

# THE BOGEYMAN OF “HARM TO CHILDREN”: EVALUATING THE GOVERNMENT INTEREST BEHIND BROADCAST INDECENCY REGULATION

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*Although the government's interest in preventing harm to children has played a central role in justifying regulation of broadcast indecency by the Federal Communications Commission (FCC), courts generally have failed to examine this asserted interest. In this Note, I argue that this failure has added great uncertainty to indecency regulation and that more thorough consideration of this interest may provide greater clarity on the boundaries of permissible speech. I first review the doctrinal history of the regulation of indecency, both within broadcasting and in other media, to demonstrate that the interest in preventing harm to children, though a central justification of the regulatory scheme, has been ill defined. I then examine the recent case of FCC v. Fox Television Stations, Inc. to illustrate that the vagueness of the current FCC indecency standard raises constitutional concerns. I contend that the vagueness may derive, at least in part, from courts' failure to identify the type of harm to children that the government seeks to prevent through restrictions on indecent speech. Although the FCC's structure may be inapt for identifying speech that is harmful to children, courts should undertake an investigation into the nature of the harm that indecency regulation seeks to prevent in order to provide limits on the scope of government authority. In the final Part, I therefore analyze five potential government interests, each stemming from a distinct potential harm that indecent broadcasting may create, and demonstrate how identifying the harm that indecency regulation is trying to address may restrict and define the scope of permissible government action.*

## INTRODUCTION

In 2004, singer Bono, accepting a Golden Globe Award, described the win as “fucking brilliant.”<sup>1</sup> With these two words, he reinvigorated a simmering First Amendment debate over regulation by the Federal Communications Commission (FCC) of so-called inde-

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<sup>1</sup> See *infra* note 69 (listing incidents leading up to policy change).

cent speech in broadcasting.<sup>2</sup> Although the ensuing lawsuit initially presented as an administrative law challenge to the FCC's policy change regarding single, or "fleeting," expletives, the constitutionality of the entire regulatory scheme for indecency in broadcasting quickly came into question. The Second Circuit's initial decision rested on administrative grounds, but, in dicta, the court extensively discussed the regulation's likely unconstitutional vagueness.<sup>3</sup> The Supreme Court limited its review to the administrative law holding.<sup>4</sup> But on remand, the Second Circuit followed the logic of its prior dicta and declared the FCC's current indecency policy void for vagueness, explaining that the FCC's failure to provide effective guidance on the scope of the regulation has chilled otherwise permissible speech.<sup>5</sup>

Ever since the Supreme Court first upheld the constitutionality of broadcast indecency regulation in 1978, courts have relied on the government's interest in protecting children to justify regulations of indecent speech. Despite the centrality of this interest in the justification of indecency regulations, courts have avoided close scrutiny of its scope or substance. Chief Judge Edwards, dissenting in a D.C. Circuit case upholding broadcast indecency regulation, decried this unquestioning acceptance: "[T]he simple truth is that '[t]here is not one iota of evidence in the record . . . to support the claim that exposure to

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<sup>2</sup> The FCC possesses the statutory authority to enforce the prohibition on "obscene, indecent, or profane language" in broadcasting. See 18 U.S.C. § 1464 (2006) (noting that FCC will promulgate regulations to enforce). The FCC defines "indecent" speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 450 (2d Cir. 2007) (quoting *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, 2703 (1987)). To determine whether a depiction or description of a sexual or excretory activity or organ is patently offensive, the FCC considers the explicitness of the description, the extent to which the material "dwells on or repeats at length" the description, and "whether the material appears to pander or is used to titillate" or is used for "shock value." *Id.* at 451 (quoting Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8003 (2001)) (emphasis omitted).

Broadcast media includes television and radio programming distributed through radio waves. The Digital TV Transition: Glossary, [http://www.dtv.gov/glossary\\_B.html](http://www.dtv.gov/glossary_B.html) (last visited June 3, 2010). The FCC's indecency regulations cover only broadcasting and do not extend to satellite or cable media. See *infra* notes 57–66 and accompanying text (discussing attempts to regulate, and judicial scrutiny of regulations of, indecent programming on cable). Many viewers, however, receive broadcast television networks retransmitted through cable or satellite providers. Stacy Katz, Note, *The Lewd, Crude, or Partially Nude: Indecency Regulation, Fleeting Expletives, and the High Price We Pay for Not-So-Free "Free Speech,"* 60 SYRACUSE L. REV. 347, 380 (2010).

<sup>3</sup> See *infra* Part II.B (discussing problems of vagueness and chilling identified in *Fox* litigation).

<sup>4</sup> See *infra* Part II.A.

<sup>5</sup> See *infra* Part II.B.

indecenty is harmful—indeed, the nature of the alleged “harm” is never explained.’”<sup>6</sup>

This Note argues that courts’ failure to examine the government’s asserted interest in protecting children from indecent speech has contributed to the vagueness of broadcast indecency regulation. Due to the absence of clear boundaries, broadcasters restrict their own speech beyond what the FCC’s already expansive regulations would require, thereby reducing the amount of free speech on the airwaves. By examining and identifying the precise nature of this interest, courts could place express limits on the permissible scope of such regulation and enable broadcasters to better tailor their programming to the legal limits.

In Part I, I review the doctrinal history of indecency regulation to demonstrate that the central justification of the regulatory scheme—preventing harm to children—has been ill defined. Part II examines the recent case of *FCC v. Fox Television Stations, Inc.* This case demonstrates that the vagueness of the current FCC indecency standard, particularly in light of the chilling effect it produces, likely renders the standard unconstitutional, as the Second Circuit recently concluded. This Part then contends that the vagueness may derive, at least in part, from the failure to identify the precise nature of the harm that the government aims to prevent. I argue that, at minimum, courts should undertake an investigation into the character of this harm in order to define the limits of government authority. Part III analyzes five distinct harms that indecent broadcasting may create and that the government may have an interest in combating. This Part also demonstrates how a more precise definition of the “harm to children” may restrict the scope of permissible government action. My analysis does not constitute a comprehensive examination of the boundaries imposed by reliance on each harm; rather, it is my hope that courts will finally take up the task of examining this governmental interest so that clear standards may develop through future litigation.

## I

### DOCTRINAL HISTORY OF INDECENCY REGULATION

Before a court examines a statute or regulation under the First Amendment, it must determine what level of scrutiny to apply. The level of scrutiny applied depends primarily on two factors: whether

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<sup>6</sup> *Action for Children’s Television v. FCC (ACT III)*, 58 F.3d 654, 671 (D.C. Cir. 1995) (Edwards, C.J., dissenting) (quoting *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 145 (D.C. Cir. 1995) (Edwards, C.J., dissenting)).

the regulation is content based or content neutral,<sup>7</sup> and whether the speech involved is high or low value.<sup>8</sup> Indecency regulation is content based,<sup>9</sup> which normally garners higher scrutiny, but indecent speech is generally, though not always, considered to be low value.<sup>10</sup> It is within this tension that broadcast indecency regulation falls, and, as the Second Circuit noted in *Fox*, the precise level of scrutiny to be applied is unclear.<sup>11</sup> The Supreme Court has applied strict scrutiny to indecency regulations outside the broadcasting context but has used only intermediate scrutiny to examine restrictions on speech in broadcasting.<sup>12</sup> Thus, we may reasonably expect a court to apply some form

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<sup>7</sup> See Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers Are Created Equal*, 10 FLA. COASTAL L. REV. 421, 446–47 (2009) (“[C]ontent-based laws receive greater scrutiny than content-neutral laws . . . .”); cf. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 814 (2000) (finding it “clear” that standard for content-based regulation of protected speech is strict scrutiny). Laws are content based when they limit speech because of the message that it conveys; content-neutral laws restrict speech regardless of its message. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–90 (1983). For an extensive exploration of the distinction between content-based and content-neutral restrictions in First Amendment doctrine, see Stone, *supra*.

<sup>8</sup> See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298 (1995) (“The Court has taken the position in various cases that some kinds of speech have less value than others and therefore are not entitled to the same quality of First Amendment protection as that given to more valued types of speech.”). This distinction traces its roots to a 1942 Supreme Court decision regarding “fighting” words, which held that punishment for the use of some classes of speech does not “raise any Constitutional problem” because they “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); see also Shaman, *supra*, at 301–02 (noting that although statute at issue in *Chaplinsky* would currently be found unconstitutionally vague and overbroad, this dictum has had longer existence as key source of low-value speech theory).

<sup>9</sup> Katz, *supra* note 2, at 379.

<sup>10</sup> See Shaman, *supra* note 8, at 298 (reporting that some Justices, although not majority, have deemed nonobscene sexually explicit speech low value). Compare *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (plurality opinion) (arguing that patently offensive references to excretory and sexual organs “surely lie at the periphery of First Amendment concern”), with *id.* at 761 (Powell, J., concurring in part) (rejecting notion that Justices may calibrate degree of First Amendment protection based on view of speech’s value), and *Reno v. ACLU*, 521 U.S. 844, 877 (1997) (acknowledging law prohibiting patently offensive and indecent material on Internet may cover “large amounts of non-pornographic material with serious educational or other value”). Shaman has noted the “vacillation and uncertainty” that marks the use of the theory of low-value speech and the resultant difficulty of identifying the classes of speech that the Court considers to be of low value. Shaman, *supra* note 8, at 298–99.

<sup>11</sup> *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 464 (2d Cir. 2007) (“[W]e recognize there is some tension in the law regarding the appropriate level of First Amendment scrutiny.”).

<sup>12</sup> See *id.* at 464–65 (surveying scrutiny applied in each context).

of heightened scrutiny, possibly strict scrutiny, to the FCC’s regulatory regime.<sup>13</sup>

In addition to receiving heightened scrutiny under the First Amendment, restrictions on speech are subject to challenges for overbreadth and vagueness. Overbreadth doctrine requires that regulations of speech neither extend beyond that speech which may be “legitimately restricted” nor “invade areas of protected speech”; a law may be void for vagueness if the scope of speech within its purview is unclear such that an ordinary person cannot determine its applicability.<sup>14</sup> Both overbroad and vague laws are constitutionally deficient because they produce a chilling effect on protected speech—that is, the laws deter speakers from engaging in speech that is protected by the Constitution because the speaker fears violating the law.<sup>15</sup>

Parties have challenged broadcast indecency regulation on these theories.<sup>16</sup> This Part provides an overview of the judicial response to these cases, demonstrating that the protection of children from harm undergirds courts’ approval of broadcast indecency regulation in the face of these challenges. I then briefly discuss challenges to other regulations of indecent speech to show that harm to children remains a central fixture of opinions, even those in which the judiciary examines the scope of restrictions more critically.

### A. FCC Regulation of Broadcast Indecency

In *FCC v. Pacifica Foundation*,<sup>17</sup> the Supreme Court declared for the first time that the FCC had the authority to restrict indecent

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<sup>13</sup> *Fox Television Stations, Inc. v. FCC (Fox II)*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 15–17 (2d Cir. July 13, 2010) (acknowledging that, in broadcasting context, “cases have applied something akin to intermediate scrutiny,” but finding “no reason why [the] rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television” in light of recent technological changes).

<sup>14</sup> Eric C. Chaffee, *Sailing Toward Safe Harbor Hours: The Constitutionality of Regulating Television Violence*, 39 U. MICH. J.L. REFORM 1, 33 (2005).

<sup>15</sup> Rafic H. Barrage, Note, *Reno v. American Civil Liberties Union: First Amendment Free Speech Guarantee Extended to the Internet*, 49 MERCER L. REV. 625, 628 (1998); see *infra* notes 84–86 and accompanying text (discussing void-for-vagueness doctrine).

