v. FCC*, 492 U.S. at 126. See also *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*60. The majority’s constitutional dictum in *Fox v. FCC* characterizes the applicable level of First Amendment scrutiny in broadcast cases as something less than strict scrutiny — indeed, as intermediate scrutiny under which speech restrictions will be upheld if they are narrowly tailored to further substantial government interests. *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*60-61. This point is arguable. While the Supreme Court has treated broadcast media differently in the First Amendment context, it has not held that strict scrutiny — of some kind — would not apply to direct content regulation of broadcast speech. In many of the broadcast First Amendment cases, the Court has not attempted to characterize the degree of its scrutiny mechanically. Instead, it has claimed to be applying the First Amendment to the broadcast media in a fashion appropriate to the specific characteristics of the medium. It is unlikely, therefore, that the Court would explicitly apply intermediate scrutiny — that scrutiny reserved for incidental restrictions on speech — to FCC attempts to regulate speech as content-

intensively as in the indecency area.

<sup>304</sup>See, e.g., *United States v. Am. Library Ass'n, Inc.* 539 U.S. 194, 215 (Kennedy, J., concurring in the judgment) (stating that “[t]he interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree.”); *Sable v. FCC*, 492 U.S. at 126 (“[w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”); *Ginsberg v. New York*, 390 U.S. 629, 637-40 (1968); *Action for Children’s Television v. FCC (ACT III)*, 58 F.3d at 661 (“[i]t is evident beyond the need for elaboration that a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.”).

<sup>305</sup>In *Playboy*, for example, Justice Kennedy states that: “Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech.” *U.S. v. Playboy*, 529 U.S. at 825. See also *Ashcroft v. ACLU*, 542 U.S. at 666-67 (finding that use of filtering software by parents was a less restrictive alternative than Child Online Protection Act’s regulatory approach). Cf. *Reno v. ACLU*, 521 U.S. at 855 (observing that reasonably effective technological methods “by which parents can prevent their children from accessing sexually explicit and other material . . . will soon be widely available”). See also Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565 (2005) (describing the tension in First Amendment jurisprudence between protection of children and adult access to speech).

<sup>306</sup>*Action for Children’s Television v. FCC (ACT III)*, 58 F.3d at 671 (Edwards, J. dissenting). The majority in *Fox v. FCC* as well implicitly required a showing of harm from fleeting expletives by its focus on the fact that the FCC record “is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.” *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*49. Admittedly, the discussion of harm was part of the *Fox* court’s statutory analysis, in which it used the lack of evidence of harm as an indication that the Commission’s shift in policy was insufficiently reasoned. Nevertheless, the majority cited First Amendment cases in its harm discussion.

<sup>307</sup>*U.S. v. Playboy*, 529 U.S. at 816-17. Justice Kennedy says in Part III of the *Playboy* opinion that “[t]here is little hard evidence of how widespread or how serious the problem of signal bleed is.” *Id.* at 819. He refers to the absence of field surveys or tests, *id.* at 821, and concludes that “the government must present more than anecdote and supposition.” *Id.* at 822.

<sup>308</sup>Candeub, *supra* note 15, at 920 (criticizing the indecency standard as an “unstable and highly politicized standard,” which has “proven a highly awkward, ineffective, and often destructive tool in protecting children”).

<sup>309</sup>The FCC has made clear that the patent offensiveness standard will not be assessed from the point of view of the most sensitive among us, but rather from the vantage point of the average adult broadcast media consumer.

<sup>310</sup>See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *U.S. v. Playboy*, 529 U.S. 803 (2000); *Fox v. FCC*, 2007 U.S. App. LEXIS 12868 at \*66 (“If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC’s robust oversight.”). See also Yoo, *supra* note 257, at 305 (“widescale deployment of the V-chip will render all attempts to restrict the broadcast of indecent programming unconstitutional”). The striking aspect of *Ashcroft* is that the definition of indecency in COPA (the Children’s Online Protection Act, at issue in *Ashcroft*) was effectively the same as the definition of obscenity under *Miller v. California*, 413 U.S. 15 (1973). This suggests that even obscene expression — traditionally thought unprotected by the First Amendment — might not be subject to criminal sanction if technology might adequately prevent unexpected exposure. See Brief of Former FCC

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Officials at n. 20, *CBS Corporation v. FCC*, No. 06-3575 (3d Cir. Nov. 29, 2006).

