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Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law. I would like to thank my parents, Stuart and Bernice Rooder, and my brother, Seth Rooder, for their unyielding encouragement and support. I would also like to thank Professor Abner Green for his invaluable guidance.

BROADCAST INDECENCY REGULATION IN THE ERA OF THE "WARDROBE MALFUNCTION": HAS THE FCC GROWN TOO BIG FOR ITS BRITCHES?

*Brian J. Rooder**

"[I]t is . . . often true that one man's vulgarity is another's lyric."[1]

INTRODUCTION

Janet Jackson, performing at the 2004 *Super Bowl Halftime Show*,[2] experienced a "wardrobe malfunction" that resulted in images of her exposed breast being broadcast to over ninety million television viewers.[3] The ensuing uproar fueled the fires of an already raging debate over whether, and how, the government should regulate our airwaves.

The Federal Communications Commission ("FCC" or "Commission") currently regulates the airwaves according to a rule which states that "no licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."[4] The FCC defines "broadcast indecency" as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[5] Until recently, the FCC enforced this standard in a manner that allowed for isolated and fleeting utterances of curse words, so long as they were not said in a manner that described sexual or excretory activities.[6] Recent incidents such as the Janet Jackson Super

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1. Cohen v. California, 403 U.S. 15, 25 (1971).

2. *Super Bowl XXXVIII* (CBS broadcast Feb. 1, 2004).

3. *See* Complaints Against Various Television Licensees Concerning their February 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19,230, 19231, 19240 (2004) [hereinafter *Super Bowl NAL*].

4. FCC Broadcast Radio Services, 47 C.F.R. § 73.3999(b) (2004).

5. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶ 4 (2001) [hereinafter *2001 Policy Statement*] (internal quotation marks omitted).

6. *See infra* notes 135-38 and accompanying text.

Bowl[7] halftime performance[8] and Bono's use of an expletive while accepting an award at the 2003 Golden Globes,[9] however, have led the FCC to broaden its interpretation of indecency.[10] At the same time, Congress is attempting to increase the maximum imposable penalty for violations of the broadcast indecency standard.[11] The consequence of these developments is self-censorship on the part of the broadcast media and a resultant chill on protected speech.

Part I of this Note provides an overview of the complex array of components underlying the broadcast indecency debate. Part I.A explores the First Amendment jurisprudence surrounding indecency regulation, noting disparities in the treatment of indecency in differing contexts. Part I.B lays out the statutory grants of authority through which the FCC regulates broadcasting. Part I.C details the evolution of the FCC's broadcast regulatory policies. Finally, Part I.D highlights the effects that the FCC's regulatory initiatives have had on the broadcast industry.

The U.S. Supreme Court's broadcast indecency doctrine enables the FCC to restrict speech—based on content—that is otherwise protected by the First Amendment.[12] Part II.A of this Note evaluates the strengths and weaknesses of the rationales that the Supreme Court has employed in according broadcast indecency a lesser degree of First Amendment protection. Part II.B then assesses the validity of the FCC's current indecency enforcement practices. Lastly, Part II.C explores an alternative approach to the current system of FCC broadcast indecency regulation.

Part III.A of this Note argues that one of the Supreme Court's proffered justifications for allowing indecency to be regulated in broadcasting—the protection of children—is valid. Part III.B, however, argues that the manner in which the FCC has enforced its indecency standard is not. Part III.C of this Note proposes that the function of protecting our children from exposure to indecent broadcast content would be more aptly served by allowing market forces to regulate our airwaves, with the FCC imposing penalties only for violations of the obscenity standard.

I. THE FOUNDATIONAL UNDERPINNINGS OF FCC BROADCAST INDECENCY REGULATION

An overview of the historical development of broadcast indecency regulation is essential to understanding the current controversy surrounding the FCC's broadcast indecency regulatory initiatives. Part I.A outlines the Supreme Court's treatment of governmental regulation of indecency in

7. *Super Bowl XXXVIII*, *supra* note 2.
8. *See infra* notes 155-58 and accompanying text.
9. *See infra* notes 133-34 and accompanying text.
10. *See infra* notes 140-43 and accompanying text.
11. *See infra* notes 106-10 and accompanying text.
12. The First Amendment to the Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

various contexts. Part I.B provides the statutory framework under which the courts and the FCC regulate and evaluate broadcast indecency. Part I.C presents an overview of the agency decisions and rationale underlying the FCC's promulgation, analysis, and enforcement of broadcast indecency regulations. Lastly, Part I.D details the effects that the FCC's latest enforcement policies have had on the broadcast industry.

A. *First Amendment Jurisprudence Surrounding Indecency Regulation*

FCC v. Pacifica Foundation[13] is the seminal case on broadcast indecency regulation and is thus a logical starting point for any discussion of government regulation of indecency on the airwaves.

1. *FCC v. Pacifica Foundation*

The FCC's broadcast indecency definition[14] remains essentially unchanged since *Pacifica*.[15] *Pacifica* involved a routine by comedian George Carlin concerning "filthy words" that could not be said "on the public . . . airwaves."[16] The routine was aired over the radio, and a father claimed to have heard the routine while driving in his car with his son.[17] The FCC found that the words were indecent and therefore subject to regulation in the form of a limitation on the time of day when these words could be broadcast,[18] specifically, whenever "'there is a reasonable risk that children may be in the audience.'"[19] The FCC ruled that the broadcaster, Pacifica Foundation, could have been subject to administrative sanctions, and that while it would not impose formal sanctions, the incident would be noted in Pacifica Foundation's license file. Furthermore, "in the event that subsequent complaints are received, the Commission [would] then decide whether it should utilize any of the available sanctions it has been granted by Congress."[20]

In *Pacifica*, "[t]he [FCC] characterized the language used in the Carlin monologue as 'patently offensive,' though not necessarily obscene."[21] This distinction between offensive speech and obscene speech is relevant because the Supreme Court's First Amendment jurisprudence has protected

13. 438 U.S. 726 (1978).

14. *See 2001 Policy Statement*, *supra* note 5 (defining "broadcast indecency" as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs").

15. *Pacifica*, 438 U.S. at 726.

16. *See id.* app. at 751.

17. *See id.* at 730.

18. *See id.* at 731-32.

19. *See id.* at 732 (quoting Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., 56 F.C.C.2d 94, 98 (1975)).

20. *Id.* at 730 (quoting Citizen's Complaint Against Pacfica Found., 56 F.C.C.2d at 99).

21. *Id.* at 731 (quoting Citizen's Complaint Against Pacfica Found., 56 F.C.C.2d at 98).

only the former.[22] The Supreme Court has defined obscenity as speech that (a) the average person, applying contemporary community standards would find, taken as a whole, appeals to the prurient interest, (b) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) taken as a whole, lacks serious literary, artistic, political, or scientific value.[23] The FCC's definition of indecency is thus broader than the Supreme Court's definition of obscenity; consequently, the FCC's regulation of indecent content regulates speech that is ostensibly within the ambit of First Amendment protection.

The *Pacifica* Court attempted to circumvent this seeming inconsistency by noting that "broadcasting . . . has received the most limited First Amendment protection" of all forms of communication.[24] The Court then affirmed the scope of the FCC's regulation of broadcast indecency because of special problems associated with broadcasting—particularly its unique pervasiveness and accessibility to children.[25] The Court placed an emphasis on the privacy of the home, specifically the right to be free from offensive speech when in the home.[26] Additionally, the Court was concerned with protecting children from exposure to indecency.[27] Apparently, the Court felt that although the burden may be placed on a subject to avert her eyes when encountering an offensive message on a public street,[28] the privacy interest relied upon in *Pacifica* trumped the First Amendment protection of offensive or indecent language when that language was encountered within the home.[29]

2. First Amendment Standards Applied to Nonbroadcast Media

The Supreme Court has roundly rejected attempts at proscribing indecency in mediums analogous to broadcast media, such as telephone, cable television, and the Internet.

a. *Telephone*

In *Sable Communications of California, Inc. v. FCC*,[30] the Court addressed the validity of an anti-"dial-a-porn" statute, which prohibited the

22. *See* Miller v. California, 413 U.S. 15, 20 (1973); Cohen v. California, 403 U.S. 15, 23 (1971); *see also* Carey v. Population Serv. Int'l, 431 U.S. 678, 701 (1977) ("At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

23. *See Miller*, 413 U.S. at 24.

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

25. *See id.* at 748-51.

26. *See id.*

27. *See id.*

28. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975); Cohen v. California, 403 U.S. 15, 21 (1971).

29. *See Pacifica*, 438 U.S. at 726. The Court's reliance on a "privacy of the home" rationale in *Pacifica* is curious given that the complainant in *Pacifica* encountered the offensive language while in his car rather than at home. *See id.* at 730.

30. 492 U.S. 115 (1989).

interstate transmission of obscene or indecent telephone messages to any person, regardless of age.[31] The law banned indecent telephone messages to adults as well as to children. The Court upheld the statute's prohibition of obscene telephone messages because the protection of the First Amendment does not extend to obscene material.[32] While the Court held that the FCC could regulate broadcast indecency, a blanket ban on such material in the context of dial-a-porn telephone messages would not be permissible.[33] In so holding, the Court expressly noted that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[34]

The Court stated that the government may, in certain instances, "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means" to do so.[35] Such a compelling interest, the Court acknowledged, was protecting the well-being of minors.[36] The Court stated that the government may serve this legitimate interest, but in order to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms."[37] The Court held that the ban on indecent telephone messages was invalid because it chilled protected indecent speech between adults,[38] and did so more than was necessary in light of effective alternatives to an outright ban, such as credit card and access code age-verification measures, and scrambling technologies.[39]

The Court distinguished *Sable* from *Pacifica* on the grounds that the *Pacifica* regulations did not constitute an outright ban on indecent content, but rather, merely channeled the time of day in which the content could be aired to avoid exposure to children.[40] The Court further reasoned that the telephone medium is not as pervasive as broadcasting and does not implicate the same privacy interests involved in *Pacifica*.[41] A recipient of telephonic messages needs to take affirmative steps in order to receive such messages, and therefore the "[p]lacing [of] a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[42] "Unlike an unexpected outburst on a radio broadcast," the Court concluded, "the message received by one who places a call to a dial-

31. *See id.* at 117-18.
32. *See id.* at 124-25; *see also* Miller v. California, 413 U.S. 15, 20 (1973).
33. *See Sable*, 492 U.S. at 130-31.
34. *Id.* at 126.
35. *Id.*
36. *See id.*
37. *Id.* (citation and internal quotations omitted).
38. *See id.* at 131.
39. *See id.* at 128.
40. *See id.* at 127.
41. *See id.* at 127-28.
42. *Id.* at 128.

