

Examining the FCC’s Indecency Regulations in Light of Today’s Technology

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I. INTRODUCTION

“A babe in a house is a well-spring of pleasure, a messenger of peace

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and love: A resting place for innocence on earth; a link between angels and men.”¹ With a prevalent attitude in this country that children are innocent beings, it is not surprising that the FCC used the protection of children as a reason to regulate indecency in the broadcast media through legislation such as the Communications Act of 1934.² By keeping the airwaves free from indecent material, children would, in theory, be able to retain the innocence that they are seen to possess.

While these FCC regulations have evolved over time, the recent advances in technology have made these regulations infeasible and illogical. If the goal is still to protect children from indecent material that is broadcast over the airwaves, something in the system needs to change, because children have multiple avenues through which they can access material that is broadcast at all hours of the day. Deregulating appears to be the most practical and effective option that is currently available, and is an effort that the FCC should consider undertaking.

Along with providing a different proposition for the future of these ineffective broadcast regulations, this Note will examine how the perception of children as innocent beings led to the regulation of indecent broadcast material. It will also look at the evolution of the definition of indecency, including a look specifically at the Supreme Court decisions in the 1978 case of *Federal Communications Commission v. Pacifica Foundation*,³ the 2009 decision remanding *Federal Communications Commission v. Fox Television Stations*⁴ to the Second Circuit, and that 2010 decision by the Second Circuit.⁵ Finally, the current advances in technology, including television’s availability on the Internet and digital video recorders (DVR), will be discussed. These advances have made children’s access to broadcast media much easier, thus making the indecency regulations no longer feasible in today’s increasingly technological world.

A recommendation for the future of indecency regulations will also be suggested, so that the law more realistically aligns with the technology available today. This proposal is a move toward complete deregulation of broadcast television in regard to indecent material. The regulations are no longer effective, and have the potential to be costly to both the networks—if they keep being the subject of litigation and fines—and to the public as a violation of the First Amendment. By deregulating, the networks would

1. MARTIN F. TUPPER, PROVERBIAL PHILOSOPHY 167–68 (25th ed. 1856).

2. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.); see also 18 U.S.C.A. § 1464 (West 2010); 47 U.S.C.A. § 303 (West 1997).

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

4. FCC v. Fox TV Stations, 129 S. Ct. 1800 (2009).

5. Fox TV Stations, Inc. v. FCC, 613 F.3d 317(2d Cir. 2010).

have greater freedom to broadcast according to the public's interests and what they deem to be appropriate without fear of penalties.

Further, giving the networks more freedom will benefit the networks themselves and the public that wants access to this type of material; but it will not cause any great harm to anyone. The material that is made available on television is not likely to change in a drastic way, since the networks would lose many viewers if their broadcasts became too indecent for the public as a whole. Further, children would not be any more harmed by the material that is broadcast, because, in addition to it likely being very similar in nature to what is currently being broadcast by the networks—children are going to gain access to this material through DVR and television on the Internet anyway. It would therefore be in all parties' best interest to deregulate this aspect of broadcast television.

II. BACKGROUND

While others have addressed the issues that are present with the FCC indecency regulations, the suggestion of deregulation has rarely been seriously considered.⁶ The problems that are inherent in indecency regulations have been the subject of past scholarship, however, with many people recognizing the ideas on which this Note relies in making its proposal for a change of the indecency regulations: the ineffectiveness of the regulations, the advances in television technology, and the potential First Amendment complications.

Adam Candeub, for one, recognizes that broadcast indecency regulations simply no longer work because they are not feasible in today's environment.⁷ He points out that the courts use the rationale of protecting children in upholding indecency regulations, but that the true motives are more political than anything else. He suggests that the regulations have been "proven [to be] unstable and highly politicized standards that do not represent a thoughtful policy to protect children or encourage a child-friendly broadcast medium."⁸

If the regulations are present for the purpose of protecting children and they are not achieving that goal, then something needs to be done to make the current system more effective. Candeub also points out particular regulatory procedures that are intended to protect children, and he describes

6. Cf. Brian J. Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown Too Big for Its Britches?*, 74 *FORDHAM L. REV.* 871, 905 (2005) (arguing that the FCC's new indecency standard is too exhaustive and that market forces should regulate instead).

7. See Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 2005 *MICH. ST. L. REV.* 911.

8. *Id.* at 919.

how they do not serve their intended purpose.⁹ Further, Candeub addresses indecency regulations, which, in addition to being politicized, are not able to appropriately respond to community standards on what type of material is appropriate for children.¹⁰ If the FCC cannot effectively reflect community standards, then, as this Note argues, it is time to let the community members themselves set the standards for what is appropriate through their power as consumers of the broadcast material.

Matthew Schneider also criticizes the current FCC regulations. He points out the problems with the indecency regulations' application to only a small minority of stations—broadcast network stations—and suggests a proposition that would make the regulations more consistent.¹¹ His suggestion is to apply the regulations to all channels so that the rationale of protecting children could possibly become a reality.¹² If all a child has to do is change the channel to access indecent material, then the FCC's policy and attempts to shield children from indecent material is not meritorious.¹³ With disingenuous motives and ineffective solutions, there seems to be an agreement that now is the time for a change in indecency regulations.