There appears to be a difference of opinion on the Court with respect to the degree of deference to be afforded Congress and administrative agencies regarding the adequacy of fit between the asserted compelling interest and the particulars of the regulation. Justice Breyer, for example, takes the position in *Playboy* that “[w]ithout some such empirical leeway, the undoubted ability of lawyers and judges to imagine some kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being.” *U.S. v. Playboy*, 529 U.S. at 841. Clever lawyers can always imagine a better approach; does this mean that no regulations of indecency can ever be constitutional? To what degree should the Court give the legislature room to craft solutions even when smart advocates can challenge both the evidence of a compelling need and the theoretical possibility of less speech-restrictive alternatives?

<sup>311</sup>Indeed, Justice Breyer suggests in his dissent in *Playboy* that the majority opinion is inconsistent with *Pacifica*. *U.S. v. Playboy*, 529 U.S. at 847 (2000) (Breyer, J. dissenting). Justice Kennedy’s response for the majority is that the Court applies strict scrutiny no matter the medium and “even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.” *Id.* at 814.

<sup>312</sup>Critics of broadcast indecency regulation would cite the Supreme Court’s decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). There, the Court noted that filters and blocking technologies appeared to provide less restrictive means of addressing the government’s interest than the criminal sanctions imposed by COPA, and stated that unless the government could show that these technologies were inadequate, the legislation would be unconstitutional. Although the government sought to show the imperfection of blocking mechanisms vis-à-vis the Internet, the Court also rejected indecency regulation in that context in *Reno v. ACLU*, 521 U.S. 844 (1997).

At the same time, the *Reno* Court did explicitly distinguish broadcasting on this basis from the Internet. The following statements illustrate the Court’s assumptions: “The Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial”; “Communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden,” and the “odds are slim” that a user would come across a sexually sight by accident”. *Id.* at 869. *See also id.* at 867 (distinguishing broadcasting as the most heavily regulated medium). With regard to *Ashcroft*, the commission does not impose criminal sanctions in the broadcast indecency context, and the fact that the current V-chip arguably cannot block unexpected indecent content (such as the Janet Jackson “wardrobe reveal”) could be seen as a constitutionally determinative distinction between broadcast indecency regulation and the legislation at issue in *Ashcroft*.

<sup>313</sup>*See, e.g., Ashcroft v. ACLU*, 542 U.S. at 668 (making clear that less restrictive alternatives do not need to be “perfect” solutions to the problem of children’s access); *U.S. v. Playboy, Inc.*, 529 U.S. at 824 (“[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time.”).

<sup>314</sup>*Ashcroft v. ACLU*, 542 U.S. at 665-670; *Reno v. ACLU*, 521 U.S. at 874.

<sup>315</sup>*See, e.g., Ashcroft v. ACLU*, 542 U.S. at 669 (lack of interest or knowledge on parents’ part is not a justification for regulation). Broadcasters have voluntarily commenced a “pan-media” educational campaign to help educate the public further on the use of the V-chip, thereby hoping to reduce the non-compliance percentages cited by critics of the V-chip. *See* John Eggerton, *Parental Control*, BROADCASTING & CABLE ONLINE, July 31, 2006, available at <http://www.broadcastingcable.com/article/CA6357451.html>; *Parents Have Content-Control Info, Says Stevens*, BROADCASTING & CABLE ONLINE, Sept. 29, 2006, available at <http://www.broadcastingcable.com/article/CA6376735.html>; [www.thetvboss.org](http://www.thetvboss.org) (“Be the Boss” campaign



