

NOTE

**THE FCC COMPLAINT PROCESS
AND “INCREASING PUBLIC UNEASE”:
TOWARD AN APOLITICAL BROADCAST
INDECENCY REGIME**

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I. INTRODUCTION

George Carlin once famously observed that there were seven words “you couldn’t say on the public . . . airwaves.”¹ The radio broadcast of his

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1. George Carlin, *Filthy Words* (Pacifica radio broadcast Oct. 30, 1973), available at <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/filthywords.html>.

“Filthy Words” comedy routine launched a legal battle that eventually ushered in a new era of broadcast indecency regulation by the Federal Communications Commission.² Thirty years and countless indecency scandals later, we remain uncertain of how to define indecency or what its implications are for our culture.

In the new century, FCC broadcast indecency regulation has commanded an increasing amount of public attention, due in part to a few high-profile incidents. After Janet Jackson’s infamous 2004 Super Bowl “wardrobe malfunction,” the Commission reported a record number of complaints and ordered CBS and its affiliates to forfeit \$3.35 million for the violation of broadcast decency standards.³

The Super Bowl incident is only one example of a pattern of increased broadcast indecency complaints, violations, and fines. The extent of this increase cannot be understated: the FCC reported 111 indecency complaints in 2000, 346 in 2001, 13,922 in 2002, 166,683 in 2003, 1,405,419 in 2004, and 233,531 in 2005.⁴ The FCC has relied on this apparent “increasing public unease” to justify an increase in enforcement, raising the original proposed forfeitures for apparent liability from \$48,000 in 2000 to \$7,928,080 in 2004.⁵ In 2005, Congress raised the maximum per-violation indecency fine from \$32,500 to \$325,000.⁶ At the signing of the bill, President George W. Bush said the fine increase would “ensure that broadcasters take seriously their duty to keep the public airwaves free of obscene, profane and indecent material.”⁷

The problem is that this “increasing public unease” is a mirage, born of well-organized interest groups and procedural changes to the broadcast indecency complaint process. Critics point to a single group, the Parents Television Council, as the primary source of increased complaints. The group filed 99.8% of all broadcast indecency complaints received in 2003.⁸ Although Commissioner Kathleen Abernathy argued

2. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

3. Andrew Duncan, *FCC Crackdown on Profanity, Indecency Marks Shift in Policy*, *Robinson Says*, VIRGINIA LAW, Nov. 16, 2006, http://www.law.virginia.edu/html/news/2006_fall/robinson_fcc.htm.

4. Federal Communications Commission, *Indecency Complaints and NALs: 1993–2006*, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Oct. 31, 2007).

5. Notice of Apparent Liability, Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-17 at 2, available at <http://www.fcc.gov/eb/Orders/2006/FCC-06-17A1.html> (2006); FCC NALs, *supra* note 4.

6. Broadcast Decency Enforcement Act of 2005, 47 U.S.C.A. § 503(b)(2)(c)(ii) (2007).

7. Whitehouse.gov, *President Signs the Broadcast Decency Enforcement Act of 2005*, June 15, 2006, <http://www.whitehouse.gov/news/releases/2006/06/20060615-1.html>.

8. Todd Shields, *Activists Dominate Content Complaints*, *MEDIAWEEK*, Dec. 6, 2004, available at http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm.

that “it shouldn’t matter” where the complaints come from,⁹ the number of complaints has been relied on by the FCC to determine if “community standards” were violated, and for determining the appropriate fine for a violation.¹⁰

This responsiveness to a vocal minority undermines the FCC’s claim that indecency should be determined by the “average broadcast viewer or listener.”¹¹ As a result, the general public has little to no impact on a standard it is supposed to define, and the FCC finds its enforcement subject to the tidal pull of politics.

To address these issues, I propose depoliticizing the broadcast indecency regime by utilizing polling to determine the average broadcast viewer’s opinion, divorced from all the pressures inherent in relying on the complaint process as a proxy.

In section II, I will discuss the background and development of the broadcast indecency doctrine from the days of the Federal Radio Commission in the 1920s through the present day. I will also explain why the apparent increasing public unease is misleading, and why valid First Amendment concerns are steamrolled by the fiery nature of the debate. In section III, I will explain why the FCC’s reliance on the complaint process violates its own indecency standards, and propose the use of polling to depoliticize the process.

II. THE FLAWED FORMATION OF BROADCAST INDECENCY LAW

Section 1464 of the Criminal Code states: “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”¹² Combined with the Congressional mandate to encourage the use of broadcast media for “the public interest,”¹³ this statute is the cornerstone of the FCC’s prohibition against broadcasting “indecent” material “between 6 a.m. and 10 p.m.”¹⁴ Content is indecent “if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium.”¹⁵ The “contemporary community standards,”

9. *Id.*

10. Notice of Apparent Liability, FCC 06-17, *available at* <http://www.fcc.gov/eb/Orders/2006/FCC-06-17A1.html> (Feb. 21, 2006).

11. *WPBN/WTOM*, 15 F.C.C.R. 1838, 1841 (2000).

12. 18 U.S.C. § 1464 (2007).

13. 47 U.S.C. § 303(g) (2007).

14. 47 C.F.R. § 73.3999 (2007).

15. Federal Communications Commission, *Obscenity, Indecency & Profanity—Frequently Asked Questions*, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Oct. 31, 2007).

in turn, are defined as the standards “of an average broadcast viewer or listener and not the sensibilities of any individual complainant.”¹⁶

There are, then, two basic elements for indecent content: it must (1) depict or describe sexual or excretory organs or activities; and it must (2) be patently offensive as measured by contemporary community standards for the broadcast medium.¹⁷ The “patently offensive” inquiry, measured by the standards of “an average broadcast viewer or listener,” must consider the context of the programming. This is accomplished by a three-factor balancing test: (1) “whether the description or depiction is explicit or graphic”; (2) “whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs”; and (3) “whether the material appears to pander or is used to titillate or shock.”¹⁸ Redeeming social value is no defense to an indecency complaint, meaning even constructive, political speech can be considered indecent and lead to fines.¹⁹

Such a nebulous standard has predictably led to great debate over broadcast indecency, yet many overlook the history of broadcast regulation. This history, however, is critical to placing the current regime in context.

