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COMMENTS

REGULATING INDECENT BROADCASTING: SETTING SAIL FROM SAFE HARBORS OR SUNK BY THE V-CHIP?

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

— First Amendment

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.

— 18 U.S.C. § 1464

I. INTRODUCTION

“Family values” has become a familiar phrase in all arenas of American life. As a result of the increasing concern over family values in broadcasting, the religious right, as well as the liberal left, have tried to stay the progression of moral decadence in our youth. The concerns have been directed towards violent, sexual and vulgar content in radio, television, and films.

Since the inception of the Radio Act of 1927,¹ the Federal Communications Commission (FCC) has promulgated regulations restricting the broadcasting of indecent programming. Most recently, Congress and the FCC prohibited indecent broadcasting during certain hours of the day in order to protect the well-being of children and to assist parents in the supervision of their children. However, portions of the provisions have been

1. Ch. 4, 44 Stat. 1162 § 83 (Feb. 23, 1927) (codified at 47 U.S.C. § 81, repealed by ch. 652 Title VI, 48 Stat. 1102 (June 19, 1934)).

held unconstitutional by the Court of Appeals for the D.C. Circuit. Additionally, the assumption that indecent material harms children has been questioned by petitioners, researchers and Judge Edwards of the D.C. Circuit Court. The Telecommunications Act of 1996,² recently passed by Congress and signed by President Clinton, has further attempted to protect children by requiring a "V-chip" in all new televisions so that parents can block television programs which they feel are inappropriate for their children.³

This comment begins by examining the recent history of the regulation of indecent broadcasting, with a focus on the congressional responses to the decisions of the United States Court of Appeals for the District of Columbia. Through these decisions and congressional responses, the development of the law of indecency will be discussed. Part III will consider the latest *Action for Children's Television v. FCC (ACT IIIR)*⁴ decision and its effect on indecent broadcasting statutes and rules. Part IV will question whether the assumptions upon which the regulation of indecent broadcasting is based are valid. The recent legislation requiring all new televisions to be equipped with a chip allowing parents to block certain broadcasts will be explored in part V. Finally, this comment concludes that since the V-chip is required by law, broadcasters may again challenge the FCC regulations as not being the least restrictive means available. Eventually, as the V-chip becomes more widespread in television, the courts may be forced to find for the challengers, possibly prompting the United States Supreme Court to decide the issue.

2. Pub. L. No. 104-104, 110 Stat. 56 (1996).

3. *Id.* § 551, 110 Stat. 56.

4. 58 F.3d 654 (D.C. Cir. 1995), *reh'g*, 11 F.3d 170 (D.C. Cir. 1993).

II. A RECENT HISTORY OF REGULATION OF INDECENT AND OBSCENE BROADCASTING

A. *The Statutes and Definitions*

1. The Statutes

Obscene and indecent broadcasting have been regulated since the advent of the FCC. Section 29 of the Radio Act of 1927, originally provided that

[n]othing in this Act shall be understood or construed to give the licensing authority the *power of censorship* over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any *obscene, indecent, or profane* language by means of radio communication.⁵

The anti-censorship provision and the prohibition against indecent broadcasts were re-enacted in Section 29 of the Communications Act of 1934.⁶ The prohibition against obscene, indecent and profane broadcasts was removed in 1948 from the Communications Act and re-enacted as 18 U.S.C. § 1464.⁷ The censorship provision is now codified at 47 U.S.C. § 326.⁸

Today, 18 U.S.C. § 1464 provides that “[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.”⁹ Although section 29 of the Ra-

5. *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978) (quoting 44 Stat. 1172-73) (emphasis added).

6. *Id.* at 738; see 47 U.S.C. 151 (1934), amended by ch. 229, § 1, 50 Stat. 189 (1937).

7. *Id.* (citing 62 Stat. 769, 866 (1948)).

8. *Id.* at 734 (citing 47 U.S.C. § 326 (amended 1948)).

9. 18 U.S.C. § 1464 (1994) (amending 18 U.S.C. § 1464 (1988)). Pub. L. 103-322, § 33016(1)(L) had struck out “not more than \$10,000” and inserted “under this title” following “shall be fined”. Pub. L. 103-322, § 33016(1)(L) (1994).

dio Act of 1927¹⁰ generally prohibits censorship, the censorship language has been interpreted as "inapplicable to the prohibition on broadcasting obscene, indecent or profane language."¹¹ However, the fact that the censorship language does not apply to the prohibition on broadcasting obscene, indecent or profane language does not give the government free reign at restricting this type of language. Instead, each type is accorded different regulatory treatment.

2. Distinguishing the Indecent from the Obscene

Distinguishing indecent material from obscene material is important for two reasons. First, because the words are written disjunctively in the statute, each has a separate meaning.¹² Secondly, and more importantly, whereas obscene material is not accorded constitutional protection, indecent material is accorded First Amendment rights.¹³

In *Miller v. California*,¹⁴ the United States Supreme Court described obscene material—as used in 18 U.S.C. § 1464—as works that "appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."¹⁵ The Court defined prurient interest as a "shameful, morbid, or unhealthy interest in sex."¹⁶ Unlike prurient interest, the Court has failed to provide a concrete definition of "patently offensive." However, the Court has deemed materials "so offensive on their face as to affront current community standards of decency"¹⁷ or materials that go "substan-

10. 44 Stat. 1172-73 (codified at 47 U.S.C. § 326 (amended 1948)).

11. *Pacifica*, 438 U.S. at 738.

12. *Id.* at 739-40.

13. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (stating that "[s]exual expression which is indecent but not obscene is protected by the First Amendment"); *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) (quoting *Sable*, 492 U.S. at 126).

14. 413 U.S. 15 (1973).

15. *Id.* at 24.

16. *Roth v. United States*, 354 U.S. 476, 488 (1957); *Brockett v. Spokane Arcades*, 472 U.S. 491, 496-98 (1985).

17. *Manual Enters. v. Day*, 370 U.S. 478, 482 (1962).

tially beyond customary limits of candor in description or representation of such matters,¹⁸ as patently offensive.

"Indecency," under 18 U.S.C. § 1464, was not defined by the FCC until 1970. The FCC adopted a broad definition of "indecent" in response to an aired interview with Jerry Garcia of the Grateful Dead on WUHY Philadelphia, a college FM station.¹⁹ The broadcast was found to violate section 1464 because its language was "patently offensive by contemporary community standards and wholly without redeeming social value."²⁰ The FCC considered the interview indecent rather than obscene because the language lacked an appeal to the prurient interest—a requirement of obscenity²¹—as the expletives were unnecessary and "gratuitous." Thus, the earliest definition of indecency exposed by the FCC paralleled that of obscenity, simply lacking an appeal to the prurient interest.

Responding to a complaint by a man who had listened with his young son to a broadcast of comedian George Carlin's twelve-minute long monologue entitled "Filthy Words" on a radio station owned by Pacifica Foundation, the FCC expounded a generic definition of indecency in *In re Pacifica Foundation*.²² This generic definition was upheld in *FCC v. Pacifica Foundation*²³ and the series of *Action for Children's Television v. FCC* cases.²⁴ Specifically, "broadcast indecency" is defined "as lan-

18. *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (quoting *Roth*, 354 U.S. at 487 n.20).

19. See Leli Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 88 (1992/93); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 104 (1994). "In just six paragraphs, [Garcia] used *like* improperly and redundantly sixteen times. But the same was equally true for *fuck* and *shit*, which he used as adjectives or substitutes for *et cetera*, and occasionally as introductory expletives." KRATTENMAKER & POWE, *supra* note 19, at 104.

20. WUHY-FM, Eastern Education Radio, Notice of Apparent Liability, 24 F.C.C.2d 408 ¶ 7 (1970); see Levi, *supra* note 19.

21. See *Roth*, 354 U.S. at 488; KRATTENMAKER & POWE, *supra* note 19, at 104.

22. 56 F.C.C.2d 94 (1975). This FCC decision explained that the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

Id. at 98.

23. 438 U.S. 726 (1978).

24. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) [here-

guage 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."²⁵ Arguments that the definition of "indecent" was vague and overbroad have been struck down by four *Action for Children's Television* Cases: *ACT I*,²⁶ *ACT II*,²⁷ *ACT III*,²⁸ and *ACT IIIR*.²⁹

B. *Enforcement Procedure*³⁰

The FCC has authority, pursuant to 47 U.S.C. § 503(b),³¹ to impose sanctions for any violation of 18 U.S.C. § 1464. The FCC does not conduct random investigations, but instead, responds when a complaint regarding a possible indecent broadcast is filed by a viewer or listener.³² When the FCC receives such a complaint, "FCC staff members examine the complaint to determine whether the broadcast would fall within the parameters of the FCC's indecency enforcement practice."³³ Once the staff determines that the complaint falls within the parameters, "the FCC staff members in the Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau [MMB] make a threshold recommendation whether to proceed

inafter *ACT I*]; *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) [hereinafter *ACT II*]; *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993) [hereinafter *ACT III*]; *Action for Children's Television v. FCC*, 58 F.3d 170 (D.C. Cir. 1995) [hereinafter *ACT IIIR*], *reh'g ACT III*, 11 F.3d 170 (D.C. Cir. 1993).

25. *ACT IIIR*, 58 F.3d at 657 (citing *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 705 n.10 (1993) ("1993 Report and Order")).

26. *ACT I*, 852 F.2d 1332.

27. *ACT II*, 932 F.2d 1504.

28. *ACT III*, 11 F.3d 170.

29. *ACT IIIR*, 58 F.3d 654.

30. The enforcement procedure and the forfeiture provisions will not be discussed within this comment in detail because the issues and cases are substantial enough to merit a separate article.

31. 47 U.S.C. § 503(b)(1)(D) (1993) ("Any person who is determined . . . to have . . . violated any provision of section 1304, 1343, or 1464 of title 18, United States Code; shall be liable to the United States for a forfeiture penalty. . . .").

32. *See, e.g., supra* note 22 and accompanying text.

33. *Action for Children's Television v. FCC*, 827 F. Supp. 4, 5 (D.D.C. 1993) (challenging the FCC enforcement procedure).

with an investigation of the complaint."³⁴ The complaint will be dismissed if the MMB, in consultation with the General Counsel's Office and/or the Commissioners' Assistants, decides that the complaint does not warrant investigation.³⁵

However, if an investigation is warranted, a Letter of Inquiry (LOI) will be sent by FCC staff members to the broadcaster named in the complaint.³⁶ The LOI requests additional information from the broadcaster, allowing the broadcaster to respond to the complaint prior to a final determination by the FCC.³⁷

After receiving the broadcaster's response to the LOI, the staff must conclude whether or not there in fact was a violation. If there was a violation, a Notice of Apparent Liability (NAL) is sent to the broadcaster alleging the violation and requesting payment of a fine.³⁸ The broadcaster can "either pay the forfeiture or submit . . . an opposition to the NAL in which it can explain why a forfeiture should not be imposed or should be reduced."³⁹ Thus, the NAL is not a final determination of an indecency violation.

