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# Just a Concern for Good Manners: The Second Circuit Strikes Down the FCC's Broadcast Indecency Regime

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# JUST A CONCERN FOR GOOD MANNERS: THE SECOND CIRCUIT STRIKES DOWN THE FCC'S BROADCAST INDECENCY REGIME

MICHAEL STROCKO\*

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## I. INTRODUCTION

In the film “A Christmas Story,” the young protagonist Ralphie, while helping his father change a flat tire, spills the screws he was holding and yells, “Oh, fudge!”<sup>1</sup> The film’s narrator then explains that Ralphie didn’t say “fudge,” but the “F-dash-dash-dash” word.<sup>2</sup> Yes, Ralphie said, “Oh, fuck!”

“Fuck” is without question a “bad word.” People say it when they drop a tray, stub their toe, or watch their favorite baseball team give up a home run to lose the World Series.<sup>3</sup> U2’s Bono used it in his acceptance speech at the 2003 Golden Globe Awards when he said that winning a Golden Globe was “fucking brilliant.”<sup>4</sup> However, this comment slipped by NBC’s censors and was broadcast on live television.<sup>5</sup> For over thirty years, the Federal Communications Commission (“FCC” or “the Commission”) generally did not issue a finding of indecency when a single, fleeting expletive was broadcast on radio or television. The FCC used Bono’s slip of the tongue to reverse its position, and thereafter put broadcast networks on notice that the airing of fleeting expletives, like “fuck,” warrants forfeitures for an indecent broadcast.

The FCC’s attempts to enforce broadcast indecency regulations have been a point of contention in the legal community for years,<sup>6</sup> and this policy change was no exception. Scholars and lawyers have repeatedly questioned the constitutionality of the FCC’s broadcast indecency regime.<sup>7</sup> However,

<sup>1</sup> A CHRISTMAS STORY (MGM/UA Entertainment Co. 1983).

<sup>2</sup> *Id.*

<sup>3</sup> The author neither confirms nor denies that he uttered such language during the 1993 World Series.

<sup>4</sup> Bill McConnell, *Bono’s F-Word Too Fleeting for FCC Action*, BROADCASTING & CABLE, Oct. 7, 2003, <http://www.broadcastingcable.com/article/CA327816.html>.

<sup>5</sup> *Id.*

<sup>6</sup> See generally THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING (1994); WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION (1990); MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST (1986).

<sup>7</sup> 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, 85–91 (2004) (warning that the FCC’s new approach to offensive broadcast language could have serious First Amendment implications) [hereinafter Calvert, *Profane Decision*]; Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L.J. 221 (1996) (arguing that the FCC’s definition of indecency is unconstitutionally vague); 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 (2005) (proposing that broadcast indecency regulation is in violation of the First Amendment). See generally JEREMY H. LIPSCHULTZ, BROADCASTING INDECENCY: F.C.C. REGULATION AND THE FIRST AMENDMENT (1997); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987).

the United States Court of Appeals for the Second Circuit in *Fox Television Stations, Inc. v. FCC* vacated the FCC's new indecency policy, not on constitutional grounds, but under the Administrative Procedure Act, calling the change in policy arbitrary and capricious.<sup>8</sup> As the Supreme Court of the United States granted the government's petition for writ of certiorari,<sup>9</sup> the legitimacy (and possibly the constitutionality) of the FCC's indecency enforcement may finally receive a definitive determination.

This article will examine the history of broadcast indecency, the reasoning behind the Second Circuit's decision, and what lies ahead regarding broadcast indecency enforcement. Part I describes the authority and procedures of the FCC's indecency determinations. Part II provides a history of broadcast indecency enforcement in the United States, and demonstrates how divisive those enforcements were, even among the FCC's commissioners. Part III analyzes the Second Circuit's decision in *Fox Television Stations, Inc. v. FCC*, where it found that the FCC's change in policy lacked a reasoned basis. Part IV places the FCC's policy change within the context of pressure from private interest groups and the higher indecency fines authorized by Congress. Part V looks ahead to the appeal to the Supreme Court, and what its decision could mean to the future of broadcast indecency enforcement.

## II. THE FEDERAL COMMUNICATIONS COMMISSION: AUTHORITY & PROCEDURES

The Radio Act of 1912<sup>10</sup> represented the federal government's first broadcast regulation. Due to the increasing amount of radio transmissions, the 1912 Act established federal authority to regulate the airwaves by requiring federal permission to transmit radio communications.<sup>11</sup> Radio licenses were quite easy to obtain, as the Secretary of Commerce was obliged to issue a license to virtually anyone with a radio transmitter.<sup>12</sup>

While the 1912 Act did not contain any reference to the content of the radio transmissions, the government still maintained an interest in

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<sup>8</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (2008).

<sup>9</sup> *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008).

<sup>10</sup> Pub. L. No. 62-264, 37 Stat. 302 (1912).

<sup>11</sup> Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1470-71 (2005). The authors elaborated that the need to regulate the airways became more pressing as confusion resulting from radio signaling played a role in the sinking of the Titanic. *Id.*

<sup>12</sup> *Id.* at 1471; Matthew Murray, *Censorship*, in *ENCYCLOPEDIA OF RADIO* 306, 307 (Christopher H. Sterling & Michael Keith eds., 2003).

“maintaining standards of good taste and upholding the moral order.”<sup>13</sup> In response to an outbreak of “radio vandalism,”<sup>14</sup> in 1914 the Department of Commerce published a pamphlet entitled “Radio Communication Laws of the United States” which stated that “[n]o person shall transmit or make a signal containing profane or obscene words or language.”<sup>15</sup>

The rapid growth of radio broadcasts spawned the Radio Act of 1927,<sup>16</sup> “which gave the newly established Federal Radio Commission (FRC) the authority to assign and revoke radio licenses”<sup>17</sup> and prohibited the utterance of “any obscene, indecent, or profane language by means of radio communication.”<sup>18</sup> While the statute “plainly impose[d] a punishment for broadcasting obscene, indecent, and profane language,”<sup>19</sup> it balanced this power with a stipulation that specifically prohibited any form of government censorship:

Nothing in this act shall be understood or construed to give the [FRC] the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the [FRC] which shall interfere with the right of free speech by means of radio communications.<sup>20</sup>

In an effort to expand federal power over both wire and radio companies,<sup>21</sup> Congress passed the Communications Act of 1934,<sup>22</sup> creating the Federal Communications Commission in the process.<sup>23</sup> “The [Communications] Act also adopted the 1927 Act’s obscenity, indecency,

<sup>13</sup> Murray, *supra* note 12, at 308.

<sup>14</sup> *Id.*

<sup>15</sup> Brown & Candeub, *supra* note 11, at 1471–72.

<sup>16</sup> Pub. L. No. 69-632, 44 Stat. 1162 (1927).

<sup>17</sup> Brown & Candeub, *supra* note 11, at 1474.

<sup>18</sup> Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1162, 1172–73 (1927).

<sup>19</sup> *Duncan v. United States*, 48 F.2d 128, 130 (9th Cir. 1931); see Radio Act of 1927 § 33 (“Any person, firm, company, or corporation who shall violate any provision of this Act . . . upon conviction thereof in any court of competent jurisdiction shall be punished by a fine of not more than \$5,000 or by imprisonment for a term of not more than five years or both for each and every such offense.”).

<sup>20</sup> Radio Act of 1927 § 29. “The no-censorship clause was crucial because it differentiated the ‘democratic’ American system of broadcasting from the state-controlled or state-affiliated systems adopted by most other nations. . . . [T]he specter of political control loomed over early discussions about radio regulation and justified the adoption of a system that endorsed private commercial development of the airwaves.” Murray, *supra* note 12, at 307.

<sup>21</sup> Brown & Candeub, *supra* note 11, at 1479.

<sup>22</sup> Pub. L. No. 73-416, 48 Stat. 1064 (1934).

<sup>23</sup> Communications Act of 1934 § 1.

and profanity language, largely verbatim.<sup>24</sup> The language banning the transmission of obscene, indecent, and profane language was amended in 1948, struck from the 1934 Act, and incorporated into the Criminal Code.<sup>25</sup> As broadcast television became more prevalent, Congress expanded the realm of indecency enforcement by empowering the FCC to fine *any* broadcast station, radio or television, for indecency.<sup>26</sup> The language originally placed in the Criminal Code is still in force today, where section 1464 states, “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”<sup>27</sup>

In order to enforce section 1464, the FCC adopted Rule 73.3999, which states that “no licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”<sup>28</sup> Neither section 1464 nor Rule 73.3999 provides an express definition of indecency, so the FCC was left to develop its own standard. Although the FCC’s definition of indecency has changed over the years, discussed *infra*, the current standard is that the material must (1) describe or depict sexual or excretory organs or activities, and (2) be patently offensive as measured by contemporary community standards for the broadcast medium.<sup>29</sup>

The “policing” of indecent broadcasts is subject to constitutional and statutory limitations. The First Amendment provides “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>30</sup> Additionally, § 326 of the Communications Act reinforces that the FCC does not have the power of censorship over broadcast communications, or the right to interfere with the right of free speech by means of broadcast communication.<sup>31</sup>

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<sup>24</sup> Brown & Candeub, *supra* note 11, at 1479. The Act reads, “No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.” Communications Act of 1934 § 326.

<sup>25</sup> Brown & Candeub, *supra* note 11, at 1479.

<sup>26</sup> Communications Act Amendments, 1960, Pub. L. No. 86-752, § 7, 74 Stat. 889, 894 (1960).  
<sup>27</sup> 18 U.S.C. § 1464 (2008).

<sup>28</sup> Enforcement of 18 U.S.C. 1464, 47 C.F.R. § 73.3999 (1995).

<sup>29</sup> *In re* Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8002 (2001) [hereinafter *Industry Guidance*].

<sup>30</sup> U.S. CONST. amend. I.

<sup>31</sup> Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1064, 1091 (1934) (codified at 47 U.S.C. § 326 (2008)).

Before the FCC commences any investigation of an allegedly indecent broadcast, it must receive a complaint from a member of the public.<sup>32</sup> The FCC accepts complaints filed in any number of ways: letters or postcards sent through the mail, facsimiles, e-mails, and telephone calls.<sup>33</sup> Additionally, the FCC now provides an electronic complaint form through its website for the “fastest and easiest way to file a complaint.”<sup>34</sup>

Once the FCC receives a complaint, it is recorded into a database and forwarded to staff responsible for initial review.<sup>35</sup> Then, a broadcast station licensee may receive a Letter of Inquiry requesting the information necessary to complete the investigation,<sup>36</sup> such as a transcript or a tape of the broadcast in question. If the FCC concludes that it needs more information to process the complaint, or that the material is not obscene, indecent or profane, it will notify the complainant by letter.<sup>37</sup> If a full review reveals that the complaint is not actionable, an Order denying the complaint will be issued.<sup>38</sup> If the FCC determines that the material is indecent, it will take further action, including possibly imposing monetary penalties.<sup>39</sup>

The complainant may file a petition for reconsideration or an application for review by the full Commission if the complaint is denied.<sup>40</sup> However, if the FCC determines that the broadcast is actionable, the broadcaster receives a Notice of Apparent Liability (NAL), which is a “preliminary finding that the law or the Commission’s rules have been violated.”<sup>41</sup> After receiving the broadcaster’s response to the NAL, the FCC may grant the complaint through a Forfeiture Order, or rescind the NAL entirely.<sup>42</sup> Enforcement measures range from mere warnings to monetary fines and the revocation of a station’s license.<sup>43</sup>

<sup>32</sup> Complaint Process, <http://www.fcc.gov/eb/oip/process.html> (last visited Sept. 21, 2008).

<sup>33</sup> Obscenity, Indecency & Profanity—Frequently Asked Questions, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Sept. 21, 2008).

<sup>34</sup> Obscene, Profane, and/or Indecent Material Complaint Form—(Form 475B), <http://fjallfoss.fcc.gov/cgb/fcc475B.cfm> (last visited Sept. 21, 2008). The FCC estimates fifteen minutes to complete the complaint form. *Id.*

<sup>35</sup> Obscenity, Indecency & Profanity—Frequently Asked Questions, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Sept. 21, 2008).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> How the FCC Resolves Obscenity/Indecency/Profanity Complaints, <http://www.fcc.gov/eb/oip/flow.pdf> (last visited Sept. 21, 2008).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Complaint Process, <http://www.fcc.gov/eb/oip/process.html> (last visited Sept. 21, 2008).

<sup>42</sup> *Id.*

<sup>43</sup> Obscene, Indecent, and Profane Broadcasts, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Feb. 27, 2008). The maximum fine the FCC can grant for a single indecent

The federal courts of appeals have exclusive jurisdiction to review all final orders of the FCC.<sup>44</sup> The party aggrieved by the FCC's final order may file a petition for review in the judicial circuit of its principal place of business, or in the U.S. Court of Appeals for the D.C. Circuit.<sup>45</sup>

### III. BROADCAST INDECENCY: ENFORCEMENT & DEVELOPMENT

In order to better understand the FCC's change in its indecency policy, it helps to understand how its indecency enforcement has progressed over the years. This section offers a comprehensive overview of the FCC's indecency rulings from the early days of radio until the orders that led to the Second Circuit's review.

#### A. *Early Indecency: From Mae West to Topless Radio*

The first notable action involving a potentially indecent broadcast occurred in 1937, just a few years after the inception of the Communications Act. On an NBC radio broadcast of *The Chase and Sanbourn Hour*, Hollywood icon Mae West provided the voice of Eve in a Garden of Eden skit where she convinced the snake to get an apple for her.<sup>46</sup> Considered by some to be bawdy and questionable programming,<sup>47</sup> the FCC wrote NBC a letter reprimanding NBC for broadcasting programming "far below the minimum standards,"<sup>48</sup> and reminded NBC of its "moral responsibility for the effect [of its programming] upon listeners of all classes and ages."<sup>49</sup> Although no fine was administered, NBC banned Mae West from all NBC programming for nearly twenty years, and did not even mention her name on the air for over a decade.<sup>50</sup>

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broadcast was recently increased from \$32,500 to \$325,000. The Broadcast Indecency Enforcement Act, 72 Fed. Reg. 33,913, 33,913 (June 20, 2007) (codified at 47 C.F.R. § 1.80(b)(1)). The impact of this increase is discussed further in this article.

<sup>44</sup> 28 U.S.C.A. § 2342 (2007).

<sup>45</sup> 28 U.S.C.A. § 2343 (2007).

<sup>46</sup> Brown & Candeub, *supra* note 11, at 1480 & n.95.

<sup>47</sup> U.S. Representative Lawrence Connery of Massachusetts complained on the House floor of "the ravishing of the American home" by this "foul, sensuous, indecent, and blasphemous radio program," which "reduced the Garden of Eden episode to the very lowest level of bawdy-house stuff." *Id.* at 1482.

<sup>48</sup> Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 VILL. SPORTS & ENT. L.J. 15, 21 (1996).

<sup>49</sup> *Id.*

<sup>50</sup> Brown & Candeub, *supra* note 11, at 1480 n.85, 1482.



Aside from the Mae West incident, indecency complaints throughout the 1940s and 1950s were rarely raised by the public as the FCC supported the broadcasters' attempts at self-monitoring and self-regulation to ensure "quality radio service."<sup>51</sup> Broadcasters like CBS and NBC developed "Standards and Practices" and "Continuity Acceptance" departments to "enforce 'courtesy and good taste' and to guarantee programming appropriate for 'homes . . . of all types . . . and all members of the family.'"<sup>52</sup> In 1939, the National Association of Broadcasters (NAB), the primary industry-lobbying group, likewise established a strict code of "accepted standards of good taste" for all its members.<sup>53</sup> In 1952, the NAB established a similar code for television broadcasters that "recognized broadcasters' responsibilities to present certain themes with greater sensitivity and with regard to their potential effects on children."<sup>54</sup>

As more and more broadcasters shifted their attention toward television, self-regulation began to break down and radio became more targeted in its offerings.<sup>55</sup> In urban radio markets, stations began to schedule more controversial and sensational programming in an attempt to "push the envelope."<sup>56</sup> As a result, the FCC became more active in reprimanding questionable programming, but initially chose not to do so under the federal criminal statutes for obscene or indecent broadcasts.

For instance, in 1959, the FCC initiated action against Denver radio station KIMN based on an announcer's comments that contained offensive speech and sexual innuendo.<sup>57</sup> The announcer spoke about a "guy who goosed a ghost and got a handful of sheet," inflating "cheaters" with helium, and flushing pajamas down a toilet (with an accompanying sound effect of a toilet flushing).<sup>58</sup> The FCC ultimately issued a cease and desist letter to the station on the grounds that "the remarks in question, which would have been offensive in any context, occurred on programs in which young people participated."<sup>59</sup> Similarly, suggestive puns and phrases<sup>60</sup> used by host "Uncle

<sup>51</sup> Murray, *supra* note 12, at 308.

<sup>52</sup> *Id.* (changes in original).

<sup>53</sup> *Id.*

<sup>54</sup> *In re* Primary Jurisdiction Referral of Claims against Government Defendant Arising from the Inclusion in the NAB Television Code of the "Family Viewing Policy," 95 F.C.C.2d 700, 702 (1983) [hereinafter *NAB Television Code*].

<sup>55</sup> Murray, *supra* note 12, at 309.

<sup>56</sup> *Id.*

<sup>57</sup> Wise, *supra* note 48, at 24–25.

<sup>58</sup> *Id.* at 24.

<sup>59</sup> *Id.* at 24–25.

<sup>60</sup> Examples of the suggestive language used by Uncle Charlie include changing the names of locations into puns ("Andrews" became "Ann's Drawers," and "Bloomville" became "Bloomersville"), and phrases such as "let it all hang out." Brown & Candeub, *supra* note 11, at 1483.