A. *The History of Broadcast Indecency*

1. 1927–1978—Establishing and Defining Indecency

The roots of broadcast indecency stretch back to Section 29 of the Radio Act of 1927, which showed from the outset the tension between free speech and regulatory interests.

Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship . . . and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.²⁰

16. *WPBN/WTOM*, 15 F.C.C.R. 1838, 1841 (2000).

17. *Id.* at 1840–41.

18. Federal Communications Commission, *Obscenity, Indecency & Profanity—Frequently Asked Questions*, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Oct. 31, 2007).

19. This was not always the case. See the discussions of *Garcia* and *Pacifica* in section II.A.1 and II.A.2, respectively.

20. Radio Act of 1927, Pub. L. No. 632, § 29, 44 Stat. 1162 (1927). The anti-censorship provisions remain, codified at 47 U.S.C. 326 (2007).

In 1934, Congress made it clear that the Commission had the power to regulate broadcast licenses in a way that served the “public interest, convenience, or necessity.”²¹ Thus, broadcast content has been regulated almost since the medium became commercially viable. In 1931, for example, the Ninth Circuit upheld a disc-jockey’s conviction under Section 29 for broadcasting profane language, such as “that damn scoundrel” and “by God.”²²

When it came to indecency, however, the FCC did not even define a standard until 1970. In a case involving a radio interview with legendary rock guitarist Jerry Garcia, the FCC held that broadcast material was indecent if it was “(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value.”²³ Commissioner Nicholas Johnson dissented, focusing on the vagueness of the announced standard: “The FCC has cast itself adrift upon the ‘boundless sea’ of a search for ‘indecency’ without compass or polestar for guidance.”²⁴ Johnson’s words were prophetic. The FCC would struggle with the indecency definition for years to come.²⁵

2. 1978–2002—Refining the Boundaries of Indecency

In this uncertain climate, Pacifica Broadcasting aired comedian George Carlin’s now-infamous “Filthy Words” routine. The Commission described this part of his standup act as “almost wholly devoted to the use of such words as ‘shit’ and ‘fuck,’ as well as ‘cocksucker,’ ‘mother-fucker,’ ‘piss,’ and ‘cunt.’”²⁶ After the FCC sought to fine Pacifica Broadcasting for broadcasting indecent material in violation of Section 1464, the broadcaster filed suit and eventually escalated the conflict to the Supreme Court. It became the most defining case in the history of broadcast indecency regulation.

In 1978’s *FCC v. Pacifica* decision, the Supreme Court held that indecency

is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium,

21. 47 U.S.C. § 309a (2007).

22. *Duncan v. United States*, 48 F.2d 128, 133 (9th Cir. 1931) (in which the court partly relied on a dictionary definition of profane as “‘irreverent toward God or holy things; speaking or spoken, acting or acted, in manifest or implied contempt of sacred things; blasphemous’”).

23. *WUHY-FM, Eastern Education Radio*, 24 F.C.C.2d 408, 412 (1970).

24. *Id.* at 424.

25. *See Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 97 (1975); Public Notice, 2 F.C.C.R. 2726 (Apr. 27, 1987).

26. *Pacifica Foundation Station WBAI (FM)*, 56 F.C.C.2d 94, 95 (1975).

sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.²⁷

This new indecency definition, taken word-for-word from the FCC's initial 1975 ruling against *Pacifica*,²⁸ notably removed *Garcia's* exception for content with "redeeming social value."²⁹ Although the Court attempted to "emphasize the narrowness" of their holding,³⁰ the *Pacifica* definition was applied (and expanded) many times in the following decades.

At the same time, the *Pacifica* court held that indecent language is "not entirely outside the protection of the First Amendment."³¹ Later courts have cited the "unique considerations" of broadcast media in applying a lower standard of scrutiny than would traditionally be required; regulation of broadcast indecency must, therefore, "serve compelling governmental interests" and be narrowly tailored.³²

The *Pacifica* Court also established four basic policy justifications for regulating indecent broadcasts. First, it put forth a nuisance theory. "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public," Justice Stevens wrote in the plurality opinion, "but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."³³ Second, he wrote, "broadcasting is uniquely accessible to children."³⁴ Third, "unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast."³⁵ Fourth, "there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest."³⁶

Establishing a new indecency standard and cementing the policy underpinnings of regulating indecent speech did not put the controversy to rest, however. After several years of relative quiet resulting from President Reagan's deregulation efforts,³⁷ the FCC moved in 1987 to broaden

27. *Pacifica*, 438 U.S. at 732.

28. *Pacifica* Foundation Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975).

29. WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408, 412 (1970).

30. *Pacifica*, 438 U.S. at 750.

31. *Id.* at 746.

32. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 464–65 (2007) (citing *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984)).

33. *Pacifica*, 438 U.S. at 748.

34. *Id.* at 749.

35. *Id.* at 731 n.2.