After reviewing the broadcaster's response to the NAL, the FCC will decide whether a forfeiture is appropriate.⁴⁰ The broadcaster may petition for reconsideration after the issuance of a forfeiture. If rejected, the broadcaster may refuse to pay the forfeiture in which case the FCC will ask the United States Attorney to commence an action to recover the forfeiture.⁴¹ "In

34. *Id.* at 6.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 6-7.

39. *Id.* at 7.

40. *Id.* In making the forfeiture determination, the FCC "considers a number of factors including the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *Id.* (citing 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. 1.80(b)(4)).

41. *Action for Children's Television v. FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995), *affg* 827 F. Supp. 4 (D.D.C. 1993).

defending the suit the broadcaster is entitled to a trial de novo on the question whether its broadcast was indecent."⁴²

C. *A Dress Rehearsal and Three ACTs: Case Development of Indecent Broadcasting*

1. A Dress Rehearsal: *FCC v. Pacifica Foundation*⁴³

FCC v. Pacifica Foundation was the first challenge to the indecency portion of 18 U.S.C. § 1464 to reach the Supreme Court. Here the Supreme Court not only validated the FCC's definition of indecency, but more importantly, maintained that the FCC had the power to regulate indecent broadcasts.

After receiving a complaint from a listener, the FCC issued a declaratory order which found that a radio station owned by the Pacifica Foundation had violated 18 U.S.C. § 1464's prohibition against indecency.⁴⁴ The broadcast, which had aired at two o'clock in the afternoon, was a monologue by comedian George Carlin, called "Filthy Words."⁴⁵ In its declaratory order, the FCC concluded:

[W]ords such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt," and "tit" depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards . . . broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast.⁴⁶

When asked to clarify its order, the FCC pointed out that "it never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to

42. *Id.* (citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977)).

43. 438 U.S. 726 (1978).

44. 56 F.C.C.2d 94 (1975); see *supra* note 19 and accompanying text.

45. The monologue was a parody of, as Carlin described them, "words you couldn't even say on the public . . . airways, . . . the ones you definitely wouldn't say, ever." *Pacifica*, 438 U.S. at 751 (appendix to the opinion of the court containing a verbatim transcript of "Filthy Words").

46. *In re Pacifica*, 56 F.C.C.2d 94, 99 (1975).

times of day when children most likely would not be exposed to it.⁴⁷ The concept of channelling indecent material later appears in both statutes and regulations, and is also a subject of contention in the *ACT* cases. The FCC limited the declaratory order to the specific facts.⁴⁸

After the United States Court of Appeals for the District of Columbia Circuit reversed the FCC order and reconsideration,⁴⁹ the United States Supreme Court granted certiorari to decide:

(1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by [47 U.S.C.] § 326; (3) whether the broadcast was indecent within the meaning of [18 U.S.C.] § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.⁵⁰

The Court found that the focus of its review should be on the determination of whether the broadcast was indecent.⁵¹ On the second issue, the Court explained that respect for legislative intent requires that the censorship language of section 326 be read as "inapplicable to the prohibition on broadcasting obscene,

47. *In re* 'Petition for Clarification or Reconsideration' of a Citizen's Complaint against Pacifica Found., 59 F.C.C.2d 892 (1976).

48. *Id.* at 893.

49. *Pacifica Found. v. FCC*, 556 F.2d 9 (1977). Judge Tamm explained, [a]s we find that the Commission's Order is in violation of its duty to avoid censorship of radio communications under 47 U.S.C. § 326 and that even assuming, arguendo, that the Commission may regulate non-obscene speech, nevertheless its Order is overbroad and vague, therefore we must reverse the Order.

Id. at 18. Chief Judge Brazelon's concurrence maintained that 47 U.S.C. § 326's prohibition against censorship was inapplicable to broadcasts forbidden by 18 U.S.C. § 1464. However, Chief Judge Brazelon concluded that § 1464 must be narrowly construed to cover only language that is obscene or otherwise unprotected by the First Amendment. *FCC v. Pacifica Found.*, 438 U.S. 726, 733-34 (1978) (citing *Pacifica Found. v. FCC*, 556 F.2d 9, 24-30 (1977)). In dissent, Judge Leventhal found that the FCC could regulate indecent broadcasts in the interest of protecting children. *Id.* (citing *Pacifica Found. v. FCC*, 556 F.2d 9, 31, 37 (1977)).

50. *FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978).

51. *Id.* at 735.

indecent, or profane language."⁵² The third issue was resolved by the Court finding that indecent language does not require prurient appeal and that because the broadcast was patently offensive, it was therefore indecent.⁵³

The Court considered the fourth question in more depth. Recognizing that "each medium of expression presents special First Amendment problems,"⁵⁴ the Court explained that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."⁵⁵ Two reasons were given for the distinction between broadcasting and other mediums. First, because the broadcast media have a "uniquely pervasive presence in the lives of all Americans," patently offensive indecent material encounters citizens both in public and in the privacy of their home.⁵⁶ Furthermore, privacy in the home was found to outweigh the First Amendment rights of the intruder.⁵⁷ Although some indecent broadcasts may warn audiences, these warnings cannot completely protect the unsuspecting viewer who tunes in and out.⁵⁸

Second, the Court was concerned with broadcasting's accessibility to children. Whereas other forms of offensive material may be withheld from children without restricting the expression at the source, this is not presently the case with broadcasting.⁵⁹ For instance, bookstores and movie theaters may be prohibited from distributing indecent material to children.⁶⁰ Additionally, in *Ginsberg v. New York*,⁶¹ the Court had found that the "government's interest in the 'well being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."⁶²

52. *Id.* at 738; see *supra* notes 7-9 and accompanying text.

53. *Pacifica*, 438 U.S. at 739, 741. For definitions of prurient interest and patently offensive, see *supra* notes 14-16 and accompanying text.

54. *Pacifica*, 438 U.S. at 748 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952)).

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

56. *Id.*; see also KRATTENMAKER & POWE, *supra* note 19, at 197.

57. *Pacifica*, 438 U.S. at 748; see also KRATTENMAKER & POWE, *supra* note 19, at 197.

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

59. *Id.*

60. *Id.*

61. 390 U.S. 629, (1964).

62. *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 640,

Therefore, privacy in the home coupled with protection of children justified cleaning the public airways of material inappropriate for children.

The first Supreme Court case challenging the indecency portion of 18 U.S.C. § 1464 resulted in a narrow and case-specific finding of indecency while contemporaneously finding that the FCC definition of indecency was valid, 18 U.S.C. § 1464 was constitutional, and that indecent materials could be channeled to late-night hours.⁶³ The narrow finding of indecency in *Pacifica* became a bright-line test that simply prohibited repeated use of the "seven dirty words" before 10:00 p.m.⁶⁴ However, there was little enforcement by the FCC because broadcasters stayed away from the "seven dirty words" and the FCC held to the narrow interpretation of the indecency standard.⁶⁵

2. ACT I: *Action for Children's Television v. FCC*⁶⁶

In 1987, after years of non-enforcement of the indecency standard, the FCC changed the course of indecent broadcasting regulation for the future. In its attempt to protect children from indecent broadcasting, the FCC expanded its interpretation of indecency and narrowed the times during which indecent material could be aired. Three opinions—*In re Infinity Broadcasting Corporation of Pennsylvania*,⁶⁷ *In re Pacifica Foundation*,⁶⁸ and *In re Regents of the University of California*⁶⁹—declared various broadcast materials (two of which were broadcast after

639 (1968)); see also KRATTENMAKER & POWE, *supra* note 19, at 197 (stating that "[p]arents may need help in their own households, and the government has its own independent interest in the 'well-being of its youth'" (citing *Pacifica*, 438 U.S. at 749)).

63. *Pacifica*, 438 U.S. at 892-93.

64. Levi, *supra* note 19, at 90-91.

65. *Id.* at 91.

66. Act I, 852 F.2d 1332.

67. 2 F.C.C.R. 2705 (1987). In *Infinity*, the FCC found that portions of Howard Stern's radio talk show, airing from 6 a.m. to 10 a.m. on weekdays, were indecent. *Id.*

68. 2 F.C.C.R. 2698 (1987). In *Pacifica Foundation*, the FCC decided that excerpts from a play called "Jerker" were actionable even though broadcast between 10 p.m. and 11 p.m. *Id.*

69. 2 F.C.C.R. 2703 (1987). In *Regents of U.C.*, the FCC believed it could regulate a broadcast, after 10 p.m., of a song entitled "Makin' Bacon." *Id.*

10 p.m. and one that was broadcast between 6 a.m. and 10 a.m.) to be indecent. In conjunction with these three opinions, the FCC issued a public notice that summarized the opinions and gave all broadcasters notice of the new standards.⁷⁰ After receiving several petitions for reconsideration of the three opinions, the FCC responded with a reconsideration order that affirmed its prior decisions and explained its change in policy.⁷¹ Most importantly, the FCC warned broadcasters that "10:00 p.m. can no longer be considered the hour after which indecent programming may be aired" but instead, midnight was the FCC's "current thinking" on "a reasonable delineation point."⁷² Effectively, the FCC created a midnight to 6:00 a.m. "safe harbor" for indecent materials.⁷³

On appeal, the petitioners claimed the FCC's broadened indecency enforcement standard was facially invalid because it was unconstitutionally vague.⁷⁴ The intervenors contended that the FCC's mode of stamping material indecent was substantially overbroad.⁷⁵ Petitioners also urged that the FCC's action was arbitrary and capricious because the change in regulatory course was not accompanied by the requisite "reasoned analysis."⁷⁶ In conjunction with the claim of arbitrary and capricious, the petitioners claimed that the safe-harbor provision interfered with adults' First Amendment rights to see and hear indecent material.⁷⁷

After establishing the FCC's authority to regulate indecent broadcasts by considering the Supreme Court's decision in *Pacifica*,⁷⁸ the court of appeals concluded that the FCC had employed the informal adjudication format to promulgate a rule of

70. Kristin A. Finch, *Lights, Camera, and Action for Children's Television v. FCC: The Story of Broadcast Indecency, Starring Howard Stern*, 63 U. CIN. L. REV. 1275, 1300 (1995) (citing Public Notice, 2 F.C.C.R. 2726 (1987)).