<sup>16</sup> *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 734 (1978) (stating that Court must determine whether FCC’s order finding broadcast indecent violates First Amendment); *Fox I*, 489 F.3d at 454 (listing as arguments against validity of FCC’s order concerning fleeting expletives that FCC’s indecency regime violates First Amendment and is unconstitutionally vague); *Action for Children’s Television v. FCC (ACT III)*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (stating that plaintiffs challenged safe harbor law on three bases, including First Amendment and vagueness grounds); *Action for Children’s Television v. FCC (ACT I)*, 852 F.2d 1332, 1335 (D.C. Cir. 1988) (noting plaintiff’s vagueness challenge and overbreadth argument).

<sup>17</sup> 438 U.S. 726 (1978).

speech in broadcasting. The case arose when a father, driving with his young son one afternoon, heard George Carlin's monologue, "Filthy Words,"<sup>18</sup> on the radio and wrote a letter complaining of the program to the FCC.<sup>19</sup> The FCC issued an opinion finding the monologue indecent and generating the definition of indecent language still in use today.<sup>20</sup> Unlike the standard for obscenity, upon which the FCC largely based its indecency standard, the indecency standard did not require that the speech "appeal to the prurient interest" and did not exempt speech with "literary, artistic, political, or scientific value," at least during hours in which children are likely to be in the audience.<sup>21</sup>

The Supreme Court, in a five-to-four decision, upheld the FCC's findings and regulation.<sup>22</sup> Although the Court recognized that Carlin's words constituted "speech" under the First Amendment,<sup>23</sup> it declared broadcasting a unique medium in which greater than normal restrictions on speech were constitutionally permissible.<sup>24</sup> Two features, the Court said, distinguish broadcasting from other media. First, it is uniquely pervasive: It invades homes, and listeners or viewers cannot be apprised of the content prior to turning on a program.<sup>25</sup> Second, it is available to children: A program over the airwaves may enter homes where children live and play, reaching even young children.<sup>26</sup> The Court ultimately concluded that concerns about the well-being of children, in light of the ease of access, "amply justify special treatment of indecent broadcasting."<sup>27</sup> The latter interest caused Justices Powell and Blackmun to concur in part, creating a majority.<sup>28</sup> Preventing

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<sup>18</sup> See *id.* at 751 app. (reproducing transcript of "Filthy Words" monologue).

<sup>19</sup> *Id.* at 729–30. The complainant was a "member of the national planning board of the pro-censorship watchdog group Morality in Media." MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 97 (2001).

<sup>20</sup> *Pacifica Found. Station WBAI (FM)*, 56 F.C.C.2d 94, ¶¶ 12, 14 (1975).

<sup>21</sup> *Id.* ¶ 11; see also *supra* note 2 (describing FCC's indecency standard).

<sup>22</sup> *Pacifica*, 438 U.S. at 750–51.

<sup>23</sup> *Id.* at 744; see also *id.* at 756 (Powell, J., concurring) ("Some of the words used [by Carlin] have been held protected by the First Amendment in other cases and contexts."); *id.* at 763 (Brennan, J., dissenting) (noting the "unanimous agreement" among Justices "that the Carlin monologue is protected speech"). This recognition distinguishes indecent speech from obscene speech, which is outside of the realm of First Amendment protection. See *Miller v. California*, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

<sup>24</sup> *Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

<sup>25</sup> *Id.* at 748–49.

<sup>26</sup> *Id.* at 749–50.

<sup>27</sup> *Id.* at 750.

<sup>28</sup> *Id.* at 758 (Powell, J., concurring) ("The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts.").

harm to children thus emerged as a primary reason to permit FCC regulation of indecency.

Despite these pronouncements about the harm to children, the impact of the *Pacifica* decision appeared limited.<sup>29</sup> Initially, it was applied narrowly; the FCC responded only to incidents involving the words in the “Filthy Words” monologue.<sup>30</sup> However, over a series of adjudications in 1987, the FCC altered its treatment of indecency.<sup>31</sup> In addition to eliminating a safe harbor period after 10 p.m.,<sup>32</sup> the FCC shifted from a “dirty words” test to a “generic” test, based on offensiveness and “contemporary community standards.”<sup>33</sup> While recognizing that the new test could inhibit the FCC and broadcasters from easily distinguishing indecent from permissible speech, the Commissioners rejected claims of vagueness or overbreadth.<sup>34</sup>

In making these changes, the FCC relied explicitly on the government’s interest in preventing harm to children. The Commissioners justified the abandonment of the safe harbor period because evidence suggested there was a “reasonable risk” of children in the audience after 10 p.m.<sup>35</sup> They also reiterated their stance that, because broadcasting was unique due to the impossibility of segregating child and adult audience members, they could limit speech for the benefit of children despite the effect upon adults.<sup>36</sup> The FCC further argued that broader enforcement of the prohibition of “indecent” material in broadcasting “advanc[ed] the government interest in safeguarding children from patently offensive depictions or descriptions of sexual

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<sup>29</sup> See *id.* at 750 (“It is appropriate . . . to emphasize the narrowness of our holding.”); see also *id.* at 755–56 (Powell, J., concurring) (indicating that Court approved only finding that “Filthy Words” monologue was indecent at time it was broadcast and did not consider indecency standard generally).

<sup>30</sup> See *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, 930 (1987) (reconsideration order) (describing proposition that only words included in Carlin’s monologue were indecent as “[u]nstated, but widely assumed” belief).

<sup>31</sup> For a discussion of the political pressures surrounding this change in policy, see HEINS, *supra* note 19, at 109–13.

<sup>32</sup> See *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699–700 (1987); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, 2704 (1987).

<sup>33</sup> See *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705, 2705–06 (clarifying prior statements to emphasize that indecency depends on context not “mechanistic classification of language”); *Pacifica Found.*, 2 FCC Rcd. at 2699 (same); see also HEINS, *supra* note 19, at 113 (discussing change in FCC indecency policy in 1987).

<sup>34</sup> *Cf. Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. at 933 (reconsideration order) (explaining that “reasonable judgment” would protect broadcasters).

<sup>35</sup> See *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699–700; *Regents of the Univ. of Cal.*, 2 FCC Rcd. at 2704; see also *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. at 2705 (“[I]ndecent speech is actionable at times of the day when there is a reasonable risk that children may be in the audience.”).

<sup>36</sup> *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699.

or excretory activities or organs, so as to enable parents to decide effectively what material of this kind their children will see or hear.”<sup>37</sup>

Groups opposing greater restrictions on speech in broadcasting, including broadcasters and Action for Children’s Television (ACT),<sup>38</sup> swiftly filed constitutional challenges to the FCC’s new standard. In *ACT I*,<sup>39</sup> then-Judge Ruth Bader Ginsburg upheld the generic indecency standard, relying heavily upon the government’s interest in protecting children.<sup>40</sup> She accepted the FCC’s explanation that the prior policy had not taken into account the effect of the material on children unless it contained one of seven specific words.<sup>41</sup> The court rebuffed assertions that the standard was overbroad because it failed to exempt material with “serious merit.”<sup>42</sup> Such an exemption was unnecessary, the court reasoned, because the social value of material was irrelevant to its effect on children.<sup>43</sup> It therefore upheld the FCC’s finding that a morning talk show had broadcast indecent programming.<sup>44</sup>

While the *ACT I* court reaffirmed the government’s interest in the protection of children from harm, it was not until *ACT II* that the court addressed the FCC’s elimination of the safe harbor provision and overruled the resulting absolute ban on the broadcasting of inde-

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<sup>37</sup> Infinity Broad. Corp. of Pa., 3 FCC Rcd. at 931 (reconsideration order).

<sup>38</sup> ACT’s primary mission was advocating better-quality and less-commercialized children’s television through increased regulation, but it initiated the suit against the FCC’s new indecency standard out of a belief that the ban violated the First Amendment. Paul Farhi, *Children’s Television Group to Fold, Saying It Has Accomplished Mission*, WASH. POST, Jan. 9, 1992, at B11.

<sup>39</sup> Action for Children’s Television v. FCC (*ACT I*), 852 F.2d 1332 (D.C. Cir. 1988).

<sup>40</sup> Judge Ginsburg asserted: “We have upheld the FCC’s generic definition of indecency in light of the sole purpose of that definition: 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.” *Id.* at 1340.

<sup>41</sup> *Id.* at 1338.

<sup>42</sup> *Id.* at 1339–40.

<sup>43</sup> *Id.* at 1340; *see also* Action for Children’s Television v. FCC (*ACT II*), 932 F.2d 1504, 1508 (D.C. Cir. 1991) (reiterating rejection of constitutional overbreadth challenge because “even material with ‘significant social value’ may have a strong negative impact on children”) (citation omitted).

<sup>44</sup> *ACT I*, 852 F.2d at 1341 (declaring that it found “[n]o principle . . . under which [the court] might rationally” distinguish between that case and *Pacifica*). The court vacated two orders finding violations for programs aired after 10 p.m. and concluded that the FCC presented insufficient evidence to justify the change in the safe harbor. *Id.* It remanded these orders to the FCC, alerting the agency that it must craft a policy that “would give effect to the government’s interest in promoting parental supervision of children’s listening, without intruding excessively upon the licensee’s range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech.” *Id.* at 1344.

cent speech.<sup>45</sup> Subsequently, Congress reestablished by statute a modified safe harbor period in which broadcasters were permitted to air indecent programming between midnight and 6 a.m. for all nonpublic stations.<sup>46</sup> Writing for the three-judge panel that initially considered the constitutionality of this law, Judge Wald rejected the protection of *adults* from intrusions into the privacy of the home as a sufficient government interest.<sup>47</sup> This left only the interest in the protection of children to justify broadcast indecency regulation, and Judge Wald accepted both variants of the interest in protecting children that the government asserted. Not only could the government act to assist parents in supervising their children, it also had an independent interest in protecting children's well-being.<sup>48</sup>

Reconsidering the case en banc, the D.C. Circuit agreed that the government had a compelling interest in protecting children, finding the government's independent interest "evident beyond the need for elaboration."<sup>49</sup> It also rejected the notion that the government must provide empirical support to justify its conclusion that indecent programming harmed children.<sup>50</sup> Not all members of the court shared this unquestioning acceptance of the government's interest, however. In dissent, Chief Judge Edwards pointed out that the government not only failed to provide evidence supporting a finding of harm to children, but it never specified the nature of the harm that it was acting to prevent.<sup>51</sup> No judge joined Chief Judge Edwards's dissent,<sup>52</sup> and the

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<sup>45</sup> 932 F.2d at 1508–09 (striking down statute banning broadcasting of indecent programs at all hours).

<sup>46</sup> Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992). The safe harbor for public stations that ceased to broadcast at or before midnight began at 10 p.m. *Id.*

<sup>47</sup> *Action for Children's Television v. FCC*, 11 F.3d 170, 174–76 (D.C. Cir. 1993), *rev'd en banc*, 58 F.3d 654 (D.C. Cir. 1995).

<sup>48</sup> *Id.* at 176–77. The panel accepted these interests but concluded that the law was unconstitutional because it was not the least restrictive means available to achieve them. *Id.* at 177.

<sup>49</sup> *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 661 (D.C. Cir. 1995) (en banc) (quoting *New York v. Ferber*, 458 U.S. 747, 756 (1982)). Unlike the panel, the en banc court accepted the midnight-to-6 a.m. safe harbor as narrowly tailored, *id.* at 665, but found it unconstitutional because the government failed to provide a basis for disparate treatment between stations closing at 10 p.m. and those closing at midnight. *Id.* at 668–69.

<sup>50</sup> *See id.* at 661–62 ("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 . . .").

<sup>51</sup> *See id.* at 670–71 (Edwards, C.J., dissenting) (noting nature of alleged harm was never explained and evidence existed to connect harm with violence on television, but not indecency).

<sup>52</sup> *Id.* at 670.