36. *Id.*

37. The FCC did not find a single violation of the indecency standard from 1978 to 1987. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 97–98 (Hill and Wang 2001). The FCC Chair during this time period was quoted as saying "if you don't like it, just don't let your kids watch it." *Id.* at 107.

the scope of indecency. It announced it would be formally adopting the *Pacifica* standard of “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.”³⁸ This announcement was accompanied by explicit warnings to three broadcasters that, under the new standards, some of their broadcasts would be considered indecent and could give rise to liability if repeated.³⁹

The FCC also invited controversy by announcing it would no longer consider broadcasts after 10 p.m. to be free from regulation, citing research that indicated “there is still a ‘reasonable risk that children may be in the listening audience.’”⁴⁰ Instead, the Commission announced it would evaluate “the risk of children in the audience during the time frame and with regard to the market before it in each case.”⁴¹ This led to a five-year tug-of-war between the FCC, the United States Court of Appeals for the D.C. Circuit, and Congress, before a 10 p.m. to 6 a.m. “safe harbor” was settled on because the audience was found to be sufficiently devoid of children and thus free from indecency regulation.⁴² A failed judicial challenge in 1995 to the FCC’s procedures in indecency cases helped further cement the current scheme.⁴³

3. 2002–Present—The Politicized Expansion of Indecency and the Illusion of “Increasing Public Unease”

In the new century, the FCC has increasingly cracked down on indecent content, in part due to a perceived increase in public concern. The FCC reported 111 indecency complaints in 2000, 346 in 2001, 13,922 in 2002, 166,683 in 2003, 1,405,419 in 2004, and 233,531 in 2005.⁴⁴ In a 2006 Notice of Apparent Liability (NAL), the FCC cited the

38. Public Notice, 2 F.C.C.R. 2726, 2726 (Apr. 27, 1987).

39. *Id.* at 2727–28.

40. *Id.* at 2726.

41. *Id.*

42. The FCC’s 1987 decision was overturned in 1988 by the D.C. Circuit, which held that 24-hour enforcement of the indecency standards amounted to a total ban on constitutionally protected speech. *See Action for Children’s Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) [hereinafter *ACT I*]. Congress responded with a law mandating 24-hour enforcement of the indecency standards, which was struck down in 1991 on the same grounds as the first case. *See Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) [hereinafter *ACT II*]. Finally, Congress attempted to create a 12 a.m. to 6 a.m. safe harbor, which the D.C. Circuit found narrowly tailored to its end but unconstitutionally disparate with the 10 p.m. to 6 a.m. window afforded public broadcasters. The court then adopted the latter window for all broadcasters. *See Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) [hereinafter *ACT III*].

43. *See Action for Children’s Television v. FCC*, 59 F.3d 1249 (D.C. Cir. 1995) [hereinafter *ACT IV*].

44. FCC NALs, *supra* note 4.

rise in complaints as evidence that “during the last few years . . . we have witnessed increasing public unease with the nature of broadcast material. In particular, Americans have become more concerned about the content of television programming.”⁴⁵ As a result of this “increasing public unease,” the total annual original proposed forfeitures for apparent liability increased \$7,880,080 between 2000 and 2004,⁴⁶ and Congress passed the 2005 Broadcast Decency Act to raise the maximum per-violation indecency fine from \$32,500 to \$325,000.⁴⁷

In 2004, the FCC issued a NAL to Viacom-owned CBS stations in response to the “‘crude,’ ‘inappropriate,’ ‘lewd’ and ‘sexually explicit’ dancing and song lyrics” featured in the Super Bowl halftime show.⁴⁸ A month later, the FCC issued a NAL to FOX for material in its *Married by America* show found to be “gratuitous, vulgar, and clearly intended to pander to and titillate.”⁴⁹ In 2006, a NAL totaling over \$3.6 million in forfeitures was issued to all CBS affiliates for the 2004 broadcast of “material graphically depicting teenage boys and girls participating in a sexual orgy” in an episode of *Without a Trace*.⁵⁰

Perhaps the most popular target of indecency enforcement since 1987 has been radio shock-jock Howard Stern. By 1994, Stern’s employer, Infinity Broadcasting, had forfeited more than \$1 million, despite the “ashamed” confession of an FCC Commissioner who admitted finding Stern “tremendously funny.”⁵¹ By 2006, Stern had been the subject of more indecency forfeitures than any broadcaster in history.⁵² That same year, he abandoned broadcast radio for Sirius satellite radio, where FCC indecency regulations would no longer apply to his show.⁵³

The increase in enforcement has had a dramatic effect on more than just shock-jocks. In 2004, dozens of ABC affiliates refused to air Steven Spielberg’s classic World War II film, *Saving Private Ryan*, due to the

45. Notice of Apparent Liability, F.C.C. 06-17 at 2, available at <http://www.fcc.gov/eb/Orders/2006/FCC-06-17A1.html> (Feb. 21, 2006).

46. FCC NALs, *supra* note 4.

47. Broadcast Decency Enforcement Act, *supra* note 6.

48. Notice of Apparent Liability, F.C.C. 04-209, available at <http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html> (Aug. 31, 2004).

49. Notice of Apparent Liability, F.C.C. 04-242, available at <http://www.fcc.gov/eb/Orders/2004/FCC-04-242A1.html> (Oct. 5, 2004).

50. Notice of Apparent Liability, F.C.C. 06-18, available at <http://www.fcc.gov/eb/Orders/2006/FCC-06-18A1.html> (Feb. 21, 2006). This total forfeiture, like most, represented the maximum statutory forfeiture in place at the time (\$32,500 per violation).

51. HEINS, *supra* note 36, at 120–21.

52. *60 Minutes: Radio Shock Jock Howard Stern’s Foray into Satellite Radio* (CBS television broadcast Sep. 17, 2006).