Charlie” on the Charlie Walker Show led to the FCC’s denial of WDKD’s broadcast license renewal as young children were subjected to the offensive remarks.<sup>61</sup> In both the KIMN and WDKD proceedings, the FCC based its decisions on general public interest grounds, as opposed to the prohibition on obscene and indecent broadcasts found in section 1464.<sup>62</sup>

That method of reasoning ended with *In re WUHY-FM*,<sup>63</sup> the FCC’s first finding of an indecent broadcast under section 1464.<sup>64</sup> On January 4, 1970, a noncommercial educational radio station in Philadelphia broadcast a prerecorded interview with Grateful Dead lead singer Jerry Garcia between 10 p.m. and 11 p.m.<sup>65</sup> Garcia’s responses “were frequently interspersed with the words ‘f—k’ and ‘s—t,’ used as adjectives, or simply as an introductory expletive or substitute for the phrase, et cetera.”<sup>66</sup>

The FCC began by differentiating the act of hearing a broadcast with either reading a book or seeing a motion picture, as “broadcasting is disseminated generally to the public under circumstances where reception requires no [deliberate] activity,”<sup>67</sup> such as purchasing a book or movie admission. As large numbers of children listen to radio, the FCC also expressed concern that if the language contained in the program became widespread “it would drastically affect the use of radio by millions of people.”<sup>68</sup> With these concerns in mind, the FCC devised its first statutory interpretation of “indecent,” adapting it from the legal standard for “obscenity.”<sup>69</sup> For a broadcast to be considered indecent, the material must be (a) patently offensive by contemporary community standards, and (b) utterly without redeeming social value.<sup>70</sup> It concluded that the broadcast of the Garcia interview fell within this indecency standard, and fined the station \$100.<sup>71</sup>

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *In re WUHY-FM*, 24 F.C.C.2d 408 (1970).

<sup>64</sup> *See id.* at 412 (“There is no precedent, judicial or administrative, for this case. There have been few options construing 18 U.S.C. 1464, and none in the broadcast field . . .”) (citations omitted).

<sup>65</sup> *Id.* at 408.

<sup>66</sup> *Id.* at 409 (changes in original).

<sup>67</sup> *Id.* at 411 (citation omitted).

<sup>68</sup> *Id.* The FCC disagreed with the station’s argument that the realistic portrayal of an interview subject with incidental strong language should not be indecent. Emphasizing the roles that newscasters and disk jockeys play in the broadcast field, the FCC believed that permitting this kind of language could lead to a DJ saying, “S—t, man . . . , listen to this mother f—r . . . .” *Id.* at 413 (changes in original).

<sup>69</sup> In 1970, the legal standard for obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” *Roth v. United States*, 354 U.S. 476, 489 (1956).

<sup>70</sup> *In re WUHY-FM*, 24 F.C.C.2d at 412.

<sup>71</sup> *Id.* at 414–15. The proposed forfeiture was only \$100 due to the “new ground” broken by the FCC with its decision and the overall record of WUHY as a noncommercial educational radio station. *Id.*

The FCC's decision was by no means unanimous. Commissioner Kenneth A. Cox disagreed with the Commission's final indecency determination, noting that the broadcast occurred at a late hour and that the program's audience was comprised mostly of college students.<sup>72</sup> Additionally, he stressed that the FCC's ruling was based on past complaints regarding WUHY's late evening programming, and that no complaints regarding the Jerry Garcia interview were filed with either the station or the FCC.<sup>73</sup> He also seriously doubted that broadcasters would flood the airwaves with expletives were the Commission not to sanction WUHY-FM.<sup>74</sup> In Commissioner Nicholas Johnson's dissent, he too questioned sanctioning a broadcast that did not generate a single complaint, and believed that the majority's unclear definition of "indecency" was unconstitutionally vague.<sup>75</sup>

As the decade of the 1970s progressed, programming on radio became more and more sensational. A number of stations ran programming known as "topless radio," where an announcer and callers engaged in discussions of rudimentary sex advice and other sexual matters.<sup>76</sup> This new format drew the attention of Congress, where Representative Torbert H. Macdonald threatened to take action against topless radio if the FCC failed to do so.<sup>77</sup>

In 1973, the FCC initiated action against station WGLD-FM and its topless radio program, "Femme Forum."<sup>78</sup> The two broadcasts reviewed by the FCC concerned keeping alive one's sex life and oral sex experiences.<sup>79</sup> In finding the broadcasts indecent under the test established in *In re*

<sup>72</sup> *Id.* at 418 (Cox, Comm'r, concurring in part and dissenting in part).

<sup>73</sup> *Id.* See *supra* Part I (the FCC no longer engages in the practice of monitoring a station based on past complaints).

<sup>74</sup> *In re WUHY-FM*, 24 F.C.C.2d at 421 ("I just do not believe there are many broadcasters waiting eagerly to flood the country with such language on an around the clock basis in the event we were to impose no sanction here. . . . [N]or do I believe that there is any great audience to be won by such tactics. I think most broadcasters have too high a regard for their profession and its responsibilities to fall into the patterns the majority envisage . . .").

<sup>75</sup> *Id.* at 422-23 (Johnson, Comm'r, dissenting). In an attempt to label the Commission's stance as out of touch with the country's young adults, he mocked the majority's description of the Grateful Dead as a "rock and roll musical group" by stating, "[t]o call [the] Grateful Dead a 'rock and roll musical group' is like calling the Los Angeles Philharmonic a 'jug band.'" *Id.* at 422.

<sup>76</sup> Charles P. Pierce, *Hot-Button Issue*, BOSTON GLOBE MAG., July 18, 2004, at 9, available at [http://www.boston.com/news/globe/magazine/articles/2004/07/18/hot\\_button\\_issue/](http://www.boston.com/news/globe/magazine/articles/2004/07/18/hot_button_issue/).

<sup>77</sup> *Id.* (citing ROBERT L. HILLIARD & MICHAEL C. KEITH, DIRTY DISCOURSE: SEX AND INDECENCY IN BROADCASTING (2003)).

<sup>78</sup> *In re Apparent Liability of Station WGLD-FM*, 41 F.C.C.2d 919 (1973), *reconsideration denied sub nom. In re Sonderling Broad. Corp.*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397 (D.C. Cir. 1974).

<sup>79</sup> *Id.* at 919.

WUHY-FM,<sup>80</sup> the FCC stressed that the broadcast field was “a medium designed to be received and sampled by millions in their homes, cars, on outings, or even as they walk around the streets with transistor radio [sic] to the ear, without regard to age, background or degree of sophistication.”<sup>81</sup> The Commission considered its action as a preventative measure against widespread broadcasts of this kind.<sup>82</sup>

As he did in the forfeiture against WUHY-FM, Commissioner Nicholas Johnson authored a lengthy dissent.<sup>83</sup> First, while finding parts of the broadcasts to be extremely distasteful, he questioned whether the FCC would have acted “absent severe Congressional pressure to do something in this area.”<sup>84</sup> He then addressed the vagueness problem of the Commission’s approach to indecency. Calling the Commission’s indecency definition a “hopeless blur,” he worried that broadcasters would “steer as wide of the ‘indecency’ mark as possible, declining to carry programming which might meet the majority’s amorphous ‘test[,]’ as well as programming which is obviously protected by the Constitution.”<sup>85</sup>

### B. *Seven Dirty Words & Pacifica*

In 1975, the FCC issued a ruling that it hoped would clarify many of the broadcast indecency concepts that were left unclear in its earlier rulings.<sup>86</sup> The full impact of the ruling was not known until more than three years later, when the Supreme Court of the United States reviewed the ruling to “decide whether the FCC ha[d] any power to regulate a radio broadcast that [was] indecent but not obscene.”<sup>87</sup>

The FCC’s ruling came in response to a complaint from a man<sup>88</sup> in New York City who heard profanity broadcast on Pacifica station WBAI while

<sup>80</sup> The FCC also found the broadcasts to be obscene and issued a \$2,000 forfeiture. *Id.* at 920.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* (FCC stating that it had “a duty to act to prevent the erosion of the country’s broadcast system”).

<sup>83</sup> *Id.* at 921–26 (Johnson, Comm’r, dissenting).

<sup>84</sup> *Id.* at 922–23.

<sup>85</sup> *Id.* at 923.

<sup>86</sup> Wise, *supra* note 48, at 15.

<sup>87</sup> FCC v. Pacifica Found., 438 U.S. 726, 729 (1978).

<sup>88</sup> The complainant was later identified as John R. Douglas, a member of the national planning board of Morality in Media, a conservative political group. Adam Candeb, *Creating a More Child-Friendly Broadcast Media*, 3 MICH. ST. L. REV. 911, 921 (2005). The significance of this fact will be discussed *infra* Part IV-A.

with his young son in the early afternoon of October 30, 1973.<sup>89</sup> At approximately 2:00 p.m., the station played an unedited recording of comedian George Carlin's "Filthy Words" routine as part of a discussion on contemporary society's attitudes toward language.<sup>90</sup> Carlin's routine, where he examined the words you couldn't say on the public airwaves, repeated words like "fuck," "shit," "cocksucker," and "motherfucker."<sup>91</sup> Immediately prior to the broadcast of Carlin's monologue, the station alerted listeners that the upcoming broadcast would contain sensitive language, and anyone who might be offended was advised to change the station.<sup>92</sup>

Before addressing whether WBAI's broadcast was indecent under section 1464, the FCC recognized that "indecent" and "obscenity" were two different concepts, and, thus, its past definition of indecency, which was derived from an obscenity standard, had to be reformulated.<sup>93</sup> Going forward, for the language of a broadcast to be indecent, it must describe, "in terms patently offense [sic] as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."<sup>94</sup>

To reach its new standard, the FCC relied on principles of nuisance law, which favors channeling behavior over prohibiting it, and stressed the strong interest in preventing "the exposure of children to language which most parents regard as inappropriate for them to hear."<sup>95</sup> Although it found WBAI's broadcast indecent under this new standard, the FCC did not impose a fine, as the declaratory order's main purpose was to clarify the applicable indecency standard.<sup>96</sup>

The Radio Television News Directors Association petitioned the FCC for clarification or reconsideration of the WBAI order.<sup>97</sup> In denying the petition, the FCC reiterated that it never intended an absolute prohibition of the broadcast of sexually explicit language, but wanted it channeled to a time of day where children would not be exposed to it.<sup>98</sup> The Commission,

<sup>89</sup> *In re* Complaint against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975) [hereinafter *Pacifica I*].

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 95-96.

<sup>93</sup> *Id.* at 97.

<sup>94</sup> *Id.* at 98.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 99.

<sup>97</sup> *In re* A "Petition for Clarification or Reconsideration" of a Citizen's Complaint against Pacifica Foundation, 59 F.C.C.2d 892, 892 (1976).

<sup>98</sup> *Id.*

however, did concede that it would be inequitable for it to hold a broadcaster responsible for indecent language said during live coverage of public events.<sup>99</sup> Pacifica challenged the declaratory order on appeal to the U.S. Court of Appeals for the D.C. Circuit, and a divided panel reversed the WBAI declaratory order.<sup>100</sup> The Supreme Court then granted certiorari<sup>101</sup> on the narrow question of whether the FCC was correct in determining that the language in Carlin's monologue as broadcast was indecent and prohibited by 18 U.S.C. § 1464.<sup>102</sup>

Following the lack of a unanimous consensus on indecency evidenced in the decisions of both the FCC<sup>103</sup> and the federal court of appeals,<sup>104</sup> the Supreme Court's ruling in *FCC v. Pacifica Foundation* was just as divided, with a plurality opinion, a concurrence, and two separate dissents. Justice John Paul Stevens, writing for the plurality,<sup>105</sup> recognized the limited First Amendment protections historically granted to broadcasting.<sup>106</sup> Pacifica did not object to the FCC's conclusion that the afternoon broadcast of Carlin's monologue was patently offensive.<sup>107</sup> Because content of that character is not entitled to absolute protection under all circumstances, Justice Stevens engaged the facts of the case in a contextual analysis to determine whether the FCC's indecency action was constitutionally permissible.<sup>108</sup>

<sup>99</sup> *Id.* at 893 n.1.

<sup>100</sup> *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). The three-judge panel split on the grounds to reverse the order. Writing for the court, Judge Edward Allen Tamm held that the order constituted censorship in violation of 47 U.S.C. § 326. *Id.* at 14. Chief Judge David L. Bazelon concurred, but also found the FCC's definition of "indecent" speech to be unconstitutional. *Id.* at 18 (Bazelon, C.J., concurring). Judge Harold Levanthal would have affirmed the order, narrowly reading the Commission's decision as limited to the language "as broadcast" in the early afternoon. *Id.* at 31–32 (Levanthal, J., dissenting).

<sup>101</sup> *FCC v. Pacifica Found.*, 434 U.S. 1008 (1978).

<sup>102</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978).

<sup>103</sup> See *In re Apparent Liability of Station WGLD-FM*, 41 F.C.C.2d 919 (1973), *reconsideration denied sub nom. In re Sonderling Broad. Corp.*, 41 F.C.C.2d 777 (1973), *aff'd sub nom. Ill. Citizens Comm. for Broad. v. FCC*, 515 F.2d 397 (D.C. Cir. 1974); *In re WUHY-FM*, 24 F.C.C.2d 408 (1970).

<sup>104</sup> See *Pacifica*, 556 F.2d at 9.

<sup>105</sup> Justice Stevens was joined in full by Justice William Rehnquist and Chief Justice Warren Burger. *Pacifica*, 438 U.S. at 729.

<sup>106</sup> The reasons for the limited protection are twofold. First, the pervasive presence of broadcasting confronts citizens in both public areas and in the privacy of their own homes. Second, the ease of broadcasting's accessibility makes it available to both adults and children. *Id.* at 748–50.

<sup>107</sup> *Id.* at 739. Justice Stevens went on to state that it was undisputed that the content of the broadcast was "vulgar," "offensive," and "shocking." *Id.* at 747.

<sup>108</sup> "[I]ndecency is largely a function of context—it cannot be adequately judged in the abstract." *Id.* at 742. Just because parts of society may find particular language offensive does not give the government the authority to suppress it. In fact, some of the most offensive words are unquestionably given First Amendment protection. *Id.* at 745–46.

In finding that the FCC's action was constitutional, Justice Stevens focused on two contextual distinctions that had relevance to the WBAI broadcast. He first addressed the uniquely pervasive presence that broadcast media had in the lives of all Americans.<sup>109</sup> "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."<sup>110</sup> He then rejected the warnings offered by WBAI prior to broadcasting Carlin's monologue as a defense, due to the radio audience's nature to constantly tune in and out of programming by noting "[t]o say that one may avoid further offense by turning off the radio is like saying that the remedy for an assault is to run away after the first blow."<sup>111</sup>

Secondly, Justice Stevens considered how "broadcasting is uniquely accessible to children, even those too young to read."<sup>112</sup> Recognizing the government's interest in the well-being of its youth and the relative ease with which children may obtain access to broadcast material, he found the FCC's special treatment (i.e., channeling) of indecent broadcasting "amply justified."<sup>113</sup> He concluded by stressing the narrowness of the plurality's opinion, affirming only the FCC's declaratory order declaring the George Carlin monologue indecent as broadcast.<sup>114</sup>

In his concurring opinion, Justice Lewis Powell, joined by Justice Harry Blackmun, agreed with the plurality's decision regarding the special treatment afforded to broadcasts due to its accessibility to children and its nature of reaching people in the privacy of their homes.<sup>115</sup> Yet he found some merit in argument that the plurality's ruling would have the effect of "[reducing] the adult population . . . to [hearing] only what is fit for children,"<sup>116</sup> as he recommended that the FCC consider this concern as it

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<sup>109</sup> *Id.* at 748.

<sup>110</sup> *Id.* (citing *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970)).

<sup>111</sup> *Id.* at 748-49.

<sup>112</sup> *Id.* at 749.

<sup>113</sup> *Id.* at 749-50.

<sup>114</sup> "It is appropriate, in conclusion, to emphasize the narrowness of our holding . . . We have not decided that an occasional expletive . . . would justify any sanction . . . The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant." *Id.* at 750.

<sup>115</sup> *Id.* at 758-60 (Powell, J., concurring).

<sup>116</sup> *Id.* at 760 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)) (changes in original).

developed its broadcast indecency standards.<sup>117</sup> He then reiterated the narrowness of the decision, in that it spoke only to the “verbal shock treatment” of the language used in the broadcast, and not to cases involving the isolated use of a potentially offensive word.<sup>118</sup>

In his dissenting opinion, Justice William Brennan, joined by Justice Thurgood Marshall, admonished the plurality for rationalizing the FCC’s action due to the presence of children in the audience, as it is the right of parents, and not the government, to make decisions regarding a child’s upbringing.<sup>119</sup> He also accused the plurality of having an “acute ethnocentric myopia” in its “inability to appreciate that . . . there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities.”<sup>120</sup> Justice Potter Stewart, along with Justices Brennan, Marshall, and Byron White, would have held that the FCC’s authority under 18 U.S.C. § 1464 was limited to actions pertaining only to obscene broadcasts.<sup>121</sup> Because the Carlin broadcast was not obscene, the four dissenting Justices believed that the FCC lacked the authority to sanction it.<sup>122</sup>

### C. Broadcast Indecency in a Post-Pacifica World

In the years following *Pacifica*, the FCC strictly observed the narrowness of the Court’s holding.<sup>123</sup> Instances of fleeting expletives that were brought to the FCC’s attention were found not to be in violation of the FCC’s

<sup>117</sup> *Id.* Currently, the FCC sanctions indecent broadcasts that air between 6:00 a.m. and 10:00 p.m. 47 C.F.R. § 73.3999 (1995). One commentator suggested that the only permissible way of channeling indecent broadcasts without violating the *Butler* principle is to prohibit indecent broadcasts during normal working hours or until the early evening, times when parents are least likely to be at home. C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VILL. SPORTS & ENT. L.J. 45, 54–58 (1996).

<sup>118</sup> *Pacifica*, 438 U.S. at 760–61 (Powell, J., concurring).

<sup>119</sup> *Id.* at 769–70 (Brennan, J., dissenting). He then explained: “As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin’s unabashed attitude towards the seven ‘dirty words’ healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words.” *Id.* at 770.

<sup>120</sup> *Id.* at 775. *Cf. In re WUHY-FM*, 24 F.C.C.2d 408, 422 (1970) (Johnson, Comm’r, dissenting) (accusing the FCC of not understanding the culture of America’s young adults and students).

<sup>121</sup> *Pacifica*, 438 U.S. at 780 (Stewart, J., dissenting). The Supreme Court characterized a work as obscene when (1) an average person, applying contemporary community standards, finds that the work taken as a whole appeals to a prurient interest, (2) the work depicts or describes sexual conduct in a patently offensive way, and (3) the work lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>122</sup> *Pacifica*, 438 U.S. at 778 (Stewart, J., dissenting).