Another issue that has been the subject of past scholarship and discussion is the advance in television technology. While this Note will focus on television on the Internet and DVR, others have noted that V-chip technology or satellite television have changed the face of television broadcast regulations.¹⁴ While some technology has allowed parents to better monitor the content of the television their children watch, other technology has made indecent material more accessible to children. The technologies on which this Note focuses have also made broadcast material more easily available to children, requiring that the FCC do something to change its current policies. While some suggest stricter and more pervasive regulations,¹⁵ this Note comes to a starkly different conclusion in suggesting a more hands-off approach.

Finally, others have also considered the First Amendment implications of these broadcast indecency regulations. Schneider suggests that the indecency regulations have a negative First Amendment effect on

9. *Id.* at 915.

10. *Id.*

11. See Matthew S. Schneider, *Silenced: The Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves Is Monopolization*, 29 CARDOZO L. REV. 891 (2007).

12. *Id.* at 902.

13. *Id.*

14. See, e.g., Candeub, *supra* note 7, at 925; Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services*, 13 RICH. J.L. & TECH., no. 4 (2007).

15. See Candeub, *supra* note 7, at 914; Schwartz, *supra* note 14, at 3–4.

the American public.¹⁶ He discusses the fact that if viewers have to turn to “niche channels” in order to see the television content that they wish to see, then that is going to deprive the public of shared experiences, since not everyone will have access to those channels.¹⁷

The difficulty of creating a regulation that is in compliance with the First Amendment has also been brought up as an issue. Brian Rooder, one of the few to recommend deregulation, suggests that the indecency regulations are both vague and overly broad, and that the FCC is going to have a hard time coming up with a solution that will pass constitutional muster.¹⁸ This Note agrees with this proposition and uses it in support of the argument against implementing stricter FCC indecency regulations.

Although others have discussed these issues and made suggestions for ways in which to change indecency regulations, there has still been no effective solution created. Based on this previous scholarship, along with the recent Second Circuit decision, this Note will argue that it is time to consider a new factor for a new solution to the problem of indecency regulations. With a consensus that the regulations are not effective and pose constitutional concerns, this Note adds to the discussion of the effect of advances in technology on the rationale that regulations protect children, and suggests that the most logical and effective course of action is for the FCC to take a step back and let the market take care of the content that is broadcast over the airwaves.

III. HISTORICAL PERSPECTIVE

A. *The Perception of Children*

Historically, children have not been assumed to be innocent and in need of protection. In ancient Greece, for example, children were associated with “grossness and lewdness, not innocence,”¹⁹ and in ancient Christian societies, the common fates of children included abandonment, infanticide, and sale into brothels.²⁰ It was not until the seventeenth century that the notion of children as innocent beings was invented.²¹

16. See Schneider, *supra* note 11.

17. *Id.* at 895–96.

18. Rooder, *supra* note 6, at 904–05.

19. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 15 (Rutgers Univ. Press 2d ed. 2007) (2001).

20. *Id.* at 16.

21. *Id.* at 18–19 (“In the 1500s, [e]verything was permitted in their presence: coarse language, scabrous actions and situations.’ ‘The idea did not yet exist that references to sexual matters . . . could soil childish innocence’ because ‘nobody thought that this innocence really existed.’ It was only toward the end of the 16th century that ‘certain pedagogues . . . refused to allow children to be given indecent books any longer.’”).

In U.S. history, the first obscenity and indecency law was enacted in Massachusetts in 1711.²² This law banned “any filthy, obscene, or profane song, pamphlet, libel, or mock sermon.”²³ However, this law was mostly used for the protection of religious sermons.²⁴ It was not until 1835 that indecency was criminalized in Massachusetts in an effort to protect the children.²⁵ The law was modified from its 1711 version to criminalize indecent or obscene speech if “it ‘manifestly’ tended ‘to the corruption of the morals of youth.’”²⁶

This trend of protecting children from indecent and obscene material that began in the eighteenth century continued to evolve as the country matured. In 1842, during the height of the industrialization and urbanization of the United States, Congress passed the first federal ban on indecent and obscene material.²⁷ This ban allowed the United States Customs Service to “confiscate ‘obscene or immoral’ pictures or prints and bring judicial proceedings for their destruction.”²⁸

In 1934, the FCC took an active role in this area and began to regulate indecency in the broadcast media.²⁹ This 1934 Act stated, “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”³⁰ The language of this Act is still in effect today and governs the FCC regulations in this area.³¹

In today’s contemporary society, the Supreme Court has also spoken on this issue, deeming the protection of children to be a compelling government interest on many different occasions.³² The FCC has continued to try to shield minors from material that may be deemed obscene and indecent, and the Supreme Court has upheld these regulations, even going so far as to strengthen the regulations to punish broadcasters for even fleeting expletives.³³

22. *Id.* at 24–25.

23. *Id.* at 24 (internal quotation marks omitted).

24. *Id.* at 24–25.

25. *Id.* at 25.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.).

30. 18 U.S.C.A. § 1464 (West 2010).

31. *Id.*

32. *See, e.g.,* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803 (2000); FCC v. Pacifica Found., 438 U.S. 726 (1978).

33. *See* FCC v. Fox TV Stations, 129 S. Ct. 1800 (2009).

