

HAVE YOU NO SENSE OF DECENCY? AN EXAMINATION OF THE EFFECT OF TRADITIONAL VALUES AND FAMILY-ORIENTED ORGANIZATIONS ON TWENTY-FIRST CENTURY BROADCAST INDECENCY STANDARDS

*Michael J. Cohen**

TABLE OF CONTENTS

I.	INTRODUCTION	113
II.	WHEN IS BROADCAST MATERIAL INDECENT?	116
	A. Defining Broadcast Indecency	116
	B. Safe Harbor Periods.....	118
	C. Enforcement Criteria.....	124
III.	THE INFLUENCE OF SOCIALLY CONSERVATIVE, TRADITIONAL VALUES AND FAMILY ORIENTED ORGANIZATIONS ON INDECENCY LAW	126
	A. A New Culture on the Rise	126
	B. Traditional Values and Family-Based Organizations Put Increased Pressure on Government and Networks to Act.....	129
	C. The Broadcast Decency Enforcement Act.....	134
	D. Responses to the Broadcast Decency Enforcement Act.....	137
IV.	CONCLUSION	142

I. Introduction

We live in an era where the Secretary of Education's "Public Enemy Number One" is a bunny named Buster¹ and where the po-

* J.D., May 2005, Seton Hall University School of Law; B.A., Rutgers College, Rutgers University.

¹ See, e.g., Lisa de Moraes, *Who Framed Buster Rabbit? The Fallout Continues*, WASH. POST, Feb. 18, 2005, at C7. In a letter to the head of PBS, the newly appointed Secretary of Education Margaret Spellings condemned an episode of the children's program *Postcards from Buster*, which showed Vermont children who lived with lesbian parents. *Id.*

litical and financial consequences of airing true-to-life documentaries are often so great that the media self-censors or refrains from exhibiting the reality they depict.² Indeed, as the pendulum that guides the political and social mores in our society swings further to the right, conservative organizations are gaining traction in their battle against perceived media indecency. These socially conscious organizations typically orient toward so-called traditional or family values and have garnered increased attention in recent years, thanks in part to publicized sex scandals involving high government officials, the rise of cable news, and the prevalence of Internet communication. The media responded to these incidents by self-censoring³ and using frequent disclaimers,⁴ thereby chilling free speech.

One striking example of the impact such fears have had on media involves the Public Broadcast System's (PBS) airing of the *Frontline* documentary, *A Company of Soldiers*, which depicts the men of the Army's Eighth Cavalry Regiment carrying out their duties in Iraq.⁶ The program contains the type of language one would expect of young men in a dangerous combat situation and provides a realistic account of life for American soldiers in Iraq.⁷ In an attempt to insulate local affiliates from a Federal Communications Commission (FCC) fine, PBS reversed its typical practice for cases involving decency and sent out a censored version of the program in its hard feed and the uncensored version in its soft

² See, e.g., Robert P. Laurence, 'Soldiers' May Be Casualty of FCC Restrictions, SAN DIEGO UNION-TRIB., Feb. 21, 2005, at D1.

³ See, e.g., *infra* notes 6-15 and accompanying text.

⁴ Maureen Ryan, *Warning: Reader Discretion Advised*, CHI. TRIB., Mar. 4, 2005, at C1. Ryan suggests three main reasons for the increase in the number of disclaimers and warnings: first, "to increase buzz"; second, to prevent viewer complaints; and third, to mitigate any action the FCC might take in light of material that could be viewed as indecent. Compare *id.*, with *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (finding that "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

⁵ See, e.g., Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW. 1 (2004), available at http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C754%5CFallow.pdf (arguing that the FCC's new pattern of enforcement and the recent congressional attention on indecency chills free speech).

⁶ Laurence, *supra* note 2.

⁷ *Id.*

feed.⁸ PBS also requested that stations airing the uncensored version sign a disclaimer of liability absolving the network of blame in the event of any FCC action.⁹

A second example occurred in November 2004 when more than sixty local ABC affiliates refused to air Steven Spielberg's World War II epic *Saving Private Ryan*.¹⁰ The network wanted to air the film uncut and unedited, but the affiliates cited concerns that its coarse language might warrant an FCC indecency fine.¹¹ Ultimately, over 150 affiliates presented the unedited film.¹² As the affiliates feared, complaints to the FCC followed.¹³ The FCC, however, declined to sanction those affiliates for the presentation of indecent material, finding that, in the context presented, the language and violence did not constitute a violation of broadcast decency standards.¹⁴ Rather, the movie conveyed "the horrors of war through the eyes of . . . soldiers, ordinary Americans placed in extraordinary situations."¹⁵

These examples illustrate Congress's and the FCC's increased attention to indecent displays in popular media in light of events like Bono's use of the "f-word" during his 2003 *Golden Globe Awards* acceptance speech and Janet Jackson's infamous wardrobe malfunction during the 2004 Super Bowl Halftime Show.¹⁶ Despite the political clamor about increased fines and broader enforcement of indecency standards, the material in question must still be found indecent in order to justify an FCC fine.¹⁷ Though the FCC has attempted to define, and on several occasions, clarify, its indecency

⁸ *Id.*

⁹ Edward Wyatt, *PBS Warns Stations of Risks from Profanity in War Film*, N.Y. TIMES, Feb. 18, 2005, at C2 (noting that requiring local PBS affiliates to sign a waiver puts those stations in an "uncomfortable situation," and noting that the network's decision to require local stations to sign waivers was financial in nature, and not a reflection on the film's merit).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Complaints Regarding the Television Presentation of *Saving Private Ryan*, 20 F.C.C.R. 4507, 4508-09 (2005).

¹⁴ *Id.* at 4510.

¹⁵ *Id.* at 4513.

¹⁶ See Fallow, *supra* note 5, at 25-26.

¹⁷ See discussion *infra* Part II.C.

standards,¹⁸ what constitutes indecent material remains largely subjective.¹⁹ Thus, this article will: examine the indecency standard, mindful of the current political environment;²⁰ discuss how enforcement has changed over time and what this means for broadcasters of potentially indecent material in the future;²¹ and trace the impact of traditional values and family-oriented organizations on indecency law.²²

II. *When is Broadcast Material Indecent?*

A. *Defining Broadcast Indecency*

Defining indecent material is an inherently subjective endeavor. The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs," aired during times when there is a reasonable risk that children may be listening.²³ Federal law prohibits the broadcast of such material by radio communication, along with any obscene or profane language.²⁴ However, unlike obscenity, which falls outside the protection of the First Amendment,²⁵ indecent speech is protected

¹⁸ See discussion *infra* Part II.A.

¹⁹ See discussion *infra* Part II.A.

²⁰ See discussion *infra* Part II.A.

²¹ See discussion *infra* Part III.

²² See discussion *infra* Part III.

²³ Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8000 (2001) [hereinafter Guidance on the FCC's Case Law]. Courts have upheld this definition of indecency (which originally came from the FCC itself) against challenges in later cases. See, e.g., *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1339 (D.C. Cir. 1988). Indecent material "qualifies for First Amendment protection whether or not it has serious merit." *Id.* at 1340.

²⁴ 18 U.S.C. § 1464 (2000). Individuals who engage in such language are subject to fine, imprisonment for "not more than two years," or both. *Id.*

²⁵ See *Miller v. California*, 413 U.S. 15, 23 (1973). Material is considered obscene material if it meets a three-pronged test:

(a) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or sci-

and may be regulated so long as the restriction is narrowly tailored to meet a compelling state interest.²⁶

In *FCC v. Pacifica Foundation*,²⁷ the Supreme Court addressed whether the FCC could regulate a radio broadcast of material that was indecent, but not obscene.²⁸ The case involved the daytime airing of a George Carlin monologue entitled *Filthy Words*.²⁹ Finding that broadcast content is "not entitled to absolute constitutional protection under all circumstances," the Supreme Court cited two rationales that justified appropriately tailored restrictions.³⁰ The Court first recognized the "uniquely pervasive" role of broadcast media in American life, and then acknowledged that young children can access broadcast media in different ways than other forms of expression.³¹ Utilizing the FCC's definition of broadcast indecency, the Court deemed these reasons sufficiently important to justify the regulation of a broadcast otherwise protected by the First Amendment.³²

For nearly a decade after *Pacifica*, the Commission declined to find any broadcast indecency.³³ However, in 1987, it issued three

entific value.

Id. at 24 (citations omitted). The Supreme Court classifies several types of speech, including obscenity, as outside First Amendment protection. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing the "incitement to unlawful conduct" test); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (creating the "fighting words" test).

²⁶ See *ACT I*, 852 F.2d at 1343 n.18.

²⁷ 438 U.S. 726 (1978).

²⁸ *Id.* at 729.

²⁹ *Id.*; see also Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975).