<sup>123</sup> *See In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978).



indecent standard, as they did not engage in the same “verbal shock treatment” of the Carlin monologue.<sup>124</sup>

The FCC did not find a broadcast indecent again until 1987. Under pressure from socially conservative activist groups like Morality in Media and the National Federation of Decency,<sup>125</sup> it clarified the broadcast indecency standard by simultaneously releasing three separate orders.<sup>126</sup> It restated, “indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. Such indecent speech is actionable at times of the day where there is a reasonable risk that children may be in the audience.”<sup>127</sup> However, clearly discernable references to sexual organs and activities could be found to be “patently offensive as measured by contemporary community standards for the broadcast medium,”<sup>128</sup> even absent the specific words at issue in *Pacifica*.<sup>129</sup>

The orders further went on to state that indecent speech, largely a function of context, must involve more than an isolated use of an offensive word.<sup>130</sup> “Isolated use of unplanned expletives during live coverage of news or public affairs programming would not necessarily be actionable . . . .”<sup>131</sup> Unlike the barrage of expletives in Carlin’s monologue, repetitive use of specific sexual or excretory words or phrases was no longer considered an *absolute* requirement for a finding of indecency.<sup>132</sup> However, “[i]f a complaint focuse[d] *solely* on the use of expletives . . . deliberate and repetitive use in a patently offensive manner [was] prerequisite to a finding

<sup>124</sup> See, e.g., *In re Application of Pacifica Found.*, 95 F.C.C.2d 750, 760–61 (1983) (no finding of indecency where words like “motherfucker” and “shit” were broadcast, but did not amount to repetitious “verbal shock treatment”); *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d at 1254 & n.6 (no finding of indecency where programs “differ[ed] dramatically from the concentrated and repeated assault involved in *Pacifica*).

<sup>125</sup> Brown & Candeub, *supra* note 11, at 1487–88.

<sup>126</sup> *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987), *reconsideration granted sub nom. In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987) [hereinafter *Pacifica II*]; *In re Regents of the Univ. of Ca.*, 2 F.C.C.R. 2703 (1987), *reconsideration granted sub nom. In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987) [hereinafter *Regents*]; *In re Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705 (1987), *reconsideration granted*, 3 F.C.C.R. 930 (1987) [hereinafter *Infinity*].

<sup>127</sup> *Regents*, 2 F.C.C.R. at 2703 (citing *Pacifica I*, 56 F.C.C.2d 94, 98 (1975)) (quotations omitted); *Infinity*, 2 F.C.C.R. at 2705 (citing *Pacifica I*, 56 F.C.C.2d at 98) (quotations omitted). See *Pacifica II*, 2 F.C.C.R. at 2699.

<sup>128</sup> *Regents*, 2 F.C.C.R. at 2703.

<sup>129</sup> *Id.* at 2704.

<sup>130</sup> *Pacifica II*, 2 F.C.C.R. at 2699; *Infinity*, 2 F.C.C.R. at 2705.

<sup>131</sup> *Pacifica II*, 2 F.C.C.R. at 2700.

<sup>132</sup> *Infinity*, 2 F.C.C.R. at 2706 (emphasis added).

of indecency.”<sup>133</sup> The FCC applied this clarified definition of indecency to cite three separate radio stations for indecent broadcasts.<sup>134</sup>

On various petitions for clarification and reconsideration, the FCC affirmed the three rulings, reiterating that a contextual approach was necessary to determine whether a broadcast was patently offensive to contemporary community standards for the broadcast medium.<sup>135</sup> This analysis included whether the words or depictions were “vulgar” or “shocking,” whether they were isolated or fleeting, and whether there was a reasonable risk of children in the audience.<sup>136</sup> Regarding “contemporary community standards,” the FCC clarified that a general broadcasting standard of an average broadcast viewer or listener, and not a local standard, would be used to judge indecency.<sup>137</sup> In a footnote, the FCC indicated midnight, rather than 10 p.m., was its current ideal timeframe regarding the “safe harbor” when stations could safely air allegedly indecent programs, as the risk of children in the audience was minimized at that later hour.<sup>138</sup>

Various “commercial broadcasting networks, public broadcasting entities, licensed broadcasters, associations of broadcasters and journalists, program suppliers, and public interest groups” sought judicial review of the FCC’s reconsideration order.<sup>139</sup> Writing for the D.C. Circuit, then-Circuit Judge Ruth Bader Ginsburg upheld the Commission’s definition of indecency, citing both the definition’s purpose to protect children from

<sup>133</sup> *Pacifica II*, 2 F.C.C.R. at 2699 (emphasis added).

<sup>134</sup> A broadcast of the program “IMRU” on KFPK-FM was declared indecent for airing excerpts from the gay-themed play “Jerker.” *Id.* at 2700–01. In addition to extensive use of language that describes sexual activities and organs in a patently offensive manner, the words “shit” and “fucking” were used repeatedly. *Id.* at 2700. A music program on KCSB-FM was declared indecent for broadcasting the song “Makin’ Bacon,” which featured explicit innuendo in its lyrics like, “Turn around baby, let me take you from behind/Makin’ bacon is on my mind.” *Regens*, 2 F.C.C.R. at 2703–04. Finally, “The Howard Stern Show” on WYSP-FM was declared indecent for “explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation[,] and testicles.” *Infinity*, 2 F.C.C.R. at 2706.

<sup>135</sup> *In re Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 932 (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>136</sup> *Id.*

<sup>137</sup> *Id.* at 933.

<sup>138</sup> *Id.* at 934 n.47. Commissioner Patricia Diaz Dennis issued a concurring opinion that questioned a midnight start-time for indecent programming. *Id.* at 936–37 (Dennis, Comm’r, concurring). She viewed the arguments provided by the FCC in support of a midnight start time would equally support an earlier start-time. *Id.* at 936. Her recommendation was a rule establishing the end of primetime programming as an appropriate start-time, with a midnight start-time for Friday and Saturday nights. *Id.* at 936–37.

<sup>139</sup> *ACT I*, 852 F.2d at 1334.

indecenty<sup>140</sup> and the FCC's assurances of a restrained enforcement policy.<sup>141</sup> The court, however, held that the FCC failed to fully consider its new channeling approach, vacated that portion of the reconsideration order, and remanded the matter back to the FCC for reconsideration.<sup>142</sup>

Unhappy with the court's ruling, Senator Jesse Helms added a rider to an appropriations act that required the FCC to enforce indecency regulations on a 24-hour per day basis.<sup>143</sup> The D.C. Circuit held that the total ban was unconstitutional on the grounds that the government "must identify some reasonable period of time during which indecent material may be broadcast[, which] necessarily means that the [government] may not ban such broadcasts entirely."<sup>144</sup>

Congress again tried to establish the "safe harbor" provision with the Public Telecommunications Act of 1992,<sup>145</sup> which established safe harbor hours from 10 p.m. to 6 a.m. for public broadcasting stations, and from midnight to 6 a.m. for all other broadcasting stations. Once again, the D.C. Circuit invalidated this measure as Congress "fail[ed] to explain how [the] disparate treatment [afforded to public broadcasters] advanced its goal of protecting young minds from the corrupting influences of indecent speech."<sup>146</sup> The FCC settled on establishing the safe harbor from 10 p.m. to 6 a.m. for all broadcast stations, which is currently embodied in the federal regulations.<sup>147</sup>

Despite the debate over the applicable safe harbor hours, indecency enforcement continued using the standard established in the FCC's 1987 reconsideration order. From 1987 until President George W. Bush's inauguration in 2001, the FCC issued a total of 36 fines for broadcast indecency.<sup>148</sup> Then, in 2001, the FCC issued a Policy Statement ("Industry Guidance") to provide "guidance to the broadcast industry regarding . . . [its] enforcement policies with respect to broadcast indecency."<sup>149</sup> It restated the

<sup>140</sup> *Id.* at 1340.

<sup>141</sup> *Id.* at 1340 n.14.

<sup>142</sup> *Id.* at 1340-44.

<sup>143</sup> Brown & Candeub, *supra* note 11, at 1491 (citing Departments of Commerce Appropriations Act of 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988)).

<sup>144</sup> Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied sub nom.* Children's Legal Found. v. Action for Children's Television, 503 U.S. 914 (1992).

<sup>145</sup> PUBLIC TELECOMMUNICATIONS ACT OF 1992, Pub. L. No. 102-356, § 16, 106 Stat. 949, 954 (1992).

<sup>146</sup> Action for Children's Television v. FCC, 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc), *cert. denied sub nom.* Pacifica Found. v. FCC, 516 U.S. 1043 (1996).

<sup>147</sup> See 47 C.F.R. § 73.3999 (2008).

<sup>148</sup> Brown & Candeub, *supra* note 11, at 1492-93.

<sup>149</sup> *Industry Guidance*, 16 F.C.C.R. 7999, 7999 (2001).

two fundamental determinations of an indecency finding. “First, the material must describe or depict sexual or excretory organs or activities. Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium,”<sup>150</sup> which is that of an average broadcast viewer or listener and not that of the individual complainant.<sup>151</sup> When the Commission considered the full context of the material,<sup>152</sup> its explicitness or graphic nature, its length or repetition, and its intent to shock or titillate were the principal factors to be weighed in determining whether a broadcast was patently offensive.<sup>153</sup>

#### D. Television & Indecency

As radio stations and shock jocks were cited for indecent broadcasts throughout the 1970s and 1980s, the FCC remained quiet against television broadcasts. This was due to the television industry’s efforts at self-regulation, which included the National Association of Broadcasters’ Television Code (“the Code”).<sup>154</sup> From its inception in 1952 until its elimination in 1983,

the Code recognized broadcasters’ responsibilities to present certain themes with greater sensitivity and with regard to their potential effects on children. The early versions of the Code forbade offensive language, vulgarity, illicit sexual relations, sex crimes and abnormalities during any time period when children comprised a substantial segment of the viewing audience.<sup>155</sup>

Shows that adhered to the Code bore the “Seal of the Code of Good Practices.”<sup>156</sup> Journalist Jeff Jarvis pointed out some of Code’s restrictions: “[I]llicit sex relations are not treated as commendable . . . . [A]ttacks on

<sup>150</sup> *Id.* at 8002 (citations omitted).

<sup>151</sup> *Id.* The Policy Statement lists two television programs found not to be indecent that illustrate the community standard. Both “The Oprah Winfrey Show” and “The Geraldo Rivera Show” featured segments on improving one’s sex life. In determining that neither show was indecent, the Commission noted that while the content may have been offensive to some people, it would not be found indecent using the standard of an average broadcast viewer. *Id.* at 8011–12.

<sup>152</sup> The Commission noted that when making an indecency determination, the *full* context in which the material appeared was *critically important*. See *id.* at 8002 (emphasis added).

<sup>153</sup> *Id.* at 8003.

<sup>154</sup> *NAB Television Code*, 95 F.C.C.2d 700, 701–02 (1983).

<sup>155</sup> *Id.* at 702.

<sup>156</sup> Jeff Jarvis, *F\*cked by the F\*CC, NATION*, May 17, 2004, available at <http://www.thenation.com/doc/20040517/jarvis>.

religion and religious faiths are not allowed . . . . The presentation of cruelty, greed and selfishness as worthy motivations is to be avoided . . . . Unfair exploitation of others for personal gain shall not be presented as praiseworthy.<sup>157</sup> These restrictions were so stringent that some network officials deemed words like “pregnant” as too provocative for television.<sup>158</sup>

Even though the Code was eliminated in 1983, it was not until 1997 when the FCC determined that indecent material was contained in a television broadcast. An unidentified science fiction motion picture<sup>159</sup> broadcast at 2 p.m. on two Virginia stations was found to “contain repetitious and gratuitous use of language that refers to sexual and excretory activities or organs in patently offensive terms.”<sup>160</sup>

The FCC cited the Spanish-language television program “*No Te Duermas*” for three separate broadcasts of indecent material that aired in April and May of 2000.<sup>161</sup> Using the national community standard for the broadcast industry to determine if the material was patently offensive, vignettes containing innuendo with unmistakable sexual meaning, a non-clinical discussion of sexual activities, and a series of ongoing unmistakable sexual references were found to be in violation of the indecency standard.<sup>162</sup> Even though one of the episodes “bleeped” many of the Spanish-language expletives,<sup>163</sup> “the sexual meaning of the segments [was] unmistakable.”<sup>164</sup> However, this same episode contained two separate instances of the expletive “motherfucker,” which was said in English and not bleeped by the censors.<sup>165</sup> Nowhere in the FCC’s Notice of Apparent Liability for

<sup>157</sup> *Id.* A full version of the Code of Practices for Television Broadcasters is available at <http://www.tvhistory.tv/SEAL-Good-Practice.htm> (last visited Sept. 25, 2008).

<sup>158</sup> See Nell Minow, *Standards for TV Language Rapidly Going Down the Tube*, CHI. TRIB., Oct. 7, 2003, Tempo, at 2.

<sup>159</sup> Grant Broad. Sys. II, Inc., 12 F.C.C.R. 8277, 8277 (1997). An Internet search using the names of characters mentioned dialogue found in the attached transcript, *id.* at 8279–81, revealed the unidentified film to be the R-rated DEEPSTAR SIX (TriStar Pictures 1989).

<sup>160</sup> Grant Broad. Sys. II, Inc., 12 F.C.C.R. at 8278. The FCC issued a forfeiture of \$2,000 for the broadcast. *Id.*

<sup>161</sup> *In re Telemundo of Puerto Rico License Corp.*, 16 F.C.C.R. 7157, 7159 (2001).

<sup>162</sup> *Id.* at 7159–60. The FCC issued a forfeiture of \$21,000 for willful and repeated violations of 18 U.S.C. § 1464. *Id.* at 7160.

<sup>163</sup> The transcript of the May 29 broadcast shows that various Spanish-language words and phrases were bleeped, including “*maricón*” (faggot) and “*mama bicho*” (cocksucker). *Id.* at 7160.

<sup>164</sup> *Id.*

<sup>165</sup> The transcript of the May 29 episode translates what was in Spanish into English, and designates when dialogue was spoken in English. While the Spanish-language expletives were bleeped and subsequently identified, the English-language expletives were not given any such treatment and remained in the transcript, indicating they were broadcast as said. *Id.* at 7165.

Forfeiture did the broadcasting of English-language expletives factor into the finding of indecency.

Under pressure from Congress,<sup>166</sup> the FCC issued a finding of indecency against a broadcast of “KRON 4 Morning News.”<sup>167</sup> On October 4, 2002, at approximately 8:25 a.m., the morning show’s hosts interviewed two performers in the stage production of “Puppetry of the Penis,”<sup>168</sup> a performance show where the actors appear nude on stage and manipulate their genitalia until it resembles various objects.<sup>169</sup> As they stood up to perform a demonstration to be viewed only by the show’s hosts, one of their penises was fully exposed on-camera,<sup>170</sup> albeit for less than a second.<sup>171</sup>

Using the indecency standard from the 2001 “Industry Guidance” policy statement, the brief display of frontal nudity was determined to be indecent, despite its fleeting and accidental nature.<sup>172</sup> As in the previous two findings of indecent television broadcasts, fleeting expletives were not the basis for the Commission’s ruling. This would be the last finding of indecent television broadcast until the 2003 Golden Globe Awards.

#### E. Initial Tolerance of Fleeting Expletives

The 2001 Industry Guidance policy statement stated that repetition of offensive language or a “persistent focus on sexual or excretory material . . . exacerbate[s] the potential offensiveness of broadcasts.”<sup>173</sup> However, the broadcast of a fleeting and isolated expletive, standing alone, tends to weigh against a finding of indecency.<sup>174</sup> Additional factors, such as references to

<sup>166</sup> The Parents Television Council, discussed further on, noted that the FCC’s issuance of a Notice of Apparent Liability against KRON-TV came “one day before the U.S. House of Representatives was scheduled to hold a hearing to investigate the FCC’s failure to enforce federal indecency laws.” *Dereliction of Duty: How the Federal Communications Commission Has Failed the Public*, <http://www.parentstv.org/PTC/publications/reports/fccwhitepaper/main.asp> (last visited Sept. 25, 2008) [hereinafter *Dereliction of Duty*].

<sup>167</sup> *In re Young Broad. of S.F., Inc.*, 19 F.C.C.R. 1751, 1751 (2004).

<sup>168</sup> *Id.* at 1751.

<sup>169</sup> *Id.* at 1752.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1755.

<sup>172</sup> *Id.* at 1756. The FCC issued a forfeiture of \$27,500 for the broadcast. *Id.* at 1757.

<sup>173</sup> *Industry Guidance*, 16 F.C.C.R. 7999, 8008 (2001).

<sup>174</sup> *Id.* The Commission provided two examples where material was not found indecent because it was fleeting and isolated. The broadcast of the line, “The hell I did, I drove the motherfucker,” was not indecent due to its fleeting and isolated nature within the context of live programming. *Id.* at 8009 (citing *L.M. Commc’ns of S.C., Inc.*, 7 F.C.C.R. 1595 (1992)). Also, a news announcer’s comment of, “Oops, fucked that one up,” did not warrant a finding of indecency due to its isolated and accidental nature. *Id.* (citing *In re Applications of Lincoln Dellar*, 8 F.C.C.R. 2582 (1993)).

sexual activities with children<sup>175</sup> or the overall graphic or explicit nature of the material,<sup>176</sup> were needed for a fleeting expletive to warrant an indecency finding.

After the FCC published these examples to provide guidance to the broadcast industry, the Commission was faced with the broadcast of an expletive during NBC's airing of the Golden Globe Awards on January 19, 2003.<sup>177</sup> When accepting a Golden Globe on-stage,<sup>178</sup> U2's lead singer Bono uttered the phrase, "this is really, really fucking brilliant."<sup>179</sup> After receiving some complaints,<sup>180</sup> an overwhelming majority of them from individuals associated with the media watchdog group Parents Television Council (PTC),<sup>181</sup> the FCC Enforcement Bureau found that this use of "fucking" was not indecent because it was used "as an adjective or expletive to emphasize an exclamation,"<sup>182</sup> and not to "[depict] or [describe] sexual or excretory activities or organs."<sup>183</sup> Citing precedent used in the Industry Guidance statement toward "fleeting and isolated remarks of this nature,"<sup>184</sup> the FCC Enforcement Bureau rejected the claims of indecency without ever applying the community standards analysis.

#### F. From Bono to Nicole Richie: Indecency under a New Standard

Unhappy with the Bureau's denial of its Golden Globes complaints, the PTC filed an Application for Review with the FCC's commissioners, maintaining that an utterance of "the 'F-Word' in any shape, form or

<sup>175</sup> *Id.* (citing *Tempe Radio, Inc.*, 12 F.C.C.R. 21828 (1997) (announcer's joke regarding having sex with an eight-year-old, while fleeting, found to be patently offensive and indecent)).