Supreme Court's denial of the petition for certiorari left the issue of the nature of the harm unresolved.<sup>53</sup>

### B. Regulation of Indecency in Other Media

Federal attempts to regulate indecent speech extend beyond broadcasting. In evaluating these attempts, the Supreme Court has accepted the interest in protecting children without much examination, focusing instead on the scope of the regulatory acts. In *Sable Communications*, the Court struck down as overbroad a law prohibiting sexually oriented commercial telephone messages even though it accepted without scrutiny the government's claimed interest in protecting children.<sup>54</sup> *Reno v. ACLU* held a virtual ban on indecency on the Internet unconstitutional<sup>55</sup> but acknowledged from the outset the "legitimacy and importance of the congressional goal of protecting children from harmful materials."<sup>56</sup>

Finally, the Court addressed the regulation of indecent cable programming in *United States v. Playboy Entertainment Group*.<sup>57</sup> The law at issue required cable operators to scramble fully and limit to a safe harbor those channels devoted to sexually explicit or indecent adult programming.<sup>58</sup> Unlike in prior cases, the government initially did not assert an independent interest in shielding children from this material; rather, it claimed it needed to act to prevent children from accessing

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<sup>53</sup> *Action for Children's Television v. FCC*, 516 U.S. 1043 (1996).

<sup>54</sup> *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have [previously] recognized . . . a compelling interest in protecting the physical and psychological well-being of minors.").

<sup>55</sup> The Court found that the Communications Decency Act of 1996, which precluded the display on the Internet of "any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" in such a way that minors could access the material, 47 U.S.C. § 223(d) (Supp. II 1994), was unconstitutional on two bases: vagueness and overbreadth. *Reno v. ACLU*, 521 U.S. 844, 874, 879 (1997).

<sup>56</sup> *Reno*, 521 U.S. at 849.

<sup>57</sup> *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). The Supreme Court had also considered the restriction of indecent speech on cable in *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 733 (1996), striking down two provisions of a law addressing leased and public access channels. In that case, the plurality accepted the government's interest in protecting children from indecent speech without further analysis. *See id.* at 743 (identifying "need to protect children from exposure to patently offensive sex-related material" as "an extremely important justification, one that this Court has often found compelling").

<sup>58</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 505, 110 Stat. 136, 136 (1996). The law addressed "signal bleed," a phenomenon in which noises or images were occasionally audible or visible despite partial scrambling to obscure the channel. *Playboy*, 529 U.S. at 806.

the material without parental consent.<sup>59</sup> The limited nature of this interest permitted the Court to find that a “less restrictive alternative” was available, namely a provision requiring cable operators to block a channel at the request of a customer.<sup>60</sup> Even though many parents had not taken advantage of this option, the government’s failure to assert an independent interest meant that it could not require the cable operator to block the channel altogether.<sup>61</sup> When the case reached the Supreme Court, the government asserted an independent interest in protecting children whose parents fail to act because of “inertia, indifference, or distraction.”<sup>62</sup> The Court rejected this interest because the government had not shown that a campaign to inform parents of the option to block would be ineffective.<sup>63</sup>

Additionally, the Court briefly scrutinized the existence of the asserted harm. Noting that the government provided only “anecdotal evidence” of signal bleed,<sup>64</sup> the majority doubted the widespread exposure of children to indecent content.<sup>65</sup> It concluded, “The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.”<sup>66</sup> Although the Court did not examine the precise nature of the harm, *Playboy* suggests willingness to question the breadth of the government’s interest.

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<sup>59</sup> *Playboy*, 529 U.S. at 811 (“[T]he Government disclaims any interest in preventing children from seeing or hearing [the material at issue] with the consent of their parents . . .”).

<sup>60</sup> *Id.* at 816.

<sup>61</sup> *See id.* (determining that customer-requested blocking was acceptable alternative despite “uncomfortable fact” that this option was already available and “the public greeted it with a collective yawn”).

<sup>62</sup> *Id.* at 824–25 (suggesting government adopted argument because nothing in record supported claim that blocking on request was not reasonable alternative).

<sup>63</sup> *See id.* at 826 (finding government had not shown publicizing alternative would be ineffective). Justice Breyer vehemently dissented from the Court’s rejection of the Government’s independent interest and noted that the Court’s prior cases did not support this result. *See id.* at 842 (Breyer, J., dissenting) (“I could not disagree more when the majority implies that the Government’s independent interest in offering such protection—preventing, say, an 8-year-old child from watching virulent pornography without parental consent—might not be ‘compelling.’”).

<sup>64</sup> *See supra* note 58 (explaining “signal bleed”).

<sup>65</sup> *Id.* at 819–22 (majority opinion).

<sup>66</sup> *Id.* at 819.

## II

FOX, CONSTITUTIONAL VAGUENESS OF FCC INDECENCY  
REGULATIONS, AND THE INTEREST IN  
PROTECTING CHILDREN FROM HARM

It is against this uncertain backdrop that the Second Circuit decided the *Fox* cases.<sup>67</sup> In Part II.A, I introduce *Fox* and outline the administrative question initially addressed by the courts. Part II.B examines constitutional problems with the FCC's regulatory scheme due to vagueness and the attendant chilling effect. This vagueness problem, which the Second Circuit first acknowledged in dicta, provided the grounds for the Second Circuit's decision holding the FCC's indecency policy unconstitutional. In the final subsection, I identify two remaining problems. One, the FCC's lack of expertise in evaluating harm to children, is unlikely to change in the near future. The other, courts' failure to examine the nature of the government's interest, provides a potential means to bring clarity to indecency regulation.

A. Fox Television Stations, Inc. v. FCC: *Administrative Decisions*

Prior to 2002, the FCC had held that a single offensive word, if not part of an otherwise indecent context, was not indecent.<sup>68</sup> Beginning in 2002, however, various incidents occurred in which a single expletive was uttered on television,<sup>69</sup> leading the FCC to abandon this rule. The Commission held that "the mere fact that specific words or

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<sup>67</sup> Fox Television Stations, Inc. v. FCC (*Fox II*), Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag (2d Cir. July 13, 2010); Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

<sup>68</sup> Pacifica Found., Inc., 2 FCC Rcd. 2698, 2699 (1987); Infinity Broad. Corp. of Pa., 2 FCC Rcd. 2705, 2705 (1987).

<sup>69</sup> The first incident occurred in December 2002, when, during a broadcast of the Billboard Music Awards, Cher stated, "People have been telling me I'm on the way out every year, right? So fuck 'em." Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002, and Mar. 8, 2005, 21 FCC Rcd. 2664, 2690 (2006) [hereinafter Omnibus Order]. One month later, at the Golden Globe Awards, Bono exclaimed, "This is really, really, fucking brilliant." Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes" Program, 19 FCC Rcd. 4975, 4976 n.4 (2004) [hereinafter Golden Globes Order]. At the 2003 Billboard Music Awards, Nicole Richie used the words "fucking" and "shit" while presenting an award. Omnibus Order, 21 FCC Rcd. at 2692-93 n.164. Characters on the drama *NYPD Blue* said "bullshit" in several episodes. *Id.* at 2696. Finally, during an interview on CBS's *The Early Show*, a contestant from CBS's reality show *Survivor: Vanuatu* called another contestant a "bullshitter." *Id.* at 2699. The FCC ultimately dismissed the complaints regarding *NYPD Blue* on procedural grounds. Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 13,299, 13,328-29 (2006). The FCC found that *The Early Show* fell within a "bona fide news" exception. *See id.* at 13,327-28 (recognizing use of expletives should be excused if part of "bona fide news story").

phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>70</sup> Broadcasters challenged the policy change,<sup>71</sup> and, in 2007, the Second Circuit vacated the FCC order on the ground that the change failed the Administrative Procedure Act’s arbitrary and capricious standard.<sup>72</sup> The court concluded that the FCC failed to provide a “reasoned analysis” in support of the change,<sup>73</sup> and it remanded the order to the FCC for reexamination.<sup>74</sup> Instead, the FCC opted to appeal to the Supreme Court.

The Supreme Court, reviewing the Second Circuit’s decision, also rested its decision on administrative law grounds. In a five-to-four decision, the Court found that the FCC’s policy change regarding fleeting expletives was not arbitrary and capricious because an agency need not present any greater rationale for a policy change than is required for an initial policy decision.<sup>75</sup> It is sufficient for the agency to “provide reasoned explanation” for the policy change, by “show[ing] that there are good reasons for the new policy.”<sup>76</sup> The agency is not required to show the court that these reasons are better than the reasons supporting the old policy.<sup>77</sup> The FCC satisfied this standard because it recognized it was changing its policy and provided rational reasons for the expanded enforcement.<sup>78</sup>

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<sup>70</sup> Golden Globes Order, *supra* note 69, at 4980. The FCC affirmed this position two years later. See Omnibus Order, *supra* note 69, at 2691 (applying new policy to 2002 Billboard Music Awards incident). In addition, it found that two words, “fuck” and “shit,” always depict sexual or excretory activities or organs regardless of their use. Golden Globes Order, *supra* note 69, at 4978–79 (holding that “fuck” has inherent sexual meaning even when used as “intensifier”); Omnibus Order, *supra* note 69, at 2684 (holding that “shit” has “inherently excretory connotation”).

<sup>71</sup> *Fox I*, 489 F.3d at 444.

<sup>72</sup> *Id.* at 447. The Act permits judicial oversight of agency action. See Administrative Procedure Act, 5 U.S.C. § 706 (2006) (directing reviewing court to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). Under the arbitrary and capricious standard, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>73</sup> *Fox I*, 489 F.3d at 462.

<sup>74</sup> *Id.* at 447.

<sup>75</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810–13 (2009).

<sup>76</sup> *Id.* at 1811.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1812.

B. *The Constitutional Issue: Vagueness and the Chilling Effect*

In its 2007 decision, however, the Second Circuit had not limited its discussion to the administrative issue. In dicta,<sup>79</sup> it stated that, even if the FCC adequately explained the change in policy, the altered regulatory scheme would likely be constitutionally defective due to vagueness.<sup>80</sup> While the Supreme Court's decision in *Fox* rested on administrative grounds, the constitutional issue loomed over the Court's opinions. The majority declined to address the constitutional question because the Second Circuit had not "definitively" ruled on the issue, yet it ominously warned that the constitutionality of the indecency standard "will be determined soon enough, perhaps in this very case."<sup>81</sup> Justices Thomas, Ginsberg, and Stevens, in concurring and dissenting opinions, expressed concerns about the constitutional issues underlying the case.<sup>82</sup> On remand, the Second Circuit finally addressed the constitutional issue directly and held the FCC's current indecency policy to be unconstitutional due to vagueness and the chilling effect that it produced.<sup>83</sup>

The prohibition on vagueness is a "basic principle" of law, yet it plays a particularly strong role in the speech context.<sup>84</sup> This rule addresses two significant problems. First, an unconstitutionally vague law "give[s] people little guidance as to what speech is covered by the prohibition," preventing them from conforming their conduct to the

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<sup>79</sup> See *Fox I*, 489 F.3d at 462 n.12 (recognizing that court's constitutional discussion was dicta).

<sup>80</sup> See *id.* at 463 ("[T]he FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.").

<sup>81</sup> *Fox*, 129 S. Ct. at 1819.

<sup>82</sup> *Id.* at 1820 (Thomas, J., concurring) (questioning continuing validity of *Pacifica*); *id.* at 1826–28 (Stevens, J., concurring) (asserting, as author of *Pacifica*, that *Pacifica* Court would not have permitted such sweeping definition of indecency); *id.* at 1828 (Ginsburg, J., dissenting) ("[T]here is no way to hide the long shadow the First Amendment casts over what the Commission has done.").

<sup>83</sup> *Fox Television Stations, Inc. v. FCC (Fox II)*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag (2d Cir. July 13, 2010). The FCC has petitioned the Second Circuit to reconsider the decision. *F.C.C. Asks Court to Revisit a Ruling Against an Indecency Policy*, N.Y. TIMES, Aug. 27, 2010, at B2.