a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it."[43]

b. *Cable Television*

In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[44] the Court invalidated regulations that required cable system operators to segregate "patently offensive"[45] programming onto a specific channel and block such programming unless a viewer affirmatively requested access, holding that the provisions impermissibly chilled protected speech.[46] At issue in *Denver Area* were three provisions of a federal statute that permitted cable operators to prohibit the transmission, over leased access and public access channels, of material that the cable operator "'reasonably believe[d] describe[d] or depict[ed] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.'"[47] The regulations required that if cable operators were to allow transmission of patently offensive programs on leased access channels, the programs had to be funneled through one channel, and access blocked unless a viewer affirmatively requested access in writing.[48] The regulations purportedly protected the well-being of minors, by shielding them from exposure to patently offensive material.[49]

The Court invalidated the provision requiring cable operators to restrict speech by segregating all patently offensive sexually explicit content on leased access channels in one channel and block it until or unless access is requested in writing, because it was not appropriately tailored to meet the legitimate governmental objective at stake.[50] The Court pointed to the availability of other less restrictive means of protecting children from exposure to patently offensive programming, such as the "V-chip," which enables subscribers to identify and block sexually explicit programming at their receivers,[51] and the "lockbox," which also enables locking out of undesired content by the recipient, rather than by the provider.[52] Additionally, the Court noted that cable operators must block any or all programs on any channel that subscribers do not wish to subscribe to.[53]

The Court also expressed concern that viewers might be disinclined to provide cable operators with a written request for access to the "patently offensive" content channel for fear the list might be disclosed, thereby

43. *Id.*
44. 518 U.S. 727 (1996).
45. *See id.* at 732.
46. *See id.* at 760.
47. *Id.* at 734 (quoting Cable Television Consumer Protection and Competition Act of 1992 § 10(a)(2), 47 U.S.C. § 532(h)).
48. *See id.* at 733.
49. *See id.* at 753-55.
50. *See id.* at 737-60.
51. *See id.* at 756.
52. *See id.* at 758.
53. *See id.* at 756.

tarnishing the viewers' reputation.[54] The Court concluded that the segregate and block restrictions were "overly restrictive, 'sacrific[ing]' important First Amendment interests for too 'speculative a gain,'" and therefore invalid.[55]

The Court, however, upheld a provision that allowed cable operators to restrict patently offensive programming on leased access channels, relying in part on the similarities between cable television and broadcast media.[56] Citing *Pacifica* favorably, the Court noted that "[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so" and "'[has] established a uniquely pervasive presence in the lives of all Americans.'"[57] Moreover, "'[p]atently offensive' material from [cable] stations can 'confron[t] the citizen' in the 'privacy of the home,' with little or no prior warning."[58] The Court also noted that there is "nothing to stop adults . . . from finding similar programming elsewhere, say, on tape or in theaters."[59]

The Court's analysis of this provision focused on the private nature of cable systems, and viewed the provision as returning to cable operators some level of editorial control over leased access channels that operators had been deprived of by prior legislation.[60] The Court reasoned that "the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress,"[61] and concluded that the provision was a sufficiently narrowly tailored response to the important problem of child exposure to indecent programming.[62]

The *Denver Area* Court rejected a third provision of the statute, which allowed cable operators to restrict patently offensive programming on public access channels,[63] by relying on distinctions between public-access and leased-access channels—namely that cable operators have never had editorial control over public-access channels—and thus the new provisions did not return control to the operators that they formerly had.[64] Additionally, the Court felt that a cable operator's veto was less likely to be necessary to protect children from patently offensive sexually explicit

54. *See id.* at 754; *cf.* Lamont v. Postmaster Gen., 381 U.S. 301, 304-05 (1965) (finding unconstitutional a requirement that recipients of Communist literature notify the Post Office that they wish to receive it).

55. *Denver Area*, 518 U.S. at 760 (quoting Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1973)) (alteration in original).

56. *See id.* at 744-47.

57. *Id.* at 744-45.

58. *Id.* at 745 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)) (third alteration in original) (citation omitted).

59. *Id.* (internal quotation marks omitted).

60. *See id.* at 743-47.

61. *Id.* at 747.

62. *See id.* at 733, 766.

63. *See id.* at 766.

64. *See id.* at 761.

programming,[65] given that public-access channels already have control systems in place over programming in the form of content supervisors,[66] and because the purpose of public-access channels is to secure programming that the community considers valuable.[67]

In *Turner Broadcasting System, Inc. v. FCC*,[68] the Supreme Court expressly noted that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation."[69] At issue in *Turner* were "must-carry" provisions of a federal regulation that required cable operators to carry signals of a specified number of local broadcast stations on their systems.[70] As the law was a must-carry provision, rather than a restriction on message content, the law's restriction on speech was found to be content neutral and accordingly given intermediate-level review.[71] The Court remanded to further develop the factual record,[72] subsequently holding that the "must-carry" provisions were in fact constitutional.[73]

In *United States v. Playboy Entertainment Group, Inc.*,[74] the Supreme Court struck down a provision of the Telecommunications Act of 1996[75] that required cable operators to "fully scramble or otherwise fully block" channels "primarily dedicated to sexually-oriented programming," or limit transmission of those channels to hours when children will most likely not be in the viewing audience (10:00 p.m.–6:00 a.m.).[76] The provision was aimed at protecting minors from exposure to sexually-oriented content through signal bleeding—a phenomenon whereby either or both audio and visual portions of programs scrambled by cable operators is heard or seen.[77]

The Court in *Playboy* noted that the regulation was a content-based restriction on speech and accordingly had to survive strict scrutiny, that is, the regulation had to be narrowly tailored to promote a compelling government interest.[78] The Court elaborated, "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[79] The Court noted that "even where speech is indecent

65. *See id.* at 763.
66. *See id.* at 761-62.
67. *See id.* at 763.
68. 512 U.S. 622 (1994).
69. *Id.* at 637.
70. *See id.* at 630.
71. *See id.* at 661-62.
72. *See id.* at 668.
73. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 224-25 (1997).
74. 529 U.S. 803 (2000).
75. Telecommunications Act of 1996, 47 U.S.C. § 561 (2000).
76. *Id.* § 561(a), (b).
77. *See Playboy*, 529 U.S. at 806.
78. *See id.* at 813.
79. *Id.* (citing Reno v. ACLU, 521 U.S. 844, 874 (1997) ("[The Internet indecency regulation's] 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.")); *see also* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The

and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."[80]

The Court also noted that "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[81] The Court elaborated that "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'"[82]

The *Playboy* Court distinguished cable television from broadcast television in that cable systems have the capacity to block unwanted channels on a household-to-household basis.[83] The Court found the regulation to be unconstitutional because of the availability and apparent effectiveness of targeted blocking—a less restrictive alternative.[84] The Court noted that the government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests, and reasoned that because the government did not meet its burden of proving that targeted blocking was ineffective the regulation could not stand.[85]

c. *Internet*

In *Reno v. ACLU*,[86] the Court struck down provisions of the Communications Decency Act of 1996 ("CDA")—a congressional attempt at criminalizing the transmission of indecent content on the Internet[87]—on the grounds that it was unconstitutionally vague,[88] overbroad, and

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Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

80. *Playboy*, 529 U.S. at 814.

81. *Id.* at 812.

82. *Id.* at 813 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)) (alteration in original); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (invalidating an ordinance prohibiting the display of nudity on drive-in movie theater screens to prevent it from being seen by viewers on public streets who can readily avert their eyes).

83. *See Playboy*, 529 U.S. at 815.

84. *See id.*

85. *See id.*

86. 521 U.S. 844 (1997).

87. Communications Decency Act of 1996, 47 U.S.C. § 223 (2000).

88. As noted *infra* Part II.B.1, the vagueness doctrine is a powerful means of attacking the validity of a regulation or statute. In *Smith v. Goguen*, the Supreme Court struck down a statute criminalizing "treat[ing] contemptuously the flag of the United States" on grounds of unconstitutional vagueness. 415 U.S. 566, 568-69, 572-73 (1974). The Court reasoned that the statute did not "draw reasonably clear lines between the kinds of nonceremonial treatment [of the flag] that are criminal and those that are not," and that without "any ascertainable standard for inclusion and exclusion," law enforcers had "unfettered latitude" and were "free to react to nothing more than their own preferences for treatment of the flag."

impermissibly curtailed protected speech.[89] The Court distinguished the Internet from broadcasting, noting that "[u]nlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.'"[90] The Court concluded that the CDA was not narrowly tailored[91] due to the availability of effective, less restrictive alternatives, such as user-based filtering and blocking software.[92]

In *Ashcroft v. ACLU*,[93] the Court upheld a preliminary injunction of a revised version of the *Reno* law on grounds that it would likely be found to violate the First Amendment.[94] The Court ruled that the government did not rebut evidence that there were alternative, less restrictive means available for achieving the same objective—protecting children from indecent material on the Internet.[95] The law at issue in *Ashcroft*, the Child Online Protection Act ("COPA"),[96] modified the CDA law at issue in *Reno* by restricting the scope of the regulation to the World Wide Web, as compared to the entire Internet in *Reno*.[97] Moreover, the bill restricted the transmission of indecent material for commercial purposes only, rather than for all purposes as in *Reno*.[98] The Court found COPA likely to be in violation of the First Amendment because it was not the least restrictive means available.[99] The Court reasoned that filtering and blocking software were a less restrictive alternative to the COPA regulations, and were more

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Id. at 574, 578. In *Baggett v. Bullitt*, the Court rejected a statute requiring state employees to swear that they were not "subversive persons" as defined by a statute, 377 U.S. 360, 362 (1964), that they would not commit, attempt, assist, advocate, advise, or teach any act intended to "overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States . . . by revolution, force, or violence." Wash. Rev. Code § 9.81.010(5) (1951). The Court found the prohibitions imposed by the oath to be unconstitutionally vague. *See Baggett*, 377 U.S. at 368. The Court was concerned that the uncertain meaning would lead oath-takers to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Id.* at 372 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). The Court went on to note that oath-takers sensitive to "the perils posed by the oath's indefinite language," could avoid sanction "only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Id.*

89. *See Reno*, 521 U.S. at 871, 874-79, 882.

90. *Id.* at 854 (quoting ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996)).

91. *See id.* at 879.

92. *See id.* at 877.

93. 124 S. Ct. 2783 (2004).

94. *See id.* at 2788.

95. *See id.*

96. 47 U.S.C. § 231 (2000).

97. *Compare Ashcroft*, 124 S. Ct. at 2789 ("[The Child Online Protection Act] imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for commercial purposes, of World Wide Web content that is harmful to minors.") (internal quotation omitted), *with Reno*, 521 U.S. at 859 ("[The Communications Decency Act of 1996] prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age . . . by means of a telecommunications device . . . .") (internal quotation omitted).

98. *See supra* note 97.

99. *See Ashcroft*, 124 S. Ct. at 2791.

likely to be effective as a means of restricting children's access to harmful material.[100]

Part I.B examines the specific statutory provisions pursuant to which the FCC regulates broadcast content and penalizes violations of its standards.