<sup>176</sup> *Id.* (citing *LBJ's Broad. Co.*, 13 F.C.C.R. 20956 (1998) (DJ's comment of, "Suck my dick you fucking cunt," while fleeting, found to be explicit and indecent)).

<sup>177</sup> *In re Complaints against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859, 19859 (2003) [hereinafter *Golden Globes I*].

<sup>178</sup> The award was for Best Original Song in a Motion Picture for the song "The Hands That Built America" in the film "Gangs of New York." HFPA—Nominations and Winners, <http://www.goldenglobes.org/nominations/year/2002> (last visited Sept. 25, 2008).

<sup>179</sup> Bono alternatively may have said, "[T]his is fucking great." *Golden Globes I*, 18 F.C.C.R. at 19859. The complaints received by the FCC vary in their characterization of what was said. *Id.* at 19859 n.4.

<sup>180</sup> The FCC received 234 complaints regarding the broadcast. *Id.* at 19859.

<sup>181</sup> Members of the Parents Television Council accounted for 217 of the 234 complaints filed with the FCC, or 92.7 percent. *Id.* Counting all PTC complaints as one, only eighteen individual complaints were filed.

<sup>182</sup> *Id.* at 19861.

<sup>183</sup> *Id.* at 19860–61 (citing *Industry Guidance*, 16 F.C.C.R. 7999, 8002 (2001)).

<sup>184</sup> *Id.* (citing *Industry Guidance*, 16 F.C.C.R. at 8009) (utterance of "motherfucker" in the context of live and spontaneous programming not actionable).

meaning on broadcast network television” is patently offensive.<sup>185</sup> NBC opposed the Application for Review, and argued that the FCC Enforcement Bureau’s original order was fully consistent with existing precedent.<sup>186</sup> In contrast to the Industry Guidance policy statement, published just three years earlier, the full Commission declared that its past rulings regarding a fleeting or isolated broadcast of the word “fuck” were no longer good law.<sup>187</sup> Any broadcast of “fuck” would now meet the indecency test, as it inherently has a sexual connotation<sup>188</sup> and “is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language.”<sup>189</sup>

Despite the fact that NBC immediately deleted the expletive from its transmissions to affiliated stations in the Mountain and Pacific time zones, which did not air the 2003 Golden Globe Awards live,<sup>190</sup> the Commission admonished NBC for allowing the broadcast of an expletive while being on-notice of potential offensive language,<sup>191</sup> as Bono “reportedly used the ‘F-Word’ on the 1994 Grammy Awards broadcast.”<sup>192</sup> No forfeitures were assessed against NBC, but the FCC placed all broadcasters “on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the ‘F-Word.’”<sup>193</sup>

Because of the FCC’s new policy regarding the broadcast of the word “fuck,” sixty-six ABC affiliates refused to air an unedited version of the film “Saving Private Ryan,”<sup>194</sup> fearing that the profanity in the film would violate the new indecency policy.<sup>195</sup> This special Veterans Day broadcast<sup>196</sup> came

<sup>185</sup> *In re Complaints against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4976 (2004) [hereinafter *Golden Globes II*].

<sup>186</sup> *Id.* See *Industry Guidance*, 16 F.C.C.R. at 8009 (broadcast of “motherfucker” in the context of live and spontaneous programming not indecent).

<sup>187</sup> *Golden Globes II*, 19 F.C.C.R. at 4980.

<sup>188</sup> *Id.* at 4978.

<sup>189</sup> *Id.* at 4979. The Commission failed to fully examine whether the average broadcast viewer would find the phrase “fucking brilliant” patently offensive, instead labeling it “shocking and gratuitous.” *Id.*

<sup>190</sup> See *Broadcast Decency: Hearing on H.R. 3717 Before the Subcomm. on Telecommunications and the Internet* (2004) [hereinafter *Broadcast Decency*] (statement of Alan Wurtzel, President of Research and Media Development, National Broadcasting Company).

<sup>191</sup> *Golden Globes II*, 19 F.C.C.R. at 4979.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 4982.

<sup>194</sup> Ted Hearn, *House Wants Big Smut Fines*, MULTICHANNEL NEWS, Feb. 21, 2005, <http://www.multichannel.com/article/CA505323.html> [hereinafter Hearn, *Smut Fines*].

<sup>195</sup> Ted Hearn, *FCC: Private Ryan Not Indecent*, MULTICHANNEL NEWS, Feb. 28, 2005, <http://www.multichannel.com/article/CA507371.html>.

<sup>196</sup> The film, broadcast on November 11, 2004, from approximately 8 p.m. until 11 p.m., was preceded with a taped introduction of Dr. Harold Baumgarten, a veteran of the D-Day landing at Normandy, and Senator John McCain, also an armed forces veteran. *In re Complaints against Various*



with warnings of the “R-rated language and graphic content”<sup>197</sup> along with the voluntary television rating warning parents of the film’s content.<sup>198</sup>

Despite new policy regarding the broadcast of “fuck” and the film’s coarse dialogue,<sup>199</sup> the unedited broadcast of “Saving Private Ryan” did not violate the Commission’s indecency standard.<sup>200</sup> While the FCC conceded that the language was “graphic and explicit, and [was] repeated throughout the . . . film,”<sup>201</sup> it was not intended to pander, titillate or shock due to its integral role in “conveying the horrors of war.”<sup>202</sup> The FCC believed that any censoring of the language would have compromised the impact and integrity of the film’s broadcast.<sup>203</sup> FCC Chairman Michael K. Powell, satisfied with ABC’s warnings to viewers,<sup>204</sup> echoed the necessity for the “accurate depiction of this significant historical tale.”<sup>205</sup>

In 2006, the FCC sought to broaden the scope of its crackdown on broadcast expletives with the “Omnibus Order,” which addressed complaints of broadcasts from the previous four years.<sup>206</sup> Despite inaction on broadcasters’ petitions of reconsideration filed in response to the new post-Golden Globes policy,<sup>207</sup> the FCC responded to another PTC complaint<sup>208</sup>

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, 4507–08 (2005) [hereinafter *Saving Private Ryan*].

<sup>197</sup> *Id.* at 4508. The advisory aired before the film, as well as at the conclusion of each of the ten commercial breaks during the broadcast. *Id.* But see *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (noting that prior warnings cannot completely protect the viewer from unexpected program content as the broadcast audience constantly tunes in and out of programming).

<sup>198</sup> The film was rated “TV MA LV” indicating that the broadcast was for mature audiences only due to language and violence. *Saving Private Ryan*, 20 F.C.C.R. at 4508.

<sup>199</sup> Complaints cited that “Saving Private Ryan” contained numerous expletives including “fuck,” “shit,” “bullshit,” and variations of those words. *Id.* at 4509.

<sup>200</sup> *Id.* at 4507.

<sup>201</sup> *Id.* at 4512.

<sup>202</sup> *Id.* at 4512–13.

<sup>203</sup> “Deleting 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.” *Id.* at 4513.

<sup>204</sup> Powell called for broadcasters to provide viewers with a full and wide disclosure of what they are likely to see and hear, so they can “make their own well-informed decisions whether to watch or not.” *Id.* at 4515 (statement of Chairman Michael K. Powell). But see *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (Supreme Court rejects station’s warnings prior to airing George Carlin monologue as a defense, due to the nature of a broadcast audience to constantly tune in and out of programming).

<sup>205</sup> *Saving Private Ryan*, *supra* note 196, at 4515.

<sup>206</sup> *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*].

<sup>207</sup> See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 452 (2d Cir. 2007).

<sup>208</sup> *Omnibus Order*, 21 F.C.C.R. at 2690 n.150 (identification of complaint as a letter from Lara Mahaney of the Parents Television Council).

by finding Fox's broadcast of the 2002 Billboard Music Awards indecent.<sup>209</sup> Cher, responding to some of her critics, told the crowd, "People have been telling me I'm on the way out every year, right? So fuck 'em."<sup>210</sup> Based on the Commission's new policy, Cher's utterance of "fuck" during the live broadcast was considered "patently offensive under contemporary community standards for the broadcast medium."<sup>211</sup>

When the FCC responded to yet another PTC complaint,<sup>212</sup> Fox's broadcast of the 2003 Billboard Music Awards was similarly declared indecent.<sup>213</sup> "The Simple Life" star Nicole Richie was the culprit this time, for having remarked, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."<sup>214</sup> In following the new indecency policy, Richie's remark of "fucking simple" in the context of a live broadcast was considered indecent.<sup>215</sup> However, the FCC also declared that Richie's reference to "cow shit" violated its indecency test, as "shit" was labeled "a vulgar, graphic, and explicit depiction of excretory activity [that] invariably invokes a coarse excretory image."<sup>216</sup>

Under this standard, two additional programs were cited as indecent broadcasts: ABC's primetime drama "NYPD Blue" for utterances of "bullshit,"<sup>217</sup> and CBS's "The Early Show" for a "Survivor: Vanuatu" contestant's description of a fellow contestant as a "bullshitter."<sup>218</sup> Showing some restraint, the FCC did not issue an indecency finding against the broadcast of "dick" and "dickhead" on "NYPD Blue."<sup>219</sup> While conceding some viewers would be offended by those expletives, they were "not sufficiently vulgar, explicit, or graphic descriptions of sexual organs or activities to support a finding of patent offensiveness."<sup>220</sup>

In an effort to limit the broadcast of contextually permissible expletives established by the "Saving Private Ryan" order, the FCC declared that expletives<sup>221</sup> aired in the "Godfathers and Sons" installment of the PBS

<sup>209</sup> *Id.* at 2691.

<sup>210</sup> *Id.* at 2690.

<sup>211</sup> *Id.* at 2691.

<sup>212</sup> *Id.* at 2693 n.163 (identifying a complaint as a letter from Lara Mahaney of the Parents

Television Council).

<sup>213</sup> *Id.* at 2694.

<sup>214</sup> *Id.* at 2693 n.164.

<sup>215</sup> *Id.* at 2694.

<sup>216</sup> *Id.* at 2693.

<sup>217</sup> *Id.* at 2696-98.

<sup>218</sup> *Id.* at 2698-99.

<sup>219</sup> *Id.* at 2696.

<sup>220</sup> *Id.*

<sup>221</sup> *See id.* at 2683 n.111. According to the complaint, the program included variations of "motherfucker" and "shit," as well as an on-screen title identifying the song "Cocksucker Blues." *See id.*

documentary series “The Blues” were indecent.<sup>222</sup> Martin Scorsese, who produced the series, maintained that an unedited airing was necessary “to accurately capture the essential character of the blues and the subculture in which it originated and flourished,”<sup>223</sup> while the station emphasized the educational experience of viewing the series.<sup>224</sup> The FCC disagreed with these arguments, stating that this was not one of the rare contexts where the airing of expletives is “demonstrably essential to the nature of an artistic or educational work.”<sup>225</sup>

Fox and CBS sought judicial review from the Second Circuit Court of Appeals of the portions of the Omnibus Order pertaining to fleeting expletives.<sup>226</sup> The FCC asked for and received a voluntary remand, as it had violated its own indecency procedure by failing to elicit responses from broadcasters with a preliminary letter of inquiry.<sup>227</sup> After the FCC received the responses from the broadcasters, it vacated the fleeting expletives section of the Omnibus Order and replaced it with a revised order (“Remand Order”).<sup>228</sup>

The bulk of the Remand Order reaffirmed the FCC’s position that the broadcast of “fuck” or “shit” during a live awards show would be per se indecent. When addressing Nicole Richie’s appearance at “The 2003 Billboard Music Awards,” the Commission asserted that it would have found the broadcast indecent before the Golden Globes decision, as “cow shit” and “fucking simple” constituted repeated offensive language.<sup>229</sup>

The FCC, however, did not rule that every broadcast of “fuck” or “shit” on a live broadcast would be per se indecent. The broadcast of “bullshitter” on “The Early Show,” originally considered indecent, was now not an actionable broadcast as “it was spoken during a bona fide news interview.”<sup>230</sup> Even though there was no news exception anywhere in the FCC’s indecency

<sup>222</sup> *Id.* at 2685.

<sup>223</sup> John Eggerton, *FCC ‘Whitewashing’ Blues, Says Scorsese*, BROADCASTING & CABLE, May 8, 2006, <http://www.broadcastingcable.com/article/ca6332444.html> [hereinafter Eggerton, *Scorsese*].

<sup>224</sup> *Omnibus Order*, 21 F.C.C.R. 2664, 2684 (2006).

<sup>225</sup> *Id.* at 2686.

<sup>226</sup> *In re* Complaints Regarding Various Television Broadcasts between February 2, 2002, and March 8, 2005, 21 F.C.C.R. 13299, 13301 (2006) [hereinafter *Remand Order*]. ABC and Hearst-Argyle Television filed an appeal with the D.C. Court of Appeals. That appeal was transferred and consolidated with the appeal in the Second Circuit. *Id.*

<sup>227</sup> *Id.* at 13301–02. The FCC did send a letter of inquiry to Fox regarding the 2003 Billboard Music Awards and received a limited response. Letters of inquiry were not sent to Fox regarding the 2002 Billboard Music Awards, to ABC regarding “NYPD Blue,” or to CBS regarding “The Early Show.” *Id.* at 13302 n.21.

<sup>228</sup> *Id.* at 13302.

<sup>229</sup> *Id.* at 13307.

<sup>230</sup> *Remand Order*, 21 F.C.C.R. at 13327.

guidelines,<sup>231</sup> First Amendment interests and a cautious approach to news programming prevented a finding of indecency for an interview on “The Early Show.”<sup>232</sup>

Fox petitioned the Second Circuit for judicial review of the Remand Order, which was consolidated into the Second Circuit’s review of the Omnibus Order.<sup>233</sup> A three-judge panel then heard arguments on the validity of the FCC’s new fleeting expletives policy announced in the Golden Globes Order and applied in the Remand Order.<sup>234</sup> Fox’s counsel argued that the FCC could not provide a reasoned explanation for its change in policy regarding fleeting expletives.<sup>235</sup> The FCC maintained that its prior decisions provided broadcasters with guidance regarding what did and did not constitute indecency.<sup>236</sup> While numerous statutory and constitutional arguments were raised,<sup>237</sup> the court made clear that it would decide the petition for review on the most narrow grounds possible.<sup>238</sup>

#### IV. THE DECISION: *FOX TELEVISION STATIONS, INC. v. FCC*

The issue presented before the Second Circuit was whether the FCC’s new fleeting expletive policy, announced in the Golden Globe Order and applied in the Remand Order, was a valid exercise of its power.<sup>239</sup> True to its word, the court decided the petition on narrow procedural grounds. The court held that the FCC’s Remand Order was an arbitrary and capricious agency decision in violation of the Administrative Procedure Act, as no reasoned basis was provided for the agency’s sudden change in policy toward fleeting expletives.<sup>240</sup> Accordingly, the court remanded the case back to the

<sup>231</sup> See *id.*

<sup>232</sup> *Id.* at 13327–28. The indecency ruling against “NYPD Blue” was dismissed on procedural grounds for inconsistencies in the complaint. *Id.* at 13328–29.

<sup>233</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). CBS and NBC were also granted motions to intervene on Fox’s Remand Order petition. *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> John Eggerton, *FCC and Fox Square Off on Profanity*, BROADCASTING & CABLE, Dec. 20, 2006, <http://www.broadcastingcable.com/article/ca6401750.html> [hereinafter Eggerton, *Profanity*].

<sup>236</sup> *Id.*

<sup>237</sup> See *Fox Television Stations*, 489 F.3d at 454.

<sup>238</sup> Eggerton, *Profanity*, *supra* note 235.

<sup>239</sup> *Fox Television Stations*, 489 F.3d at 454.

<sup>240</sup> *Id.* at 455. The court also addressed numerous constitutional challenges raised by the networks. *Id.* at 462–66. While these points were admittedly dicta, some of them are discussed in later sections of this paper. *Id.* at 462 n.12.

FCC for further analysis of the issues raised by the networks.<sup>241</sup> The Supreme Court of the United States has since granted certiorari to review the Second Circuit's decision.<sup>242</sup>

This section will examine the court's decision to reject the FCC's reasoned explanation for its change in policy by framing its statutory grounds, and analyzing each of the FCC's proffered reasons against the majority opinion, the dissenting opinion, and the parties' briefs submitted to the Supreme Court.

### A. Administrative Procedure Act

There is no absolute "barrier to an agency altering its initial interpretation of a regulation to adopt another *reasonable* interpretation—even one that represents a new policy response generated by a different administration."<sup>243</sup> "[A]gencies are free to change their rules and policies without judicial second-guessing[, b]ut an agency cannot ignore a substantial diversion from its prior policies."<sup>244</sup>

Under the Administrative Procedure Act ("APA"), "a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>245</sup> An agency action qualifies as arbitrary and capricious "if the agency . . . offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>246</sup> The reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given."<sup>247</sup>

At issue here was not the FCC's power to regulate fleeting expletives, but the implementation of the Remand Order's new policy, which

<sup>241</sup> *Id.* at 467. The Second Circuit also noted, in admitted dicta, that it was "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Id.* at 462 & n.12. It went on to express concern that the indecency test could be unconstitutionally vague and that new media and technologies could make the uniquely pervasive nature of broadcast television obsolete at some point in the future. *Id.* at 463–66.

<sup>242</sup> *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008).

<sup>243</sup> *Paralyzed Veterans of Am. v. D.C. Arena Ltd. P'ship*, 117 F.3d 579, 586 (D.C. Cir. 1997) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)) (emphasis added).

<sup>244</sup> *CBS Corp. v. FCC*, 535 F.3d 167, 181–82 (3d Cir. 2008).

<sup>245</sup> 5 U.S.C. § 706(2)(A) (2008).

<sup>246</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d. Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>247</sup> *Id.*

represented a change from prior agency precedent. The court noted that agencies are free to revise their rules and policies, so long as any changes are accompanied by a reasoned analysis for any departures from prior precedent:<sup>248</sup>

[W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for change, and has shown that the rule is consistent with the law that gives the agency its authority to act . . . . Although there is not a heightened standard of scrutiny . . . the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.<sup>249</sup>

Unless a federal agency can reach this standard of reasoned explanation for a change in policy, it will be struck down as arbitrary and capricious.<sup>250</sup>

### B. *The Court Rejects the Reasoned Analysis of the FCC*

The FCC offered five explanations regarding its decision to change its indecency policy regarding fleeting expletives, and the Second Circuit considered each one insufficient to establish the reasoned explanation required by the APA. This section examines each of the FCC's proffered explanations, and explores the rationale behind the court's rejection of them as lacking a reasoned basis.