<sup>84</sup> *Id.* at 18 (identifying this "basic principle" and recognizing "special burden" created by First Amendment "to ensure that restrictions on speech are not impermissibly vague" (citations omitted)).

law.<sup>85</sup> Second, vagueness provides opportunities for discriminatory and abusive enforcement.<sup>86</sup>

The Second Circuit found the FCC's indecency policy susceptible to both problems. Although the FCC had articulated a three-factor test for determining whether speech was "patently offensive," an element of indecency, it failed to apply this test in a manner that allowed broadcasters to predict future outcomes and conform their speech to the law.<sup>87</sup> The FCC applied the exceptions for bona fide news programs and artistic necessity with such "little rhyme or reason" that broadcasters could not rely on them in predicting the permissibility of future programming.<sup>88</sup>

Moreover, while the court made clear that it found no evidence that the FCC favored certain viewpoints, it noted the substantial risk for content-based determinations as a result of the vagueness of the standard.<sup>89</sup> For instance, in its 2007 decision, the Second Circuit expressed particular concern about the potential for the FCC to make determinations based on the "merit of [the] speech."<sup>90</sup> Under the "artistic necessity" exception, the FCC permitted broadcasters to defend the airing of indecent speech on the basis that it was "'integral' to the work."<sup>91</sup> However, the court noted that the standard invited merit-based determinations because the FCC did not clarify the burden a broadcaster must meet to establish that speech was "integral."<sup>92</sup> The uncertainty of this standard and the potential for abuse becomes clear when contrasting two films: *Saving Private Ryan*, a film depicting the Allied invasion of Normandy during World War II, and

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<sup>85</sup> Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 630 (2005); see *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 19 (identifying need to provide fair notice of prohibited conduct as "important objective" of vagueness doctrine); *supra* text accompanying notes 14–15 (stating that vague law is sufficiently unclear that ordinary person could not determine speech to which it applies, producing chilling effect).

<sup>86</sup> *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 19 ("Specificity, [unlike vagueness,] guards against subjectivity and discriminatory enforcement."); see also Brian J. Rooder, Note, *Broadcast Indecency Regulation in the Era of the 'Wardrobe Malfunction': Has the FCC Grown Too Big for Its Britches?*, 74 FORDHAM L. REV. 871, 897 (2005) (noting that purpose of vagueness doctrine is "to avoid discriminatory and arbitrary enforcement").

<sup>87</sup> *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 23 (describing FCC's application of test as "repetition of one or more of the factors without any discussion of how it applied them," which "hardly gives broadcasters notice of how the Commission will apply the factors in the future").

<sup>88</sup> *Id.* at 25–26.

<sup>89</sup> *Id.* at 27.

<sup>90</sup> *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 464 (2d Cir. 2007).

<sup>91</sup> *Id.*; see also *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 25 (describing this as "artistic necessity" exception).

<sup>92</sup> *Fox I*, 489 F.3d at 464.

*The Blues: Godfathers and Sons*, a Martin Scorsese documentary about blues musicians. While the FCC found that expletives used during *Saving Private Ryan* fell within the exception, it deemed use of similar expletives during *The Blues* indecent because they were not necessary to preserve the work's educational purpose.<sup>93</sup> In striking down the indecency policy as unconstitutional, the court questioned "how fleeting expletives could be more essential to the 'realism' of a fictional movie than to the 'realism' of interviews with real people about real life events," and found it "hard not to speculate that the FCC was simply more comfortable with the themes in 'Saving Private Ryan,' a mainstream movie with a familiar cultural milieu, than it was with 'The Blues,' which largely profiled an outsider genre of musical experience."<sup>94</sup>

The vagueness of the FCC's indecency standard is particularly problematic because it chills permissible speech: It encourages broadcasters to limit speech that *might* be penalized even if ultimately that speech would not have been deemed indecent.<sup>95</sup> Two aspects of FCC regulation exacerbate this chilling effect. First, the FCC has consistently refused to issue *ex ante* decisions concerning the content of a planned program; a station must broadcast the material and risk a fine before the FCC will determine whether it is indecent.<sup>96</sup> Second, the

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<sup>93</sup> *Id.* at 463.

<sup>94</sup> *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 28.

<sup>95</sup> *Id.* at 29 ("[B]roadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose. Indeed, there is ample evidence in the record that the FCC's indecency policy has chilled protected speech."); see Aurele Danoff, Comment, "Raised Eyebrows" over Satellite Radio: Has Pacifica Met Its Match?, 34 PEPP. L. REV. 743, 772 (2007) ("[B]roadcasters compromise the discussion of mature topics because they fear being fined."); Kurt Hunt, Note, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. & TECH. L. REV. 223, 235 (2007) (describing "chilling effect" of FCC indecency regulation in which stations "'voluntarily' refuse to air controversial material, or . . . insist on edited versions"). For an extended discussion of this chilling effect and its relationship to the vagueness of the FCC's standards, see generally Noelle Coates, Note, *The Fear Factor: How FCC Fines Are Chilling Free Speech*, 14 WM. & MARY BILL RTS. J. 775 (2005). The FCC's attitude toward the chilling effect has been largely dismissive, refusing to acknowledge the impact on speech that is not indecent. See, e.g., Infinity Broad. Corp. of Pa., 3 FCC Rcd. 930, 937 n.45 (1987) (reconsideration order) ("Obviously, to the extent that a broadcaster is 'chilled' from airing indecent programs when there is a reasonable risk that children may be in the audience, that is not an 'inappropriate chill.'"); Omnibus Order, *supra* note 69, at 2667 (stating that, in enforcement, FCC proceeds with caution and "appropriate restraint," "mindful" of First Amendment prohibitions on regulation).

<sup>96</sup> See HEINS, *supra* note 19, at 115 (describing FCC's refusal to issue ruling on indecency prior to broadcast of potentially indecent material); *ABC Affiliates Pulling 'Private Ryan'*, CNN/MONEY, Nov. 11, 2004, [http://money.cnn.com/2004/11/11/news/fortune500/savingpvt\\_ryan/index.htm?cnn=yes](http://money.cnn.com/2004/11/11/news/fortune500/savingpvt_ryan/index.htm?cnn=yes) (reporting that FCC refused to provide *ex ante* decision on *Saving Private Ryan* because doing so would constitute censorship).

finer that the FCC imposes for violations of its indecency regulation have risen sharply.<sup>97</sup> This is the result of both an increase in the amount of each fine and a change in the manner in which the FCC calculates fines, from a per-program to a per-licensee method.<sup>98</sup> Increased penalties further deter the broadcast of potentially indecent material.<sup>99</sup>

Numerous incidents in recent years demonstrate the existence of this chilling effect.<sup>100</sup> For example, more than sixty ABC affiliates decided not to air *Saving Private Ryan* in 2004 due to the use of expletives.<sup>101</sup> Following the broadcast, the FCC adjudicated the film not to be indecent.<sup>102</sup> In another instance, NBC removed a scene from the medical drama *E.R.* that included brief exposure of an eighty-year-old woman's breast during surgery, despite similar uses of incidental nudity in the past.<sup>103</sup> Finally, PBS offered its local stations both an edited and unedited version of the World War II documentary *The War* so that stations would not have to risk fines for expletives in the film.<sup>104</sup> These examples indicate that FCC regulation is likely to deter—and indeed already has deterred—the broadcast of material even where there is a strong likelihood that the material will not be found to be indecent.

Despite the Second Circuit's opinion, the status of indecency regulation remains uncertain. *Pacifica*, as Supreme Court precedent, remains valid. The Second Circuit found that *Pacifica* did not preclude

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<sup>97</sup> For a description of fines imposed in 2004, see Rooder, *supra* note 86, at 887–88, and also KIMBERLEY A. ZARKIN & MICHAEL J. ZARKIN, THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS 132 tbl.5.1 (2006). Congress blessed this increase in fines by enacting the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235 § 2, 120 Stat. 491, 491 (2006), which increased the maximum possible penalty to \$325,000 for each violation of broadcast indecency regulations, with a cap of three million dollars in damages for a single act.

<sup>98</sup> See *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 9–10 (reporting that at time Congress increased maximum fine by factor of ten, FCC began to treat each licensee's broadcast of same program as separate violation).

<sup>99</sup> *Fox II*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 29–32 (citing numerous examples); see also Rooder, *supra* note 86, at 899–900 (arguing that recent increase in penalties will amplify chilling effect). The chilling effect is particularly strong for small stations, who can less afford to pay fines. See Danoff, *supra* note 95, at 772 (“[W]hile fines may not have a substantial effect on a company like Viacom, which earns billions of dollars each year, fines do have a direct negative impact on smaller station's [sic] bottom line.”).

<sup>100</sup> See Coates, *supra* note 95, at 780–82, for an expanded list of examples.

<sup>101</sup> *Id.* at 781; Gregory B. Phillips, Note, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237, 250–51 (2006).

<sup>102</sup> *Supra* text accompanying note 93.

<sup>103</sup> See Rooder, *supra* note 86, at 888–89 (explaining that decision to pull was made in response to exposure of Janet Jackson's breast during 2004 Super Bowl halftime show).

<sup>104</sup> Paul Farhi, *Fearing Fines, PBS to Offer Bleeped Version of 'The War,'* WASH. POST, Aug. 31, 2007, at C1.

their constitutional determination because the *Pacifica* Court “declined to address *Pacifica*’s argument that the regulation was overbroad and would chill protected speech.”<sup>105</sup> It seems likely, however, that clarification of the relationship between these cases and the continuing validity of *Pacifica* will necessitate additional Supreme Court consideration. Moreover, the FCC may promulgate a new standard in an attempt to comply with the Second Circuit’s decision. Even as it found that the current standard failed constitutional scrutiny, the Second Circuit refused to “suggest that the FCC could not create a constitutional policy.”<sup>106</sup>

### C. Problems Remaining After Fox

The *Fox* decisions produce both constitutional and administrative issues related to the government’s underlying interest in the protection of children. As demonstrated in Part II.B, the FCC’s failure to propound a clear and limited definition of indecency likely renders its standard so vague as to be unconstitutional. To justify its flexible standard for indecency, the FCC argues it cannot specify those words or acts that cause harm to children,<sup>107</sup> requiring that speech be judged in context.<sup>108</sup> Despite the centrality of the protection of children to the FCC’s indecency regime and the imprecise nature of its indecency standard, courts have largely avoided close scrutiny of the nature of this government interest,<sup>109</sup> leaving the precise nature of this harm uncertain.<sup>110</sup> As Judge Leval pointedly inquired of the FCC’s counsel

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<sup>105</sup> *Fox Television Stations, Inc. v. FCC (Fox II)*, Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag, slip op. at 5 (2d Cir. July 13, 2010) (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 734–35, 743 (1978)).

<sup>106</sup> *Id.* at 32.

<sup>107</sup> This is clear in the FCC’s explanation of its shift toward an amorphous definition of indecency in 1987. The FCC abandoned its previous policy because it produced anomalous results in that material that was “of concern with respect to its exposure to children[ ] would have been permissible to broadcast simply because it avoided certain words.” *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, 930 (1987) (reconsideration order).

<sup>108</sup> *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705, 2705–06 (1987) (emphasizing essential role of context in evaluating indecency).

<sup>109</sup> See *supra* Part I (examining doctrinal history of indecency regulation and reliance on harm-to-children interest); see also HEINS, *supra* note 19, at 5 (describing government’s interest in well-being of minors as “truism”); Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 431 (2000) (observing that Supreme Court repeatedly “fail[ed] to analyze the state’s asserted compelling interest” in protecting children).

