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So Easily Offended - A First Amendment Analysis of the FCC's Evolving Regulation of Broadcast Indecency and Standards for Our Contemporary Community

Paige Connor Worsham

So Easily Offended? A First Amendment Analysis of the FCC's Evolving Regulation of Broadcast Indecency and Standards for Our Contemporary Community

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INTRODUCTION

Thirty-seven days after U2 singer Bono proclaimed "[t]his is really, really fucking brilliant. Really, really great . . . ." while accepting a Golden Globe award for best original song,[1] the ABC Television Network and several affiliates aired an episode of *NYPD Blue* on February 23, 2003, entitled "Nude Awakening."[2] Bono's speech, initially dismissed as not indecent by the Federal Communications Commission Enforcement Bureau,[3] was subsequently found indecent and profane by the entire Commission in an Order reversing more than two decades of "fleeting expletive" treatment.[4] One month before the Federal

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[*] Juris Doctor Candidate, University of North Carolina School of Law, 2009.

1. In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 19 F.C.C.R. 4975 (Mar. 18, 2004) [hereinafter Golden Globe Awards Order].

2. In the Matter of Complaints Against Various Television, Licensees Concerning Their Feb. 25, 2003 Broad. of the Program *NYPD Blue*, Notice of Apparent Liability for Forfeiture, 2008 FCC LEXIS 833 (Jan. 25, 2008) [hereinafter NYPD Blue NAL].

3. In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 18 F.C.C.R. 19859 (Oct. 3, 2003) (finding the language fleeting and unactionable, and though the "word 'fucking' may be crude and offensive . . . [it] did not describe sexual or excretory organs or activities" (alteration added)).

4. Golden Globe Awards Order, *supra* note 1, ¶ 12 ("While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."). In 2007, the United States Court of Appeals for the Second Circuit held that the Federal Communications Commission's new "fleeting expletives" policy was arbitrary and capricious under the Administrative Procedure Act because the agency did not

Communications Commission (FCC) unveiled its new "fleeting expletives" policy, Janet Jackson experienced a "wardrobe malfunction" during CBS' broadcast of the 2004 Super Bowl.[5] Following this instance of fleeting nudity, the FCC found that "although the exposure was brief, it was clearly graphic"[6] and issued a forfeiture of $550,000 against Viacom, Inc.[7]

On January 25, 2008, almost five years after the *NYPD Blue* episode aired on ABC and following several months of reduced FCC action,[8] the FCC issued a Notice of Apparent Liability for Forfeiture (NAL)[9] for $1.4 million against ABC and affiliates.[10] The FCC found a

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provide a reasoned explanation for the abrupt reversal. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007).

5. Kelefa Sanneh, *Pop Review; During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D4.

6. In the Matter of Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII, Notice of Apparent Liability for Forfeiture, 19 F.C.C.R. 19230 ¶ 13 (Sept. 22, 2004) (explaining that the length of the exposure of Janet Jackson's breast was 19/32 of a second).

7. *Id.*

8. On the FCC website, a list of all Notices of Apparent Liability (NAL) for broadcast indecency issued since the Enforcement Bureau's establishment indicates an almost two-year gap between the NYPD Blue NAL issued on Jan. 25, 2008, and the most recent predecessor, an NAL issued on Mar. 15, 2006, against CBS and affiliates for a "Without a Trace" episode. Fcc.gov, *Obscenity, Indecency & Profanity—FCC Actions: Notices of Apparent Liability*, http://www.fcc.gov/eb/broadcast/NAL.html.

9. The FCC Complaint Process is outlined on the agency's website. In brief: after the FCC receives a complaint regarding an indecent, obscene, or profane broadcast, the staff may choose to initiate an investigation into the aired material. The staff may request more information in a Letter of Inquiry (LOI) to the station. If the FCC staff does not dismiss the complaint at this point, but determines the material was indecent, obscene, or profane, it issues a Notice of Apparent Liability for Forfeiture (NAL), "which is a preliminary finding that the law or the Commission's rules have been violated." The finding is either "confirmed, reduced, or rescinded" in an FCC Forfeiture Order. Fcc.gov, *Complaint Process*, http://www.fcc.gov/eb/oip/process.html.

10. NYPD Blue NAL, *supra* note 2. The total fine was reduced to $1.2 million in the Feb. 19, 2008, Forfeiture Order because two ABC affiliates correctly argued the statute of limitations had run on their particular station licenses, and five stations did not have complaints filed against them. In the Matter of Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broadcast of the Program "NYPD Blue," Forfeiture Order, 2008 FCC LEXIS 1415 ¶¶ 34, 23 (Feb.

scene of an "adult woman's buttocks" to fall within the scope of its indecency definition, and declared it was "patently offensive as measured by contemporary community standards for the broadcast medium."[11] The *NYPD Blue* episode aired one year before the Super Bowl halftime show that provoked both FCC and congressional reaction,[12] and the ABC affiliates were fined pursuant to amounts applicable in 2003.

In its second Forfeiture Order of 2008, the FCC issued a total penalty of $91,000 against the Fox Television Network and affiliates for broadcasting an episode of *Married by America* on April 7, 2003.[13] This Order significantly reduced the initial fine of $1.18 million, cited in the NAL; the FCC adjusted the penalty, asserting it would "confine . . . forfeiture action to those stations about which we received complaints."[14] Rejecting similar procedural and constitutional arguments from the networks in both Forfeiture Orders, the FCC claimed its indecency policy was neither vague nor overbroad, and that the policy applies a national contemporary community standard, and not a local one.[15] The FCC also cited a new United States Supreme Court case in these 2008 Forfeiture Orders to explain its interpretation of "contemporary community standards" and stated that it only ordered penalties against stations that were the subject of a complaint.[16] I will discuss the inconsistency in the FCC's interpretations of contemporary community standards and its, apparently, new approach to forfeitures *infra*.

19, 2008) [hereinafter NYPD Blue FO]. ABC paid the forfeiture in order to appeal the FCC decision to the Second Circuit. John Eggerton, *ABC Appeals NYPD Blue Fine, Appeals Decision in Federal Court*, BROADCASTING & CABLE, Feb. 21, 2008, http://www.broadcastingcable.com/article/CA6534368.html.

11. NYPD Blue NAL, *supra* note 2, ¶¶ 11, 12.

12. CBSNews.com, *House Weighs Bigger Indecency Fines*, June 6, 2006, http://www.cbsnews.com/stories/2006/06/06/business/main1688225.shtml. The Broadcast Decency Enforcement Act of 2005 increased the maximum fine to $325,000 per violation.

13. In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on Apr. 7, 2003, Forfeiture Order, 2008 FCC LEXIS 1672 ¶ 1 (Feb. 22, 2008) [hereinafter Married by America FO].

14. *Id.* ¶ 5.

15. *See* NYPD Blue FO, *supra* note 10, ¶ 35; *see also* Married by America FO, *supra* note 13, ¶ 27.

16. *See* NYPD Blue FO, *supra* note 10, ¶ 53.

In its NAL against ABC, the FCC explicitly stated that the "Commission's indecency determinations are not governed by the number of complaints received about a given program, however, nor do they turn on whether the program or the station that broadcast it happens to be popular in its particular market."[17] In the same paragraph, the FCC explained it "received numerous complaints, including thousands of letters from members of various citizen advocacy groups."[18] The FCC does not offer an explanation for the discrepancy between this particular issuance of forfeiture and the failure to fine previous instances of broadcast nudity on *NYPD Blue*, a show known for frequent occurrences.[19]

The FCC's complaint process, in conjunction with its use of "contemporary community standards" to determine patent offensiveness for the broadcast medium in its indecency definition,[20] beg First Amendment concerns. While the FCC frequently asserts that the number of complaints for alleged indecency violations does not impact its determination to hold a radio or television station liable, the rising number of complaints in recent years corresponds with the FCC's increased enforcement.[21] These complaints and the FCC's skewed response evidence several difficulties with the community standard, as applied to determine indecency. The FCC has described its standard as a national one, and not based on the sensitive viewer; however, the

17. NYPD Blue NAL, *supra* note 2, ¶ 15.

18. *Id.*

19. *See* Alan Sepinwall, *Frequently Asked Questions (FAQ) about NYPD Blue*, last updated Feb. 21, 2006, http://www.stwing.upenn.edu/~sepinwal/faq.html#nude (providing a "rundown of regulars and semi-regulars who have appeared in the buff at least once: David Caruso, Sherry Stringfield, Amy Brenneman, Dennis Franz, Jimmy Smits, Sharon Lawrence, Gail O'Grady, Kim Delaney, Justine Miceli, Andrea Thompson, Rick Schroder, Henry Simmons, Jacqueline Obradors, Charlotte Ross and Mark-Paul Gosselaar. James McDaniel, Nicholas Turturro, Gordon Clapp and Garcelle Beauvais have all appeared topless or in very revealing underwear, making Bill Brochtrup the only longtime regular to always appear fully-clothed"); *see also* Bryan Curtis, *NYPD Blue: The Eroticism of the Cop Show*, SLATE, Feb. 23, 2005, http://www.slate.com/id/2113912/fr/rss/ (remarking that *NYPD Blue*'s creator included nudity clauses in each actor's contract).