³⁰ *Pacifica*, 438 U.S. at 747. In response to a complaint filed with the Commission, the FCC issued an order designed to clarify the standards the agency would use to address indecency matters. *Id.* at 731. The order cited four considerations that justified treating broadcasts different from other forms of expression: first, children's access to radios at times when they are unsupervised; second, radios are frequently located in the home, where personal privacy interests are entitled "extra deference;" third, unconsenting adults may be subject to the offensive language without warning; and fourth, public airwaves are a scarce resource, which the government may license. *Id.* at 731 n.2.

³¹ *Id.* at 748-50. Upholding the constitutionality of the FCC's broadcast indecency rules, the Court in *Reno v. ACLU*, 521 U.S. 844 (1997), recognized the "special justifications for regulation of the broadcast media that are not applicable to other speakers." *Id.* at 869.

³² *Pacifica*, 438 U.S. at 748-50.

³³ *Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930 (1987). For more than a decade

rulings announcing violations of its decency standards.³⁴ Two of the broadcasts at issue occurred after 10:00 p.m., the threshold previously identified by the FCC as the time when the risks of exposing children to such material were minimal.³⁵ However, shortly after issuing its 1987 rulings, the Commission revised its industry guidelines and specified that the new threshold "safe harbor" period would begin at midnight.³⁶

B. Safe Harbor Periods

The 1988 decision in *Action for Children's Television v. FCC (ACT I)*³⁷ involved a challenge to the three 1987 decisions discussed above, and to the Commission's abandonment of its own 10:00 p.m. "safe harbor."³⁸ The United States Court of Appeals for the District of Columbia affirmed the FCC's ruling in *Infinity Broadcasting Corp. of Pennsylvania*,³⁹ the one complaint about a broadcast that occurred earlier than 10:00 p.m., but the court vacated the Commission's rulings in *Pacifica Foundation* and *Regents of the University of California*,⁴⁰ the broadcasts that occurred after 10:00 p.m.⁴¹ With respect to the latter two decisions, the court found that the FCC "failed to consider fairly and fully what time

after *Pacifica*, the FCC found no broadcasts to be actionable under its indecency standard. See *id.*

³⁴ See *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2701 (1987); *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703, 2704 (1987); *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2706 (1987). In each of these cases, the Commission issued a warning to the respective broadcast outlets in light of some confusion on the indecency standard that ensued after some of the FCC's earlier rulings. See *Pacifica Found., Inc.*, 2 F.C.C.R. at 2701; *Regents of the Univ. of Cal.*, 2 F.C.C.R. at 2704; *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. at 2706.

³⁵ *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1339 (D.C. Cir. 1988).

³⁶ *Infinity Broad.*, 3 F.C.C.R. at 937 (issuing guidance following the three orders cited *supra* note 34). In that opinion, the FCC indicated that midnight, rather than 10:00 p.m., was a more "reasonable delineation point." *Id.* at 934 n.47. The safe harbor extended until 6:00 a.m. under the Commission's new and old reasoning. See *id.*

³⁷ 852 F.2d at 1332 (D.C. Cir. 1988).

³⁸ See *id.* at 1340-45. The FCC defines the safe harbor as "the time during which indecent speech may be legally broadcast." Guidance on the FCC's Case Law, 16 F.C.C.R. 7999, 8001 (2001).

³⁹ *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. at 2705.

⁴⁰ *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987).

⁴¹ *ACT I*, 852 F.2d at 1341.

lines should be drawn,” and ordered the Commission to determine “the times at which indecent material may be broadcast.”⁴²

In the months between *ACT I* and the FCC’s planned hearings on the safe harbor issue, Congress, in an appropriations bill rider, directed the FCC to “enforce the provisions of [18 U.S.C. § 1464] on a 24-hour-per-day basis.”⁴³ After effectuating the congressional mandate, the FCC issued a report finding a “reasonable risk” that children could access indecent broadcast material at any time of day or night without active parental supervision.⁴⁴ Accordingly, absent a total ban on indecent material, nothing would satisfy the government’s compelling interest in protecting minors from indecent material.⁴⁵

Media advocacy groups, civil libertarians, and other *amici* immediately challenged the implementing regulations behind the new congressional mandate.⁴⁶ In *Action for Children’s Television v. FCC (ACT II)* the petitioners made two arguments in support of their challenge to the FCC’s total ban on broadcast indecency.⁴⁷ First, they claimed that government agencies could not “completely suppress indecent speech in any medium.”⁴⁸ Second, they

⁴² *Id.* at 1341-44.

⁴³ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988); *see also* Enforcement of Prohibitions Against Broad. Obscenity & Indecency in 18 U.S.C. § 1464, 4 F.C.C.R. 457 (1988) (enforcing the congressional mandate and noting the lack of discretion afforded the FCC in the legislative language). Writing separately, Commissioner Patricia Diaz Dennis, who concurred in the result, questioned the constitutionality of the congressional mandate. *Id.* at 457 (Diaz Dennis, C., separate opinion).

⁴⁴ Enforcement Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990) [hereinafter Enforcement Prohibitions]. The Commission believed that it could proscribe indecent broadcasts in the wake of the Supreme Court’s decision in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), so long as it could prove that its regulations were the least restrictive measure to effectuate the government’s compelling interests. *Action for Children’s Television v. FCC (ACT II)*, 932 F.2d 1504, 1507 (D.C. Cir. 1991). In short, the Commission read *Sable* as giving it the power to presume that children were in the audience at all times — a presumption that could be rebutted only with evidence, considered on a case-by-case basis, that children were not in the market’s audience at the time the allegedly indecent broadcast aired. *See* Enforcement Prohibitions, 5 F.C.C.R. at 5310.

⁴⁵ Enforcement Prohibitions, 5 F.C.C.R. at 5310.

⁴⁶ *ACT II*, 932 F.2d at 1504.

⁴⁷ *Id.* at 1508.

⁴⁸ *Id.*

asserted that “even if a total ban could theoretically be justified,” the FCC’s actions do not meet the high threshold for strict scrutiny.⁴⁹ Given the constitutional underpinnings of the *ACT I* decision, the D.C. Circuit in *ACT II* concluded that neither Congress nor the FCC, consistent with the First Amendment, could legitimately ban all indecent broadcast material.⁵⁰ The court directed the Commission to reevaluate the concerns that warranted the regulation of indecent broadcasting and establish a safe harbor consistent with the least restrictive means standard.⁵¹

In response to the *ACT II* decision, Congress once again acted to limit broadcast indecency by passing the Public Telecommunications Act of 1992,⁵² which directed the FCC to pass regulations limiting indecent broadcasts to the period between midnight and 6:00 a.m.⁵³ Section 16(a) of the law included a narrow exception allowing public radio or television stations that went off the air at or before midnight to broadcast indecent material between 10:00 p.m. and 6:00 a.m.⁵⁴

In *Action for Children’s Television v. FCC (ACT III)*,⁵⁵ the D.C. Circuit addressed three challenges to section 16(a) of the 1992 Public Telecommunications Act.⁵⁶ After quickly disposing of the petitioners’ vagueness challenges,⁵⁷ the court addressed the sub-

⁴⁹ *Id.*

⁵⁰ *Id.* at 1509. In so holding, the court noted that it: would be unseemly for a regulatory agency to throw down the gauntlet, even a gauntlet grounded on the Constitution, to Congress. But just as the FCC may not ignore the dictates of the legislative branch, neither may the judiciary ignore its independent duty to check the constitutional excesses of Congress.

Id. at 1509-10.

⁵¹ *Id.* at 1509-10. The court directed the FCC to consider the following concerns, originally raised in *ACT I*: “the appropriate definitions of ‘children’ and ‘reasonable risk’ for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government’s interest in regulating indecent broadcasts.” *Id.* at 1510.

⁵² Pub. L. No. 102-356, 106 Stat. 949 (1992).

⁵³ *Id.*; see also *Action for Children’s Television v. FCC (ACT III)*, 58 F.3d 654, 658-59 (D.C. Cir. 1995) (en banc). The petitioners challenged section 16(a) of the Public Telecommunications Act of 1992 and its implementing regulations. *ACT III*, 58 F.3d at 659.

⁵⁴ *ACT III*, 58 F.3d at 658-59.

⁵⁵ *Id.* at 654.

⁵⁶ *Id.* at 659.