B. *The Transformation of the Definition of Indecency*

While Massachusetts was a trendsetter in indecency and obscenity law in the eighteenth century, the early definition of indecency was borrowed from common law in England.³⁴ This definition evolved from the definition of obscenity, and transformed over time from one that dealt with immoral and obscene material³⁵ to the present one that deals with patently offensive material that concerns “sexual or excretory activities or organs.”³⁶

In the 1957 Supreme Court case of *Roth v. United States*, the Court announced that obscene language was outside of First Amendment protection.³⁷ The Court adopted the test for obscene language as “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”³⁸ Nine years later, in 1966, this test was expanded in the case of *Memoirs v. Massachusetts*. In that opinion, the Supreme Court set out a three-part test for determining whether or not language is obscene: “(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”³⁹

While obscenity was defined, although in a very vague manner, there was yet to be an articulated definition of indecency, even though it was banned from broadcast over the airwaves by the FCC.⁴⁰ By 1970, the FCC had a definition of indecency, which was borrowed from the *Roth* and *Memoirs* definitions of obscenity. That year, a radio station in Philadelphia interviewed Jerry Garcia, lead guitarist of the Grateful Dead, during which he used profane language that the FCC deemed to be indecent.⁴¹ The definition in place at that time described indecent language as that which is “patently offensive by contemporary community standards; and . . . utterly without redeeming social value.”⁴² This definition, however, would be dramatically changed just five years later when a New York radio station aired George Carlin’s monologue, “Filthy Words,” which led to the infamous *Federal Communications Commission v. Pacifica Foundation*

34. HEINS, *supra* note 19, at 25.

35. *Id.*

36. *Action for Children’s TV v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995).

37. *See Roth v. United States*, 354 U.S. 476 (1957).

38. *Id.* at 489.

39. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

40. HEINS, *supra* note 19, at 92.

41. *Id.* at 94.

42. WUHY-FM, Eastern Educational Radio, *Notice of Apparent Liability*, 24 F.C.C.2d 408, para. 10 (1970); *see also* HEINS, *supra* note 19, at 94.

Supreme Court case.⁴³

IV. JURISPRUDENCE

A. Federal Communications Commission v. Pacifica

In 1973, George Carlin's monologue would change the face of the FCC's indecency regulation. Broadcast on the afternoon of October 30, 1973, on Pacifica's New York WBAI radio station, this monologue was used to address "contemporary society's attitude toward language."⁴⁴ For twelve minutes, Carlin commented on the words that were acceptable to use over the airwaves, and those seven words that he had decided could never be spoken over the air.⁴⁵ After listing all of those words, he continued to discuss each of the seven words in graphic detail.⁴⁶

Hearing this monologue in the car while driving with his son, John Douglas filed a complaint with the FCC six weeks later.⁴⁷ Douglas was "a member of the national planning board of the pro-censorship watchdog group Morality in Media,"⁴⁸ and his complaint was filed at a time when the FCC was "under severe pressure to 'do something'" about regulating the airwaves and ridding them of indecent material.⁴⁹ However, the FCC sat on the complaint and did not take any action until 1975.⁵⁰

When the FCC ruled on Douglas's complaint in February 1975, it felt it had the judicial support it would need to resolve Douglas's complaint in a way that would allow it to continue with its stricter regulation of the content that could be broadcast over the airwaves.⁵¹ It decided to rule on the monologue under the category of indecency, which was broader than and no longer a part of the obscenity category. All that was required for the material to be indecent was that it be patently offensive, which the FCC determined Carlin's monologue to be.⁵² There was no longer a need for the speech to appeal to the "prurient interest" or be devoid of any redeeming social value.⁵³ This gave the FCC more power to ban certain language from the airwaves that did not meet with FCC approval, but did not reach the

43. HEINS, *supra* note 19, at 95.

44. *Id.* at 97 (quoting FCC v. Pacifica Found., 438 U.S. 726, 729 (1978)).

45. *Id.*

46. *See id.*

47. *Id.* at 97.

48. *Id.* at 97.

49. *Id.* at 98.

50. *Id.* at 99.

51. *Id.*

52. *Id.*

53. *Id.* (quoting Citizen's Complaint Against Pacifica Found., Station WBAI (FM), *Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 11 (1975)).

level of legal obscenity, either.

In addition to the ruling on the Douglas complaint, other significant events in the regulation of indecency took place later in 1975. A week after the *Pacifica* decision, the broader definition of indecency was officially adopted by the FCC and used in its *Report on the Broadcast of Violent, Indecent, and Obscene Material*.⁵⁴ This new definition defined indecent language as that which “describes, in terms patently offensive as measured by contemporary community standards for broadcast media, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”⁵⁵ Two months later, in April, the National Association of Broadcasters had modified its 1952 Television Code to “create a ‘family viewing hour.’ Under this scheme, the first hour of TV prime time and the preceding hour ‘would not consist of programming unsuitable for viewing by the entire family.’”⁵⁶

Fearing that the *Pacifica* ruling and subsequent related events would lead to “a deleterious impact on accurate and insightful reporting,” the Radio-Television News Directors Association filed a petition for the FCC to reconsider its ruling in the *Pacifica* complaint.⁵⁷ The FCC replied that its decision was for a fact-specific situation and that it would not harm the broadcast journalism industry.⁵⁸ The FCC also did not sanction *Pacifica*; it merely put the decision in the station’s license file in case it broadcast indecent material again.⁵⁹

Pacifica chose to appeal the decision, however, and in 1977, the D.C. Circuit ruled that the FCC had gone too far with its regulations.⁶⁰ Judge Edward Tamm’s opinion stated, “the FCC had practiced censorship in violation of its own governing statute”⁶¹ He also borrowed language from Justice Frankfurter’s opinion in the 1957 case of *Butler v. Michigan*, stating:

In its effort to shield children from language which is not too rugged for many adults the Commission has taken a step toward reducing the adult population to hearing or viewing only that which is fit for

54. *Id.* See Report on Brdcast. of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975) [hereinafter Broadcast Report].