20. NYPD Blue NAL, *supra* note 2, ¶ 4.

21. *See Indecency Complaints and NALs: 1993-2006*, http://www.fcc.gov/eb/oip/ComplStatChart.pdf (last visited Mar. 22, 2008).

sensitive viewer is disproportionately supplying the bulk of complaints.[22] Also, though the FCC claims to enforce a national definition of indecent programming, it only fines licensees who were the subject of a complaint.[23]

This Note will specifically address the second prong of the FCC's indecency definition, "contemporary community standards," and the FCC's ability to manipulate its own comprehension and application of the standard. As a result, the indecency policy operates in an inconsistent and vague manner, prompting First Amendment concerns. In *Fox Television Stations, Inc. v. FCC*,[24] the United States Court of Appeals for the Second Circuit found that the FCC's new fleeting expletives policy was arbitrary and capricious, violating the Administrative Procedure Act and seemed, in dicta, to imply that the agency's entire indecency definition may no longer be constitutionally sound.[25] Judge Pooler, writing in the 2-1 decision, stated that the court was "sympathetic to the Networks' contention that the FCC's indecency test is unrefined, indiscernible, inconsistent, and consequently, unconstitutionally vague."[26] While supposedly invoking contemporary community standards to measure patently offensive material in its definition, the FCC does not seem to adhere to this test in regulatory practice. The test is ambiguous, resulting in indistinct parameters and chilling the speech of broadcasters.

Part I of the Note provides a brief history and timeline of the FCC's statutory regulation of broadcast material and several judicial responses, concluding with an overview of the 2007 Second Circuit

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22. *See* Adam Thierer, *Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process*, THE PROGRESS AND FREEDOM FOUNDATION, Nov. 2005, http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf (explaining the number of complaints filed by the Parents Television Council, including 99.8% of all complaints in 2003).

23. NYPD Blue NAL, *supra* note 2, ¶ 19 ("Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of 'NYPD Blue,' we propose forfeitures against only those licensees whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission.").

24. 489 F.3d 444 (2d Cir. 2007).

25. *Id.* at 463 (questioning "whether the FCC's indecency test can survive First Amendment scrutiny").

26. *Id.*

decision. There are numerous orders and notices issued by the FCC involving broadcast indecency; I will refer to three orders, central to this background, by shortened names: the Golden Globe Awards Order,[27] the Omnibus Order,[28] and the Remand Order.[29] In Part II, I will explain how the FCC defines contemporary community standards as well as the process to file complaints with the FCC; these subjects have received a considerable amount of attention and commentary, specifically in regard to the influence of vocal advocacy groups. The complaints commence the FCC's appraisal of potentially indecent material and have significantly increased regulation and enforcement action. Though the Court has not addressed indecency in the broadcast communications realm for thirty years, in 1996, the Supreme Court struck down "contemporary community standards" as applied to Internet communications, finding it overly broad and vague.[30] This section also includes a small sample of the data demonstrating the escalating number of complaints filed with the FCC.

Part III will compare contemporary community standards to other criteria utilized to test public perception in an alternative area of the law, specifically, the "evolving standards of decency" test. In Part IV, I will review some recent examples of censored or chilled broadcasts to highlight the vague nature of contemporary community standards and the corresponding confusion afforded to broadcasters. Also, while the FCC states that it does not base its indecency decisions on viewer complaints, it is illustrative to review opinion surveys of American citizens, examining their actual attitudes toward broadcast material. Finally, Part V will address Congress's recently strengthened efforts to propose FCC regulation of violent programming, similar to indecency regulation. By using contemporary community standards to determine what is

27. Golden Globe Awards Order, *supra* note 1.

28. In the Matter of Complaints Regarding Various Television Broadcast Between Feb. 2, 2002 and Mar. 8, 2005, Notices of Apparent Liability and Memorandum of Opinion and Order, 21 F.C.C.R. 2664 (Mar. 15, 2006) [hereinafter Omnibus Order].

29. In the Matter of Complaints Regarding Various Television Broadcast Between Feb. 2, 2002 and Mar. 8, 2005, Order, 21 F.C.C.R. 13299 (Nov. 6, 2006) [hereinafter Remand Order].

30. Reno v. ACLU, 521 U.S. 844, 871 (1997).

actionable as violent material, the FCC will confront similar First Amendment issues in this parallel regulatory scheme.

I. THE FCC AND REGULATION OF BROADCAST INDECENCY

The FCC derives its power to regulate and fine utterances of obscene, indecent, or profane language over broadcast communications from Congressional delegation.[31] The Communications Act of 1934 (Act) created the FCC to regulate wire and radio communications and enforce the Act.[32] According to the censorship provision,[33] the Act itself does not "give the Commission the power of censorship over the radio communications . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[34] In *Red Lion Broadcasting Co., Inc. v. FCC,*[35] the Supreme Court upheld, against a First Amendment challenge, the constitutionality of the fairness doctrine,[36] finding support in the scarce availability of broadcast frequencies and Congress's specific directive that the FCC "consider the demands of the public interest in the course of granting licenses."[37]

In 1978, the Supreme Court first squarely addressed and interpreted the FCC's power to regulate indecent material on television and radio broadcasts in *FCC v. Pacifica Foundation.*[38] In a 5-4 decision, the Court explained that the radio broadcast of George Carlin's "Seven Dirty Words" was indecent speech.[39] The Court noted the distinction

31. 18 U.S.C. § 1464 (2005).
32. 47 U.S.C. § 151 (2005).
33. 47 U.S.C. § 326 (2005).
34. *Id.*
35. 395 U.S. 367 (1969).
36. *But see* Syracuse Peace Council v. FCC, 867 F.2d 654, 655-56 (D.C. Cir. 1989) ("Under the 'fairness doctrine,' the Federal Communications Commission has, as its 1985 Fairness Report explains, required broadcast media licensees (1) 'to provide coverage of vitally important controversial issues of interest in the community served by the licensees' and (2) 'to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.'"). The court upheld the FCC's decision to rescind the fairness doctrine. *Id.*
37. 395 U.S. at 379.
38. 438 U.S. 726 (1978).
39. *Id.* at 751.

between indecent speech and obscene speech, which is "denied the protection of the First Amendment because [the] content is so offensive to contemporary moral standards."[40] Though indecent speech is protected by the First Amendment, the Court held that broadcast communications were entitled to less protection[41] because they are "a uniquely pervasive presence in the lives of all Americans" and are "uniquely accessible to children."[42]

The Court did not interpret 47 U.S.C. § 326, the Act's censorship provision, to prohibit the FCC from fining broadcasters for airing indecent, obscene, or profane material.[43] While the FCC may not engage in censorship to alter material before it is shown or heard, it may review concluded broadcasts.[44] The Court's ruling in *Pacifica* applied narrowly to the facts in the case;[45] this is significant, as the FCC regulated conservatively for ten years after the decision to avoid First Amendment conflicts.[46] The two concurring Justices began their opinion by explaining that the "Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion."[47]

For the subsequent decade, the FCC did not sanction fleeting or isolated expletives.[48] In a 1987 Public Notice and a simultaneous

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40. *Id.* at 745 (alterations added) (citing Roth v. United States, 354 U.S. 476 (1957)).

41. *Id.* at 748 ("And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

42. *Id.* at 748-49.

43. *Id.* at 738.

44. 438 U.S. 726, 735 (1978).

45. *Id.* at 750.

46. *Id.* at 755-56 (Powell and Blackmun, JJ., concurring).

47. *Id.*; *see also* Omnibus Order, *supra* note 28, at 2726 (Adelstein, Comm'r., dissenting) ("The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on governmental regulation of protected speech.").

48. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 457-58 (2d Cir. 2007) (The court disagrees with the agency's "first blow" rationale for its change in policy because, for example, "the Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between Pacifica and Golden Globes."). *See also* Adam

Infinity Order,[49] the FCC expanded its definition of indecency from the words used in Carlin's monologue to the current, generic definition, but maintained the policy for fleeting use: "[s]peech that is indecent must involve more than the isolated use of an offensive word."[50] However, in 2004, in its Golden Globe Awards Order,[51] the FCC drastically altered its regulations to find fleeting expletives actionable. The Order reversed an earlier decision by the FCC Enforcement Bureau, finding Bono's acceptance speech at the 2003 Golden Globe Awards not indecent or obscene.[52] The Order explained that the FCC revisited the Bureau's original decision after the Parents Television Council filed an Application for Review requesting "the Commission levy a forfeiture against each licensee that aired the 'Golden Globe Award' program" because the speech was "patently offensive."[53] After explaining the agency's indecency analysis, the Order reversed the Bureau, finding the "F-word, [and] any use of that word or a variation, in any context,

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Cohen, *Fighting for Free Speech Means Fighting for . . . Howard Stern,* N.Y. TIMES, May 3, 2004, at A22 ("On March 18, the F.C.C. issued orders that spell out, as the commission puts it, 'a new approach.' Some of the standards are objectionable on their face. The FCC's inclusion of 'profanity,' which it concedes is often synonymous with 'blasphemy,' means, a coalition of civil liberties groups, media organizations and artists points out, that 'the most commonplace of divine imprecations, such as 'Go to Hell' or 'God damn it,' are now actionable.' As disturbing as the new rules, however, is the FCC's warning that it does not intend to hold itself to any specific definitions of indecency. The commission states, at the end of a list of vague categories of forbidden speech, that it will 'analyze other potentially profane words or phrases on a case-by-case basis.' While making its criteria hopelessly vague, the F.C.C. is removing longstanding protections that give speakers breathing room. While the law has long said that violations must be 'repeated' before a penalty can be imposed, the F.C.C. now says an isolated incident is enough. Instead of requiring that offenses be 'willful,' the new rules hold that a broadcaster's good-faith efforts to understand highly subjective standards are 'irrelevant' to whether it will be punished.").

49. New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, Public Notice, 2 F.C.C.R. 2726 (Apr. 29, 1987).

50. In the Matter of Infinity Broadcast Corp. of Pa., Memorandum Order and Opinion, 2 F.C.C.R. 2705 (Apr. 29, 1987) (alteration added).

51. Golden Globe Awards Order, *supra* note 1.

52. *Id.* ¶ 3 n.4 (explaining Bono stated "[t]his is really, really fucking brilliant. Really, really great" after winning a Golden Globe for best original song (alteration added)).

53. *Id.* National Religious Broadcasters and Morality in Media also filed amicus briefs in support of review.

inherently has a sexual connotation,"[54] and Bono's speech was "patently offensive under contemporary community standards for the broadcast medium and therefore indecent."[55]

The Golden Globe Awards Order proceeded to radically modify two previous approaches to FCC regulation. First, the agency instituted the fleeting expletives rule and put broadcasters on notice "that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[56] The Order also included a footnote foreshadowing the Commission's prediction of future impact: "[w]e do not envision that today's action will lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent."[57] Second, the FCC, in a new application to profane language regulation, defined profanity as "vulgar, irreverent, or coarse language."[58] Explaining that nothing in the FCC's case law limited the definition of profanity to blasphemy,[59] the Order found Bono's speech fell within this expanded treatment,[60] and that "fuck," used in this independent context, fell "within the definition of profanity."[61]

In 2006, adhering to its new fleeting expletives policy, the FCC released the Omnibus Order[62] and the subsequent Remand Order,[63]

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54. *Id.* ¶ 8 (alteration added).

55. *Id.* ¶ 9.

56. *Id.* ¶ 12. The FCC acknowledged its departure from agency precedent: "[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law." *Id.* (alteration added).

57. Golden Globe Awards Order, *supra* note 27, ¶ 12 n.30 (alteration added).

58. *Id.* ¶ 13.

59. *Id.*

60. *Id.* ("Broadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of 'profanity' the 'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word,' to the extent such language is broadcast between 6 a.m. and 10 p.m. We will analyze other potentially profane words or phrases on a case-by-case basis.").

61. *Id.*

62. Omnibus Order, *supra* note 28.

eventually finding that Fox aired indecent and profane material in the 2002 and 2003 Billboard Music Award shows.[64] The FCC found both instances of fleeting expletives actionable, but did not issue a penalty because the broadcasts occurred before the Golden Globe Awards order and accompanying notice.[65] Additionally, in the Omnibus Order, the FCC declared that both "shit" and "fuck" were "presumptively profane;"[66] however, "[i]n rare contexts, language that is presumptively profane will not be found to be profane where its use is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance."[67] After the Remand Order was released, Fox's original petition for review of the FCC's Omnibus Order was reinstated, with CBS and NBC as intervenors.[68] The United States Court of Appeals for the Second Circuit, reviewing the FCC's new policy announced in the Golden Globe Awards Order,[69] held that the fleeting expletives rule was arbitrary and

63. Remand Order, *supra* note 29.

64. *Id.* ¶ 2 ("The 2002 Billboard Music Awards: The Commission received a complaint concerning 'The 2002 Billboard Music Awards' program that aired on Station WTTG(TV), Washington, DC, beginning at 8:00 p.m. Eastern Standard Time on December 9, 2002. The complaint specifically alleged that during the broadcast Cher, an award winner, stated, 'People have been telling me I'm on the way out every year, right? So fuck 'em.' 'The 2003 Billboard Music Awards: The Commission received a number of complaints about the 'The 2003 Billboard Music Awards' program that aired on Fox Television Network stations beginning at 8:00 p.m. Eastern Standard Time on December 10, 2003. The complaints concerned a segment in which Nicole Richie, an award presenter, stated, 'Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.'").

65. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 453-54 (2d Cir. 2007).

66. Omnibus Order, *supra* note 28, ¶¶ 95, 107.

67. *Id.* ¶ 134 (alteration added).

68. *Fox*, 489 F.3d at 454.

69. The United States Court of Appeals for the Second Circuit rejected the FCC's invitation to limit its review to the two Billboard Music Award broadcasts found indecent and profane in the Remand Order. "The Remand Order applies the policy announced in Golden Globes. If that policy is invalid, then we cannot sustain the indecency findings against Fox. Thus, as the Commission conceded during oral argument, the validity of the new 'fleeting expletive' policy announced in Golden Globes and applied in the Remand Order is a question properly before us on this petition for review." *Id.*

capricious, violating the Administrative Procedure Act, and remanded to the agency.[70]

Though the FCC acknowledged its radical change in rule,[71] it had offered no reasoned analysis for the new indecency regime. While explicitly avoiding constitutional issues in the decision, the court expressed doubt regarding the FCC's ability to "provide a reasoned explanation for its 'fleeting expletives' regime that would pass constitutional muster"[72] and, in dicta, questioned "whether the FCC's indecency test can survive First Amendment scrutiny."[73] The FCC recently sought review of the *Fox* decision, and the Supreme Court granted certiorari in March of 2008.[74] The Court will review the Second Circuit's ruling that the FCC's fleeting expletives rule violated the Administrative Procedure Act. However, the Court likely took the case in order to tackle, for the first time in decades, the FCC's broader ability to regulate indecent speech on broadcast communications. Aspects of the FCC's current application of its indecency definition, distinctly altered both in practice and by a modern media landscape since the Court's *Pacifica* decision in 1978, are discussed *infra*.

II. CONTEMPORARY COMMUNITY STANDARDS

Under the FCC's generic indecency definition, reasserted in a 1987 Public Notice,[75] the FCC defined "broadcast indecency" as: "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[76] In each

70. *Id.* at 467.

71. *Id.* at 456.

72. *Id.* at 462.

73. *Id.* at 463.

74. Linda Greenhouse, *Justices take up On-Air Vulgarity Again*, N.Y. TIMES, Mar. 18, 2008, at A16. The United States Court of Appeals for the Third Circuit heard oral arguments in CBS Corp. v. FCC, No. 06-3575 on Sept. 11, 2007. At the printing of this publication, the court had not yet issued an opinion in the case.

75. New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, Public Notice, 2 F.C.C.R. 2726 (Apr. 29, 1987).

76. *Id.* (acknowledging this new standard, the notice begins: "The Commission, by this public notice, puts all broadcast and amateur radio licensees on

case, the FCC must determine whether the material describes or depicts sexual or excretory organs or activities and whether the material is "patently offensive."[77] This is a two-step process.