53. *Id.*

uncertainty of indecency and profanity standards.⁵⁴ Yet just two years earlier, prior to 2004's explosion of indecency violations, the movie had aired without incident.⁵⁵ In 2007, PBS was forced to release an edited version of a World War II documentary—removing four expletives used by ex-soldiers in interviews—in order to ease the fears of public television stations that the FCC would find the unedited version to be indecent.⁵⁶

In response to broadcaster challenges to this increased activity, courts began struggling with the FCC over the basic limits of the indecency definition. Despite the FCC's previous explanation that "deliberate and repetitive use" of expletives was a "requisite to a finding of indecency,"⁵⁷ it stated in 2004 that broadcast indecency standards would now be applied even to "fleeting" expletives.⁵⁸ The Commission pointed to an acceptance speech by U2's Bono, in which he stated that winning the award was "fucking brilliant," as an example of something that would thereafter be treated as a violation of broadcast indecency rules.⁵⁹ This change in policy was later struck down by the U.S. Court of Appeals for the Second Circuit as "arbitrary and capricious," in violation of the Administrative Procedures Act.⁶⁰

In addition to the dramatic expansion of indecency doctrine in the new century, the FCC has attempted to broaden its traditional profanity doctrine and has even suggested regulating violent content.⁶¹

54. *Dozens of ABC Affiliates Silence "Private Ryan"*, BROADCASTENGINEERING, Nov. 15, 2004, available at <http://broadcastengineering.com/news/private-ryan-abc-20041115>. Although even the PTC believed the context of "Saving Private Ryan" made the questionable content not indecent, some affiliates decided they could not risk the FCC's unpredictability. *Id.*

55. *Id.*

56. Paul Farhi, *Fearing Fines, PBS to Offer Bleeped Version of 'The War'*, WASHINGTON POST, Aug. 31, 2007, Page C01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083001945.html>. These fears are not as overblown as they may seem. A PBS station forfeited \$15,000 after the FCC found the airing of Martin Scorsese's documentary "The Blues: Godfathers and Sons" to be indecent because of "numerous 'obscenities,' including the 'F-Word,' the 'S-Word' and various derivatives of those words." Notices of Apparent Liability, F.C.C. 06-17, at 23-27, available at <http://www.fcc.gov/eb/Orders/2006/FCC-06-17A1.html> (Feb. 21, 2006).

57. *Pacifica Foundation, Inc.*, 2 F.C.C.R. 2698, 2699 (Apr. 16, 1987).

58. Memorandum Opinion and Order, F.C.C. 04-43, at 16, available at <http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html> (Mar. 3, 2004).

59. *Id.* at 8.

60. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 447 (2d Cir. 2007).

61. In 2004, the FCC wrote an order in which it stated that it will no longer "limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation." See Memorandum Opinion and Order, F.C.C. 04-43, at 7, available at <http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html> (Mar. 3, 2004). In early 2007, the FCC released a report suggesting that violent content be regulated like indecent content, largely because of reports that "exposure to violence in the media can increase aggressive behavior in children, at least in the short term." Press Release, F.C.C., FCC Adopts

Setting aside, for the moment, the many concerns raised by the FCC's expansion of broadcast indecency doctrine, we cannot ignore that the expansion's underlying rationale is unsound. The contention that the increase in complaints, on its own, proves "increasing public unease" is misleading for two reasons. First, much of the apparent sudden jump in complaints is the direct result of a 2003 change in FCC reporting methods. Second, to the extent that the number of complaints did increase, the increase is due largely to the activity of interest groups that have become more effective in the internet age.

a. Change in FCC Reporting Methods

If it seems difficult to imagine there was a 12,000% increase in indecency complaints between 2000 and 2004, that is because there was not. In fact, the number of actual complaints during this time period is impossible to calculate, partly due to the FCC's use of a "consolidated complaint" process. This process counted "multiple emailed complaints about the same incident" as a single complaint for reporting purposes.⁶²

In addition to consolidating complaints during this time period, the FCC has been accused of blocking certain email addresses from sending complaints.⁶³ In a January, 2004 Congressional hearing, a spokesman for the Parents Television Council testified: "Recently, we learned many of our supporters had their E-mail complaints returned as undeliverable. Then we were being told by somebody in the FCC they were being blocked."⁶⁴ The PTC spokesman also complained about the consolidated complaint process:

The FCC reported that in the second quarter of 2003 it received only 351 complaints from broadcast indecency. That is not true. It is preposterous. In the same period our members alone filed over 8,000 complaints. We found out afterwards that all the complaints were being lumped into one.⁶⁵

Under pressure from the PTC and Congress, the FCC discontinued its use of the consolidated complaint process and, presumably, ceased

Report on Violent Television Programming and Its Impact on Children (Apr. 25, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-272652A1.pdf.

62. Jeff Johnson, *FCC Accused of Discounting TV Indecency Complaints*, CNSNEWS.COM, Jan. 10, 2005, available at <http://www.cnsnews.com/ViewSpecialReports.asp?Page=%5CSpecialReports%5Carchive%5C200501%5CSPE20050110a.html>.

63. "Can You Say That on TV?": *An Examination of the FCC's Enforcement with Respect to Broadcast Indecency, Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. On Energy and Commerce*, 108th Cong. 108-67 (2004) (testimony of L. Brent Bozell, III, President, Parents Television Council).

64. *Id.* at 27.

65. *Id.*

the transparent blocking of some complaints from organized groups. Because the timing of these changes is disputed—the PTC reports the inconsistencies continued throughout 2003, whereas the FCC claims it stopped consolidating complaints in early 2003—it is impossible to know at what point the reported number of indecency complaints can be considered accurate.⁶⁶ What is certain, however, is that some significant portion of the apparent “increasing public unease” was the result of procedural changes and not a flood of public outcry.

b. Interest Groups

The increase in complaints during this time period can be directly attributed to a small number of interest groups that exerted political pressure to alter the reporting techniques described in subsection II.A.3.a and coordinated members to target perceived violations of the indecency standard.