- web site). *But see* John Eggerton, *PTC Pulls Punches*, BROADCASTING & CABLE ONLINE, March 26, 2007, available at <http://www.broadcastingcable.com/article/CA6427590.html> (describing PTC claim that campaign is a “failure”).
- <sup>316</sup>The ratings system voluntarily adopted by broadcasters in response to the Telecommunications Act of 1996 has been criticized as effectively leaving the fox in charge of the hen-house. Critics complain that broadcasters’ desires not to alienate their advertisers impose pressures on them to understate the sexuality or violence in their content ratings. *See* FCC Report, *In re Violent Television Programming and Its Impact on Children*, 22 F.C.C.R. 7929, 7944-46 ¶¶ 35-37 (2007) [hereinafter *2007 Violence Report*]. Studies question the reliability of the ratings system. *See, e.g.*, John Eggerton, *PTC Pans Content Descriptors*, BROADCASTING & CABLE ONLINE, April 16, 2007, available at <http://www.broadcastingcable.com/article/CA6434297.html> (describing Parents Television Council study that characterizes the ratings system as “grossly unreliable,” with two thirds of shows not having “appropriate” content descriptors).
- <sup>317</sup>Former FCC officials Glen Robinson and Henry Geller argue that “it is time to put an end to this experiment with indecency regulation. *Pacifica* has ceased to be a moderate tool for reining in a small number of provocative broadcast personalities and irresponsible licensees; it has become a rallying cry for a revival of Nineteenth Century Comstockery.” Brief of Former FCC Officials as Amicus Curiae in Support of Petitioners and in Support of a Declaration That Indecency Enforcement Violates the First Amendment at 24, *Fox Television Stations Inc. v. FCC*, No. 06-1760-ag (2d Cir. Nov. 29, 2006).
- <sup>318</sup>John Eggerton, *Violence: The New Indecency? Washington Considers A Crackdown on TV Gore*, BROADCASTING & CABLE ONLINE, Jan. 22, 2007, available at <http://www.broadcastingcable.com/article/CA6408809.html>.
- <sup>319</sup>Chairman Martin has endorsed an extension of indecency regulation to cable and satellite providers. *The Broadcast Decency Enforcement Act of 2004: Hearings on HR 3717 Before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce*, 108th Congress 68 (2004) (statement of Kevin Martin). *See also* Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment*, 10 COMM. L. & POL’Y 179, 180-81, 183-84, 211-213 (2005) (and sources cited therein) (describing legislation designed to extend indecency regulation to cable and DBS); Stephen Labaton, *F.C.C. Chief Prods Pay TV to Help Combat Indecency*, N.Y. TIMES, Nov. 30, 2005, at C3 (describing Chairman Martin’s proposal that cable and satellite television companies provide customers with more choices to reject channels as part of effort to combat television indecency).
- <sup>320</sup>Remarks of FCC Chairman Kevin J. Martin, *supra* note 205.
- <sup>321</sup>*See, e.g.*, Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio*, 30 S. ILL. U.L.J. 243, 246-47 (2006) [hereinafter *Corn-Revere, Can Broadcast Indecency Regulations be Extended*]. *See also* Cheryl Bolen, *FCC’s Martin Stresses A La Carte As Solution for Television Indecency*, BNA TELECOMM. MONITOR, June 18, 2007, available at <http://pubs.bna.com/ip/bna/tcm.nsf/eh/A0B4R3T1J0> (reporting Chairman Martin’s statement in support of new Congressional bill, the Family and Consumer Choice Act of 2007).
- <sup>322</sup>Under the bill, cable and satellite operators would have three options: to adhere to broadcast decency standards from 6 a.m.-10 p.m., or to create a family tier of programming including all channels in the expanded basic tier except those with mature or TV-14 rated programming, or to offer an “opt-out” a-la-carte programming option which would allow subscribers to cancel any channel for credit. Bolen, *supra* note 303. Family and Consumer Choice Act of 2007, H.R. 2738, 110th Cong. (1st Sess) (June 15, 2007), available at <http://www.thomas.gov/cgi-bin/query/C?c110::/temp/~c110adgNOX>.
- <sup>323</sup>*See, e.g.*, Timmer, *supra* n. 319 at 207-208 (arguing that there is “stronger justification” for regulating