55. Broadcast Report, *supra* note 54, at 425.

56. HEINS, *supra* note 19, at 98 (quoting Primary Jurisdiction Referral of Claims Against Gov’t Defendant Arising from the Inclusion in the NAB TV Code of “Family Viewing Policy,” Report, 95 F.C.C.2d 700, 700 n.1 (1983)).

57. *Id.* at 101 (citing Petition for Clarification or Reconsideration of a Citizen’s Complaint Against *Pacifica* Found., Memorandum Opinion and Order, 59 F.C.C.2d 892, para. 3 (1976)).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

children. The Commission's Order is a classic case of burning the house to roast the pig.⁶²

The FCC appealed the ruling, and the Supreme Court heard the case on April 18, 1975.⁶³ The makeup of the Court at that time had been recently changed by President Nixon, and the five Justices making up the plurality were all appointed by either President Nixon or President Ford.⁶⁴ This majority was just what the FCC needed to have the decision of the D.C. Circuit overturned, and to have the new definition of indecency adopted.

The opinion, handed down on July 3, 1978, and written by Justice Stevens, outlined the rationale for regulating the broadcast airwaves:

Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children.⁶⁵

The opinion also noted the facts that broadcast media was uniquely pervasive in the lives of Americans and that it was uniquely accessible to children, even those who are too young to read.⁶⁶

The Court found authority for the FCC to regulate this type of broadcast in two different statutes: "18 U.S.C. § 1464 . . . , which forbids the use of 'any obscene, indecent, or profane language by means of radio communications,' and 47 U.S.C. § 303(g), which requires the Commission to 'encourage the larger and more effective use of radio in the public interest.'"⁶⁷ After finding the authority for the FCC to act as it did, the Court addressed the possibility of this ruling leading to greater censorship, the same concern expressed by the Radio-Television News Directors Association when the FCC first made its decision.⁶⁸ In trying to alleviate this concern, the Court articulated:

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of

62. *Pacifica Found. v. FCC*, 556 F.2d 9, 17 (D.C. Cir. 1977) (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

63. HEINS, *supra* note 19, at 103.

64. *Id.* at 104.

65. *FCC v. Pacifica Found.*, 438 U.S. 726, 731 n.2 (1978) (citations omitted).

66. *Id.* at 748-49.

67. *Id.* at 731.

68. *See supra* note 57 and accompanying text.

these references may be protected, they surely lie at the periphery of First Amendment concern.⁶⁹

The decision also did not ban this type of language in its entirety—it only modified the times during which it was able to be broadcast. It analogized the indecent language to “‘a pig in the parlor instead of the barnyard.’ We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.”⁷⁰

Finally, the Court adopted the FCC’s position that this was a narrow holding that was based on the particular fact pattern at issue. While the opinion gave no reason why children needed to be protected from indecent language, that was its desired effect. Indecent material could no longer be broadcast in times during which there were likely to be children in the audience—deemed to be before 10:00 p.m.⁷¹ This opinion would be used in later cases to establish “safe harbors,” times in which indecent material could be safely broadcast,⁷² which no longer make sense in today’s society.

B. *The Creation of “Safe Harbors”*

The Supreme Court’s plurality decision in the *Pacifica* case over thirty years ago is still the basis for the current indecency regulations of the FCC. In the *Action for Children’s Television (ACT)* line of cases, following the *Pacifica* decision, the idea of safe harbors was created and the specific times for them were determined. In the first case in 1988, the D.C. Circuit held that the FCC’s definition of indecency was constitutionally sound, although its vagueness was inherent.⁷³ The court also found that the FCC’s decision about the hours of the safe harbors was not made in a reasonable manner.⁷⁴ The matter was therefore returned to the FCC for “redetermination, after a full and fair hearing, of the times at which indecent material may be broadcast.”⁷⁵

Four years later, in 1992, Congress addressed the idea of safe harbors in legislation, stating:

The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight;

69. *Pacifica*, 438 U.S. at 743 (citations omitted).

70. *Id.* at 750–51.

71. HEINS, *supra* note 19, at 104.

72. *See Action for Children’s TV v. FCC*, 852 F.2d 1332, 1335 (D.C. Cir. 1988).

73. *See id.* at 1344.

74. *Id.* at 1335.

75. *Id.* at 1344.

and (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).⁷⁶

In the second *ACT* case, decided in 1995, the D.C. Circuit upheld the FCC safe harbor regulations that were articulated pursuant to Congress's directive, although it did not agree with the distinction that was drawn between television and radio stations that go off the air at or before midnight and those that continue to be broadcast after midnight.⁷⁷ In its holding, relying on the compelling government interest of protecting children, the court articulated:

We find that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. We are also satisfied that, standing alone, the "channeling" of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment. Because the distinction drawn by Congress between the two categories of broadcasters bears no apparent relationship to the compelling Government interests that section 16(a) is intended to serve, however, we find the more restrictive limitation unconstitutional. Accordingly, we grant the petitions for review and remand the cases to the Federal Communications Commission with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.⁷⁸

In addition to ruling on the safe harbor hours for broadcasters, the court also rearticulated and reaffirmed the definition of indecency that had been established almost twenty years previously and still remains in effect today:

In enforcing section 1464 of the Radio Act, the Federal Communications Commission 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." This definition has remained substantially unchanged since it was first enunciated in *In re Pacifica Foundation*.⁷⁹

The case was remanded back to the FCC to adjust the safe harbor hours so that they were consistent for all broadcasters. The Supreme Court denied certiorari in the case,⁸⁰ so the safe harbor hours of 10:00 p.m. to 6:00 a.m. were effectuated and still remain in effect today.