⁵⁷ *Id.* The court had also denied the petitioner’s vagueness argument used in

stance of the petitioners' First Amendment arguments, and their claim that the Act "unconstitutionally discriminate[d] among categories of broadcasters by distinguishing the times during which certain public and commercial broadcasters [could] air indecent material."⁵⁸

Any restriction on broadcast indecency must be narrowly tailored to meet the government's compelling interests.⁵⁹ In *ACT III*, the FCC identified three such interests: (1) respect for parents' rights to supervise their own children, (2) concern for children's well-being, and (3) the protection of the home from offensive broadcasts.⁶⁰ The court focused almost exclusively on the "children's well-being" rationale, viewing the "respect for parents" rationale as a lesser included component of the former.⁶¹ This rationale, the court found, was sufficiently compelling to serve as an independent justification for the Commission's indecency regulations.⁶²

The petitioners argued that in order to suppress indecent material at times when parents are available to supervise children, the government must establish a "causal nexus . . . between broadcast indecency and any physical or psychological harm to minors."⁶³ The court, however, disagreed for two reasons. First, the D.C. Circuit acknowledged studies showing that parents are unable to effectively monitor what their children watch or listen to at all hours of the day.⁶⁴ Since many children, even those under twelve, have television sets in their rooms, own their own portable radios, and otherwise have access to broadcast material at times when parents or guardians cannot exercise control over their viewing or listening, the government has a keen interest in helping parents ensure that such material does not reach children.⁶⁵ By shielding minors

ACT I and *ACT II*. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 660. The court adhered to the traditional strict scrutiny analysis, while acknowledging that broadcast television and radio is a unique medium that has traditionally received only limited First Amendment protection. *Id.* at 559-60.

⁶⁰ *ACT III*, 58 F.3d at 660-61.

⁶¹ *Id.* at 661.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 661-62.

from exposure to indecent material through regulation, the government clearly achieves its objectives: parental authority is bolstered such that they may better direct the rearing of their own children, and the children themselves are protected from exposure to potentially damaging indecent material.⁶⁶

Second, the court recognized that petitioners are not required to show "clinically measurable injury" to minors through "scientific demonstrations" in order for any restriction on indecent speech to be held constitutional.⁶⁷ The Supreme Court previously found sufficient non-scientific legislative findings that exposure to indecent materials might impair the moral development of children.⁶⁸ The court of appeals adopted this reasoning and suggested, somewhat surprisingly, that the detrimental effects of indecent material on children are so readily apparent that legislatures, in crafting laws to restrict access to such material, need not even take testimony from experts.⁶⁹ Additionally, the court appeared to attribute a decline in the "quality" of America's youth to exposure to indecent materials.⁷⁰ The court seemed to say that a modicum of wholesomeness is required to participate effectively in government, and that restrictions on indecent material can be justified by an unspecified interest in the future of American democracy.⁷¹

After finding the government's justification for the restriction compelling, the court assessed whether the government's means met the required least restrictive standard.⁷² The petitioners contended that section 16(a) was unconstitutionally broad for two

⁶⁶ See *ACT III*, 58 F.3d at 663. Without meaningful restrictions on broadcast indecency, most parents who seek to shield their children from such material will be hard pressed to do so. *Id.* However, even with the restrictions, parents wishing to expose their children to indecent material can do so by purchasing cable television or pay-per-view services and renting videos. See *id.*

⁶⁷ *Id.* at 661-62.

⁶⁸ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (no scientific demonstration of injury required when there is a compelling interest in protecting students at a high school from exposure to indecent material); *Ginsberg v. New York*, 390 U.S. 629, 643 (1968) (a legislature is not required to provide "scientifically certain criteria" when drafting laws to restrict children's access to pornography).

⁶⁹ See *ACT III*, 58 F.3d at 662-63.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² *Id.* at 663-64.

reasons: first, it encompassed children over the age of twelve, and second, the midnight to 6:00 a.m. safe harbor restricted the First Amendment right of adults to view indecent material during evening prime time hours.⁷³

As to the first argument, the court found the FCC's reasons for defining children as individuals ages seventeen and under convincing, and found the government's restriction sufficiently narrow in that respect.⁷⁴ The court found the petitioners' second argument no more persuasive. It balanced the government's compelling interests in protecting children against the adult population's right to access indecent material.⁷⁵ Presented with significant evidence that minors watch television and listen to radio before midnight, the court concluded that "there is a reasonable risk that large numbers of children would be exposed to any indecent material broadcast between 6:00 a.m. and midnight."⁷⁶ So long as Congress provided evidence for its judgment, the court decided that the precise boundaries of the safe harbor period could be left to the legislature.⁷⁷ The court viewed the difference between the 10:00 p.m. threshold and the midnight threshold as one of degree, and not as a "less restrictive alternative in kind."⁷⁸ As such, the Commission's restriction fit the narrowly tailored standard.⁷⁹

Note that the D.C. Circuit upheld as constitutional the FCC's 6:00 a.m. to midnight indecency ban, viewed independently from the statutory exception for public broadcasting stations.⁸⁰ As the court pointed out, neither the Commission nor Congress adequately addressed the reasons for the special treatment afforded

⁷³ *Id.* at 664.

⁷⁴ *Id.* One of the reasons the court remanded in *ACT I* was because the Commission failed to fully and fairly enumerate its findings and consider the ramifications of those findings. *See id.* The FCC cited three reasons: (1) federal statutes "designed to protect children from indecent material use the same standard;" (2) most states have criminalized dissemination of sexually explicit material to anyone under age seventeen; (3) many Supreme Court decisions have upheld as constitutional statutes protecting children below the age of eighteen. *Id.*

⁷⁵ *ACT III*, 58 F.3d at 665.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 686 (citation omitted).

⁷⁹ *Id.* at 667.

⁸⁰ *Id.*

to public broadcasting stations that went off the air before midnight.⁸¹ This regulation lacked a relationship to the previously mentioned interests asserted by the government.⁸² Therefore, the “preferential safe harbor” undermined the FCC’s and Congress’s arguments for prohibiting indecent broadcasts before midnight as well as the “constitutional viability of the more restrictive safe harbor” by creating two separate standards for broadcasts of indecent programming.⁸³ Consequently, the court found section 16(a) unconstitutional insofar as it banned indecent broadcast material between 10:00 p.m. and midnight.⁸⁴ Accordingly, the court readjusted the start of the safe harbor for all broadcasts downward to 10:00 p.m., and not just for the excepted stations that go off the air at midnight.⁸⁵

C. *Enforcement Criteria*

The FCC lacks the power to respond *sua sponte* to incidents of indecency.⁸⁶ Rather, the agency relies on documented complaints brought by the public.⁸⁷ FCC staff members then evaluate each complaint and determine whether the broadcast material is indecent.⁸⁸ If the staff believes the material is indecent, it will send a

⁸¹ *ACT III*, 58 F.3d at 667. The court emphasized that “Congress has made no suggestion that minors are less likely to be corrupted by sexually explicit material that is broadcast by a public as opposed to a commercial station” *Id.* at 668.

⁸² *See id.* at 668; *see, e.g., Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (finding unconstitutional a city’s attempt to ban news racks on public sidewalks to reduce litter because the distinction between commercial and noncommercial speech lacked a relationship “to the particular interests that the city ha[d] asserted.”).

⁸³ *ACT III*, 58 F.3d at 668.

⁸⁴ *Id.* at 668-69.

⁸⁵ *Id.* at 669-70.

⁸⁶ *See* FCC Enforcement Bureau, Regulation of Obscenity, Indecency and Profanity, <http://www.fcc.gov/eb/oip/Welcom.html> (last visited Mar. 2, 2006) [hereinafter Regulation of Obscenity].

⁸⁷ FCC Enforcement Bureau, Complaint Process, <http://www.fcc.gov/eb/oip/process.html> (last visited Mar. 2, 2006). Complainants are asked to provide details of the indecency (what was actually said or depicted) during the broadcast, the date and time of the broadcast, and the call sign of the broadcast station. FCC Enforcement Bureau, Indecency Fact Sheet, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Mar. 2, 2006).

⁸⁸ FCC Enforcement Bureau, Complaint Process, <http://www.fcc.gov/eb/oip/process.html> (last visited Mar. 2, 2006).

“letter of inquiry” to the broadcaster indicating that the Commission is pursuing an investigation and possibly requesting tapes or transcripts of the allegedly indecent programming.⁸⁹ If the FCC preliminarily finds the material indecent and seeks to fine a broadcaster, it issues a Notice of Apparent Liability (NAL), to which the broadcaster may respond.⁹⁰ The Commission then issues its final ruling and order, which may or may not conform specifically to the determinations made in the NAL.⁹¹

The Commission must make two determinations before finding material indecent.⁹² First, “the material must describe or depict sexual or excretory organs or activities.”⁹³ Second, “the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.”⁹⁴ Even though the Commission applies an “average viewer or listener” standard, such a determination is inherently subjective and remains a highly fact-specific balancing inquiry.⁹⁵ Moreover, unlike the Supreme Court’s obscenity standard in *Miller v. California*,⁹⁶ which defined the contemporary community standard as those of the broadcast locale, the FCC defines the relevant “community” as the nation as a whole, not just the local community served by the broadcaster.⁹⁷

⁸⁹ *Id.* Complaints that do not contain sufficient information to determine whether the material violated the indecency standard are dismissed. *Id.* In such cases, complainants have the option of refiling a new complaint with more information, petitioning for reconsideration, or filing for review before the full Commission. *Id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² Guidance on the FCC’s Case Law, 16 F.C.C.R. 7999, 8002 (2001).