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- DBS rather than cable like broadcast); Yoo, *supra* note 257.
- <sup>324</sup>It is true, however, that Justice Breyer's plurality opinion in *Denver Area v. FCC*, 518 U.S. 727 (1996), which resolved a First Amendment challenge to three indecency-related provisions of the Cable Television Consumer Protection and Competition Act of 1992, tends in a different direction. In *Denver Area*, the plurality opined that cable could be subjected to lesser First Amendment scrutiny and concluded that the considerations underlying *Pacifica* — pervasiveness and accessibility to children — also applied to cable. Although the Court was split as to the standard of review to use vis-à-vis cable, language in the opinion suggests that *Pacifica* could be extended to other media satisfying its triggers. Subsequent precedent casts doubt on the vitality of the analysis. See, e.g., Yoo, *supra* note 257, at 298-300. In *U.S. v. Playboy*, 529 U.S. 803 (2000) — the “signal bleed” case — which involved a First Amendment challenge to a statute requiring cable operators either to “fully scramble or otherwise fully block” channels that are “primarily dedicated to sexually-oriented programming” or else to limit their transmission to hours when children were unlikely to be in the audience, the Court clearly stated that all attempts to regulate indecency on cable would be subject to strict scrutiny. Even Justice Breyer, who had refused to commit to a particular standard of First Amendment scrutiny in *Denver Area* accepted strict scrutiny as the appropriate metric in *Playboy*. *Denver Area v. FCC*, 518 U.S. 727 (1996). See, e.g., Corn-Revere, *Can Broadcast Indecency Regulations Be Extended*, *supra* note 321; Yoo, *supra* note 250.
- <sup>325</sup>In *U.S. v. Playboy*, for example, the Court explained that the ability to block cable channels distinguished cable from broadcasting. 529 U.S. at 815.
- <sup>326</sup>See, e.g., Corn-Revere, *Can Broadcast Indecency Regulations Be Extended*, *supra* note 321; Yoo, *supra* note 257.
- <sup>327</sup>See, e.g., Aurele Danoff, Comment, “Raised Eyebrows” Over Satellite Radio: Has *Pacifica* Met Its Match?, 34 PEPP. L. REV. 743 (2007). See also Corn-Revere, *Can Broadcast Indecency Regulations Be Extended*, *supra* note 321; Jessica E. Elliott, Note, *Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?*, 5 CONN. PUB. INT. L.J. 263, 283 (2006); Gregory B. Phillips, Note & Comment, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237 (2005/2006)
- <sup>328</sup>See Remarks of FCC Chairman Kevin J. Martin, National Cable & Telecommunications Association, Las Vegas, NV May 7, 2007 (as prepared for delivery), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-272897A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272897A1.pdf) (“I do not believe that requiring cable and satellite television providers to offer programming in a more a la carte manner raises any substantial difficulty under the First Amendment.”).
- <sup>329</sup>*Id.*
- <sup>330</sup>See, e.g., Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended*, *supra* note 321.
- <sup>331</sup>See, e.g., Goodman, *supra* note 299.
- <sup>332</sup>The option-based approach of the recently introduced Family and Consumer Choice Act of 2007 appears consistent with a move away from command-and-control speech regulation. Family and Consumer Choice Act of 2007, H.R. 2738, 110th Cong. (1st Sess.) (June 15, 2007), available at <http://www.thomas.gov/cgi-bin/query/C?c110:/temp/~c110adgN0X>. See *supra* note 322.
- <sup>333</sup>2007 *Violence Report*, 22 F.C.C.R. at 7930 ¶ 2 and sources cited therein. See also Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMM. L. & POL'Y 351 (2004).
- <sup>334</sup>See, e.g., John Eggerton, *FCC to Congress: Take Action on Violence*, BROADCASTING & CABLE ONLINE, Apr. 30, 2007, available at <http://www.broadcastingcable.com/article/CA6437751.html?>. See also 2007 *Violence Report*, 22 F.C.C.R. at 7930 ¶ 2 and sources cited therein.
- <sup>335</sup>John Eggerton, *PTC Continues to Push on Violence*, BROADCASTING & CABLE ONLINE, Feb. 14, 2007, available at <http://www.broadcastingcable.com/article/CA6416682.html>.