The rise of the internet, and the subsequent ease with which like-minded people could organize, made such an increase in complaints inevitable. Socially conservative groups, most notably the Parents Television Council, have taken full advantage of the option of submitting indecency complaints by email or webform. Its official website includes multiple form letters complaining to the FCC about allegedly indecent broadcasts; these letters need only the addition of the complainant’s name, address, and email address before they can be electronically submitted to the FCC.⁶⁷ The PTC even invites website visitors to view clips of the allegedly indecent material, likely with the hope the visitors will be offended and file a complaint with the FCC.⁶⁸ This electronic approach is effective. Mediaweek reported that the PTC was responsible for 99.8% of all broadcast indecency complaints received in 2003.⁶⁹

66. Johnson, *supra* note 62.

67. See, e.g., Parents Television Council, *File An Official FCC Indecency Complaint Against FOX*, <https://www.parentstv.org/ptc/action/FoxFootball/main.asp> (last visited Oct. 31, 2007); Parents Television Council, *File An Official FCC Indecency Complaint Against ER and Desire*, <https://www.parentstv.org/ptc/action/ERDesire/main.asp> (last visited Oct. 31, 2007). For a glimpse into the effectiveness of these electronic form letters, you can view 180 pages of complaints filed against FOX for a broadcast of “Married in America”; the document is page after page of PTC form complaints, with very few exceptions. See *Copies of Complaints (2003)*, <http://www.fcc.gov/eb/broadcast/Pleadings/marriedbyamericacomplaints.pdf>.

68. Parents Television Council, *File An Official FCC Indecency Complaint Against ER and Desire*, <https://www.parentstv.org/ptc/action/ERDesire/main.asp> (last visited Oct. 31, 2007) (“View Clip” link halfway down the page).

69. Shields, *supra* note 8.

B. *First Amendment Concerns and Why They Don't Matter*

Broadcast indecency has become a political minefield, pitting “family values” activists against “free speech” activists. In part due to the increased visibility of the controversy, the pressure for Congress and the FCC to react have grown, and the result since 2002 has been a dramatic increase in indecency regulation.

At the same time, technological innovation has changed the context of broadcast media. The last 30 years have seen the rampant proliferation of cable television, satellite communications, and the internet. Commentators openly question whether it makes sense to continue singling out broadcast for content-based regulation.⁷⁰

The *Pacifica* court first put forth a nuisance theory, likening broadcast media to “an intruder” in the home.⁷¹ Even in 1978, this argument ignored critical details. Broadcasts are not capable of “intruding” into the home; they must be invited, by way of a tuner. To receive transmissions, a person must purchase a receiving unit (such as a television set or a radio), bring the unit home, plug it in or otherwise install it, turn it on, and tune in to the programming.

Even if the policy’s immediate weaknesses are ignored, pervasiveness is becoming less and less unique to broadcast media. For example, Nielsen reports that, as of 2003, almost 70% of all American households subscribed to cable television.⁷² Yale Law student Matthew Bloom argues that the pervasive nature of broadcast is no longer sufficient to distinguish broadcast media from subscription-based media, due to “the relative ease of subscribing to cable as opposed to the difficulty of buying and maintaining an antenna, the grouping of educational programming with indecent programming, and the new ownership requirements that allow a few players to control most of television.”⁷³

The *Pacifica* court also argued that “broadcasting is uniquely accessible to children,”⁷⁴ and that the “well-being of [the country’s] youth . . . justified the regulation of otherwise protected expression.”⁷⁵ Ignoring the questionable presumption of “unique” pervasiveness discussed above, the Court skips the middle step that links indecent broadcasting to the

70. See, e.g., Matthew Bloom, *Pervasive New Media: Indecency Regulation and the End of the Distinction Between Broadcast Technology and Subscription-Based Media*, 9 *YALE J. OF L. AND TECH.* 109 (2007), available at <http://www.yjolt.org/files/bloom-9-YJOLT-109.pdf>.

71. *Pacifica*, 438 U.S. at 748.

72. Media Info Center, *Audience Penetration*, <http://www.mediainfocenter.org/compare/penetration> (last visited, Oct. 31, 2007) (“69.8% of all television households have cable television”).

73. Bloom, *supra* note 70, at 121.

74. *Pacifica*, 438 U.S. at 749.

75. *Id.* at 749–50.

“well-being” of children. In fact, as free speech interest groups are quick to point out, there is a great deal of controversy as to indecent content’s effect on children.⁷⁶ In other words, this rationale offers no proof that any state interest is being served. Additionally, if protection of children is the primary state interest, many alternative approaches would provide a more narrow solution.⁷⁷

Similar challenges apply to the Court’s assertion that regulation of broadcast indecency is justified because “unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast.”⁷⁸ Namely, is it really a compelling state interest to shield adults from non-obscene content they find offensive?

More broadly, the entire indecency definition suffers from vagueness and unpredictability. As discussed above, many stations have refused to air programming due to uncertainty about the FCC’s indecency enforcement.⁷⁹ Small stations and non-commercial stations, especially, are unlikely to be able to risk the exorbitant forfeitures, and are more likely to self-censor as a result of the unclear broadcast indecency standards. The resulting chilling effect—stations will “voluntarily” refuse to air controversial material, or will insist on edited versions—should be of great concern to anyone who values broadcast’s role in important cultural discussions.

Yet for all the strengths of these First Amendment arguments, the political reality is that the broadcast indecency regime is going nowhere soon. Judicial actions to limit the scope of indecency are met with fierce reaction from interest groups, Congress, and the FCC itself.⁸⁰ Legislators

76. See generally HEINS, *supra* note 36.

77. As Justice Frankfurter famously wrote: “quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, . . . is to burn the house to roast the pig.” *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

78. *Pacifica*, 438 U.S. 731 at n.2.