⁹³ *Id.* (citing WPNB/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1840-41 (2002)).

⁹⁴ *Id.*

⁹⁵ *See id.* In a separate statement, Commissioner Harold W. Furchtgott-Roth wrote that “there is a certain vagueness inherent in [this] subject matter.” *Id.* at 8017 (Furchtgott-Roth, C., separate opinion) (citing *Action for Children’s Television v. FCC (ACT I)*, 852 F.2d 1332, 1338 (D.C. Cir. 1988)). However, Commissioner Gloria Tristani dissented and wrote that the FCC Industry Guidance 2001 statement “perpetuates the myth that broadcast indecency standards are too vague and compliance so difficult that a Policy Statement is necessary to provide further guidance.” *Id.* at 8023 (Tristani, C., dissenting).

⁹⁶ 413 U.S. 15 (1973).

⁹⁷ Guidance on the FCC’s Case Law, 16 F.C.C.R. at 8002; *Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 933 (1987) (attempting to clarify the Supreme Court’s standard in *Hamling v. United States*, 418 U.S. 87 (1974)); *cf. Miller*, 413 U.S. at 30-31 (defining

Three principal factors aid in the FCC's determination of indecency: (1) the explicitness or graphic nature of the depiction or description; (2) the extent to which the material dwells on or repeats the description or depiction of the questionable material; and (3) whether the material panders, "is used to titillate," or is "presented for its shock value."⁹⁸ The Commission also clearly indicates that context is critical in evaluating whether material is indecent, particularly with respect to the third principal factor.⁹⁹ However, the presence or absence of any of these factors is not the end of the determination, as the balance is highly sensitive.¹⁰⁰

III. The Influence of Socially Conservative, Traditional Values and Family Oriented Organizations on Indecency Law

A. A New Culture on the Rise

The FCC's disinclination to find broadcast indecency in the years following *Pacifica* agitated some individuals and groups concerned about morality and decency on the airwaves.¹⁰¹ One group, the National Federation of Decency, picketed FCC headquarters in 1986 after President Reagan announced the renomination of Mark Fowler, a First Amendment-friendly FCC chairman, who appeared to care more about deregulation than indecency.¹⁰² The

contemporary community standards as "those of the . . . local community").

⁹⁸ Complaints Regarding Airing of the *Golden Globe Awards* Program, 19 F.C.C.R. 4975, 4978 (2004) [hereinafter *Golden Globe Awards*]. Innuendo or double entendre does not preclude a finding of indecency. Guidance on the FCC's Case Law, 16 F.C.C.R. at 8003-04. Material with repeated or persistent references to sexual or excretory functions is more likely to be found indecent. *Id.* at 8008-10. To the contrary, the fact that a reference to such material is fleeting tends to mitigate against a finding of indecency. *Id.* Such material is usually found indecent when the subject matter is deemed patently offensive. *Id.* The intent behind the broadcast (*e.g.*, to titillate or pander) and the manner of presentation are "exacerbating factor[s]" in any indecency determination. *Id.* at 8010.

⁹⁹ Regulation of Obscenity, *supra* note 86.

¹⁰⁰ See generally *Golden Globe Awards*, 19 F.C.C.R. at 4975.

¹⁰¹ See Bob Davis, *FCC Chief Shifts Obscenity View As He Seeks Job Reappointment*, WALL ST. J., Dec. 4, 1986, at 44. Between 1978 and 1986, the FCC received almost 20,000 obscenity or indecency complaints each year, but took no action. *Id.*

¹⁰² John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344 (1989). The authors believe that the protests of Chairman Fowler's renomination marked the dawn of the late twentieth and early twenty-first century movements by traditional and family val-

Federation urged its 320,000 members to oppose Fowler's nomination because of his hesitation to address indecency complaints.¹⁰³ In 1986, leading members of decency-oriented organizations met with Fowler and his lead counsel to discuss how the FCC would enforce the indecency standards.¹⁰⁴ It was after these meetings that the FCC declared indecent the three radio broadcasts that became the subject of *ACT I*.¹⁰⁵

During this period, the FCC more actively warned broadcasters that failure to adhere to the Commission's decency standard could result in the loss of the station's license.¹⁰⁶ Before he left office in 1987, Chairman Fowler cautioned broadcasters about this possible sanction.¹⁰⁷ Similarly, in 1987, the Commission's Mass Media Bureau Chief James McKinney admonished public radio broadcasters that violations of the FCC's new indecency policy might result in "demerits at license renewal time or license revocation."¹⁰⁸ Patrick J. Buchanan, the former White House Communications Director and noted social conservative, suggested that President Reagan become even more involved in the indecency debate by urging the FCC to revoke a license to send a clear message to broadcasters.¹⁰⁹

ues-oriented groups seeking tougher enforcement of decency regulations. *Id.*

¹⁰³ *Id.* at 345.

¹⁰⁴ *Id.* (discussing meetings between Chairman Fowler and Brad Curl of the National Decency Forum, and between Fowler, Curl, and Paul McGeady of Morality in Media).

¹⁰⁵ 852 F.2d 1332 (D.C. Cir. 1988). Organized groups sent numerous complaints to the FCC, with detailed transcripts or tapes of the material at issue. Alex S. Jones, *FCC Studies 'Indecency' on Radio*, N.Y. TIMES, Nov. 22, 1986, at 9. The detailed information in the complaints made it more likely that the Commission would take action upon them. *Id.* Organized groups like the National Decency Forum and the Parents Music Resource Center prepared some of the actual complaints that prompted the FCC's indecency determination in *Pacifica Foundation, Infinity Broadcasting Corp. of Pennsylvania*, and *Regents of the University of California*. *Id.*

¹⁰⁶ See, e.g., Crigler & Byrnes, *supra* note 102, at 346-47.

¹⁰⁷ *Id.* Fowler allegedly said, "[b]e careful what you put on the air because you could lose your license." *Id.*

¹⁰⁸ *Id.* at 347.

¹⁰⁹ Patrick J. Buchanan, *A Conservative Makes a Final Plea*, NEWSWEEK, Mar. 30, 1987, (Magazine), at 23, 26. Buchanan noted that the National Council of Churches backed President Reagan in his crusade against indecency and obscenity. *Id.* Buchanan wrote:

[T]he President should become more visibly involved; and demand of that toothless lion, the FCC, that it begin pulling the licenses of broad-

Although socially conservative crusaders were in the minority during the late 1980s, they were certainly a vocal and politically active group.¹¹⁰ With allies in Congress and elsewhere in the federal government, and with strong organization, they became a recognizable political force. The Reverend Donald Wildmon, for example, is a driving force behind the movement to end broadcast indecency, something he describes as a "biblical ethic."¹¹¹ Wildmon founded the National Federation for Decency in 1977, now known as the American Family Association (AFA), a fundamentalist organization created to foster "Christian values."¹¹² Boasting more than 2.8 million members nationwide,¹¹³ the AFA and Wildmon encourage followers to boycott advertisers who sell products on programs the organization considers indecent.¹¹⁴ In one instance, Wildmon visited with the corporate heads of Proctor & Gamble and convinced the organization to remove advertising from approximately fifty programs he deemed indecent.¹¹⁵ The *AFA Journal*, the organization's newsletter, regularly includes the names and contact information of Congressmen, openly encouraging its readers to get involved by calling or writing to their poli-

casters who flagrantly abuse the privilege. A single license jerked would instantly depollute the airways of this garbage, which the Supreme Court has ruled is not protected speech.

Id. at 26.

¹¹⁰ See *infra* Parts III.A-B.

¹¹¹ Seth T. Goldsamt, "Crucified by the FCC"? *Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 245 (1995) (also describing how Rev. Wildmon has long targeted Howard Stern's radio show as indecent broadcast media).

¹¹² Val E. Limburg, Museum of Broad. Comm'n, David Wildmon: U.S. Minister/Media Reformer, <http://www.museum.tv/archives/etv/W/htmlW/wildmonдона/wildmondона.htm> (last visited Mar. 3, 2006). Wildmon has worked with Christian leaders to form other groups to combat media indecency, including the Coalition for Better Television with Moral Majority founder Reverend Jerry Falwell, and Christian Leaders for Responsible Television (CLEAR-TV). *Id.*

¹¹³ AFA Online, <http://www.afa.net> (last visited Mar. 3, 2006). In 1989, the *AFA Journal*, the organization's newsletter, reached 380,000 subscribers. Don Kowet, *The Righteous Indignation of Donald Wildmon: How a Mississippi Minister Terrorizes the TV Networks*, WASH. TIMES, July 12, 1989, at E1, available at 1989 WLNR 66557.