- <sup>336</sup>Congress has expressed concern about violent television programming since the 1950s. *See, e.g.*, U.S. Congress, House Committee on Interstate and Foreign Commerce, Investigation of Radio and Television Programs, 82nd Cong., 2d Sess. (1952); Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 1975 WL 30212 (1975) [hereinafter *1975 Violence and Indecency Report*]. Recent attempts to legislate against television violence include Sens. Rockefeller and Hutchison's bill, *The Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005*. *See* CONG. REC. S2649 (Mar. 14, 2005). Sen. Rockefeller will reportedly introduce a bill to regulate violent programming on broadcast, cable and satellite in the fall. *See* Eggerton, *Violence Bill Still on Drawing Board*, *supra* note 255. *See also* John Eggerton, *Rockefeller Plans To Introduce TV Violence Bill By August Recess*, BROADCASTING & CABLE ONLINE, July 15, 2007, available at <http://www.broadcastingcable.com/article/CA6460143.html>.
- <sup>337</sup>*2007 Violence Report*, 22 F.C.C.R. at 7930 ¶ 4.
- <sup>338</sup>*2007 Violence Report*, 22 F.C.C.R. 7939 at ¶ 21. The congressional request asked the Commission to comment on the following three issues: "What are the negative effects on children caused by the cumulative viewing of excessively violent programming? What are the constitutional limits on the government's ability to restrict the broadcast of excessively violent programming when children are likely to be a significant or substantial part of the viewing audience? In particular, could television violence regulations, including possible time channeling requirements, be narrowly tailored to the governmental interests they are intended to serve? Is it in the public interest for the government to adopt a definition of 'excessively violent programming that is harmful to children,' and could the government formulate and implement such a definition in a constitutional manner?" *Id.* at 7930 ¶ 4.
- <sup>339</sup>*Id.* at 7931 ¶ 5.
- <sup>340</sup>The *1975 Violence and Indecency Report* concluded that broadcaster self-regulation would be the most appropriate approach to the reduction of television violence. The report extensively recounted the joint FCC and broadcaster efforts to develop a family viewing hour for television, as well as enhanced warnings about inappropriate content. *1975 Violence and Indecency Report*, 1975 WL 30212 at \*2-\*6. Ultimately, however, as noted above, the "jawboning" by the Commission chairman that led to these self-regulatory efforts was ultimately struck down in *Writers Guild of America, West Inc. v. Amer. Broadcasting Co.*, 609 F.2d 355 (9th Cir. 1979).
- <sup>341</sup>*2007 Violence Report*, 22 F.C.C.R. at 7931 ¶ 5.
- <sup>342</sup>*2007 Violence Report*, 22 F.C.C.R. at 7931-32 ¶6 ("We agree with the views of the Surgeon General and find that, on balance, research provides strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term."); *id.* at 7949-50 ¶¶ 45-49.
- <sup>343</sup>*2007 Violence Report*, 22 F.C.C.R. at 7931 ¶ 5.
- <sup>344</sup>The report effectively concedes that the commission does not have any statutory authority to regulate television violence at this point. While it mentions that the industry could undertake self-regulatory efforts, *id.* at 7949 ¶ 47, the thrust of the report is an elaboration of congressional interventions.
- <sup>345</sup>*Id.* at 7940 ¶ 25 ("We find that Congress could impose time channeling restrictions on excessively violent television programming in a constitutional manner. Just as the government has a compelling interest in protecting children from sexually explicit programming, a strong argument can be made ... that the government also has a compelling interest in protecting children from violent programming and supporting parental supervision of minors' viewing of violent programming."). *See also Id.* at 8 ¶¶ 26, 47, 49.
- <sup>346</sup>*Id.*
- <sup>347</sup>*Id.* at 7943 ¶ 32.
- <sup>348</sup>*Id.* at 7945 ¶ 37.

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<sup>349</sup>*Id.* at ¶ 47.

<sup>350</sup>*Id.* at 7946 ¶ 38.

<sup>351</sup>*Id.* at 7940 ¶ 25.

<sup>352</sup>*Id.* at 7940-41 ¶¶ 26-27. Courts that have addressed such rules have thus far found them constitutionally infirm. For a review of the cases, see generally Robert Corn-Revere, *Regulating TV Violence: The FCC's National Rorschach Test*, 22 FALL COMM. LAW 1 (2004) [hereinafter Corn-Revere, *Regulating TV Violence*].

<sup>353</sup>2007 *Violence Report*, 22 F.C.C.R. at 7939 ¶ 22 (“While a restriction on the content of protected speech will generally be upheld only if it satisfies strict scrutiny, meaning that the restriction must further a compelling government interest and be the least restrictive means to further that interest, this exacting standard does not apply to the regulation of broadcast speech.”)