71. *Id.* at 1301 (citing Reconsideration Order, 3 F.C.C.R. 930 (1987)).

72. *ACT I*, 852 F.2d 1332, 1334 (1988) (citing *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad.Reg.2d (P & F) 211, 219 n.47 (1987) (Reconsideration Order)).

73. *Id.* (citing Reconsideration Order, 64 Rad.Reg.2d at 217, 219 n.47).

74. *ACT I*, 852 F.2d at 1334.

75. *Id.*

76. *Id.* at 1334-35.

77. *Id.* at 1340-41.

78. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); see *supra* part II.C for the *Pacifica* decision.

general applicability.⁷⁹ *Pacifica*, on the other hand, had established a rule for specific application—the seven dirty words. Because adjudication did not insulate the FCC from judicial review, the court proceeded to consider the other issues.

The court of appeals first considered the question of vagueness. Realizing that the generic definition of indecency—“exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs”⁸⁰—was virtually the same as had been adopted by the Supreme Court in *Pacifica*, the court of appeals inferred that the Supreme Court had not regarded the term “indecent” as so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application.”⁸¹ In sum, the court of appeals concluded that “if 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.”⁸² Such a conclusion is most likely still correct because the FCC has not changed its definition of “indecent,” future

79. *ACT I*, 852 F.2d at 1337. The explanation for the regulatory change offered by the FCC in its Reconsideration Order, was that it found

the deliberately-repeated-use-of-dirty-words policy “unduly narrow as a matter of law” and inconsistent with its obligation responsibly to enforce section 1464. The former approach permitted the unregulated broadcast of any material that did not contain Carlin’s “filthy words,” no matter how the material might affect children exposed to it. It made no legal or policy sense, the FCC said, to regulate the Carlin monologue but not “material that portrayed sexual or excretory activities or organs in as patently offensive a manner . . . simply because it avoided certain words.”

Id. at 1338 (citing Reconsideration Order, 64 Rad.Reg.2d at 214) (citations omitted)).

80. *In re Pacifica*, 56 F.C.C.2d 94, 98 (1975); *Pacifica*, 438 U.S. 726; see *supra* part II.A concerning the definition of indecency.

81. *ACT I*, 852 F.2d at 1339 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The *ACT I* court found that

[t]he Commission now treats the nature of the material involved and the time of day separately; the time of a broadcast is pertinent to whether it is actionable, not whether it is indecent. Nevertheless, a violation of section 1464 must be predicated on the same components relevant under the [*In re Pacifica*] formulation: whether material is indecent and whether it was broadcast when there was a reasonable risk of children in the audience.

Id. at 1339 n.8 (citing Reconsideration Order 64 Rad.Reg.2d at 213 n.6).

82. *Id.* at 1339.

courts upheld the definition, and the Supreme Court has consistently denied certiorari to indecent broadcasting cases—including recently denying review to *ACT IIIIR*.⁸³

In challenging the FCC's definition of "indecent" as overbroad, the intervenors premised their argument on the inability of "serious merit" to redeem material from indecency status.⁸⁴ In holding that "serious merit" need not, in every instance, immunize indecent material from FCC channeling authority,⁸⁵ the court of appeals realized that there may be instances where protection of children may outweigh the "serious merit." Furthermore, the FCC does not entirely disregard "serious merit."⁸⁶ Instead, the FCC considers "serious merit" relevant in determining whether material is patently offensive, but having merit does not make a broadcast per se not indecent.⁸⁷ Reiterating that indecent material that is not obscene qualifies for First Amendment protection whether or not it has serious merit, the court of appeals qualified its view by stating that children's access to indecent material may be regulated.⁸⁸ Additionally, "since the overall value of a work will not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible . . . [and] therefore, is not vulnerable to the charge that it is substantially overbroad."⁸⁹

Having upheld the FCC's generic definition in light of its purpose—"to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear"⁹⁰—the court of appeals considered the FCC's "current thinking" regarding the channeling hours. The petitioners argued that the chan-

83. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996).

84. *ACT I*, 852 F.2d at 1339.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1340 (quoting *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))) (stating that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .'").

89. *Id.*

90. *Id.* (citing Reconsideration Order, 64 Rad.Reg. at 213 para. 2.).

neling of indecent material to after midnight was arbitrary and capricious, as it did not have an adequate basis in fact or analytical analysis.⁹¹ Petitioners also contended that the channeling interfered with the First Amendment rights of adults to hear and see indecent material.⁹²

Agreeing with the petitioners that, "in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn," the court of appeals vacated the FCC's rulings in *Pacifica Foundation* and *Regents of U.C.*⁹³ The court of appeals remanded these rulings to the FCC for a thorough reconsideration of the times at which indecent material may be aired, including a record of the size of the radio audience involved and why it includes teens between the ages of twelve to seventeen as part of the relevant age group.⁹⁴ Additionally, the FCC was required to "afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired."⁹⁵ Although the court of appeals vacat-

91. *Id.* (citing *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

92. *Id.* at 1340-41.

93. *Id.* at 1341.

94. *Id.* at 1341-42. The court regarded evidence from ratings data indicating the estimated numbers of children in the viewing audience at the times of the broadcasts in question as insubstantial. *Id.* at 1341. As the court noted, there was little explanation as to why the FCC changed the relevant age from 12 and under to under 18 and therefore instructed the FCC to "supply information on the listening habits of children in that age range, or explain how it extrapolates relevant data for that population from the available ratings information." *Id.* at 1342.

95. *Id.* at 1343. The court had found that "the FCC itself has recognized that 'the effect of [a case-by-case] approach may well be to cause broadcasters to forego the broadcast of certain protected speech altogether, rather than to channel it to late night hours.'" *Id.* at 1342 (citing *Reconsideration Order*, 64 Rad.Reg.2d at 219 n.47). Thus, by being given clear notice, broadcasters may feel more willing to broadcast such material. The FCC had also noted that a channeling decision must accommodate the following competing interests:

- (1) the government, which has a compelling interest in protecting children from indecent material;
- (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired;
- (3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and
- (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene.

Id. (citing *Reconsideration Order*, 64 Rad.Reg.2d at 219 n.47).

ed *Pacifica Foundation* and *Regents of U.C.*, it found the United States Supreme Court's decision in *Pacifica* dispositive to the affirming of the FCC's decision in *Infinity*.⁹⁶ Because the broadcast had occurred within the same hours as the broadcast in *Pacifica* (6:00 a.m. to 10:00 p.m.), there was no reason to command a different result.⁹⁷

3. ACT II: *Action for Children's Television v. FCC*⁹⁸

Before the FCC could develop a better record to justify the change in hours during which indecent material could be broadcast, Congress, at the urging of Senator Jesse Helms, intervened. Two months after *ACT I* was decided, President Bush signed a 1989 appropriations bill containing a rider that instituted a twenty-four-hour ban on section 1464 material.⁹⁹ Accordingly, the FCC issued a rule prohibiting all broadcasts of indecent material.¹⁰⁰ The Commission also abandoned the *ACT I* court's mandate to produce an adequate record.¹⁰¹ A panel of the United States Court of Appeals for the District of Columbia Circuit granted the petitioners' motion to stay the ban.¹⁰² While briefing on the validity of the ban was before the court of appeals, *Sable Communications, Inc. v. FCC*¹⁰³ was decided by the United States Supreme Court. In *Sable*, the Supreme Court found a similar ban on indecent commercial telephone messages unconstitutional.¹⁰⁴ The court of appeals remanded to the FCC to assemble relevant data supporting the total ban.¹⁰⁵

96. *Id.* at 1341.

97. *Id.*

98. *ACT II*, 932 F.2d 1504.

99. *Id.* at 1507 (citing Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988)). The rider read: "By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis." *Id.*

100. *Id.*; see *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency* in 18 U.S.C. § 1464, 4 F.C.C.R. 457 (1988); Finch, *supra* note 70 at 1305.

101. *ACT II*, 932 F.2d at 1507.

102. *Id.*

103. 492 U.S. 115 (1989).

104. *Id.* at 131 (stating that "[b]ecause the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.")

105. *ACT II*, 932 F.2d at 1507 (citing *Action for Children's Television v. FCC*, No.

After receiving and reviewing comments, the FCC issued a report explaining how the twenty-four-hour ban comports with *Sable*.¹⁰⁶ The FCC found that a “reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times’ without ‘active’ parental supervision.”¹⁰⁷ Therefore, “the Commission concluded that no alternative to a total ban would effectuate the government’s compelling interest in protecting children from broadcast indecency.”¹⁰⁸

Petitioners subsequently challenged the FCC’s action on the basis that the FCC’s definition of indecency was unconstitutionally vague and overbroad.¹⁰⁹ Because the court of appeals had rejected the claim that the definition was vague and overbroad in *ACT I*, the court again succinctly rejected it.¹¹⁰ Petitioner’s core challenge was to the constitutionality of a total ban on the broadcast of indecent material. The challenge was based on two contentions. First, that under United States Supreme Court and circuit precedent, the government may not completely suppress protected speech in any medium.¹¹¹ Second, even if a total ban could be justified, the FCC’s action failed to satisfy the strict scrutiny standard as accorded in *Sable*.¹¹²

Basing its decision on *ACT I* and *Sable Communications*, the court of appeals found that a total ban on the broadcast of indecent material was unconstitutional.¹¹³ The court’s previous holding in *ACT I* had required that the FCC identify some reasonable period in which indecent material may be broadcast.¹¹⁴ The fact that Congress had mandated a total ban did not alter the court’s “view that, under *ACT I*, such a prohi-

88-1916 (D.C. Cir. Sept. 13, 1989) (remanding record to the FCC for a “full and fair hearing on the issue of the propriety of indecent broadcasting”).

106. *Id.* (citing Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. 5297, 5297 (1990)).

107. *Id.* (quoting Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 5 F.C.C.R. at 5297, 5306 (1990)).

108. *Id.*

109. *Id.*

110. *Id.* at 1507-08.

111. *Id.* at 1508.