B. *FCC's Statutory Authority to Regulate Broadcast Content*

The FCC derives its authority to regulate broadcast content from 18 U.S.C. § 1464, which prohibits the utterance of "any obscene, indecent, or profane language by means of radio communication."[101] 47 U.S.C. § 326, however, specifically denies the FCC the power of "censorship over the radio communications or signals transmitted by any radio station," and further specifies that "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."[102] While 47 U.S.C § 326 has been interpreted by the Supreme Court as unequivocally denying the FCC "any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves," it has not been interpreted as denying the FCC "the power to review the content of completed broadcasts in the performance of its regulatory duties."[103] It is through this power that the FCC reviews broadcasts on television and radio.

Accordingly, the FCC may impose penalties for violations of the broadcast decency standards established in 18 U.S.C. § 1462.[104] The current maximum statutory penalty imposable for a violation of the broadcast decency standard is $32,500,[105] but Congress is attempting to raise this statutory maximum through pending legislation.[106] House Bill 310, passed by the House of Representatives on February 16, 2005, proposes to raise the maximum statutory penalty to $500,000 for each

100. *See id.* at 2792.

101. 18 U.S.C. § 1464 (2000).

102. 47 U.S.C. § 326 (2000).

103. FCC v. Pacifica Found., 438 U.S. 726, 735 (1978).

104. *See* 47 U.S.C. § 503(b) (2000) (providing in pertinent part that "[a]ny person who is determined by the Commission . . . to have . . . violated any provision of . . . section . . . 1464 of Title 18 . . . shall be liable to the United States for a forfeiture penalty").

105. *See* 47 C.F.R. § 1.80(b)(1) (2004) ("[T]he forfeiture penalty under this section shall not exceed $32,500 for each violation."). This maximum penalty was recently raised from its previous level of $27,500 in accordance with the Debt Collection Improvement Act of 1996, which "requires Federal agencies to adjust 'civil monetary penalt[y] . . . by law' at least once every four years" to account for inflation. *See* Inflation Adjustment of Maximum Forfeiture Penalties, 69 Fed. Reg. 47,788-89 (Aug. 6, 2004) (effective Sept. 7, 2004) (quoting the Debt Collection Improvement Act of 1996, 28 U.S.C.A § 2461 notes (West Supp. 2005)). It is pursuant to the Debt Collection Improvement Act of 1996 that the Federal Communications Commission ("FCC") has been able to raise the maximum statutory penalty above the $25,000 level specified in 47 U.S.C. § 503(b)(2)(A).

106. *See* Broadcast Decency Enforcement Act of 2005, H.R. 310, 109th Cong. (2005); Broadcast Decency Enforcement Act of 2005, S. 193, 109th Cong. (2005). The FCC Reauthorization Act of 2003 provides for raising the maximum statutory penalty for violations of the broadcast decency standard to $250,000. *See* FCC Reauthorization Act of 2003, S. 1264, 108th Cong. § 5 (2003).

violation of the broadcast decency standard.[107] Senate Bill 193, a measure pending before the Senate, would raise the maximum penalty to "$325,000 for each violation or each day of a continuing violation," with a $3,000,000 cap on penalties for "any single act or failure to act."[108]

House Bill 310 provides factors for the FCC to consider in evaluating the culpability of violators of the decency standard, such as whether the material uttered was recorded or scripted; whether the broadcaster had a reasonable opportunity to review recorded or scripted programming or a reasonable basis to believe live or unscripted programming would contain obscene, indecent, or profane material; whether the violator failed to block live or unscripted programming; the size of the viewing or listening audience of the programming; and whether the violation occurred during a children's television program.[109]

House Bill 310 also provides for up to $500,000 in fines[110] to be imposed directly on speakers who willfully or intentionally utter expletives which are broadcast, if the speaker had actual or constructive knowledge that the utterance would be broadcast.[111] Additionally, the Bill requires the FCC to commence license revocation proceedings if there are three violations during the term of a broadcast license.[112]

Beyond attempts at increasing and enhancing penalties for violations of the broadcast indecency standard, Congress has also attempted to strengthen broadcast indecency regulation by amending the language of 18 U.S.C. § 1464 itself to expressly provide examples of prohibited "profane" language.[113]

Having explored the statutory authority granted to the FCC by Congress to regulate and enforce broadcasting standards, the following section will trace the progression of the FCC's broadcast indecency regulatory policies from enforcement of a "bright line" indecency rule to the current contextual, "generic" indecency standard.

C. *Historical Development of the FCC's Indecency Regulatory Policies*

The stringency of the FCC's broadcast indecency enforcement initiatives and policies has varied greatly over the twenty-six years since *Pacifica*. Most of the decade following *Pacifica* was marked by limited FCC

107. *See* H.R. 310 § 2.
108. S. 193 § 2.
109. *See* H.R. 310 § 3.
110. *See id.* § 2
111. *See id.* § 4.
112. *See id.* § 9.
113. *See* H.R. 3687, 108th Cong. (2003) ("As used in [18 U.S.C. § 1464], the term 'profane' [shall include] the words 'shit', 'piss', 'fuck', 'cunt', 'asshole', and the phrases 'cock sucker', 'mother fucker', and 'ass hole', compound use (including hyphenated compounds) of such words and phrases with each other or with other words or phrases, and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms).").

indecency enforcement.[114] During this period, the FCC employed a bright-line rule in narrowly construing the indecency standard, essentially limiting actionable indecency to repeated use, between the hours of 6:00 a.m. and 10:00 p.m., of the seven "dirty words" at issue in *Pacifica*.[115] Indecency enforcement actions were thus relatively limited during this period due to the FCC's narrow construction and broadcasters' avoidance of the specifically proscribed language.[116]

The year 1987 saw a sharp change in the FCC's enforcement practices. Through the issuance of a Public Notice,[117] in conjunction with warnings to three broadcasters,[118] the FCC announced a new, far more expansive, indecency policy. The Commission's new policy aimed to begin enforcing the "generic definition of broadcast indecency" initially advanced in *Pacifica*, but subsequently retreated from in the FCC's enforcement actions.[119] This generic standard defined 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."[120] The Commission adopted a contextual approach to indecency enforcement,[121] in lieu of its prior bright-line rule,

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114. *See* Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. Rev. L. & Soc. Change 49, 91 (1992) (characterizing this post-*Pacifica* period as an era of "regulatory retreat . . . consist[ing] of a new decade of agency non-enforcement of the broad indecency standard developed in the Commission's original decision in *Pacifica*").

115. *See id.* at 90-91 ("[W]hat in fact emerged from the case was a bright-line test that simply prohibited repeated use of Carlin's immortalized seven dirty words before 10:00 p.m."); *see also* Rahall Broad. of Ind., Inc., 94 F.C.C.2d 1162 (1983); Application of Pacifica Found., 95 F.C.C.2d 750 (1983); Serv. Broad. Corp., 46 R.R.2d 413 (1979).

116. *See* Levi, *supra* note 114, at 91 ("Because broadcasters largely avoided the seven 'dirty' words and the Commission held to its narrow interpretation of the indecency standard, the prohibition on indecency nearly fell into desuetude during this period."); Howard M. Wasserman, *Second-Best Solution: The First Amendment, Broadcast Indecency, and the V-Chip*, 91 Nw. U. L. Rev. 1190, 1198 (1997) ("The FCC did not take *Pacifica* as a mandate to aggressively enforce the rules against broadcast indecency."). Professor Wasserman continued,

> Broadcasters, playing it safe, simply avoided repetitive use of the seven words from the Carlin monologue, with a "safe harbor" after ten p.m., a time when few (or fewer) children would be in the audience. The Commission refrained from enforcing the indecency standard between 1978 and 1987.

Id. (citations omitted).

117. *See* New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, Public Notice, 2 F.C.C.R. 2726 (1987) [hereinafter 1987 Public Notice].

118. *See* Pacifica Found., Inc., 2 F.C.C.R. 2698 (1987); The Regents of the Univ. of Cal., 2 F.C.C.R. 2703 (1987); Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705 (1987).

119. *See* 1987 Public Notice, *supra* note 117 at 2726.

120. *Id.* (internal quotations omitted).

121. *See id.* ("[R]epetitive use of specific sexual or excretory words or phrases is not the only material that can constitute indecency."). The Commission elaborated, stating that

> if a broadcast consists solely of the use of expletives, then deliberate and repetitive use of such expletives in a patently offensive manner would be a requisite to a finding of indecency. If a broadcast goes beyond the use of expletives . . . then the

and noted its intention to expand indecency enforcement to include language beyond the seven words involved in *Pacifica*.[122] The Commission further noted that while indecent speech must involve more than isolated use of offensive language, the offensive language need not be repeated to the extent that the language was repeated in *Pacifica* to be actionably indecent.[123]

With regard to time channeling, the Commission ruled that indecent content would be actionable only if aired at a time when "there is a reasonable risk that children may be in the audience . . . ."[124] Although the hours of 10:00 p.m. through 6:00 a.m. had previously been considered a "safe harbor" period when children were presumptively not in the audience, the Commission ruled that "this benchmark is not susceptible to a uniform standard" because evidence suggested that children might still be in the audience after 10:00 p.m.[125] Thus, the primary rationale underlying the FCC's 1987 regulatory policy was protection of children.

The FCC has explicated its 1987 indecency standard by noting that two "fundamental determinations" are required to sustain a finding of indecency:[126]

> "First, the material alleged to be indecent must fall within the subject matter scope of [its] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium."[127]

In making its indecency determinations, the FCC has noted that the "full context in which the material appeared is critically important,"[128] and has articulated three "principal factors"[129] for its analysis:

> "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or

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> context in which the allegedly indecent language is broadcast will serve as an important factor in determining whether it is, in fact, indecent.

Id.

122. *See The Regents of the Univ. of Cal.*, 2 F.C.C.R. at 2703 ("[N]or do the seven words at issue in *Pacifica* provide an exhaustive list." (citations omitted)).

123. *See id.* ("Speech that is indecent must involve more than an isolated use of an offensive word. Specific words, however, need not necessarily be repeated to the same degree as were the words involved in Pacifica . . . ." (citations omitted)).

124. 1987 Public Notice, *supra* note 117, at 2726 (internal quotation omitted).

125. *Id.* While the courts have recognized that the government has a compelling interest in protecting children, courts have rejected the FCC's attempted imposition of a twenty-four hour a day ban on indecency. *See* Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992).

126. *See* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 F.C.C.R. 4975, 4977 (2004) [hereinafter *Golden Globes II*].

127. *Id.* (second alteration in original) (emphasis omitted) (quoting *2001 Policy Statement*, *supra* note 5, at 8002).

128. *Id.* at 4977-78 (internal quotation omitted).