¹¹⁴ See Limburg, *supra* note 112.

¹¹⁵ *Id.* In addition to Proctor & Gamble, Wildmon and his organizations have protested against, among others, Mazda Motors of America, Burger King, the 1980s Madonna hit *Like a Prayer*, the movie *The Last Temptation of Christ*, radio personality Howard Stern, and ABC's *NYPD Blue*. *Id.*

ticians.¹¹⁶

As Professor Kathleen M. Sullivan noted, Evangelical Protestant ministers like Wildmon and the Reverend Jerry Falwell play active political roles, engaging openly against a culture they perceive to be anathema to traditional moral values.¹¹⁷ Sullivan describes these men as “[m]asters of direct mail campaigns experienced at monitoring and boycotting commercial media for ‘anti-Christian’ or ‘anti-family’ themes”¹¹⁸

B. Traditional Values and Family-Based Organizations Put Increased Pressure on Government and Networks to Act

During the 1990s, traditional values organizations lamented the lack of FCC enforcement of indecency standards, but the new millennium and the election of President George W. Bush gave them new hope.¹¹⁹ The resurgence of a more conservative and traditional culture combined with a friendly political climate and greater media access allows these organizations to flourish.¹²⁰ Indeed, the FCC issued some of its first Notices of Apparent Liability as a result of increased pressure from these organizations.¹²¹ As media commentator Todd Shields wrote in 2004: “The last time a broadcaster refused to pay an indecency penalty sought by the

¹¹⁶ *Id.*

¹¹⁷ Kathleen M. Sullivan, *Religious Participation in Public Programs: Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 196 (1992).

¹¹⁸ *Id.*

¹¹⁹ See Letter from 54 national and local organizations committed to morality and decency in media to President George W. Bush (Jan. 31, 2005), available at <http://www.cnsnews.com/pdf/2005/BushReFCCChairman.pdf>. The letter claims that during the 1990s, “shock jocks” violated indecency law “with little or no fear of the FCC.” *Id.* The letter continues:

There appeared to be an unwritten enforcement policy that (1) actions against any particular licensee would remain sporadic at best, (2) fines would be levied only in amounts that a licensee could handle as an affordable cost of doing business, and (3) the FCC would never revoke or refuse to renew a broadcast license.

Id.; see also Todd Shields, *Fighting FCC on Indecency*, MEDIAWEEK, Nov. 29, 2004, at 8 (noting that “few expect another seven years of quiet,” referring to a lack of enforcement of broadcast indecency laws during the Clinton Administration).

¹²⁰ See *infra* notes 121-126, 138-148 and accompanying text.

¹²¹ See generally FCC, INDECENCY COMPLAINTS AND NALS: 1993-2004 1 (Mar. 4, 2005), available at <http://www.fcc.gov/eb/broadcast/ichart.pdf> [hereinafter INDECENCY COMPLAINTS].

Federal Communications Commission, the matter ended with no fine and a promise from the agency to clarify how it goes about regulating indecency.”¹²² The FCC ordered that clarification in 1994, yet the actual industry guidance report that addressed the 1994 order was not issued until 2001.¹²³

Broadcast indecency finally became a mainstream issue during the Super Bowl in January 2004 when Janet Jackson’s infamous wardrobe malfunction aired live on CBS. However, some earlier, and perhaps lesser known, incidents actually spurred the indecency debate prior to the Super Bowl. For example, in 2002, the FCC fined Infinity Broadcasting for a stunt by shock jocks Opie and Anthony after participants in a contest called *Sex for Sam* had sexual intercourse inside St. Patrick’s Cathedral in New York City, described on live radio.¹²⁴ The station pulled the duo off the air days later when Catholic League President William Donohue publicly excoriated Infinity, WNEW-FM, and the pair for airing the act.¹²⁵ Similarly, the Fox television network faced a \$1.2 million fine after a 2003 broadcast of the program *Married by America* featured “pixilated strippers performing sexual acts.”¹²⁶

Although the FCC issued no fine, it declared that NBC and its affiliates violated 18 U.S.C. § 1464 by airing U-2 lead singer Bono’s use of the “f-word” during a live *Golden Globe Awards* acceptance

¹²² Shields, *supra* note 119.

¹²³ *Id.*; see generally Guidance on the FCC’s Case Law, 16 F.C.C.R. 7999.

¹²⁴ See Shields, *supra* note 119. In November 2004, Viacom, the parent company of Infinity, which also owns CBS, “agreed to pay \$3.5 million to the FCC to wipe its slate clean of all indecency charges except for the Jackson/Super Bowl incident.” *Id.* Clear Channel, which aired the Howard Stern show in certain markets, “agreed to pay the FCC \$1.75 million dollars to resolve all of its outstanding indecency violations.” H.R. REP. NO. 109-5, at 4 (2005), available at http://www.washingtonwatchdog.org/environmental_justice/documents/documents/cong_reports/house/109/housereport109_005.html.

¹²⁵ Anthony B. Smith, *Sex in the (Catholic) City*, 5 RELIGION IN THE NEWS 3, 3 (2002), available at <http://www.trincoll.edu/depts/csrpl/RINVol5No3/sex%20in%20catholic%20city.htm>. Local media covered the incident as a mere prank or stunt until Mr. Donohue filed an FCC complaint and requested that WNEW’s license be revoked. *Id.* One FCC Commissioner declared that the agency should “consider the strongest enforcement action possible against [WNEW], up to and including the revocation of the station’s license,” if the allegations are proven true. *Id.* Thereafter, the incident quickly became grist for the national media and cable news stations. See *id.*

¹²⁶ Shields, *supra* note 119.

speech.¹²⁷ In that action, the Parents Television Council (PTC), a conservative decency-oriented organization, alleged that, although Bono's use of the word did not describe any sexual or excretory organ or activity and was only used as an "intensifier," such a word is *per se* patently offensive, and hence, indecent.¹²⁸ The Commission agreed, noting that any use or variation of the f-word "inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."¹²⁹ The FCC also found, applying *Pacifica's* "children's well-being" rationale,¹³⁰ that use of the f-word is "patently offensive under contemporary community standards," and therefore indecent.¹³¹ Remarkably, despite its firm and clear statements that context matters in indecency determinations,¹³² the FCC held that use of the f-word during a live broadcast is a strict liability offense and noted that "[t]he fact that the use of [the] word may have been unintentional is irrelevant"¹³³ The Commission also indicated that its prior decisions holding "isolated or fleeting broadcasts of the f-word" not to be indecent are no longer good law.¹³⁴ The FCC gave an ominous warning to broadcasters that serious or multiple violations of the indecency rules would result in license revocation proceedings.¹³⁵

Notwithstanding the FCC's departure from nearly three decades of precedent, the Commission's refusal to consider the merits of the speech itself threatens the First Amendment by chilling speech broadcast via television and radio.¹³⁶ Indeed, the 2004 *Golden Globe* decision led networks to implement policies that restrict speech in order to limit their liability and potential exposure

¹²⁷ *Golden Globe Awards*, 19 F.C.C.R. 4975 (2004).

¹²⁸ *Id.* at 4976. Several family-oriented organizations submitted a brief in support of the Parents Television Council's argument including Dr. James Dobson's Focus on the Family and Tony Perkins's Family Research Council. See Brief in Support of the Application for Review, *Complaints Regarding Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004) (No. EB-03-IH-0110), available at <http://www.frc.org/get.cfm?i=CB03L01>.

¹²⁹ *Golden Globe Awards*, 19 F.C.C.R. at 4978.

¹³⁰ *Id.* at 4982.

¹³¹ *Id.* at 4979.

¹³² See Guidance on the FCC's Case Law, 16 F.C.C.R. 7999, 8002-03 (2001).

¹³³ *Golden Globe Awards*, 19 F.C.C.R. at 4979.

¹³⁴ *Id.* at 4980.

¹³⁵ *Id.* at 4982.