76. 47 U.S.C. § 303 note (2006) (Broadcasting of Indecent Programming; FCC Regulations).

77. *Action for Children's TV v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995).

78. *Id.*

79. *Id.* at 657–58 (quoting Enforcement of Prohibitions Against Brdcast. Indecency in 18 U.S.C. § 1464, *Report and Order*, 8 F.C.C.R. 704, n.10 (1993)) (citations omitted).

80. *Action for Children's TV v. FCC*, 516 U.S. 1043 (1996).

C. Federal Communications Commission v. Fox

More than a decade after the safe harbors were established, in 2001, the FCC, in explaining its indecency guidelines, said that “[n]o single factor generally provides the basis for an indecency finding.”⁸¹ The three different factors that it suggested be examined when determining whether or not broadcast material was indecent, at least at that particular point in time, were:

(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 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.*⁸²

At this time, “fleeting expletives” were not generally subject to sanctions from the FCC. In the 2001 report, the FCC stated:

Repetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts. 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.⁸³

It was not until 2004 that the FCC banned “fleeting expletives” by stating that “a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once.”⁸⁴ The events giving rise to this decision occurred at the 2002 and 2003 *Billboard Music Awards*, both airing on affiliates of Fox Television Stations, Inc.⁸⁵

At the 2002 *Awards*, Cher exclaimed during a live broadcast after winning an award, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f* * * ‘em.”⁸⁶ At the 2003 *Awards*, Paris Hilton and Nicole Richie were presenting an award when Hilton reminded Richie to “watch the bad language.”⁸⁷ Nicole Richie proceeded to comment on the reality television show that she and Paris Hilton starred in, *The Simple Life*, saying, “[w]hy do they even call it ‘The Simple Life?’ Have you ever tried to get cow s* * * out of a Prada purse?”

81. Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*, 11 F.C.C.R. 7999, para. 10 (2001).

82. *Id.* (emphasis in the original).

83. *Id.* at para. 17.

84. FCC v. Fox TV Stations, Inc., 129 S. Ct. 1800, 1807 (2009).

85. *Id.* at 1808.

86. *Id.*

87. *Id.*

It's not so f* * *ing simple.'"⁸⁸ The FCC received many complaints from parents whose children were watching the *Billboard Music Awards* at the time the language was used.⁸⁹ On March 15, 2006, the FCC released notices of apparent liability for the broadcasts.⁹⁰

In determining that both incidents were indecent, the FCC pointed to the fact that "Cher used the F-Word not as a mere intensifier, but as a description of the sexual act to express hostility to her critics,"⁹¹ and that Nicole Richie's language was indecent because "it involved a literal description of excrement, rather than a mere expletive, because it used more than one offensive word, and because it was planned."⁹²

This ruling by the FCC was important because it changed the course of indecency regulations:

The order stated, however, that the pre-*Golden Globes* regime of immunity for isolated indecent expletives rested only upon staff rulings and Commission dicta, and that the Commission itself had never held "that the isolated use of an expletive . . . was not indecent or could not be indecent." In any event, the order made clear, the *Golden Globes Order* eliminated any doubt that fleeting expletives could be actionably indecent, and the Commission disavowed the bureau-level decisions and its own dicta that had said otherwise. Under the new policy, a lack of repetition "weigh[s] against a finding of indecency," but is not a safe harbor.⁹³

The rationale behind this decision was that if this regulation was not changed, then broadcasters could get around the safe harbor regulations by broadcasting indecent language one expletive at a time.⁹⁴

Fox challenged this decision by the FCC, and the Second Circuit overturned the decision, "finding the Commission's reasoning inadequate under the Administrative Procedure Act. The majority was 'skeptical that the Commission [could] provide a reasoned explanation for its "fleeting expletive" regime that would pass constitutional muster,' but it declined to reach the constitutional question."⁹⁵

In 2008, the Supreme Court granted certiorari in the *Federal Communications Commission v. Fox* case, and in 2009, the Court handed down its ruling. It upheld the FCC's decision to punish fleeting expletives, using the rationale from the 2002 and 2003 decisions and the *Pacifica*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1809.

92. *Id.*

93. *Id.* (citations omitted).