First, the FCC decides "whether the complained-of material is within the scope of [the FCC's] indecency definition; *i.e.*, whether it describes or depicts sexual or excretory activities or organs."[78] Second, if the material does fall within the FCC's indecency definition, the agency then decides whether "the broadcast [is] patently offensive as measured by contemporary community standards for the broadcast medium"[79] by applying an analysis of contextual factors:

> In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important." Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience. In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "each indecency case presents its own particular mix of these, and possibly, other factors." In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency. [80]

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notice as to new standards that the Commission will apply in enforcing the prohibition against obscene and indecent transmissions").

77. FCC, *Obscenity, Indecency, & Profanity—Frequently Asked Questions*, http://www.fcc.gov/eb/oip/FAQ.html.

78. Omnibus Order, *supra* note 28, ¶ 14.

79. *Id.* ¶ 12 (alteration added).

80. *Id.* ¶ 13.

In another order,[81] the FCC explained that its contemporary community standards followed the definition used by the Court in *Hamling v. United States*[82] and were not determined by a local standard or a specific geographical area.[83] Rather, the analysis focused on a standard based on the "average viewer or listener."[84] As such, contemporary community standards are "judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group,"[85] and the determination is "based on a broader standard for broadcasting generally."[86] For example, in one case, the FCC explained that surveys indicating that radio listeners in the Cleveland area did not find material patently offensive were not a reason to refrain from sanctioning the station.[87] In a subsequent order holding Infinity Radio liable for its concert broadcast of "The Last Damn Show," the FCC explained the contemporary community standards test does not turn on "the popularity of the speakers or the event . . . ."[88]

The FCC, however, also asserted that it utilizes its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary

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81. In the Matter of Infinity Broadcast Corp. of Pa., Memorandum Opinion and Order, 3 F.C.C.R. 930 (Dec. 29, 1987).

82. 418 U.S. 87, 107 (1974) (asserting that a decision applying contemporary community standards establishes "that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group" (citing Miller v. California, 413 U.S. 15, 33 (1973))).

83. In the Matter of Infinity Broadcast Corp. of Pa., Memorandum Opinion and Order, 3 F.C.C.R. 930, ¶ 24 (Dec. 29, 1987); *see also* Omnibus Order, *supra* note 28, ¶ 12 n.13 ("The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.").

84. In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999 ¶ 8 (Apr. 6, 2001).

85. *Infinity Broadcast Corp.*, 3 F.C.C.R., at ¶ 24.

86. *Id.*

87. Independent Group Limited Partnership, Licensee, Radio Station WWWE(AM), Letter, 6 F.C.C.R. 3711 (Apr. 25, 1990).

88. In the Matter of Infinity Radio License, Inc., 19 F.C.C.R. 5022 ¶ 12 (Mar. 18, 2004).

citizens, to keep abreast of contemporary community standards for the broadcast medium."[89] The FCC has also recently referred to itself as "an expert agency,"[90] alluding to a recognition made by the Supreme Court in *Reno*,[91] which apparently endows the FCC with unique abilities to decipher content that is patently offensive for the broadcast medium. In practice, these assertions contradict the objective standard of the contemporary community and allow the Commissioners and their staff to act as ultimate decisionmakers, often under pressure from a discrete number of citizens. The decision process simultaneously removes the "average person"[92] from the central role of decisionmaker, while allowing subjective judgments to replace a general standard. As a result, FCC orders imposing fines or license revocation for indecent speech are made in an inconsistent manner, implicating First Amendment concerns.[93]

In his dissenting statement to the Omnibus Order,[94] Commissioner Adelstein foreshadowed the potential discord with the agency's approach. Quoting the FCC's explanation of its contemporary community standards, Adelstein declared that the FCC exceeded its constitutional authority in the Omnibus Order[95] and warned that overzealous action may invite court action to remove the FCC's regulatory power over indecency forever.[96] In addition to his apprehension that the FCC did not "determine the appropriate

89. *Id.*

90. NYPD Blue FO, *supra* note 10, ¶ 42; Married by America FO, *supra* note 13, ¶ 16.

91. Reno v. ACLU, 521 U.S. 844, 867 (1997) (explaining that the order under review in *Pacifica* was "issued by an agency that had been regulating radio stations for decades").

92. Hamling v. United States, 418 U.S. 87, 104 (1974).

93. Action for the Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."(alterations added)).

94. Omnibus Order, *supra* note 28 (Adelstein, Comm'r, concurring in part, dissenting in part).

95. *Id.* (This Order followed the Golden Globe Awards Order and its radical changes to the Commission's regulatory scheme.).

96. *Id.* at 2727-28.

community standard" before issuing forfeitures, he criticized the application.[97]

In the following Remand Order,[98] Commissioner Adelstein again criticized the FCC's application of contemporary community standards as illogical, because a nationally employed standard would implicate all stations airing the indecent material.[99] Instead, the FCC fined only the local station; the distinguishing factor was whether an individual in the area complained.[100] For example, in the recent NAL regarding *NYPD Blue*, the FCC only fined the ABC licensees "whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission," though other stations also broadcast the show outside safe harbor hours.[101]

To increase uncertainty, the most recent Forfeiture Orders for *NYPD Blue* on ABC and *Married by America* on Fox reference a new interpretation of "contemporary community standards for the broadcast medium" to inform the FCC's approach.[102] Where FCC Orders previously cited *Hamling* to describe the standard, these new orders cite *Smith v. United States*,[103] asserting that the FCC's "approach to discerning community standards parallels that used in obscenity cases, where the jury is instructed to rely on its own knowledge of community standards in determining whether material is patently offensive."[104] In *Smith*, the Court held that a finding of obscenity under contemporary community standards was a jury decision, and state law could not circumscribe that determination.[105]

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97. *Id.*

98. Remand Order, *supra* note 29.

99. *Id.* at 13333-34.

100. *Id.* ("The complaint and the complainant serve an important role, but the real party in interest is the Commission, acting on behalf of the public, rather than the specific individual or organization that brings allegedly indecent material to our attention.").

101. NYPD Blue NAL, *supra* note 2, ¶ 19. In *Action for Children's Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995), the court remanded to the FCC "with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m."

102. *See* NYPD Blue FO, *supra* note 10, ¶ 42; Married by America FO, *supra* note 13, ¶ 16.

103. 431 U.S. 291 (1977).

104. NYPD Blue FO, *supra* note 10, ¶ 42.

105. *Smith*, 431 U.S. at 308.

The potentially more significant development, previously adopted in the Omnibus Order and discussed *supra*, is the application of a limited enforcement policy, whereby the FCC only issued forfeitures to stations who were actually the subject of complaints.[106] This procedure and admitted change in FCC forfeiture policy again highlights the problematic issue raised by Commissioner Adelstein. If the FCC claims its standard for determining patently offensive material for *the* broadcast medium is a *national* one, why would it limit enforcement of its rules to those areas from which it received complaints? If a television or radio program is found to be indecent when broadcast on one station (assuming the program airs between 6 a.m. and 10 p.m.), why is it not also indecent when shown at the same time in the neighboring town or state? Shouldn't the FCC issue fines on a national basis if its standard of patent offensiveness is defined in that manner?

Instead, under this recent approach, the FCC seems to follow a local standard buttressed by complaints; a station receives a penalty if someone in its viewing area complained, but the adjacent station escapes forfeiture because no one there filed a complaint, even though a viewer perhaps saw the program and was offended. The FCC's latest enforcement process conflicts with the notion that "contemporary community standards for the broadcast medium" include *all* broadcasts. This is, apparently, the FCC's understanding and implementation of a "restrained enforcement policy."[107] However, it is doubtful the Supreme Court associated the "narrowness of [its] holding"[108] in *Pacifica* to a reduced number of liability notices. Rather, the Court seemed to expect

106. NYPD Blue FO, *supra* note 10, ¶ 53; *see also* Omnibus Order, *supra* note 28, ¶ 86 (recognizing "that this approach differs from that taken in previous Commission decisions involving the broadcast of apparently indecent programming. We find, in this case, however, that, in the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program. Our commitment to an appropriately restrained enforcement policy, however, justifies this more limited approach towards the imposition of forfeiture penalties").