79. See, e.g., *Dozens of ABC Affiliates Silence “Private Ryan”*, BROADCASTENGINEERING, Nov. 15, 2004, available at <http://broadcastengineering.com/news/private-ryan-abc-20041115>; Paul Farhi, *Fearing Fines, PBS to Offer Bleeped Version of ‘The War’*, WASHINGTON POST, Aug. 31, 2007, Page C01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083001945.html>.

80. For example, FCC Chair Kevin Martin’s response to the Second Circuit’s *Fox v. FCC* decision: “I completely disagree with with the Court’s ruling and am disappointed for American families. . . . It is the New York court, not the Commission, that is divorced from reality in concluding that the word ‘fuck’ does not invoke a sexual connotation.” Press Release, FCC, Statement of FCC Chairman Kevin Martin on 2nd Circuit Court of Appeals Indecency Decision, June 4, 2007, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf. In September, it was announced that the Office of the Solicitor General would be appealing the case to the Supreme Court. Stephanie Kirchgaessner, *Bush in Bid to Challenge Fox Over Expletives*, FINANCIAL TIMES (LONDON), Sept. 28, 2007, available at <http://www.ft.com/cms/s/0/63f0e5ae-6d53-11dc-ab19-0000779fd2ac.html>. The PTC responded to the *Fox v. FCC* decision with a press release headlined “Court OK’s F-Word in Front of Kids.” The group wrote that the court “has, in essence, stolen the airwaves from the

hoping to curb or limit the doctrine or the resulting fines can easily be painted as cheerleaders for cultural pollution, indifferent to the welfare of American youth. Short of a Supreme Court ruling striking down the broadcast indecency regime (which would invite a Congressional response) or a dramatic shift in the FCC's stance (which is unlikely to happen any time soon), these constitutional problems will remain. Energy should therefore be spent on practical concerns, fixing what we can to make indecency enforcement less problematic.

III. ADHERING TO THE "AVERAGE BROADCAST VIEWER" STANDARD AND DEPOLITICIZING THE BROADCAST INDECENCY REGIME

A. "*The Average Broadcast Viewer*" Standard

Although the FCC defines and investigates indecency, it does not initiate any allegations of indecency. Rather, members of the general public submit complaints about broadcast material they find offensive.⁸¹ These complaints are screened by FCC staffers, who determine if there is "information sufficient to suggest" that a violation of Section 1464 has taken place.⁸² If there is, an investigation is started and a Letter of Inquiry is sent to the broadcaster, requesting tapes or transcripts of the alleged violation. The Commission then determines if the broadcast was indecent and, if it was, issues a Notice of Apparent Liability (NAL), which may later be confirmed, altered, or rescinded by a Forfeiture Order.⁸³

As discussed in section II.A.3 above, many factors indicate that the complaint process is utilized primarily by well-organized activist groups, and that the FCC has been—inappropriately—reacting to what may well be a vocal minority.

This responsiveness is problematic because it runs contrary to the FCC's own standard of indecency. Material is indecent "if, in context, it depicts or describes sexual or excretory organs or activities in terms pat-

public and handed ownership over to the broadcast industry." Press Release, Parents Television Council, PTC: Court OK's F-Word in Front of Kids, June 4, 2007, available at <http://www.parentstv.org/PTC/publications/release/2007/0604.asp>.

81. 47 U.S.C. § 208 (2000) (providing the basic statutory underpinnings for the complaint process). 47 C.F.R. §§ 1.701–1.736 (2000) (laying out the regulatory details of the process).

82. Federal Communications Commission, *Complaint Process*, <http://www.fcc.gov/eb/oip/process.html> (last visited Oct. 31, 2007).

83. Federal Communications Commission, *Complaint Process Flow Chart*, <http://www.fcc.gov/eb/oip/flow.pdf> (last visited Oct. 31, 2007).

ently offensive as measured by contemporary community standards for the broadcast medium.”⁸⁴

“Contemporary community standards” is said by the FCC to mean the standards “of an average broadcast viewer or listener and not the sensibilities of any individual complainant.”⁸⁵ Commissioner Kathleen Abernathy’s argument that “as long as you’re following precedents and the law, it shouldn’t matter” where the complaints come from seems reasonable but over-simplifies the situation.⁸⁶

The increase in complaints has been described by the FCC as plainly demonstrating “increasing public unease.”⁸⁷ This language was at the very beginning of a 76-page-long 2004 FCC memo that served 6 NALs, found 4 other television shows to be “indecent and/or profane” without proposing forfeitures, and found 16 shows to not violate the indecency standard.⁸⁸ The FCC’s conclusion that “Americans have become more concerned” lends credence to some commentators’ concerns that groups like the PTC “control the debate.”⁸⁹

As I discussed in Section II.A.3.b, using the increase in complaints as a proxy for determining whether the “contemporary community standards” have been offended overlooks the simple fact that the internet has made it extremely easy for groups of all kinds to organize. For example, Stormfront, a “white nationalist discussion board,” has more than 100,000 members.⁹⁰ ImpeachBush.com hosts a petition to impeach President George W. Bush that has been signed 867,647 times.⁹¹ It is simply inaccurate to assume that a large number of complaints is somehow representative of the average citizen’s views.

The trend toward increased regulation reflects a disconcerting growth in power among media watchdog groups. The extent to which the PTC or any similar groups accurately represent the views of the “average broadcast viewer” is impossible to know, yet their effectiveness has dramatically altered the treatment of American broadcast television.

84. Federal Communications Commission, *Obscenity, Indecency & Profanity—Frequently Asked Questions*, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Oct. 31, 2007).