94. *Id.*

95. *Id.* at 1810 (citations omitted).

case.⁹⁶ The Court determined that the FCC's decision was not arbitrary or capricious, and that the advances in technology that allowed broadcasters to bleep out offending language more easily lent support to the stepped-up regulations.⁹⁷ The Court also deemed certain words inherently offensive and therefore punishable for even a single use, such as the language used in the *Billboard Music Award* broadcasts.⁹⁸

Articulating the Court's opinion, Justice Scalia wrote:

The Second Circuit believed that children today "likely hear this language far more often from other sources than they did in the 1970's when the Commission first began sanctioning indecent speech," and that this cuts against more stringent regulation of broadcasts. Assuming the premise is true (for this point the Second Circuit did not demand empirical evidence) the conclusion does not necessarily follow. The Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children. In the end, the Second Circuit and the broadcasters quibble with the Commission's policy choices and not with the explanation it has given. We decline to "substitute [our] judgment for that of the agency," and we find the Commission's orders neither arbitrary nor capricious.⁹⁹

Although the Supreme Court found the regulation to not be arbitrary or capricious, the case was remanded back to the Second Circuit to determine if the regulation was in violation of the First Amendment. The decision that would be made on that issue would alter the landscape of indecency regulations and open the door a crack for a path toward deregulation.

D. Federal Communications Commission v. Fox, *Remanded*

After being upheld under the arbitrary and capricious standard by the Supreme Court, the Second Circuit struck down the regulation as being in violation of the First Amendment. The regulation was deemed to be impermissibly vague, as it did not give the networks clear notice of what would be considered indecent and subsequently subject to fines.¹⁰⁰ The court noted that there were inconsistencies in how the same word was classified in two different circumstances, and that that was not sufficient clarity for the networks.¹⁰¹ Because a large amount of money and First

96. *Id.* at 1812.

97. *Id.* at 1813.

98. *Id.* at 1812–13.

99. *Id.* at 1819 (citations omitted).

100. *See* Fox TV Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).

101. *See id.* at 332.

Amendment protections were at stake, a vague standard that is subject to interpretation was not acceptable to the court.¹⁰²

With the FCC's indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an 'ad hoc' basis, there is a risk that those decisions will reflect the officials' subjective biases.¹⁰³

In addition to finding the regulations impermissibly vague, the Second Circuit also warned of the potentially chilling effect that the regulations would have on speech.¹⁰⁴ As this Note suggests, if a network is afraid of being the subject of fines and sanctions, it is not going to broadcast material that may be valuable if there is any question that it may be considered indecent. Episodes of *House*, *That 70s Show*, political debates in Vermont, and even coverage of Pat Tillman's funeral have already fallen victim to this chilling effect.¹⁰⁵ With this regulation in place, there was no telling what other "important and universal themes in art and literature"¹⁰⁶ would be kept off of the airwaves.

The language in this opinion also supports the idea that the media landscape has changed drastically recently and that the regulations that were in place during the time of *Pacifica* may not be practical today. For example, the court noted, "[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. . . . The [I]nternet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs."¹⁰⁷ In acknowledging these advances in technology, this opinion lends support to the argument that this Note makes: deregulation is the most practical solution in light of the ever-present nature of broadcast television in today's world.

III. THE CURRENT LANDSCAPE

A. *Advances in Technology*

In recent years, technology has enhanced consumers' enjoyment of broadcast media. With the invention and development of the digital video recorder (DVR) and networks making many of their television shows available on the Internet, people can access their favorite shows at any time, day or night.

102. *Id.*

103. *Id.*

104. *Id.* at 334.

105. *Id.* at 334–35.

106. *Id.* at 335.

107. *Id.* at 326 (citations omitted).

The earliest mode of digital recording, TiVo, was launched in 1999 at the Las Vegas Consumer Electronics Show.¹⁰⁸ It was touted as a “breakthrough new personal television service that is poised to change forever the way consumers watch television.”¹⁰⁹ In 2008, “consumer research, from Leichtman Research Group, report[ed] that 27% of TV households in the United States have at least one Digital Video Recorder (DVR), and 30% of those households have more than one DVR, and that 87% of DVR owners would recommend their DVR service to a friend.”¹¹⁰

The same study found that thirty-five percent of people with DVR spent more time watching programs recorded on their DVR than regularly scheduled programs, and that fifty-five percent of DVR owners record more than five programs per week:¹¹¹

The report says that the number of US households with DVRs has essentially doubled in the past two years and, with a continued push from cable, DBS, and Telco TV providers, will likely double again over the next four years. LRG forecasts that DVRs and on-Demand’s share of total TV viewing time in the US will increase from about 6% today to 16% at the end of 2012.¹¹²

While there are many people who use DVRs to watch their favorite shows, many people also turn to shows that are available on the Internet. The numbers have been increasing in recent years, as well. “About 43 percent of the U.S. online population—nearly 80 million people—have watched a television show on the Internet, according to a Solutions Research Group tracking study. Just one year ago, that figure was only 25 percent, marking a 72 percent increase year-over-year.”¹¹³

In addition to the networks providing access to their television shows on their own websites, in 2007, the idea of Hulu was conceived, described as “the largest Internet video distribution network ever assembled with the most sought-after content from television and film.”¹¹⁴ At its inception, the

108. Press Release, TiVo to Unveil 1999’s Hottest Consumer Electronics Breakthrough at CES with First Public Demo of Personal Television, BUSINESS WIRE (Jan. 7, 1999), <http://www.highbeam.com/doc/1G1-53526147.html>.

109. *Id.*

110. Jack Loechner, *DVR Ownership Increases, but Recordings Not Priority Viewing*, RESEARCH BRIEF (Oct. 1, 2008, 8:15 AM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=91553.