129. *Id.* at 4978.

activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value."[130]

The FCC continued enforcement of this contextual, generic indecency standard, reaching a $1.7 million settlement with Infinity Broadcasting in 1995 for multiple indecency complaints related to the *Howard Stern Show*.[131] In recent years, the FCC has begun imposing increasingly large fines, including a $357,000 Notice of Apparent Liability for Forfeiture ("NAL") against Infinity Broadcasting in October of 2003 for indecent content aired on the *Opie & Anthony Show*.[132]

On January 19, 2003, the 2003 Golden Globe Awards aired on NBC. Bono, from the group U2, uttered a variation of the word "fuck" two times during an award acceptance speech.[133] The utterances took the adjectival form, qualifying the word "brilliant" in one instance, and the word "great" in another.[134] In its ruling on the incident, the FCC's Enforcement Bureau found that as a threshold matter, Bono's use of the "F-word" in this manner and context did not constitute actionable indecency, because the "program [did] not describe or depict sexual and excretory activities and organs."[135] The Bureau went on to note that while "[t]he word 'fucking' may be crude and offensive, [it did not,] in the context presented here, . . . describe sexual or excretory organs or activities."[136] Rather, the FCC characterized Bono's use of the word "as an adjective or expletive [used] to emphasize an exclamation."[137] In so ruling, the Bureau relied on past decisions holding that "offensive language used as an insult rather than as a description of sexual or excretory activity or organs," as well as "fleeting and isolated remarks of this nature," do not constitute actionable indecency.[138]

Congress did not react well to the FCC's decision, and urged the Commission to reverse the *Golden Globes* ruling and to take a stricter approach to enforcement of indecency standards in broadcast media.[139] In response to congressional pressure, the FCC did in fact revisit the *Golden*

130. *Id.* (emphasis omitted) (quoting *2001 Policy Statement*, *supra* note 5, at 8003).

131. *See* Sagittarius Broad. Corp., 10 F.C.C.R. 12,245 (1995).

132. *See* Infinity Broad. Operations, Inc., 18 F.C.C.R. 19,954, 19,955 (2003) [hereinafter *2003 Infinity NAL*].

133. *See* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 18 F.C.C.R. 19,859 (2003).

134. *See id.*

135. *Id.* at 19,861.

136. *Id.*

137. *Id.*

138. *Id.*; *see also 2001 Policy Statement*, *supra* note 5, at 8008 ("Repetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts."). The Policy Statement continued, "In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency." *Id.*

139. *See* S. Res. 283, 108th Cong. (2003) (resolution urging FCC to overturn the *Golden Globes* decision and increase enforcement activities); H. Res. 482, 108th Cong. (2003) (same); H.R. 3687, 108th Cong. (2003) (profanity bill).

Globes decision, and subsequently reversed the Bureau's decision on March 18, 2004 in a memorandum opinion and order.[140] The Commission ruled that Bono's use of the "F-Word" was in fact indecent by agency standards, and therefore legally actionable.[141] The Commission reasoned that Bono's language "[did] depict or describe sexual activities" because "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation . . . ."[142] The Commission also expressly overruled nearly twenty years of its own precedent which held that isolated or fleeting broadcasts of the "F-Word" did not constitute actionable indecency.[143] The Commission thus modified its previous "contextual" approach to indecency analysis, establishing a bright-line test for certain words regardless of their context.

With regard to the second prong of its indecency analysis, the Commission found that Bono's language was patently offensive under contemporary community standards because "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language . . . [whose] use invariably invokes a coarse sexual image."[144] The Commission further maintained that the "fact that the use of this word may have been unintentional is irrelevant; it still [had] the same effect of exposing children to indecent language."[145] The Commission concluded that its routine enforcement action against the use of such language when children were expected to be in the audience was necessary to avoid more widespread use of such indecency.[146] The Commission decided not to fine NBC due to its departure from its past precedent, but it used the memo as an opportunity to put broadcasters on notice that "they will be subject to potential enforcement action for any broadcast of the 'F-Word' or a variation thereof in [future] situations such as that here."[147]

The FCC also used the second *Golden Globes* opinion as an opportunity to announce a new and "independent" standard for finding a violation of 18 U.S.C. § 1464—profanity. The Commission ruled that in addition to being indecent, the use of the "F-Word" in the context at issue also constituted profanity.[148] The Commission defined the term profanity as "vulgar, irreverent, or coarse language" and ruled that the "[u]se of the 'F-Word' in the context at issue . . . is clearly the kind of vulgar and coarse language that

140. *See Golden Globes II*, *supra* note 126, at 4978.
141. *See id.*
142. *See id.*
143. *See id.* at 4980 ("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.").
144. *Id.* at 4979.
145. *Id.*
146. *See id.*
147. *Id.* at 4982.
148. *See id.* at 4981.

is commonly understood to fall within the definition of 'profanity.'"[149] The Commission went on to note,

> 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.[150]

Importantly, the Commission did not clarify whether this newly expanded definition of profanity is broader or narrower than its definition of indecency.[151]

In January 2004, the FCC issued an NAL to Clear Channel Communications, Inc., for a proposed fine of $755,000 for broadcasting allegedly indecent material on the *Bubba the Love Sponge* show.[152] This fine represented "the largest single penalty for indecency in the FCC's history."[153] The magnitude of this action was obscured one week later, however, when the halftime show of the 2004 Super Bowl[154] became the latest front of the FCC's war on indecency.

During a performance by Justin Timberlake and Janet Jackson, Mr. Timberlake tore the right side of Ms. Jackson's bustier, exposing her right breast.[155] The stunt drew prompt criticism from then-FCC Chairman Michael K Powell[156] and Commissioner Kevin Martin, along with vows to institute an immediate investigation.[157] An immediate investigation did follow, and on September 22, 2004, the FCC issued an NAL for $550,000 against Viacom-owned CBS affiliates for broadcast of the halftime show.[158]

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149. *Id.*

150. *Id.* (internal citations omitted).

151. *See infra* notes 273-75 and accompanying text (discussing the vagueness problems created by the Commission's new profanity standard).

152. *See* Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 1768, 1769 (2004).

153. Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 Comm. Law., 1, 25 (2004).

154. *Super Bowl XXXVIII*, *supra* note 2.

155. *See Super Bowl NAL*, *supra* note 3, ¶ 6.

156. On January 21, 2005, Chairman Powell announced his intent to step down from the post of FCC Chairman and Commissioner in March 2005. *See* Statement of FCC Chairman Michael K. Powell on Leaving the Commission, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256206A1.doc (last visited Sept. 1, 2005).

157. *See* Press Release, Fed. Commc'n Comm'n, FCC Chairman Powell Calls Super Bowl Halftime Show a "Classless, Crass, Deplorable Stunt." Opens Investigation (Feb. 2, 2004), 2004 WL 187406; Press Release, Fed. Commc'n Comm'n,FCC Commissioner Martin Supports the Opening of Investigation into Broadcast of Super Bowl Halftime Show (Feb. 2, 2004), 2004 WL 193087.

158. *See Super Bowl NAL*, *supra* note 3. *But cf.* WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838 (2000) (ruling that adult frontal nudity depicted during a broadcast of the film *Schindler's List* was not patently offensive).

This proposed forfeiture represented the then-statutory maximum of $27,500 for each of the twenty Viacom-owned CBS affiliates that broadcasted the halftime show.

Other FCC enforcement actions taken after the Super Bowl[159] aired include a $247,500 NAL issued against Clear Channel Communications on March 12, 2004, for the broadcast of allegedly indecent content on the *Elliot in the Morning* show,[160] and a March 18, 2004, NAL for $27,500—the statutory maximum—against Infinity Broadcasting for broadcasting allegedly indecent material on the *Howard Stern Show*.[161] On June 10, 2004, the FCC entered into a record $1.75 million settlement with Clear Channel Communications to settle indecency allegations related to its broadcast of the *Howard Stern Show*.[162] Larger than the $1.7 million settlement paid by Infinity Broadcasting in 1995, this record-setting Clear Channel settlement represents the largest broadcast indecency settlement in FCC history. In October of 2004 the FCC issued its largest indecency fine when it issued a $1.18 million NAL to the Fox Television Network for a stripper scene in the reality television program *Married by America*.[163]

The increased stringency of the FCC's post-*Golden Globes II*, post-Janet Jackson regulation of broadcast indecency has had significant effects on the broadcast industry. Part I.D details recent developments in the broadcast industry that have followed the FCC's adoption of its new enforcement policies.

D. *Industry Reaction to the FCC's Broadcast Indecency Regulatory Initiatives*

In the week following the 2004 Super Bowl,[164] General Electric-owned NBC decided to pull a scene from the popular medical drama *E.R.* in which an elderly woman's breast was briefly exposed[165]—despite the fact that the program airs after 10:00 p.m. The scene, which depicted an eighty-year-old woman undergoing emergency surgery, showed the woman's breast for approximately 1.5 seconds in the background.[166] John Wells, the executive producer of *E.R.*, commented that *E.R.* has broadcast incidental nudity before—one repeat episode containing such a scene aired shortly before the

159. *Super Bowl XXXVIII*, *supra* note 2.

160. *See* AMFM Radio Licenses, L.L.C., 19 F.C.C.R. 5005 (2004).

161. *See* Infinity Broad. Operations Inc., 19 F.C.C.R. 5032 (2004).

162. *See* Travis E. Poling, *Clear Channel Puts Indecency Issue Behind: Analysts Say Record $1.75 Million Settlement Allows Media Industry to Focus on Other Looming Issues*, San Antonio Express-News, June 10, 2004, at 1E.

163. *See* Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married By America" on April 7, 2003, 19 F.C.C.R. 20,191 (2004).

164. *Super Bowl XXXVIII*, *supra* note 2.

165. *See* Bill Carter, *After Furor, Janet Jackson Is to Be Cut from Grammy Awards*, N.Y. Times, Feb. 5, 2004, at C8.

166. *See id.*

Super Bowl[167] incident with no complaints—and always in a medical context.[168] Wells stated that the shot "lends that sense of seeing someone who is vulnerable in a way that is important to the overall narrative of the piece—their loneliness, dislocation and loss of privacy."[169] "She's 80 years old," Wells added, "[t]o think there is anything salacious there is absurd."[170]

Clear Channel Communications—the nation's largest radio chain—dropped the *Howard Stern Show* in February of 2004 from all six of its stations that carried the program.[171] Earlier that same week, Clear Channel fired Florida radio personality Bubba the Love Sponge.[172] Clear Channel's decision to drop the *Howard Stern Show* followed an on-air interview with Rick Salomon, the ex-boyfriend of celebrity socialite Paris Hilton, during which a caller used a racial slur.[173] John Hogan, President and CEO of Clear Channel Radio, issued a statement saying that "Clear Channel drew a line in the sand today with regard to protecting our listeners from indecent content and Howard Stern's show blew right through it."[174] He added, "It was vulgar, offensive, and insulting."[175] The company also moved to install new decency standards for all of its stations on Wednesday of that week, one day before Hogan was scheduled to testify at a congressional hearing on broadcast indecency.[176] The new decency standards included instituting a delay for all Clear Channel stations that did not already have a delay system in place.[177]

Former Viacom President Mel Karmazin instituted a new "zero tolerance" policy in February 2004 as well, in an effort to rid that company's shows of anything "graphic or explicit."[178] According to one morning show producer at a Viacom station in Ohio, the stricter new rules have "definitely enhanced my responsibilities . . . I hit the delay button four

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167. *Super Bowl XXXVIII*, *supra* note 2.