<sup>354</sup>Although the Supreme Court has upheld broadcast content regulations such as the fairness doctrine (which required broadcasters to address controversial issues of public importance and provide balanced viewpoints on those issues in their overall programming), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), and the reasonable right of access for political advertising by federal candidates, *CBS v. FCC*, 453 U.S. 367 (1981), and would probably uphold the commission's current regulations on children's educational programming, *Children's Television Obligations of Digital Television Broadcasters*, 21 F.C.C.R. 11065 (2006), it should be noted that none of the regulations at issue in these cases is a classic content or viewpoint based regulation.

<sup>355</sup>2007 *Violence Report*, 22 F.C.C.R. at 7938 ¶ 20 (“[g]iven the totality of the record before us, we agree with the view of the Surgeon General that: ‘a diverse body of research provides strong evidence that exposure to violence in the media can increase children's aggressive behavior in the short term.’ At the same time, we do recognize that ‘many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior.’ We note that a significant number of health professionals, parents and members of the general public are concerned about television violence and its effects on children.”)(footnotes omitted). See also Jonathan L. Freedman, *Television Violence and Aggression: Setting the Record Straight*, May 16, 2007, available at [www.mediainstitute.org](http://www.mediainstitute.org); John Eggerton, *Media Companies Fire Back at Violence Studies*, BROADCASTING & CABLE ONLINE, May 16, 2007, available at <http://www.broadcastingcable.com/article/CA6442496.html>. For the First Amendment Center's discussion of the 2007 *Violence Report*, see *Online Symposium: TV Violence and the FCC*, available at [http://www.firstamendmentcenter.org/collection.aspx?item=TV\\_violence\\_FCC](http://www.firstamendmentcenter.org/collection.aspx?item=TV_violence_FCC).

<sup>356</sup>*Id.* Rather, it appears to justify regulation on the facts that there is significant public concern about the effects of television violence and some empirical evidence to support the public concern. Cf. Kevin W. Saunders, *The Cost of Errors in the Debate Over Media Harm to Children*, 3 MICH. ST. L. REV. 771 (2005) (arguing that even if empirical evidence is not definitive, failing to regulate poses more of a risk of harm to children than regulating without complete proof).

<sup>357</sup>The 2007 *Violence Report* suggests that dispositive evidence of harm should not be considered necessary with respect to television violence, just as it was not deemed necessary by courts in the indecency context. 2007 *Violence Report*, 22 F.C.C.R. at 7939 ¶ 23 (“[i]n light of relevant U.S. Supreme Court precedent, the D.C. Circuit refused in *ACT III* to insist on scientific evidence that indecent content harms children, concluding that the government's interest in the well-being of minors is not “limited to protecting them from clinically measurable injury.”). However, the possibility of overbreadth is arguably even more problematic with regard to “violent” than “indecent” speech and might argue for more of a showing of harm.

<sup>358</sup>2007 *Violence Report* 22 F.C.C.R. at 7948 ¶ 44.

<sup>359</sup>See, e.g., Corn-Revere, *Regulating TV Violence*, *supra* note 352; Harry T. Edwards & Mitchell N. Berman,

*Regulating Violence on Television*, 89 NW. U. L. REV. 1487 (1995).

<sup>360</sup>See generally NATIONAL TELEVISION VIOLENCE STUDY (Sage Pubs. 1998).

<sup>361</sup>See, e.g., Freedman, *supra* note 355.

<sup>362</sup>The report argues that “[a] definition used for TV ratings purposes might be based on different criteria than a definition used for identifying video programming that must not be shown or must be channeled to a later hour. For example, the definition used in a mandatory ratings regime intended to facilitate parental control might take into account a depiction’s potential for harm without requiring a finding of a likelihood of harm. Ratings and blocking regulations might require multiple definitions for different kinds of violent programming to which parents might want to restrict their children’s access. Another variable is what type and degree of violent content the research demonstrates, with a reasonable probability, is harmful to children. 2007 *Violence Report*, 22 F.C.C.R. at 7946 ¶ 39.

<sup>363</sup>2007 *Violence Report*, 22 F.C.C.R. at 7948 ¶ 44.

<sup>364</sup>*Id.* The commission explained that “In determining whether such depictions are patently offensive, the Government could consider among other factors the presence of weapons, whether the violence is extensive or graphic, and whether the violence is realistic.” *Id.*

<sup>365</sup>See David H. Solomon, *No Violence to the First Amendment*, BROADCASTING & CABLE ONLINE, June 18, 2007, available at <http://www.broadcastingcable.com/article/CA6452656.html>.