<sup>110</sup> See *supra* text accompanying note 51; see also Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children from “Indecent” Speech*, 11 WM. & MARY BILL RTS. J. 671, 673 (2003) (recognizing that, beneath apparent consensus that government has compelling interest in protecting children, a “deep ambiguity persists regarding the precise nature of the government’s legitimate objectives”); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) (noting that

during the Second Circuit reargument in *Fox*, "What are you protecting children from?"<sup>111</sup>

Precise definition of the harm, however, is a valuable undertaking because a more narrowly defined harm may aid policymakers in limiting and defining the scope of speech that may be found indecent.<sup>112</sup> Catherine Ross argues that the Court's failure to scrutinize the interest in protecting children from harmful speech has encouraged the government to "promulgat[e] broad regulations impinging on protected speech" because it perceives no bounds to the speech that might be regulated.<sup>113</sup> *Playboy* demonstrates the potential limiting power of a narrowed conception of harm.<sup>114</sup> In that case, the government initially presented only an interest in supporting parents who did not wish for their children to be exposed to signal bleed; therefore, the Court concluded that a program informing parents of the channel-blocking option was a sufficient alternative.<sup>115</sup> Had the government successfully established an independent interest, the Court may have permitted it to retain the broader law that directly regulated signal bleed. Although precisely identifying the harm may not fully address the uncertain boundaries of the indecency standard, it may provide some clear boundaries between permissible and impermissible speech.

An additional problem *Fox* and its predecessors brought into relief is that the FCC is unsuited to accomplishing the mission of protecting children. Its current structure is inadequate for determining whether a broadcast actually harms children. The Commissioners or Enforcement Division make ad hoc indecency determinations based

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Supreme Court has never identified "from precisely what" it is protecting children). The Court's failure to closely examine the government's interest is not unique to the regulation of speech. For an argument that courts and scholars have generally neglected to analyze compelling government interests, see generally Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988). However, in this context, the failure to identify closely the interests involved is particularly insidious because of the emotional appeal of the protection of children. See Ross, *supra* note 109, at 466 (identifying "emotional response to children's vulnerability" as factor contributing to failure to engage in "cogent legal analysis" when "protection of children is invoked as an interest").

<sup>111</sup> *Fox Television v. FCC Oral Argument* 45:13 (C-Span television broadcast Jan. 13, 2010), available at <http://www.c-spanarchives.org/program/ID/217993>.

<sup>112</sup> The FCC itself has noted that "it is important to make it explicit whom we are protecting and from what" to prevent its regulations from encumbering protected speech. *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, 931 (1987) (reconsideration order).

<sup>113</sup> Ross, *supra* note 109, at 433-34.

<sup>114</sup> *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000).

<sup>115</sup> See *supra* text accompanying notes 57-63 (discussing Court's analysis in *Playboy*).

on viewer complaints, without consideration of the best available knowledge on juvenile development.<sup>116</sup>

The government is unlikely to undertake an overhaul of the FCC's structure in the near future, and the Supreme Court has refused to require a heightened showing of proof, at least for administrative law purposes, that may compel such a reorganization.<sup>117</sup> Thus, considering the precise nature of the harm to be prevented would be valuable as a means of placing clear limits on the FCC's authority.

### III GOVERNMENT INTERESTS AND POSSIBLE "HARMS" TO CHILDREN

As I have demonstrated in Parts I and II, courts have almost entirely failed to examine the precise nature of the central government interest in regulating indecency: protecting children from harm. This failure has hindered the ability of courts to place effective limitations on FCC authority, the lack of which prompts broadcasters to chill potentially violative speech. In this Part, I identify in the relevant case law five potential government interests in shielding children from allegedly indecent materials in broadcasting: (1) supporting parental preferences; (2) preventing psychological harm; (3) preventing imitation of harmful behavior; (4) promoting civility and socially appropriate behavior; and (5) protecting from offense. After tracing arguments for and against each interest, I suggest means by which courts could limit the scope of FCC authority if they found that the FCC was acting to further a particular interest.

#### A. *Supporting Parental Preferences*

The best understood and least controversial interest that indecency regulations may promote is that of supporting the preferences

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<sup>116</sup> In the *Fox* litigation, former FCC Commissioners and officials harshly criticized the notion that the agency possesses expertise in identifying material as indecent or harmful to children:

A determination of what constitutes indecency does not entail any such expertise; but even if it did, the FCC has not exercised any. It has simply capitulated to public clamor and political pressure. No expertise is involved in reading emails sent by angry viewers who want the FCC to act as surrogate parents. No expertise is required to understand a threat from a congressman (also responding to the same angry viewers) . . . . The FCC simply opens its email.

Brief for Amici Curiae Former FCC Commissioners and Officials in Support of Respondents at 25, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582).

<sup>117</sup> See *Fox*, 129 S. Ct. at 1813 (observing that empirical data regarding harmful effect of indecency on children is not readily available and deeming it sufficient "to know that children mimic the behavior they observe").

of parents concerning their children's access to sexually explicit materials.<sup>118</sup> When acting under this interest, the government does not determine whether children should hear or see certain material; rather, it aids parents' efforts to prevent their children from being exposed to speech that the parents believe to be harmful or inappropriate.<sup>119</sup> The harm to be prevented, then, is the exposure of children to material in defiance of their parents' preferences.

The Supreme Court has recognized, within the Due Process Clause, a constitutional right of parents to control their children's upbringing.<sup>120</sup> The government's interest in assisting parents in their childrearing efforts is therefore easily seen as compelling.<sup>121</sup> Additionally, support of parental preferences emerges as a distinct governmental interest in case law regarding the protection of children from indecent materials. In *ACT III*, the FCC asserted an interest in assisting parents in the supervision of their children as one of two variants of the general interest in protecting children.<sup>122</sup> Both the panel that initially decided the case and the D.C. Circuit rehearing the case en banc accepted this interest.<sup>123</sup> This acceptance mirrored then-Judge Ruth Bader Ginsburg's finding in *ACT I* that the FCC could establish a rule channeling indecent programming to a safe harbor period "in order to shelter children from exposure to words and phrases that parents regard as inappropriate for them to hear."<sup>124</sup> Ginsburg empha-

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<sup>118</sup> See Bhagwat, *supra* note 110, at 673 (describing government's "interest in supporting and facilitating parental supervision over their children's access to sexually explicit speech" as "quite uncontroversial"). In *ACT III*, for example, the challengers did not dispute the strength of this interest. *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 661 (D.C. Cir. 1995) (en banc).

<sup>119</sup> See *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1343-44 (D.C. Cir. 1988) (emphasizing that FCC should determine policy that best advances parental control).

<sup>120</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents from compulsory education statute on finding that it violates their right to control their children's religious upbringing); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that statute requiring children to attend public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (rooting parent's right to teach child foreign language in Due Process Clause).

<sup>121</sup> Garfield, *supra* note 85, at 616 ("State empowerment of parents is in many ways an attractive basis for a First Amendment exception. This is because parents' right to control their children's upbringing is itself of constitutional pedigree.").

<sup>122</sup> *Action for Children's Television v. FCC*, 11 F.3d 170, 176-77 (D.C. Cir. 1993), *rev'd en banc*, 58 F.3d 654 (D.C. Cir. 1995) (observing that FCC invoked both interest in assisting parents' supervision of their children and independent interest in shielding children from indecent material).

<sup>123</sup> *Id.* at 177 (holding that courts had "repeatedly" recognized government's interest in protecting children); *ACT III*, 58 F.3d at 661.

<sup>124</sup> *ACT I*, 852 F.2d at 1340.

sized that the FCC's objective was not censorship "but to *assist parents*."<sup>125</sup> Even when the Court has questioned the government's independent interest in protecting children from indecent programming, it has accepted the government's role in supporting parents' preferences.<sup>126</sup>

The government's interest in supporting the preferences of parents is well accepted as a theoretical matter. Some opponents of FCC regulation argue that the regulation unduly burdens those parents who wish their children to have access to indecent materials.<sup>127</sup> Catherine Ross, for instance, asserts that it is more difficult to find alternative modes of access to indecent programming than to other materials, such as pornographic magazines, which she concedes the government may restrict.<sup>128</sup> This claim, however, rests on an outdated factual assertion. In contemporary society, where cable is common and films may be delivered by mail to one's home, it is at least as easy for a parent to provide her child access to indecent programming as it would be for a parent to purchase a pornographic magazine.<sup>129</sup> In contrast, it would be extremely difficult for parents who wish to prevent their children from having access to sexually explicit speech in broadcasting to do so without government action, as the D.C. Circuit recognized.<sup>130</sup> Although one might argue that such a parent should simply

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<sup>125</sup> *Id.* at 1334.

<sup>126</sup> See *United States v. Playboy Entm't Group*, 529 U.S. 803, 811–15 (2000) (accepting governmental interest in aiding parents who do not want their children exposed to adult programming, but questioning government's independent interest).

<sup>127</sup> See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 770 (1978) (Brennan, J., dissenting) (arguing that regulation of indecency infringes on right of parents who want to expose their children to indecent material such as Carlin's monologue); Bhagwat, *supra* note 110, at 704 (doubting permissibility of regulation contrary to most parents' views of indecency because of interference with parental rights).

<sup>128</sup> Ross, *supra* note 109, at 478 (declaring that it is "much less burdensome" to purchase magazines than to subscribe to cable or rent or purchase movies).

<sup>129</sup> It is significant that the Court has refused to permit regulation of indecent material on cable television and the Internet as these provide easy access to more explicit programming. See *supra* Part I.B (discussing failed attempts to regulate indecency outside of broadcasting); cf. Garfield, *supra* note 85, at 621 (recognizing that if liberal parents have easy alternative access to restricted material, such as Carlin's "Filthy Words" monologue, "their constitutional complaint is largely undermined"). But see Bhagwat, *supra* note 110, at 705 (positing that to find suppression constitutional, almost all parents must agree that suppressed speech is inappropriate for minors).

<sup>130</sup> *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc). One potential tool is the V-Chip, a device that allows parents to block programs assigned certain ratings. It has been a required feature in new televisions since 2000. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 140–42 (1996) (prescribing establishment of rating code and requiring that televisions include apparatus enabling viewers to block programming based upon ratings); see also ZARKIN & ZARKIN, *supra* note 97, at 153–54 (describing V-Chip). Some have suggested that it provides a sufficient alternative means for parents to control their children's television viewing. See, e.g.,

prevent his child from watching television or listening to the radio at all, this would deprive the child of an important information source,<sup>131</sup> one which is becoming increasingly essential to participation in our technology-driven society.<sup>132</sup> In light of the greater burden a sensitive minority of parents would face in shielding their children from certain programming, the Court should permit the government to assist these parents.

Once a court establishes that the FCC is acting in support of parental preferences, the court may limit the scope of the FCC's authority. *Playboy* demonstrates the limits of government authority when acting solely on an interest in supporting parents. Because the government in that case initially asserted that it was interested only in preventing children from viewing material without their parents' consent, the lower court was able to find a less restrictive alternative means to achieve this objective, namely an extant law that required cable operators to block a channel at the request of the customer. Although the government attempted in the Supreme Court to expand its interest to include protecting children whose parents had failed to consider or act upon a desire to shield their children from this material, the Court concluded that the government failed to show that a publicity campaign would be ineffective at promoting parental action.<sup>133</sup> Were the FCC or courts to rely solely upon the govern-

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Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, Then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157, 181 (2008) (advocating technologies that permit parental control, such as V-Chip). However, the V-Chip suffers from several flaws. It does not work on older televisions. It also works only if enabled, so it would not protect children who watch television on non-enabled televisions outside of their homes. Bhagwat, *supra* note 110, at 708–09. Finally, it responds to preassigned ratings rather than reacting to speech as it is broadcast during live programming. As a result, several programs recently judged indecent were given a rating indicating that they included less potentially offensive content than the speech used during the program warranted. See Brief for American Academy of Pediatrics et al. as Amici Curiae in Support of Neither Party at 27, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582) (discussing 2002 and 2003 Billboard Music Awards). See generally *id.* for an expanded argument that the V-Chip is not an appropriate alternative to FCC regulation.

<sup>131</sup> See William D. Araiza, *Captive Audiences, Children, and the Internet*, 41 BRANDEIS L.J. 397, 399 (2003) (arguing that placing obligation on parents to turn off radio would impose real costs on children in terms of loss of access to information).