112. *Id.*

113. *Id.*

114. *Id.* at 1509.

bition cannot withstand constitutional scrutiny."¹¹⁵ The court's decision returned the FCC to the position it occupied after *ACT I*. Specifically the court directed the FCC,

in "redetermin[ing], after a full and fair hearing, . . . the times at which indecent material may be broadcast," to carefully review and address the specific concerns [it] raised in *ACT I*: among them, the appropriate definitions of "children" and "reasonable risk" for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts.¹¹⁶

For those reasons, the case was remanded to the FCC for further proceedings in accordance with *ACT II*, and hence *ACT I*.¹¹⁷

4. *ACT III: Action for Children's Television v. FCC*¹¹⁸

Once again, the FCC was not able to begin hearings as directed by the court of appeals before Congress intervened. Congress passed the Public Telecommunications Act of 1992, which in section 16(a), required the FCC to promulgate a new rule barring indecent material during the broadcast hours from 6:00 a.m. to midnight, but allowing public broadcast stations that go off the air at or before midnight to broadcast indecent material between 10:00 p.m. and midnight.¹¹⁹ The FCC, as instructed by Congress, issued a notice of proposed rulemaking¹²⁰ and a

115. *Id.* Looking to *Sable*, the court acknowledged the protected status of indecent speech and that any governmental regulations on the content of that speech must satisfy a strict constitutional standard. *Id.* The court also referred to the FCC's previous position that it "may only do that which is necessary to restrict children's access to indecent broadcasts" and "may not go further so as to preclude access by adults who are interested in seeing or hearing such material." *Id.* (quoting *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930, 931 (1987)).

116. *Id.* at 1510.

117. *Id.*

118. *ACT III*, 11 F.3d 170.

119. Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992) (codified at 47 U.S.C. § 303 note) [hereinafter Telecommunications Act of 1992].

120. Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 7 F.C.C.R. 6464 (1992) (stating that "[t]he focus of th[e] ensuing rulemaking] proceed-

report and order¹²¹ adopting the new mandate. The codified rulemaking reads:

- (a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.
- (b) No licensee of a public broadcast station . . . that goes off the air at or before 12 midnight shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.
- (c) No licensee of a radio or television broadcast station not described in paragraph (b) of this section shall broadcast on any day between 6 a.m. and 12 midnight any material which is indecent.¹²²

Petitioners sought review of the regulations and section 16(a) charging that they were unconstitutional because they were not tailored narrowly enough to meet First Amendment standards and because the exception for public broadcasting stations that go off the air on or before midnight violates the equal protection of the laws.¹²³ The court of appeals stayed the enforcement of the regulation pending the outcome of the case.¹²⁴

The court first considered whether the FCC's stated purpose of protecting privacy interests was sufficiently compelling to withstand strict scrutiny. Although recognizing the United States Supreme Court's finding in *Pacifica* that broadcasting was a uniquely pervasive presence and invaded the privacy of one's home, the court of appeals reasoned that the holding in *Pacifica* was not based "on a general privacy rationale applicable to adults and children alike."¹²⁵ Refraining from extending

ing [was] . . . confined to the matter of updating the Commission's record pertaining to the governmental interest in restricting the broadcasting of indecent material.").

121. Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 (1993) [hereinafter 1993 Report and Order]. The 1993 Report and Order articulated the government's interests as (i) "ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts, regardless of whether parents choose to exercise that supervision," (ii) "the government's independent interest in ensuring the well being of minors" regardless of parental supervision, and (iii) "the right of all members of the public to be free of indecent material in the privacy of their homes;" *ACT III*, 11 F.3d at 173 (quoting 1993 Report and Order, 8 F.C.C.R. at 705-706 ¶¶ 10, 14).

122. 47 C.F.R. § 73.3999 (1993).

123. *ACT III*, 11 F.3d at 173.

124. *Id.*

125. *ACT II*, 11 F.3d at 174-75.

a captive audience rationale,¹²⁶ the court found that the government's true concern is the protection of children, not adults, from indecent broadcasting.¹²⁷ Therefore, the court rejected reliance on a generalized privacy rationale to justify regulation of indecent broadcasting.¹²⁸

Although the court of appeals did not find that privacy was a compelling interest, it did find two compelling interests in protecting children from indecent material: (1) "helping parents supervise their children," and (2) "shielding children from exposure to indecent material regardless of parental supervision."¹²⁹ Once a compelling interest was established, the court needed to determine whether the regulation—6:00 a.m. to midnight ban on indecent broadcasting—was narrowly tailored. The court concluded that the "government did not properly weigh viewers' and listeners' First Amendment rights when balancing the competing interests to determine the widest safe-harbor period consistent with the protection of children."¹³⁰ Also, like in *ACT I*, the court of appeals could not detect any "reasoned analysis" supporting the promulgated safe harbor.¹³¹

After considering the competing interests of parental supervision, shielding minors from indecent material, and the First Amendment rights of adults, the court of appeals determined that the regulation was not narrowly tailored. Concerning the interest of parental supervision, the court of appeals found that the government had not produced any evidence that suggested the effectiveness of parental supervision varies by the time of day or night.¹³² Nor was there any evidence produced that showed that the safe harbor was crafted to assist parents at specific times when they would need help from the government to supervise their children.¹³³ Thus, this interest did not justi-

126. *Id.* at 175. For a discussion of the captive audience rationale see *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

127. *ACT III*, 11 F.3d at 176.

128. *Id.*

129. *Id.* at 176-77.

130. *Id.* at 177.

131. *Id.*

132. *Id.* at 178.

133. *Id.* In fact, the court reasoned that "one could intuitively assume that as the evening hours wear on, parents would be better situated to keep track of their

fy the regulation, as no evidence showed that the safe harbor protects children from indecent material at times when parental supervision is likely to be least effective.¹³⁴

Next, the court of appeals held that the government's compelling interest in shielding all minors, regardless of age, from exposure to indecent material did not justify the safe harbor period.¹³⁵ In fact, the court found that the interest in protecting a minor fades as that minor matures.¹³⁶ Previously, the United States Supreme Court in *Erznoznik v. City of Jacksonville* held that the values protected by the First Amendment were no less applicable when the government seeks to control the flow of indecent material to minors.¹³⁷ Although *Pacifica* held that the government could prevent young children's exposure to indecent material at a time when the FCC defined children as under the age of twelve, the *ACT III* court did not read *Pacifica* as a wholesale dismissal of older minors' First Amendment rights explicitly recognized by *Erznoznik*.¹³⁸ Hence, the court of appeals pronounced that the FCC must "adduce data which permits a more finely tuned trade-off between adults' First Amendment rights and the government's interest in protecting children from indecent material as that interest varies in importance with their age."¹³⁹

Finally, the court of appeals turned to the First Amendment rights of adults. The court found that there was no evidence in the record that the government had narrowly tailored its protection of children to avoid unnecessary infringement on the First Amendment rights of adults.¹⁴⁰ In an attempt to show

children's viewing and listening habits." *Id.*

134. *Id.*

135. *Id.* at 180.

136. *Id.*

137. *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975)). In *Erznoznik*, the Supreme Court rejected the government's general interest in protecting minors from films containing nudity, and held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik*, 422 U.S. at 213-14 (rejecting a Jacksonville statute restricting the showing of films containing nudity at a drive-in).

138. *ACT III*, 11 F.3d at 179.

139. *Id.* at 180.

140. *Id.* at 181.

that adults' rights had not been unnecessarily infringed, the FCC pointed out that there were alternative sources available to adults from which to receive indecent material.¹⁴¹ The court rejected this alternative sources argument, finding that it did not relieve the government from considering the First Amendment rights of the broadcast audience.¹⁴² Additionally, the court determined that the FCC had exclusively focused on the number of children in the audience which indicated that the government had "failed to balance its child-oriented compelling interests against the countervailing First Amendment rights of adult listeners and viewers."¹⁴³ By requiring a record and evidence to support the FCC's general conclusions, the court essentially placed the FCC back at the same point as in *ACT I*.

In concurrence, Judge Edwards commented on the problems with the government's view that the regulation rests on vague notions that too many parents are either unavailable to supervise their children or are inept at the task of parenting.¹⁴⁴ First, Edwards concluded that the "Government tramples heedlessly on parents' rights to rear their children as they see fit and to inculcate in them moral values of the parents' choosing."¹⁴⁵ Second, Edwards asserted that in acting to limit children's exposure to indecent material, the government's stated purpose rested on inconsistent, confused and possibly false premises.¹⁴⁶ Furthermore, Edwards contended that "if facilitation of 'parental supervision' is the principal interest to be served, then a good argument can be made that ensuring the availability of "blocking devices—to permit parents to block their children from seeing and hearing indecent material in their absence—is the most that Government ought to do."¹⁴⁷

141. *Id.* Such alternative sources include "audio and video tapes, cable television, wireless cable or subscription satellite television services." 1993 Report and Order, 8 F.C.C.R. 704, 709 ¶ 30 (citing *Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, 5 F.C.C.R. 5297, 5208-09 (1990) [hereinafter 1990 Report and Order]).

142. *ACT III*, 11 F.3d at 181.

143. *Id.* at 182.

144. *Id.* at 184 (Edwards, J., concurring).

145. *Id.*

146. *Id.* at 185 (stating that ill effects of indecent material on children have yet to be unearthed); see *infra* part IV for the possibility that the assumptions about the effects of indecent material on children are inaccurate.

147. *Id.* See *infra* part V for a discussion of the possibility that blocking devices

III. *ACT III*:¹⁴⁸ REHEARING *ACT III*

Upon remand of *ACT III* to the FCC, the FCC successfully requested that the D.C. Circuit rehear *ACT III*.¹⁴⁹ At the rehearing, the petitioners presented three challenges to the constitutionality of section 16(a) of the Telecommunications Act of 1992¹⁵⁰ and its implementing regulations. While the challenge to the generic definition of indecency as unconstitutionally vague was dismissed as meritless,¹⁵¹ the following two challenges were considered: (1) that the statute and regulations imposing restrictions on indecent broadcasts were not narrowly tailored to the Government's compelling interest, and therefore violated the First Amendment; and (2) that "section 16(a) unconstitutionally discriminate[d] among categories of broadcasters by distinguishing the times during which certain public and commercial broadcasters may air indecent material."¹⁵²

A. *The First Amendment Challenge*

The court of appeals recognized that despite the fact that traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment, strict scrutiny should be applied when assessing the constitutionality of such regulations.¹⁵³ The strict scrutiny standard in broadcasting required that a statute regulating the content of constitutionally protected speech, in order to promote a compelling interest, be narrowly tailored, using the least restrictive means to further that interest.¹⁵⁴

such as the V-chip may be an alternative to regulation.

148. *ACT III*, 58 F.3d 654.