168. *Id.*

169. Lisa de Moraes, *Flags Keep Dropping on Super Bowl Stunt*, Wash. Post, Feb. 5, 2004, at C01 (internal quotations omitted).

170. *See* Carter, *supra* note 165 (internal quotations omitted); *see also* de Moraes, *supra* note 169 ("[A]dult viewing audiences at 10 p.m., who have been warned appropriately of a show's adult content, are more than capable of making the distinction and adjusting their viewing habits accordingly. These types of affiliate overreactions have a chilling effect on the narrative integrity of adult dramas." (quoting John Wells, Executive Producer of *E.R.*)).

171. *See* Tim Feran, *Shock Jock's Suspension Boosts Decency Efforts*, Columbus Dispatch, Feb. 27, 2004, at D11.

172. *See id.*

173. *See id.*

174. Press Release, Clear Channel Commc'ns, Inc., Howard Stern Show Taken Off Clear Channel Stations (Feb. 25, 2004), *available at* http://www.clearchannel.com/Radio/PressReleases/2004/20040226_Rad_Stern.pdf (internal quotations omitted).

175. *Id.*

176. *See* Feran, *supra* note 171.

177. *See id.*

178. *Id.* (internal quotations omitted).

times this week so far. The stuff that got dumped was pretty harmless, but when in doubt, leave it out."[179]

The National Football League ("NFL") canceled a February 2004 Pro Bowl halftime show starring former 'N Sync member JC Chasez because "it was afraid of his choice of songs—*Blowing Me Up (With Her Love)*—and the accompanying choreography. Chasez [was] replaced with Hawaiian-themed entertainment."[180] NFL spokesman Greg Aiello said that Chasez's song "included some very suggestive lyrics and we didn't think it was appropriate in light of the current situation."[181]

Las Vegas reality TV show *The Casino*[182] ran afoul of network censors at Fox in the summer of 2004 with partial nudity and a "*Crying Game*" incident in which a male character discovered that his sexual partner was not female.[183] Fox also told producers of its show *The O.C.*[184] not to show one of the female characters having an orgasm, but approved the showing of a male character's orgasm in the same scene.[185]

ABC initiated a five-second delay on its live telecast of the 75th Annual Academy Awards[186] so that it could censor any "wardrobe malfunctions" or Bono-esque moments that might occur.[187] The Academy Awards had never previously had a delay for censoring content.[188] According to Academy Awards Executive Director Bruce Davis, "'It was just a feeling that the absolute liveness on both coasts was part of the appeal.'"[189] Davis added, "'Part of what they're worried about is that bill in Congress that would increase the financial penalties [for broadcasting an indecency] tenfold . . . . [I]f [the] bill is passed . . . we might be exposing them to some horrendous amount of money.'"[190]

In November of 2004, numerous ABC affiliate stations preempted the network's unedited airing of the Steven Spielberg film *Saving Private Ryan*[191] at 8:00 p.m. on Veteran's Day, due to concerns that the movie's frequent expletives and violence would subject them to FCC enforcement action.[192] Sinclair Broadcasting, owner of many of the affiliates that scheduled alternative programming, said "the recent crackdown on indecent

179. *Id.* (internal quotations omitted).
180. *See* de Moraes, *supra* note 169 (internal quotations omitted).
181. *Id.* (internal quotations omitted).
182. *The Casino* (Fox television broadcast Summer 2004).
183. *See* Scott Robson, *You Can't Do That on Television!*, N.Y. Times, July 18, 2004, Television Section, at 1.
184. *The O.C.* (Fox television broadcast).
185. *See id.*
186. *The 75th Annual Academy Awards* (ABC television broadcast Feb. 29, 2004).
187. *See* de Moraes, *supra* note 169.
188. *See id.*
189. *Id.*
190. *Id.* (second alteration in original).
191. Saving Private Ryan (DreamWorks SKG & Paramount Pictures Corporation & Amblin Entertainment, Inc. 1998).
192. *See* Frank Rich, *Bono's New Casualty: 'Private Ryan,'* N.Y. Times, Nov. 21, 2004, § 2, at 1.

material by the Federal Communications Commission was a major factor in its decision to shun the R-rated film, which ABC is obligated to broadcast without editing or bleeps under an agreement with DreamWorks, the studio that produced it."[193] The President of one of the preempting stations, WOI-TV, issued a statement saying, "Would the FCC conclude that the movie has sufficient social, artistic, literary, historical or other kinds of value that would protect us from breaking the law? With the current FCC, we just don't know."[194]

In response to broadcaster inquiries asking if the film would violate indecency rules, Janice Wise, the spokeswoman for the FCC's Enforcement Bureau, said the Commission was barred from making a pre-broadcast decision "because that would be censorship,"[195] but added, "If we get a complaint, we'll act on it."[196]

In February of 2005, Super Bowl XXXIX[197] passed with little controversy, unlike its 2004 predecessor. Although the FOX television network prevented a provocative advertisement in which a woman's breast was nearly exposed from rerunning during the game's fourth quarter, the halftime show, featuring a fully clothed performance by Paul McCartney, aired without incident.[198]

II. THE DEBATE SURROUNDING BROADCAST INDECENCY REGULATION: STRIKING A BALANCE BETWEEN MORAL VALUES AND FREE SPEECH

As outlined in Part I, broadcast indecency regulation involves a complex interplay between jurisprudential, statutory, and regulatory components. This part closely analyzes the strengths and weaknesses of the doctrinal distinctions employed by the Supreme Court in according indecency a lower degree of constitutional protection in the context of broadcasting. It then examines criticisms of the FCC's indecency enforcement policies, specifically, vagueness and over-breadth challenges to the manner in which the FCC currently makes indecency determinations, as well as challenges to the validity of penalties imposed once the FCC finds that a violation has occurred. Finally, it explores the relative merits of an alternative approach to indecency regulation, one that allows market forces, rather than the FCC, to regulate the content of our airwaves.

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193. Reuters, *ABC Fought the Pre-emption of 'Private Ryan,'* N.Y. Times, Nov. 12, 2004, at C4.

194. *ABC Affiliates Pulling 'Private Ryan': Stations in 8 States Will Pre-empt Broadcast of Award-Winning Film Due to Concerns About Indecency*, CNN Money, Nov. 11, 2004, http://money.cnn.com/2004/11/11/news/fortune500/savingpvt_ryan/index.htm?cnn=yes (internal quotations omitted).

195. Walt Belcher, *Fearful ABC Affiliates Yank "Saving Private Ryan' from Schedules*, Tampa Trib., Nov. 12, 2004, at 1.

196. Phillip Coorey, *TV Networks Save Viewers from War*, Courier Mail (Queensland, Austl.), Nov. 13, 2004, World, at 23 (internal quotations omitted).

197. *Super Bowl XXXIX* (Fox broadcast Feb. 26, 2005).

198. *See* John D. Solomon, *What's Indecent?*, USA Today, Feb. 9, 2005, at 13A.

A. *General Justification for Content-Based Regulation of Broadcast Indecency*

There is a strong presumption against content-based regulation in our First Amendment jurisprudence.[199] In order to restrict speech based on content, a government regulation must be narrowly drawn to serve a compelling government interest[200] unless it is a regulation of speech that the Court has deemed to fall outside the protection of the First Amendment.[201] Indecency does not fall under any of these categories and thus is protected by the First Amendment. However, the Supreme Court held in *FCC v. Pacifica Foundation* that, despite the protection of indecency under the First Amendment, indecent speech is subject to regulation in the context of broadcast media.[202]

The Court based its determination in *Pacifica* on the grounds that broadcasting invades the privacy of the home and is more easily accessible to children than other media.[203] The Court has upheld this reasoning in its subsequent decisions, distinguishing broadcast media from closely analogous media that also confront the subject in the privacy of the home and are also accessible to children—such as telephone, cable, and the Internet.[204] The Court continues to affirm the *Pacifica* rationale for broadcast indecency regulation, distinguishing other communicatory mediums from broadcasting on the basis of the availability of effective, less-restrictive alternatives[205] and the level of affirmative activity needed to access the programming.[206]

Some scholars argue that *Pacifica* is in tension with the rest of the Supreme Court's First Amendment jurisprudence,[207] because in most other contexts the Court has put the burden on the recipient of offensive yet protected speech to weather the first blow of the offensive message and then

199. *See* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992).

200. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); *cf.* Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980).

201. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (holding that obscenity may be wholly prohibited); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the government may proscribe speech that incites immediate lawless action); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that the government may forbid speech calculated to provoke a fight).

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

203. *See id.* at 748-51.

204. *See, e.g.*, Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (Internet); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (cable); *Sable*, 492 U.S. at 115 (telephone).

205. *See supra* notes 83-85, 95, 100 and accompanying text.

206. *See supra* notes 42-43 and accompanying text.

207. *See* Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L.J. 245, 249 (2003) (arguing that "the current regulatory approach to broadcasting represents a constitutional anomaly").

avert her eyes to avoid further bombardment.[208] For example, in *Erznoznik v. City of Jacksonville*,[209] the Court invalidated an ordinance which restricted outdoor movie theaters from showing nudity.[210] In *Cohen v. California*,[211] the Court reversed the conviction of an individual who had been convicted for wearing a jacket emblazoned with the words "Fuck the Draft" in the public hallway of a county courthouse where women and children were present.[212] Sections II.A.1 and II.A.2 evaluate the adequacy of the Supreme Court's "privacy of the home" and "protection of children" rationales in justifying this disparate treatment of indecent, nonobscene speech in broadcasting.

1. Broadcasting as "Invader" of the Privacy of the Home

Some commentators view the *Pacifica* Court's reliance on the privacy of the home in distinguishing broadcasting from other circumstances as being consistent with an established principle that "[t]here . . . is no right to force speech into the home of an unwilling listener."[213] In *Frisby v. Schultz*[214] for example, the Supreme Court upheld an ordinance which it construed as banning targeted protests outside of residences due to the privacy right of residents to be free from unwanted speech while in their homes.[215] Justice Sandra Day O'Connor, writing for the majority, stated that "protection of the unwilling listener" is an "important aspect of residential privacy."[216] Citing *Pacifica* favorably, O'Connor noted that "individuals are not required to welcome unwanted speech into their own homes" and that "the government may protect this freedom."[217] O'Connor also pointed to *Rowan v. United States Post Office Department*,[218] a case in which the Court upheld a law enabling householders to prevent mailers of materials that the householder deems sexually provocative from sending any future mailings to the householder,[219] as supportive of this principle.[220] Under

208. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) ("[T]he burden normally falls upon the viewer to 'avoid further bombardment of [her] sensibilities simply by averting [her] eyes.'") (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

209. *Id.*

210. *See id.* at 217.