<sup>132</sup> Barbara Woodhouse has commented on the centrality of television in children's lives, noting, for instance, that children may be assigned homework assignments that involve watching television programs. Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL F. 85, 105. Woodhouse argues that "to control the relentless flow of media influences, a parent would have to remove the child from peer influences and from mainstream social institutions." *Id.* at 106.

<sup>133</sup> See *supra* notes 57–63 and accompanying text (discussing *Playboy*).

ment's interest in supporting parents' preferences as to what their children see or hear in broadcasting, *Playboy* suggests that courts would favor rules that increase parental choice over direct FCC regulation of the content of broadcast programs because the former would more narrowly comport with the interest.

The government, however, has repeatedly asserted that its interest extends beyond an interest in supporting parental preferences and that it has an independent interest in restricting the material to which children have access.<sup>134</sup> In *ACT III*, the FCC clearly distinguished its interest in supporting parents and the government's independent interest as distinct elements within the overarching interest in protecting children from harm.<sup>135</sup> I next assess four possible independent rationales for the government's interest in limiting children's access to indecent material.<sup>136</sup>

### B. Preventing Psychological Harm

Courts may conclude that the government has an independent interest in restricting indecent programming in broadcasting in order to prevent psychological harm. If the FCC could show that children exposed to indecent programming became "emotionally disturbed,"<sup>137</sup> a court could permit regulation on this basis. Kevin Saunders, a supporter of regulation of sexually explicit speech for the protection of children, claims that First Amendment protection of such material has

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<sup>134</sup> See, e.g., *United States v. Playboy Entm't Group*, 529 U.S. 803, 824–25 (2000) (discussing government's asserted independent interest).

<sup>135</sup> See *supra* notes 122–23 and accompanying text (stating that both panel and court rehearing case en banc accepted both interests).

<sup>136</sup> Whether the government may rely upon an independent interest when some parents oppose its regulations is a hotly contested issue. For example, then-Judge Ginsburg insisted in *ACT I* that the FCC's proper mission was "to determine what channeling rule will most effectively promote parental—as distinguished from government—control." *Action for Children's Television v. FCC (ACT I)*, 852 F.2d 1332, 1344 (D.C. Cir. 1988). During oral arguments in that case, she expressed consternation that the agency would act as a "superparent" despite its lack of expertise in child development. HEINS, *supra* note 19, at 117 (citation omitted). The question of whether the government can assert an independent interest against the wishes of the parents is an issue that exceeds the scope of this Note. For an extensive examination of the interaction between different parents' views of the suppression of speech (including supportive, opposing, and neutral) and the government's authority to act on its independent interest, see Bhagwat, *supra* note 110. If supporting parental preferences were the only interest sufficient to support FCC regulation, it could significantly narrow the permissible scope of regulation.

<sup>137</sup> Garfield, *supra* note 85, at 627 (finding that courts might conclude that "minors, particularly young minors, are emotionally disturbed by exposure to explicit sexual materials and that such exposure is therefore harmful").

led our society "to fail in its duty to raise its youth in a safe and psychologically healthy manner."<sup>138</sup>

Courts, in evaluating the FCC's claim of an independent government interest in protecting children, have frequently presumed that the harm to be prevented is psychological. The Court in *Sable Communications* reiterated its past recognition of a compelling government interest in protecting children's psyches.<sup>139</sup> For the Court, the protection of children from psychological harm was as important as protection from physical harm.<sup>140</sup> In *ACT III*, the court determined that the government had an independent interest in FCC indecency regulation because "[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the . . . psychological well-being of a minor is compelling."<sup>141</sup> Just as the government may deny children's access to cigarettes and alcohol to protect their physical well-being, so too may it shield children from influences that cause psychological harm.

Opponents of FCC indecency regulation do not claim that the prevention of psychological harm would be an insufficient interest to warrant regulation. Rather, they argue that no proof exists to show that indecent programming produces psychological harm in children.<sup>142</sup> Their demand for empirical proof, however, is problematic given ethical restrictions that generally preclude testing to determine

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<sup>138</sup> KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 1* (2003).

<sup>139</sup> See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the . . . psychological well-being of minors.").

<sup>140</sup> *Id.* (grouping government's concern with protecting minors' psychological well-being with concern about minors' physical well-being as same interest); accord *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 661 (D.C. Cir. 1995) (en banc) (same).

<sup>141</sup> *ACT III*, 58 F.3d at 661 (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)).

<sup>142</sup> See, e.g., *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 461 (2d Cir. 2007) (noting lack of evidence of harm caused by fleeting expletives); *ACT III*, 58 F.3d at 670–71, 682 (Edwards, C.J., dissenting) (criticizing majority's acceptance of government's independent interest where FCC was unable to produce evidence of psychological harm); Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 34–35 (2004) (discussing dearth of evidence that pornography is harmful to children, particularly in comparison to abundant evidence of harmful effects of violent programming); Ross, *supra* note 109, at 504 (arguing that it is nearly impossible to find evidence that sexually explicit content harms children). Barbara Woodhouse, despite arguing that both sex and violence in media are harmful to children, acknowledges that "experts in child psychology and neurology are more concerned with images of violence or of sex coupled with violence." Woodhouse, *supra* note 132, at 115.

the effects of children's exposure to sexually explicit materials.<sup>143</sup> Although a small number of studies on the effects of indecent material on children are available,<sup>144</sup> courts are unlikely to rely on such studies because they could not absolutely disprove the possibility of harm.<sup>145</sup>

Were courts to accept such an interest, however, it might function to limit the scope of the FCC's regulatory authority in two ways. First, courts could demand that the FCC make an affirmative showing of empirical proof of harm in order to regulate. The D.C. Circuit, however, rejected the need for an affirmative showing of empirical proof of harm in order for the FCC to act.<sup>146</sup> The Supreme Court affirmed this refusal, at least under the Administrative Procedure Act, asserting that a requirement of proof would render the ban on broadcast indecency "a nullity" as such evidence was unavailable.<sup>147</sup>

Alternatively, courts could permit broadcasters to present proof of a *lack* of psychological harm as a defense to FCC sanctions. A broadcaster that has been accused of airing indecent material may have access to sufficient proof to show in its defense that this particular material did not cause psychological harm, without colliding with the problems of proof noted above. For instance, as children are often exposed to similar material outside of broadcasting, either through other media outlets or in their daily lives, the broadcasters could attempt to obtain scientific evidence that this particular incident is so insignificant that it could not produce a distinct psychological injury. A court might find that, because the material did not cause the harm alleged, such a defense adequately demonstrates that the broadcaster need not be penalized. Although it may seem perverse in a free speech regime to place the burden on the speaker to prove a lack of harm, and though it does not fully address the chilling effect of the regulation, in light of courts' unwillingness to demand that the govern-

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<sup>143</sup> See Garfield, *supra* note 85, at 608 ("There is little social scientific evidence examining the impact of [sexually explicit] material, however, because it is thought to be unethical, if not illegal, to expose children to it.").

<sup>144</sup> See Brett Ferenchak, Comment, *Regulating Indecent Broadcasting: Setting Sail from Safe Harbors or Sunk by the V-Chip?*, 30 U. RICH. L. REV. 831, 861-62 (1996) (discussing study finding no effect or harm, but noting no studies were available at time *ACT III* was decided).

<sup>145</sup> Cf. *Ginsberg v. New York*, 390 U.S. 629, 641-42 (1968) (upholding statute regulating materials that were obscene as to minors because scientific studies could neither prove nor disprove harm); Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 VILL. SPORTS & ENT. L.J. 15, 26-27 (1996) (discussing *Ginsberg*).

<sup>146</sup> See *ACT III*, 58 F.3d at 661-62 ("[T]he Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.").

<sup>147</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) ("There are some propositions for which scant evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them.").

ment prove harm when regulating sexual speech,<sup>148</sup> this would empower speakers by providing some means to ensure the protection of indecent speech.

### C. *Preventing Imitation of Harmful Behavior*

The government may assert another potentially quantifiable interest in support of FCC regulation—the interest in preventing harm that comes from imitating certain behavior seen or discussed in broadcast programs, particularly on television. The term “indecent” typically refers to sexually explicit material.<sup>149</sup> The Supreme Court has long indicated that the government may limit minors’ sexual activities, going so far as to uphold criminal laws barring sexual activity between minors of the same age.<sup>150</sup> Thus, the government could restrict minors’ access to sexually explicit broadcasting if it could establish that minors emulated the activity.

Supporters of FCC regulation often point to minors’ participation in harmful behaviors as evidence of the harm of indecent programming. Kevin Saunders begins his argument in favor of limiting sexually explicit speech for the benefit of children by reminding the reader of high rates of violent crime, pregnancy, and alcohol and tobacco use among minors.<sup>151</sup> The Parents Television Council, analyzing increased depictions of nonmarital and nontraditional sexual behaviors on television, opines that television has “given the imprimatur of acceptability” to these types of behavior and that children are, “in many cases, imitating that behavior.”<sup>152</sup> Justice Scalia, concluding that the FCC had adequately supported its change on fleeting expletives in *Fox*, asserted, “[I]t suffices to know that children mimic the behavior they observe.”<sup>153</sup>

Opponents of regulation may argue that the proper reaction to imitation of harmful behavior is not to deny children access to information, but to counter negative influences with increased information,

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<sup>148</sup> See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (refusing to require scientific data proving adverse effects of obscene material); *Ginsberg*, 390 U.S. at 641–42 (upholding restriction on obscene-as-to-minors materials where studies were ambiguous as to harm); *ACT III*, 58 F.3d at 661–62.

<sup>149</sup> Bhagwat, *supra* note 110, at 671.

<sup>150</sup> See *Michael M. v. Superior Ct.*, 450 U.S. 464, 466–67 (1981) (upholding, over equal protection challenge, criminal statute penalizing seventeen-year-old male for sex with sixteen-year-old female because of state’s strong interest in preventing teenage pregnancy).

<sup>151</sup> SAUNDERS, *supra* note 138, at 1.

<sup>152</sup> PARENTS TELEVISION COUNCIL, *HAPPILY NEVER AFTER: HOW HOLLYWOOD FAVORS ADULTERY AND PROMISCUITY OVER MARITAL INTIMACY ON PRIME TIME BROADCAST TELEVISION 3* (2008).

<sup>153</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009).

for example by giving information about contraceptives to prevent teenage pregnancy and the transmission of sexually transmitted diseases.<sup>154</sup> Moreover, they may assert that the arguments of supporters of broad indecency rules are at least partially dependent upon value judgments; the Parents Television Council's condemnation of depictions of nonmarital sex, for instance, depends heavily upon the notion that sex should occur only within marriage.

In fact, some evidence supports the notion that indecent programming may encourage minors to partake in harmful behaviors. A recent study established, for the first time, a link between minors' viewing of sexual content on television and teenage pregnancy.<sup>155</sup> Studies have also found links between watching television with sexual content and early initiation of sexual activity.<sup>156</sup> The availability of scientific evidence of harm suggests that this may be a fertile source of government authority. Yet, these studies are not definitive,<sup>157</sup> so the FCC and courts would likely continue to grapple with issues of proof when evaluating this interest. In addition, social scientists in this area may encounter ethical problems similar to those that impede testing to establish psychological harm because studies would involve exposing minors to materials the scientists believe may ultimately harm them.

Regardless of potential problems of proof, the FCC's use of this interest to justify regulation would inherently limit the scope of its authority. Certain words or behaviors, prohibited under current regulations, would be so unlikely to encourage harmful behaviors among children that they likely could not be subject to the prohibition on indecent material. For example, the FCC established that several words have inherent sexual or excretory meaning, even when not used literally to refer to sexual or excretory activities.<sup>158</sup> It is unlikely, though, that these words would induce sexual activity when used in their nonliteral sense. Therefore, if the FCC were relying on this interest, it likely could not completely restrict the use of these words in broadcasting. Moreover, the FCC's indecency definition includes

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<sup>154</sup> See Garfield, *supra* note 85, at 627 (suggesting problem of teenage pregnancy could be result of lack of sexually explicit speech).