149. *Action for Children's Television v. FCC*, 15 F.3d 186 (D.C. Cir. 1994), *vacating and granting reh'g to ACT III*, 11 F.3d 170 (D.C. Cir. 1993).

150. *See supra* note 118 and accompanying text.

151. *ACT III*, 58 F.3d at 659.

152. *Id.*

153. *Id.* at 660.

154. *Id.* at 663-64 (citing *Sable Communications, Inc. v. FCC*, 429 U.S. 115, 126 (1989)).

1. Compelling Interests

The court of appeals found independently compelling the government's interests in (1) supporting parental supervision of what children see and hear on the public airwaves, and (2) the well-being of minors.¹⁵⁵ Although recognizing the first interest, in regard to the second, petitioners argued that because "no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors' that interest [the well-being of children] is 'too insubstantial to justify suppressing indecent material at times when parents are available to supervise their children.'"¹⁵⁶ The court of appeals responded by questioning the effectiveness of parental supervision¹⁵⁷ and by pointing out that the United States Supreme Court recognized that the Government's interest extends beyond shielding children from physical and psychological harm.¹⁵⁸ Finally, the court of appeals found that "the Government's dual interest in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when parents" can supervise their children.¹⁵⁹

155. *Id.* at 661. The court did not consider the third interest identified by the FCC: the protection of the home against intrusion by offensive broadcast. *Id.* at 660-61.

156. *Id.* at 661 (quoting Joint Brief for Petitioners at 32, 33). See *infra* part IV for an analysis on the nexus between indecent material and harm.

157. *Id.* The court recognized that "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise control' over what their children see on television." *Id.* (quoting *In re Action for Children's Television*, 50 F.C.C.2d 17, 26 (1974)). The court also looked to two studies which found that multiple televisions and radios were present in most households and that more than half of the children had a television and radio in their bedroom. *Id.*

158. *Id.* at 661-63. Previously, the Supreme Court had not required scientific demonstration of psychic harm when protecting high school students from indecent speech at an assembly. *Id.* at 662 (citing *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 682 (1986)). The Court also stated that it "di[d] not demand of legislatures scientifically certain criteria of legislation." *Id.* at 662 (quoting *Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968)). Additionally, the court concluded that "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material" that is indecent. *Id.*

159. *Id.* at 663.

2. Least Restrictive Means

Petitioners argued that section 16(a) of the Telecommunications Act of 1992 is not narrowly drawn to the government's interest in protecting children from broadcasting indecency for two reasons.¹⁶⁰ First, petitioners asserted that the class of children to be protected should be limited to those under the age of twelve.¹⁶¹ Second, petitioners argued that the "safe harbor" was not narrowly tailored because it failed to take proper account of adults' First Amendment rights and because of the chilling effect of the 6:00 a.m. to midnight ban on the programs aired during the evening "prime time" hours.¹⁶²

Both *ACT I* and *ACT II* directed the FCC to address the definition of "children."¹⁶³ The court of appeals accepted the three reasons the FCC had offered in support of its definition of children to include "children ages 17 and under."¹⁶⁴ The reasons given by the FCC were: "Other federal statutes designed to protect children from indecent speech use the same standard; most States have laws penalizing persons who disseminate sexually explicit materials to children ages 17 and under; and several Supreme Court decisions have sustained the constitutionality of statutes protecting children ages 17 and under."¹⁶⁵

Additionally, the court considered that the sponsor of section 16(a), Senator Byrd, had made specific reference to the FCC's finding that "there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day or night."¹⁶⁶ Therefore, the FCC had finally complied with at least a portion of the *ACT I* and *ACT II* directives to supply evidence to justify its conclusory findings.

160. *Id.* at 664.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* (citations omitted).

166. *Id.* (quoting 138 CONG. REC. S7308 (1992) (statement of Sen. Byrd)).

Next the court of appeals turned to the constitutionality of the ban itself. The court only addressed the 6 a.m. to midnight ban because if that ban could survive constitutional scrutiny, then the reduction of the ban by two hours would remain narrowly tailored.¹⁶⁷ The question considered by the court of appeals was "what period [would] serve the compelling governmental interest without unduly infringing on the adult population's right to see and hear indecent material."¹⁶⁸ First, the court concluded that there was a "reasonable risk that large numbers of children would be exposed to any indecent material broadcast between 6:00 a.m. and midnight."¹⁶⁹ Second, the court recognized that while the number of adults listening to radio and watching television after midnight was admittedly small, it was not insignificant.¹⁷⁰ Coupled with alternative means of viewing or listening to indecent material available to adults, the court found "that a midnight to 6:00 a.m. safe harbor [took] adequate account of adults' First Amendment rights."¹⁷¹ The court of appeals went further, saying that "there may be a range of safe harbors, each of which [would] satisfy the 'narrowly tailored' requirement of the First Amendment."¹⁷²

B. *The Public Broadcaster Exception*

Public stations that sign off the air at or before midnight, unlike any other stations, are permitted by section 16(a) and regulations pursuant to that section to broadcast indecent material after 10:00 p.m.¹⁷³ Congress provided no real explanation for this special treatment, except for accommodating those pub-

167. *Id.* The court offered two reasons for looking only at the 6 a.m. to midnight ban. First, in addressing the "narrowly tailored" issue, the parties had concentrated on the 6 a.m. to midnight ban. *Id.* Second, the principles applied to determine the constitutionality of the 6 a.m. to midnight will apply equally to the other hours. *Id.*

168. *Id.* at 665.

169. *Id.* The court came to this conclusion after considering data collected by the FCC and republished in the Congressional Record.

170. *Id.* at 666.

171. *Id.* (rejecting petitioners' arguments of a chilling effect and of the ban occurring when children are presumably subject to strict adult supervision).

172. *Id.* at 667.

173. Pub. L. No. 102-356, § 16(a)(1), 106 Stat. 954 (1992); 47 C.F.R § 73.3999.

lic stations that go off the air at or before midnight.¹⁷⁴ The FCC did little more to explain the preference.¹⁷⁵ The court of appeals concluded that the exception was a result of a misunderstanding of its directive in *ACT II*—that the FCC must “afford broadcasters clear notice of reasonably determined times at which indecent material safely may be aired”—which did not require that every station be treated equally.¹⁷⁶ Additionally, neither Congress or the FCC explained how the disparate treatment accorded public stations related to the government’s compelling interest.¹⁷⁷ Because there was no explanation as to the disparate treatment, the court held that the section was “unconstitutional insofar as it bar[red] the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight.”¹⁷⁸ Accordingly, the court remanded the case to the FCC with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m.¹⁷⁹

C. Dissent by Chief Judge Edwards¹⁸⁰

Once again, Chief Judge Edwards wrote separately, this time in dissent. Edwards found that section 16(a) of the Telecommu-

174. *ACT III*R, 58 F.3d at 667. The court considered the following as the only explanation: “In order to *accommodate* public television and radio stations that go off the air at or before 12 midnight, the FCC’s enforcement authority would extend [to] the hour of 10 o’clock p.m. for those stations.” *Id.* (emphasis added) (quoting 138 CONG. REC. S7308 (statement of Sen. Byrd)).

175. *Id.* The FCC gave the following explanation:

In balancing the interests at stake, it appears reasonable to afford public broadcasters that do not operate during the regular safe harbor time period at least some opportunity to air indecent material as opposed to forcing them to extend their broadcast day beyond that which is economically feasible. Congress carved out this exception apparently as a kind of “rough accommodation” of its concerns for public broadcasters.

Id. (quoting 1993 Report and Order, 8 F.C.C.R. 704, 710 (1993)).

176. *Id.* at 669. (quoting *ACT II*, 932 F.2d 1504, 1509 (1991)).

177. *Id.* at 668-69. The present case was distinguished from *Alliance for Community Media v. FCC*, 56 F.3d 105, 127-28 (D.C. Cir. 1995). In *Alliance*, the same court allowed the FCC to require the segregation and blocking of indecent programs on leased-access channels while not imposing a similar restriction on public access channels. 56 F.3d at 129.

178. *ACT III*R, 58 F.3d at 669.

179. *Id.* at 669-70.

180. *Id.* at 670-83 (Edwards, C.J., dissenting).

nications Act of 1992¹⁸¹ was unconstitutional for three reasons. First, Edwards found that the government's asserted interests were irreconcilably in conflict.¹⁸² Second, Edwards felt that the government did not meet the Supreme Court's doctrine of providing evidence of harm before enacting speech restrictive regulation because the government showed no evidence that indecent broadcasting harmed children.¹⁸³ Finally, Edwards concluded that the least restrictive means had not been employed to promote the interests asserted.¹⁸⁴

Before considering the three reasons for dissent, Chief Judge Edwards considered the reasons why broadcast media had been more heavily regulated than non-broadcast media, finding those reasons inapplicable today.¹⁸⁵ First, Edwards found that the spectrum scarcity rationale was no longer appropriate.¹⁸⁶ Additionally, Edwards determined that the characteristic of broadcasting espoused in *Pacifica*, that "broadcasting is uniquely accessible to children," failed to distinguish it from cable which has the same First Amendment rights as other media.¹⁸⁷

181. See *supra* note 119 and accompanying text.

182. *ACT IIR*, 58 F.3d at 672 (Edwards, C.J., dissenting).

183. *Id.*

184. *Id.*

185. *Id.* at 672-77.

186. *Id.* at 675. The spectrum scarcity theory is based on both economic and technological scarcity theories. The Supreme Court first offered an economic scarcity theory in *Red Lion* finding that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is ideal to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367, 388 (1969). The technological scarcity theory offered by the Court recognized the need to prevent "overcrow[ing of] the spectrum." *Id.* at 389. Furthermore, the Court in *Red Lion* held that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390.

Edwards rejected both the economic and technological scarcity theories. *ACT IIR*, 58 F.3d at 675-76 (Edwards, C.J., dissenting). Technological scarcity can now be overcome by devoting more resources toward the development of the electromagnetic spectrum. *Id.* at 675 (Edwards, C.J., dissenting). Economic scarcity, Edwards argues, is rendered superfluous by the development of cable and other alternatives. *Id.* at 675.

187. *Id.* at 676.