111. *See id.*

112. *Id.*

113. Traci Patterson, *U.S. Internet TV Viewers on the Rise*, CEDMAGAZINE.COM (Feb. 5, 2008), <http://www.cedmagazine.com/US-Internet-TV-viewers-on-the-rise.aspx>.

114. Press Release, NBC Universal and News Corp. Announce Deal with Internet Leaders AOL, MSN, MySpace and Yahoo! to Create a Premium Online Video Site with Unprecedented Reach, HULU.COM (Mar. 22, 2007), http://www.hulu.com/press/new_video_venture.html [hereinafter NBC Universal Press Release].

site promised to provide “thousands of hours of full-length programming, movies and clips, representing premium content from at least a dozen networks and two major film studios.”¹¹⁵

Hulu was released to the public on March 12, 2008, and has grown considerably from what had originally been contemplated. Instead of a dozen networks participating in the site, there were over fifty networks that were providing free video access to the public.¹¹⁶ Peter Chernin, president and chief operating officer of News Corporation described Hulu as a “game changer for Internet video.”¹¹⁷ He also described Hulu as a service that

helps fans find great content wherever they are online With tools that make sharing easy, Hulu encourages viral distribution. At the same time, Hulu’s distribution partners are some of the most visited on the Web, engaging consumers where they are already spending their time. This is a powerful combination.¹¹⁸

Similarly, Jason Kilar, chief executive officer of Hulu, commented, “[w]ith full-length episodes of current and archived television shows, feature films, sports and news, we believe the Hulu service is a step forward in giving consumers entertainment on their terms.”¹¹⁹ After such an advancement in technology as Hulu, individuals have access to shows at any time, day or night, from the privacy of their own home, and their own computer screens. These technological advancements, in making television more easily accessible to the public—including children—cast serious doubt on the rationale behind safe harbors. If the time of the broadcast no longer makes a difference in terms of access to the material, then regulating the material that is broadcast on the basis of the time of the program is no longer a logical course of action.

B. Why Safe Harbors No Longer Make Sense

With so many Americans viewing television shows at times other than their regularly scheduled timeslots, the time at which a show is broadcast is no longer an important aspect of that show. The rationale that the Supreme Court and the FCC used for creating safe harbors for broadcasting indecent material, therefore, is no longer sound in this respect.

If a child wants to watch a television program that is on after he goes to bed, he can simply program the family DVR to record the show with a

115. *Id.*

116. Press Release, Hulu.com Opens to Public, Offers Free Streams of Hit TV Shows, Movies and Clips from More than 50 Providers Including FOX, NBC Universal, Metro-Goldwyn-Mayer Studios Inc. and Sony Pictures Television, HULU.COM (March 12, 2008), http://www.hulu.com/press/launch_press_release.html [hereinafter Hulu Opening Press Release].

117. NBC Universal Press Release, *supra* note 114.

118. Hulu Opening Press Release, *supra* note 116 (internal quotation marks omitted).

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

touch of a button, find the show on the network's website, or on another television website (such as Hulu), and watch it at his convenience. If he is one of the many children who has access to his own computer and laptop today, his parents may not necessarily be aware that he is watching such a program when he accesses the material.

Further, a recent study by the Kaiser Family Foundation looked at the media habits of children between the ages of eight and eighteen. The study found that those children spend more than seven and a half hours each day using various electronic devices, including computers and the Internet.¹²⁰ The amount of time that children spend on the computer has more than tripled since 1999, and the amount of television that they watch has also continued to steadily increase.¹²¹ Additionally, twenty-nine percent of children own a laptop, as opposed to only twelve percent who did in 2004.¹²² This means that the ability of a child to access television programming in general, including those programs that his parents might not find appropriate for him, is much easier than it was just six years ago.

Combining the unprecedented availability of broadcast television programming with the ease with which children can access the Internet and the family DVR, the safe harbor rationale just does not make sense any longer. There are no longer any hours where it is significantly less likely that children will have access to the programs. Indecency that is broadcast at midnight now seems just as likely to be viewed by children all over the country with access to these technologies as that which is broadcast at 9:00 p.m. As a result, deregulation is the most logical next step to take in this matter. If regulations are no longer effective, it no longer makes sense to penalize networks for violating them.

VI. PROPOSAL FOR THE FUTURE

Since the current regulations do not make sense in their present form, something needs to be done to bring them in line with today's technology. Children will find a way to access indecent broadcast material if they really want to, so the restrictions on the networks should either be strengthened so that there is less indecent material out there for children to access, or they should be relaxed so that the networks have more freedom, since children will see and hear the material anyway.

While it may be tempting for parents to advocate for stricter indecency laws so that their children are protected, the complete ban of indecent material would be subject to First Amendment challenges and

120. Tamar Lewin, *If Your Kids Are Awake, They're Probably Online*, N.Y. TIMES, Jan. 20, 2010, at A1.

121. *Id.*

122. *Id.*

would likely suffer the same fate as the recent FCC regulation that was recently struck down. Since this would be a content-based regulation of the media, any regulation would have to survive strict scrutiny. Since protecting children has been viewed as a compelling government interest,¹²³ strict scrutiny would apply to any ban. Any regulation would therefore have to be narrowly tailored to the compelling interest and a least restrictive means of protecting it; a complete ban would not pass this test, as was made apparent by the recent Second Circuit decision.¹²⁴

Furthermore, any restriction cannot prevent adults from legally having access to the indecent material. As the Supreme Court stated in *Bolger v. Youngs Drug Products Corporation*, “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”¹²⁵ This rationale demonstrates the importance of careful drafting of additional regulation in order for it to not be deemed unconstitutional and struck down.