107. NYPD Blue FO, *supra* note 10, ¶ 53.

108. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (explaining that the Court's decision is premised on the importance of context in the FCC's enforcement and that "a telecast of an Elizabethan comedy" or "an occasional expletive" will not "justify any sanction" by the FCC) (alteration added).

the FCC to exercise restraint in treading on the First Amendment,[109] while adhering to the statutory directive prohibiting censorship in the Communications Act of 1934.[110]

A. The Complaint Process

The vulnerability of the FCC complaint process to influence from a disproportionate sample of complainants is the subject of much criticism and commentary. Relying on a complaint process initiated by viewers, the FCC misapplies contemporary community standards in two ways. First, the FCC responds to complaints filed disproportionately by one advocacy group, asserting a single viewpoint.[111] This group may represent a particularly sensitive viewer or the complaints may arise from a specific region of the country. In either case, the representation is not an accurate portrayal of community standards. Second, the FCC, specifically the Commissioners, decide whether the broadcast complained of is patently offensive.[112] The decision is retroactive, as the FCC does not oversee all broadcasts before or while they air, so the FCC responds to filed complaints which provide a slanted sample.[113]

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109. *See, e.g.*, Action for the Children's Television v. FCC, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) ("Though declining to defer absolutely to broadcasters' judgments of what is or is not indecent, the FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

110. 47 U.S.C. § 326 (2005).

111. *See* Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK (Dec. 6, 2004), *available at* http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm ("According to a new FCC estimate obtained by Mediaweek, nearly all indecency complaints in 2003—99.8 percent—were filed by the Parents Television Council, an activist group.").

112. In the Matter of Indus. Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999 ¶ 16 (Apr. 6, 2001).

113. *Id.* Explaining its enforcement process in a 2001 Industry Guidance statement, the agency states: "[t]he Commission does not independently monitor broadcasts for indecent material. Its enforcement actions are based on documented complaints of indecent broadcast received from the public." *Id.* (alteration added).

The process for filing a complaint with the FCC, as outlined on its website,[114] can be manipulated in practice. The purported increase in number of complaints is a result of the FCC's computation method, and an overwhelming majority of the complaints are filed by two activist groups.[115] A 2006 Wall Street Journal article explained that broadcasters believe the significant increase in number of complaints stems from "email campaigns organized by Christian or pro-family interest groups, like the Parents Television Council"[116] (PTC). In addition to reports stating that the PTC initiated 99.8% of all broadcast indecency complaints filed in 2003,[117] and 99.9% in 2004,[118] Freedom of Information Act requests regarding a 2004 episode of *Without a Trace* on CBS show that "[o]f about 6,500 complaints filed against stations that received fines, all but three appeared to originate as computer-generated form letters."[119]

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114. FCC, *Filing a Complaint with the FCC is Easy,* http://www.fcc.gov/cgb/complaints.html (last visited Mar. 22, 2008); *see also* Parents Television Council, *File an Official Indecency Complaint with the FCC Now*, https://www.parentstv.org/PTC/fcc/fcccomplaint.asp. The complaint form appears on the website with directives to complete the required information; the form is submitted directly to the FCC with the complainant's click. American Family Association, *AFA Activism*, http://www.afa.net/activism/wopcd_radiostations.asp. The site provides links to the FCC complaint page.

115. *See* Brief for Amicus Curiae Creative Voices in Media in Support of Petitioners, CBS Corp. v. FCC, 5-6 (3d Cir. Nov. 27, 2006) (No. 06-3575), http://www.mediaaccess.org/filings/2006-11-26-CCVAmicus.pdf; *see also* Thierer, *supra* note 22.

116. Amy Schatz, *Networks Fight Rising Number of FCC Fines*, WALL ST. J., May 19, 2006, at B1.

117. *See* Shields, *supra* note 111.

118. Thierer, *supra* note 22 ("Exempting the complaints associated with the Janet Jackson Super Bowl episode, 99.9% of all other FCC indecency complaints were generated by the PTC.").

119. Schatz, *supra* note 116; *see also* Thierer, *supra* note 22 ("In [the 2003 episode of *Married by America*,] the FCC originally said that 159 complaints were received about one specific episode. As a result, the agency fined Fox and its affiliates $1.2 million for indecency violations. But after blogger and former *TV Guide* critic Jeff Jarvis sent a FOIA request to the FCC about the case, the agency's Enforcement Bureau was forced to reveal that there were actually only 90 total complaints from 23 unique individuals. The majority of these complaints were essentially the same PTC form letter." (alteration added)).

Using online forms, complainants can send multiple copies of the same complaint to numerous offices and personnel within the agency. The complainant can also file multiple times, and the FCC counts each of these complaints individually.[120] The complainant need not watch the offending program, but may receive a solicitation from the advocacy group to complain. Thus, some complainants may file complaints regardless of whether they saw the program at all, or saw the program and were not actually offended.[121]

This complaint process does not provide the opinion of the contemporary community in America, and may allow a heckler's veto where community standards would not find the speech patently offensive.[122] The FCC may rely on this skewed complaint process to inform its decisions on indecent speech. As a result, the FCC either ignores the contemporary community standards test included in its own indecency policy or allows the views of minority advocacy groups to replace the American public. In both instances, community standards can be manipulated and imposed subjectively.

B. Contemporary Community Standards in other Regulatory Schemes

In 1996, the Supreme Court addressed community standards, albeit as applied to the Internet. In *Reno v. ACLU*,[123] the Court struck down the Communications Decency Act's (CDA) obscenity definition, with the same "contemporary community standards" language used to regulate Internet communications,[124] as a violation of the First Amendment. Though the Court did not include broadcast regulation in its decision, it explained that "the 'community standards' criterion as

120. Brief for Creative Voices, *supra* note 115, at 33, Appendix A: Jonathan Rintels, *Big Chill: How the FCC's Indecency Decisions Stifle Free Expression, Threaten Quality Television, and Harm America's Children*, Sept. 21, 2006.

121. *Id.*

122. *See* Brief of Amici Curiae Center for Democracy and Technology and Adam Thierer in Support of Petitioners, CBS Corp. v. FCC, 8 (3d Cir. Nov. 29, 2006) (No. 06-3575), http://www.cdt.org/speech/20061129circuit3.pdf; *see also* Reno v. ACLU, 521 U.S. 844, 880 (1997) (explaining that the CDA, discussed *infra*, affords "broad powers of censorship, in the form of a heckler's veto, upon any opponent of indecent speech").

123. 521 U.S. 844 (1996).

124. Communications Decency Act, 47 U.S.C. § 223 (1996).

applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message."[125]

The statute at issue in the case included language parallel to the FCC's indecency definition for the broadcast medium, and the Court found it overly broad and vague.[126] While the Court, in *Reno*, addressed the distinctions between the FCC regulation upheld in *Pacifica* and the CDA at issue, it is significant to highlight the majority's discussion of the relevant statutory language. The portion of the CDA, held unconstitutional in *Reno*, stated:

> Whoever—(1) in interstate or foreign communications knowingly . . . (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, *in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs*, regardless of whether the user of such service placed the call or initiated the communication . . . .[127]

The Court explained that the CDA did not provide a definition for the use of "indecent"[128] or for its reference to material that "in context

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125. *Reno*, 521 U.S. at 877-78.

126. *Id.* at 874 ("We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

127. *Id.* at 860 (quoting "Communications Decency Act of 1996," 47 U.S.C. § 223(d)(1)(B) (1996)) (emphasis added).

128. *Id.* at 859 ("Whoever—(1) in interstate or foreign communications-- . . . (B) by means of a telecommunications device knowingly—(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . ." 47 U.S.C. § 223(a) (1996) (emphasis added)).

depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," and that, "[g]iven the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."[129]

In a similar vein, the Court declared that the CDA could not suppress the marketplace of ideas available to adults simply because the Internet is accessible by both adults and minors, and the level of scrutiny should not be qualified in a manner similar to the broadcast spectrum because "the Internet can hardly be considered a scarce expressive commodity."[130] The primary reasons for allowing limited First Amendment protection over broadcast communications in *Pacifica*, namely its pervasive presence in American homes and accessibility to children, are frequently contended as non-existent today.[131] That the new media landscape diminishes the FCC's rationale for regulating indecency on broadcast communications is an argument parallel to the one addressed in *Reno*.

The Supreme Court subsequently addressed the constitutionality of the Child Online Protection Act[132] (COPA), passed by Congress in 1998. The Court held that COPA's "use of 'community standards' to identify 'material that is harmful to minors' . . . does not render the statute facially unconstitutional [under the First Amendment]."[133] The Court found three distinctions between COPA and the CDA from *Reno*: (1) the CDA regulated speech to adults in violation of the First Amendment; (2) was not confined to commercial speech; and (3) was not

129. *Id.* at 871 (alterations added).

130. *Id.* at 870.