## 1. THE "FIRST BLOW" THEORY (WITH SOME EXCEPTIONS)

The primary reason offered by the FCC was rooted in Justice Stevens's "first blow" analogy in *FCC v. Pacifica Foundation*.<sup>251</sup> In the Remand Order, the Commission believed that if it granted an automatic exception for

<sup>248</sup> *Fox Television Stations*, 489 F.3d at 456.

<sup>249</sup> *Id.* (quoting *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)). See also *State Farm*, 463 U.S. at 42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.") (emphasis added).

<sup>250</sup> *Fox Television Stations*, 489 F.3d at 444. E.g., *CBS Corp. v. FCC*, 535 F.3d 167, 189 (3d Cir. 2008) (FCC's revised policy of including fleeting images within the scope of actionable indecency declared arbitrary and capricious as no reasoned explanation was supplied for its departure from prior policy); *State Farm*, 463 U.S. at 34 (National Highway Traffic Safety Administration's revocation of a requirement for passive restraints in automobiles declared arbitrary and capricious as no reasoned explanation was provided for a change in historical practice).

<sup>251</sup> *Pacifica*, 438 U.S. at 748–49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

isolated or fleeting expletives, it would unfairly force viewers to take “the first blow” of hearing indecent language.<sup>252</sup> Writing for the court, Judge Rosemary Pooler rejected this as a reasonable explanation for the FCC’s change in policy, as “the record [failed to] support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to [indecent] language on the airwaves.”<sup>253</sup>

Judge Pooler saw no rational connection when comparing the Commission’s fleeting expletives policy with the “first blow” theory.<sup>254</sup> First, she singled out the Commission’s unofficial news exemption, which pardoned expletives broadcast during bona fide news interviews.<sup>255</sup> Specifically, she noted that viewers who were watching the live broadcast of “The Early Show” were forced to take the first blow when the “Survivor: Vanuatu” contestant said “bullshitter” on live television, regardless of whether they understood it to be a bona fide news interview.<sup>256</sup>

FCC Commissioner Ervin S. Duggan previously raised this concern in 1991.<sup>257</sup> In the early evening, the National Public Radio program “All Things Considered” broadcasted a segment concerning organized crime figure John Gotti, including an unedited wiretap of a phone conversation where Gotti used variations of the word “fuck” numerous times.<sup>258</sup> The FCC refused to find the broadcast indecent because the program, “when considered in context, was an integral part of a bona fide news story . . . .”<sup>259</sup> Commissioner Duggan, however, worried that the decision, which stopped short of adopting an express “news exemption,” would encourage a number of alleged “newscasts” to broadcast objectionable material under the guise of journalistic legitimacy.<sup>260</sup>

Judge Pooler was also concerned with the breadth of the news exception. During oral argument, the FCC conceded that while segments from the 2002 Billboard Music Awards and the 2003 Billboard Music Awards were ruled indecent, unedited rebroadcasts of the same material

<sup>252</sup> *Remand Order*, 21 F.C.C.R. 13299, 13309 (2006).

<sup>253</sup> *Fox Television Stations*, 489 F.3d at 459.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* See, e.g., *Remand Order*, 21 F.C.C.R. at 13328 (broadcast of an interview where a “Survivor: Vanuatu” contestant said “bullshitter” declared not indecent due to the nature of the program as a news interview); Mr. Peter Branton, 6 F.C.C.R. 610, 610 (1991) (letter to Peter Branton by direction of the FCC) (NPR broadcast of a wiretap phone conversation in which John Gotti repeatedly used variations of “fuck” declared not indecent as it was an integral part of a bona fide news story).

<sup>256</sup> *Fox Television Stations*, 489 F.3d at 458.

<sup>257</sup> See Mr. Peter Branton, 6 F.C.C.R. at 611–12 (Duggan, Comm’r, dissenting).

<sup>258</sup> *Id.* at 610 (majority).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 611 (Duggan, Comm’r, dissenting).

shown on news programming would not be actionable, despite viewers being subjected to the same “first blow.”<sup>261</sup>

Judge Pooler was not alone in her concerns, as FCC Commissioner Jonathan Adelstein expressed similar doubt regarding this aspect of the new fleeting expletives policy. In dismissing what he called an “infotainment exception,” he found it completely unreasonable to stretch legitimate news or public affairs programming to include the cross promotion of a network’s primetime programming, “the latest contestant to be voted off the island[,] or the latest contestant to hear ‘you’re fired’ or even ‘come on down.’”<sup>262</sup> Declaring the bona fide news interview exception bereft of any legal support, he considered his own Commission’s decision-making to be “arbitrary, subjective and inconsistent.”<sup>263</sup>

In its brief to the Supreme Court, the FCC argued that its policy simply recognized that in some contexts some blows are likely to be more harmful than others.<sup>264</sup> It pointed to the context of a news program, where “countervailing First Amendment interests may be at stake, making it appropriate for the Commission to proceed with the utmost restraint.”<sup>265</sup> Likewise, Judge Pierre Leval, in his dissent, recognized that a blanket prohibition of all broadcasts of words like “fuck” would suppress material of value that should not be deemed indecent.<sup>266</sup>

The Second Circuit appears incorrect in failing to properly address the FCC’s restraint toward fleeting expletives in news programming. The ripple effect of the broadcast of Bono’s Golden Globe speech on indecency regulation effectively made it newsworthy. If the FCC punished stations for the broadcasting of expletives in a bona fide news story, stations would be hesitant to present a full and accurate reporting of the facts.<sup>267</sup> The First

<sup>261</sup> *Fox Television Stations*, 489 F.3d at 458.

<sup>262</sup> *Remand Order*, 21 F.C.C.R. 13299, 13333 (2006) (Adelstein, Comm’r, concurring in part and dissenting in part).

<sup>263</sup> *Id.* at 13332. Compare *In re Young Broad. of S.F., Inc.*, 19 F.C.C.R. 1751, 1752 (2004) (station’s claim that the brief airing of a man’s penis during a bona fide news interview goes unaddressed in the FCC’s indecency analysis) and *In re Applications of Lincoln Dellar*, 8 F.C.C.R. 2582, 2585 (1993) (newscaster’s utterance “fucked that one up” during a broadcast dismissed as fleeting and isolated without mention of its nature as news programming) with *Mr. Peter Branton*, 6 F.C.C.R. at 610 (broadcast of taped conversation with repeated variations of “fuck” declared not indecent as it was an integral part of a bona fide news story).

<sup>264</sup> Brief for the Petitioners at 28, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008) (No. 07-582).

<sup>265</sup> *Id.* at 30.

<sup>266</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 471 (2d Cir. 2007) (Leval, J., dissenting).

<sup>267</sup> *Cf. Time, Inc. v. Hill*, 385 U.S. 374 (1967) (Black, J., concurring) (noting that publications would cease reporting news in a readable fashion if they would be liable for every possible inaccuracy contained in the article).



Amendment's freedom of the press guarantee<sup>268</sup> assures the "widest possible dissemination of information from diverse and antagonistic sources."<sup>269</sup> The FCC's decision to trust the editorial judgment of broadcast news programs would appear, then, to be a rational exception to the first blow theory.

The news exception was not the only basis for the court's rejection of the first blow theory. In addition, Judge Pooler also found fault with the FCC's determination that an unedited broadcast of the film "Saving Private Ryan" was not indecent.<sup>270</sup> She noted, "[V]iewers, including children who may have no understanding of whether expletives are 'integral' to a program . . . , will have to accept the alleged 'first blow' caused by use of these expletives."<sup>271</sup>

Professor Christopher Fairman, echoing this view, does not see any difference between the broadcasts of "The 2003 Golden Globe Awards" and "Saving Private Ryan." "Each of us who hears the word fuck come out of a television or radio is either shocked or not shocked . . . . [I]t shouldn't matter whether it's said on an awards show or in a war movie—fuck should be treated the same."<sup>272</sup> He argues that neither the type of speaker nor the type of programming should justify a distinction between an indecent and not indecent broadcast of the word "fuck."<sup>273</sup> To hold otherwise, he cautions, would allow the FCC's Commissioners to have their personal tastes and preferences dictate when "fuck" can and cannot be broadcast, thus subjecting indecency rulings to possible abuse.<sup>274</sup>

<sup>268</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press . . . .")

<sup>269</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)) (quotations omitted).

<sup>270</sup> Fox Television Stations, 489 F.3d at 458. In that ruling, the Commission found that removing the expletives from the broadcast "would have altered the nature of the work and diminished the power, realism and immediacy of the film experience for viewers." *Saving Private Ryan*, 20 F.C.C.R. 4507, 4513 (2005).

<sup>271</sup> Fox Television Stations, 489 F.3d at 459.

<sup>272</sup> Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1746 (2007).

<sup>273</sup> *Id.* He found the distinction between Bono's speech and "Saving Private Ryan" particularly troubling because "it is not rational to punish a station for Bono's outburst over which it had no control, yet not to punish the station that has total control over whether to broadcast [the film]." *Id.*

<sup>274</sup> *Id. Compare Omnibus Order*, 21 F.C.C.R. 2664, 2705–07 (2006) (rejecting an indecency claim against "The Oprah Winfrey Show" where sexual terms such as "tossed salad" and "rainbow party" are explained), and *Saving Private Ryan*, 20 F.C.C.R. at 4512–13 (contending that numerous expletives in Steven Spielberg's unedited film were integral to the film's overall context) with *In re Infinity Broad. Operations, Inc.*, 19 F.C.C.R. 5032, 5035–36 (2004) (finding of indecency against "The Howard Stern Show" where sexual terms such as "David Copperfield" and "blumpkin" are explained), and *Omnibus Order*, 21 F.C.C.R. at 2683–87 (finding of indecency where numerous expletives in a documentary film were not essential to the nature of the overall work).

Professor Fairman was not alone, as FCC Commissioner Jonathan Adelstein voiced similar concern in a separate statement to the Commission's Omnibus Order.<sup>275</sup> After noting the importance of content and context in the FCC's indecency determinations, he found that some of the Commission's rulings "dangerously departed from those precedents."<sup>276</sup> He specifically targeted the FCC's decision to declare a PBS broadcast of the PBS documentary series "The Blues" as indecent. "It is clear from a *common sense* viewing of the program that coarse language is part of the culture of the individuals being portrayed . . . . This contextual reasoning is consistent with our decision[] in *Saving Private Ryan* . . . ." <sup>277</sup>

When the FCC's decisions regarding "Saving Private Ryan" and "The Blues" are compared, two alarming inconsistencies arise. First, the FCC appeared to totally abandon its contextual approach in finding "The Blues" indecent. Producer Martin Scorsese stated that the unedited language was necessary "to accurately capture the essential character of the blues."<sup>278</sup> This is not any different from the FCC's belief that deleting or bleeping the profanity in "Saving Private Ryan" "would have altered the nature of the artistic work and diminished the power, realism[,] and immediacy of the film experience for viewers."<sup>279</sup> Any precise distinction between the two broadcasts remains unclear.<sup>280</sup> Will the FCC permit the broadcast of expletives in primetime only in the context of war movies? World War II movies? D-Day movies airing on Veterans Day? Would any film depicting the "horrors of war through the eyes of . . . ordinary Americans placed in extraordinary situations"<sup>281</sup> meet the FCC's standard? By this logic, a station could conceivably broadcast "Flags of Our Fathers," "Platoon," and "Full Metal Jacket," all R-rated war films involving ordinary Americans in extraordinary situations, and not fear an indecency fine.<sup>282</sup>

<sup>275</sup> *Omnibus Order*, 21 F.C.C.R. at 2726–29 (Adelstein, Comm'r, concurring in part and dissenting in part).

<sup>276</sup> *Id.* at 2728.

<sup>277</sup> *Id.*

<sup>278</sup> Eggerton, *Scorsese*, *supra* note 223.

<sup>279</sup> *Saving Private Ryan*, 20 F.C.C.R. at 4513.

<sup>280</sup> See Brief for Public Broadcasters as Amici Curiae Supporting Respondents at 22, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008) (No. 07-582) (arguing that the different outcomes of the orders regarding "Saving Private Ryan" and "The Blues" illustrate that the FCC's indecency policy "lacks a coherent, principled long-term framework").

<sup>281</sup> *Id.*

<sup>282</sup> Columnist James Poniewozik wondered that if critical acclaim and contextual accuracy is all that is needed to permit unedited broadcasts of mature programming, whether "The Sopranos" could air on NBC unedited being it has a wealth of critical acclaim and, much like soldiers in war, mobsters swear all the time. James Poniewozik, *The Decency Police*, TIME, Mar. 28, 2005, at 24.

Even more troubling is that “The Blues” is a work of non-fiction and “Saving Private Ryan” is a work of fiction. This distinction apparently had no effect on the FCC’s reasoning, as it rejected PBS’s argument that “The Blues” offered an educational experience.<sup>283</sup> However, television documentaries are more like long-form news segments than they are like sitcoms, dramas, or motion pictures. If the FCC’s conception of a bona fide news program is broad enough to include reality contestant interviews, shouldn’t it be broad enough to include documentary films?<sup>284</sup> This dissonance was not lost on the networks, as a number of CBS affiliates declined to broadcast the network’s award-winning documentary “9/11,” about the September 11 terrorist attacks, until the safe harbor time period began.<sup>285</sup>

Thus, while the Second Circuit appears to have erroneously discounted the FCC’s approach regarding news programming, it appears to be correct in finding the “first blow” reasoning implausible in light of its determinations regarding “Saving Private Ryan” and “The Blues.” The lack of a reasoned basis behind the FCC’s determinations regarding those two broadcasts might be best attributed to the Commission’s personal taste and preferences trumping common sense.

## 2. INHERENT SEXUAL OR EXCRETORY CONNOTATION

In the Omnibus Order, the FCC noted that given the core-meanings of “fuck” and “shit,” any use of those words or their variations in any context would have an inherently sexual and excretory connotation, respectively.<sup>286</sup> This led to another line of reasoning examined by the court: the FCC’s claim that it is “difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions.”<sup>287</sup>

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<sup>283</sup> Omnibus Order, 21 F.C.C.R. 2664, 2684 (2006). “The Blues” was billed as “part of a celebration that raises awareness of the blues and its contribution to American culture and music worldwide.” PBS | The Blues, <http://www.pbs.org/theblues/> (last visited Aug. 28, 2008).

<sup>284</sup> See Brief for National Association of Broadcasters et al. as Amici Curiae Supporting Respondents at 23, FCC v. Fox Television Stations, Inc., 128 S. Ct. 1647 (2008) (No. 07-582) (arguing that the FCC’s indecency policy regarding documentary films “threatens to make broadcast journalism less authentic, less insightful, and less thought provoking”).

<sup>285</sup> Lili Levi, *First Report: The FCC’s Regulation of Indecency*, FIRST AMENDMENT CENTER, Aug. 6, 2007, at 42, <http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.pdf>. A CBS affiliate in Phoenix cut short its coverage of the funeral of former Arizona Cardinal Pat Tillman because of some of the mourners’ language. Calvert, *Profane Decision*, *supra* note 7, at 84.

<sup>286</sup> Omnibus Order, 21 F.C.C.R. at 2684.

<sup>287</sup> Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 459 (2d Cir. 2007) (quoting *Remand Order*, 21 F.C.C.R. 13299, 13308 (2006)), *cert. granted*, 128 S. Ct. 1647 (2008).

“This defies any [commonsense] understanding of these words,” wrote Judge Pooler, “which, as the general public well knows, are often used without any ‘sexual or excretory’ meaning.”<sup>288</sup> The prime example the court offered as an instance where “fuck” was said in a non-literal manner without any sexual connotation was Bono’s exclamation of “fucking brilliant” at the Golden Globe Awards,<sup>289</sup> the same broadcast that started the FCC’s new broadcast indecency policy. The court also cited a broadcast where microphones picked up President George W. Bush’s remark to British Prime Minister Tony Blair that the United Nations needed to “get Syria to get Hezbollah to stop doing this shit.” With these examples in mind, the court found that “no reasonable person would believe [these expletives] referenced ‘sexual or excretory organs or activities.’”<sup>290</sup>

The FCC now argues that it is in a better position to evaluate the connotations of language, having studied the issue.<sup>291</sup> The Commission claims that both it and the Supreme Court “have long recognized the inherent sexual meaning of the F-Word,” and that it is this inherent sexual meaning that makes “fuck” so effective as an intensifier or an insult.<sup>292</sup> However, these arguments fail on three levels.

First, the FCC’s expertise in the area of linguistics and offensive language cannot be assumed as a fact. The Supreme Court had previously noted the difficulty in governmental determinations regarding language because “it is nevertheless often true that one man’s vulgarity is another man’s lyric. . . . [I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste of style so largely to the individual.”<sup>293</sup> Despite the FCC’s self-proclaimed expertise, the determination of the connotation of words is probably best left to the determination of experts in linguistics and not government officials.

Second, the claim that both the FCC and the Supreme Court have long recognized the inherent sexual meaning of “fuck” is not entirely accurate. While the Commission initially stated that words such as “fuck” and “shit” “depict sexual and excretory activities and organs in a manner patently

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 459–60 (emphasis added).

<sup>291</sup> Brief for the Petitioners, *supra* note 264, at 18.

<sup>292</sup> *Id.* at 35.

<sup>293</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971). See also *Expansion of Indecency Regulation: Presented by the Federalist Society’s Telecommunications Practice Group*, 60 FED. COMM. L.J. 1, 2 (2007) [hereinafter *Expansion*] (FCC Chairman commenting that “the government is generally not as good at trying to make [broadcast appropriateness] determinations about content”).

offensive by contemporary community standards,<sup>294</sup> the Industry Guidance statement in 2001 listed several examples of “not indecent” broadcasts containing “fuck” that were devoid of any mention of the word’s inherent sexual meaning.<sup>295</sup> The Supreme Court in *FCC v. Pacifica Foundation* did find the broadcast of Carlin’s monologue “vulgar, offensive, and shocking,”<sup>296</sup> but never considered the issue of whether “fuck” has an inherent sexual connotation. However, in *Cohen v. California*, the Court flatly rejected the notion that a jacket bearing the words “Fuck the Draft” would “conjure up [erotic] psychic stimulation in anyone likely to be confronted with [it].”<sup>297</sup> Instead of “long recognition,” both FCC and Supreme Court precedent demonstrate that the issue of any inherent sexual meaning in the word is far from a settled matter.