<sup>366</sup>2007 *Violence Report*, 22 F.C.C.R. at 7940-41 ¶ 26.

<sup>367</sup>Indeed, the new president of the PTC, participating in an online symposium on the commission’s 2007 *Violence Report*, emphasized the self-regulatory recommendations of the report and expressed the PTC’s preference for what the PTC would consider an appropriate industry solution. Tim Winter, Parents Television Council, *A commentary on the Federal Communications Commission report*, April 27, 2007, available at <http://www.firstamendmentcenter.org/commentary.aspx?id=18492>.

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## **JUSTICES TO EXAMINE 'FLEETING' EXPLETIVES**

BY TONY MAURO

First Amendment Center legal correspondent

WASHINGTON — Thirty years ago, cable television was beginning to take hold, satellite television was in its infancy, and on broadcast airwaves, “Mork & Mindy” debuted.

That year the Supreme Court issued *FCC v. Pacifica Foundation*, upholding FCC enforcement of rules that outlawed the broadcast of George Carlin’s recitation of the “seven dirty words” on radio.

Yesterday, the Court agreed to review the latest version of those same rules against a backdrop of a vastly different media landscape, where some of the language the FCC bans seems fairly tame.

The case *FCC v. Fox Television Stations*, also comes to a court in which some justices have questioned the validity of distinguishing between cable television, where profanity abounds, and over-the-air broadcast, where speech regulation persists.

“The categories don’t make any sense anymore,” said Robert O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression. O’Neil said yesterday that he hoped the Court would “begin by rewriting the whole matrix and context” for broadcast speech regulation.

But if the current Court uses the case to rearrange the regulatory landscape, will it loosen the reins on traditional broadcasters, or maintain on-air broadcasts as a last bastion of decency? Hard to predict, says O’Neil.

The current case looks at the FCC’s Bush-era expansion of decency regulation to cover even the “fleeting” or accidental use of expletives in live broadcasts. The *Pacifica* decision left that question unanswered, and for most of the 30 years since, broadcasters have felt generally unthreatened when a prime-time expletive escaped from an entertainer’s mouth.

That changed after the seemingly spontaneous use of the F-word by Cher in 2002 and both the F-word and the S-word by Nicole Richie in 2003 on Fox broadcasts of the Billboard Music Awards.

In accepting an award, Cher said critics had counted her out for decades, and she added, “So f--- ‘em. I still have a job, and they don’t.”

## A P P E N D I X

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Richie got an award for her role in a reality show that had her living a rural life. “Have you ever tried to get cow s--- out of a Prada purse?” she asked on the air. “It’s not so f--- -- simple.”

After receiving complaints, the FCC ruled that these instances and others violated its policy and seemed to extend the ban on indecent language to “even relatively fleeting” instances. The commission also ruled against NBC when the singer Bono exclaimed during a Golden Globes award broadcast in 2003 that the award was “f----- brilliant.” The commission did not levy fines, however, finding that networks did not have adequate notice of its policy.

Networks appealed and won a ruling from the 2nd U.S. Circuit Court of Appeals that the FCC’s new rules were “arbitrary and capricious” and “divorced from reality.”

In his petition to the high court, Solicitor General Paul Clement said the 2nd Circuit ruling conflicted with the 1978 *Pacifica* ruling. Clement said the Fox ruling had sent the FCC on a virtually impossible “Sisyphean errand” of revising its regulations.

Networks, which face increased fines for violating the indecency rules, tried to persuade the Supreme Court to let the 2nd Circuit ruling stand. They hired Supreme Court veterans to plead their case. Sidley Austin’s Carter Phillips is representing Fox, while Miguel Estrada of Gibson, Dunn & Crutcher filed a brief for NBC Universal.

Estrada wrote that the *Pacifica* ruling rests on a “moth-eaten foundation.” With the wide availability of cable and satellite television and the Internet, which are not governed by the FCC indecency regulation, “there no longer exists any sound basis for according broadcast speech less protection than obtains in other channels of communication.”

O’Neil noted that several justices, and not just liberals, have expressed similar sentiments. For instance, Justice Clarence Thomas, writing in the 1996 *Denver Area Educational Telecommunications Consortium v. FCC ruling*, said the distinctions the Court has made between media for First Amendment purposes were “dubious from the start.”



Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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