Chief Judge Edwards reiterated what he stated in his concurring opinion in *ACT III*,¹⁸⁸ that the government's interests were irreconcilably in conflict.¹⁸⁹ Edwards felt that the FCC could not "simultaneously seek to facilitate parental supervision over their children's exposure to indecent programming and at the same time protect all children from indecent speech by imposing a flat ban on indecent programming from the hours of 6 a.m. to midnight."¹⁹⁰ Furthermore, Edwards argued that because parents may not agree with the FCC as to what is indecent, nor whether indecent programming may be appropriate in certain circumstances, nor at what age children may be exposed to indecent programming, the government was essentially intruding into the rights of parents to raise their children as they see fit.¹⁹¹

Chief Judge Edwards looked to *Turner Broadcasting Systems v. FCC*¹⁹² to support his claim that a more definite harm must be posited.¹⁹³ In *TBS*, the Supreme Court required that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."¹⁹⁴ Edwards found that the FCC had not fulfilled this requirement.¹⁹⁵

Finally, Chief Judge Edwards considered whether the least restrictive means had been employed. Edwards failed to find any "data on actual parental supervision, parental preferences, or on the effectiveness of parental supervision at different hours of the day and night."¹⁹⁶ Additionally, Edwards cited the FCC's own assurances to the court that blocking technology, in which a chip placed in television sets prevents certain shows from being transmitted, is available.¹⁹⁷ Once again, Edwards

188. *ACT III*, 11 F.3d at 183-86 (Edwards, J., concurring).

189. *ACT III*R, 58 F.3d at 678 (Edwards, C.J., dissenting).

190. *Id.*

191. *Id.* at 678-79.

192. *Turner Broadcasting Systems v. FCC*, 114 S. Ct. 2445 (1994) [hereinafter *TBS*].

193. *ACT III*R, 58 F.3d at 680 (Edwards, C.J., dissenting).

194. *Id.* (quoting *TBS*, 114 S. Ct. at 2470).

195. *Id.* at 682.

196. *Id.*

197. *Id.* at 683 (citing Transcript of Oral Argument at 62).

found that the Government had failed to fulfill the requirement of least restrictive means when creating the regulation.¹⁹⁸

D. *Analysis of the Decision*

The court of appeals in *ACT IIR* finally concluded that channeling indecent broadcasting was constitutional. It appears that had the FCC complied earlier with the order in *ACT I* to develop evidence supporting its definition of children and justifying the time of the safe harbor, the court would have upheld the regulations. No new arguments were presented, and in fact, the court relied on similar reasoning, as in previous holdings, to come to its decision. However, in *ACT IIR*, the FCC finally supplied data on both sides of the balance—adults' rights and the government's compelling interest to protect children. The court of appeals found that the balance tilted towards the compelling interest.

The discrepancy between public broadcasters was an easy one for the court of appeals to decide. Similar to the lack of evidence problem the FCC had in previous *ACT* cases, there was no record as to why the public broadcasters should be treated differently on the basis of what time went off the air. Therefore, the disparate treatment was not as justified as it would have to be to overcome strict scrutiny. One wonders how Congress could have thought that such a provision could possibly withstand a court challenge.

198. *Id.*

IV. QUESTIONED ASSUMPTIONS?

The regulation of indecent broadcasting has hinged upon the assumption that indecent material is harmful to children.¹⁹⁹ Social scientists, the petitioners in the discussed cases, and D.C. Circuit Judge Edwards in his concurring opinion in *ACT III* and dissenting opinion in *ACT IIIR*, have challenged this important assumption. As of 1992, there had been no scientific studies on the effects of children's exposure to indecent language.²⁰⁰ In fact, one researcher found that "[n]o known social values can be shown which support the need to keep children away from indecent language."²⁰¹

Another group of researchers found that empirical research provided no reasonable evidence to suggest that harmful effects result from exposure to indecent material.²⁰² That group found that the few studies that have examined exposure to sexual images found on broadcast television only suggest that these images have a limited effect—increased knowledge regarding sexual terms, but no evidence of changes in beliefs, attitudes, or values regarding sexual practices, nor changes in actual behavior.²⁰³ The researchers came to three conclusions: (1) the few studies on the effect of exposure to indecent material have shown no effect or harm to children under the age of eighteen; (2) "there is serious reason to doubt that exposure to [indecent] material has an effect on children up to age 12 in view of the general sexual illiteracy of this age group, their limited ability

199. Edward Donnerstein et al., *On the Regulation of Broadcast Indecency to Protect Children*, 36 J. BROADCASTING & ELECTRONIC MEDIA 111, 111 (1992); see Jeremy Harris Lipschultz, *Conceptual Problems of Broadcast Indecency Policy and Application*, COMM. & L., June 1992, at 14 (stating that "[a]t the heart of the government's 'legitimate interest' in the protection of children is the assumption that pornography can lead to negative social outcomes.>").

200. Donnerstein et al., *supra* note 199, at 111.

201. Lipschultz, *supra* note 199, at 27.

202. Donnerstein et al., *supra* note 199, at 111.

203. *Id.* at 114. The findings were from an experiment on high school students randomly assigned to view excerpts of television programs depicting: 1) prostitution, 2) married intercourse, 3) unmarried intercourse, and 4) homosexuality. *Id.* at 113. (citing GREENBERG ET AL., *MEDIA, SEX, AND THE ADOLESCENT* (1991); Greenberg et al., *Adolescents and Their Reactions to Television Sex* (1988) (unpublished manuscript, on file with the Michigan State University Department of Communications)).

to understand sexual references, and their probable lack of interest in indecent material;" and (3) adolescents aged thirteen to seventeen are likely to have developed moral standards which enable them to deal with broadcast content more critically.²⁰⁴

Although the previously cited studies were over three years old, there has been a recent study considering discrepancies between the legal code and community standards for sex and violence.²⁰⁵ The study found that the criminal code demands punishment of certain consenting sexual depictions, although community members tolerate the material and feel such material requires no punishment.²⁰⁶ According to the researchers, "[t]he discrepancy between community tolerance and the obscenity code may exist because sexually explicit depictions of consensual behavior are no longer perceived as *harmful* by community members."²⁰⁷ Although the study focused on films prosecuted in an obscenity case, the same conclusions are likely to hold in indecency cases. The films were found not to appeal to a prurient interest, nor were they patently offensive.²⁰⁸ Because the definition of indecency employed by the FCC requires that a film be "patently offensive," the films did not fall under the FCC's definition.

If these studies are valid, then the petitioners may have been correct in the *ACT* cases. The studies also point to the conclusion that the patently offensive standard used by the FCC may not correspond with the community's patently offensive standard. One would think that the FCC should closely mirror society's prevailing views on patently offensive material, or else

204. Donnerstein et al., *supra* note 199, at 115-16.

205. Daniel Linz et al., *Discrepancies between the Legal Code and Community Standards for Sex and Violence: An Empirical Challenge to Traditional Assumptions in Obscenity Law*, 29 LAW & SOC'Y REV. 127 (1995). The study was undertaken to investigate lay persons' perceptions of sexually explicit and violent materials in an American community. *Id.* at 127-28. The participants were shown one of three films—sexually explicit, violent, and control—which they were asked questions about. *Id.* The study was submitted as evidence in *United States v. Ellwest Stero Theaters of Memphis*, No. 89-20254 (W.D. Tenn. 1990). *Id.* at 137.

206. *Id.* at 157.

207. *Id.* at 160. The researchers did find that violence has been cited as having the most potentially damaging societal effects. *Id.*

208. Linz et al., *supra* note 205, at 155.

run the risk of being found to have overbroad regulations and enforcement standards.

V. ALTERNATIVE PROTECTION: THE V-CHIP AND THE TELECOMMUNICATIONS ACT OF 1996

A. *The Telecommunications Act of 1996*

Recent years have seen the explosion of the Internet and other technologies. With the expanding computer and electronic technologies, there have been hopes that they might solve some of society problems, including moral decay. In fact, there is hope in Congress that these technologies can be employed to block indecent programming. On February 8, 1996, President Clinton signed the Telecommunications Act of 1996.²⁰⁹ This Act includes requirements for a "V-chip" to allow parents to block certain television shows and a rating system for television shows to help parents choose which shows to block.²¹⁰

Section 551(a) of the Telecommunications Act of 1996 contained a list of findings in order to justify its provisions. These findings included:

- (1) Television influences children's perceptions of the values and behavior that are common and acceptable in society.
- (2) [The t]elevisi[on] [industry] . . . should follow practices . . . that take into consideration . . . [the] uniquely pervasive presence [television has] in the lives of American children.
- (3) The average American child is exposed to 25 hours of television each week and some children are exposed to as much as 11 hours of television a day.
- (4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior . . .
- (6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on

209. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C. and 18 U.S.C. (1996)).

210. *Id.*, § 551, 110 Stat. at 139 (codified at 47 U.S.C. § 303(w),(x) (1996)).

television, eroding the ability of parents to develop responsible attitudes and behavior in their children. (7) Parents express grave concern over violent and sexual [television] programming and strongly support technology that would give them greater control to block [programs] . . . they consider harmful to their children. (8) There is a compelling governmental interest in empowering parents to limit the negative influences of [television] programming that is harmful to children. (9) Providing parents with timely information about the nature of upcoming [television] programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.²¹¹

Section 551(b) of the Telecommunications Act of 1996 required that a television rating system be established.²¹² The system will be implemented either by the television industry or the FCC. Through the use of an advisory committee, the system will be implemented one year after the date of enactment of the Telecommunications Act of 1996 by the FCC, *only* if the FCC determines the following:

[I]n consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of [television] programming have not, [within one year]—(A) established voluntary rules for rating [television] programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission; and (B) agree voluntarily to broadcast signals that contain ratings of such programming.²¹³

The advisory committee established by the FCC will create “guidelines and recommend[] procedures for the identification and rating of [television] programming that contains sexual, violent, or other indecent material. . . .”²¹⁴ The committee will

211. Telecommunications Act of 1996, § 551(a), 110 Stat. at 139-40 (1996).

212. *Id.*, § 551(b), 110 Stat. at 140-41 (1996).

213. *Id.* § 551(e)(1), 110 Stat. at 142.