Third, research and studies by linguists reveal that the modern usage of “fuck” has largely eroded its inherent sexual connotation. Some cite that its increased adjectival use moved “fuck” so far away from “its original meaning and use that it will be employed in every other way than to describe the sexual act.”<sup>298</sup> “Others argue that, given the degree of separation between the word and the act to which it once referred, [fuck’s] power has largely washed away.”<sup>299</sup> Dr. Ruth Wajnryb notes that “fuck” lost its referential function (referring to sexual intercourse) as people used it more for its emotional functions (such as displeasure and intensification).<sup>300</sup> “There is *barely a sexual glimmer of meaning* in the word, as it often means something more like ‘go figure.’”<sup>301</sup>

Dr. Timothy Jay, comparing curse words with ordinary words, notes that “[c]urse words are different in that the connotative meaning dominates over the denotative meaning.”<sup>302</sup> However, he also notes that “[o]ne cannot restrict the interpretation of cursing to connotative meanings.”<sup>303</sup> Thus,

<sup>294</sup> *Pacifica I*, 56 F.C.C.2d 94, 99 (1975).

<sup>295</sup> See *Industry Guidance*, 16 F.C.C.R. 7999, 8008–09 (2001).

<sup>296</sup> 438 U.S. 726, 747 (1978).

<sup>297</sup> 403 U.S. at 20.

<sup>298</sup> ASHLEY MONTAGU, *THE ANATOMY OF SWEARING* 314 (Univ. of Pa. 2001) (1967). Professor Christopher Fairman noted that one Internet search revealed that “fuck” was more commonly used than “mom, baseball, hot dogs, apple pie, and Chevrolet,” while an AP survey found that sixty-four percent of those polled used the word “fuck.” Fairman, *supra* note 272, at 1720–21. To quote Prof. Fairman, “fuck is everywhere.” *Id.* at 1720.

<sup>299</sup> RUTH WAJNRYB, *EXPLETIVE DELETED: A GOOD LOOK AT BAD LANGUAGE* 40 (2005).

<sup>300</sup> *Id.* at 45.

<sup>301</sup> *Id.* at 46 (emphasis added).

<sup>302</sup> TIMOTHY JAY, *WHY WE CURSE: A NEURO-PSYCHO-SOCIAL THEORY OF SPEECH* 136 (2000).

The FCC also cited this line in its brief to the Supreme Court. See *Brief for the Petitioners*, *supra* note 264, at 35.

<sup>303</sup> JAY, *supra* note 302, at 136.

according to his research, some curse words, like “cock” and “blow job,” are primarily used in a literal manner, while others, like “fuck” and “shit,” are primarily used in a non-literal fashion.<sup>304</sup> “This means that ‘asshole’ and ‘bastard’ are generally used to refer to a thoughtless male, not a body part and an illegitimate child, respectively.”<sup>305</sup>

In his dissenting opinion, Judge Leval interpreted the FCC’s position as stating that, despite the speaker’s intent to use “fuck” in a nonsexual manner, “a substantial part of the community, and of the television audience, [would] understand the word as freighted with an offensive sexual connotation.”<sup>306</sup> However, it is hard to follow the logic that if a majority of people use the word “fuck,”<sup>307</sup> and those who use it do so in a non-literal manner,<sup>308</sup> that a “substantial part of the community . . . [would] understand the word as freighted with an offensive connotation.”<sup>309</sup> Just as Justice Harlan rejected this very contention in *Cohen*,<sup>310</sup> Judge Pooler appears correct in her commonsense understanding of these words.

### 3. THE PREVENTION OF “F-BOMBS GALORE!”

The third reason proffered by the FCC for its change in indecency policy was a belief that if it remained with its old policy regarding fleeting expletives it would “permit broadcasters to air expletives at all hours of [a] day so long as they did so one at a time.”<sup>311</sup> The court dismissed this fear as “divorced from reality because the Commission itself recognize[d] that broadcasters have never barraged the airwaves with expletives[,] even prior to [the change in policy].”<sup>312</sup> The majority also rejected this contention as “both unsupported by evidence and directly contradicted by prior experience.”<sup>313</sup>

Judge Leval mentions, however, that the regulated broadcast networks are competing for an audience with the unregulated cable networks, whose

<sup>304</sup> See *id.* at 140.

<sup>305</sup> *Id.*

<sup>306</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 473 (2d Cir. 2007) (Leval, J., dissenting), *cert. granted*, 128 S. Ct. 1647 (2008).

<sup>307</sup> See Fairman, *supra* note 272, at 1720–21.

<sup>308</sup> See WAJNRYB, *supra* note 299, at 40–46; JAY, *supra* note 302, at 136–37, 142; MONTAGU, *supra* note 298, at 314.

<sup>309</sup> *Fox Television Stations*, 489 F.3d at 473 (Leval, J., dissenting).

<sup>310</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>311</sup> *Fox Television Stations*, 489 F.3d at 460 (quoting *Remand Order*, 21 F.C.C.R. 13299, 13309 (2006)).

<sup>312</sup> *Id.* The *Remand Order* even cites how all four major broadcast networks generally prohibit the broadcast of any form of “fuck” or “shit” at any time of the day. *Remand Order*, 21 F.C.C.R. at 13310.

<sup>313</sup> *Fox Television Stations*, 489 F.3d at 461 n.11.

programs are permitted to contain liberal amounts of material, including expletives, not permitted on broadcast television.<sup>314</sup> Noting press reports on how difficult it is for networks to compete with cable for that very reason, he believed that the FCC had good reason to expect a marked increase in the airing of expletives if it continued to use the old policy from Industry Guidance.<sup>315</sup>

Looking at the history of broadcast expletives on network television casts serious doubt on the FCC's concerns. The networks' stance of refraining from broadcasting fleeting expletives was a long-standing practice that existed well before the second Golden Globes Order. NBC, for example, began broadcasting the Golden Globe Awards in 1996, and prior to Bono's speech in 2003, had done so without incident.<sup>316</sup> When Bono unexpectedly said "fucking brilliant," NBC deleted the word from its transmissions to its affiliates in the Mountain and Pacific time zones, which did not air the 2003 Golden Globe Awards live.<sup>317</sup> NBC deleted these words from the broadcast at a time when the FCC declined to issue forfeitures for the broadcast of "fuck" if it was "fleeting and isolated within the context of live and spontaneous programming."<sup>318</sup> Prior to the issuance of the second Golden Globes Order, NBC took the initiative to begin airing all live award shows on a ten-second delay to further prevent the broadcast of any expletives.<sup>319</sup>

Regarding the broadcast of President Bush saying, "Get Hezbollah to stop doing this shit," discussed previously, ABC, NBC, and CBS all bleeped the expletive during its coverage, citing longstanding policies.<sup>320</sup> This practice of self-censorship on television even extends to programs airing during the safe harbor hours that are seemingly outside the scope of

<sup>314</sup> *Id.* at 472 (Leval, J., dissenting).

<sup>315</sup> *Id.* at 472-73.

<sup>316</sup> *Broadcast Decency*, *supra* note 190 (statement of Alan Wurtzel, President of Research and Media Development, National Broadcasting Company).

<sup>317</sup> *Id.* It should be noted that Fox followed a similar protocol by editing out the expletives said during "The 2002 Billboard Music Awards" and "The 2003 Billboard Music Awards" for broadcast on its affiliates in the Mountain and Pacific time zones. *Remand Order*, 21 F.C.C.R. 13299, 13310, 13325 (2006).

<sup>318</sup> *Industry Guidance*, 16 F.C.C.R. 7999, 8009 (2001).

<sup>319</sup> *Broadcast Decency*, *supra* note 190 (statement of Alan Wurtzel, President of Research and Media Development, National Broadcasting Company). Wurtzel defended the time delay practice by stating, "While the delay process cannot be foolproof, NBC's Standards professionals are among the most practiced in the industry and the application of their expertise should help prevent any future incidents." *Id.*

<sup>320</sup> John Eggerton, *H--l to the Chief*, BROADCASTING & CABLE, July 24, 2006, <http://www.broadcastingcable.com/article/CA6355400.html>. CNN, a network that normally does not air expletives, chose to air the clip of President Bush unedited, in part because it was said by the President. *Id.* However, as CNN is a cable network, it is not subject to broadcast indecency restrictions. *Id.*

indecent regulation, including late night programs airing on both broadcast television<sup>321</sup> and cable.<sup>322</sup> During the 2007 Emmy Awards, Fox employed a muting mechanism to edit out Ray Romano's comment of "Frasier is screwing my wife" and Sally Field's reference to "goddamn wars,"<sup>323</sup> even though these comments would traditionally not warrant FCC action.

Additionally, one need only look at the fastidious nature of national and local advertisers to realize the folly of the concern that the policy change was needed to prevent "F-bombs galore, any time, anywhere."<sup>324</sup> It is no secret that large advertisers will pull their spots from controversial programming so the public does not associate their product with the potentially offensive material.<sup>325</sup> Advertisers will even provide their ad agencies with a list of specific programs during which they do not want their commercials to air.<sup>326</sup> In the past, advertisers have pulled their spots from programs and stations for programming deemed anti-immigrant,<sup>327</sup> overly sexual,<sup>328</sup> homophobic,<sup>329</sup> and overly offensive.<sup>330</sup> The importance of advertisers and sponsors in broadcast television and radio has led many scholars and industry experts to

<sup>321</sup> Posting of SNL: Bleep in a Box to Blog on Broadcasting & Cable, <http://www.broadcastingcable.com/blog/1380000138/post/160006016.html> (Dec. 19, 2008) (commenting on the bleeping of the word "dick" in the "Dick in a Box" music video parody on NBC's "Saturday Night Live").

<sup>322</sup> David Oxenford, Heated Reactions to Indecency Ruling, Broadcast Law Blog, <http://www.broadcastlawblog.com/archives/indecency-heated-reactions-to-indecency-ruling.html> (Jun. 5, 2007) (commenting on the bleeping of expletives on Comedy Central's "The Daily Show" even though it airs during the safe harbor period and on cable television, which is not subject to broadcast indecency regulation).

<sup>323</sup> Lynette Rice, *EMMYS 2007: The Showdown*, ENT. WKLY., Sept. 28, 2007, at 36.

<sup>324</sup> L. Brent Bozell III, *Judges Favor the Profane*, MEDIA RESEARCH CENTER, July 24, 2008, <http://mrc.org/BozellColumns/entertainmentcolumn/2008/col20080724.asp>.

<sup>325</sup> See Denise Gellene, *Company Town*, L.A. TIMES, Nov. 14, 1995, at D7.

<sup>326</sup> Peter Schulberg, *Expanding Ad 'Hit Lists' a Sign of the Times*, OREGONIAN (Portland), June 30, 1993, at D07.

<sup>327</sup> David Hinckley, *Latinos Give WKXW a Lesson in Economics 101.5*, DAILY NEWS (N.Y.), May 2, 2007, at 76 (noting advertisers pull spots off station over alleged anti-immigrant campaign).

<sup>328</sup> William Booth, *A Hot Property*, WASH. POST, Nov. 14, 2004, at N01 (noting advertisers pull spots off broadcasts of "Desperate Housewives" due to "peekaboo lingerie and promiscuity").

<sup>329</sup> Alan Sepinwall & Matt Zoller Seitz, *Dr. Laura Atones*, STAR-LEDGER (Newark, N.J.), Oct. 12, 2000, at 71 (referencing Proctor & Gamble pulling sponsorship and advertisers pulling spots off Dr. Laura Schlesinger's radio program after she makes homophobic comments).

<sup>330</sup> See, e.g., Poniewozik, *supra* note 282, at 24 (noting advertisers stayed away from edgy programs like the FX network's "Nip/Tuck" and "The Shield"); Fran Wood, *Radio Station Pretends the Egg on Its Face Is an Omelet*, STAR-LEDGER (Newark, N.J.), Feb. 9, 2005, at 15 (commenting on several major advertisers pulling spots off station after broadcast of a tsunami parody song); Janet Rausa Fuller, *Stern Watch*, CHI. SUN-TIMES, Aug. 10, 2000, at 43 (noting numerous advertisers withdrawing spots from Howard Stern's radio program); Joanne Weintraub, *Dramatic Developments*, MILWAUKEE J. SENTINEL, Dec. 21, 1999, at 1 (Cue) (referencing Coca-Cola and other large advertisers pulling spots from "WWF Smackdown!").



propose letting the marketplace decide exactly what is acceptable for broadcast.<sup>331</sup>

If a broadcast network did in fact flood the airwaves with “fuck” and “shit,” advertisers may pull all of their commercials from the network. It defies logic for a network to engage in a manner of content programming that would be so self-destructive. The Second Circuit noted that federal courts have consistently required a government regulation to demonstrate that a purported problem is real, and not merely based on conjecture and speculation.<sup>332</sup> Despite FCC Commissioner Michael Copps’s worries that the Second Circuit’s decision may signal a green light for broadcasters to air more expletives,<sup>333</sup> the continued self-censorship of broadcast networks and the looming impact of the loss of valuable advertising revenue demonstrates that these fears are largely unfounded. As one editorial surmised, “the court’s ruling is not a license to fill the air with sailor talk, [but] merely an acknowledgment that broadcasters should not be unduly punished for reflecting contemporary society.”<sup>334</sup>

#### 4. PROTECTING CHILDREN FROM EXPOSURE TO INDECENT BROADCASTS

Underlying all of the FCC’s proffered reasons for its change in indecency policy was its interest in protecting children.<sup>335</sup> The Supreme

<sup>331</sup> See, e.g., *Expansion*, *supra* note 293, at 19–20 (discussing comments by Time Warner’s Adam Ciongoli that “if people weren’t consuming particular entertainment, it wouldn’t be for sale”); Genelle I. Belmas et al., *In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67, 101–02 (2007) (agreeing with the recommendation to let the broadcast marketplace govern indecency determinations); Rooder, *supra* note 7, at 905–06 (proposing that protecting children from exposure to indecent broadcast content would be more aptly served by allowing market forces to regulate the airwaves); Brown & Candeub, *supra* note 11, at 1498–1512 (proposing an indecency regime based on the viewer-advertiser relationship); Candeub, *supra* note 88, at 925–28 (proposing that a focus on advertisers, not broadcasters, could lead to cleaner program content).

<sup>332</sup> *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). See, e.g., *United States v. Playboy Entm’t Group*, 529 U.S. 803, 822–23 (2000) (noting that the government must prove the actual problem alleged in the case and not rely on mere anecdote and supposition); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (noting that the government must demonstrate that the alleged harms are real and not merely conjectural); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985) (noting that purported harms the government sought to address must be real and not a “fanciful threat”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (finding that a government regulation that remedies a given problem is “highly capricious if that problem does not exist”).

<sup>333</sup> See John Eggerton, *Copps Says Court Profanity Ruling Is No Green Light*, BROADCASTING & CABLE, Jun. 4, 2007, <http://www.broadcastingcable.com/article/ca6448988.html>.

<sup>334</sup> Editorial, *A Decent Ruling*, L.A. TIMES, Jun. 6, 2007, at A20.

<sup>335</sup> *Fox Television Stations*, 489 F.3d at 461; see generally MARJORIE HEINS, NOT IN FRONT OF THE

Court has long recognized the compelling interest in protecting the well being of minors,<sup>336</sup> which it echoed in its decision in *FCC v. Pacific Foundation*.<sup>337</sup> The Second Circuit noted that while the FCC was free to change its previously settled view on fleeting expletives, its decision was “devoid of any evidence that suggests a fleeting expletive is harmful, let alone . . . serious enough to warrant government regulation.”<sup>338</sup> The court noted that in the Remand Order’s explanation of the new fleeting expletives policy, it provided no reasoned analysis of the purported problem it sought to address, nor did it explain how its policy would provide a remedy.<sup>339</sup> According to Professor Clay Calvert, the FCC just assumed that children liked to watch purportedly indecent material, and assumed that children were harmed or injured by exposure to it.<sup>340</sup>

Even the dissenting Judge Leval, who thought the sexual connotation of “fuck” was sufficient to justify the FCC’s action regarding that word,<sup>341</sup> had difficulty applying the same justification to fleeting broadcasts of “shit.” In the one point he essentially concurred on, he wrote: “There is an enormous difference between censorship of references to sex and censorship of references to excrement. For children, excrement is a main preoccupation of their early years. There is surely no thought that children are harmed by hearing references to excrement.”<sup>342</sup>

It is interesting that the court looked at harm to children as a factor in its reasoning. The Supreme Court in *Pacifica* addressed children’s

CHILDREN: INDECENCY, CENSORSHIP, AND THE INNOCENCE OF YOUTH (2d ed., Rutgers Univ. Press 2007) (2001).

<sup>336</sup> See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“[T]here is a compelling interest in protecting the physical and psychological well-being of minors.”); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“The well-being of its children is of course a subject within the State’s constitutional power to regulate . . .”).

<sup>337</sup> 438 U.S. 726, 749–50 (1978).

<sup>338</sup> *Fox Television Stations*, 489 F.3d at 461.

<sup>339</sup> *Id.*

<sup>340</sup> See *Expansion*, *supra* note 293, at 2. But see Clay Calvert, *Sins of Omission and “A Line-Drawing Exercise”: A Response to FCC Chairman Kevin Martin’s Comments on the “Expansion of Indecency Regulation”*, 60 FED. COMM. L. J. F. 1, 2 (2008), available at [http://www.law.indiana.edu/fclj/pubs/v60/no1/Calvert\\_Forum\\_Final.pdf](http://www.law.indiana.edu/fclj/pubs/v60/no1/Calvert_Forum_Final.pdf). Calvert goes on to speculate exactly how children could be injured from exposure to obscene images and words. To dispel the notion that kids today are becoming “sex-crazed hedonists,” he notes statistical declines in both teenage sex and teenage pregnancy rates. However, “even if those rates had gone up in a positive correlation with an increase in sexually racy content on broadcast television, that would say nothing about causation.” *Id.* at 5.

<sup>341</sup> See *Fox Television Stations*, 489 F.3d at 473 (Leval, J., dissenting).

