ABORTING THE INDECENCY STANDARD IN POLITICAL PROGRAMMING

In the 1992 political season, the use of graphic aborted fetuses in television commercials by political candidates fostered much public debate. Michael Bailey was a Republican congressional candidate from Indiana who formulated graphic commercials and permitted them to be used by candidates in fourteen other states. Three basic formats were used: The first advertisement aired divided the television screen between images of "Choice A," a live baby, and "Choice B," an aborted fetus; in the second format, the candidates broadcast commercials equating legalized abortion to the Holocaust by showing graphic aborted fetal tissue beside prisoners of Auschwitz; and, finally, the candidates ran ads showing tweezers pulling apart aborted fetal tissue in a petri dish. During the months in which those ads aired, the Federal Communications Commission ("FCC" or "Commission"), received over 1200 telephone calls and 300 letters, the vast majority of which complained about the graphic nature of the content of those ads.

Almost simultaneously, the FCC was imposing fines on radio stations whose disc jockeys violated federal law by using indecent language during their radio programs while children were likely to be in the listening audience. It is inconsistent that the FCC would sanction these radio stations in an attempt to curb the exposure of indecent programming to children, while prohibiting licensees from limiting political candidates' free use of arguably disturbing images without regard for child viewers.

Since its formation in 1934, the FCC has had the authority to regulate broadcasting to serve the public interest, convenience and necessity. Toward these ends, the FCC has enforced federal law prohibiting obscene programming and has determined that programming which is indecent must be channeled to time periods when the risk that children will be in the audience is minimal. The federal statute regulating broadcast content in terms of obscenity and indecency is 18 U.S.C. § 1464. It states "[W]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not

3 Media: Sides Dispute Effects of "Graphic" Ads, AMERICAN POLITICAL NETWORK, Sept. 9, 1992 available in LEXIS, Nexis Library.
more than $10,000 or imprisoned not more than two years, or both." 11 Conflicting with section 1464 is another federal statute, section 315 of the Communications Act of 1934 ("Communications Act" or "Act").12 Section 315 prohibits a broadcast licensee from censoring the content of a political candidate's material.13 The identified purpose in granting that immunity was to allow a candidate an unfettered opportunity to disseminate her political views to the voting public.14 Hence, section 315 has been construed as sacrosanct, conferring an exemption upon political candidates from our nation's obscenity and indecency laws.15 Thus arises a tug-of-war between two federal statutes and a clash of interests with respect to political candidates and children.

This Comment addresses the apparent conflict between the FCC's political and children's programming policies. Part I explores the evolution of those policies through the FCC's reasonable access and indecency standards. Part II will then review current applications of the standards enunciated in both the political and non-political arenas. Discussion in this section focuses on debate over the use of graphic aborted fetuses in political advertisements to illuminate the conflict between the statutes and the competing interests of political candidates and children. Part III then analyzes the implications of these developments and offers two possible avenues for resolution. Part IV concludes that the current exemption for political broadcasting from the indecent programming statute works to the detriment of children who were, ironically, the original intended beneficiaries of the FCC's indecent programming policies. Finally, this Comment urges the adoption of a policy more sensitive to the special interests of children.

I. PRIOR LAW

A. Political Programming: Reasonable Access and No-Censorship Provisions

In 1960, the FCC determined that political programming was one of fourteen "major elements usually necessary to meet the public interest, needs and desires of the community."16 To ensure that federal candidates could avail themselves of the airwaves to disseminate their message, section 312(a)(7) of the Communications Act was enacted.17 This section of the statute affords legally qualified candidates "reasonable access" to broadcast media so they might fully disseminate their message to the voting public.18 However, as the statute itself suggests, the right of political candidates to use the airwaves has never been absolute; it is only reasonable access which must be provided by the broadcaster.

In 1978, almost two decades later, the FCC issued

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13 Id. Section 315(a) of the Communications Act reads: If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section.
14 Id. Farmers Educational & Coop. Union v. WDAY, Inc., 360 U.S. 525, 529 (1959) ("More important, it is obvious that permitting a broadcast station to censor allegedly libelous remarks would undermine the basic purpose for which § 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates." Id. at 529.)
15 See In Re Complaint by Julian Bond, 69 F.C.C.2d 943 (1978) ("Finally, even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of Section 315 we may not prevent a candidate from utilizing that word during his "use" of a licensee's broadcast facilities." Id. at 944); see also In Re Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, Report and Order, 68 F.C.C.2d 1079, para. 25 (1978) ("All stations are forbidden by Section 315 of the Communications Act from censoring any uses of a broadcast station by a legally qualified candidate for public office and may not dictate the content or format of any non-exempt appearance of such candidate." Id.). But see Memorandum to Letter from Mark Fowler, Chairman, FCC, to Hon. Thomas A. Luken, U.S. House of Representatives (Jan. 19, 1984). See infra notes 42-43 and accompanying text.
16 1960 Programming Inquiry, supra note 1, at 2314. The other elements recognized by the FCC include: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorializations by licensees . . . , (9) agricultural programs, (1) [sic] news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programs.
17 47 U.S.C. § 312(a)(7) (1988). This section reads in relevant part:
(a) The Commission may revoke any station license or construction permit—
   * * *
(7) For willful or repeated failure to afford reasonable access to or permit the purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.
18 Id.
a Report and Order 18 ("1978 Report and Order") outlining its policies concerning section 312(a)(7)—the reasonable access provisions of the Communications Act. 19 The Commission reaffirmed its policy of allowing licensees broad discretion to determine which time slots would be available to which candidates, and what constituted "reasonable access." 20 The FCC recognized that "there may [also] be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day," 21 although specific examples were not given.