131. *See, e.g.*, Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 COMMLAW CONSPECTUS 431, 433 (2007) ("The marketplace hegemony that radio and television broadcast networks and stations once enjoyed has eroded rapidly in recent years. Decades of dominance has been undone by the rise of countless new competitors and technologies, including: cable and satellite television; satellite radio; VCRs and DVDs; the Internet and the World Wide Web; blogging; social networking; podcasting; portable digital music and video; gaming platforms; and the many other multimedia information and entertainment services.").

132. 47 U.S.C. § 231 (1998).

133. Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (alteration added).

narrowly tailored.[134] In her concurrence in *Ashcroft*, Justice O'Connor outlined her support for a national standard approach to obscenity regulation on the Internet.[135] She disagreed with the plurality's application of *Hamling* and *Sable,*[136] which placed the burden on the mailer and phone operator, respectively, to comply with varying community standards.[137] Instead, O'Connor argued, the very nature of the Internet makes that burden too high, because the material is sent online to a national and international audience.[138]

Notwithstanding the distinction between obscene speech addressed in the previous Internet cases and indecent speech regulated by the FCC, O'Connor's application of a national standard and the rationale necessitating it parallels closely the breadth and reach of broadcast communications. Like material dispersed over the Internet, broadcast material aired on the radio and television finds recipients in all corners of the nation. Placing the burden on the broadcaster to tailor its programming to the varying community standards and the most sensitive viewer or listener increases the potential to chill speech and infringe expression. As explained in *Reno*, the vague statutory language of "patently offensive as measured by contemporary community standards" in the CDA offered no definition, elaboration, or reference to examples of speech that are included or excluded and, therefore, raised a possible "chilling effect on free speech"[139] that can be transposed to the broadcast regulatory scheme.

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134. *Id.* at 568-70.

135. *Id.* at 587.

136. *Id.* at 580.

137. *Id.* at 581 ("If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." (quoting Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 125-26 (1989))).

138. *Id.* at 587 (explaining that "given Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable,* may be entirely too much to ask, and would potentially suppress an inordinate amount of expression").

139. Reno v. ACLU, 521 U.S. 844, 872 (1997).

C. The FCC's Increased Regulation of Indecent and Profane Broadcasts

The FCC declared that it does not rely on audience response (e.g., popularity ratings) to determine whether broadcasts are indecent, but the increased number of complaints has visibly prompted more regulation.[140] In the FCC Order following Super Bowl XXXVIII,[141] where Janet Jackson experienced a "wardrobe malfunction" during the halftime show, former Commission Chairman Michael Powell stated that the FCC "received an unprecedented number of complaints" after the halftime show on CBS.[142] To illustrate the sharp escalation in FCC complaints: the Commission received a total of 111 complaints concerning 111 programs in 2000;[143] in 2004, the FCC received over 1.4 million complaints regarding 314 programs.[144] In his statement before the House Energy and Commerce Committee,[145] Powell acknowledged the increased number of complaints and specifically, the eclipse of radio complaints with television ones. As a response, he promised the FCC would apply stricter enforcement and action.[146] In a 2004 interview at the National Association of Broadcasters Convention, Powell again explained that the FCC's increased enforcement of indecent speech was a "direct response" to the large number of filed complaints.[147] He also

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140. *See* Lili Levi, First Report: The FCC's Regulation of Indecency (Aug. 6, 2007), http://www.firstamendmentcenter.org/PDF/FirstReport.Indecency.Levi.pdf.

141. In the Matter of Complaints against Various Television Licensees concerning their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII, Notice of Apparent Liability for Forfeiture, 19 F.C.C.R. 19230 ¶ 2 (Sept. 22, 2004).

142. *Id.* ¶ 2 n.6 ("To date, the Commission has received over 542,000 complaints concerning the broadcast."); *cf.* Brief for the Center for Democracy and Technology and Adam Thierer, *supra* note 123 (questioning the authenticity, individuality, and origin of this number).

143. Indecency Complaints and NALs: 1993—2006, http://www.fcc.gov/eb/oip/ComplStatChart.pdf (last visited Mar. 22, 2008).

144. *Id.*

145. Testimony of Federal Communications Commission Chairman Michael K. Powell before the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, 2-3 (Feb. 11, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A3.pdf.

146. *Id.*

147. Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Association of Broadcasters Convention, Las Vegas,

stated that there was a subjective component to the FCC's indecency regime, but believed judicial decisions validated the policy.[148]

To avoid providing an arbitrary and capricious standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[149] Whether or not the FCC claims the increased number of complaints contributed to its change in policy to find fleeting expletives actionable, there is a connection between the number of complaints and FCC NALs.[150] This may indicate arbitrary and capricious action on the part of the agency.[151]

III. CONTEMPORARY COMMUNITY STANDARDS AND EVOLVING STANDARDS OF DECENCY

In an explanation of his conventional morality theory of judicial review, Wojciech Sadurski[152] examines the counter-majoritarian role of courts and their use of standards to discern moral majority views.[153] Conventional morality is considered and defined within the courts by a myriad of terms including "'contemporary community standards', 'community values', 'public morality', 'common views of morality', 'the moral consensus', 'evolving standards of decency', 'the ethical standards current at the time', etc."[154] Courts look to these standards to determine where material falls along the spectrum of moral consensus; for example, whether something is obscene or not.[155] In these instances of degree,[156] the court relies on society to provide the underlying measurement.[157]

Nevada, 1 (Apr. 20, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246876A1.pdf.

148. *Id.* at 2.

149. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

150. Indecency Complaints and NALs: 1993-2006, *supra* note 145.

151. *See* Brief for the Center for Democracy and Technology and Adam Thierer, *supra* note 122.

152. Professor of Legal Philosophy, University of Sydney.

153. *See generally* WOJCIECH SADURSKI, MORAL PLURALISM AND LEGAL NEUTRALITY (1990).

154. *Id.* at 38.

155. *Id.* at 39.

This analysis provides a possible comparative framework to the FCC's regulation of broadcast material. While FCC decisions are rarely reviewed by a court, either prior to issuance of an NAL or after, there is, nevertheless, a small group of people determining the degree of offense. Whether it is the FCC Commissioners (and their staff) or advocacy groups vocalizing their opinions, a disproportionately small perspective is substituted for the majority consensus. This strays from the traditional understanding of counter-majoritarian difficulty, but also emphasizes the potential administrative and constitutional problems with an uncertain standard and its inherent vulnerability toward manipulation.

Analogous to the FCC's indecency definition and contemporary community standards, the courts have struggled with an inherent vagueness surrounding application of the Eighth Amendment. For decades, the Court has tapped into a moral standard to clarify cruel and unusual punishment under the Eighth Amendment. In 1958, the Court determined that the words "cruel and unusual" are not precise and the Eighth Amendment "[draws] its meaning from the evolving standards of decency that mark the progress of a maturing society."[158] Though this initial reference did not involve a death penalty case, the Court referred to evolving standards of decency in *Furman v. Georgia*[159] and found the application of the death penalty in that case violated the Eighth Amendment.[160]

In 2005, the Court held that the Eighth Amendment prohibits imposing the death penalty on juvenile offenders,[161] citing evolving standards of decency as a necessary evaluation when determining the proportionality of punishment.[162] In a concurring opinion, Justices Stevens and Ginsburg reiterate the centrality of the standards of decency to the Court's interpretation; the standards are not static, nor are they

156. *Id.* at 40.

157. *Id.*

158. Trop v. Dulles, 356 U.S. 86, 101 (1958) (alteration added).

159. 408 U.S. 238 (1972).

160. *Id.* at 239-40 ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

161. Roper v. Simmons, 543 U.S. 551 (2005).

162. *Id.* at 561.

identical to standards understood when the Eighth Amendment was drafted.[163]

In *Atkins v. Virginia*,[164] evolving standards of decency played a principal role in the Court's decision to forbid executions of mentally retarded criminals as violative of the Eighth Amendment. The Court specifically analyzed legislation as objective indices of evolving standards;[165] while objective factors do not "wholly determine the controversy," the trend in legislation was enough to constitute a "national consensus"[166] against executing mentally retarded persons.

The Court has continually reiterated and reevaluated evolving standards of decency to analyze whether a punishment, particularly the death penalty, violates the Eighth Amendment prohibition against cruel and unusual punishment. The Court also uses the phrases "contemporary standards" and "values" interchangeably.[167] From the Court's initial reference to "evolving standards of decency that mark the progress of a maturing society"[168] through its continued current use of the phrase, there is an explicit acceptance of gauging public temperament. The phrase also signifies that perceptions change and progress. Similarly, "contemporary community standards," as an indication of the present consciousness, can develop with society.