211. *Cohen*, 403 U.S. at 15.

212. *See id.* at 25. In the context of offensive mailings, the Court has noted that "the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'" Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (quoting Lamont v. Comm'r. of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967)).

213. Frisby v. Schultz, 487 U.S. 474, 485 (1988).

214. *Id.* at 474.

215. *See id.* at 486.

216. *Id.* at 484.

217. *Id.* at 485.

218. 397 U.S. 728 (1970).

219. *See id.* at 738.

220. *See Frisby*, 487 U.S. at 485. In support of the proposition that the government may protect a citizen's right to be free from unwanted speech when in their home, Justice O'Connor also cited *Kovacs v. Cooper*, 336 U.S. 77, 86-88 (1949), a case in which the Court

this view of residential privacy, the fact "[t]hat we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere."[221]

On the other hand, the First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech."[222] Accordingly, some argue that the privacy of the home rationale is an inapt justification for government regulation in the context of broadcasting because of the availability of a self-help remedy that enables householders to avoid objectionable speech.[223] Unlike other intrusions of unwanted speech into the home, the radio and television can simply be turned off.[224] Perhaps Justice William J. Brennan best encapsulated this argument in his *Pacifica* dissent, where he noted:

> Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations, or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.[225]

Still others argue that the Court's reliance on the privacy of the home is misguided[226] because the complainant in *Pacifica* was not in a home at the time that he heard the program.[227] In fact, the complainant was actually "in a car[,] where an adult is normally present and where the Court, in other contexts, consistently has maintained that the expectation of privacy is considerably less than in the home."[228] Professor Laurence H. Winer contends that the Court's decision in *Pacifica* thus leads to an "absurd conclusion."[229]

> Complainant and his son were entitled to be completely protected from even momentary exposure to the Carlin monologue on the car radio; immediately changing stations or turning off the radio was not a sufficient remedy. Yet, if they stopped in front of Cohen as he crossed the street wearing his emblazoned jacket, or if they drove past Erznoznick's [sic] outdoor movie theater, the first amendment would demand that they just

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upheld a ban on the use of sound amplifying equipment on city streets in order to protect unwilling listeners who were otherwise helpless to avoid an invasion of their privacy.

221. *Frisby*, 487 U.S. at 484 (quoting *Rowan*, 397 U.S. at 738).

222. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (quoting Consol.Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 539, 542 (1980)).

223. *See* Laurence H. Winer, *The Signal Cable Sends, Part II—Interference from the Indecency Cases?*, 55 Fordham L. Rev. 459, 498-99 (1987).

224. *See id.* (citing Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974)).

225. *FCC v. Pacifica Found.*, 438 U.S. 726, 765-66 (1978) (Brennan, J., dissenting).

226. *See* Winer, *supra* note 223, at 498 ("The Court's discussion of the pervasiveness of radio, particularly in the privacy of one's home, is . . . deficient.").

227. *See id.* at 500.

228. *Id.* at 500-01.

229. *See id.* at 501.

avert their eyes or otherwise accommodate themselves to the unwanted offense.[230]

2. Accessibility of Broadcasting to Children as Compared with Other Media

Some commentators have argued that *Pacifica* is inconsistent with the Court's treatment of other media.[231] Professor Christopher S. Yoo, for example, argues that broadcasting is not readily distinguishable from other media on the grounds of pervasiveness and confronting the citizen in the privacy of the home.[232] On the contrary, Yoo asserts that "books and the mail[] are similarly pervasive and enter the home as easily, and yet the Court had previously struck down attempts to ban offensive speech transmitted over those media."[233]

Similarly, Professor Lucas A. Powe, Jr., argues that broadcasting is no more accessible to children than newspapers, magazines, and mail.[234] Moreover, Powe asserts that the implication of the Supreme Court's use of the unique accessibility of broadcasting to children as a justification for broadcast indecency regulation is that adults may not hear what is unfit for children.[235] This is problematic in light of the Supreme Court's reasoning in *Butler v. Michigan*,[236] a case where the Court, in reversing a conviction under a law that prohibited making available to the general public materials that could be harmful to minors, noted that the government may not, in its efforts to protect children, "reduce the adult population . . . to reading only what is fit for children."[237] Justice Byron R. White, however, argues that *Pacifica* does not offend the principle expounded in *Butler*, because the statute at issue in *Butler* amounted to a total ban on the sale of indecent books, whereas the broadcast indecency regulation endorsed by the Court in *Pacifica* applies only during certain times of the day when children are likely to be in the audience.[238]

Consistent with the analyses of Professors Yoo and Powe, the Supreme Court has refused to extend the reduced First Amendment protection that

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230. *Id.*

231. *See* Howard M. Wasserman, *supra* note 116, at 1192 ("[T]he rationales outlined in *Pacifica* do not justify the lesser protection given to broadcasting compared with other media . . . .").

232. *See* Yoo, *supra* note 207, at 294.

233. *Id.* (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (mail); Butler v. Michigan, 352 U.S. 380 (1957) (books)); *see also* Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming 220 (1994); Lucas A. Powe, Jr., American Broadcasting and the First Amendment 210 (1987); Matthew L. Spitzer, Seven Dirty Words and Six Other Stories 120 (1986); Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1496 (1995).

234. *See* Powe, *supra* note 233, at 219-20.

235. *See id.*

236. 352 U.S. 380 (1957).

237. *Id.* at 383.

238. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989).

indecency receives in broadcast media to other media, such as the Internet, cable, or telephone.[239] The Court has distinguished broadcasting based on the level of affirmative steps needed to access broadcast media as compared to other analogous media,[240] as well as a lack of less restrictive alternatives to broadcast regulation.[241]

The protection of children is commonly regarded as a compelling government interest.[242] Avoiding the exposure of children to indecent sexually explicit material has been found to implicate this interest.[243] The Supreme Court has found that it is less likely that children will be unwillingly or unwittingly subjected to sexually explicit, indecent content via telephone message or the Internet than broadcasting because a child has to take more affirmative steps in order to access indecent content via these mediums.[244] Additionally, the Court has noted that there are more reliable systems in place in the telephone, Internet, and cable mediums to prevent minors from accessing inappropriate material.[245] Indecent telephone message providers can prevent access by minors through credit card verification and access codes.[246] Filtering and blocking software can protect against indecent web content.[247] Cable television providers can block cable television stations at the request of the subscriber.[248] While all of these media are amenable to various preventative measures, the Supreme Court has not yet found that less restrictive protections are effective against indecent programming in broadcast media.[249]

Having examined the arguments for and against the general justification for content-based regulation of broadcast indecency, this Note turns next to

239. *See* cases cited *supra* note 204.

240. *See supra* notes 42-43 and accompanying text.

241. *See supra* notes 39, 83-85, 95, 100 and accompanying text.

242. *See, e.g.*, *Sable*, 492 U.S. at 126 ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); New York v. Ferber, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." (internal quotation omitted)); Ginsberg v. New York, 390 U.S. 629, 640 (1968) ("[T]he State has an interest 'to protect the welfare of children.'" (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944))).

243. *See Sable*, 492 U.S. at 126 ("This interest [in protecting the physical and psychological well-being of minors] extends to shielding minors from the influence of literature that is not obscene by adult standards.").

244. *See* Reno v. ACLU, 521 U.S. 844, 854 (1997) ("Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." (internal quotations omitted)); *Sable*, 492 U.S. at 128 ("[Telephone] requires the listener to take affirmative steps to receive the communication . . . . Unlike an unexpected outburst on a . . . broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.").

245. *See* cases cited *supra* note 204.

246. *See Sable*, 492 U.S. at 128.

247. *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2792 (2004).

248. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000).

249. *But see* Yoo, *supra* note 207, at 304-05 (noting that widespread deployment of the V-Chip will render all content-based regulation of broadcast television unconstitutional).

the more specific means through which the FCC has implemented its broadcast indecency regulations.

B. *Criticisms of the Current Broadcast Indecency Regulatory Regime*

The Supreme Court's continued adherence to a "broadcasting is different" approach to indecency regulation has granted the FCC a fair amount of latitude in its enforcement of broadcast decency standards. The FCC's chosen regulatory practices, however, remain the subject of considerable criticism, primarily on the grounds that (1) the broadcast indecency standard is impermissibly vague, providing insufficient guidance to broadcasters on how to avoid sanctions, (2) excessive penalties for violations lead to media self-censorship, and (3) the broadcast indecency standard is overbroad and regulates speech that is constitutionally protected.

1. Vagueness of the FCC's Generic Indecency Definition

The vagueness doctrine requires that regulations be sufficiently clear to avoid discriminatory and arbitrary enforcement.[250] In order to avoid being found void for vagueness, a regulation must be tailored so that it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[251] A vagueness attack on the indecency standard was not reached by the Supreme Court in *Pacifica*, although the issue was raised in an amicus brief.[252] The Supreme Court's silence on the matter was subsequently interpreted by the U.S. Court of Appeals for the D.C. Circuit as dispositive of the issue in *Action for Children's Television v. FCC*.[253]

In contrast, the Supreme Court did reach the issue of vagueness in its plurality decision in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[254] However, the Court held that the statute there at issue—the language of which was identical to that of the FCC indecency definition—was not unconstitutionally vague.[255] The plurality's cursory analysis of the matter relied on the legislative history of the statute, which indicated that the term "patently offensive" referred to pictures of oral sex, bestiality, and rape.[256] The plurality noted that the statute's language did not refer to scientific or educational programs "unless done with a highly

250. *Cf.* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)) (vague laws may lead to arbitrary enforcement); Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (uncertainty may perniciously chill speech).

251. *Grayned*, 408 U.S. at 108.

252. *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1338 n.9 (D.C. Cir. 1988).

253. *Id.* at 1339 ("[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction.").

254. 518 U.S. 727 (1996).

255. *See id.* at 754.

256. *See id.* at 752.

unusual lack of concern for viewer reaction,"[257] and cited *Pacifica* for the notion that what is patently offensive depends on context.[258]

The Court again addressed the vagueness question in *Reno v. ACLU*,[259] this time arriving at a different conclusion. The Court invalidated provisions of the CDA that criminalized the transmission or display of "indecent" and "patently offensive" material via the Internet.[260] The Court held that the statute's language—which was essentially identical to the FCC's indecency definition—was unconstitutionally vague[261] and would impermissibly chill constitutionally protected speech, a result that was not justified by the government's interest in protecting children.[262]

The Court did not, in either *Denver Area* or *Reno*, provide any examples of what might be patently offensive in particular contexts or address any of the language or content typically at issue in FCC enforcement actions. For guidance on these matters, broadcasters must rely on the FCC's administrative determinations.