In CBS, Inc. v. FCC 22 ("CBS"), the Supreme Court gave judicial approval to the 1978 Report and Order. The Court affirmed a candidate's specific right of reasonable access to broadcast stations in furtherance of her candidacy and also delineated possible limitations on section 312(a)(7) access. 23 In determining what was in fact "reasonable," the Court suggested guidelines licensees might employ such as: burden on regular programming, amount of equal time requests from all candidates, amount of access already afforded a specific candidate, notice given by a candidate, whether a candidate is in fact legally qualified under the provisions of the Communications Act, and whether a campaign season has actually commenced. 24 The Court also stressed that if licensees "act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance." 25

In December 1991, the FCC issued a Report and Order 26 ("1991 Report and Order") that announced and codified its political broadcasting regulations, and wherein the FCC affirmed a candidate's right to present uncensored political broadcasts. 27 The 1991 Report and Order was intended to be a comprehensive guide to political broadcasting and supersede all previous FCC interpretations of the political broadcasting provisions of the Communications Act. 28 Throughout the Commission's discussion of its guidelines on reasonable access, equal opportunities and lowest unit charge, the FCC reiterated its policy of deference to the good faith judgment of broadcasters—that those deemed to be closest to the varying circumstances surrounding candidates' requests. 29

Specifically, concerning reasonable access requirements, the FCC integrated and adopted the guidelines as first set out in the 1978 Report and Order later affirmed by the Supreme Court in CBS. 30 The Commission emphasized that reasonable access was not a set formula by which broadcasters and candi-

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19 Id.
20 Id. paras. 40-41. Since the passage of section 312(a)(7) in 1971, the FCC's policy has been to defer to the reasonable, good faith judgment of licensees as to what constitutes "reasonable access" under all circumstances of a particular case. In the 1978 Report and Order, the Commission made clear its belief that reasonable access required that legally qualified candidates be afforded program time in prime time. Id. paras. 1, 40.
21 Id. para. 43.
23 Id. at 387.
24 Id. at 386-87.
25 Id. at 387.
27 Id. para. 24 ("[s]ection 315(a) further stipulates that the licensee shall have no power of censorship over material broadcast pursuant to these requirements." Id.).
28 Id. para. 1
29 Id. para. 4. With respect to its deference to broadcasters, the Commission stated:
(A) Reasonable Access. Section 312(a)(7) requires stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase 'reasonable amounts of time' in this regard the Commission will:
(i) Continue to rely upon the reasonable good faith judgments of licensees to determine what constitutes reasonable access.

(B) Equal Opportunities. Section 315(a) requires stations that permit legally qualified candidates to use their station to afford equal opportunities to the candidates' opponents. Bona fide newscasts, as well as news interviews, documentaries, and news events, are exempt from these requirements. In this regard the Commission will:

(iii) Continue to defer to licensees' reasonable, good faith judgment in determining whether sufficient sponsorship identifications have been provided in political programming and advertising.

(v) Continue our present policy that permits stations to request candidates to submit their advertisements in advance to allow the station to determine whether the ad constitutes a use by a candidate and whether it complies with the sponsorship identification requirements. If a candidate refuses to allow the station to pre-screen the ad, the station should advise the candidate that it will take whatever steps are necessary to add the appropriate sponsorship identification to the submitted material.

Id. Similar flexibility was given to broadcasters with respect to lowest unit charge. Lowest unit charge, section 315(b) of the Communications Act, prohibits stations from charging candidates more than the lowest unit charge of the station for each class and period of time. Id.
30 Id. para. 9.
dates might determine fixed time slots for political programming to air. Rather, reasonable access was a good faith determination by the broadcaster in light of the surrounding circumstances, reviewable by the FCC on a case-by-case basis.\textsuperscript{32} The Commission maintained that it would "defer to a licensee's discretion, and overturn a decision only if the licensee has acted unreasonably pursuant to the established guidelines."\textsuperscript{33}

Section 312(a)(7), the Communication Act's reasonable access provision,\textsuperscript{34} works in conjunction with section 315(a) of the Communications Act to regulate political programming.\textsuperscript{35} Section 315 prohibits a broadcaster from censoring the content of a political candidate's announcement, regardless of offensiveness.\textsuperscript{36} Therefore, once a broadcast licensee has determined, in accordance with section 312(a)(7), that a candidate has a right to reasonable access to the airwaves, then that candidate ostensibly has an artist's freedom to fill the empty canvas in any manner she conceives. The provisions of section 315 have generally been regarded as impervious, but not for want of effort.

During the 1972 election year, the FCC was petitioned by the Atlanta NAACP for a ruling allowing television stations to refuse to air the political advertisements of a senatorial candidate.\textsuperscript{37} The candidate, Chairman of the National States Rights Party, ran the following advertisement:

\begin{quote}
I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and the niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you.\textsuperscript{38}
\end{quote}

The NAACP argued that the content was inflammatory and posed an imminent threat to the public safety and should therefore be censored.\textsuperscript{39} The FCC found no factual basis to support these allegations and, reasoning that the provisions of section 315 of the Communications Act were absolute, held that the stations were obligated to air the candidate's ads.\textsuperscript{40} In so doing, the FCC affirmed the right of any legally qualified candidate to unrestricted use of the broadcast media regardless of public outcry against the nature of its content.\textsuperscript{41}