Comparing a recent use of community standards in an FCC order,[169] the FCC explained its contextual factor analysis[170] and its

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163. *Id.* at 587.

164. 536 U.S. 304 (2002).

165. *Id.* at 316.

166. *Id.*

167. *See* Gregg v. Georgia, 428 U.S. 153, 175-76 (1976) (discussing the role of legislatures as representative of society's moral values).

168. Trop v. Dulles, 356 U.S. 86, 101 (1958).

169. Infinity Radio License, Memorandum Opinion and Order, 19 F.C.C.R. 5022 (Mar. 18, 2004).

170. *Id.* ¶ 11 ("In examining these three factors, it is necessary to weigh and balance them to determine whether the broadcast material is patently offensive because 'each indecency case presents its own particular mix of these, and possibly other, factors . . . .' In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency. The 'merit' of a work is one of many variables that make up a work's context; however, the presence of artistic or social merit does not preclude a finding that material is indecent. Thus, regardless of whether there was artistic or social

application of the average broadcast listener[171] to hold Infinity Radio liable. However, the order also recognized the standard it relied on to determine patent offensiveness can change, stating "we conclude that the nation's ever-changing contemporary community standards have not yet reached the point where the cited material is acceptable broadcast fare."[172] Therefore, the community standard, currently susceptible to minority pronouncement, can also evolve.

IV. CONTEMPORARY COMMUNITY STANDARDS IN CONTEXT: CHILLED SPEECH AND VAGUE PARAMETERS

If contemporary community standards measure what is patently offensive for the broadcast medium, the viewer/listener should, presumably, see or hear the material in context. Indeed, the Court cited "context" as "all-important" in *Pacifica*,[173] and the FCC continually reiterates the fundamental role of its "contextual analysis"[174] in determining whether the broadcast material is patently offensive. The function of context poses particular problems for religious and political speech. Unpopular or marginal views may be censored because that "community" has less of a voice or chooses not to file complaints in response to other speech. The regulations will slant to respond to those complaining, removing controversial or unwelcome speech. The Commissioners said that they "rely on our collective experience and knowledge, developed through constant interaction with lawmakers,

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merit to 'The Last Damn Show,' we may still find that the material broadcast by Station WLLD(FM) was indecent if, after weighing and balancing all pertinent factors, we conclude that the material is patently offensive. Because we agree with the Bureau that the cited material was explicit, graphic and repeated, we also conclude that, even after factoring in the concert's merit, as described by Infinity, the Bureau correctly determined that the material was patently offensive.").

171. *Id.* ¶ 12 ("Applying the test of the average broadcast listener to the material at issue, we are satisfied that he or she would find it patently offensive for the broadcast medium.").

172. *Id.*

173. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

174. *See, e.g.*, NYPD Blue FO, *supra* note 10, ¶ 12 (declaring that "the overall context of the broadcast in which the disputed material appeared is critical"); *see also* Omnibus Order, *supra* note 28, ¶ 2 ("Overall, the decisions demonstrate repeatedly that we must always look to the context in which words or images occur to determine whether they are indecent.").

courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[175] However, this explanation does not provide explicit evidence on how they arrive at their determinations without subjectively focusing on their own perspective or understanding of certain types of speech as the final arbiters.

A. Chilled Speech

The potential for broadcasters to chill speech to avoid FCC action and penalties is significant. Both broadcasters and commentators critique the FCC's entire indecency policy (and the new fleeting expletives rule) as vague and inconsistent in its application. In the *Fox Television Stations* decision, the Second Circuit agreed "that the FCC's 'patently offensive as measured by contemporary community standards' indecency test coupled with its 'artistic necessity' exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to "steer far wider of the unlawful zone."[176] Aside from a lack of clarity regarding the indecency definition, television and radio licensees may censor their own material before it airs, implicating religious and political expression. During the 2007 Fox broadcast of the Emmy Awards, the final portion of Sally Field's acceptance speech was censored.[177] Field uttered a fleeting expletive, and the broadcast cut sound, however the remainder of her sentence included political speech. Fox explained it censored the objectionable language only.[178]

In October 2007, a New York public radio station decided not to air Allen Ginsberg's "Howl" because it feared the FCC would find the poem indecent and fine the station.[179] The station noted the irony of the fiftieth anniversary of *People v. Ferlinghetti*, in which a San Francisco Municipal Court ruled the poem was not obscene.[180] Instead, the radio

175. Infinity Radio License, *supra* note 170, ¶ 12.

176. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 463 (2d Cir. 2007).

177. Edward Wyatt, *Fox Explains Censorship of Actors at Emmys*, N.Y. TIMES, Sept. 18, 2007, at E1.

178. *Id.*

179. Joe Garofoli, *'Howl' too hot to hear*, S.F. CHRON., Oct. 3, 2007, at A1.

180. *Id.*

station hosted an online reading of the poem on its parent website entitled "Howl against Censorship."[181]

Critiques are replete with references to the FCC's treatment of *Saving Private Ryan*, and the film's repeated use of "fuck," "shit," and multiple other potentially offensive words.[182] Though the film aired on television in 2001 and 2002, several ABC affiliates feared airing it in 2004 would invite FCC penalties.[183] A subsequent FCC Order explained that the repetitive use of expletives in *Saving Private Ryan* was not indecent and profane and distinguished it from Bono's fleeting use because, in context, it was an artistic work.[184]

Acknowledging the difficulties attending the FCC's indecency regime, the Second Circuit disagreed with the agency that a literal use of an expletive cannot be distinguished from non-literal use.[185] Asserting a "common-sense understanding [of expletives], which, as the general public well knows, are often used in everyday conversation without any sexual or excretory meaning[,]"[186] the court claimed the distinction is evident. In addition to Bono's speech, which was not literal use, the court compared instances where "even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced sexual or excretory organs or activities."[187]

In their analysis to determine patent offensiveness, the Commissioners analyze the full context of the material with three factors: (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells

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181. *Id.*

182. Lisa de Moraes, *'Saving Private Ryan': A New Casualty in the Indecency War*, WASH. POST, Nov. 11, 2004, at C01.

183. *Id.*

184. In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," Memorandum Opinion and Order, 20 F.C.C.R. 4507 ¶ 14 (Feb. 28, 2005).

185. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 459 (2d Cir. 2007).

186. *Id.* (alterations added).

187. *Id.* at 459-60 ("President 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' and Vice President Cheney's widely-reported 'Fuck yourself' comment to Senator Patrick Leahy on the floor of the U.S. Senate.").

on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[188] On the FCC website, the agency explains that "[n]o single factor is determinative" on the patent offensiveness issue, and the agency will "[balance and weigh]" the above factors and "possibly other[] factors" as well.[189] The weight applied collectively to these factors, or one more than others, may be based on opinion and perspective, but could determine whether indecent material is found. While evaluation of the speech in context is necessary to the FCC's definition of indecency, the Commissioners may find the material in its entirety offensive, but not indecent.[190] However, an offensive context could tip the balance toward indecency.[191]

One commentator criticized the "conduit-based regulation" vein of First Amendment jurisprudence.[192] While the FCC engages in content-based regulation and the Commissioners perform a self-described contextual analysis of the speech at issue, Jim Chen argues that "discrimination on the basis of content does not and should not acquire sudden immunity merely because speech passes through a less privileged conduit."[193] The theory that prompted the Court in *Pacifica* to afford less protection to the broadcast medium no longer holds sway. The scarcity rationale explained in *Red Lion* also cannot validate a lesser standard of review for free speech, because the achievements in technology and media render it obsolete.[194]

B. A Sample of Public Opinion

Because the FCC's standard is that of the community, it seems helpful, though not conclusive, to examine citizens' actual responses.

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188. Golden Globe Awards Order, *supra* note 27, ¶ 7.

189. *See* FCC: *Obscenity, Indecency & Profanity—Frequently Asked Questions*, http://www.fcc.gov/eb/oip/FAQ.html (alterations added).

190. Levi, *supra* note 140, at 18.

191. *Id.*

192. Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1438 (2005).

193. *Id.* at 1450.

194. *Id.* at 1451; *see also* Thierer, *supra* note 131.