¹³⁶ See *id.*

to actions by the FCC.¹³⁷

Traditional values and family-oriented organizations view these events, and the accompanying publicity, as opportunities to broaden their audience and more aggressively mobilize their members. The number of complaints registered to the FCC has greatly increased as a result of these broadcasting incidents.¹³⁸ Many of these organizations create mass e-mail engines that generate generic e-mails so that members can simply “copy and paste” a complaint against programming they deem incompatible with traditional values.¹³⁹ At one 2004 congressional hearing, then-FCC Chairman Michael Powell testified that the Commission received more than 240,000 indecency complaints in 2003, up from approximately 14,000 in 2002, and less than 350 each in 2001 and 2000.¹⁴⁰ In 2004, that number exceeded 1.4 million.¹⁴¹ Although these numbers seem impressive, the FCC estimates that the mass mailing apparatus of a single group, the Parents Television Council (PTC), generated nearly all (over 99.8%) of the indecency complaints over the past two years.¹⁴²

¹³⁷ See Sona I. Patel, *An Indecent Proposal*, N.J. LAW., Dec. 2004, at 10, 12. Patel cites several examples of restrictive policies, including Infinity's new zero tolerance policy, which the CEO Mel Karmazin announced at congressional hearings on indecency in 2004, Clear Channel's firing of several shock jocks, the five-minute time delay airing the 2004 Grammy Awards, and the five-second delay at the Oscars. *Id.*

¹³⁸ See INDECENCY COMPLAINTS, *supra* note 121.

¹³⁹ See Todd Shields, *Activists Dominate Content Complaints: FCC: Parents' Group Accounts for over 98 Percent of Indecency Filings*, MEDIAWEEK, Dec. 6, 2004, at 4. For examples of such mass mailing engines, see, for example, American Family Association, www.afa.net (last visited Mar. 3, 2006); Focus on the Family, www.family.org (last visited Mar. 3, 2006); Parents Television Council, www.parentstv.org (last visited Mar. 3, 2006).

¹⁴⁰ See Shields, *supra* note 139; cf. S. REP. NO. 108-253, at 2 (2004) (citing slightly different numbers of complaints filed in the specified years).

¹⁴¹ INDECENCY COMPLAINTS, *supra* note 121.

¹⁴² Shields, *supra* note 139. In 2003, the group filed 99.8% of complaints and through October 2004—omitting complaints filed regarding the Super Bowl incident—the group filed 99.9% of all indecency complaints. *Id.* Discussing the organization's methods, PTC President L. Brent Bozell III, explained that the group, which was founded in 1995, sought to increase online activism through a “massive, coordinated, and determined campaign.” *Id.* The group contends that it increased online activism more than 2400%. *Id.* Broadcasters are less enthusiastic: Fox argued that the FCC should reconsider its decision to fine the network for perceived indecency during its broadcast of its reality television program *Married by America* because even though the FCC claimed it received 159 complaints about the show, all but four of them were identical and only one complainant indicated that he or she actually

While the deluge of complaints does not necessarily diminish the merits of the PTC's concerns, it does raise questions about how such a small minority can so directly affect indecency policy for the country.¹⁴³ To start, PTC employs a series of analysts who watch prime time programming on every broadcast channel and track incidents of perceived indecency of every kind.¹⁴⁴ In addition, PTC's leadership is heavily engaged in politics.¹⁴⁵ PTC President L. Brent Bozell, III has testified before several House and Senate panels considering indecency regulations,¹⁴⁶ and he frequently cites to statistical information compiled by his organization and other similarly oriented groups.¹⁴⁷ Bozell argues that his group's one million members, and polling data that demonstrates that a vast majority of Americans believe there is too much sex and violence on television, prove that the country supports his cause.¹⁴⁸

There may be some independent support for Bozell's claims.¹⁴⁹ A recent article on broadcast indecency in *Time* magazine suggests that a majority of Americans believe the government should more strictly regulate sex and violence on television.¹⁵⁰ While few survey respondents formally complained to a broadcaster, the government, or advertisers about broadcast content, most believed that there was too much violence, cursing, sexual language, and explicit sexual content on the airwaves.¹⁵¹ Over seventy-five percent of respondents thought nudity of any kind was

viewed the broadcast. *Id.*

¹⁴³ *See id.*

¹⁴⁴ Todd Shields, *Content Activist: Brent Bozell and His Parents Television Council Continue to Assail the TV Industry for Filling Its Schedules with What He Calls Sewage*, MEDIAWEEK, Feb. 14, 2005, at 20.

¹⁴⁵ *See id.*

¹⁴⁶ *See, e.g.*, H.R. REP. NO. 109-5, at 3 (2005), available at http://www.washington-watcdog.org/environmental_justice/documents/documents/cong_reports/house/109/housereport109_005.html; S. REP. NO. 108-253 (2004) (citing to the PTC's report, entitled *The Blue Tube: Foul Language on Prime Time Network TV*, which found a 94.8% increase in foul language between 8:00 p.m. and 9:00 p.m., and to the Kaiser Family Foundation study, which found that only 3% of parents ever used a V-Chip to block programming).

¹⁴⁷ H.R. REP. NO. 109-5, at 3.

¹⁴⁸ Shields, *supra* note 144.

¹⁴⁹ *See* James Poniewozik, *The Decency Police*, TIME, Mar. 28, 2005, (Magazine), at 28-29.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

unacceptable for broadcast outside of the safe harbor period, and more than half deemed implied sex without nudity, same-sex couples kissing, and advertising for sexual-potency drugs similarly inappropriate.¹⁵²

Despite his organization's successes, Bozell does not hesitate to criticize the broadcast industry, advertisers, or even his political allies.¹⁵³ For example, he was quite critical of former FCC Chairman Michael Powell, believing that Powell's "reluctance to enforce broadcast decency laws sanctioned prime time topics including bestiality, masturbation, oral sex, anal sex and pedophilia."¹⁵⁴ By contrast, Bozell and the PTC support the Commission's new Chairman, Kevin Martin, whom they believe will more aggressively enforce indecency laws.¹⁵⁵

C. *The Broadcast Decency Enforcement Act*

Current law limits the penalty to \$32,500 per violation for licensees; an amount the FCC does not believe deters potential violators.¹⁵⁶ Non-licensees, like individual entertainers who violate the indecency laws on live television, are currently subject to \$11,000 fines, but only for a second offense.¹⁵⁷ Like the penalty for licensees, this amount hardly serves as an effective deterrent.¹⁵⁸ The law also allows the FCC to revoke the license of any station that violates its regulations; however, the Commission has never exercised this power for an indecency violation.¹⁵⁹

Amid public outcry and great discussion on cable news and the Internet in the weeks following the Super Bowl wardrobe mal-

¹⁵² *Id.*

¹⁵³ Shields, *supra* note 144.

¹⁵⁴ *Id.* (citations omitted).

¹⁵⁵ *Id.* According to a *Washington Post* article, Martin frequently lamented the fact that indecency fines were too low and called for fines "for each utterance or depiction of indecency material within a program." Frank Aherns, *FCC's New Standard Bearer: Bush Picks Vocal Indecency Opponent Kevin J. Martin to Head Commission*, WASH. POST, Mar. 17, 2005, at E1.

¹⁵⁶ H.R. REP. NO. 109-5, at 3 (2005), available at http://www.washingtonwatchdog.org/environmental_justice/documents/documents/cong_reports/house/109/housereport109_005.html.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

function, Congress considered aggressive legislation to increase penalties for broadcast indecency.¹⁶⁰ The Broadcast Decency Enforcement Act (2005 BDEA), which is substantively similar to the 2004 Act of the same name,¹⁶¹ increases the maximum fines for both licensees and non-licensees to \$500,000.¹⁶² The Act allows the FCC to levy \$3 million in fines per day.¹⁶³ For the first time, the 2005 BDEA also makes performers personally liable for their first instance of indecent behavior.¹⁶⁴ Supporters of the new fines for indecent programming point out that the FCC assessed only \$48,000 in fines four years ago, but last year, its fines exceeded \$7.7 million.¹⁶⁵ The Congressional Budget Office estimates that the new penalties could increase government revenues by approximately \$10 million over the next four years.¹⁶⁶ After the House of Representatives overwhelmingly passed the bill twice, it stalled when House and Senate conferees failed to agree on specific provisions.¹⁶⁷ FCC Chairman Kevin Martin strongly supports

¹⁶⁰ *Id.* "The [House] Subcommittee on Telecommunications and the Internet held one oversight hearing on indecency and two legislative hearings on House Bill 3717, a bill nearly identical to H.R. 310." *Id.* House Bill 310 is the House version of the Broadcast Indecency Act of 2005, introduced in the 109th Congress. H.R. 310, 109th Cong. (2005). House Bill 3717 was substantively the same bill introduced in the 108th Congress. H.R. 3717, 108th Cong. (2004). The morning after the infamous wardrobe malfunction, then-FCC Chairman Michael Powell issued a statement calling the incident "a classless, crass, and deplorable stunt." S. REP. NO. 108-253 (2004). Powell instructed the FCC to open an investigation of the incident *sua sponte*. *Id.*

¹⁶¹ H.R. 3717; H.R. 310. Since the 2004 and 2005 versions of the Act as introduced in the House are substantively similar, except where specifically indicated, I will refer generally to the 2005 Act. The two houses of Congress failed to reach agreement on the provisions of the 2004 Act. *See infra* text accompanying note 176.