85. WPBN/WTOM, 15 F.C.C.R. 1838, 1841 (2000).

86. Shields, *supra* note 8.

87. Notice of Apparent Liability, F.C.C. 06–17, available at <http://www.fcc.gov/eb/Orders/2006/FCC-06-17A1.html> (Feb. 21, 2006).

88. *Id.*

89. Clay Calvert, *The First Amendment, the Media and the Culture Wars: Eight Important Lessons from 2004 About Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325, 359 (2005).

90. Stormfront White Nationalist Community, <http://www.stormfront.org/forum/> (last visited Oct. 31, 2007).

91. ImpeachBush, <http://www.impeachbush.org/site/PageServer> (last visited Oct. 31, 2007).

Although critics may claim that this growing “public” influence is good, the actions of the PTC and similar groups must be kept in context. Questions of spectrum allocation and regulation were delegated to the FCC—an independent agency—in part because it was seen as “the only way to sufficiently insulate spectrum decisions from the political process.”⁹² As with other regulatory initiatives of the time, spectrum regulation was seen as something best left to expert, apolitical, administrators.⁹³ Given this context, we can see more clearly the concerns raised by the FCC’s new responsiveness to political pressure—it is, in many ways, utterly contrary to how the Commission is supposed to operate.

That the indecency complaint and investigation process seems incapable of removing itself from the political ebb and flow of politicians and interest groups, perhaps to the point of regulatory capture, indicates that there is a fundamental problem with current indecency doctrine. As technology makes it easier for interest groups to organize, this problem will only grow worse. We must, then, examine how to deal with a convoluted indecency doctrine in the age of the internet.

The continued existence of the complaint process is necessary; it remains unrealistic to force the FCC to police every single radio and television broadcast made anywhere in the country. Therefore, I propose retaining the complaint process but revising the ensuing investigation process to make it blind to the number of complaints.

This would be accomplished by utilizing polling to accurately determine how many broadcast viewers find the material to be “patently offensive.” Polling would remove “control of the debate” from a handful of energetic groups, and improve the accuracy of the indecency standard. If what we are truly concerned about is the “contemporary community standards,” why not just ask the community?

B. *Identifying “Patently Offensive” Content Through Polling*

In an attempt to capture elusive community standards, the FCC could turn to the same thing every other institution in the world turns to when they need to know public opinion: polling. A random sampling of broadcast viewers or listeners around the country could determine, with an accuracy equal to that of any other statistical study, whether the “average broadcast viewer or listener” found the content in question to be offensive or not.

92. STUART MINOR BENJAMIN ET AL., *TELECOMMUNICATIONS LAW AND POLICY* 58 (Carolina Academic Press 2006) (2001).

93. *Id.*

Citizens, whether organized in a group like the PTC or not, would continue to submit complaints about indecent content. However, no one at the FCC responsible for investigating indecency would have access to the number of complaints, and so organized indecency campaigns would be no more effective than any other indecency complaint.⁹⁴ This would prevent the temptation to buckle under political pressure or to make the unfounded assumption that the number of complaints automatically translates to a representation of the views of the “average broadcast viewer or listener.”

Under this system, the FCC would continue to screen-out complaints that provide insufficient information or that make no allegation of a Section 1464 violation. It would then review the materials to address the first prong of the inquiry, by making the factual determination of whether the material “depicts or describes sexual or excretory organs or activities.”⁹⁵ If this prong is satisfied, the Commission would then issue a Letter of Inquiry—necessary to involve the accused broadcaster and fill the evidentiary void. It is at this point that the process would be altered. Rather than determining whether a likely indecency violation has occurred, the FCC would present the content to a random sampling of broadcast viewers or listeners to determine what percentage find it to be “patently offensive.”

1. Measuring the “Average Broadcast Viewer”

At its heart, broadcast content is much like any other commodity. While broadcast may be seen as a service, specific shows are much more like products: distinctive, measurable, and targeted at a certain demographic. Consumers “buy” broadcast content with their time—there is an obvious opportunity cost to watching two hours of sitcoms every night. For this reason, broadcast content can be studied and customized much like food, electronics, or any other product.

The Nielsen Company—probably best known for its Nielsen Ratings on the relative popularity of television programs—is one company that offers market research services to media companies. The company claims that it can “help clients understand consumer behavior across all their media and entertainment options, set the value of commercial time and space, monitor their competitors, plan and conduct media campaigns and develop innovative media promotion methods.”⁹⁶ If broadcast viewers and listeners can be measured for their opinions on programming in

94. Actual number of complaints would, of course, be retained for reporting purposes.

95. Public Notice, 2 F.C.C.R. 2726, 2726 (Apr. 27, 1987) (establishing the baseline “sexual or excretory” requirement for broadcast indecency).

96. The Nielsen Company, *Services*, <http://www.nielsen.com/solutions/index.html> (last visited Oct. 31, 2007).

these ways, surely they can be measured for their opinions as to whether specific content is “patently offensive” or not. In fact, indecency polling would not even require new techniques or a new market; the expertise and infrastructure for media polling is well-established and widely used.

Broadcast viewers/listeners in the sample would be shown the entire broadcast at issue, from beginning to end. This would ensure that the polling results comply with the requirement that indecency be considered “in context.”⁹⁷ The sampled audience would then be informed that whether material is “patently offensive” may vary based on several factors including, but not limited to: (1) “whether the description or depiction is explicit or graphic”; (2) “whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs”; and (3) “whether the material appears to pander or is used to titillate or shock.”⁹⁸

With the accepted factors of the “patently offensive” inquiry laid out, the sampled audience would then be asked about specific moments in the show and asked whether, under varying circumstances, they would find that moment to be “patently offensive.” For example, here is a possible set of questions related to Ken Burns’ documentary “The War”:⁹⁹

Recall the interview in which a former soldier explains the slang term “FUBAR” to mean “fucked up beyond all recognition.” Keeping in mind the factors described above and the full context of the show, would you find this content to be “patently offensive” . . .