While public opinion surveys employ various methodologies and may only reach a small sample of society, they can be useful as a broad brush of sentiment and attitude. For example, a 2004 Gallup poll canvassed attitudes after Janet Jackson performed at the Super Bowl.[195] The survey included phone interviews with 1008 adults and the responses indicated that more Americans were not offended by the Super Bowl incident than the number who were.[196] Respondents also answered that they were more offended by violence than sexuality/profanity content on television.[197] This particular trend may allude to the impetus for more support for proposed Congressional action to push FCC regulation over violent programming.[198]

In contrast to Gallup poll data from 1995, fewer Americans in 2004 believed that the entertainment industry needed to make a serious effort to regulate the amount of sex and violence on television.[199] If data from public polls surveying a presumably broader sample of society is afforded more weight than an increased number of complaints from advocacy groups, the contemporary community standard could be evolving and changing. It is also likely that respondents in 2004 benefited from diverse entertainment options, as compared to viewers in 1995.

A 2005 PEW Survey of 1505 Americans found that more respondents (48%) believed "undue government restrictions" posed a greater danger than "harmful content" (41%).[200] The distinction fell

195. Jeffrey M. Jones, *Most Americans offended by Sex and Violence on Television,* Gallup.com (Feb. 12, 2004), http://www.gallup.com/poll/10588/Most-Americans-Offended-Sex-Violence-Television.aspx.

196. *Id.*

197. *Id.*

198. Violent Television Programming and its Impact on Children, FCC 07-50, MB Docket No. 04-261 (Apr. 25, 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-50A1.pdf.

199. Jones, *supra* note 195 (showing 83% in 1995 believed that the industry should make a serious effort and 75% believed the same in 2004).

200. The Pew Research Center for the People and the Press, *Support for Tougher Indecency Measures, But Worries About Government Intrusiveness: New Concerns About Internet and Reality Shows,* http://people-press.org/reports/display.php3?ReportID=241 (In response to the question: "What's the greater danger these days: That the entertainment industry will produce material harmful to society, or that the government will impose undue restrictions on it in an effort to control what it produces?").

along political party lines, but all regions of the U.S. responded similarly. A Kaiser Family Foundation study found that parents are less concerned with "isolated incidents," including the Super Bowl "wardrobe malfunction," but would favor greater regulation over the amount of sex and violence in early evening hours, when children may watch.[201]

> When it comes to TV, parents are most concerned that their children are being exposed to too much sexual content, followed by concerns about violence and adult language. Six in ten parents (60%) say they are "very" concerned that their children are being exposed to too much sexual content in the TV shows they watch; 53% are "very" concerned about violent content, and 49% about adult language.[202]

In a 2005 poll of 1010 Americans, published in *Time* magazine, 94% responded they had never "complained to a broadcaster or the government, or participated in a boycott or demonstration about indecent or explicit content on television."[203] Approximately one-third of respondents stated that they were offended by the Super Bowl incident when Janet Jackson's breast was exposed.[204] While many Americans responded that there was too much violence, cursing, and sexual content on television, at 66%, 58%, and 50% respectively, no majority claimed that they were offended by it, nor believed that the government should ban it.[205]

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201. News Release, Kaiser Family Foundation, *Parents Favor New Limits on TV Content in Early Evening Hours,* (Sept. 23, 2004), http://www.kff.org/entmedia/entmedia092304nr.cfm.

202. Victoria Rideout, *Parents, Media, and Public Policy: A Kaiser Family Foundation Survey*, (2004), http://www.kff.org/entmedia/upload/Parents-Media-and-Public-Policy-A-Kaiser-Family-Foundation-Survey-Report.pdf.

203. Time Poll, *We Hate It! We Want It!,* TIME, Mar. 28, 2005, at 28 (5% responded yes; 1% Don't Know).

204. *Id.*

205. *Id.* (42%, 38%, 32% respectively are offended; 36%, 41%, 41% responded government should ban).

V. VIOLENT PROGRAMMING, STANDARDS, AND FUTURE REGULATION

In its 2007 Report to Congress regarding the regulation of violent programming on television, the FCC responded to Congress's request for guidance in promulgating a definition of "excessively violent programming harmful to children."[206] Specifically, Congress was interested in a definition that would pass constitutional muster, both in language and in implementation.[207] The potential conflicts between regulating violent programming and the First Amendment are numerous, and the FCC did seem to acknowledge this tension,[208] though Commissioner Adelstein's concurrence addressed it directly.[209]

The FCC offered several possible definitions of violent programming, including one proposed by the activist organization, Morality in Media.[210] The FCC believes Congress can draft a constitutional definition and recommended it do so.[211] Among several complications, by using the standards of the contemporary community, a definition of violence would confront the same constitutional and arbitrary issues as the FCC's indecency regime. The broadcast audience may differ in their own perceptions of what constitutes violent programming, while the FCC may rely on a distorted sample of complaints and their own subjective comprehension of violence.

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206. Violent Television Programming and Its Impact on Children, *supra* note 198, at 18.

207. *Id.*

208. *Id.* at 19.

209. *Id.* at 31-32 ("The central tension we face is that adults' access to violent programming is protected under the First Amendment to the U.S. Constitution. The difficult question is precisely which violent programming, if any, the government can regulate in the interest of protecting children. That question—the most challenging Congress faces—is never answered here.")

210. *Id.* at 19-20 (MIM recommends augmenting FCC's indecency definition to include violence. According to MIM, indecent speech or violent programming should be defined as content that, in context, describes or depicts: "(1) sexual or excretory activities or organs or (2) outrageously offensive or outrageously disgusting violence or (3) severed or mutilated human bodies or body parts, in terms patently offensive as measured by contemporary community standards for the broadcast medium." MIM defines violence as: "intense, rough or injurious use of physical force or treatment either recklessly or with an apparent intent to harm").

211. *Id.* at 21.

CONCLUSION

Numerous alternative methods are proffered for the FCC and/or households to utilize to regulate broadcast material. Traditionally, the FCC focused on the broadcaster-viewer relationship for purposes of indecency regulations.[212] Explaining that the community standards test and FCC's indecency definition lead to "politicized enforcement,"[213] two commentators stated that regulation depends more on the administration in office and advocacy groups, and less on a consistent indecency standard. They proposed a market-based approach where regional communities could make their preferences known through information and support for advertisers; this local standard would more accurately represent viewers and their wishes than the national community standard promulgated by the FCC,[214] as well as avoid the politicization of the enforcement process.

Because the variety and abundance of multiple entertainment options makes the scarcity rationale supporting broadcast regulation obsolete, families may provide more efficient regulation at the individual household level.[215] Parental controls, like the V-chip and channel restrictions, would allow particularized restraints that may satisfy *Pacifica's* children protection justification.[216] As another possible solution, because the regulation of indecency is currently arbitrary and "inconsistently applied across mediums,"[217] the FCC should also regulate cable and satellite television services to truthfully follow the *Pacifica* decision and protect children and the privacy of the home.[218]

Regardless of the feasibility of alternative regulatory schemes, the current test of patent offensiveness, as determined by contemporary

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212. *See* Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1470-80 (2005).

213. *Id.* at 1480.

214. *Id.* at 1508-09.

215. *See* Adam Thierer, *Why Regulate Broadcasting? Toward a consistent First Amendment standard for the Information Age,* 15 COMMLAW CONSPECTUS 431, 470-71 (2007).

216. *Id.* at 471-73.

217. *See* Matthew Schwartz, Article, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services,* 13 RICH. J.L. & TECH. 17, ¶ 124 (2007).

218. *Id.*

community standards for the broadcast medium, provides inconsistent guidance to broadcasters, chills free speech, and is unconstitutionally vague. Critiques of the FCC's enforcement of broadcast indecency, and more recently, its regulation of fleeting expletives and profanity abound. By responding to a disproportionate representation of viewers who are able to abuse and skew the complaint process, and enforcing a recently enacted forfeiture procedure to issue penalties only to stations that were the subject of a complaint, the FCC may be called upon to reevaluate its policies in the near future. Filing an amicus brief on behalf of the FCC in 2006, the Parents Television Council faulted the FCC for its unclear definition of indecency, and provided counterexamples of perceived profanity in New York City versus profanity in a smaller community to explain why "indecency can be difficult, at times to define, especially when using a national community standard."[219]

In light of these alternative methods of regulation and the FCC's current process to determine and apply contemporary community standards, the agency's indecency regime is arbitrary and prone to infringe upon protected free speech, prompting judicial review under the First Amendment.

219. Brief for Amicus Curiae Parents Television Council in Support of Respondents, Fox v. FCC, 10-11 (2d Cir. Dec. 12, 2006) (No. 06-1760-AG), *available at* http://www.parentstv.org/PTC/fcc/images/PA-38-2ndCirAmicus.Brief.pdf.