¹⁶² Genero C. Armas, *Congress to Tackle Indecency*, CBS NEWS, Feb. 16, 2005, <http://www.cbsnews.com/stories/2005/02/16/entertainment/main674448.shtml> (last visited Mar. 3, 2006).

¹⁶³ Patel, *supra* note 137, at 10.

¹⁶⁴ *Id.*

¹⁶⁵ Armas, *supra* note 162.

¹⁶⁶ H.R. REP. NO. 109-5, at 4 (2005), available at http://www.washingtonwatchdog.org/environmental_justice/documents/documents/cong_reports/house/109/housereport109_005.html.

¹⁶⁷ *See* Fallow, *supra* note 5, at 1. The Act passed the House by a 391-22 vote on March 11, 2004. *Id.* The 2005 Act passed the House again by a vote of 389-38 in February 2005. The Library of Congress: Thomas, H.R. 310, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00310:@@:@R> (last visited Mar. 13, 2006).

legislation increasing the fines.¹⁶⁸

In addition to increased penalties, the proposed BDEA expands the list of factors for the Commission to consider when assessing penalties for indecency violations.¹⁶⁹ At present, the FCC must consider the "degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁷⁰ However, because the Act provides for such a drastic increase in indecency fines, Congress proposes to supply the Commission with additional guidance when considering which penalties to levy.¹⁷¹ When evaluating the "degree of culpability," the legislature instructs the FCC to also consider "whether the material uttered by the violator was live or recorded, scripted or unscripted; whether there was a reasonable opportunity to review recorded or scripted programming; whether there was a time delay mechanism for live programming; the size of the audience; and whether the content is considered children's programming."¹⁷² With respect to a violator's "ability to pay," the Commission is instructed to consider "whether the violator is a company or individual, and if the violator is a company, the size of the company and the size of the market served."¹⁷³

The Senate version of the 2004 legislation included two provisions that distinguished it from the House bill.¹⁷⁴ The first provision, based on testimony by the PTC and the Consumers Union, halted the enactment of media ownership rules, passed in 2003, for an additional year while members determine whether there is a correlation between media consolidation and broadcast indecency.¹⁷⁵ This provision, which the House Republican leadership

¹⁶⁸ House Energy and Commerce Committee, Prepared Witness Testimony of the Hon. Kevin J. Martin, (Feb. 11, 2004), *available at* <http://energycommerce.house.gov/108/Hearings/02112004hearing1200/Martin1860.htm>.

¹⁶⁹ H.R. REP. NO. 109-5, at 10.

¹⁷⁰ *Id.* This portion of the Act amends section 503(b)(2) of the Communications Act of 1934. *Id.* The Act does not apply to cable television, the Internet, or satellite radio. Patel, *supra* note 137, at 11.

¹⁷¹ H.R. REP. NO. 109-5, at 10.

¹⁷² Patel, *supra*, note 137, at 10.

¹⁷³ *Id.* The Act also includes a "three strikes" provision, mandating license revocation after a third offense. *Id.* (citation omitted).

¹⁷⁴ S. 2056, 108th Cong. (2004).

¹⁷⁵ S. REP. NO. 108-253, § 108 (2004) (citing PTC testimony that recent media consolidation caused "a coarsening of content on the airwaves").

opposed, led to the demise of the 2004 legislation.¹⁷⁶ The second provision directed the FCC to determine whether tools like the V-Chip and program ratings are effectively used by parents to protect children from indecent programming.¹⁷⁷

The Senate's 2005 version of the legislation, introduced by Sen. Sam Brownback (R-KS) and Sen. Joseph Lieberman (D-CT), raises the maximum fine to \$325,000, rather than the House's \$500,000.¹⁷⁸ As of this writing, the BDEA remains stalled in the Senate Committee on Commerce, Science and Transportation.¹⁷⁹

D. *Responses to the Broadcast Decency Enforcement Act*

The 2005 House Bill's passage engendered some strong dialogue on both sides of the political aisle. Representative Joe Barton (R-TX), one of the principal sponsors of the legislation in the House, called the penalty one that "makes broadcasters sit up and take notice," and noted that the law "makes it safe for families to come back into their living room."¹⁸⁰ The White House issued a similar statement of support.¹⁸¹ Others who spoke in support of the legislation made arguments similar to those made by the FCC in the ACT decisions.¹⁸²

Opponents of the BDEA, and the FCC's indecency crackdown generally, premise their arguments on three central principles.¹⁸³ First, they argue that the law chills free speech.¹⁸⁴ Perhaps the most vehement opponent of the bill, Congresswoman Jan Schakowsky

¹⁷⁶ Todd Shields, *A Fine Mess: Increased Penalties For Indecency Derailed over Media-Ownership Rules*, MEDIAWEEK, Oct. 11, 2004, at 12. Brent Bozell of the PTC referred to the Senate's media consolidation provision as a "poison pill," and blamed Sen. Byron Dorgan's (D-ND) insistence on keeping the provision in the bill for killing the legislation. *Id.*

¹⁷⁷ S. REP. NO. 108-253, § 203.

¹⁷⁸ Todd Shields, *Indecency Bills Grow Teeth: Fines for Performers Could Rocket to As High As \$500,000 from \$11,000*, MEDIAWEEK, Jan. 31, 2005, at 6; see also S. 193, 109th Cong. (2005).

¹⁷⁹ See Library of Congress Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00310:@@R> (last visited Feb. 11, 2006).

¹⁸⁰ Associated Press, *House OKs Stiff Fines for Indecency*, Feb. 16, 2005, available at <http://www.msnbc.msn.com/id/6979996/>.

¹⁸¹ *Id.*

¹⁸² See discussion *supra* Part II.B.

¹⁸³ See Patel, *supra* note 137, at 12-14.

¹⁸⁴ *Id.* at 12.

(D-IL), the lone member of the House Commerce Committee to vote against reporting the bill to the full chamber, defended the rights of performers.¹⁸⁵ Schakowsky, a staunch supporter of First Amendment rights, claims that the Act “threatens to undermine both our Constitution and our creativity.”¹⁸⁶ Representative Ron Paul (R-TX), the lone Republican to vote against the BDEA expressed similar concerns that the government’s actions bordered on censorship.¹⁸⁷ Indeed, fear of FCC reprisal has led many networks to delay live events,¹⁸⁸ and even cancel some programs that executives considered arguably indecent.¹⁸⁹ Because of this uncertainty about what material will or will not be considered indecent, broadcasters are erring on the side of caution.¹⁹⁰

Second, opponents argue that the BDEA “deprives the audience of its right to choice in programming.”¹⁹¹ Dissenting in *Pacifica*, Justice Brennan warned that ultimate control over what is heard on radio or seen on television should belong to the listener or viewer, and not the government.¹⁹² Congressman Henry Waxman (D-CA) echoed Justice Brennan’s sentiments in his arguments against the Act, noting that it is the parents’ role to determine what is appropriate for their children to see and hear, not government.¹⁹³ In addition to taking power out of the hands of parents, the FCC’s current crackdown gives the minority who per-

¹⁸⁵ Shields, *supra* note 178.

¹⁸⁶ *Id.*

¹⁸⁷ See Patel, *supra* note 137, at 12.

¹⁸⁸ See *supra* text accompanying note 137; see also Fallow, *supra* note 5, at 26 (citing examples of self-censorship in the wake of the FCC’s crackdown).

¹⁸⁹ Patel, *supra* note 137, at 12. Despite an FCC holding that the airing of a Victoria’s Secret fashion show would not violate indecency laws, company officials cancelled the show. *Id.*

¹⁹⁰ *Id.*; see also *supra* text accompanying notes 127-137 (discussing the First Amendment ramifications of the FCC’s *Golden Globes* ruling).

¹⁹¹ See Patel, *supra* note 137, at 13.

¹⁹² See *FCC v. Pacifica Found.*, 438 U.S. 726, 772 (1978) (Brennan, J., dissenting).

¹⁹³ 151 CONG. REC. H652, H658 (daily ed. Feb. 16, 2005) (statement of Rep. Waxman). Congressman Waxman said:

Let us trust parents to know better than government officials what material they want their children to be exposed to. And let us have adults be able to watch television programming that is not so watered down, that the only thing we will see on television is suitable for a 5-year-old whose parents are prudes.