<sup>342</sup> *Id.* at 474 n.18. For children’s books in support of this argument, see generally TARO GOMI, *EVERYONE POOPS* (2d ed. 1993); SUSAN GOODMAN, *THE TRUTH ABOUT POOP* (2d ed., Puffin 2007) (2004).

accessibility to indecent material<sup>343</sup> without ever addressing the harms involved with a child's exposure to such material. The reason might lie in the fact that in *Pacifica* the FCC was trying to establish its authority to penalize indecent broadcasts, whereas in *Fox Television Stations* the FCC was trying to provide a reasoned basis for a change in its indecency precedent. When an agency changes its policies, it must explain why the original reasons for adopting a policy are no longer applicable through "reasoned analysis for the change *beyond* that which may be required when an agency does not act in the first instance."<sup>344</sup> Thus, if the FCC intended to protect children from broadcasts that were not previously considered indecent, the court looked for evidence of harm to children caused by exposure to these broadcasts.

One problem with looking for evidence of harm to children in this context is the paucity of available evidence. Professor Calvert noted that social science data is irrelevant in determining the harms caused by exposure to fleeting expletives on broadcast television, as no institution would ever undertake such a study, and any long-term effects of such exposure (or lack thereof) would be impossible to prove.<sup>345</sup> Similarly, Professor Alan E. Garfield explained that "proving a causal connection between speech and children's emotions and antisocial behavior is not something that lends itself to empirical analysis,"<sup>346</sup> when other influences such as parents, teachers, peers, poverty, and crime all increase the difficulty in isolating one variable as the source of the trouble.<sup>347</sup>

Thus, the Supreme Court in *Ginsberg v. New York* did not require a showing of a causal link between a minor's exposure to obscene material and any subsequent harm.<sup>348</sup> However, *Ginsberg* dealt with "obscene" material, not alleged "indecent" material. While harm in children resulting from exposure to "obscene" material might be a matter of common sense,<sup>349</sup> harm

<sup>343</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978).

<sup>344</sup> *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasis added).

<sup>345</sup> Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157, 178–79 (2008).

<sup>346</sup> Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 608–09 (2005).

<sup>347</sup> *Id.* at 609; See also JAY, *supra* note 302, at 212 ("Social science data do not support the hypothesis that words alone physically harm listeners, but psychological effects have been documented . . . . One also must evaluate any speech effects in the context of other sociocultural forces (e.g., poverty, lack of education, discrimination) that harm people.").

<sup>348</sup> 390 U.S. 629, 642–43 (1968). The Court noted that while a causal link between exposure to obscene materials and harm was not demonstrated, such a causal link was not disproved either.

<sup>349</sup> See Garfield, *supra* note 346, at 613.

resulting from exposure to a fleeting expletive on broadcast television is not.<sup>350</sup>

While Professor Garfield noted that “the difficulty of proving a [] causal connection between speech and harm should give courts pause before invalidating child-protection [regulations] for lack of empirical proof,”<sup>351</sup> he also noted the “difference between giving [regulators] breathing room and giving them complete deference.”<sup>352</sup> The FCC has not provided any new empirical evidence that a child’s exposure to fleeting expletive on broadcast television causes physical or psychological harm, or that hearing “fuck” or “shit” would cause more harm than other highly offensive words, like racial or homophobic slurs.<sup>353</sup>

If this were an initial ruling by the FCC, a court might defer to the judgment of the federal agency. However, since this was a change in policy, the court required information beyond what was required for an initial determination.<sup>354</sup> As the FCC failed to provide any evidence regarding why this policy change was necessary to protect children after thirty years of indecency precedent to the contrary, the Second Circuit appears correct in its finding that the policy change was arbitrary and capricious.

## V. LOOKING OUTSIDE THE CASE: THE FCC UNDER PRESSURE

The Second Circuit rejected each of the FCC’s proffered explanations for why it changed its broadcast indecency policy regarding fleeting expletives. This section goes outside of the FCC’s stated reasoning to look at some outside influences on the policy change. It then goes on to explore the effect the policy change would have had on broadcasters had it been upheld. Specifically, this section shows how the FCC’s broadcast indecency mechanism is vulnerable to tremendous influence from private interest groups. It also demonstrates how the now-rejected fleeting expletives policy, when combined with the new indecency fines, could have potentially crippled the broadcast industry.

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<sup>350</sup> Cf. *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001) (finding that the court could not adopt the *Ginsberg* “common sense” approach in determining whether children were harmed by exposure to violent videogames).

<sup>351</sup> Garfield, *supra* note 346, at 610.

<sup>352</sup> *Id.*

<sup>353</sup> See Calvert, *Profane Decision*, *supra* note 7, at 80–81. Calvert also questions whether hearing “fuck” on broadcast television is more harmful to minors than the “hyper-sexualized” antics and lyrics of singers like Britney Spears and Christina Aguilera. *Id.*

<sup>354</sup> See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.* 463 U.S. 29, 43 (1984).

A. *The Parents Television Council: Keeping the Airwaves Squeaky Clean*

One explanation for the FCC's 180-degree turn on fleeting expletives is that it was a response to a general increase in casual indecency on both television and radio.<sup>355</sup> A look at the FCC's posted indecency complaints appears to confirm this view. While the FCC only received 111 complaints in 2000, it received 13,922 in 2002, and 233,531 complaints in 2005.<sup>356</sup> As former FCC Chairman Michael Powell explained, the FCC's actions are simply responses to public complaints.<sup>357</sup> While it is possible that the sheer number of indecent programs has increased in recent years, a closer look at the FCC's complaint totals reveals a more likely scenario.

In 2003, in an effort to keep up with new technologies and to appease the demands of private interest groups, the FCC changed the way it counted public complaints, deciding to count every complaint towards the total, even if different viewers submitted identical complaints.<sup>358</sup> This accounting change proved to be quite advantageous for the Parents Television Council (PTC), one of the private interest groups calling for FCC reform.<sup>359</sup>

Lauding itself as a "non-partisan education organization advocating responsible entertainment," the PTC, with over one million members, seeks to promote and restore decency to the airwaves of America.<sup>360</sup> It employs a full-time staff whose sole purpose is to monitor broadcast content<sup>361</sup> and track "every incident of sexual content, violence, profanity, disrespect for

<sup>355</sup> Levi, *supra* note 285, at 38; see also Frank Ahrens, *Delays, Low Fines Weaken FCC Attack on Indecency*, WASH. POST, Nov. 10, 2005, at A01 (noting that program content that was considered shocking in the mid-1990s seemed quaint in 2005); News Release, Kaiser Family Foundation, Number of Sexual Scenes on TV Nearly Double Since 1998 (Nov. 9, 2005), <http://www.kff.org/entmedia/entmedia110905nr.cfm> (referencing a study which found that seventy percent of the shows surveyed included some sexual content).

<sup>356</sup> Federal Communications Commission, *Indecency Complaints and NALs: 1993-2006*, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Oct. 12, 2008).

<sup>357</sup> *All Things Considered* (National Public Radio broadcast Oct. 6, 2004) (interview with Michael Powell discussing the evolving role of the FCC in American broadcasting).

<sup>358</sup> John Eggerton, *Indecency Complaints Quadruple in 3Q*, BROADCASTING & CABLE, Nov. 9, 2005, <http://www.broadcastingcable.com/article/ca6282739.html> [hereinafter Eggerton, *Indecency Complaints*]. Under the old system, identical complaints from different viewers were lumped together as one complaint, as the FCC assumed that all identical complaints originated from the same source. After the change, each complaint, even if identical to another complaint, is counted toward the total. *Id.*

<sup>359</sup> See *Dereliction of Duty*, *supra* note 166.

<sup>360</sup> About the Parents Television Council, <http://www.parentstv.org/PTC/aboutus/main.asp> (last visited Oct. 19, 2008).

<sup>361</sup> Pierce, *supra* note 76.

authority, and [any] other negative content.”<sup>362</sup> Additionally, the PTC allows its members to send indecency complaints via an online e-mail form located on its own website.<sup>363</sup> This ease of accessing a complaint form, combined with the FCC’s accounting change, have led to dramatic results in the perception of the current state of broadcast television.

Consider the number of broadcast indecency complaints lodged by the PTC in 2003: over 18,000 complaints following Bono’s Golden Globes acceptance speech, over 46,000 complaints following Nicole Richie’s appearance at the Billboard Music Awards, and over 100,000 complaints filed in 2003 altogether.<sup>364</sup> In July of 2005, the PTC accounted for all but five of the 23,547 complaints received by the FCC.<sup>365</sup> This percentage falls in line with other reports of the PTC flooding the FCC with indecency complaints.<sup>366</sup> The PTC’s complaints are so numerous that the FCC released two separate orders *on the same day* addressing programs alleged to be indecent by the PTC: thirty-six programs named in its complaints and thirty-six denials of a finding of indecency.<sup>367</sup>

The FCC’s indecency test determines indecency based on the standards of an average broadcast viewer and not on the standards of an individual

<sup>362</sup> Poniewozik, *supra* note 282. The broad sweep of the PTC’s notion of “negative content” includes any discussion of drugs and even minor swear words, like “damn.” *Id.* The PTC once complained that foul language increased in every primetime time slot between 1998 and 2002, including 109.1 percent in the 8 p.m. to 9 p.m. time slot. Minow, *supra* note 158. However, considering the classification of “damn” as falling within “foul language,” a reading of these statistics must be taken with many grains of salt.

<sup>363</sup> Eggerton, *Indecency Complaints*, *supra* note 358.

<sup>364</sup> *Dereliction of Duty*, *supra* note 166.

<sup>365</sup> *PTC Drives Spike in Smut Gripes*, BROADCASTING & CABLE, Nov. 14, 2005, at 12, available at <http://www.broadcastingcable.com/article/ca6283286.html>.

<sup>366</sup> See Clay Calvert, *The First Amendment, the Media and the Culture Wars: Eight Important Lessons From 2004 About Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325, 330 (2005) (noting that in 2003 and 2004, excluding the Janet Jackson Super Bowl incident, ninety-nine percent of indecency complaints were traced to the PTC).

<sup>367</sup> See *In re Complaints by Parents Television Council*, 20 F.C.C.R. 1920 (2005); *In re Complaints by Parents Television Council*, 20 F.C.C.R. 1931 (2005) [hereinafter *PTC II*]. The influence of public interest groups on complaint numbers was even recognized by the Third Circuit in its recent decision rejecting the fine assessed to CBS stations regarding the Janet Jackson “wardrobe malfunction” during the Super Bowl XXXVIII Halftime Show. *CBS Corp. v. FCC*, 535 F.3d 167, 172 n.2 (3d Cir. 2008) (noting that the number of form complaints generated by single-interest groups made “[t]he record [] unclear on the actual number of complaints received from unorganized, individual viewers”). According to former FCC commissioners and officials, the Commission “is fully aware that the overwhelming percentage of recent complaints target a handful of programs, and most of them are computer-generated electronic complaints provided by activist groups . . . .” Brief for Former FCC Commissioners and Officials as Amici Curiae Supporting Respondents at 20–21, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008) (No. 07-582).

complainant. To the PTC, words like “damn” are offensive,<sup>368</sup> while words like “bitch,” “bosom,” and “whore” warrant a broadcast indecency complaint.<sup>369</sup> “Damn,” now considered “a modern secular term for mild exasperation of disapproval,”<sup>370</sup> is so common in everyday word usage that the PTC’s view of it as offensive casts serious doubt on considering a PTC member an average broadcast viewer.

Average viewer or not, members of these conservative activist groups have been affecting the FCC’s indecency enforcement for decades. John R. Douglas, founder of the activist group *Morality in Media*, was identified as the man who filed the complaint against WBAI’s broadcast of the George Carlin monologue.<sup>371</sup> Pressure from various activist groups precipitated the FCC’s clarification of the indecency standard in 1987.<sup>372</sup> Lately, the PTC has been pressuring the FCC and the courts to reform to its notion of decency.<sup>373</sup> If the FCC’s indecency regime is built around its reaction to viewer and listener complaints, there is the danger that its indecency decisions are not reflective of an average broadcast viewer, but instead are responses to pressure from these highly influential conservative groups.

The tenacity of these groups is troubling, as they appear to be striving to assert their own notions of parenting on the nation as a whole through indecency enforcement. In *Pacifica*, Justice Brennan argued that some parents may have wanted their children to hear Carlin’s monologue, noting that “parents, not the government, ha[d] the right to make certain decisions regarding the upbringing of their children.”<sup>374</sup> Where the PTC wants the

<sup>368</sup> Poniewozik, *supra* note 282.

<sup>369</sup> *PTC II*, 20 F.C.C.R. at 1936–37. Based on these standards, it would be indecent, on name alone, to broadcast some rather innocent songs (e.g., ELTON JOHN, *The Bitch Is Back*, on CARIBOU (MCA Records 1974)), television shows (*Bosom Buddies* (ABC 1980–82)), and movies (e.g., *DAMN YANKEES!* (Warner Bros. 1958)) without violating the PTC’s indecency standards.

<sup>370</sup> WAJNRYB, *supra* note 299, at 127.

<sup>371</sup> Candeub, *supra* note 88, at 921.

<sup>372</sup> Brown & Candeub, *supra* note 11, at 1487–90.

<sup>373</sup> After the FCC’s initial determination that Bono’s Golden Globes acceptance speech was not indecent, a PTC spokesperson called out the Commission by referring to it as a “toothless lion.” Calvert, *Profane Decision*, *supra* note 7, at 78–79. Similarly, reacting to the Third Circuit’s finding that the FCC acted arbitrarily and capriciously in fining stations who broadcast the “wardrobe malfunction,” the PTC President Tim Winter said, “the court’s opinion goes beyond judicial activism; it borders on judicial stupidity.” Press Release, Parents Television Council, PTC Condemns Court Decision Overturning Super Bowl Striptease Indecency Fine (July 21, 2008), <http://www.parentstv.org/PTC/news/release/2008/0721.asp>.

<sup>374</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 770 (1978) (Brennan, J., dissenting) (emphasis omitted). This right of parents to raise children as they see fit is so fiercely defended that it has prevented U.S. ratification of the United Nations Convention on the Rights of the Child. See generally THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND

government to protect children from allegedly indecent broadcasts when their parents fail to do so, others think that the government does not have a compelling interest in this particular area.<sup>375</sup> Many agree that a child's exposure to a jarring broadcast, like a fleeting expletive, can lead to a "teaching moment," where the parent can explain to the child why such language is inappropriate.<sup>376</sup> These teaching moments, despite their value to other parents, appear to be outside the PTC's interest in shielding every child from any and all potentially offensive broadcasts.

It is also troubling that the PTC's crusade against indecent broadcasts is more concerned with FCC complaints than with promoting either parental responsibility<sup>377</sup> or new technologies that could control a child's exposure to broadcasts.<sup>378</sup> The Telecommunications Act of 1996 mandated that all televisions thirteen inches or larger be manufactured with a device, the "V-chip," that enables viewers to block programs that contain a common rating.<sup>379</sup> The television networks adopted a TV rating system with six age-classifications, each with subratings that specify the potentially offensive content, like AL (adult language) and AC (adult content).<sup>380</sup> However, the PTC dismisses the V-Chip as not used widely enough, and the ratings system as faulty.<sup>381</sup> Journalist James Poniewozik noticed a certain "cognitive dissonance" with the PTC's stance on indecency, as activists want protection

IMPLICATIONS OF U.S. RATIFICATION (Jonathan Todres et al. eds., 2006); David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 81 (2006); T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 111 (2006); Bruce C. Hafen and Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449 (1996).

<sup>375</sup> See *Expansion*, *supra* note 293, at 8 (presenting comments by Time Warner's Adam Ciongoli).

<sup>376</sup> See, e.g., *id.* at 18 (comments of Dr. Roger Pilon explaining that a parent discussing with a child the "slings and arrows" he may be exposed to is more appropriate if the child is going to live in the real world, "as opposed to [being] sheltered from everything"); Calvert, *Profane Decision*, *supra* note 7, at 94-95 (considering the "wardrobe malfunction" as a "teachable moment: a chance to take an incident that is both unexpected and jarring and turn it into a valuable learning experience"); Minow, *supra* note 158 (urging parents to explain to children that while they may have heard bad words, they should be mature enough not to use them).

<sup>377</sup> In a panel discussion on indecency, FCC Chairman Kevin Martin stated that "parents and families really are the first line of defense for what's appropriate on television and radio." *Expansion*, *supra* note 293, at 2.

<sup>378</sup> Time Warner's Adam Ciongoli noted that "parents should have the tools to control what their children are watching in their own homes." *Id.* at 5.

<sup>379</sup> 47 U.S.C. § 303(x) (West 2008).

<sup>380</sup> V-Chip Information, <http://www.v-chip.org/abc/> (last visited Oct. 13, 2008).

<sup>381</sup> Poniewozik, *supra* note 282. See Brief for Parents Television Council as Amicus Curiae Supporting Petitioners at 7-9, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008) (No. 07-582) (arguing that Fox mislabeled its TV ratings for both the 2002 and 2003 Billboard Music Awards).



from indecent broadcasts, but don't use or promote the V-Chip for such protection.<sup>382</sup> The V-Chip is discussed more in Section V, *infra*.

The FCC used to adhere to a policy where it would decline to find a program indecent merely because it was offensive to some viewers.<sup>383</sup> Now, the pressure and influence of activist groups like the PTC give the impression that the FCC may be making indecency determinations because a program was offensive to *the groups*. While the FCC contends that the programs it finds indecent are patently offensive to the average viewer,<sup>384</sup> the sheer volume of the PTC's complaints compared to those of the rest of the broadcast audience indicates otherwise.

### B. *New Federal Indecency Fines: Maximum Fine Increases Tenfold*

The FCC's new fleeting expletives regime did not result in the imposition of any forfeitures, as the FCC thought it unfair to fine stations for a broadcast that was not actionable under previous agency precedent.<sup>385</sup> However, if the policy had been upheld, when viewed in conjunction with recent trends in FCC-imposed forfeitures and federal legislation, the potential for fines could have reached up to the tens of millions of dollars for a single violation of indecency standards.

For the entire seven-year period from 1996 to 2002, proposed indecency forfeitures totaled only \$388,400.<sup>386</sup> Coinciding with FCC's new policy toward fleeting expletives, the proposed forfeiture amounts ballooned to \$440,000 in 2003, nearly \$8 million in 2004, and nearly \$4 million for the first half of 2006.<sup>387</sup>

The forfeitures in 2006 were particularly aggressive, often imposing the statutory maximum forfeiture allowed by law.<sup>388</sup> The Omnibus Order imposed \$355,000 in forfeitures against six programs, five of which received

<sup>382</sup> Poniewozik, *supra* note 282.