214. *Id.* § 551(b)(1), 110 Stat. at 140; *Why the Markey Chip Won't Hurt You*, BROADCASTING & CABLE, Aug. 14, 1995, at 10 [hereinafter *Markey Chip*]; *Markey*

be composed of “parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and . . . [be] fairly balanced in terms of political affiliation, . . . points of view represented, and . . . functions to be performed by the committee.”²¹⁵ Finally, distributors of television programs will be required to transmit the ratings so that parents can block programs that they consider inappropriate for their children.²¹⁶

In order to prevent the government from being involved in the rating process—an “indispensable conviction” of the entire television industry²¹⁷—the television industry quickly reacted and agreed to implement their own rating system.²¹⁸ This action was a departure from television broadcasters long-standing opposition to a national rating system and the V-chip.²¹⁹ The ratings will be determined by the distributor of each program, not the program producers,²²⁰ and will resemble movie ratings of the Motion Picture Association of America (MPAA).²²¹ There will be an industry review and “oversight monitoring process, which from time to time will examine specific programs and then comment on whether or not these ratings were appropriate under the canopy of guidelines” created by the industry.²²²

Wins on V-Chip, BROADCASTING & CABLE, Aug. 7, 1995, at 10; Christopher Stern, *Face-off on the V-Chip*, BROADCASTING & CABLE, Oct. 2, 1995, at 19 [hereinafter *Face-off*].

215. Telecommunications Act of 1996, 551(b), 110 Stat. at 140; 141 CONG. REC. H8485 (1995).

216. Telecommunications Act of 1996, § 551(b)(1), 110 Stat. at 140.

217. Jack Valenti, *Delivers Remarks After Meeting with Entertainment Executives on Violence on T.V.* *18 (Feb. 29, 1996) (transcript available at 1996 WL 88309) (Jack Valenti is the Chief Executive Officer of the Motion Picture Association of America.)

218. *Id.*

219. Christopher Stern, *Broadcasters Seek V-Chip-Less Solution*, BROADCASTING & CABLE, July 24, 1995, at 17; *Face-off*, *supra* note 216, at 19. However, broadcasters had supported other sorts of blocking devices including: V318 TV Lock-Out, TeleCommander, Intelelevision, TV Guardian, TimeSlot, SuperVision, TV Allowance, and Multimedia. *Id.* at 17. For a description of these devices, see *id.*

220. Valenti, *supra* note 217 at *16; *T.V. Ratings Brought About by Unprecedented Cooperation*, COMM. DAILY, Mar. 1, 1996, available in WESTLAW, 1996 WL 2365923 [hereinafter *Cooperation*].

221. *Cooperation*, *supra* note 220; Lewis M. Andrews, *Private Ratings*, NAT'L REV., Sept. 25, 1995, at 82.

222. Valenti, *supra* note 217, at *17; see *Cooperation*, *supra* note 222.

In order to facilitate the spread of the V-chip, the Telecommunications Act of 1996 requires that all televisions with a screen thirteen inches or greater sold in the United States be equipped with the blocking device.²²³ After consulting the ratings guidebook, the owners of the television will be able to block certain shows by programming the V-chip with a remote control.²²⁴ The V-chip would then read the rating transmitted to the television for each show and then block it if so programmed by the owner,²²⁵ working much like a VCR does for VCR-Plus codes.²²⁶

Finally, the Telecommunications Act of 1996 provides, in section 561, for expedited review.²²⁷ In anticipation of constitutional challenges, this provision would help implement the Act with some finality as quickly as possible. Challengers are given "only a year to make their case, so the V-chip won't die a slow death while stuck in court."²²⁸ Thus far, there have been no challenges to the V-chip, which NBC West Coast President Don Ohlmeyer has described as "unfortunate."²²⁹

223. Telecommunications Act of 1996, § 551(c), 110 Stat. at 140; *Markey Wins on V-Chip*, *supra* note 214, at 10; *Face-off*, *supra* note 214; Andrews, *supra* note 223, at 81-82.

224. 141 CONG. REC. S12209 (1995) (statement of Sen. Dole) (quoting Michelle Quinn, *V-chip Still Only a Vision—Despite All the Talk, It Doesn't Exist*, S.F. CHRON., July 28, 1995, at B1).

225. *Id.*

226. Andrews, *supra* note 221, at 83.

227. Telecommunications Act of 1996 § 561, 110 Stat. at 142-43 ("[A]ny civil action challenging the constitutionality [of the Act] . . . shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.").

228. Kinney Littlefield, *Violence Study Spurs on the V-Chip's Fans*, THE ORANGE COUNTY REG., Feb. 11, 1996, at F7; see 28 U.S.C. § 2284 (1994).

229. Jenny Hontz et al., *Programmers Wonder How Much This is Going to Hurt*, ELECTRONIC MEDIA, Mar. 4, 1996, at 27 ("Mr. Ohlmeyer said it is 'unfortunate' the networks have not filed suit to challenge the v-chip.")

B. "Power-to-the-Parents" or a "Television Condom?"

Whereas President Clinton has described the V-chip as a "power-to-the-parents technology monitor,"²³⁰ others have contemptuously referred to it as a "television condom."²³¹ During debates in the House of Representatives, one representative even created a "Lettermanesque" top ten list for the V-chip:

[F]rom the home office of the Family Empowerment Coalition, the top 10 unintended consequences of the . . . V-chip mandate: No. 10, bureaucrats will be able to pick the show your kids watch, but will not read them a bedtime story. No. 9, rating tens of thousands of hours of shows each year is fun, easy, and fat free, but it will not be cheap. No. 8, the viewer is upset that V-chip is not as good as the original show with that Ponch guy. No. 7, Oh, I am sorry, No. 7 has been blocked out by Government censors. No. 6, Angela Lansbury now stars in "Jaywalking, She Wrote." No. 5, provides jobs for unemployed Federal bureaucrats. No.4, will not work on that old out-of-date TV you bought last week. No. 3, brings back all the intrusive Big Government attitude that we all miss. No. 2, C-SPAN's annual NEA debate blocked out for sexual content. And the No. 1 unintended consequence of the . . . V-chip: blocks Regis, spares Kathie Lee.²³²

However, for nearly every claim against the V-chip there is a more persuasive countervailing argument. Additionally, there are persuasive justifications for the V-chip.

The Telecommunications Act of 1996 was passed by an overwhelming majority of Congress. Although this may reflect support for other provisions in the act, it may also reflect a similar sentiment of a survey which found that ninety percent of those polled support the inclusion of V-chip technology in new televi-

230. President William J. Clinton, The President, Vice President, and Mrs. Gore Discuss the Telecommunications Act of 1996 and Demonstrate How the V-chip Functions *8 (Feb. 9, 1996) (transcript available at 1996 WL S6227).

231. Tom Shales, *Chip of Fools; Any Way you Program It, the V-Chip Is a Long Stride Toward Censorship*, WASH. POST, Mar. 10, 1996, at G1 [hereinafter *Chip of Fools*].

232. 141 CONG. REC. H8490-91 (1995) (statement of Rep. Hayworth from Arizona).

sion sets.²³³ This sort of support is probably related to the feeling that "violent and sexually explicit programming desensitizes children and can influence their behavior and emotional development."²³⁴ Recently, the "National Television Violence Study," an analysis of programs on commercial broadcast, cable and public television that was commissioned by the cable television industry, found that violent programs are a potential minefield, posing "substantial risks," which "include learning to behave violently, becoming more desensitized to the harmful consequences of violence, and becoming more fearful of being attacked."²³⁵ The study found that violence is found in forty-four percent of network programs and eighty-five percent of cable programs.²³⁶

Whereas television viewing was once a family activity where parents regulated what their children watched, "changes in society and technology have made it more difficult for parents to monitor their children's exposure to television programming."²³⁷ One of the main purposes of the V-chip is to "provide families [with] the ability to determine the kind of information their children see and hear on television consistent with their family's values."²³⁸ In a roundtable discussion with parents and children hosted by the President, Vice-President and First Lady, a child stated that he liked the "V-chip because it doesn't automatically do anything, but . . . gives the parents the power to control" what their children watch.²³⁹ However, even President Clinton recognized that "parents now have to do their end of the job and decide what they do or don't want their young children to see. . . . The responsibility of parents to do this is something they deserve, and something they plainly

233. 141 CONG. REC. E1436 (1995) (statement of Rep. Markey).

234. 141 CONG. REC. H8496 (1995) (statement of Rep. Waxman).

235. Bill Reed, *Public TV Continues Tradition of Quality Programming and Public Service*, KAN. CITY STAR, Mar. 11, 1996, at B5.

236. Littlefield, *supra* note 228, at F7.

237. 141 CONG. REC. H8496 (1995) (statement of Rep. Waxman).

238. President William J. Clinton, *The President and Vice President Deliver Remarks After Signing the Telecommunications Act of 1996* *29-30 (transcript available at 1996 WL 73750) (Feb. 8, 1996).

239. Michael Eisenbrey, *The President, Vice President and the First Lady Participate in a Roundtable Discussion on T.V. Violence* *33 (transcript available at 1996 WL 90866) (Mar. 1, 1996).

need."²⁴⁰ In fact, President Clinton went so far as to say that the V-chip "can become a powerful voice against teen violence, teen pregnancy, and teen drug use."²⁴¹

Although there has been widespread support for the V-chip, opponents have expressed concerns and concocted apocalyptic visions of a V-chip using United States. In fact, Brandon Tartikoff, NBC's former programming chief, said that "[i]t may not be Hitler going into Poland, but it's still an invasion. Once you open the door, you're inviting two things to happen: censorship, and the government getting into a business it has no business being in. Where is it going to end?"²⁴² Some even feel that the V-chip

will not only fail to "clean up" TV, but will actually make things worse. With a rating system and a V-chip in place . . . networks will no longer have to censor the content of shows. The [V-chip] could be a shield protecting programs that have far more explicit sex and violence than anything on the air today.²⁴³

However, such a prospect is unlikely as long as such material would still be regulated by 18 U.S.C. § 1464 and limited to the "safe harbor" period, or banned as obscene material.

One of the greatest concerns expressed by broadcasters is the money factor. The money factor appears in two forms, loss of advertising and cost of implementing. Ted Turner, among others thought that the V-chip could cost broadcasters "quite a bit of money" as advertisers would avoid some shows.²⁴⁴ However, others, such as NBC President Robert Wright and ABC's President Robert Inger, disagree by asserting that sponsors have always screened shows and know the show's content before they buy time.²⁴⁵ An analyst for Merrill Lynch agreed with Wright and Inger when he said that labeling programs would neither change the way advertisers pursue their key viewer demograph-

240. *Supra* note 238.

241. *Id.* at *30.

242. *Chip of Fools*, *supra* note 231 at 65; Hontz et al., *supra* note 222, at 27.

243. *Chip of Fools*, *supra* note 231, at 65.

244. *Cooperation*, *supra* note 220.