<sup>155</sup> Rob Stein, *Study First to Link TV Sex to Real Teen Pregnancies*, WASH. POST, Nov. 3, 2008, at A1.

<sup>156</sup> *Id.* Studies have also linked viewing music videos featuring sexually explicit content to increased rates of STDs. *Id.*

<sup>157</sup> See *id.* (quoting critic arguing that study established correlation but not causation); see also Calvert, *supra* note 130, at 160 (discussing problem of proving that media influences cause specific harm rather than other factors).

<sup>158</sup> See *supra* notes 69–70.

material depicting sexual *and excretory* conduct.<sup>159</sup> Imitation of excretion by a minor cannot be considered harmful.<sup>160</sup> Thus, were the regulatory scheme to be evaluated under this interest, the FCC would be unable to justify regulation of nonliteral expletives and references to excretory activities and organs.

The two independent government interests that I have analyzed focus on children's physical and psychological development, but the *ACT III* majority recognized that "it is significant that the . . . Government's interest in protecting children extends beyond shielding them from physical and psychological harm."<sup>161</sup> The government may take steps to "protect children from exposure to materials that would 'impair[ ] [their] *ethical and moral* development.'"<sup>162</sup> I now turn to two potential interests in protecting the ethical and moral development of children.

#### *D. Promoting Civility and Socially Appropriate Behavior*

In addition to leading to imitation of harmful behavior, viewing indecent programming may cause children to imitate speech and behavior that, while not inherently harmful, is inappropriate in some contexts. The harm, therefore, is that children do not learn what speech and actions are appropriate in certain social contexts and are thereby impaired in their ability to function in society and as citizens.<sup>163</sup> I refer to the government's interest in avoiding this harm as an interest in promoting civility and socially appropriate behavior.<sup>164</sup>

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<sup>159</sup> *Fox Television Studios, Inc. v. FCC (Fox I)*, 489 F.3d 444, 450 (2d Cir. 2007) (quoting Regents of the Univ. of Cal., 2 FCC Rcd. 2703, 2703 (1987)) (providing FCC's definition of "indecent").

<sup>160</sup> Judge Leval dissented from the Second Circuit's opinion in *Fox I*, but he noted that a clear distinction existed between references to excrement and references to sexual activity: "[I]t seems to me there is an enormous difference between censorship of references to sex and censorship of references to excrement. For children, excrement is a main preoccupation of their early years. There is surely no thought that children are harmed by hearing references to excrement." *Id.* at 474 n.18 (Leval, J., dissenting). Because the case did not address use of the word "shit," he dissented. *Id.*

<sup>161</sup> *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc).

<sup>162</sup> *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)). The court found that the government was attempting to prevent the "coarsening of impressionable minds" that threatened the "quality," not merely the "health," of children, and so it did not need the assistance of social scientists to establish harm. *Id.* at 662-63.

<sup>163</sup> *Cf. Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (arguing that because "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens," states may impose laws to protect children's ability to perform citizenship functions).

<sup>164</sup> This interest is *not* the same as an interest in enforcing moral norms. In general, *Lawrence v. Texas*, 539 U.S. 558 (2003), called into question the sufficiency of morality as the sole interest supporting a law that infringes upon a constitutional right. *See id.* at

This interest was well expressed by the majority in *Bethel School District No. 403 v. Fraser*, in which the Supreme Court upheld restrictions on sexually explicit speech in schools.<sup>165</sup> *Fraser* involved a civil rights suit by a public high school student alleging that his First Amendment rights were violated when he was punished for giving, during an assembly, a speech involving what the majority characterized as an “elaborate, graphic, and explicit sexual metaphor.”<sup>166</sup> The majority, finding no First Amendment violation, noted that a primary objective of public education was inculcating the “fundamental values of ‘habits and manners in civility’ essential to a democratic society,” and so society properly had an interest, sufficient to counteract students’ speech rights, “in teaching students the boundaries of socially appropriate behavior.”<sup>167</sup> The Court continued:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.<sup>168</sup>

The student in *Fraser*, for example, may have exceeded social norms and offended other students and teachers, particularly women, as his speech “glorif[ie]d male sexuality.”<sup>169</sup>

Although *Fraser* addressed promoting civility and socially appropriate behavior within the school context, this interest may apply in broadcasting as well. Broadcasting does not have the pure educational mandate of public schools, but the FCC is statutorily obligated to ensure that broadcasters serve the public interest,<sup>170</sup> and the govern-

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577–78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *id.* at 590 (Scalia, J., dissenting). In this context, morality would be a particularly weak interest because the government would be opposing the moral views of some parents. Ross, *supra* note 109, at 479 (noting that parents will differ in when they believe their children should have access to different material, and will take into account different factors such as age, maturity, and judgment). Constitutional parental rights would mean little if the government could override parents’ moral choices that do not produce physical or serious psychological harm.

<sup>165</sup> 478 U.S. 675 (1986).

<sup>166</sup> *Id.* at 677–78. The concurrence noted that the speech was not, in fact, particularly vulgar or explicit. *Id.* at 687–88 (Brennan, J., concurring).

<sup>167</sup> *Id.* at 681.

<sup>168</sup> *Id.* at 683.

<sup>169</sup> *Id.*

<sup>170</sup> 47 U.S.C. § 309(a) (2006) (instructing FCC to consider “public interest, convenience, and necessity” in determining whether to approve broadcaster’s license application).

ment has mandated educational functions for broadcasters.<sup>171</sup> Broadcasting, especially television, provides a model of behavior and speech for children.<sup>172</sup> This interest, then, permits the government to act where programming demonstrates the use of words or actions outside of socially appropriate contexts.

The D.C. Circuit's discussion in *ACT III* of the "coarsening of impressionable minds" through indecent broadcasting reflects concern about this harm.<sup>173</sup> Justice Scalia explained during the oral argument for *FCC v. Fox* that this "coarsening" produced by shows with fleeting expletives is the result of these shows presenting the words "as something that is . . . normal in polite company."<sup>174</sup> This unique danger distinguished those expletives that a child hears on television from those a child overhears during his or her daily activities.<sup>175</sup> Even opponents of FCC regulation admit that it is important that children gain an understanding of the appropriate place and time for potentially offensive words and actions.<sup>176</sup>

The notion that the government may attempt to influence the socialization of children would seem to run counter to the concept that parents must control their children's upbringing in our pluralistic society.<sup>177</sup> This notion presumes, however, that, absent the government's intervention, parents would control their children's access to information. As Barbara Woodhouse demonstrates, however, parental control is not absolute in contemporary society; instead, mass media

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<sup>171</sup> Most notably, the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990), required broadcasters to air educational and informational programming for children. See Children's Educational Television, FCC, <http://www.fcc.gov/cgb/consumerfacts/childtv.html> (last visited June 24, 2010) (describing broadcasters' obligations to air educational television and limit advertisements during children's programs).

<sup>172</sup> Justice Stevens alluded to this teaching function when he commented in *Pacifica* that the broadcast of Carlin's monologue "could have enlarged a child's vocabulary in an instant." *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978). See generally Woodhouse, *supra* note 132 (reconceptualizing traditional relationship between parent, child, and state to acknowledge importance of mass media in socialization of children).

<sup>173</sup> *Action for Children's Television v. FCC (ACT III)*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc).

<sup>174</sup> Transcript of Oral Argument at 50, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (No. 07-582).

<sup>175</sup> *Id.*; see also *Fox*, 129 S. Ct. at 1813 ("[I]t suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate.").

<sup>176</sup> See Brief for ACLU et al. as Amici Curiae Supporting Respondents at 23, *Fox*, 129 S. Ct. 1800 (No. 07-582) ("In today's world children hear [expletives] from many sources. The important point is that they learn when the words are appropriate and when they are not.").

<sup>177</sup> See *supra* text accompanying note 120 (noting constitutional right of parents to control childrearing).

exerts a strong independent influence on children.<sup>178</sup> Given this reality, the government is not necessarily stepping on parents' toes; rather, the government is acting because it recognizes that broadcast television and radio are major channels through which children learn culture and culturally appropriate behavior<sup>179</sup> and that parents cannot prevent such exposure without impairing the child's ability to participate in society.<sup>180</sup> So while the government could not interfere if *parents* instructed their children not to comply with social norms and to act in a manner that would be considered socially inappropriate, the government may intervene where the *media* provides this influence because parents retain sufficient alternative means to teach their children nonconformist behavior.<sup>181</sup>

If a court concluded that the FCC was relying on this interest in making a determination about whether a program was indecent, it could place a significant limitation on the scope of FCC authority. Specifically, a court may find that a program that would otherwise be indecent falls within a "socially appropriate context" exception. Regulation to teach children when and where certain speech and behavior should not occur suggests that there are places and times when this type of speech and behavior *is* appropriate. Thus, in addition to warranting the suppression of material in the "wrong" context, the interest in civility and socially appropriate behavior would protect material when shown in the "right" context.

In many ways, this exception resembles the FCC's current exception for material where offensive speech is "integral" to the program.<sup>182</sup> However, the "socially appropriate context" exception would provide a clearer and more cogent line demarcating permissible and impermissible broadcasts. For example, the FCC distinguished between *Saving Private Ryan*, a fictional movie about the Allied invasion of Normandy in World War II, and *The Blues: Godfathers and Sons*, a documentary about blues musicians, finding that the use of

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<sup>178</sup> Woodhouse, *supra* note 132, at 105.

<sup>179</sup> *See id.* (describing media as filling role of socializing children because modern economy has required parents to work outside the home and to leave children at home unsupervised).

<sup>180</sup> *See supra* note 132 (discussing Woodhouse's argument regarding centrality of media to children's lives).

<sup>181</sup> *See supra* notes 127–32 and accompanying text (arguing that it is far less burdensome for parents who would prefer less regulation of broadcasting to expose their children to indecent speech through alternative means than for parents who would prefer more regulation to prevent their children from seeing and hearing such material in broadcasting).

<sup>182</sup> The FCC permits broadcasters to defend against an indecency claim by showing that the allegedly indecent speech was "'integral' to the work." *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 464 (2d Cir. 2007).

expletives was "integral" to the former but not the latter.<sup>183</sup> Under the "socially appropriate context" exception, neither of these programs would have been found indecent. The FCC correctly determined that the inclusion of expletives in *Saving Private Ryan* was necessary to preserve the realistic depiction of a war zone,<sup>184</sup> so the use of these words by soldiers in an active war is socially acceptable. Similarly, as the station that the FCC sanctioned noted, the station retained the expletives in *The Blues: Godfathers and Sons* to portray accurately the blues musicians being interviewed.<sup>185</sup> Because such language was appropriate in the musicians' environment, it would be permissible under the "socially appropriate context" exception.

This exception would also extend to nonverbal speech. Visual depictions of sexual organs, too, may be socially appropriate or inappropriate. Shortly after the exposure of Janet Jackson's breast during a Super Bowl halftime show, executives responsible for the television show *E.R.* decided not to air a scene depicting a woman's breast exposed during a surgical procedure.<sup>186</sup> Jackson's exposure clearly was not appropriate given the social context: Her breast was revealed when a cop performer removed a part of her costume at the end of a live performance with more than ninety million viewers.<sup>187</sup> In contrast, exposure of a breast during surgery is normal and contextually appropriate. Thus, if the courts or FCC recognized a "socially appropriate context" exception, NBC could broadcast the scene without fear of penalty by presenting evidence that the scene depicted a widely and socially acceptable practice. It is important to note that this exception should apply only if the broadcast is aiming for realism. For example, a highly fictionalized program, such as the high-school drama, *Gossip Girl*, could not include sexually explicit matter merely because high school students curse or are sexually active. A documentary or hyperreal program, in contrast, could include contextually appropriate but otherwise indecent speech.