<sup>383</sup> See *In re* Application of Pacifica Found., 95 F.C.C.2d 750, 761 (1983).

<sup>384</sup> See *Remand Order*, 21 F.C.C.R. 13299, 13303 (2006).

<sup>385</sup> See, e.g., *Golden Globes II*, 19 F.C.C.R. 4975, 4981–82 (2004); *Omnibus Order*, 21 F.C.C.R. 2664, *passim* (2006); See *Remand Order*, 21 F.C.C.R. at 13321–22, 13326.

<sup>386</sup> Federal Communications Commission, *Indecency Complaints and NALs: 1993–2006*, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Oct. 13, 2008).

<sup>387</sup> *Id.*

<sup>388</sup> The statutory maximum forfeiture was increased in 2006 to adjust for inflation. All programs airing before September 7, 2004, were subject to a maximum penalty of \$27,500 for each indecency violation. Programs airing on or after that date were subject to a maximum penalty of \$32,500 for each indecency violation. *Omnibus Order*, 21 F.C.C.R. at 2670 (citing *In re* Amendment of Section 1.80 of the Commission's Rules, 19 F.C.C.R. 10945, 10946 (2004)).

the maximum amount.<sup>389</sup> Subsequent forfeiture orders not only fined the statutory maximum, but levied the forfeitures against each individual licensee that broadcast the indecent program: \$550,000 in forfeitures against twenty owned-and-operated CBS affiliates for Janet Jackson's Super Bowl XXXVIII wardrobe malfunction,<sup>390</sup> more than \$1.2 million in forfeitures against 45 ABC affiliates for the showing of female buttocks on "NYPD Blue,"<sup>391</sup> and more than \$3.6 million in forfeitures against 111 CBS affiliates for the depiction of a teenage sex party on "Without a Trace."<sup>392</sup>

Congress felt that the indecency forfeitures were not high enough, and passed the Broadcast Indecency Enforcement Act of 2005, which increased the maximum indecency forfeiture from \$32,500 per violation to \$325,000 per violation.<sup>393</sup> If the episode of "Without a Trace" mentioned previously aired today, the total forfeiture could top \$36 million.

Before the Broadcast Indecency Enforcement Act passed the vote in the House, a number of elected representatives voiced their opposition to its means and its purpose. Representative Bernard Sanders of Vermont worried of the increasing specter of censorship in America.<sup>394</sup> Representative Jerrold Nadler of New York recommended that people who want to find more suitable programming on television should find a remote control and learn how to use it.<sup>395</sup> Representative Henry Waxman of California, echoing

<sup>389</sup> *Omnibus Order*, 21 F.C.C.R. at 2670–90. Only Martin Scorsese's documentary "The Blues," discussed previously, received under the statutory maximum. The FCC did decrease the forfeiture against Aerco Broadcasting's WSJU-TV. Initially the station was fined the maximum \$27,500 for each of fourteen separate broadcasts of "Video Musicales." However, seeing the \$385,000 aggregate fine as excessive, the FCC lowered it to \$220,000. *See id.*

<sup>390</sup> *In re Complaints against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 F.C.C.R. 2760 (2006), *rev'd*, *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008); John Eggerton, *FCC Lowers \$4 Million-Plus Indecency Boom*, BROADCASTING & CABLE, Mar. 15, 2006, <http://www.broadcastingcable.com/article/ca6316388.html> [hereinafter Eggerton, *Indecency Boom*].

<sup>391</sup> *In re Complaints against Various Television Licensees Concerning Their February 25, 2003, Broadcast of the Program "NYPD Blue"*, 23 F.C.C.R. 3147 (2008); John Eggerton, *ABC Pays NYPD Blue Fine, Appeals Decision in Federal Court*, BROADCASTING & CABLE, Feb. 21, 2008, <http://www.broadcastingcable.com/article/ca6534368.html>.

<sup>392</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 (2006); Eggerton, *Indecency Boom*, *supra* note 390. It must be noted that the original broadcast of "Without a Trace" did not garner any indecency complaints. They were generated only after the PTC notified its members about the content of the program two weeks later. Belmas, *supra* note 331, at 104.

<sup>393</sup> The Broadcast Indecency Enforcement Act, 47 C.F.R. § 1.80(b)(1) (2008). These higher forfeitures went into effect on July 20, 2007. *Id.*

<sup>394</sup> Hearn, *Smut Fines*, *supra* note 194.

<sup>395</sup> *Id.*

Justice Powell's opinion in *Pacifica*,<sup>396</sup> feared that the bill would reduce TV and radio stations to only air programming suitable for five-year-olds.<sup>397</sup> Waxman also thought it best for parents, rather than the government, to determine what material they would want their children exposed to,<sup>398</sup> echoing Justice Brennan's dissent in *Pacifica*.<sup>399</sup>

Had the FCC's indecency policy regarding fleeting expletives continued, the new maximum forfeitures could have sent the networks into an age of extreme self-censorship, causing a ripple effect that some fear would have a very negative effect on broadcast television revenues. To avoid the liability that would come with the broadcast of a fleeting expletive, stations might end live broadcasts and choose to air sporting events on a delay.<sup>400</sup> Considering the natural occurrence of microphones to pick up obscenities said by athletes,<sup>401</sup> real-time live coverage of sporting events could well have become a thing of the past.<sup>402</sup>

The broadcast industry's fear was that the higher fines and stricter indecency regulations would cause broadcast television to become more sanitized and safe, causing the younger and more desirable audiences to seek programs available elsewhere, such as satellite and cable television.<sup>403</sup> This is reflective of broadcast television in general, where provocative shows like ABC's "Desperate Housewives" succeed and wholesome shows like CBS's "Clubhouse" rarely last a full season.<sup>404</sup> If the networks were relegated to run low-rated shows that were clear of any provocative material, their programming lineups would attract smaller audiences, which would result in smaller advertising revenues. This would have left the networks with a Catch-22 of steep indecency fines or smaller advertising revenues.

<sup>396</sup> FCC v. *Pacifica Found.*, 438 U.S. 726, 760 (1978) ("It is said that this ruling will have the effect of reducing the adult population to hearing only what is fit for children. This argument is not without force.") (citation omitted).

<sup>397</sup> *Id.*

<sup>398</sup> Hearn, *Smut Fines*, *supra* note 194.

<sup>399</sup> *Pacifica*, 438 U.S. at 770 ("[P]arents, not the government, have the right to make certain decisions regarding the upbringing of their children.") (emphasis omitted).

<sup>400</sup> Calvert, *Profane Decision*, *supra* note 7, at 64. CBS apparently considered such a measure in March 2004. *Id.*

<sup>401</sup> See, e.g., Todd Zolecki, *A Curse Heard*, PHILA. INQUIRER, July 15, 2008, at C1 (reporting baseball player Chase Utley's expletive during 2008 Home Run Derby introductions); Terry Blount & Angelique Chengelis, *NASCAR Will Not Punish Stewart for Profanity During Practice Session*, ESPN, Sept. 30, 2007, <http://sports.espn.go.com/rpm/news/story?seriesId=2&id=3043467> (reporting that NASCAR driver Tony Stewart said expletive during televised practice session).

<sup>402</sup> Calvert, *Profane Decision*, *supra* note 7, at 64.

<sup>403</sup> Jarvis, *supra* note 156.

<sup>404</sup> Poniewozik, *supra* note 282.

The higher indecency fines and the FCC's revised fleeting expletives policy also had the potential to drastically impact smaller broadcasters, like those cited for indecent broadcasts in the nascent days of FCC enforcement.<sup>405</sup> California public radio station KCRW-FM fired personality Sandra Tsing Loh after she inadvertently said "fuck" on the air.<sup>406</sup> Representative Lamar Smith of Texas even admitted that if a small community radio station accidentally broadcast a fleeting expletive, it could rightly go out of business due to the new maximum indecency fine.<sup>407</sup> While Representative Smith stated that the goal of the increase was not to put people out of business,<sup>408</sup> the combination of the fines and the FCC's revised policy would essentially have caused that effect.

## VI. THE AFTERMATH: CONGRESS REACTS, AND FLEETING EXPLETIVES HEAD TO THE SUPREME COURT

Within months of *Fox Television Stations v. FCC*, members of Congress acted swiftly to counteract the court's decision. Senator John Rockefeller of West Virginia sponsored a bill that would "require the FCC, in enforcing its regulations concerning the broadcast of indecent programming, to maintain a policy that a single word or image may be considered indecent."<sup>409</sup> Representative Charles Pickering of Mississippi sponsored an identical bill in the House of Representatives.<sup>410</sup> However, these bills have not undergone a vote on either the Senate or the House floors.

A more immediate response to the decision will likely come from the Supreme Court, who unexpectedly agreed to hear the appeal of *Fox Television Stations*.<sup>411</sup> The question remains whether the Court will merely review the Second Circuit's reasoning under the Administrative Procedure

<sup>405</sup> See, e.g., *Pacifica I*, 56 F.C.C.2d 94 (1975) (finding broadcast on community radio station indecent); *In re WUHY-FM*, 24 F.C.C.2d 408 (1970) (finding broadcast on noncommercial educational radio station indecent).

<sup>406</sup> Naoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 212-13 (2006).

<sup>407</sup> *Talk of the Nation* (National Public Radio broadcast Jan. 28, 2004) (comments by Representative Lamar Smith during interviews concerning obscenity over the airwaves and whether Congress or the FCC should tighten restrictions and regulations).

<sup>408</sup> *Id.*

<sup>409</sup> Protecting Children from Indecent Programming Act, S. 1780, 110th Cong. (2007).

<sup>410</sup> Protecting Children from Indecent Programming Act, H.R. 3559, 110th Cong. (2007).

<sup>411</sup> *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008). Several communications attorneys had stated that the Supreme Court was unlikely to take the appeal because the case was decided on narrow procedural grounds and concerned the application of established law. John Eggerton, *FCC Profanity Crackdown in Limbo*, BROADCASTING & CABLE, Oct. 1, 2007, at 5, available at <http://www.broadcastingcable.com/article/ca6485599.html>.

Act, or if it will address any of the constitutional challenges to the FCC's policy that the Second Circuit briefly addressed in observations made "in the interest of judicial economy."<sup>412</sup>

If the Supreme Court affirms the ruling on administrative grounds, then the FCC must deal with the Second Circuit's remand and "adequately respond to the constitutional and statutory challenges raised by the Networks."<sup>413</sup> If the Commission is unable to meet those challenges, it will need to rethink its entire fleeting expletives policy, perhaps reverting back to standards from the Industry Guidance policy statement,<sup>414</sup> or even adopt a completely new system that would protect stations that commit only one offense.<sup>415</sup>

If the Supreme Court reverses the ruling, it would reinforce the FCC's expertise on contemporary values and represent a serious blow to any future challenges to indecency findings.<sup>416</sup> Broadcast attorney John Crigler believes that a reversal would make it "virtually impossible to challenge any FCC indecency ruling because the rulings would turn on 'expert' administrative opinions entitled to deference and not susceptible to disproof."<sup>417</sup>

However, the Supreme Court could go outside the APA reasoning and rule on other arguments addressed in the briefs to the Court, such as whether technological advancements, like the V-Chip, provide a less restrictive alternative to the FCC's actions against indecent broadcasts.<sup>418</sup> Supreme Court precedent indicates that when technology provides a way of

<sup>412</sup> Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (2008).

<sup>413</sup> *Id.* at 467.

<sup>414</sup> *Industry Guidance*, 16 F.C.C.R. 7999, 8008 (2001) (explaining that the fleeting or isolated nature of an expletive tends to weigh against a finding of indecency).

<sup>415</sup> Milagros Rivera-Sanchez recommends a "warning system," where a first-time offender receives a letter of warning containing the nature of the offense. A second-time offender would receive a letter of reprimand that would go on the station's record. Fines would then be assessed on all subsequent violations. "[T]his approach would give broadcasters an opportunity to become educated and would protect stations that, for whatever circumstance, commit only one offense." Milagros Rivera-Sanchez, *How Far Is Too Far? The Line Between "Offensive" and "Indecent" Speech*, 49 FED. COMM. L.J. 327, 366 (1997).

<sup>416</sup> John Eggerton, *Fox, FCC Square Off Over Indecency*, BROADCASTING & CABLE, June 9, 2008, at 36, <http://www.broadcastingcable.com/article/ca6568202.html>.

<sup>417</sup> *Id.*

<sup>418</sup> See, e.g., Brief for Respondent Fox Television Stations, Inc. at 45–48, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008) (No. 07-582); Brief for Respondents NBC Universal, Inc. et al. at 43–47, *Fox Television Stations*, 128 S. Ct. 1647 (2008) (No. 07-582); Brief for American Civil Liberties Union et al. as Amicus Curiae Supporting Respondents at 35–37, *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (2008) (No. 07-582); Brief for Parents Television Council as Amicus Curiae Supporting Petitioner, *supra* note 381, at 35–37.

protecting children from exposure to potentially harmful speech, its less restrictive nature is preferred over government enforcement of censorship.<sup>419</sup>

Recently, the Third Circuit in *American Civil Liberties Union v. Mukasey*<sup>420</sup> compared blocking and filtering Internet software with civil and criminal penalties levied by the Child Online Protection Act (COPA).<sup>421</sup> The Government did not challenge the district court's factual findings that filters were widely available, easy to obtain, fairly easy to use, effective in blocking about ninety-five percent of sexually explicit material, and customizable based on the age of the user and the category of speech.<sup>422</sup> The Third Circuit rejected the argument that filters are not effective because not every parent uses them,<sup>423</sup> as "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative."<sup>424</sup> The Third Circuit also rejected the "belt-and-suspenders" argument, whereby filters (the "belt") and COPA (the "suspenders") would both serve the protection of minors, because "if the belt works as effectively as the suspenders, then the Government cannot prosecute people for not wearing suspenders."<sup>425</sup>

A similar argument can be made regarding the V-Chip and potentially indecent broadcasts. The V-Chip is widely available and easy to obtain, as

<sup>419</sup> See, e.g., *United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000) (holding that a federal statute that required cable providers to limit the availability of adult pay-per-view channels from 10 p.m. to 6 a.m. was unconstitutional as the opportunity for subscribers to order signal blocking on a household-by-household basis was a less-restrictive alternative); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 121–22, 130–31 (1989) (holding that a federal ban on "1-900" numbers is unconstitutional as existing safeguards of credit card screening, user identification codes, and message scrambling proved to be less restrictive alternatives).

<sup>420</sup> 534 F.3d 181 (3d Cir. 2008).

<sup>421</sup> 47 U.S.C. § 231 (2008). COPA provides for civil fines up to \$50,000 and criminal imprisonment for up to six months for anyone who, "by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1). Material that is considered harmful to minors includes any communication that is obscene, appeals to a prurient interest, depicts sexual conduct in a manner that is patently offensive to minors, or, taken as a whole, lacks serious literary, artistic, political, or scientific value. 47 U.S.C. § 231(e)(6).

<sup>422</sup> *Mukasey*, 534 F.3d at 201 (citing *Am. Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775, 793–94, 813 (E.D. Pa. 2007)).

<sup>423</sup> *Id.* at 203.

<sup>424</sup> *Id.* at 202 (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004)). The Government cited a study that only fifty-four percent of parents used filters, but neglected to mention that the usage rate among parents had increased by sixty-five percent over a four-year span. *Id.* See also *United States v. Playboy Entm't Group*, 529 U.S. 803, 805 (2000) ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").

<sup>425</sup> *Mukasey*, 534 F.3d at 204.

every television manufactured since 2000 comes equipped with one.<sup>426</sup> The different TV-ratings and subratings allow parents to tailor what they choose to block based on the age of their children and the content of the program. A 2007 study by the Kaiser Family Foundation showed that while V-Chip use and awareness are still low, its use has more than doubled since 2001, and those who do use it find it “very useful.”<sup>427</sup>

Even if the Court agrees that the FCC’s change in its indecency policy was arbitrary and capricious, it could still remand the case to a district court to engage in comprehensive fact-finding regarding the effectiveness of the V-Chip. The district court could be instructed to make a determination regarding the V-Chip’s ease of use,<sup>428</sup> and whether federal programs that promote the V-Chip would greatly affect its usage.<sup>429</sup> If the “belt” of the V-Chip is adequate to protect minors from potentially indecent broadcasts, the FCC’s practice of issuing indecency fines may be relegated to being needless “suspenders.” In this age of rapidly expanding technology and digital broadcast signals, the Supreme Court may very well decide to determine if technology has surpassed the need for the FCC to police broadcasts for indecency.

## VII. CONCLUSION

When the Second Circuit held that the FCC’s new policy on fleeting expletives was arbitrary under the Administrative Act, it placed the FCC on notice that its crackdown on broadcast indecency would not survive scrutiny without a justifiable reason. I contend the best way to view the facts of this case is through language from a footnote in Judge Leval’s dissenting opinion: “When the censorship is exercised only to protect polite manners and not by

<sup>426</sup> See 47 U.S.C. § 303(x) (1997).

<sup>427</sup> According to the study, only sixteen percent of the parents surveyed used the V-Chip to block specific content, up from seven percent in 2001. Although eighty-two percent of the parents surveyed purchased televisions containing a V-Chip, fifty-seven percent were not aware that the television contained the device. Among those parents who were aware that they had a television with a V-Chip, forty-six percent said they used it. And among those parents who used it, seventy-one percent found it to be “very useful.” News Release, Kaiser Family Foundation, Parents Say They’re Getting Control of Their Children’s Exposure to Sex and Violence in the Media—Even Online (June 19, 2007), <http://www.kff.org/entmedia/entmedia061907nr.cfm>.

<sup>428</sup> Judge David B. Sentelle of the U.S. Court of Appeals for the D.C. Circuit once remarked that the only members of a household who knows how to use the V-Chip to block programming may be the children for whom the blocking is intended. *Expansion, supra* note 293, at 10.

<sup>429</sup> Cf. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670 (2004) (“COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.”).

reason of risk of harm, I question whether it can survive scrutiny.”<sup>430</sup> As the FCC’s explanation for its policy change seems devoid of a reasoned basis, the Commission does not seem concerned with truly indecent broadcasts, but instead with enforcing good manners.

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<sup>430</sup> Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 474 n.18 (2d Cir. 2007) (Leval, J., dissenting), *cert. granted*, 128 S. Ct. 1647 (2008).