Twelve years later, Congressman Thomas A. Luken raised the potential statutory conflict between section 1464 and section 315.\textsuperscript{42} Specifically, Luken requested a ruling advising what the legal duties of broadcast licensees were when a political candidate, pursuant to her section 312(a)(7) and 315 rights, requested air time for an advertisement containing either obscene or indecent material.\textsuperscript{43} In a memorandum drafted in response ("Luken Memorandum"), then-FCC Chairman Mark Fowler analyzed both the legislative history of section 315 and the canons of statutory construction.\textsuperscript{44} The Chairman first concluded, based on a reading of the legislative history of section 315, that Congress did not intend the section to confer an immunity on candidates for federal office from obscenity or indecency laws.\textsuperscript{45} This was supported by the deletion from the original bill of an amendment which relieved licensees from liability for any uncensored material that violated criminal section.

\begin{itemize}
\item \textsuperscript{32} Id. paras. 8-9.
\item \textsuperscript{33} In re Request for Declaratory Ruling of National Assoc. of Broadcasters Regarding Section 312(a)(7) of the Communications Act, Staff Ruling and Request for Public Comment, 7 FCC Rcd. 6880, para. 4 (1992). The National Association of Broadcasters sought a general declaratory ruling by the FCC that "broadcast stations need not provide legally qualified candidates for federal office with program time in increments other than those which the station ordinarily sells to commercial advertisers or which it ordinarily programs." Id. para. 1. At the urging of the Democratic National Committee, the FCC invited public comment on this issue, stressing, however, that reasonable access issues such as those challenged here, were within the authority of broadcasters in their good faith determinations. Id. paras. 1-2. The deadline for comments was January 15, 1993, and the deadline for reply comments was March 1, 1993. Id. para. 5.
\item \textsuperscript{34} 47 U.S.C. § 312(a)(7) (1988).
\item \textsuperscript{35} Id. at 635-36.
\item \textsuperscript{36} Id. at 635.
\item \textsuperscript{37} Id. at 636-37.
\item \textsuperscript{38} Id.
\item \textsuperscript{40} Memorandum to Letter from Mark Fowler, Chairman, FCC, to Hon. Thomas A. Luken, U.S. House of Representatives (Jan. 19, 1984) [hereinafter Luken Memorandum] (on file with CommLaw Conspectus).
\item \textsuperscript{41} Id. at 2, 5.
\item \textsuperscript{42} Id. at 4.
\end{itemize}
laws.\textsuperscript{46}

Second, Chairman Fowler concluded that the canons of statutory construction supported the determination that section 315 should not be interpreted to supersede section 1464.\textsuperscript{47} To do so, the Chairman stated, would render an unreasonable result, i.e., granting an exemption from the federal Criminal Code to broadcasters and political candidates under section 315 for content, which by definition, lacked serious political value.\textsuperscript{48} In determining that section 315 did not grant an immunity from the provisions of section 1464, the FCC stressed that “the exclusion of obscene or indecent speech does not violate Section 315’s purpose of fostering political debate. The spirit of Section 315 is uncompromised by reading Section 1464 as an exception to Section 315’s no-censorship provision.”\textsuperscript{49}


In 1978, the Supreme Court decided the landmark case FCC v. Pacifica Foundation.\textsuperscript{50} The issue before the Court was whether the FCC had the authority to regulate non-political programming which was indecent but not obscene.\textsuperscript{51} This case arose when a New York radio station owned by Pacifica Foundation broadcast the “Filthy Words” monologue of comedian George Carlin at two o’clock in the afternoon.\textsuperscript{52} The FCC issued a Memorandum Opinion and Order granting a complaint concerning the broadcast.\textsuperscript{53} Applying a nuisance principle, the FCC concluded that

the concept of ‘indecent’ is intimately connected with the

exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.\textsuperscript{54}

The FCC therefore held the two o’clock afternoon broadcast of the monologue to be in violation of 18 U.S.C. § 1464.\textsuperscript{55} Although a fine was not imposed against Pacifica Foundation, the complaint did become the impetus for the FCC to review and revise its policies regarding indecent programming.\textsuperscript{56}

On appeal by Pacifica Foundation, the United States Court of Appeals for the District of Columbia Circuit reversed the FCC’s Memorandum Opinion and Order.\textsuperscript{57} The United States Supreme Court granted certiorari\textsuperscript{58} to review, inter alia, whether the FCC’s holding constituted censorship within section 326 of the Communications Act, and whether the language violated 18 U.S.C. § 1464.\textsuperscript{59} Section 326 of the Communications Act is a parallel provision to section 315, prohibiting censorship by the FCC of non-political broadcasting.\textsuperscript{60} Reviewing the legislative history, the Supreme Court held that section 326 was inapplicable to the prohibitions as outlined in 18 U.S.C. § 1464 on broadcasting obscene, indecent or profane programming.\textsuperscript{61} Therefore, the Court held that the channeling of programming which fell within the meaning of 18 U.S.C. § 1464 was not a form of censorship; content of the programming remained unchanged, only the time of day when it might be broadcast was restricted.\textsuperscript{62}

Having determined that the FCC could regulate such broadcasting, the Court then reviewed the FCC determination that the Carlin monologue was inde-
cent per 18 U.S.C. § 1464. Upon review, the Court affirmed the FCC's judgment that each of the indecency elements of 18 U.S.C. § 1464 were satisfied. In its conclusion, the Court outlined a two-tiered standard for determining whether content is indecent. As a threshold matter, content must first, on its face, refer to sexual or excretory functions. Second, the context surrounding the alleged indecency violation must render, rather than excuse, the programming actionable. In a concurrence, Justices Powell and Blackmun characterized Carlin's repetitive use of his seven "Filthy Words" as "verbal shock treatment."