The FCC has not provided a bright line for broadcasters to know what is, and is not, patently offensive. Rather, the FCC has relied on the "highly fact-specific"[263] nature of indecency determinations and has stressed that these determinations are "necessarily made on a case-by-case basis,"[264] taking into account multiple variables such as "whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value."[265]

Some scholars argue that the FCC's indecency standard is impermissibly vague.[266] Professor Jonathan Weinberg, for example, asserts that the FCC's approach to indecency determinations "maximizes the agency's discretion and minimizes the predictability of its decision-making,"[267] thereby ignoring the concerns underlying the Court's vagueness jurisprudence.[268] Judge Wald argued in her dissenting opinion in *Action for Children's Television v. FCC*[269] that "broadcasters have next-to-no

257. *Id.*
258. *See id.*
259. 521 U.S. 844 (1997).
260. *See id.* at 858-59.
261. *See id.* at 874.
262. *See id.* at 875.
263. Liability of Sagittarius Broad. Corp., 7 F.C.C.R. 6873, 6874 (1992).
264. *Id.*
265. *Golden Globes II*, *supra* note 126, at 4978 (quoting *2001 Policy Statement*, *supra* note 5, at 8003). Other variables considered by the Commission in making indecency determinations include "the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities," and "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." *Id.*
266. *See* Jonathan Weinberg, *Vagueness and Indecency*, 3 Vill. Sports & Ent. L.J. 221, 257 (1996) ("It seems unlikely that FCC indecency regulation could satisfy the requirements of precision and predictability imposed by ordinary First Amendment vagueness doctrine.").
267. *Id.* at 228 (citing Action for Children's Television v. FCC, 58 F.3d 654, 684 (D.C. Cir. 1995) (Wald, J., dissenting)).
268. *Id.*
269. 58 F.3d at 654.

guidance in making complex judgment calls. Even an all clear signal in one case cannot be relied upon by broadcasters 'unless both the substance of the material they aired and the context in which it was aired were substantially similar.'"[270] Thus, Wald continued, "conscientious broadcasters and radio and television hosts seeking to steer clear of indecency face the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the Commission which side of the line their program will fall on."[271]

Beyond attacks on the FCC's indecency standard, some contend that the boundaries of permissible broadcasting are further obfuscated by the FCC's recent redefinition of profanity in its *Golden Globes II* decision. Professor Clay Calvert suggests that by redefining profanity as vulgar and coarse language that is as highly offensive as the "F-Word," without providing more detailed factors for determining whether language crosses the profanity threshold,[272] the Commission "create[d] substantial dangers of vagueness and vast discretion that may result in possible uneven and subjective enforcement of a federal law affecting a constitutional right."[273] At the very least it provides broadcasters with even less certainty as to what constitutes actionable broadcast content,[274] thereby facilitating the proliferation of media self-censorship to avoid penalty.[275]

Another criticism of the current broadcast indecency regulatory regime is that increasingly high penalties for violations will lead to even greater incidences of self-censorship, a concern to which this Note now turns.

2. Increased Penalties May Pose Heightened Risk of Ex Ante Self-Censorship

In *Reno v. ACLU*,[276] the Supreme Court noted that vagueness of a criminal statute created an increased deterrent effect and posed "greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area*."[277] The Court reasoned that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[278] The

270. *Id.* at 685 (Wald, J., dissenting) (quoting Liability of Sagittarius Broad. Corp., 7 F.C.C.R. 6873, 6874 (1992)).

271. *Id.*

272. *See supra* text accompanying notes 149-51.

273. *See* Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 Seattle U. L. Rev. 61, 75 (2004).

274. *See id.* at 87 (noting that it is not clear whether the FCC's new profanity standard will be duplicative of the existing indecency standard, or sweep more broadly, encompassing language that does not currently rise to the level of actionable indecency).

275. *See id.* at 64.

276. 521 U.S. 844 (1997).

277. *Id.* at 872 (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996)).

278. *Id.* (citing Dombrowski v. Pfister, 380 U.S. 479, 494 (1965)).

Court's reasoning appears to correlate the severity of sanctions with a deterrent effect on protected speech. If the broadcast indecency standard were vague, one might infer from this reasoning that higher penalties for violations of the indecency standard would lead to a greater deterrent effect on protected speech. Commentators argue that the combination of the FCC's new enforcement policies and its imposition of increasingly hefty fines for violations results in substantial chilling effects on protected speech, specifically, ex ante self-censorship by the broadcast media.[279] Moreover, some suggest that this chilling effect "will be magnified if Congress approves the proposed increases in the maximum fine for indecency violations."[280]

Proponents of this view point to recent developments in the broadcast industry that suggest that self-censorship is taking root.[281] For example, the Rocky Mountain News reported in March 2004 after interviewing a number of radio industry officials that there has been "a wave of self-censorship on a national and local level."[282] Many insiders in the television industry reportedly "fear the onset of a kind of television self-censorship, in which writers—anticipating resistance from standards and practices departments, which are anticipating inquiries from the Federal Communications Commission—don't even pitch their most challenging shows or plot lines."[283] If the fears of these industry insiders are any indication, commentators' concerns about media self-censorship do not appear to be unfounded.

Beyond criticizing current regulations as self-censorship inducing, some detractors of the current regulatory regime argue that the FCC's indecency definition is impermissibly overbroad.

3. Over-Breadth of the FCC's Generic Indecency Definition

The Supreme Court has been careful to emphasize the narrowness of its holding in *Pacifica*.[284] Some commentators argue that, construed narrowly, *Pacifica* does not support the FCC's generic definition of indecency, but

279. *See* Calvert, *supra* note 273, at 64-65 (arguing that a negative ramification of the FCC's new response to broadcast indecency may be a chilling effect and a new wave of media self-censorship, and that evidence suggests this already is taking place); Fallow, *supra* note 153, at 26 (arguing that recent acts of self-censorship on the part of the media are driven in large part by the FCC's increased enforcement activity).

280. Fallow, *supra* note 153, at 30.

281. *See supra* notes 167-97 and accompanying text. For an extensive listing of recent incidences of media self-censorship driven by fears of FCC enforcement action, see *The Decency Debate: Pulled into a Very Wide Net: Unusual Suspects Have Joined the Censors' Target List, Making for Strange Bedfellows (Wait—Can We Say That?)*, L.A. Times, Mar. 28, 2004, at E26.

282. *See* Mark Brown, *No Evil: Broadcast Words, Actions Stir Efforts To Clean Up 'Dirty' Airwaves*, Rocky Mtn. News (Denver), Mar. 27, 2004, at 1D.

283. *See* Robson, *supra* note 183, at 27.

284. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978); *see also* Sable Comm'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (emphasizing the narrowness of *Pacifica*'s holding); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (same).

rather only supports proscribing the radio broadcast of repeated use of the seven words at issue in *Pacifica* during the daytime.[285] For example, Professor Howard M. Wasserman[286] writes that "*Pacifica* was an emphatically narrow holding that should be limited to the facts of that case—those seven words in a weekday afternoon radio broadcast."[287] According to Lucas A. Powe, Jr., "It takes a lot of extrapolation to move from *Pacifica* to a full-blown theory of regulation."[288]

One might view these arguments as raising over-breadth concerns about the FCC's generic indecency definition. The over-breadth doctrine requires that a regulation not be overly broad in its application.[289] "A statute is overbroad if it . . . sweeps within its coverage speech that is constitutionally protected."[290] Reading *Pacifica* narrowly might suggest that the FCC's generic definition of broadcast indecency is overbroad to the extent that it allows the FCC to regulate speech beyond the specific facts of *Pacifica*.

The above criticisms highlight some potential shortcomings of the FCC's broadcast indecency policies, and beg the question of whether another approach would be preferable. Part II.C explores the viability of a market-driven approach to broadcast indecency as an alternative to the current FCC indecency regime.

C. *A Deregulated Marketplace Approach to the Broadcast Indecency Problem*

Some commentators argue that "the Commission should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace."[291] Indeed, in advocating the deregulation of the FCC's broadcast licensing procedures, Mark S. Fowler, former Chairman of the FCC, and Daniel L. Brenner[292] argued that "[t]here is every reason to believe that the marketplace, speaking through advertisers, critics, and self-selection by viewers, provides an adequate substitute for Commission involvement in protecting children and adults

285. *See* Wasserman, *supra* note 116, at 1204; *see also* Thomas G. Krattenmaker & Marjorie L. Esterow, *Censoring Indecent Cable Programs: The New Morality Meets the New Media*, 51 Fordham L. Rev. 606, 628 (1983) ("The Court's opinion is, in fact, narrowly confined to cases concerning both the precise language conveyed and the particular medium of communication . . . . *Pacifica* is about dirty words on radio.").

286. Professor Wasserman is an Assistant Professor of Law at Florida International University College of Law, and holds a J.D. from Northwestern University School of Law.

287. Wasserman, *supra* note 116, at 1204 (internal citations omitted); *see also* C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 Vill. Sports & Ent. L.J. 45, 45-46 (1996) (noting the narrowness of the *Pacifica* decision).

288. Powe, *supra* note 233, at 212.

289. James V. Dobeus, *Rating Internet Content and the Spectre of Government Regulation*, 16 J. Marshall J. Computer & Info. L. 625, 637 (1998) (citing Broadrick v. Oklahoma, 413 U.S. 601, 612 (1979)).

290. *Id.* (citing *Broadrick*, 413 U.S. at 612-13).

291. Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 210 (1982).

292. Daniel L. Brenner is the Legal Assistant to the former Chairman of the FCC.

from television's 'captive' quality."[293] They went on to note that "those who would justify regulation by pointing to a program's potential to offend viewers stand the first amendment on its head."[294]

Fowler and Brenner's arguments were directed at content evaluation processes involved in the FCC's "Trusteeship Model" broadcast licensing procedures.[295] However, one might analogize their reasoning to the context of indecency regulation by arguing that the current broadcast indecency regulatory regime is unnecessary given the market-driven nature of both the television and radio broadcasting media. While some federal guidelines may be necessary to set the broad parameters of acceptable broadcasting standards, this reasoning would suggest that market forces would adequately serve the purpose of fine-tuning these boundaries. Viewers will not watch programs that they find objectionable, nor, presumably, will they allow their children to do so. Broadcast networks, which are driven almost entirely by advertising revenue, have an exceedingly strong incentive to maximize consumption of their programming, and consequently to not alienate their audience with objectionable content.[296] Moreover, "there is no reason to assume that the [FCC] is a better clearinghouse for passing judgment on programs than advertisers or the subscribers who support them or the viewers who ultimately decide whether to watch their programs."[297] From this perspective, an overactive regulatory body would be an unnecessary use of administrative power and funding.

There is an argument that markets respond to consumer preference rather than voter preference,[298] suggesting that market forces may be inadequate to regulate broadcast indecency. This argument reasons that people behave differently as consumers than as voters.[299] The implication of this reasoning when analogized to the context of broadcast indecency is that people may watch or listen to indecent broadcasts which offend them, although they would prefer to have the indecency proscribed by regulation. Accordingly, market-based indecency regulation would be ineffective under this view because it would only accommodate citizens' consumption preferences and not necessarily their moral and ideological preferences.