245. *Id.*

ics, nor the way shows deliver them.²⁴⁶ Additionally, the audience lost through the V-chip is precisely the segment of the audience that programmers are not targeting when they include sexual and violent scenes.²⁴⁷ One parent considered the V-chip to be a voting mechanism, by which a lack of viewers will cause advertisers to reduce advertisements during that program, thereby prompting programmers to reconsider the content of the program blocked by many households.²⁴⁸

The argument that the cost of implementing the V-chip mandate and rating system would be prohibitive is also suspect. First, the V-chip has been projected to cost less than five dollars under the Burton/Markey proposal.²⁴⁹ If a person can afford to spend hundreds of dollars on a new television, their cost analysis will not be affected by a five dollar increase from a chip. The argument that a rating system would be expensive is not so easily dismissed. Some claim that a massive bureaucracy will be created to rate the massive number of hours of television programming.²⁵⁰ Although a massive undertaking at first, the rating of new shows will not require quite as much manpower in the future. Additionally, there is already a bureaucracy in place to regulate television, the FCC. Regardless, someone will be paid to rate programs.

Another argument proffered by V-chip opponents is that the V-chip technology does not exist,²⁵¹ and would take years to have an effect.²⁵² In response to the claim that the technology does not exist, one needs only to look to our northern neighbor, Canada. Canada has performed tests in the Toronto area involving several television stations including a Fox station out of Buffalo, New York.²⁵³ The tests have been spearheaded by Canada's two largest cable operators without a governmental

246. Hontz et al., *supra* note 229, at 27.

247. H.R. REP. NO. 204, 104th Cong., 1st Sess., pt. 1, at 225 (1995).

248. *Supra* note 239.

249. *House Nears Passage of Telecom Bill*, COMM. DAILY, Aug. 3, 1995, available in WESTLAW, 1995 WL 9473429.

250. *Chip of Fools*, *supra* note 231, at G1.

251. 141 CONG. REC. S12209 (1995) (statement of Sen. Dole).

252. 142 CONG. REC. S1631 (1996) (statement of Sen. Simon).

253. *Joint TV-Program Ratings with U.S. Proposed by Canada*, WALL ST. J., Oct. 17, 1995, at B4.

mandate through V-chip legislation.²⁵⁴ Most Canadians who have participated in the test have endorsed the blocking device.²⁵⁵ Canada's system has more than twenty different ways to block out objectionable programming.²⁵⁶ Because of the success in Canada, the chairman of the Canadian Radio-Television and Telecommunications Commission has threatened to scramble American television signals coming into Canada unless they are encoded.²⁵⁷

Although the technology apparently exists, it is unclear how long it will take for the technology to be in most American living rooms. The problem is that the V-chip is only mandated in new televisions. What will happen to those who do not buy new televisions? Most likely, they will not have the ability to block programs without having similar technology installed in their present televisions. Another possibility is that there will be other technologies available to block programs. Regardless, the fact that it may take years for there to be a significant percentage of televisions with the V-chip should not deter the goal of providing parents with the ability to block programs.

Opponents have also questioned whether the programming of the V-chip will even take place or be changed by technologically adept children.²⁵⁸ "How will the device be made easy enough for parents to use yet complicated enough to confound teenagers' attempts to bypass it?"²⁵⁹ There is an obvious trade-off working here. Where the programming of the V-chip is made easier for the parents to use, it also becomes easier for children to override. If the programming involves a difficult procedure so that children cannot change it easily, parents may

254. Joanne Ingrassia, *U.S. Stations Get in on Canadian V-chip Tests*, ELECTRONIC MEDIA, Feb. 26, 1996, at 41.

255. *Id.*

256. Joanne Ingrassia, *Canada Eyes U.S. as it Tests V-chip.*, ELECTRONIC MEDIA, Mar. 4, 1996, at 26.

257. *Id.*

258. *V-Chip No Substitute for Judgment*, STATE J.-REG., Mar. 3, 1996, at 52; Mike Redmond, *Mom's No' Out-V-Chips Technology*, INDIANAPOLIS STAR, Mar. 9, 1996, at D1.

259. Steve Johnson, *V-Chip Fueling Censorship Debate: The Government Could be Buried up to Its Eyeballs in Controversy if it Insists on Creating a Ratings System to Curb Violence and Sex on Television*, CHI. TRIB., Feb. 11, 1996, at 1 [hereinafter *V-Chip Fueling*].

not be able to program it themselves. There is also the question as to whether parents will take the time to look at the ratings and program the V-chip when they had failed in the past to monitor their children's television viewing for lack of time or presence.²⁶⁰ If so, parents may forego the trouble and the V-chip would fail to meet its objective; "to give parents the technological capacity to be able to block their children from seeing [certain programs] when they are not in the home or not in the same room as their children."²⁶¹

An ironic argument is that rating and blocking certain programs may result in an attraction to "the forbidden fruit." One study indicates that the current "parental advisory" on television programming actually can be an enticement to juvenile boys.²⁶² It has also been suggested that the R rating is a magnet for adolescents.²⁶³ There is probably no solution to this problem except for better parent-child relationships.

C. *Possible Effects on the ACT Decisions*

How does the Telecommunications Act of 1996 and the V-chip mandate fit in with the series of *ACT* cases? First, the Act has supplied evidence and a record of the reasons why such a step is needed, a hurdle that the FCC and Congress failed to overcome until the *ACT IIIIR* case. Second, unlike the ban on indecent broadcasting, the blocking of television programs will not require rating and implementation by the government. Instead, the ban will require rating and implementation by private individuals, whether it be the parents who program the V-chip or the independent committee that rates the programs. Because industry has planned to establish the ratings and transmit them, it is unlikely that the government will be involved, and

260. 142 CONG. REC. S1631-32 (1996) (statement of Sen. Simon) ("[T]he homes that most need to use the V-chip will not use it. . . . Too often, the children of parents [in high-crime areas] are desperately trying to get by, and if watching more violence keeps the children off the streets, it will strike many parents as a reasonable trade-off").

261. *Markey Chip*, *supra* note 214, at 12.

262. *Id.*

263. 142 CONG. REC. S1631 (1996) (statement of Sen. Simon).

hence it will be difficult to claim that the government is restricting or censoring speech.

However, both the Telecommunications Act of 1996 and the *ACT* cases concern overlapping groups of television programming. Whereas the Telecommunications Act of 1996 deals with all programming, the *ACT* cases deal with only a certain type of broadcasting, that of indecent material. The V-chip may successfully shift the burden of protecting children back to the parents by giving them the ability to monitor what their children watch even while not supervised. Nevertheless, the government may still assert its independent interest in the well-being of children and continue to have indecent broadcasting channeled into certain times. Although one might think that the V-chip would render the channeling of indecent material to certain hours unnecessary, this is not the case—at least for now.

First, one must remember that the V-chip is only required for new television sets. Therefore, there will be large numbers of families without any protection except for the channeling of indecent material to late night hours. Second, there will still be the need to protect those children whose parents fail to program the V-chip or who have bypassed the parents' programming. Just because the V-chip will help protect children does not mean that the governments independent interest in protecting children has been fulfilled. However, there will be a question as to whether the ban is still the least restrictive means of achieving the governments interest. Courts may not find that there is a reasonable risk that large numbers of children will be exposed to indecent material because of the use of the V-chip.²⁶⁴ Therefore, broadcasters may once again challenge the FCC regulations channeling indecent material, while not challenging the V-chip. However, such a challenge would likely fail until the V-chip technology has significantly spread to households throughout the nation. Should a challenge succeed, the fears that the V-chip would make television programming worse may come true.²⁶⁵ Additionally, Chief Judge Edwards'

264. See *supra* note 169 and accompanying text.

265. See *supra* note 243 and accompanying text.

concerns in *ACT III*²⁶⁶ and *ACT IIIR*²⁶⁷ over possible difference in opinions between parents and the FCC over what is indecent may extend to the rating system. Nor does the V-chip remove his concern that the channeling of indecent material may not correspond with parents' perceptions of indecent material.

VI. CONCLUSION

The Government and FCC have a long standing precedent of regulating broadcasting. From the inception of the Radio Act of 1927,²⁶⁸ indecent broadcasting has been regulated. The regulation of broadcasting has experienced a number of stages. At first, there was little enforcement of the ban on indecent broadcasting, until an interview by Jerry Garcia was found to be patently offensive.²⁶⁹ The FCC formulated a generic definition of indecency in *Pacifica*,²⁷⁰ which still stands today. After *Pacifica*, the FCC, Congress and the courts began a series of responses, rules and decisions. The rules for broadcasting indecent material changed from a midnight to 6:00 a.m. safe harbor, to a 10:00 p.m. to 6:00 a.m. ban, to a twenty-four hour ban, to a combination of midnight to 6:00 a.m. and 10:00 p.m. to 6:00 a.m. safe harbors, and finally back to a 10:00 p.m. to 6:00 a.m. safe harbor. However, the 10:00 p.m. to 6 a.m. safe harbor is not conclusive, for the *ACT IIIR* court found that a midnight to 6 a.m. safe harbor could be constitutional,²⁷¹ and invited the FCC to promulgate rules for and create a record supporting such a safe harbor.²⁷²

With the increased questioning of the assumptions on which the ban is based and the prospect of V-chip being required, the current status of the law is likely to change. D.C. Chief Circuit Judge Edwards reflected this perspective in his concurring

266. See *supra* notes 144-47 and accompanying text.

267. See *supra* notes 180-98 and accompanying text.

268. 44 Stat. 1162, 47 U.S.C.A. § 81-83.

269. See *supra* notes 19-21 and accompanying text.

270. See *supra* notes 22-23 and accompanying text.

271. See *supra* notes 167-72 and accompanying text.

272. See *supra* note 176 and accompanying text.

opinion in *ACT III*²⁷³ and his dissenting opinion in *ACT III*.²⁷⁴ In fact, if the assumptions are incorrect or the FCC's interpretation of patently offensive does not coincide with prevailing social norms, the law should change.

Until the V-chip is present in most televisions, it is unlikely that the FCC will drop all regulation of indecent material. This is because there seems to be an inherent distrust of parents' ability to supervise their children, not to mention the government's independent interest in the well-being of children. The FCC may keep the safe harbor and ban for these reasons. However, such regulation will become more difficult to justify as the protection of children is provided through the V-chip. At some point, the First Amendment rights of adults will exceed these waning compelling interests and the ban will be abolished. The same result could occur from the realization that children are not actually harmed by indecent material. However, nothing except for a change in the hours of the safe harbor, to midnight to 6 a.m., will likely occur until the realization of the V-chip.

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273. See *supra* notes 144-47 and accompanying text.

274. See *supra* notes 180-98 and accompanying text.