The plurality opinion also legitimized the government's policy objectives of protecting children from this nature of programming. Recognizing that the broadcast media are "uniquely pervasive" in our homes as well as "uniquely accessible to our children," the Court justified the FCC's regulation of indecent programming to protect the nation's children. The Court also stated that prior advisory warnings were not sufficient to protect children: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." Protection of children therefore "amply justifies special treatment of indecent broadcasting."

In 1987, the FCC evidently determined that the Pacifica indecency standard was too narrowly drawn and required review. In three matters before the FCC, programming which would not otherwise have been held indecent under the Pacifica standard was held to violate 18 U.S.C. § 1464. The FCC explained that the repetitive use of the words identified in Pacifica was not inclusive of other material which might also be patently offensive, according to community standards, and therefore indecent. Later in 1987, the FCC issued a Memorandum Opinion and Order outlining the appropriate application of the standard, as well as determining that the risk of children in the broadcast audience would be minimized after midnight, rather than at the previous hour of ten o'clock p.m. Consequently, indecent programming became actionable when broadcast outside the "safe harbor" hours of midnight to six o'clock a.m.

In Action For Children's Television v. FCC ("ACT I"), petitioners sought review of the FCC's 1987 Memorandum, challenging the FCC's indecent programming standard on vagueness and overbreadth grounds, as well as challenging the delineation of "safe harbor" hours. Petitioners argued that there was no rationale for altering the Pacifica standard and that its vagueness constricted broadcasters' programming choices. Petitioners also argued that the standard was overbroad because it did not allow for programming which necessarily must contain indecent references, yet still had redeeming social or scientific merit sufficient to withstand sanctions.
The Court of Appeals for the District of Columbia Circuit sided with the FCC and denied petitioners' vagueness and overbreadth challenges, recognizing that a generic definition of indecency, decided on a case-by-case basis, was necessary to ensure the FCC could achieve its child protection objectives.\(^8\)

The court, however, agreed with petitioners' argument that the safe harbor hours of midnight to six o'clock a.m. were arbitrarily drawn and without factual support.\(^8\) This issue was therefore remanded to the FCC for reconsideration.\(^8\) Before the FCC could act on the court's remand, President Bush signed an appropriations bill containing a rider prohibiting the broadcast of indecent material twenty-four hours a day, thereby eliminating safe harbor hours altogether.\(^8\) The FCC subsequently issued an Order in compliance with the provisions of the rider that totally barred indecent material from the airwaves.\(^8\)

In *Action For Children's Television v. FCC*\(^7\) ("ACT II"), *ACT I* petitioners brought an action requesting review of the FCC's Order.\(^8\) A panel of the Court of Appeals for the District of Columbia granted a motion to stay enforcement of the ban pending the outcome of its review.\(^8\) Before the court ruled on the issues in *ACT II*, the Supreme Court decided *Sable Communications of Cal., Inc. v. FCC*.\(^8\) This decision led the FCC to conclude that if it could show that the twenty-four hour ban on indecent programming was the only measure that would guarantee enforcement of 18 U.S.C. § 1464, then it would withstand judicial scrutiny.\(^8\) After soliciting public comment, the FCC issued a *Report*\(^9\) reaffirming its contention that the twenty-four hour-per-day ban was the only method that would "effectuate the government's compelling interest in protecting children from broadcast indecency."\(^9\)

When the court of appeals finally reviewed the FCC's Report, it struck down the ban on the basis of its holding in *ACT I*—that indecency, but not obscenity, was afforded First Amendment protection as long as it was channeled to times that reasonably protected children from such programming.\(^8\) The court once again remanded to the FCC the task of delineating safe harbor hours for indecent programming.\(^8\) However, in August 1992, President Bush signed the Public Telecommunications Act of 1992 in which Congress delineated safe harbor hours.\(^8\) And in September 1992, the FCC issued a *Notice of Proposed Rule Making* announcing proceedings aimed at implementing the congressionally mandated safe harbor hours.\(^9\)

## II. CURRENT DEVELOPMENTS

### A. Non-Political Broadcasting Violations of 18 U.S.C. § 1464

In recent months the FCC has issued opinions illuminating its current position regarding indecent programming. In February 1992, the FCC fined a South Carolina radio station $3,750.00 for violating

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\(^8\) *Id.* at 1340.

\(^9\) *Id.*

\(^8\) *Id.* at 1341.


\(^8\) *Action for Children's Television,* 932 F.2d at 1507.

\(^8\) *Id.* at 1508-09.

\(^8\) *Id.* at 1510.


SEC 16. (a) FCC REGULATIONS. — The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming —

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

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

*Id.* at 954.


\(^8\) *Action for Children's Television,* 932 F.2d at 1507.

\(^8\) *Id.*

\(^8\) *Id.*


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*Id.* at 954.

At approximately nine o'clock in the morning, two announcers at station WYBB(FM) carried on a conversation during which the word "crap" was used repetitiously to heighten the one-time use of the word "shit." Following the nuisance rationale of Pacifica, the FCC held that the single occurrence of the word "shit" was "patently offensive language concerning excretory activities and occurred at a time of day... when children were likely to have been in the listening audience," and thus violated the indecency standard. This holding highlighted the interdependency of the actual offensive act with the surrounding circumstances in indecency determinations. Just as the Court stated in Pacifica, the FCC held that the broadcast occurred at a time when there was a reasonable risk that children may have been in the audience, and focus on the word rendered it actionable.

Two subsequent FCC decisions further highlight the current application of the indecency standard. In June 1992, Zapis Communications filed for renewal of its broadcast license and had to overcome a citizen's Petition to Deny that alleged several incidents of indecent programming. Although the FCC held that the complainant provided insufficient detail regarding content and air times to sustain a finding of indecency, it did offer a comprehensive definition of the indecency standard in current application. Next, in July 1992, the FCC fined a San Francisco radio station $25,000 after the FCC determined that disc jockey Rick Chase's afternoon program repeatedly contained sexually explicit material.