In addition to these First Amendment concerns, such restrictions would also exacerbate the problem of depriving viewers of shared experiences and of creating a less-informed public, which Schneider discusses in his article.¹²⁶ Further, by eliminating an entire type of broadcast media, this will inhibit viewers from receiving information to which they might have had access with more relaxed regulations. While it may seem trivial on the surface, if certain programs, such as the *Billboard Music Awards* and *Golden Globes*, were not broadcast for fear that the networks would be sanctioned for indecent material, this would actually eliminate access to significant popular culture events. If this prohibition of broadcast of certain events were expanded even further, other important programs could theoretically be eliminated from the airwaves as well.¹²⁷ There is really no way to know how far the networks would go in order to save themselves from FCC sanctions.

Another option for the future of regulations is a more moderate approach that the regulations should be relaxed, but not eliminated. This would require the networks to continue to monitor what they are broadcasting over the airwaves to keep children protected from highly offensive material, but it would also give the networks more flexibility in their programming choices. The FCC would no longer be able to sanction a network for choosing to air a program that may contain some indecent

123. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Action for Children’s TV v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995).

124. See *Fox TV Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010).

125. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983).

126. See Schneider, *supra* note 11, at 896.

127. See *Fox TV Stations*, 613 F.3d at 334.

material at 9:00 p.m. instead of 10:00 p.m., when viewership may be higher and the number of children who would eventually have access to the program would be exactly the same.

If the safe harbors were minimized to only between the hours of 1:00 a.m. and 6:00 a.m., this could possibly provide a workable compromise. The programming that is on between those hours is not likely to be anything in which children are really going to be interested, so indecent material could be broadcast then. While children could still theoretically have access to the programs broadcast during these hours, they are likely going to be less interested in those programs than other ones that may air at times that are within the current safe harbor, such as *Saturday Night Live* that airs at 11:30 p.m.

Decreasing the regulations without eliminating them would allow the FCC to continue to regulate indecency without putting an unfair burden on the networks. The FCC would retain control over the airwaves, but at the same time, the networks would have more freedom in their program lineups. In this increasingly technologically advanced world, regulations of the media need to keep up with the times, and relaxing the safe harbor regulations would be a logical first step.

While the option of decreasing the safe harbors may seem like it would be an effective change, however, it is likely only going to be the second-best option that is available. In addition to making sure that the regulations are not running afoul of the First Amendment, maintaining any indecency ban means the networks are still going to have to bear the costs of sanctions and the costs of excluding some programming in an effort to avoid those sanctions.

The ideal solution in this situation, therefore, would be to eliminate this control that the FCC has over the networks by deregulating. If children are going to have access to the material anyway, why should the networks be punished simply because they broadcast the indecent material one hour too early? Broadcasting that material one hour later is not going to make a difference in whether the child with his own laptop is going to watch the broadcast on Hulu, so it does not make sense that networks should pay the price.

This option may be controversial, because networks could then conceivably start broadcasting indecent material at 3:00 p.m., for example, when children are coming home from school. However, networks would likely lose many viewers by engaging in this type of behavior, so the market would keep the especially offensive material off the airwaves, thus keeping network broadcast material acceptable to the majority of people. Additionally, after all these years of regulations and the broadcasts that have become commonplace on television, it is unlikely that the networks

would drastically change their programming to that which would contain large amounts of indecent material. Ignoring timing considerations entirely would result in a complete change in what networks currently air at peak times, which would not likely be a wise business decision. The networks would probably not change their lineups; they would just have more freedom with the time slots and less fear of running afoul of the FCC regulations for material that one person may find indecent, like John Douglas during George Carlin's monologue.

This solution would also be a logical extension of the recent Second Circuit decision striking down the FCC indecency regulation. With the court's recognition that the landscapes of the media and technological worlds have changed drastically since the days of *Pacifica*, updating the FCC regulations to be more in line with the times would be a realistic and ideal goal. The groundwork has already been laid for a path toward deregulation, and it would be in the best interest of everyone involved if the FCC decided to take that path.

VII. CONCLUSION

With the relatively recent advances in technology and the ability of children to access broadcast material from almost anywhere at almost any time, it is time for the FCC to change its indecency regulation policy to something that reflects the realities of today. Safe harbors are no longer safe with the invention of Hulu and the DVR, so the rationale behind that regulation is no longer sound. If the FCC is really looking to protect children, the indecency regulations are in need of a facelift. The most logical solution is to let the market handle the content of broadcasts; any move strengthening regulations would likely run afoul of the First Amendment. Especially after the recent Second Circuit opinion striking down a regulation that punished even fleeting expletives, deregulation is the most realistic option.

While deregulation would likely be initially seen as a drastic change, this is the option that would lead to the most effective and realistic long term change. Technology is going to continue to advance, and children will likely be able to access broadcast material even more easily in the future. By maintaining the regulations, the FCC is not going to effectuate its intent of protecting children from indecent broadcast material. Rather, they are just going to make it harder on the networks to broadcast material that might be in public demand. Since children are not going to be able to be completely protected by any regulation that passes constitutional muster, the networks should not have to pay the price. The most logical course of action, therefore, is to move toward deregulation and let the market keep the indecent material off of network broadcasts.