Id.

ceive broadcast material to be indecent power over the majority who choose to watch or listen to such material.¹⁹⁴ This market-based theory recognizes that, despite the claims of indecency crusaders, many people who view or listen to such material are choosing not to change the channel.¹⁹⁵

As legislators begin to encroach on viewers or listeners who utilize pay television and radio services, the battle over audience choice broadens. Recently, Senator Ted Stevens (R-AK) announced he would seek to place the same indecency restrictions that apply to broadcast television on cable and satellite programming.¹⁹⁶ Both the PTC, which regularly monitors certain cable channels, and the American Family Association, which believes Congress can authorize the FCC to regulate cable,¹⁹⁷ support him. Since cable and satellite services are so prevalent in American homes, Senator Stevens argues that most people do not differentiate between broadcast and pay services like cable providers and satellite programmers.¹⁹⁸ A similar amendment, proposed by former Senator John Breaux (D-LA), to the BDEA in 2004 failed in committee by a single vote.¹⁹⁹ However, Senator Stevens's proposal must overcome serious First Amendment hurdles since the Supreme Court explicitly distinguishes pay services from free broad-

¹⁹⁴ See generally Goldsamt, *supra* note 111. Compare, for example, the PTC's one million members with Howard Stern's estimated cumulative listenership of eight million. See David Hinkley, *A Number of Factors in Charting Popularity*, N.Y. DAILY NEWS, Nov. 13, 2002, available at <http://www.nydailynews.com/entertainment/story/34927p-33050c.html>. The eight million figure does not even include Stern's television show, movies, or books. See *id.* Stern, who is consistently a target of Reverend Wildmon and Mr. Bozell, consistently ranks first in several major markets, and near the top in many others. See *id.*

¹⁹⁵ See Patel, *supra* note 137, at 13.

¹⁹⁶ Frank Ahrens, *Senator Bids to Extend Indecency Rules to Cable: Industry Defends Its Self-Policing Activities As Sufficient*, WASH. POST, Mar. 2, 2005, at E1.

¹⁹⁷ See Jonathan Curiel, *Decency Gets Some Heavy Opposition; FCC Urged to Start Regulating Cable TV, But Free-Speechers Say Enough, Already*, S.F. CHRON., May 16, 2004, at E3.

¹⁹⁸ Associated Press, *Senator Wants Cable, Satellite TV Subject to Indecency Rules: Key GOP Senator Says He Would Push for Such Legislation*, WINSTON-SALEM J., Mar. 2, 2005, available at http://www.journalnow.com/servlet/Satellite?pagename=WSJ%2FMSGArticle%2FWFSJ_BasicArticle&c=MC&Article&cid=1031781320656&path=!nationworld&s=1037645509161.

¹⁹⁹ Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, PROGRESS ON POINT, May 2005, at 3, available at <http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf>.

cast services.²⁰⁰

Though Rep. Barton supported Senator Stevens's proposal, contending the same standards should apply to all programming services, another primary co-sponsor of the BDEA was more cautious.²⁰¹ Representative Fred Upton (R-MI) expressed concerns about the constitutionality of such a proposal in light of the Supreme Court's prior decisions, since viewers choose to bring pay services into their homes and they are not as pervasive as free broadcast services.²⁰²

Finally, BDEA opponents claim that the proposed legislation does little to clarify an already vague indecency standard.²⁰³ The current standard is reminiscent of Justice Potter Stewart's claim of "I know it when I see it," with respect to obscenity.²⁰⁴ Representative Waxman lamented the Act's failure to clearly and consistently define indecency, noting, "No one knows when one person's crea-

²⁰⁰ See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (invalidating part of a telecommunications law that would require cable operators to scramble or restrict the hours of access to cable channels dedicated to sexually explicit or indecent programming, noting that cable is not part of the public airwaves and that the FCC can only regulate the public airwaves); *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down, on overbreadth grounds, parts of the Communications Decency Act, which regulated transmission of obscene or indecent material over the Internet to minors, and recognizing that broadcast media is pervasive in a way that the Internet is not); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) ("The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'"); *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 388 (1969) (finding that the scarcity of broadcast bandwidth makes the medium incompatible with absolute First Amendment freedoms).

²⁰¹ Ahrens, *supra* note 196.

²⁰² See *id.*; see also *supra* note 200. One solution to the problem of indecency on cable is voluntary a la carte channeling, which allows customers to pay for cable on a per-channel basis, without package bundles. Ctr. for Creative Voices in Media, *A La Carte Cable Option Benefits Consumers and Creative Artists, Reduces Indecent Programming and Media Concentration* (Sept. 24, 2004), <http://www.creativevoices.us/php-bin/news/showArticle.php?id=90>. Interestingly, while PTC agrees with Senator Stevens on the need to limit children's access to indecent materials, the organization disagrees with the Senator as to the method. Ctr. for Creative Voices in Media, *Creative Voices vs. Parents TV Council on CNBC* (Mar. 1, 2005), <http://www.creativevoices.us/php-bin/news/showArticle.php?id=112>. PTC, like the Center for Creative Voices in Media, expressed support for a la carte cable programming options. *Id.*

²⁰³ See Patel, *supra* note 137, at 13.

²⁰⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

tive work will become a violation of another person's definition of decency."²⁰⁵

In the wake of increasing pressure from conservative organizations, the FCC, and Congress, networks are fighting back against the current indecency standard. In an April 19, 2004 petition for reversal of the *Golden Globe* decision, NBC argued that the FCC's interpretation of the indecency definition, as approved by the Supreme Court in *Pacifica*, is impermissibly vague.²⁰⁶ In response to indecency complaints, several broadcasters argue that the Commission's enforcement is subjective, and that the FCC manipulates its indecency standard to achieve its desired result.²⁰⁷ By making context a factor in its analysis, the FCC inserts an element of subjectivity into its decision-making process and lends credence to the broadcaster's argument.²⁰⁸ The Commission's determination of indecency is unquestionably a function of a qualitative analysis of the program.²⁰⁹ Accordingly, although the D.C. Circuit rejected claims that the standard is unconstitutionally vague,²¹⁰ it seems clear that pursuant to the Supreme Court's vagueness definition, reasonable people "of common intelligence" must guess at the

²⁰⁵ 151 CONG. REC. H652, H658 (daily ed. Feb. 16, 2005) (statement of Rep. Waxman). Waxman continued by noting:

Creative works that tackle challenging themes that are controversial but important are threatened by this legislation. Everything is objectionable to someone. A few years ago one of our colleagues took to the House floor to condemn the broadcast of the Oscar award-winning film "Schindler's List." He was outraged that scenes portraying Holocaust victims contained some nudity. Legislation such as this can lead us to these kinds of absurd results.

Id.

²⁰⁶ Shields, *supra* note 119.

²⁰⁷ See Wade Kerrigan, Note, *FCC Regulation of the Radio Industry: A Safe Harbor for Indecent Programming?*, 79 IOWA L. REV. 143, 166-67 (1993). Howard Stern also argues that the FCC and the President manipulate indecency laws for political purposes. See Patel, *supra* note 137, at 14.

²⁰⁸ Fallow, *supra* note 5, at 28. For a broader discussion of the ambiguity in the FCC's indecency enforcement policy, see *id.*

²⁰⁹ *Id.*; see also Crigler & Byrnes, *supra* note 102, at 357 (noting that the FCC's general counsel "actively advised prospective complainants about appropriate targets for complaint," reinforcing allegations of potential bias in what should be a "content-neutral" policy).

²¹⁰ See *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 658-59 (D.C. Cir. 1995) (en banc).

regulation's meaning.²¹¹

IV. Conclusion

The broadcast indecency standard is imprecise and subjective. Moreover, its enforcement over the past thirty years appears to reflect the Zeitgeist. However, it is difficult to ascertain whether the pendulum-swing to the right is representative of the majority will or the voice of an increasingly powerful and vocal minority. If television and radio ratings for shows that present indecent material are any indication, the answer seems to be the latter. Yet, increased aggressiveness on the part of the FCC and the potential increase on the cap for indecency fines under the BDEA have already had a clear toll on broadcast programming. Increasing pressure from socially conservative organizations that have a powerful new ally as chairman of the FCC will only further this chilling effect.

Despite arguments by courts and the FCC that the indecency standard is sufficiently clear, were it actually so unambiguous, the Commission would not need to issue so many industry guidance reports on its interpretation of 18 U.S.C. §1464. Indeed, these analyses, combined with the Commission's hesitation to fine broadcasters for first-time indecency determinations, demonstrate that the standard is not hard and fast, but rather changes as the FCC is presented with new situations.

To alleviate these problems, Congress must exercise care and not respond too quickly to public pressure about indecency by reflexively increasing the fines. Congress should also carefully consider the First Amendment implications of its actions. The legislature must recognize that the current broadcast indecency standard and the most recent proposals to aggressively enforce it have created an atmosphere in which consenting adults are deprived of their choice of programming and advertisers and broadcasters feel compelled to withdraw their support from programming that might result in FCC penalties. Most important, though, in the midst of all of its discussion about raising indecency fines,

²¹¹ See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (A law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning.").

Congress fails to address the standard that has created so much confusion. Before meaningful progress can be made, the legislature needs to provide clear guidelines for the FCC to follow in making indecency determinations, independent from the influence of socially conservative organizations.