It would be another repeat offender, however, who would manage to draw the largest fine ever imposed for broadcast indecency by the FCC. In December 1992, in a trenchant opinion, the FCC levied a $600,000 fine against three radio stations (collectively referred to as "Infinity") for broadcasting "shock-jock" Howard Stern's radio program that the FCC determined contained indecent material. The unprecedented fine was imposed because of the ap-
parent disregard by Infinity and Howard Stern for the FCC’s channeling policies as evidenced by the pattern of repeated indecency offenses. In two concurring opinions, FCC Commissioners signaled their frustration with the necessity to enforce the indecency standard through the use of fines and indicated their willingness to revoke licenses if child protection devices such as channeling continue to be ignored. Contrasting the Infinity fine with those issued earlier in 1992, this message is likely to be received loud and clear. However, it is also likely that the indecency standard will continue to be tested until the FCC actually revokes a license on these grounds.

The aforementioned examples illustrate the current application of the indecency standard as well as the continued inclusion of and reliance on the surrounding circumstances and context of the alleged violations by the Commission in its review of indecency complaints. Also exhibited is the FCC’s continued readiness to act in loco parentis to aid parents in protecting children from language which violates 18 U.S.C. § 1464. The FCC’s insistence in furthering this compelling government interest was particularly displayed in the Howard Stern opinion, by the amount of the fine as well as the implied threats of license revocation for those broadcasters who continue to ignore the indecency standard. These examples of the FCC’s indecency policy regarding commercial speech lie in sharp contrast to the debate surrounding the application of the same standard to political broadcasting.

FV: I don’t know what?
HS: Yeah.
FV: He does. I don’t know what.
RQ: But ah.
FV: But you also stop masturbating when your wife comes in the room.
HS: Of course.
RQ: So he doesn’t do it in front of anybody.
HS: Right.
FV: You don’t do it in front anybody even though.
HS: Well, that’s for a very personal reason, I don’t want my wife to think I’m some kind of pervert.

Id. at LEXIS 31-32.

107 The FCC stated:

In determining the amount of the forfeitures, we have carefully considered the apparent pattern of indecent broadcasting exhibited by Infinity over a substantial period since our initial indecency warning to Infinity in 1987 for Howard Stern material carried by WYSP(FM). . . The clear notice afforded by the 1987 warning and the substantial similarity of the material cited then and here render this intervening pattern of apparent misconduct particularly troubling. Under these circumstances, we believe it is appropriate to impose a monetary penalty substantially higher than that suggested by our Policy Statement on Standards for Assessing Forfeitures . . .

Id. at LEXIS 3-4 (citations omitted).

108 Commissioners Quello and Duggan, concurring in the FCC determination, each offered separate statements underscoring their commitment to enforcing the child protective channeling policy. See Infinity, supra note 6.

109 See supra notes 2-3 and accompanying text. See infra note 112.

110 Booth, supra note 2, at A1 (“I knew that if we could ever show an aborted baby on TV, we could horrified people. . . .”) Id.


112 Candidate’s ‘Hitler’ Ad Equates Holocaust, Abortion, UPI, Aug. 17, 1992, available in LEXIS, Nexis Library, UPI File (“If offending people was what I was worried about I wouldn’t have been running for Congress . . . .”).

113 Nightline, supra note 2.

114 Id.

115 See Gillett, supra note 7.

116 Id. at 5599.

B. 18 U.S.C. § 1464 Challenges to Political Programming

During the 1992 political season, Republican congressional candidate Michael Bailey formulated advertisements containing images of graphic aborted fetuses. The purpose behind the broadcast of the ads was clear—Bailey stated that his intention was to “horrrify” viewers to the realities of abortion. Knowing that his decision to run for office gave him a “tremendous platform from which to speak,” Bailey willfully used sections 312(a)(7) and 315 of the Communications Act as a shield to visually shock viewers without regard to community standards of good taste. Parents of child viewers were appalled at the airing of the ads. The mother of Sean Meyers, who became hysterical after viewing one of these ads, stated “[it’s an adult topic, not a child topic. This shouldn’t be shown when children should be watching.” Ms. Meyers echoes the current community standard approach which channels adult topics to later broadcast times. But perhaps it is Bailey himself who best enunciated the controversy: “When something is so horrifying that we can’t stand to look at it, then why are we tolerating it?”

In an effort to stop the dissemination of these political advertisements, two separate Petitions for Declaratory Ruling (“Petitions”) were filed with the FCC. Petitioners were Gillett Communications (“Gillett”), an Atlanta television station and Kaye, Scholer, Fierman, Hays & Handler (“Kaye, Scholer”), a law firm representing several unnamed television and radio stations. Both petitioners of-
ferred several arguments: first, that the section 312(a)(7) reasonable access requirements were not absolute; second, on a nuisance rationale, that these images were outside community standards for television broadcast times accessible to children; third, that the use of graphic aborted fetuses constituted indecent programming; and finally, despite previous interpretations, that channeling these images to times when the risk that children would be viewers would be minimal was consistent with section 315 of the Communications Act.\textsuperscript{117} Unlike Gillett who submitted a specific advertisement for review, Kaye, Scholer requested a general ruling allowing its clients to channel to safe harbor hours those ads that in their good faith determinations violated indecency standards.\textsuperscript{118}