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293. Fowler & Brenner, *supra* note 291, at 229.

294. *Id.*

295. *See id.* at 213. The Trusteeship Model is a system by which "exclusivity to a radio frequency [is] assigned by the Commission on the amorphous 'public interest' standard." *Id.* Specifics of this model are beyond the scope of this Note.

296. *See id.* at 230 ("In a free marketplace, whether broadcast or print, advertisers and subscribers will not eagerly support materials, whether delivered on the air or on the doorstep, that are as likely to offend as to attract potential customers.").

297. *Id.*

298. *See* Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 9-10 (2000); *see also* Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 77 (1979); Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 179 (1995); Cass R. Sunstein, Democracy and the Problem of Free Speech 245-46 (1995); Cass R. Sunstein, Free Markets and Social Justice 20-24, 44-45 (1997).

299. *See* Greene, *supra* note 298, at 9-10.

III. BROADCAST INDECENCY REGULATION IS ULTIMATELY INCOMPATIBLE WITH THE FIRST AMENDMENT

This Note has outlined the FCC's approach to broadcast indecency regulation, as well as criticisms revealing potential shortcomings of this approach versus regulation alternatives. Part III.A now argues that despite doctrinal weaknesses, the *Pacifica* rationale for treating broadcasting differently from other media is still compelling. Part III.B then argues that the current broadcast regulatory regime is not valid, however, due to flaws in the FCC's broadcast indecency policies. Lastly, Part III.C proposes that market-driven indecency regulation is a preferable alternative to the current FCC broadcast indecency regime.

A. *Continuing Validity of the Pacifica Rationale*

While the "privacy of the home" argument relied upon in *Pacifica*[300] is certainly not without merit, the Court takes this reasonable concept to unreasonable extremity in its application in *Pacifica*. The Court's reliance on the privacy of the home is more persuasive in the context of targeted picketing at issue in *Frisby v. Schultz*,[301] than when employed in the context of broadcasting. The intrusion inflicted upon a resident by picketers is far more invasive than that inflicted upon a radio listener who momentarily encounters an objectionable message in the time between turning on her radio and changing the station. The radio, unlike picketers, can simply be turned off. Moreover, broadcasting is not readily distinguishable from other media on the grounds that it invades the privacy of the home,[302] and the Supreme Court has refused to extend the reduced First Amendment protection that indecency receives in broadcast media to other media.[303] The foregoing seriously calls into question the continued validity of the "privacy of the home" rationale in supporting reduced First Amendment protection for indecency in broadcast media.

Despite the weakness of the "privacy of the home" rationale, the *Pacifica* Court's "protection of children" rationale is still compelling.[304] There is still a need for outward boundaries to be set in broadcast media to avoid the exposure of children to indecent sexually explicit content. Broadcast media lacks effective, less-restrictive alternatives for protecting minors from exposure to indecent content.[305] In this regard, broadcast media is still unique and continues to warrant lesser First Amendment protection with regard to indecency, as prescribed by the Supreme Court in *Pacifica*.

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300. *See supra* Parts I.A, II.A.1.
301. *See supra* notes 213-17 and accompanying text.
302. *See supra* notes 232-33 and accompanying text.
303. *See supra* note 239 and accompanying text; *see also supra* text accompanying notes 240-41.
304. *See supra* notes 242-49 and accompanying text.
305. *See supra* text accompanying note 249.

B. *FCC's Broadcast Indecency Policies Are Irreparably Flawed*

While the *Pacifica* rationale is still valid, the FCC's indecency standard is impermissibly vague, and therefore invalid. The vagueness of the FCC's indecency definition,[306] combined with the FCC's levying of unprecedented ex post fines and the looming threat that Congress will increase penalties even further, will ultimately chill protected speech.[307] Indeed, considerable evidence suggests that such a chill has begun to manifest. Broadcasters are censoring themselves ex ante out of fear of receiving ex post sanctions under this less than clear standard.[308]

The FCC has inserted an additional layer into the regulatory process by providing overly strong incentives for speakers to censor themselves. In doing so, the FCC regulatory establishment has effectively circumvented the rationale behind 47 U.S.C. § 326, which was presumably to give the FCC enough power to punish egregious abuses of broadcasting privileges through fines, but not to allow them to review and censor broadcasts before they are aired. By imposing increasingly large fines[309] and broadening the category of legally actionable speech,[310] the FCC has realized the practical equivalent of censoring broadcasts before they are aired, perhaps curtailing speech even further than if they were allowed to censor broadcasts themselves. This effect is exacerbated by congressional attempts at substantially increasing the maximum statutory penalty.[311] The end result borders on compulsion. The fear of receiving crippling fines leads networks to take "a better safe than sorry" approach.[312] This results in over-censorship which severely limits the marketplace of ideas in broadcast media to that which is determined to be acceptable to socially conservative constituents of the incumbent administration and its co-partisans in Congress and the FCC. In the words of Justice White, "Free speech may not be so inhibited."[313]

In addition to being vague, the FCC's indecency standard is also overbroad. If *Pacifica* supports a generic indecency definition,[314] the FCC's new indecency standard, as announced in its *Golden Globes II* decision,[315] oversteps the bounds established in *Pacifica* by ruling that an isolated utterance of the word "fuck," even as an adjective, constitutes actionable indecency.[316]

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306. *See supra* Part II.B.1.
307. *See supra* Part II.B.2.
308. *See supra* Part I.D.
309. *See supra* notes 152-54, 159-63 and accompanying text.
310. *See supra* notes 140-51 and accompanying text.
311. *See supra* notes 105-12 and accompanying text.
312. *See supra* Part I.D.
313. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).
314. *See supra* Part II.B.3.
315. *See supra* text accompanying notes 140-47; *see also Golden Globes II*, *supra* note 126.
316. *See supra* notes 142-44, 148 and accompanying text.

As noted in *Denver Area*, "what is 'patently offensive' depends on context (the kind of program on which it appears), degree (not 'an occasional expletive'), and time of broadcast (a 'pig' is offensive in 'the parlor' but not the 'barnyard')."[317] The *Pacifica* Court, in emphasizing the narrowness of its holding, expressly noted that it did not hold that an occasional expletive in all contexts constituted actionable indecency, but rather limited its holding to the repeated use of the curse words at issue in that case.[318] By modifying its indecency standard and making the occasional expletive actionable—as it did with Bono's use of the "F-Word" at the 2003 Golden Globes—the FCC has gone beyond the boundaries delineated by the Court in *Pacifica*. The FCC's new indecency standard is thus overbroad, impermissibly restricting speech that is within the protection of the First Amendment in the context of broadcasting, even after *Pacifica*. Without *Pacifica* as justification for its new tack, the FCC's *Golden Globes II* indecency standard cannot pass constitutional muster.

C. *Allow Market Forces to Regulate*

Establishing and enforcing a standard of broadcast indecency is an inherently subjective endeavor that is fraught with both theoretical and pragmatic difficulties. Allowing market forces to regulate broadcast indecency would thus be more viable than the existing FCC broadcast indecency regulatory regime.[319] It would be more efficient to allow market forces to regulate broadcast content with the FCC imposing reasonable fines only for violations of the obscenity standard. Despite the large number of parties involved, the transaction costs of achieving a balance between desirable and objectionable content are very low due to existing ratings systems used for the broadcast advertising market. Broadcasters already have the technology in place to effectively monitor audience reaction to aired content. If a broadcaster airs a program, the content of which too much of its audience finds to be objectionable, the audience for the program will dwindle. A smaller audience would reduce advertisers' willingness to pay for spots during the program, thereby internalizing externalities involved in a network's evaluation of programming options. Thus, broadcast networks are best positioned to evaluate where the lines should be drawn, according to how many viewers or listeners tune in.

Criticism of the adequacy of market-based broadcast deregulation, founded on the notion that markets respond to consumer preference but not voter preference,[320] are less than compelling. The problem with this argument is that even if broadcast content is regulated to conform to people's preferences as voters, cable television will still offer content that

317. Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 752 (1996) (citing FCC v. Pacifica Found., 438 U.S 726, 750 (1978)).

318. *Pacifica*, 438 U.S. at 750 ("We have not decided that an occasional expletive . . . would justify any sanction . . . .").

319. *See supra* Part II.C.

320. *See supra* notes 298-99 and accompanying text.

appeals to people's preferences as consumers. If broadcast media becomes over-sanitized, the market will shift further toward cable, thereby threatening the continued economic viability of free broadcasting.

This is precisely the effect that the "must-carry" regulations at issue in *Turner Broadcasting System, Inc. v. FCC*[321] were enacted to curtail—a shift in market share from broadcast to cable leading to an erosion of the advertising revenue base that sustains free local broadcast television.[322] Congress was there concerned that "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[323] The Supreme Court acknowledged this concern when it concluded that "preserving the benefits of free, over-the-air local broadcast television . . . is an important governmental interest."[324]

This threat to free broadcast television is a very real possibility that may ensue from the FCC's new stringent enforcement policies. A number of popular television shows currently in circulation are on cable networks, where producers have the creative freedom to pursue edgy concepts and plotlines free from the censor's constrictive grasp. As cable secures more television market share due to its unconstrained ability to produce novel and compelling storylines, more and more advertising revenue will be diverted away from broadcast networks to cable networks, eventually threatening the continued economic viability of free broadcast television so valued by Congress in *Turner*.

CONCLUSION

Although there is a valid justification for allowing regulation of indecency in broadcasting—protecting children—there is a lack of a viable method by which to do so. It does not seem possible to create an indecency definition that is sufficiently narrow and specific. To avoid vagueness, one might argue for a bright-line indecency standard that prohibits the broadcast of certain specific words and body parts in all circumstances. The inflexibility of such an approach is immediately apparent. It would lead to far stricter standards than are currently in place. Under such a system, we would not, for example, be able to broadcast full frontal nudity during the last scene of *Schindler's List*,[325] in which Holocaust victims are lead to gas chambers—content that the FCC has found not to be actionably indecent,[326] nor could we show *Saving Private Ryan* with its frequent use of expletives such as the F-Word.[327]

321. 512 U.S. 622, 626 (1994).
322. *See id.* at 634.
323. *Id.* (quoting the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(16), 106 Stat. 1460 (1992)).
324. *Id.* at 662-63.
325. Schindler's List (Universal Pictures 1993).
326. *See* WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838 (2000).
327. *See supra* note 192 and accompanying text.

The alternative to a bright line rule is a generic contextual rule, as we currently have in place, which instills in an enforcement agency the discretion to decide what is and is not indecent, pursuant to increasingly amorphous standards. The problem with such an approach is that any contextual definition will be plagued with vagueness and over-breadth, due to the inherently subjective nature of such a standard. This Note accordingly argues that in lieu of a viable standard, the government should not regulate broadcast indecency. Market forces will best serve the function of regulating content that is offensive but not obscene. The FCC's content regulation function should be relegated to enforcement of the obscenity standard.