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<sup>183</sup> See *supra* text accompanying notes 91–93 (discussing Second Circuit's frustration with vagueness of "artistic necessity" exception in light of these examples).

<sup>184</sup> See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 FCC Rcd. 4507, 4512–13 (2005) (acknowledging that deleting expletives would have diminished film's "power, realism and immediacy").

<sup>185</sup> Omnibus Order, *supra* note 69, at 2684; see also *id.* at 2728 (Adelstein, Comm'r, dissenting in part) (arguing that "a common sense viewing" of *The Blues* reveals "that coarse language is a part of the culture of the individuals being portrayed" and inclusion of such language is needed "[t]o accurately reflect their viewpoint and emotions").

<sup>186</sup> Rooder, *supra* note 86, at 888–89.

<sup>187</sup> See Frank Ahrens, *FCC Plans Record Fine for CBS; Halftime Show Found Indecent*, WASH. POST, Sept. 4, 2004, at E1.

*E. Protecting from Offense: Children as a Captive Audience*

Finally, a child's feeling of offense in response to certain speech may be considered harmful; courts might recognize this harm as sufficient to permit the government to shield the child from such speech. This interest is attractive because it mirrors the definition of indecency as including only "patently offensive" material.<sup>188</sup>

Under most circumstances, offense is not sufficiently harmful to warrant the suppression of speech.<sup>189</sup> Even where children are present, the Court has concluded that those who are offended by speech must at times simply "avert[ ] their eyes."<sup>190</sup> However, courts have accepted one situation in which offense, by itself, is a sufficient harm to restrict speech: where the offended recipient is a member of a "captive audience."<sup>191</sup> "Captive audience theory reflects a concern that individuals subjected to certain speech . . . had no choice, or at least no reasonable choice, as to whether to listen to the speech."<sup>192</sup> The idea of a captive audience is often related to a conception of the home as the traditional place of retreat from offensive speech.<sup>193</sup> However, what ultimately defines a captive audience is not the home but the notion of the ability to retreat and avoid continuing offense.<sup>194</sup> Thus, the government may not proscribe all offensive speech invading the

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<sup>188</sup> *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 450 (2d Cir. 2007) (quoting *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, 2703 (1987)).

<sup>189</sup> Justice Brennan explained, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>190</sup> *Cohen v. California*, 403 U.S. 15, 21 (1971). Cohen was arrested and charged with disturbing the peace for wearing a jacket emblazoned "Fuck the Draft" to a courthouse. There were children present in the corridor of the courthouse at the time of his arrest. *Id.* at 16. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court held that "the Constitution does not permit [the] government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Id.* at 210. Thus, it struck down a law prohibiting the showing of films containing nudity on outdoor screens visible from the street. *Id.* at 206–07. The Court rejected the protection of children as a sufficient interest to uphold the law because the regulation covered all nudity, not just that which might be harmful to minors. *Id.* at 213–14.

<sup>191</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 n.13 (1992) (White, J., concurring) (observing that offensive speech "may be proscribed when it intrudes upon a 'captive audience'"). For example, the Supreme Court invoked the captive audience doctrine to uphold a law prohibiting residential picketing in *Frisby v. Schultz*, 487 U.S. 474 (1988), and to permit a city to refuse to place political advertisements on public transit vehicles in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

<sup>192</sup> Araiza, *supra* note 131, at 407–08.

<sup>193</sup> See *Frisby*, 487 U.S. at 484–85 (noting government's ability to prevent intrusions into special privacy people have within their home).

<sup>194</sup> See Araiza, *supra* note 131, at 401 (recognizing that home is protected "because it preserves a sphere to which the individual can retreat").

home; rather, it may regulate only that speech from which one cannot reasonably retreat.<sup>195</sup>

Justice Stevens's majority opinion in *Pacifica* first indicated that captive audience doctrine might apply to broadcasting. Stevens justified regulation of indecency in broadcasting in part on the medium's ability to penetrate the home.<sup>196</sup> By referring to the inability to escape broadcasting even within this traditional area of retreat, Stevens suggests listeners or viewers might be members of a captive audience. Under this theory, broadcast recipients cannot evade offensive speech because they cannot know what speech they will encounter when they turn on the television or radio, even within their homes.<sup>197</sup> As they lack knowledge to make an informed choice about encountering potentially offensive speech, they cannot choose to retreat or avoid it.

For adults, this is an uncomfortable analogy. People often lack sufficient information to make an informed choice about initially encountering speech, yet courts have granted offensive speech First Amendment protection. Persons in a courthouse likely would not anticipate seeing a jacket displaying "Fuck the Draft," and persons on the street likely would not expect to see a nude person on a nearby drive-in theater screen.<sup>198</sup> Yet these forms of speech have constitutional protection because, after an initial encounter, viewers may choose to "avert[ ] their eyes."<sup>199</sup> Even when viewers first hear or see the speech within their homes, courts will recognize it as constitutionally protected so long as viewers can reasonably turn away from it.<sup>200</sup>

Children, though, may not have the same ability to retreat from speech as adults. Children may be members of a "captive audience" by reason of their immaturity: They lack the ability to make mature choices about encountering speech.<sup>201</sup> "Children have not yet formed

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<sup>195</sup> See, e.g., *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983) (finding that captive audience doctrine does not apply to mailings containing contraceptive advertisements sent to residences because offended viewers may easily avert their eyes by discarding mailing).

<sup>196</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) (observing that broadcasting is "uniquely pervasive," confronting citizens in privacy of their homes).

<sup>197</sup> *Araiza*, *supra* note 131, at 408 (arguing that this lack of choice is highlighted in *Pacifica*).

<sup>198</sup> See *supra* note 190 (discussing cases in which these fact scenarios arose).

<sup>199</sup> See text accompanying note 189 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>200</sup> See *supra* note 195 and accompanying text.

<sup>201</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) ("[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." (quoting *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring)) (alteration in original)); see also Edward L. Carter, R. Trevor Hall & James C. Phillips, *Broadcast Profanity and the*

their own preferences, have not acquired basic moral values, do not have the information needed for sound judgments, and are subject to ready manipulation by others.”<sup>202</sup> As children are unable to make informed choices, a court may conclude they are unable to turn away from material that they would otherwise choose not to encounter. If this is the case, the FCC may claim the ability to shield children from indecent content because they, like a captive audience, lack a reasonable ability to retreat from or avoid it.<sup>203</sup>

Reliance upon an interest in protecting children as members of a captive audience would have two significant implications for the scope of FCC regulatory authority. First, the emphasis on the inability to retreat or avoid the speech demonstrates that the FCC’s fleeting expletive policy<sup>204</sup> would not further this interest, for the essential quality of fleeting expletives is their momentary nature. Once a word has been spoken and any related offense inflicted, the event is over. There is nothing from which a viewer or listener may attempt to retreat. Although some harm has been imposed, it is not ongoing, so this interest would not permit government intervention. Second, the FCC likely would not have authority to regulate to protect older minors, whose increased maturity would permit them to make informed decisions regarding the speech they view or hear.<sup>205</sup> Although the FCC may be able to make a convincing argument that another of the interests discussed in this Part justify shielding older minors from certain speech, a court should not accept that they are members of a captive audience unable to make independent decisions.

The effect of a shift to protecting only young children might be limited because programming, once broadcast, is accessible to persons of all ages. However, it is worth noting that the FCC, at the time of *Pacifica*, focused on protecting children less than twelve years of age

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“Right to Be Let Alone”: Can the FCC Regulate Non-Indecent Fleeting Expletives Under a Privacy Model?, 31 HASTINGS COMM. & ENT. L.J. 1, 41 (2008) (contending that three interests underlying captive audience doctrine—“the right to make individual choices (autonomy); the right to repose; and the right to be free from offense”—apply with greater force to children than adults (quoting Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 108 (1991))).

<sup>202</sup> Etzioni, *supra* note 142, at 45.

<sup>203</sup> See Araiza, *supra* note 131, at 412 (“Children are presumed incapable of choice regarding certain basic issues such as the decision to view sexually-oriented material . . .”).

<sup>204</sup> See generally *Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444 (2d Cir. 2007) (discussing fleeting expletive policy).

<sup>205</sup> Cf. HEINS, *supra* note 19, at 259 (criticizing harm-to-minors jurisprudence as “frequently fail[ing] to make . . . age- and maturity-based distinctions” and for “[t]oo often . . . merg[ing] toddlers, grade schoolers, and teenagers into one vast pool of vulnerable youth”); Ross, *supra* note 109, at 485–86 (describing court and parental roles in promoting responsible maturation and “fostering the emerging autonomy of the young”).

from exposure to indecent material but subsequently began to consider the viewing habits of teenagers to justify its policy decisions, specifically the attempt to reduce the safe harbor period.<sup>206</sup> In addition, while “emphasiz[ing] the narrowness of [its] holding,” the Court in *Pacifica* acknowledged the importance of context to determining whether a program was indecent.<sup>207</sup> Specifically, it recognized, “The content of the program in which the language is used will also affect the composition of the audience,” so its decision concerning Carlin’s monologue did not dictate that an expletive in a “telecast of an Elizabethan comedy” might be similarly indecent.<sup>208</sup> This language suggests that the FCC may have less power to regulate content of programming that would not be expected to appeal to children and therefore would have few children in the audience. The issue of whether the government may protect older as well as younger children might affect the hours during which the indecency prohibition applies and, if the courts reinvigorate this language from *Pacifica*, the degree to which the prohibition would apply to different programs.

#### CONCLUSION

In the regulation of indecency in broadcasting, the government’s proffered interest in protecting children from harm has been woefully underexamined by the courts. By identifying harms from which the government may be shielding children, I hope to provide some clear limitations on government authority in an area otherwise dominated by vagueness.

The scope of regulations permitted by the harms that I have identified varies. While a court might interpret some harms to justify only very narrow government action, other forms of harm are capable of justifying the imposition of broader limitations. For example, if a court accepted only the government’s interest in supporting parents, the government would be forced to abandon independent regulation of speech if, in the future, an effective mechanism for parents to control their children’s access to different programming became available. In contrast, the interest in promoting civility would likely allow substantial government discretion in determining what behavior was inappropriate in social context. Throughout my analysis, I have examined each potential harm separately. A court, however, would be free to

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<sup>206</sup> See *Action for Children’s Television v. FCC (ACT I)*, 852 F.2d 1332, 1341–42 (D.C. Cir. 1988) (observing that, although FCC stated in its *Pacifica* brief that its concern was with children under twelve years, it justified the expansion of the safe harbor using statistics involving twelve- to seventeen-year-olds without explanation for change).

<sup>207</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978).

<sup>208</sup> *Id.*

adopt multiple harms, which could expand the scope of speech subject to regulation. My aim in this Note is not to provide an exhaustive list of limits grounded in reliance on the harms identified in Part III or to dictate which government interests courts should ultimately accept. Rather, I hope that, in providing a detailed analysis of the potential interests, courts may begin to both examine the specific form of harm that the FCC is acting to prevent and eliminate the generic protection of children as an excuse for unrestrained government discretion. This will in turn allow clearer standards to develop over time.

In this Note, I refrain from taking a normative stance on indecency regulation; instead, given its existence, I seek to examine potential mechanisms that may provide some meaningful restrictions on its scope. Nevertheless, I recognize that there are legitimate concerns about the suppression of speech and imposition of values through the regulation of indecency. Courts, in evaluating these measures, should take heed of Justice Brennan's warning "that in our land of cultural pluralism, there are many who think, act, and talk differently from [Supreme Court Justices], and who do not share their fragile sensibilities."<sup>209</sup> In light of the potential for the use of the regulation of speech to suppress unpopular viewpoints, it is of particular import that courts clarify the goals that regulation is intended to accomplish so as to determine whether the regulation can achieve these ostensible aims.

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<sup>209</sup> *Id.* at 775 (Brennan, J., dissenting).