In a consolidated letter denying both Petitions, the FCC examined the issue in three parts: first, whether the FCC could issue a general ruling; second, whether reasonable access requirements prohibited channeling (for whatever reason) of political broadcasting; and, finally, whether the use of graphic aborted fetuses in these advertisements was within the indecency definition of 18 U.S.C. § 1464 and therefore subject to regulation.\textsuperscript{119}

Despite the fact that Gillett submitted a videotape of a specific advertisement containing images of the class of programming in dispute, the FCC first established that decisions had to be determined on the traditional case-by-case basis rather than issuing a general ruling (as requested by Kaye, Scholer) banning graphic aborted fetuses as a class of programming.\textsuperscript{120} Next, the FCC decided that the section 312(a)(7) reasonable access requirements were paramount to any channeling initiatives, regardless of whether the channeling was for an indecency policy or a content-neutral policy.\textsuperscript{121} The FCC maintained that regardless of the impetus, channeling of a political candidate's advertisement would impinge on her ability to disseminate the campaign's message, therefore violating section 312(a)(7).\textsuperscript{122} Finally, the FCC examined whether the images complained of actually constituted indecent programming within the meaning of section 1464. Using the indecency standard identified in \textit{Pacifica}, the Commission held that bloodied fetal tissue aborted from a human body did not constitute "excrement" as defined by Webster's Dictionary.\textsuperscript{123} Because the FCC did not reach the question of whether these images were in fact indecent, the Commission did not directly address the issue of whether material defined as indecent under section 1464 could be channeled without violating the provisions of sections 312(a)(7) and 315 of the Communications Act. However, the FCC did note that if it had made such a determination, then an analysis would have been warranted under the \textit{Luken Memorandum}.\textsuperscript{124}

The FCC did offer advice to broadcasters to minimize any negative effects that might occur in airing the advertisements. The Commission proposed the following viewer advisory be aired immediately prior to the broadcast of an advertisement containing graphic images: "The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised."\textsuperscript{125} The FCC determined that such an advisory "represent[s] a reasonable accommodation" between the competing interests of political and children's programming.\textsuperscript{126}

After this decision was handed down, Kaye, Scholer petitioned the FCC for reconsideration.\textsuperscript{127} In its \textit{Application for Review}, Kaye, Scholer advanced several arguments: first, that broadcasters who make good faith determinations that the content of a political announcement is outside contemporary community standards be permitted to channel the broadcast to a safe harbor time period without violating sections 312(a)(7) or 315;\textsuperscript{128} second, that the FCC erred in its determination that the use of graphic aborted fetuses did not constitute "excretory activity" under the \textit{Pacifica} standard;\textsuperscript{129} and third, that the viewer advisories aired prior to political advertisements containing graphic aborted fetuses were insufficient to

\begin{itemize}
  \item\textsuperscript{117} Gillett posed the following question in its \textit{Petition for Declaratory Ruling}: "Whether a licensee may channel a view by a legally qualified candidate to a safe harbor when children are not generally present in the audience if the licensee determines in good faith that the proposed use is indecent or otherwise unsuitable for children." \textit{Id.} at 5599. With its \textit{Petition for Declaratory Ruling}, Gillett submitted a videotape of a specific advertisement depicting an aborted fetus for the Commission's review. \textit{Id.}
  \item\textsuperscript{118} \textit{Id.}
  \item\textsuperscript{119} \textit{Id.} at 5599-600.
  \item\textsuperscript{120} \textit{Id.} at 5599. A general ruling "would be inconsistent with the Commission's long-held view that indecency determinations must be based on the specific factual context in which the allegedly offensive material appears." \textit{Id.}
  \item\textsuperscript{121} \textit{Id.} at 5599-600.
  \item\textsuperscript{122} \textit{Id.} at 5600.
  \item\textsuperscript{123} \textit{Id.} at 5600 n.2.
  \item\textsuperscript{124} \textit{Id.} at 5600 n.3.
  \item\textsuperscript{125} \textit{Id.} at 5600.
  \item\textsuperscript{126} \textit{Id.}
  \item\textsuperscript{127} \textit{In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act (Kaye, Scholer), Erratum to Application for Review, (Sept. 2, 1992) (on file with Commlaw Conspectus).}
  \item\textsuperscript{128} \textit{Id.} at 5.
  \item\textsuperscript{129} \textit{Id.} at 11.
\end{itemize}
III. DETERMINING AN EFFECTIVE POLICY

The Gillett letter ruling and the FCC's subsequent request for public comments raise the possibility of reformulation of public policy that will be more sensitive to the special interests of children. In determining an effective policy choice which balances the competing interests of political candidates with the non-electorate, the Commission should consider, inter alia, the following issues: whether graphic aborted fetuses—consistent with current applications of the indecency standard—do in fact constitute indecent programming regulable under section 1464; whether viewer advisories constitute a "reasonable accommodation" to the interests of parents and children, and not just to the candidates and broadcasters; whether material which is not indecent but otherwise harmful to children may be channeled by broadcasters in their good faith determinations; and whether a political candidate is able to disseminate her message effectively to the electorate without resorting to indecent programming outside safe harbor hours.