1. If broadcast on a major network at midnight?
2. If broadcast on a major network at noon?
3. If broadcast on a public broadcasting channel (PBS) at midnight?
4. If broadcast on a public broadcasting channel (PBS) at noon?
5. If broadcast on a cable television channel (such as MTV, E!, or The History Channel) at midnight?
6. If broadcast on a cable television channel (such as MTV, E!, or The History Channel) at noon?
7. If broadcast on a premium channel (such as HBO or Showtime) at midnight?

97. Federal Communications Commission, *Obscenity, Indecency & Profanity—Frequently Asked Questions*, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Oct. 31, 2007).

98. *Id.*

99. For a discussion of “The War,” see Section II.A.3 above.

8. If broadcast on a premium channel (such as HBO or Showtime) at noon?

Possible answers would simply be “yes,” “no,” or “don’t know.” This would allow the poll to take into account the legally mandated 10 p.m. to 6 a.m. safe harbor.¹⁰⁰ Of course, answers related to alleged indecency on cable television and premium channels would not be relevant to the inquiry, but they help ensure the sampled audience considers the broadcasting context and may also provide valuable information for further refinement of the standard.

With the information collected from the poll (and, of course, being careful to take into account any margin of error in the data), the FCC would be able to accurately determine if, in fact, the “average broadcast viewer or listener” would find the questionable content to be “patently offensive” if broadcast between 6 a.m. and 10 p.m. The Commission should err on the side of caution when the difference in viewer/listener opinion is within the margin of error. With the public’s opinion determined, the complaint would either be denied by letter or public order, or the FCC would issue a Notice of Apparent Liability.¹⁰¹ Should a complainant choose to file a petition for reconsideration, the process would be repeated.

2. What Polling Solves and What It Doesn’t

A polling approach to indecency addresses issues of political insulation and agency capture, and would reduce the improper politicization of the process that threatens, in the name of the public interest, to remove control from the public. However, I do not suggest it resolves all the problems lurking in the indecency doctrine.

Most notably, there is always the possibility that the average viewer will indeed find an airing of *Saving Private Ryan* or *Schindler’s List* offensive. I am certainly not the only person who would think an outcome like this would indicate a deep flaw with the existing standard. Even with polling, serious concerns of predictability and free speech remain.

In addition, it is an open question how much this approach would reduce the political tension around the issue of indecency. Interest groups would no doubt remain vocal about their opposition to seemingly indecent content, and would likely turn to other means—including political pressure on Congress and market pressure on broadcasters—to achieve their

100. See generally the ACT cases, *supra* note 42.

101. Federal Communications Commission, *Complaint Process*, <http://www.fcc.gov/eb/oip/process.html> (last visited Oct. 31, 2007).

goals.¹⁰² Thus, although polling would reduce the politicization of the FCC and its application of the indecency standard, it may or may not reduce the politicization of the issue as a whole.

IV. CONCLUSION

In Section II, I outlined some of the major developments in the history of broadcast indecency regulation, from its origins in the 1920s, through its crystallization in the 60s and 70s, and up to its modern day political expansion. In section II.A.3, I addressed the complaint process and the inaccurate reliance on “increasing public unease” to justify increased indecency enforcement. In Section II.B, I briefly examined some of the arguments for abolishing broadcast indecency regulation, either by eliminating the distinction between broadcast media and other media or by finding indecency regulation as a whole unconstitutional. Finally, in Section III, I suggested a more politically moderate approach that would retain the existing indecency standard but that would seek to rein in some of the more politicized elements of the doctrine by revising how the FCC would determine the “contemporary community standards.”

Current indecency doctrine is flawed; this is, in fact, one of the few things both sides of the debate can agree on. It relies on a vague standard, politicized complaint process, inconsistent enforcement, and constantly-evolving interpretation. In the new era of increased regulation and increased fines, broadcasters are rightfully concerned about not knowing where to draw the line; the resulting chilling effect in no way serves the public interest.

Fixing such fundamental problems is next to impossible, especially given the climate surrounding broadcast indecency. It would be political suicide for a Congressman to introduce a bill reducing indecency fines or relaxing the indecency definition, and even the courts cannot be relied on to properly chart their way through decades of confused FCC decisions.

If indecency as a whole cannot be fixed, however, that does not mean it cannot be improved. The moderate polling suggestion I make in this Note is but one possible solution for reducing some of the legitimate

102. There is a well-known precedent for the market pressure approach. In 1989, a Michigan woman named Terry Rakolta organized a letter-writing campaign to companies advertising on Fox's *Married . . . With Children* sitcom, threatening a boycott because of the show's "blatant exploitation of women and sex and anti-family attitudes." The effort succeeded in getting major advertisers—including Procter & Gamble, McDonald's, Kimberly-Clark, and Coca-Cola—to abandon the show. One of Mrs. Rakolta's primary concerns was the sitcom's "references to homosexuality," a strong indication that a market approach could restrict speech far more severely than even the flawed broadcast indecency doctrine. *THE MEDIA BUSINESS: A Mother Is Heard as Sponsors Abandon a TV Hit*, N.Y. TIMES, Mar. 2, 1989, at A1.

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concerns about indecency enforcement. It would hopefully relieve some of the political pressure currently entangled with broadcast indecency and therefore allow for future improvements of the process and doctrine. There are, without question, many similar “baby step” approaches that would achieve a similar result.

Broadcast indecency regulation will remain a controversial problem for years, and maybe decades to come, regardless of the outdated policy arguments and valid First Amendment concerns. The sooner we accept that, the sooner we can take measures to ensure that it remains as fair and accurate a process as possible. This is the only way we can hope to serve the “public interest.”