A. Graphic Aborted Fetuses as Indecent Programming

The FCC misapplied the current indecency standard in determining that the graphic aborted fetuses did not constitute indecent programming. The Pacifica decision outlined a two-step test for determining whether a broadcast is indecent: first, whether the disputed material on its face violates 18 U.S.C. § 1464; and, second, whether the disputed material was presented in such a context that renders it indecent. Based on this flawed premise, the FCC determined that aborted fetal tissue did not fall within the Pacifica standard. Rather than examine the definition of "excrement," the FCC should have directed its attention to the specific language of the standard articulated in Pacifica, i.e., "excretory or sexual activities," in the same dictionary, "excretory" is defined as "of, relating to, or functioning in excretion." And "excrete" is defined as "to sift out, discharge . . . to separate and eliminate or discharge . . . from the blood or tissues or from the active protoplasm." Having only examined the meaning of "excrement" as fecal matter, the FCC erred in not classifying aborted fetal tissue within excretory activity because it may be classified as tissue which has been sifted out, discharged and separated from the body. A similar determination could have been made if the FCC had examined whether aborted fetal tissue may be classified as "sexual activity." Again, in the same Webster's dictionary employed by the FCC, "sexual" is defined as "of, relating to, or associated with sex or the sexes . . . having or involving sex <reproductive>" Clearly abortions and fetuses are related to sex and reproduction.

The second level of the analysis is whether the context in which the material is presented renders the material indecent. Because the FCC determined that the images failed to meet the requirements of the first tier, as a threshold matter, it did not examine the surrounding circumstances of these images in its determination of indecency. If the FCC had reached the second tier, it could not have ignored the clamoring of voices eager to enunciate the offensiveness of these ads. Both television stations and the FCC received numerous complaints regarding the

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130 Id. at 15.
131 In re Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act, Public Notice and Request for Comments, 7 FCC Rcd. 7297, para. 3 (1992). The FCC requested public comments on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. [The FCC] also seek[s] comment as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children.

In the first part of its analysis, the Commission analogized aborted fetal matter to "excrement" according to a definition from Webster's Dictionary. Based on this flawed premise, the FCC determined that aborted fetal tissue did not fall within the Pacifica standard. Rather than examine the definition of "excrement," the FCC should have directed its attention to the specific language of the standard articulated in Pacifica, i.e., "excretory or sexual activities." In the same dictionary, "excretory" is defined as "of, relating to, or functioning in excretion." "Excretion" is defined as "the act or process of excreting; something excreted; especially useless, superfluous, or harmful material . . . that is eliminated from the body and that differs from a secretion in not being produced to perform a useful function." And "excrete" is defined as "to sift out, discharge . . . to separate and eliminate or discharge . . . from the blood or tissues or from the active protoplasm." Having only examined the meaning of "excrement" as fecal matter, the FCC erred in not classifying aborted fetal tissue within excretory activity because it may be classified as tissue which has been sifted out, discharged and separated from the body. A similar determination could have been made if the FCC had examined whether aborted fetal tissue may be classified as "sexual activity." Again, in the same Webster's dictionary employed by the FCC, "sexual" is defined as "of, relating to, or associated with sex or the sexes . . . having or involving sex <reproductive>" Clearly abortions and fetuses are related to sex and reproduction.

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132 See supra note 65 and accompanying text.
133 See Gillett, supra note 7, at 5600 n. 2.
135 Id.
136 Id.
137 Id.
138 Id. at 1079.
nature of these advertisements. Even the political candidates themselves stated that their intention was to show horrifying images to the broadcast audience in an attempt to shock the viewers into casting votes in their favor. The candidates deliberately used a loophole in the indecency laws to "sneak" shocking images into citizens' homes. It is illogical that the FCC would overlook the public, the licensees, and the proponents of these ads in making its indecency determination. These are the very people qualified to put the images into context for the FCC and determine community standards of indecency.

Although the encouragement by the FCC to use viewer advisories to warn children of potentially disturbing images should be applauded for its recognition that this class of programming is inappropriate for children, the effectiveness of these warnings is questionable and begs for a permanent policy change which would protect children from these images altogether. The effectiveness of an advisory such as the one suggested by the FCC in the Gillett letter ruling is dependent on many variables: first, whether the viewers will actually tune in in time to see the advisory before the commercial airs; second, whether the children are supervised by an adult decision-maker; third, if unsupervised, whether the children will be able to read visual warnings or understand audio ones; and fourth, if unsupervised, whether children will have the foresight to actually avoid the potentially disturbing images or be so titillated by the warning that their interest is only enhanced. Even prior to the age of the remote control, the Pacifica Court doubted the effectiveness of such advisory warnings.139 The characterization of graphic aborted fetuses as indecent programming and the adoption of a policy to channel political programming which is indecent would eliminate the foregoing outlined problems and would be more sensitive to the special interests of children.

B. Graphic Aborted Fetuses As Harmful Programming

If the FCC determines that the use of graphic aborted fetuses does not constitute indecent programming, then another avenue remains for the FCC and broadcasters to channel these images. In its decisions regarding reasonable access requirements, the FCC continually underscores its deference to the good faith determinations of broadcasters in resolving when to air political ads.140 Using a parallel nuisance rationale as articulated in Pacifica and its progeny, broadcasters should be allowed to consider community standards of good taste and offensiveness to determine whether the content of a political advertisement may be harmful to children. Using a good faith determination, the broadcaster may then channel such harmful ads to times when children are unlikely to be in the viewing audience. Thus, the non-electorate would be protected from harmful images aimed at inducing voting adults to cast ballots based on the targeted matter.

A broadcaster already possesses the means to make this determination: First, the broadcaster may review an advertisement before its airing pursuant to determining equal opportunities;141 second, the candidate does not have an absolute right to the time slot of her choosing, but must defer (as does the FCC) to the determination of the broadcaster as to when the advertisement will air;142 and finally, material which is not indecent but still deemed harmful to children is already channeled or banned from the airwaves, and it gives valid precedent for broadcasters to channel the images discussed here.

The Children's Television Act of 1990143 is a non-content based attempt to structure children's programming to better serve their interests, and specifically to protect children from overcommercialization on television.144 Time limits are imposed by the law

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139 See supra notes 67-72 and accompanying text.
140 See supra note 30 and accompanying text.
141 See id.
142 See 1991 Report and Order, supra note 27.
144 Id. The law reads in pertinent part

TITLE I — REGULATION OF CHILDREN'S TELEVISION FINDINGS
SEC. 101. The Congress finds that —

* * *

(4) special safeguards are appropriate to protect children from overcommercialization on television;

(5) television station operators and licensees should follow practices in connection with children's television programming and advertising that take into consideration the characteristics of this child audience;

* * *

STANDARDS FOR CHILDREN'S TELEVISION PROGRAMMING
Sec. 102. (b) Except as provided in subsection (c), the standards prescribed under subsection (a) shall include the requirement that each commercial television broadcast licensee shall limit the duration of advertising in children's television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays.

Id. at 996-97.
on the amount of advertising allowed during children's programming.\textsuperscript{146} Congress justified these special guidelines because of the amount of time spent by children in front of the television set, the susceptibility of children to commercial pitches, and the special interest the State has in protecting children.\textsuperscript{146} In the spring of 1991, the FCC issued a Report and Order\textsuperscript{147} implementing the provisions of the 1990 law. Clearly excessive advertising during programming when children were likely to be in the viewing audience was deemed harmful and capable of regulation through public policy and Commission rules.

Appalled at the amount of violence shown during hours when children were likely to be in the viewing audience, Senator Paul Simon of Illinois sponsored a bill the ultimate goal of which was to affect broadcast content.\textsuperscript{148} Passed into law in 1990, the Television Program Improvement Act conferred an exemption from antitrust laws upon the television industry for joint discussions aimed at curbing violence on television.\textsuperscript{149} In December 1992, ABC, CBS and NBC issued programming standards committed to alleviating "gratuitous or excessive portrayals of violence."\textsuperscript{150} Of particular note are standards 4, 5, 9 and 11, which deplore violent images whose intent is to shock, images portraying "excessive gore," images in which children are victims, and images which may be "unduly frightening or distressing to children."\textsuperscript{151}

These standards reflect what has long been recognized in academia. Over 3,000 articles have been written on the effects of television on children and society as a whole.\textsuperscript{152} Congress, academia and the television industry have all determined that, in the best interests of children, content which is harmful but not necessarily indecent should be subject to regulation. In a sense, the three networks are using a nuisance rationale to self-regulate program content. Unless a measure is adopted by Congress or the FCC, during the next political season these standards will be in direct conflict with political advertisements containing graphic aborted fetuses.\textsuperscript{153}

If the FCC adopts either an indecency or harmful test in the political programming arena, the question remains whether the ability of political candidates to convey their messages to the public will be impaired. Other avenues are available, even on the volatile issue of abortion, for political candidates to drive their messages home to the electorate with equal force during safe harbor hours. For example, a pro-choice candidate does not have to resort to graphically enlarging a photo of a woman's cervix with a hanger piercing it to remind voters of the nature of back-alley abortions. A hanger with a red slash through it signifying the candidate's opposition to its use is also a forceful image, and is one that does not subject children to potentially indecent or harmful images. It also allows parents to decide how much or how little of an explanation they wish to give their child on the symbolism represented by the advertisement. Political candidates, after the safe harbor hours, may then broadcast advertisements without regard to content.

This Comment urges reversal of the Gillett letter ruling and the articulation of a political programming policy more sensitive to those too young to vote. Classification of graphic aborted fetuses as either indecent or harmful material, and the requirement that these images be channeled, regardless of the status of the proponent of the images, is more sensitive to the special interests of children. The FCC should review
complaints—either from those candidates whose ads have been channeled or from the public who have viewed these ads outside safe harbor hours—deferring to the reasonable good faith determinations of broadcasters. In those cases where a broadcaster has unreasonably censored or restricted access of a candidate’s advertisement, the FCC may then impose a fine similar to the forfeitures imposed in Notices of Apparent Liability in indecency proceedings. Adopting such a policy is more sensitive to the special interests of children while still allowing a candidate opportunity to express her message to the public.

IV. CONCLUSION

Denial of the Gillett Communications and Kaye, Scholer Petitions is in direct conflict with enunciated indecent and harmful programming standards and the government’s strong interest in protecting children. Channeling graphic aborted fetuses to times of the day when the risk of young viewers would be minimal would not constrain the no-censorship provisions of section 315. The candidates who are employing these images are doing so because they admittedly intend to shock the viewers. As in Pacifica where George Carlin’s monologue was sanctioned as “verbal shock treatment” by the Supreme Court, so too must “visual shock treatment” be sanctioned. Applying the nuisance rationale of Pacifica, programming which is not acceptable to community standards must be channeled to protect child viewers. Channeling only those images to later broadcast times does not limit the candidate from discussing and promoting her political ideology in a manner which does not harm young viewers. As the Supreme Court made clear in Pacifica, channeling of programming which falls within 18 U.S.C. § 1464 is not a form of censorship.164 The content of the programming remains unchanged, only the time of day when it may be broadcast is restricted.

The irony that the FCC will afford political candidates a higher level of protection than our nation’s children is two-fold. First, it is irresponsible for the FCC, with its acute hearing, to place itself in loco parentis when issuing fines for the indecent language broadcast over the radio, while turning a blind eye to the use of graphic aborted fetuses. Second, it is illogical that the FCC will not regulate the potentially harmful content of political broadcasting for the protection of those who, no matter whether positively or negatively impacted by these images, cannot vote.

Lisa Suzanne Mangan

164 See supra note 62 and accompanying text.